

Document:-
A/CN.4/SR.529

Summary record of the 529th meeting

Topic:
Consular intercourse and immunities

Extract from the Yearbook of the International Law Commission:-
1960 , vol. I

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

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

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

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

It was so agreed.

ARTICLE 20 (*Persons deemed unacceptable*)

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

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

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

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

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

The meeting rose at 1 p.m.

529th MEETING

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

Chairman: Mr. Luis PADILLA NERVO

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

[Agenda item 2]

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

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

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

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

dered in the English by the words "gives serious grounds for complaint". He thought it would be better to use the same formula in both articles. He asked which expression in the French text the Special Rapporteur preferred.

3. Mr. ŽOUREK, Special Rapporteur, explained that he had found different phraseology in various consular conventions, but he agreed that it would be better to use in the French text of article 20 the formula employed in article 18.

4. Mr. YOKOTA felt some doubt about the use of the words "serious grounds for complaint" in article 20. Article 8 of the draft on diplomatic intercourse¹ merely provided that the receiving State might at any time notify the sending State that the head of a mission, or any member of the staff of the mission, was not acceptable. Article 20 of the consular draft, on the other hand, provided that there had to be "serious grounds for complaint" before the receiving State could take such action with respect to a consular official. He could not see what justification there was for such a distinction. For a receiving State, it was a far more serious matter to request a diplomat's recall than to ask for the recall of a member of the staff of a consulate. He did not believe that consular staff should have greater protection than that of a diplomatic mission. It was true, of course, that article 18 provided for the recall of the head of a consular post through the withdrawal of the *exequatur* — though only where there were serious grounds for complaint — but that provision did not apply to other consular staff. He could not agree that the latter should have the same protection as that enjoyed by the head of a consular post and greater protection than that enjoyed by the members of the diplomatic mission.

5. At the eleventh session, the Special Rapporteur had argued that consular staffs were small and that great inconvenience could be caused by the recall of the head of a small post. Actually, however, in the case dealt with in article 20 there was no real risk of the work of the post being seriously affected, for the head of the post would still be there. Moreover, it was not proposed to recall the member of the consular staff or to terminate his functions; a request was to be made to his State to recall him "within a reasonable time". In the meantime, the sending State could appoint his successor. He proposed that the words "Where the conduct of a member of the consular staff other than the head of post gives serious grounds for complaint" should be omitted. The provision would then be approximate to that in the draft on diplomatic intercourse.

6. Mr. PAL said that he had intended to make an observation similar to Mr. Yokota's. He referred to an exchange between Sir Gerald Fitz-

maurice (Chairman at the eleventh session) and the Special Rapporteur (509th meeting, paragraphs 1-3) concerning the differences which existed between the draft on consular intercourse and immunities, and that on diplomatic intercourse and immunities. It was nowhere stated in article 8 of the latter draft that any reason had to be given, nor that any explanation could be requested for the recall of a diplomat. None of the twenty-one Governments which had commented on that draft had objected to that article.² In his opinion, the provisions of article 20 of the consular draft should be parallel to those of article 8 of the draft on diplomatic intercourse. He proposed that article 20 should be redrafted to conform with article 8 of the draft on diplomatic intercourse.

7. Mr. SANDSTRÖM recalled that article 18 had been adopted at the eleventh session partly because it was modelled on clauses appearing in a number of consular conventions. He supported Mr. Pal's proposal. He suggested that article 20 should begin with the sentence "Where the conduct . . . as the case may be"; the sentence "The receiving State . . . that the said person is not acceptable" should become a separate paragraph. In his view it might be advisable to stipulate a more severe sanction than the withdrawal of recognition in the circumstances described in article 20. Such a sanction might suffice in the draft on diplomatic intercourse but in the case of consular intercourse the receiving State might go so far as to request the closing of a consulate.

8. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Yokota, said that he had not intended, in his draft, to place consular staffs in a better position than diplomatic missions. The articles he had drafted should be examined as a whole. There was a fundamental distinction between the members of diplomatic missions, who were not subject, in their public or in their private acts, to the jurisdiction of the receiving State even in criminal matters, and, on the other hand, consular staffs who were subject to the jurisdiction of the receiving State both in criminal and in civil matters. To counterbalance that considerable privilege, the receiving State was therefore entitled to ask for the recall of a diplomat whom it regarded as *persona non grata*. There was no intention of giving to consuls the privileges enjoyed by diplomats, and it would be wrong, in his view, to remove the protection offered to consular staffs in the draft text of the article. In the large number of consular conventions which he had read there were no provisions like those embodied in article 8 of the draft on diplomatic intercourse; even if there were, it would be no argument for the deletion of the passage in articles 18 and 20 which was under discussion. The recall of even a minor consular official could place the consul in difficulty, for example if that official were a specialist in certain matters (e.g., shipping). Consulates often did

¹ See *Yearbook of the International Law Commission, 1958*, vol. II (United Nations publication, Sales No. 58.V.1, vol. II), pp. 89-105.

² *Ibid.*, pp. 111 *et seq.*

not have sufficient qualified specialized personnel. He believed that paragraph 1 should be retained, as it had been in article 18 as adopted. However, there was much to be said for Mr. Sandström's suggestion of changing the order of the paragraph, and perhaps the suggestion could be referred to the Drafting Committee. In drafting paragraph 2, he had thought of going further and that the receiving State might have the power to expel. But he felt that the wording was sufficient as it stood and the intention could, of course, be explained in the commentary.

9. Mr. AGO agreed that the position of consuls differed from that of diplomats; nevertheless the same terms should be used as far as possible in the two draft conventions except where it was important to emphasize the differences. Consequently, he shared the view of Mr. Yokota and Mr. Pal that there was no reason to depart from the provisions of article 8 of the draft on diplomatic intercourse and immunities, and he found the phraseology of that article preferable to that of article 20 in the consular draft. In particular he believed that the phrase "at any time", should be added in article 20, which would then read "The receiving State . . . may at any time inform the sending State that the said person is not acceptable." It would be desirable, in his view, to amalgamate articles 18 and 20 in order to have a single article dealing with persons deemed unacceptable, as had been the case in the draft convention on diplomatic intercourse and immunities. There was a much greater difference between heads of diplomatic missions and members of their staff than between the head of a consular post and his staff, although the head of a consular post could of course suffer the withdrawal of his exequatur. That would naturally be an exceptional measure. One single article could be drafted on the lines of article 8 of the convention on diplomatic intercourse and immunities; it might end with a simple reference to the extreme measure of withdrawing the exequatur. Such a formulation would be simpler, more concise and more logical, and it would be easy, he thought, for the Drafting Committee to devise such a text.

10. The CHAIRMAN expressed the view that the opening passage of article 20, paragraph 1, did not give greater protection in the way Mr. Yokota had suggested. It was rather a means of blaming an official whose recall had been requested. A consular official, in the same way as a diplomat, had to enjoy the goodwill of the receiving State. It was not clear who was going to judge the complaint, and there might be serious grounds for dispute, which would be embarrassing both to the official concerned and to the sending State. There would certainly be a controversy if the sending State did not agree with the seriousness of the complaint. Accordingly, he believed it would be better to follow the phraseology of article 8 of the draft on diplomatic intercourse. He thought the substance of article 20 was really included in article 18, since the expression "consular official" included, according to article 1, the head of the consular post. He shared the view

of Mr. Ago that the only real problem was whether the receiving State simply requested the recall or whether it withdrew the exequatur. The problem could be solved by using the expression "to recall . . . or it may withdraw his exequatur, as the case may be".

