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39th meeting of the Second Committee

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THIRTY-NINTH MEETING

Monday, 1 April 1963, at 3.20 p.m.

Chairman: Mr. GIBSON BARBOZA (Brazil)

Consideration of the draft articles on consular relations adopted by the International Law Commission at its thirteenth session (A/CONF.25/6) (continued)

Article 56 (Special provisions applicable to career consular officials who carry on a private gainful occupation) (continued)

1. Mr. BLANKINSHIP (United States of America) said that he had abstained from voting on article 56 at the previous meeting because the wording adopted covered only part of the question. He approved of the principle that consular officials and consular employees should not carry on any private gainful occupation; that, incidentally, was prohibited by United States law. But, as the representatives of Israel and France had pointed out, the article was inadequate and would result in the members of the families of consular officials being in a less favourable position in that connexion than consular employees and the members of their families.

2. Mr. JESTAEDT (Federal Republic of Germany) said that he wished to draw attention to a drafting matter in connexion with article 56. In paragraph 2 of the text adopted by the Committee, it would, in his opinion, be preferable to replace the words "exemptions provided for" by the words "privileges and immunities provided for" and he asked that his suggestion be referred to the drafting committee.

3. The CHAIRMAN said that due note would be taken.

Article 57

(Regime applicable to honorary consular officials)

4. The CHAIRMAN invited the Committee to consider article 57 and the amendments thereto.¹

5. Mr. VAZ PINTO (Portugal) said that neither career consuls nor honorary consuls were defined in chapter III of the International Law Commission's draft; he considered that a methodological defect. The omission was probably due to the difficulty of establishing a distinction, but a definition was needed since it was necessary to know who was a career consul and who was an honorary consul. An appropriate method which would supply a solid working basis would be to complete article 1 of the draft convention by inserting the following sub-paragraphs between sub-paragraphs (b) and (c):

"(x) 'Career consular official' means any person who is an official of the sending State, is in receipt of a

¹ The following amendments had been submitted: Canada, A/CONF.25/C.2/L.122/Rev.1; Nigeria, A/CONF.25/C.2/L.140; Australia, A/CONF.25/C.2/L.154; United States of America, A/CONF.25/C.2/L.182; South Africa, A/CONF.25/C.2/L.189; India, A/CONF.25/C.2/L.200; Norway, A/CONF.25/C.2/L.212; United Kingdom, A/CONF.25/C.2/L.213; Pakistan, A/CONF.25/C.2/L.214; Japan, A/CONF.25/C.2/L.217; France, A/CONF.25/C.2/L.218.

regular salary and does not exercise in the receiving State any professional activity other than his consular functions;

"(xx) 'Honorary consular official' means any person entrusted with the exercise of consular functions who does not fulfil the conditions stated in sub-paragraph (x)."

Paragraph 2 would then be deleted.

6. The CHAIRMAN regretted that he could not accept the Portuguese representative's suggestion. The general committee had instructed the First Committee to consider article 1 and the Second Committee could not lawfully interfere. Naturally, the Conference sitting in plenary could deal with the question should it so desire.

7. Mr. VAZ PINTO (Portugal) explained that he merely wished to draw the attention of delegations to the point so that they might bear it in mind during the consideration of article 1 by the First Committee.

8. Mr. NWOGU (Nigeria) said that, in view of the adoption of article 35, and of its paragraph 3 in particular, he withdrew his amendment (L.140).

9. Mr. AMLIE (Norway) introduced his amendment (L.212), which was based on the idea that some privileges and immunities were granted to consulates as consular posts, whereas others were provided for the benefit of consular officials. That distinction, though logical, was not made in article 57. The restrictive provisions of article 69 could relate only to the privileges and immunities granted to consular officials, and not to those having reference to consular posts.

