

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1960

Volume I

*Summary records
of the twelfth session*

25 April - 1 July 1960

UNITED NATIONS



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INTRODUCTORY NOTE

The summary records which follow were originally distributed in mimeographed form as documents A/CN.4/SR.526 to A/CN.4/SR.579. They include the corrections to the provisional summary records that were requested by the members of the Commission and such drafting and editorial modifications as were considered necessary.

Symbols of United Nations documents are composed of capital letters combined with figures. The occurrence of such a symbol in the text indicates a reference to a United Nations document.

The documents pertaining to the work of the tenth session of the Commission are reproduced in volume II of this publication.

A/CN.4/SER.A/1960

UNITED NATIONS PUBLICATION

Catalogue No.: 60. V. 1, Vol. I

Price: \$(U.S.) 4.00; 28/6 stg.; Sw. fr. 17.—
(or equivalent in other currencies)

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MEMBERS OF THE COMMISSION

Mr. Roberto Ago, Italy	Mr. Faris el-Khoury, United Arab Republic
Mr. Gilberto Amado, Brazil	Mr. Ahmed Matine-Daftary, Iran
Mr. Milan Bartoš, Yugoslavia	Mr. Luis Padilla Nervo, Mexico
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Mr. F. V. García Amador, Cuba	Mr. Alfred Verdross, Austria
Mr. Shuhsi Hsu, China	Mr. Mustafa Kamil Yasseen, Iraq
Mr. Eduardo Jiménez de Aréchaga, Uruguay	Mr. Kisaburo Yokota, Japan
	Mr. Jaroslav Žourek, Czechoslovakia

Officers

Chairman: Mr. Luis Padilla Nervo

First Vice-Chairman: Mr. Kisaburo Yokota

Second Vice-Chairman: Mr. Milan Bartoš

Rapporteur: Sir Gerald Fitzmaurice

Mr. Yuen-li Liang, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary of the Commission.

AGENDA

Document A/CN.4/123
8 January 1960

The Commission adopted the following agenda at its 527th meeting held on 27 April 1960 :

1. Filling of casual vacancies in the Commission (article 11 of the Statute)
2. Consular intercourse and immunities
3. State responsibility
4. Law of treaties
5. *Ad hoc* diplomacy
6. General Assembly resolution 1400 (XIV) on the codification of the principles and rules of international law relating to the right of asylum
7. General Assembly resolution 1453 (XIV) on the study of the juridical régime of historic waters, including historic bays
8. Co-operation with other bodies
9. Date and place of the thirteenth session
10. Planning of future work of the Commission
11. Other business