11. Mr. ERIM agreed with the Chairman and with the previous speakers. Article 20 appeared to give complete discretion to the receiving State with regard to consular staff. It would be preferable to provide that any such action as was contemplated in article 20 required agreement between the two States. In the absence of such agreement the consular official could no longer exercise his functions. Paragraph 2 might lead to dispute between the two States; so far as paragraph 1 was concerned, it was not clear who was to judge whether the "conduct gives ground for serious complaint". In that respect the consular draft contained a new element, for, in the draft on diplomatic intercourse, a diplomatic agent was either *persona grata* or *persona non grata*. A dispute could arise over the private life of the person concerned, his public conduct or the functions of a post. He thought that would be very dangerous, and he believed that articles 18 and 20 should be redrafted to conform to article 8 of the draft on diplomatic intercourse.

12. Mr. LIANG, Secretary to the Commission, said that, while there was a case for merging articles 18 and 20, as Mr. Ago and Mr. Erim had suggested, it was arguable equally that the two provisions should be separate. The main reason against the merger was the fact that the withdrawal of the exequatur applied only to the head of the post, while in the case of other consular staff the question of the delivery or withdrawal of the exequatur did not usually arise. In that connexion, the definitions in article 1 were somewhat misleading. Under definition (j) the expression "members of the consular staff" meant consular officials and employees, while under definition (h), the expression "consular official" meant any person, including a head of post. It was desirable to retain paragraph 2 of article 20 and that it should apply to members of the consular staff other than the head of post. The Commission might reconsider the definitions in article 1, remembering that in the definitions clause of the draft on diplomatic intercourse it was expressly specified that the expression "members of the staff of the mission" did not include the head of the mission. Accordingly, the Special Rapporteur had some grounds for treating separately, in the articles on consular intercourse, the case of the head of post and that of members of the consular staff.

13. Mr. AGO'S suggestion that article 20 should stipulate the right of the receiving State to inform the sending State "at any time" that a particular member of the consular staff was not acceptable was valid and logical, but failed to bring out the point that the receiving State could object to the entry of such a person before he began to carry

out his functions, thus exercising a right of refusal which differed from a request for recall as a result of conduct giving serious grounds for complaint.

14. In conclusion, he believed that article 20 could be brought somewhat closer into line with article 8 of the draft on diplomatic intercourse and immunities.

15. Sir Gerald FITZMAURICE agreed with previous speakers that article 20 needed careful reconsideration, in connexion with article 18 and article 8 of the draft on diplomatic intercourse. The difficulties were concerned with both drafting and substance. In so far as drafting was concerned, he said that, whereas article 8 of the draft on diplomatic intercourse dealt with the head of the mission and the members of the staff in a single article, article 18 of the draft on consular intercourse related only to the head of the post, while article 20 dealt only with other consular officials. He agreed with Mr. Ago that the distinction in the context of article 20 was somewhat artificial, and arose from the procedure of withdrawal of the exequatur. The actual fact of recall was the same for the head of a consular post as for other consular officials; the only difference was one of procedure.

16. The substantive difficulty was created by the passage "where the conduct of a member of the consular staff other than the head of post gives serious grounds for complaint". If article 20 were read by itself, the implication seemed to be that the receiving State did not have the right to request the recall of a head of post whose conduct gave serious grounds for complaint; in actual fact, however, under article 18 the head of post was subject to exactly the same rule as were other members of the mission. That implication should be eliminated. In any case, he doubted whether the whole idea of such a criterion was correct or desirable. No such provision existed in article 8 of the draft on diplomatic intercourse, and the receiving State could notify the sending State, without giving any reasons, that a certain member of the mission staff was no longer *persona grata*. On receipt of such notification, that person's functions were immediately terminated. The Special Rapporteur had explained that there were marked differences between the positions of diplomatic and consular missions. That argument should be recognized as valid up to a point: the sending State had one diplomatic mission in the capital of the receiving State, with a relatively large staff, and consequently the withdrawal of one member would not cause any special inconvenience. A consular post, on the other hand, might have a small staff of key persons, and there should be some restriction on requests for withdrawal, to avoid any great disruption of services in, for example, a large seaport. Nevertheless, while the receiving State had the right to request the recall of any member of a diplomatic mission, even an ambassador, without giving a reason or lodging grounds for complaint, it was recognized that the reasons for such requests could probably not be made public; in any case, the