10. Mr. HEUMAN (France) pointed out that by its vote on article 56 at the preceding meeting the Committee had prohibited consular officials from exercising a private gainful occupation, but had said nothing about consular employees, who would in that way not only be authorized, but in some sort incited to carry out occupations of that nature. In the circumstances, he withdrew his amendment (L.218) which he feared had lost its meaning. That would not prevent him, however, from voting for the Japanese amendment (L.217) or that of the United Kingdom (L.213), which were based on the same principle. He approved the Norwegian delegation's amendment, which was full of good sense. Chapter II of the International Law Commission's draft was divided into two sections, one of which dealt with the "facilities, privileges and immunities relating to a consulate" and the other one with the "facilities, privileges and immunities regarding consular officials and employees". Logically, chapter III should be sub-divided in the same way, but that had not been done and the Norwegian amendment would make good that omission.

11. With regard to the procedure to be followed, he noted that article 57 referred to numerous other articles of the future convention. When the time came to vote, the Committee would have to choose between two possible methods: it could either vote on the various amendments submitted by delegations, one by one, or else vote article by article and group together all the amendments proposing the inclusion or deletion of the reference to any particular article in article 57.

12. The CHAIRMAN said that the various amendments submitted did not seem to be mutually exclusive. In order to facilitate the Committee's work he had requested the secretariat to draw up a synoptic table.

13. Mr. AMLIE (Norway) explained that his amendment referred to a question of method rather than any specific article mentioned in article 57. If the Commission were to decide to delete any of the articles referred to therein, he would ask that his amendment be put to the vote, disregarding any article omitted.

14. Mr. KHOSLA (India), introducing his delegation's amendment (L.200), said that the reference to articles 28 and 49 should be deleted, because honorary consuls were not entitled to the privileges connected with the national flag, nor were they entitled to exemption from customs duties since in addition to their consular functions they frequently exercised activities of a private nature; such privileges might therefore give rise to abuse. In practice, it was impossible to tell whether a car with a flag was being used for private or for official purposes. Even more important was the impossibility of distinguishing those articles intended for official use from others. In addition, it was very undesirable that the privileges referred to in paragraph 2 of article 49 should also be granted under article 57. It was particularly important for the less developed countries that the provisions of article 49 should be extended as little as possible.

15. Mr. DRAKE (South Africa) explained that in his amendment (L.189) he had proposed the deletion of the references to article 39 and to paragraph 3 of article 41. With regard to the first proposal, there seemed no justification for burdening the receiving State with the obligations under article 29. Honorary consular officials and their staffs were generally permanently resident in the receiving State and could reasonably be expected to have a first-hand knowledge of local conditions. Care should be taken in framing the convention to avoid imposing additional obligations on the receiving State, especially when that was not really necessary. If article 69 were eventually amended so as to be applicable to permanent residents as well as nationals of the receiving State, the deletion of the reference to article 29 would not be necessary. It was not certain, however, that article 69 would be changed and it would be wiser, therefore, to delete in article 57 the reference to article 29, as suggested in his delegation's amendment.

16. With regard to the deletion of the reference to paragraph 3 of article 41, the basic objection to making that paragraph applicable to an honorary consular official was that it would, in effect, give him a privileged position in respect of proceedings instituted against him in his private capacity. There again, the honorary consular official would most likely be permanently resident in the receiving State, and engaged in private business. As he would thus be devoting only a limited part of his time to the exercise of his consular functions, the necessity to avoid hampering him in the performance of his part-time duties was much less pressing than it would be in the case of a career consular official. The point he had made in reference to article 69 would also apply, though to a lesser extent.

17. The Canadian amendment (L.122/Rev.1) was an excellent proposal. It was not necessary, however, to add paragraph 2 of article 49 to the list in article 57. In paragraph 2 of the Canadian amendment, the insertion of the words "or at the instance of" after the words "supplied by" would make the text less restrictive so that it could accommodate situations arising in which articles intended for the official use of a consulate headed by an honorary consular official were not supplied direct from the sending State but were ordered from other countries of manufacture for shipment to the office concerned.