LIST OF DOCUMENTS PERTAINING TO THE TWELFTH SESSION OF THE COMMISSION

<i>Document No.</i>	<i>Title</i>	<i>Observations and references</i>
A/3859	Report of the International Law Commission covering the work of its tenth session	<i>Official Records of the General Assembly, Thirteenth Session, Supplement No. 9</i> ; also reproduced in <i>Yearbook of the International Law Commission, 1958</i> , vol. II
A/4169	Report of the International Law Commission covering the work of its eleventh session	<i>Ibid.</i> , <i>Fourteenth Session, Supplement No. 9</i> ; also reproduced in <i>Yearbook of the International Law Commission, 1959</i> , vol. II
A/4425	Report of the International Law Commission covering the work of its twelfth session	<i>Ibid.</i> , <i>Fifteenth Session, Supplement No. 9</i> ; also reproduced in <i>Yearbook of the International Law Commission, 1960</i> , vol. II
A/CN.4/96	State responsibility: International responsibility: report by F. V. García Amador, Special Rapporteur	See <i>Yearbook of the International Law Commission, 1956</i> , vol. II
A/CN.4/106	State responsibility: International responsibility: second report by F. V. García Amador, Special Rapporteur	<i>Ibid.</i> , 1957, vol. II
A/CN.4/108	Consular intercourse and immunities: report by Jaroslav Zourek, Special Rapporteur	<i>Ibid.</i>
A/CN.4/111	State responsibility: International responsibility: third report by F. V. García Amador, Special Rapporteur	<i>Ibid.</i> , 1958, vol. II
A/CN.4/119	State responsibility: International responsibility: fourth report by F. V. García Amador, Special Rapporteur	<i>Ibid.</i> , 1959, vol. II
A/CN.4/123	Provisional agenda	Adopted without change. See page ix above
A/CN.4/124	Co-operation with other bodies: report by Dr. Yuen-Li Liang, Secretary of the Commission, on the proceedings of the Fourth Meeting of the Inter-American Council of Jurists	See <i>Yearbook of the International Law Commission, 1960</i> , vol. II
A/CN.4/125	State responsibility: International responsibility: fifth report by F. V. García Amador, Special Rapporteur	<i>Ibid.</i>
A/CN.4/126	General Assembly resolution 1453 (XIV) on the study of the juridical regime of historic waters, including historic bays: note by the Secretariat	<i>Ibid.</i>
A/CN.4/127	Filling of casual vacancies in the Commission: note by the Secretariat	<i>Ibid.</i>
A/CN.4/128	General Assembly resolution 1400 (XIV) on the codification of the principles and rules of international law relating to the right of asylum: note by the Secretariat	<i>Ibid.</i>
A/CN.4/129	<i>Ad hoc</i> diplomacy: report by A. E. F. Sandström, Special Rapporteur	<i>Ibid.</i>
A/CN.4/131	Consular intercourse and immunities: second report by Jaroslav Zourek, Special Rapporteur	<i>Ibid.</i>
A/CN.4/132	Report of the International Law Commission covering the work of its twelfth session	Same text as A/4425

<i>Document No.</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.86	Consular intercourse and immunities: provisional draft articles submitted by Jaroslav Zourek, Special Rapporteur	See <i>Yearbook of the International Law Commission, 1960</i> , vol. II
A/CN.4/L.87	<i>Ad hoc</i> diplomacy: provisions on <i>ad hoc</i> diplomacy proposed by Mr. Jiménez de Aréchaga for insertion in the draft articles on diplomatic intercourse and immunities prepared by the International Law Commission at its tenth session (A/3859)	<i>Ibid.</i>
A/CN.4/L.88	<i>Ad hoc</i> diplomacy: memorandum by Mr. Jiménez de Aréchaga in explanation of his proposal concerning <i>ad hoc</i> diplomacy (A/CN.4/L.87)	<i>Ibid.</i>
A/CN.4/L.89	<i>Ad hoc</i> diplomacy: new alternative proposal submitted by the Special Rapporteur	<i>Ibid.</i>
A/CN.4/L.90 and Add.1	Provisional draft articles relating to consular intercourse and immunities: texts prepared by the Drafting Committee and submitted to the Commission for its consideration	Mimeographed
A/CN.4/L.92 and Add.1, 2 and 3	Draft report of the International Law Commission covering the work of its twelfth session	Mimeographed

INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE TWELFTH SESSION

Held at the Palais des Nations, Geneva, from 25 April to 1 July 1960

526th MEETING

Monday, 25 April 1960, at 3 p.m.

Chairman: Sir Gerald FITZMAURICE

later: Mr. Luis PADILLA NERVO

Opening of the session

1. The CHAIRMAN declared the twelfth session of the International Law Commission open.

Tribute to the late Mr. Manley O. Hudson

2. The CHAIRMAN said that the world of international law had suffered a grievous loss by the recent death of the eminent American jurist Mr. Manley O. Hudson, a former Chairman of the Commission.

3. At the invitation of the CHAIRMAN, the Commission observed one minute's silence as a tribute to the memory of Mr. Manley O. Hudson.

Election of officers

4. The CHAIRMAN called for nominations for the office of Chairman.

5. Mr. GARCÍA AMADOR proposed Mr. Amado who, in addition to having rendered valuable services to the Commission, came from a country which had made an outstanding contribution to international law in Latin America.

6. Mr. AMADO, though deeply grateful for the honour done him, regretted that his health and age obliged him to decline it.

7. He would nominate instead Mr. Padilla Nervo, whose ability and experience eminently qualified him for the office.

8. Mr. MATINE-DAFTARY seconded that proposal.

Mr. Padilla Nervo was unanimously elected Chairman and took the Chair.