right was exercised with discretion. Articles 18 and 20 of the draft on consular intercourse and immunities seemed to go to the other extreme, and obliging the receiving State to justify its request by reference to the local conduct of the official concerned. While it was true that inconvenience might be caused by a request for recall, it hardly seemed advisable to oblige the receiving State in the case of all members of the consular staff to justify such request by *prima facie* evidence of grounds for recall, especially since the provision would give consular staff considerable privileges vis-à-vis members of diplomatic missions. Accordingly, the criterion of "conduct giving serious grounds for complaint" did not seem to be fully justified.

17. Mr. YOKOTA observed, in reply to the Special Rapporteur's statement, that many consular conventions provided for the recall of members of consular staff only when their conduct gave serious grounds for complaint, that an equally large number of such conventions did not contain express stipulations to that effect. At the Commission's eleventh session (516th meeting paragraph 30), Sir Gerald Fitzmaurice had cited a number of conventions containing no such provisions. It was therefore hardly wise to lay down a rule of international law on the basis of the provisions found in one group of conventions, but not in another.

18. Mr. AGO agreed with Sir Gerald Fitzmaurice that the difficulties connected with article 20 related both to substance and to drafting. The substantive question remained the same, whether or not articles 18 and 20 were merged. The Commission had to consider whether it was advisable to retain the provision that the receiving State could not request the recall of consular officials unless it alleged that their conduct gave serious grounds for complaint. The decision could not be based on the number of conventions which contained such a provision; the intrinsic merit of the criterion must be considered. A request for the recall of a consular official was always a serious matter, and the decision was not taken lightly by any receiving State. In the general interest, however, it was better to follow the procedure laid down for diplomatic missions in the case of consular officials also. The receiving State should not be required to allege — and it was allegation that was in question — conduct giving serious grounds for complaint. Such a requirement was neither in the interests of the two States concerned, whose relations would be impaired by the resulting dispute, nor in the interests of the person concerned. In many cases a discreet silence on the matter would certainly be desirable. Accordingly, it would be wise to bring the article closer into line with the corresponding provision of the draft on diplomatic intercourse.

19. With regard to the drafting difficulties, he could not share the Secretary's views on the difficulty of merging articles 18 and 20. The difference between the measures to be taken in pursuance

of the two articles was merely procedural. The situation would be clarified by adding at the end of the combined article a statement to the effect that the exequatur would be withdrawn in the case of a head of post and that a different procedure would be used in the case of other officials.

20. Mr. ŽOUREK, Special Rapporteur, said that in his reply to comments he would refer only to article 20, since the Commission had decided at its previous session not to reconsider the articles it had already adopted. Article 20 referred only to consular staff other than the head of post. The nomenclature in the definitions given in article 1 was clearly inadequate, and he would propose a definition covering members of consular staff only, excluding the head of the post. The second sentence of article 20, paragraph 1 should also be revised, to meet Sir Gerald Fitzmaurice's objection.

21. Several members had expressed the view that a closer connexion should be established with article 8 of the draft on diplomatic intercourse. He did not believe that that would be possible without considerable modifications. A consul exercised his functions on the basis of the exequatur issued to him, and while he held that exequatur he could not be recalled. The criterion of "conduct giving serious grounds for complaint" had been inserted in order to stress that a request for recall could not be an arbitrary measure. The fact that the receiving State had to give a reason for its request did not necessarily mean that the reason should form the subject of discussion or dispute between the two States concerned. A passage to that effect might be inserted in the commentary to the article. Nevertheless, in the absence of any qualifying phrase, the receiving State could request the recall of all the staff of a consular post without any guarantee of protection for the sending State.