18. Mr. WOODBERRY (Australia) explained his delegation's amendment (L.194), which was a drafting change and therefore a matter primarily for the drafting committee. His delegation would support the principle of the Norwegian amendment.

19. Mr. SMITH (Canada) introduced his delegation's amendment (L.122/Rev.1) and said he could accept the South African representative's proposal for adding the words "or at the instance of" after the words "by the sending State" in paragraph 2. The effect of the first part of his amendment would be to clarify the Commission's text which was difficult to follow because it required many cross-references. The object of the second part was to restrict the meaning of "articles for the use of the consulate" so as to prevent possible abuse by honorary consuls, especially if they were nationals or permanent residents of the receiving State. The wording in paragraph 2 would, for example, prevent imports of liquor ostensibly for consular use but actually for private use. The honorary consul would not be allowed to import at will whatever articles he wanted, but would be restricted to what the receiving State was willing to let him import.

20. Mr. BLANKINSHIP (United States of America) said that the purpose of his amendment (L.182) was to insert, among the articles listed in article 57, paragraphs 1 and 2 of article 30 (Inviolability of the consular premises), which would entail the deletion of article 58, and article 40 (Special protection and respect due to consular officials), which would entail the deletion of article 61.

21. Mr. KANEMATSU (Japan) said that in his amendment (L.217) he proposed, like the United States representative and for the same reasons, to include article 40 among those enumerated in paragraph 1 of article 57. He also proposed to include in that list article 55 (Respect for the laws and regulations of the receiving State), which would entail the deletion of article 66, and to add at the end of the article a new provision concerning consular employees employed at a consulate headed by an honorary consular official. The second part of his amendment related to the families of honorary consular officials and was intended to set a limit to the extension of privileges. He agreed with the Norwegian representative that a distinction should be made between articles applying to consulates and those applying to honorary consular officials.

22. Mr. RUSSELL (United Kingdom) said that his amendment (L.213) was intended to serve three purposes.

Firstly, to correct a defect of drafting in the article by inserting an allusion to consulates as well as to consular officials. Secondly, to add to the list of references in article 57 references to article 31 which provided for exemption from taxation for consular premises, article 54, paragraph 3, concerning the obligations of third States, and article 55 concerning respect for the laws and regulations of the receiving State; there appeared to be no reason for drawing a distinction in respect of those articles between career and honorary consular officials. Thirdly, to introduce a reference to consular employees; while the concept of honorary consular employees was somewhat indeterminate, especially in the absence of an adopted text for article 1, it was at least arguable that the term should be regarded as applicable to such cases as, for example, that of a clerk in a shipping office who occasionally performed consular services on behalf of the manager of the shipping office who was himself an honorary consul.

23. The United Kingdom delegation supported the Canadian amendment (L.122/Rev.1), which proposed the addition of an article on exemption from duties and taxes on imports. For practical reasons, it opposed the inclusion of article 30 on the inviolability of the consular premises in the list given in paragraph 1 of article 57. It could agree that article 40 on special protection should be included in that list, as the United States and Japanese delegations had proposed. With regard to the Japanese amendment, his delegation could accept the proposed addition to paragraph 1, but was not convinced of the value of the last phrase, "and who are not engaged in a private gainful occupation in the receiving State". His delegation thought that the question of gainful occupation might with advantage form the subject of a separate provision.

24. Mr. HABIBUR RAHMAN (Pakistan) associated himself with the Norwegian representative's remarks concerning the distinction to be drawn between articles that applied to consulates and those that applied to consular officials. In his amendment (L.214) he proposed that article 43, article 44, paragraph 3, and article 49, with the exception of paragraph 1 (b), should be deleted from the enumeration in article 57.