9. The CHAIRMAN, thanking members for having elected him, said that it was a great responsibility to succeed so distinguished a chairman as Sir Gerald Fitzmaurice and, in a sense, to replace the eminent Mr. Amado, whom members had had in mind as their first choice for Chairman. He would endeavour to carry on the work of the Com-

mission in accordance with the tradition laid down by his predecessors.

10. He called for nominations for the office of First Vice-Chairman.

11. Mr. EDMONDS proposed Mr. Yokota.

Mr. Yokota was unanimously elected First Vice-Chairman.

12. The CHAIRMAN called for nominations for the office of Second Vice-Chairman.

13. Mr. AGO proposed Mr. Bartoš, who represented the legal systems of the whole of Europe.

14. Mr. AMADO seconded the proposal.

Mr. Bartoš was unanimously elected Second Vice-Chairman.

15. The CHAIRMAN called for nominations for the office of Rapporteur.

16. Mr. PAL proposed Sir Gerald Fitzmaurice.

17. Mr. AMADO seconded the proposal.

Sir Gerald Fitzmaurice was unanimously elected Rapporteur.

The meeting rose at 3.45 p.m.

527th MEETING

Wednesday, 27 April 1960, at 10.30 a.m.

Chairman: Mr. Luis PADILLA NERVO

Adoption of the agenda (A/CN.4/123)

1. The CHAIRMAN said that he had received a letter from Mr. Verdross stating that, owing to his academic obligations, he would not be able to attend meetings of the Commission until 2 May, but would then be able to attend continuously until 24 June.

2. He asked the Commission to consider its provisional agenda (A/CN.4/123).

3. Mr. ŽOUREK suggested that the Commission consider under item 11 of the agenda (*Other business*) a recommendation that the publication of the indexes to the United Nations *Treaty Series* be accelerated.

It was so agreed.