22. In reply to Mr. Erim, he said that he had drafted two distinct rules in paragraph 1 because two different situations were involved. The first sentence referred to a person who had been appointed, but had not yet begun to exercise his functions. The persons referred to in the second sentence, however, were already carrying out consular functions, and a motive had to be given for requesting their recall. Mr. Erim also thought that that provision might give rise to disputes; it was obvious, however, that in the final instance any such matter would be decided by the receiving State.

23. He was not in favour of amalgamating articles 18 and 20. Not only were the situations of heads of post and of other consular staff fundamentally different, but a merger was unnecessary because article 18 related to the withdrawal of the exequatur, and, in the circumstances envisaged in that article, the receiving State was given all the necessary guarantees. In any case, the suggestion should be referred to the Drafting Committee, so that the Commission should not lose too much time. In view of the objections that had

been raised to the criterion of "conduct giving serious grounds for complaint", he would withdraw the passage criticized.

24. Sir Gerald FITZMAURICE said that he interpreted the Commission's decision not to reconsider articles adopted at the previous session as meaning that it would not re-examine them *seriatim*, but that it would not be precluded from reviewing them and making any necessary changes in such of them as might be affected by the later articles now being dealt with. The discussion at the current meeting had shown that some such changes should be made — for instance, in the definitions in article 1.

25. Mr. ŽOUREK, Special Rapporteur, pointed out that, at the eleventh session³ it had been expressly decided to review the definitions at the current session. Nevertheless, he would stress that the Commission was in the process of a first reading and should try to deal with as many of the outstanding articles as possible. In order to speed up the Commission's work, and bearing in mind the fact that it was dealing with a provisional draft which was to be reconsidered at the next session in the light of comments made by Governments, he would provisionally withdraw the words "Where the conduct . . . gives serious grounds for complaint", which had given rise to controversy.

26. Mr. PAL agreed with Sir Gerald Fitzmaurice that the Commission's decision did not preclude reconsideration of articles adopted. With regard to the present controversial article, he drew attention to the suggestion made by the Chairman at the eleventh session (524th meeting, paragraph 14) that Mr. Scelle might ask for a reconsideration of article 17 at the next session.

27. The CHAIRMAN, observing that the Special Rapporteur had withdrawn the controversial passage in paragraph 1, suggested that article 20 should be referred to the Drafting Committee for final formulation and for consideration of the question of its amalgamation with article 18.

It was so agreed.

ARTICLE 21 (*Notification of arrival and departure*)

28. Mr. ŽOUREK, Special Rapporteur, introduced article 21 and said that it was similar to article 9 of the draft on diplomatic intercourse and immunities, and therefore could be referred to the Drafting Committee; the Commission could later discuss and vote upon the final text established by that committee.

29. Mr. FRANÇOIS said that the question dealt with in article 21 was precisely one of those in respect of which it was not possible to adopt a provision identical with that of the draft on diplomatic intercourse and immunities. The notifica-

³ See *Official Records of the General Assembly, Fourteenth Session, Supplement No. 9*, p. 25.

tion of the arrival and departure of members of the families and private staff of diplomatic personnel was indispensable because of the immunity from jurisdiction which those persons would enjoy. The local authorities should therefore be aware of their identity and whereabouts.

30. No such reason existed in the case of private staff of consular officers. It was even more unusual to require such notification in respect of locally recruited persons. In the Netherlands, at any rate, it was not the practice to require such notifications.

31. Mr. BARTOŠ said that there was no uniform practice on the subject, except in respect of the notification of arrival and departure of a consul. In Yugoslavia, notification was also required of the presence or absence of a consul or honorary consul in the consular district.