25. Mr. MARESCA (Italy) thought that the draft article was properly balanced, but that a distinction should be made between articles relating to consulates and those dealing with consular officials, as the Norwegian representative had rightly pointed out. An honorary consul might be assimilated to a career consul when he was performing official acts, and the Italian delegation would vote in favour of any amendments which stressed the nature of the functions performed.

26. Mr. JESTAEDT (Federal Republic of Germany) observed that if the Committee were to adopt the various amendments submitted, several articles would be omitted from chapter III of the Convention. It might be better to examine chapter III as a whole so as to be able to make a decision with a full knowledge of the matter.

27. The CHAIRMAN observed that article 57 was the most important provision in chapter III and that, in discussing it, the Committee could hardly avoid

referring to other articles. Nevertheless, the best procedure might be to continue to consider the chapter article by article, as the Committee had done hitherto.

28. Mr. KAMEL (United Arab Republic) pointed out that most States considered honorary consuls to be consular officials who were not in receipt of a regular salary from the sending State and who were authorized to exercise a gainful occupation in the receiving State. That definition corresponded to the one which the International Law Commission had adopted at its eleventh session.² Nevertheless, the Commission seemed to have accorded excessive privileges to honorary consuls and the delegation of the United Arab Republic would vote against any amendment which was likely to extend the facilities, privileges and immunities granted to honorary consular officials.

29. Mr. SALLEH bin ABAS (Federation of Malaya) favoured the amendments which would add other articles to the list set out in article 57, paragraph 1. The United Kingdom amendment proposed the addition of article 31, article 54, paragraph 3, and article 55. If that proposal were adopted, articles 59, 65 and 66 would be eliminated from chapter III. If the Committee adopted the United States amendment, articles 58 and 61 would be deleted. The amendment of South Africa was acceptable, as there was no valid reason for treating honorary consuls, who were more often than not nationals of the receiving State, better than their fellow citizens. The Malayan delegation could support the Canadian amendment, but would like paragraph 1 (a) of article 49 to be referred to in the list in paragraph 1 of the proposed new article.

30. Mr. NASCIMENTO e SILVA (Brazil) said that the Norwegian amendment would materially improve the text of article 57. A consulate headed by an honorary consular official should fulfil the same conditions as a consulate headed by a career consul. If the honorary consul was a national of the receiving State, article 69 would apply. A person employed by the consulate and paid by an honorary consul would be treated in the same manner as a member of the private staff within the meaning of article 1, sub-paragraph 1 (i).

31. The Canadian amendment put the matter in its proper place by allowing exemption only in respect of "articles exclusively for the official use of a consular post": it could be considered that the articles in question were intended not for the honorary consul, but for the consulate, and that it was the sending State which consigned them to him. The amendments by the United States of America, the United Kingdom and Japan had some points in common, and the Brazilian delegation could support them. The amendment by Pakistan (L.224) introduced restrictions that were unacceptable because they related to official acts performed in the exercise of consular functions, acts in respect of which article 69 provided for immunity of jurisdiction and personal inviolability of members of the consulate who were nationals of the receiving State.

² See *Yearbook of the International Law Commission, 1959*, vol. II (United Nations publication, Sales No. 59.V.I, vol. II), p. 111.

32. Mr. MARAMBIO (Chile) said that he could not support the first part of the Canadian amendment because that text would broaden the scope of article 57, paragraph 1. On the other hand, he supported the new article proposed by the Canadian delegation, because it would limit the exemption from duties and taxes on imports. When the various amendments were put to the vote, the Chilean delegation would vote in favour of all those which restricted the scope of the privileges and immunities granted to honorary consuls.

33. Mr. RUSSELL (United Kingdom) explained that, in his previous statement, he had referred to employees paid by the sending State or from funds provided by the sending State and not to persons whose remuneration came from a different source — for example, from the honorary consular official concerned in his private capacity.

34. Mr. HENAO-HENAO (Colombia) commended the Norwegian amendment, which took into account the amendments to the draft articles adopted by the Committee. It would facilitate the work of the Committee to take a decision on the Norwegian amendment first.