4. Mr. SANDSTRÖM suggested that item 5 (Ad hoc diplomacy) should be placed higher on the agenda, since the General Assembly in resolution 1450 (XIV) had decided that an international conference of plenipotentiaries should be convoked at Vienna not later than the spring of 1961 to consider the question of diplomatic intercourse and immunities. Ad hoc diplomacy was undoubtedly linked with the subject matter of the proposed conference.
5. The CHAIRMAN pointed out that the Commission had decided at its eleventh session to place on the provisional agenda of its twelfth session the subject of state responsibility, the law of treaties and ad hoc diplomacy, in addition to the item on consular intercourse and immunities, which would be given first priority.¹ The Commission had, however, decided that the order in which the first three items was mentioned did not necessarily indicate that the Commission would discuss them in that order.
6. Mr. PAL observed that the records of the Commission's eleventh session (515th meeting, paragraph 5), indicated that the original idea had been that the topic of ad hoc diplomacy should be considered immediately after that of consular intercourse and immunities, so that the reports on those two subjects and on diplomatic intercourse and immunities might be submitted to governments together.
7. Mr. GARCÍA AMADOR said that he could not but agree with Mr. Sandström; at the same time, however, it had also been agreed at the previous session (515th meeting, paragraph 37) that attention should be given to the topic of State responsibility at the twelfth session. The discussion on that topic (for which he was Special Rapporteur) would require at least two weeks. He would have to return for some time to Havana, owing to academic obligations, and would appreciate it if the Commission decided when it would give that subject its attention. He suggested that the Commission might spend the seventh and eighth weeks of its session on the subject, leaving the last week for other business and the preparation of its report. The Commission had had the subject of State responsibility on its agenda for nearly seven years, but final work on it had been deferred for various reasons. Unless a further report on the Commission's discussions were produced, the General Assembly might wonder why the subject was being delayed so long.
8. Sir Gerald FITZMAURICE observed that even if the Commission finished a draft on ad hoc diplomacy at the current session, it would have to be referred, in accordance with normal procedure, to the governments for comment and then be completed in the light of those comments. It could not, therefore, be submitted to the General Assembly until after the Vienna conference.
9. Mr. SANDSTRÖM said that he had taken account of that consideration in his report (A/CN.4/129), but, if the Commission discussed the report, perhaps some way could be found of enabling the conference to deal with the topic. A preliminary exchange of views should not take more than one week.
10. Mr. TUNKIN observed that a draft convention on diplomatic intercourse and immunities would be dealt with at the Vienna conference, and ad hoc diplomacy was very closely related to that subject. Mr. Sandström was therefore correct. Even if the conference did not discuss ad hoc diplomacy, some decision by the Commission might be of use for a future conference. There was every reason, therefore, to take that subject immediately after the item on consular intercourse and immunities. State responsibility and the law of treaties would probably take years to complete and no plenipotentiary conference was likely to be convened in the foreseeable future to deal with those two topics.
11. Mr. AGO suggested a different approach. It would be natural to deal with ad hoc diplomacy immediately after consular intercourse and immunities. The Commission would then have dealt with all kinds of privileges and immunities. State responsibility and the law of treaties were of course likewise important and interesting subjects. The Commission had, however, spent some weeks at the previous session dealing with the law of treaties, and might try to complete its consideration of that subject, which would be impossible if the item was placed too low on the agenda. The result might be that it would come up for discussion at a time when the Commission's membership, which was now familiar with the main underlying principles, might have changed. Anyway, the best course would be to begin with consular intercourse and immunities, then undertake a preliminary examination of ad hoc diplomacy, and then decide the order of the other items.
12. Mr. YOKOTA agreed with Mr. Tunkin and Mr. Ago that it was very possible that the General Assembly would include the subject of ad hoc diplomacy in the agenda of the proposed Vienna conference. The Commission should accordingly discuss it at the current session. The item consular intercourse and immunities would probably take five weeks. Ad hoc diplomacy could be disposed of in one week; that would leave four weeks. The Commission might decide later whether it would devote those four weeks to State responsibility or the law of treaties.
13. Mr. GARCÍA AMADOR said that Mr. Ago's argument was logical, but not wholly realistic. It would no doubt have been more logical to discuss the law of treaties, if there had been any hope that the discussion could be completed; the fact was that that subject had been on the agenda for a very long time and did not require to be finished by any particular date. He agreed that the Commission should begin with consular intercourse

¹ Official Records of the General Assembly, Fourteenth Session, Supplement No. 9, para. 43.

and immunities and continue with *ad hoc* diplomacy, in view of the proposed Vienna conference, but the decision on the order of the agenda taken by the Commission at its eleventh session should be maintained, and consequently the seventh and eighth weeks of its session should be devoted to State responsibility.

14. Mr. BARTOŠ agreed with Mr. Ago that there were practical reasons for dealing with *ad hoc* diplomacy immediately after consular intercourse and immunities. Mr. Tunkin and Mr. Yokota had argued cogently in favour of that course in view of the proposed Vienna conference. A further reason was that the Commission had decided that the law on *ad hoc* diplomacy should be codified. A basic draft had been provided by Mr. Sandström; if the Commission produced recommendations on that basis, that would not prejudice any final decision. The other items were extremely important too, and the Commission had already settled certain basic principles, but drafting would not be finished during the present Commission's term of office, as the subjects were vast and complicated. Many divergent views had for example been expressed on the subject of state responsibility. There had been more agreement on the subject of the law of treaties, especially since the Commission had enjoyed the benefit of basic reports by a succession of special rapporteurs. The subject of *ad hoc* diplomacy would not require a great deal of time, since the Commission had already laid down certain principles in its draft on diplomatic privileges and immunities, and all that it had to do was to see whether they could be applied to *ad hoc* diplomacy, about which there seemed to be few existing principles of positive law. *Ad hoc* diplomacy was used almost daily, and a solution of the problems involved should be sought as soon as possible. The Commission should therefore decide to take the subject of consular intercourse and immunities first, and *ad hoc* diplomacy, which was organically linked with it, immediately afterwards.

15. The CHAIRMAN noted that all members agreed that the item on consular intercourse and immunities should be taken first and that *ad hoc* diplomacy should be examined immediately afterwards. The Commission might then take a decision on the ensuing items without altering the order suggested at the previous session.