32. With regard to private staff, he said that regulations varied from country to country. The Soviet Union required a notification in the case of the employment of one of its nationals on the private or domestic staff of a consul or of a consul's family. In Yugoslavia, notification was required only in the case of foreign nationals employed on the private staff who were brought in from abroad; the reason was that those persons were exempted from certain police regulations applicable to aliens. In the United States of America, United States citizens who served a foreign consulate or consul were required to register as foreign agents; that registration was, however, not required for the purposes of the Department of State, but was laid down under certain laws relating to the security services.

33. Mr. ŽOUREK, Special Rapporteur, said that although the practice was not uniform, many consular conventions exempted private staff brought in from abroad from such requirements as registration and residence permits.

34. The provisions of paragraph 1 (a) of article 21 were meant to apply only to members of private staff brought by consular officers from abroad. It would be most unusual to compel a consul to observe the formalities of aliens control in connexion with the entry and employment of such persons if he did not observe them where he and his family were concerned.

35. In any event, it would be extremely useful to keep the provision as it stood, so as to obtain government comments thereon. If many governments criticized it, the Commission could alter the article; on the other hand, if the provision regarding private staff were deleted, it would not be possible to obtain government comments on that question.

36. Mr. AGO said that the inclusion of a reference to private staff would be justified only if the Commission recognized that such staff had any privileges.

37. Sir Gerald FITZMAURICE agreed, and suggested that the point should be left open until

a decision had been taken regarding the privileges, if any, of the persons concerned.

38. Mr. MATINE-DAFTARY said that it would be useful to maintain the provision on private staff to cover such cases as that of a foreign chauffeur or other servant employed by a consular officer. In many countries, it was difficult for foreigners to obtain residence and labour permits.

39. The CHAIRMAN, agreeing with Mr. Matine-Daftary, said that it was not always easy for an alien to enter a country as a domestic employee. It was, therefore, useful to maintain in the draft some provision to cover that case.

40. If there was no objection, he would consider that the Commission agreed to refer article 21 and the comments thereon to the Drafting Committee.

It was so agreed.

ARTICLES 22 (*Use of the State coat-of-arms*) and 23 (*Use of the national flag*)

41. Mr. ŽOUREK, Special Rapporteur, said that articles 22 and 23 expressed the rule of customary international law on the subject of the use of the sending State's coat-of-arms and national flag; similar provisions occurred in practically all consular conventions.

42. Mr. BARTOŠ said that a difficulty could arise where the owner of the building which housed the consulate objected to the use of foreign national emblems. Clearly, all that the receiving State was bound to permit was the use of those emblems and therefore it could only be required to do what was in its own power to enable them to be displayed. A situation could sometimes arise in which the authorities of the receiving State were powerless to compel a private owner to permit that display over his property.

43. With regard to article 23, paragraph (b), he said that the provision should specify that the means of transport in question were those used exclusively by heads of consular posts.

44. Mr. ŽOUREK, Special Rapporteur, said that in a certain case, the Supreme Court of Austria had decided that the owner of a building was under an obligation to allow an honorary consulate which rented premises from him to use its coat-of-arms; that Court had, however, decided that the owner was not obliged to permit the use of a foreign flag.

45. He considered that the receiving State was under an obligation to permit the use of the coat-of-arms and national flag of the sending State, and should therefore take all necessary steps to make that use possible.

46. The Drafting Committee would no doubt find the most suitable language to cover the situation.

47. Mr. FRANÇOIS said that he could not agree with the Special Rapporteur's interpretation. It was the duty of the receiving State not to hinder the use of the coat-of-arms and national

flag of the sending State, but the receiving State was not under an obligation to ensure in all circumstances that they could be displayed over the objections of the owner of the premises.

48. Sir Gerald FITZMAURICE said that the language used in article 23 would not accomplish the purpose suggested by the Special Rapporteur; that could only be achieved by stating that the receiving State was bound to ensure the use of the coat-of-arms and flag.