35. Mr. ADDAI (Ghana) said that the privileges and immunities set forth in article 57 were indispensable to the satisfactory exercise of consular functions. His delegation would therefore oppose any departure from that principle and would vote against the amendments of South Africa and Pakistan. On the other hand, it would vote in favour of the amendments of the United States, the United Kingdom and Norway.

36. Mrs. VILLGRATTNER (Austria) pointed out that if certain articles enumerated in paragraph 1 of article 57 were removed, it would not necessarily follow that the corresponding articles of chapter III would disappear from the text of the Convention. Those articles could be altered in accordance with the amendments which the Commission would adopt. Her delegation also wished to point out that the new paragraph 3 which the Commission had added to article 49 should not, in its opinion, apply to honorary consuls.

37. Mr. DAS GUPTA (India) noted that the delegation of Pakistan proposed in its amendment to delete from article 57, paragraph 1, the reference to article 43, which laid down immunity of jurisdiction only in respect of acts performed in the exercise of consular functions. It was true that an honorary consul was more often than not a national of the receiving State, but it should not be forgotten that the receiving State itself had accepted his appointment as honorary consul. Nor did it seem advisable to delete the reference to paragraph 3 of article 44 and thus oblige an honorary consul to give evidence concerning matters connected with the exercise of his functions, or the reference to article 49, except for paragraph 1 (b), because honorary consular officials should be privileged with regard to all their official acts.

38. The Norwegian amendment raised a question of method, but it would also have the effect of refusing to grant honorary consul facilities which were necessary for the performance of his functions. As for the Canadian amendment, he would willingly vote in favour of it, but

the enumeration contained in paragraph 2 of the proposed new article was much too vague, and some articles, such as books, office equipment and office furniture should not be included. He found it difficult to accept the amendments of the United Kingdom (L.213) and the United States (L.182) because they would broaden the scope of draft article 57 as proposed by the International Law Commission.

39. Mr. HEUMAN (France) observed that a comparison between draft article 57 and the various amendments showed that 23 texts were in question. The French delegation would oppose the inclusion in article 57 of five articles, because of their discriminatory character. It would therefore vote against the amendments to add articles 30, 31, 40 and 55 and article 54, paragraph 3, to the enumeration in paragraph 1 of article 57.

The meeting rose at 6.10 p.m.

FORTIETH MEETING

Tuesday, 2 April 1963, at 10.20 a.m.

Chairman: Mr. GIBSON BARBOZA (Brazil)

Consideration of the draft articles on consular relations adopted by the International Law Commission at its thirteenth session (A/CONF.25/6) (continued)

Article 57 (Regime applicable to honorary consular officials)

1. The CHAIRMAN invited the Committee to continue its consideration of article 57 and the amendments relating to it.¹

2. Mr. PAPAS (Greece) said that it would be inappropriate to grant the same privileges and immunities to honorary consular officials as to career consular officials, since the honorary consular official was usually a national of the sending State, recruited on the spot, and pursuing a gainful occupation. There was a special category, sometimes described as honorary consuls, who were really officials of the sending State; they received emoluments in respect of their consular activities and did not pursue any other gainful occupation. They should be treated in every way as career consular officials, but otherwise it was necessary to maintain a sharp distinction between career and honorary consular officials. The same was true of honorary consulates which were usually located on the private or professional premises of the consul and therefore could not lay claim to the immunities to which consulates headed by a career consul were entitled.

3. He agreed that honorary consular officials should be granted the facilities accorded to career consular officials by articles 33, 34, 36, 37, 38, 39, 43, 44 (paragraph 3), 45 and 53. Moreover, article 28 should apply to consular premises and to consular officials only when engaged in the exercise of their functions. He supported

¹ For the list of amendments to article 57, see the summary record of the thirty-ninth meeting, footnote to para. 4.