16. Mr. GARCÍA AMADOR agreed.
The agenda (A/CN.4/123) was adopted.

**Filling of casual vacancy in the Commission
(Article II of the Statute) (A/CN.4/127)**

[Agenda item 1]

17. The CHAIRMAN suggested that the Commission hold a private exchange of views on item 1 of the agenda.

It was so agreed.

The meeting rose at 12.10 p.m.

528th MEETING

Thursday, 28 April 1960, at 10.10 a.m.

Chairman: Mr. Luis PADILLA NERVO

**Consular intercourse and immunities
(A/CN.4/131, A/CN.4/L.86)**

[Agenda item 2]

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

1. The CHAIRMAN invited the Commission to begin consideration of item 2 of its agenda, and called upon the Special Rapporteur on Consular Intercourse and Immunities to introduce the provisional draft articles (A/CN.4/L.86).

2. Mr. ŽOUREK, Special Rapporteur, said that when he had prepared his first report,¹ he had not had all the necessary documentation, and had therefore been obliged to defer certain points for later study. The Commission had then adopted the articles on diplomatic intercourse and immunities,² and he had had to re-examine his draft on consular intercourse and immunities in order to concord it as far as possible with the Commission's draft on diplomatic intercourse. Those two factors had caused him to amend and expand his original draft. The Commission had adopted nineteen articles at its eleventh session; the remaining articles were in the 1957 report, and some additional clauses were proposed in his second report (A/CN.4/131). For the Commission's convenience, the whole set of articles had been incorporated in one document (A/CN.4/L.86).³

3. The Commission would have to consider carefully to what extent it should strive after concordance between the corresponding articles of the drafts on diplomatic and on consular intercourse and immunities. The existing international law and the international practice relating to various points should be studied — for example, whereas in practice certain immunities might be admitted both in the case of diplomats and in the case of consuls, the two types of immunity might well differ in extent. Even where the immunity was the same in every respect, the Commission was not bound to follow the language of the draft on

¹ *Yearbook of the International Law Commission, 1957*, vol. II (United Nations publication, Sales No. 1957.V.5, vol. II), pp. 71-103.

² *Ibid.*, 1958, vol. II (United Nations publication, Sales No. 58.V.1, vol. II), pp. 89-105.

³ References to articles 1 to 18 in the present records should be interpreted as references to the text in that document.

diplomatic intercourse and immunities if it thought that it was possible to improve the working of the provisions in question.

4. At its previous session the Commission had adopted articles 1 to 18 and article 24 of the draft, although article 2, paragraph 2, had been reserved, and two variants were given for article 4.¹ The Commission would therefore have to return to those two articles after discussing the outstanding clauses. The Drafting Committee would undoubtedly propose some changes in the articles already adopted. The outstanding articles fell into two groups, one consisting of those corresponding to certain articles of the draft on diplomatic intercourse and immunities; there was no need to repeat the discussion of those articles *in extenso* and the main criterion for their adoption should be the question whether they had a rightful place in the draft. That summary treatment might be applied to articles 22, 23, 27, 28, 31, 36, 41, 43, 44, 45, 46 and 52, and also to articles 59 and 60, although the Commission might prefer to deal with the last two in greater detail. The normal methods of discussion would be used for the remaining group of articles.

5. In conclusion, with reference to the structure of the draft, he said that, in his view, full conformity with the draft on diplomatic intercourse and immunities could hardly be achieved, for the provisions concerning honorary consuls had no counterpart in the other draft. He had endeavoured to adapt the structure of the draft on consular intercourse and immunities to that of the draft on diplomatic intercourse and immunities; nevertheless, he would have preferred to keep his draft in its original form, under which consular intercourse in general had been dealt with in chapter I, the general question of the immunities of consular representatives in chapter II, honorary consuls in chapter III, and general provisions in chapter IV. The Commission might decide on a different structure from the one he had used; in any case, that question could be decided later. Finally, he thought that considerable time might be saved if the Special Rapporteur were to intervene more often in the debate, in order to dispel any misunderstandings as they arose.