49. He drew attention to the terms of article 18 of the draft on diplomatic intercourse and immunities, which simply stated that the diplomatic mission and its head had the right to use the flag and emblem of the sending State. That provision could not be interpreted as meaning that the receiving State was under an obligation to compel private persons to allow the display of that flag and emblem.

50. Normally, the question would be governed by the terms of the lease signed by the owner of the premises. Clearly, if that owner insisted on a clause forbidding the display of a foreign flag, the consulate would probably not lease the premises. Where the lease was silent on the point, it would seem, however, that the consulate would normally have the right to display its flag and coat-of-arms.

51. Mr. AGO said that the right of the sending State to use its coat-of-arms and flag was a right under international law. Accordingly, it was the duty of the receiving State, through the operation of its public law, not to hamper the exercise of that right. The relations between the consulate and the landlord were governed by their contract and by the civil law of the receiving State. The Commission was only concerned with questions of international law, not with those governed by civil law.

52. Mr. BARTOŠ said that three types of cases had come to his notice. In one case, one of the standard clauses of the lease in a New York building prohibited the display of foreign flags, and the question had arisen whether the acceptance of such a clause by a foreign consulate was valid in view of its right, under international law, to use its flag. In another case a lease had been assigned to a consulate, the landlord's consent not being required therefor. The landlord, however, had claimed the right to prevent the display of the flag of the consulate in the interests of the other tenants, who feared possible demonstrations against the consulate. Lastly, there was the case where the lease was silent on the question of the use of a flag and the consulate claimed that its right to such use was implicit by virtue of usage.

53. In many instances, the courts had held that the rights of the landlord prevailed over those of the consular tenant, on the grounds that the relations between the two were governed exclusively by private law and were consequently unaffected by interstate relations.

54. Mr. EDMONDS said that the expression "is bound to permit" might be interpreted in at least two ways. The purpose of both article 22 and article 23 was clearly to lay down the rule that the receiving State should place no restriction on the use of the sending State's coat-of-arms and national flag. Any restriction by a landlord would be a matter for decision under the contract of the parties and the municipal law of the receiving State.

55. Mr. SANDSTRÖM recalled that when the corresponding article 18 of the draft on diplomatic intercourse and immunities had been discussed, the only question which the Commission had had in mind was that of the existence in certain countries of restrictions concerning the use of flags and emblems of foreign States (see commentary on article 18 of that draft).

56. Mr. MATINE-DAFTARY said that he saw no reason why different language should be used in the opening words of articles 22 and 23. Both articles were concerned with a right vested in the sending State; if it was desired to recognize the fact that it possessed that right, both should stipulate that the sending State was entitled to display its coat-of-arms or to fly its national flag.

57. If there was any conflict between the right of the consulate to display its flag under international law and any rights under private law, the former should prevail.

58. Mr. ŽOUREK, Special Rapporteur, said that he had no objection to the drafting change suggested by Mr. Matine-Daftary.

59. He agreed that the provisions of articles 22 and 23 set forth rights under international law exclusively. The rules of international law in question, however, were binding on all the organs of the receiving State, including its courts. In concluding an international convention, a State assumed the obligation of giving effect to it. Accordingly, it should, where necessary, introduce legislation to ensure that the terms of that convention were applied. That raised the familiar and difficult question of the relationship between international law and municipal law, a question which was not settled in the proper way by all States and which, for the time being, the Commission was not called upon to solve.

60. Mr. SCALLE observed that, as Mr. Matine-Daftary had mentioned, it was sound law to say that a rule of international law must necessarily prevail over the provisions of municipal law. He drew attention to article 24 which stated that the receiving State was bound to facilitate, as far as possible, the procuring of suitable premises for the consulate; premises over which a consulate could not fly its national flag could not be described as suitable. A clause in a lease stipulating that a consul did not have the right to display his national flag or coat-of-arms would be at variance with international public order and would therefore be null and void.

61. The fact that the provisions of consular conventions were not uniform meant that with regard to the question of consular intercourse and immunities the Commission was expected to develop rules of international law rather than to re-state existing practice.