6. Mr. BARTOŠ said he was not in favour of adhering too closely to the relevant provisions of the draft on diplomatic intercourse and immunities. Of course, if the Commission decided that a provision of that draft applied also to consular intercourse and immunities, and the extent to which it should apply it should refer the article to the Drafting Committee without lengthy debate; it should, however, endeavour to improve the wording of the articles whenever possible. In any case, he agreed with the Special Rapporteur that the question of applicability was the deciding factor of acceptance.

ARTICLE 19 (*Staff employed in the consulate*)

7. The CHAIRMAN invited the Special Rapporteur to introduce article 19.

8. Mr. ŽOUREK, Special Rapporteur, said that he had included the article because several members considered that not only the legal position of the head of the post, but also that of subsidiary personnel, should be precisely defined. After consulting a number of consular conventions he had drafted a text which reflected international law and practice. The receiving State's obligation to accept the requisite number of consular officials and employees followed from the act of consent to the establishment of a consulate. The right of the sending State was, however, qualified by the provisions of articles 9 and 20; article 9 provided that the consent of the receiving State was essential for the appointment of consular officials from amongst the nationals of that State, and article 20 dealt with the case of persons declared unacceptable, either before or after appointment to the post. Article 19 referred only to members of the consular staff other than the head of the post; he drew attention to the need for broadening the definitions given in article 1 by introducing a definition which would cover consular officials and employees excluding the head of post.

9. Article 10 of the draft on diplomatic intercourse and immunities contained fairly elaborate provisions concerning the size of the mission staff; but he did not believe it necessary to make similarly elaborate provision in the case of consular staff, for the latter was usually much smaller than the staff of diplomatic missions. He had drafted the article in terms of a general rule, subject to the qualifying provisos. Finally, his draft made it clear that the question of the hierarchy and legal status of consular officials was left entirely to the sending State.

10. Mr. ERIM said, with reference to the expression "requisite number", that the receiving State should have some power to decide whether the number of officials and employees at a consulate was in excess of the necessary strength.

11. Sir Gerald FITZMAURICE agreed that there were practical differences between the staff of diplomatic missions and that of consulates, but thought that the differences hardly justified such sharply contrasting treatment. It would be wrong to place undue limitations on the number of the staff; but article 19 of the consular draft went almost to the opposite extreme, in denying the receiving State any say in the matter of size of staff. Moreover, the adjective "requisite" stood by itself, undefined. It might be better to bring the article into closer conformity with article 10 of the draft on diplomatic intercourse and immunities.

12. With regard to the last phrase, he said that the expression "legal status" seemed to suggest that the sending State could determine the legal status of its consuls in a manner different from that

¹ Official Records of the General Assembly, Fourteenth Session, Supplement No. 9, chap. III.

set forth in the convention which would ultimately be adopted.

13. Mr. MATINE-DAFTARY agreed that the words "requisite number" were too vague. The article as it stood could provide an escape clause for States wishing to introduce their nationals into another country under the guise of consular officers: it would be tantamount to closing the door while leaving the window open. Some kind of limitation should be added to prevent malpractices; by comparison with the limitation affecting the size of the staff of diplomatic missions, the provisions of article 19 were far too liberal.

14. Mr. BARTOŠ agreed with Mr. Matine-Daftary that the article provided a dangerous escape clause. Moreover, the fact that consulates were decentralized and might be in distant parts of the receiving State made it even more dangerous to adopt a provision that would allow an unlimited number of so-called consular officials to enter the country.

15. With regard to the last phrase, he thought that the expression "condition juridique" was used inaccurately. Moreover, the provision as it stood completely disregarded the practice, widespread in many American and Anglo-Saxon countries, of delivering the exequatur, or at least letters patent, to consular officials, and not only to heads of post. Hence, the sending State could not always determine the legal status of consular officials; the receiving State in fact often exercised some control over that status, and that circumstance should not be ignored.