62. Mr. FRANÇOIS asked Mr. Scelle whether, if it were agreed that the sending State had a right to display its flag and coat-of-arms, a clause in a lease entered into with a consulate which prohibited such display would in fact be invalid.

63. Mr. SCELLE reiterated that the clause in question would be invalid as incompatible with international law, which prevailed over municipal law.

64. Mr. ERIM said that there appeared to be a possibility that the terms of article 24 might serve as a pretext to the authorities of the receiving State for compelling a reluctant landlord to accept a consulate as a tenant.

65. For his part, he had always understood that the codification of the rules of international law in the matter could not affect rights under private law, but having heard Mr. Scelle's statement, he now entertained some doubts on the question.

66. As a matter of drafting, he suggested that article 23 (a) should read "soit arboré au consulat" (at the consulate) instead of "soit arboré par le consulat" (by the consulate). The latter wording suggested that the flag might be flown elsewhere than at the consulate itself.

67. The CHAIRMAN said that the only question to be decided was whether articles 22 and 23 should state that the receiving State "shall" (or "is bound to") permit the use of the coat-arms and flag or that the sending State "is entitled" (or "has a right") to such use.

68. Whatever decision was taken by the Commission on that point, the further question of a possible conflict between a consulate and a landlord was a matter of interpretation by the competent courts of the receiving State.

69. Mr. BARTOŠ said that a different kind of difficulty had occurred in Yugoslavia. At Split, four consulates were housed in the same building, and there had been a conflict between them over the right to fly their respective flags over the building. Neither the courts nor the Protocol Division of the Ministry of Foreign Affairs had been able to settle that dispute.

70. Sir Gerald FITZMAURICE suggested that articles 22 and 23 should be referred to the Drafting Committee on the understanding that the purpose of those articles was to lay down that the receiving State should, so far as it was concerned, permit (or not prevent) the use of the coat-of-arms and national flag of the sending State. There was no intention to interfere in the private relations between a consulate and a landlord.

71. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to Sir Gerald Fitzmaurice's suggestion.

It was so agreed.

Appointment of drafting committee

72. The CHAIRMAN proposed that the Commission should appoint a drafting committee with the following membership: Mr. Yokota (Chairman), Mr. Ago, Sir Gerald Fitzmaurice, Mr. François and Mr. Žourek.

It was so agreed.

The meeting rose at 6.5 p.m.

530th MEETING

Monday, 2 May 1960, at 3 p.m.

Chairman: Mr. Luis PADILLA NERVO

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

[Agenda item 2]

PROVISIONAL DRAFT ARTICLES (ACN.4/L.86) [continued]

ARTICLES 25 (*Inviolability of consular premises*) and 27 (*Inviolability of the archives and documents*)

1. The CHAIRMAN, observing that article 34 (*Accommodation*) had been adopted at the previous session as article 15 A (524th meeting, paragraph 8) and as article 19,¹ invited the Commission to consider article 25.

2. Mr. ŽOUREK, Special Rapporteur, said that he had tried to make the article on the inviolability of consular premises concord in principle with article 20 of the draft articles on diplomatic intercourse and immunities,² and it was indissolubly linked with article 27 of the present draft (*Inviolability of the archives and documents*). Such inviolability was already recognized by customary international law and had been embodied in many conventions, including those mentioned in the commentary to the corresponding article (article 25) in his first draft.³ Doctrine had recognized the principle of the inviolability of consular archives as early as 1896 in article 9 of the regulations on consular immunities adopted in that

¹ *Official Records of the General Assembly, Fourteenth Session, Supplement No. 9*, p. 35.

² *Yearbook of the International Law Commission, 1958*, vol. II (United Nations publication, Sales No. 58.V.1, vol. II), p. 95.

³ *Ibid.*, 1957, vol. II (United Nations publication, Sales No. 1957.V.5, vol. II), pp. 98 and 99.