16. Mr. FRANÇOIS shared the doubts expressed concerning the last phrase of the article. The titles of consular officials were enumerated in article 6, and the sending State could not prescribe any new titles; it could only specify which class a particular official belonged to and, in any case, the receiving State had to be consulted on the matter. With regard to the legal status of officials, he said that their status was determined by the draft itself, and was not a matter for the sending State to decide.

17. Mr. SCALLE considered the article to be unacceptable in its present form. The sending State could not have absolute freedom to determine the number of officials to be attached to a consular post; the provision should conform more closely to the corresponding article of the draft on diplomatic intercourse and immunities. Reference should be made not only to articles 9 and 20, but also to a special article providing for limitation of numbers by the receiving State in certain exceptional cases. The last phrase, concerning titles and legal status, should be deleted and reference should be made to "a" consulate, and not to "its" consulate. He proposed that the article should be revised to read: "Subject to the provisions of articles 9 and 20 [and article . . .], the sending State is entitled to employ in a consulate the number of consular officials and employees which it considers necessary."

18. Mr. AGO said that, during the discussion of article 10 of the draft on diplomatic intercourse and immunities he had pointed out that there might be certain dangers in allowing the receiving State to limit the number of officials attached to the diplomatic mission. The interests of the receiving State had prevailed, however, and now it was only logical to enable the receiving State to limit the number of consular staff, likewise, to some extent. The practical difficulties cited as a reason for granting such powers to the receiving State were greater for consular than for diplomatic missions, and from the political point of view the effect of overstaffing distant consulate posts might be much more serious than in the case of diplomatic missions, which were under central control in the capital of the receiving State. The article should therefore be brought into line with article 10 of the draft on diplomatic intercourse.

19. Mr. YOKOTA shared the view that the size of consular missions should be subject to some limitation. He recalled the lengthy negotiations that had been conducted with regard to the size of the Soviet trade mission admitted to Japan when diplomatic relations between the two countries had been re-established. After long discussion, it had been agreed that the number of members of the mission should be limited to thirty, although the Soviet Union had wished to send more staff. Even if a trade mission differed in function from a consular mission, there was still a certain similarity between them in so far as the need for limiting their size was concerned. Accordingly, the rights of the receiving State should be taken into account in the article.

20. Mr. AMADO said that the article was wrong in not allowing the receiving State any say in the matter of the size of staff. Secondly, he considered that the question of the status of consular officials was settled in article 6. He could not accept the view that their legal status should be settled by the sending State. The article should be brought into line with article 10 of the draft on diplomatic intercourse and immunities.

21. Mr. ŽOUREK, Special Rapporteur, replying to the comments, said that his draft of article 19 had been criticized mainly on the grounds that it allowed the number of consular officials and employees to be determined by the sending State. Actually, the word "requisite" was itself a limitation. Article 10 of the draft on diplomatic intercourse was also rather vague concerning the criteria affecting the size of the mission. Essentially, the two States would have to settle by agreement what size of staff was "requisite". Besides, it would be inadvisable to frame a rigid rule, for new and unforeseeable situations might present themselves that would necessitate a departure from the rule.

22. There was a fundamental difference between the staff of diplomatic missions and the staff of consular posts. The former were not under the jurisdiction of the receiving State and had broad responsibilities. By contrast, the functions and

as a rule, the territorial competence of consulates were much more narrowly circumscribed. The position of trade missions, to which Mr. Yokota had alluded, did not really offer a parallel, for States with a centrally planned economy, such as the USSR, had commercial missions which formed part of the diplomatic mission.

23. There was one matter that he had perhaps not stressed sufficiently in introducing his draft. Article 19 dealt with subsidiary staff and not with heads of missions as defined in article 6. A comparison between the legislation of different countries and consular conventions showed great differences in the structure of such staff, which he did not suppose the Commission wished to determine.

24. With regard to the criticism concerning the expression "legal status", he said that, in order to avoid any misunderstanding, it might be advisable to add some such words as "in accordance with international law".

25. Mr. BARTOŠ had said that the exequatur was sometimes delivered not only to heads of posts but also to other consular officials. That question was provided for in article 8, paragraph 2.

26. Mr. MATINE-DAFTARY had criticized article 19 as lending itself to abuse; in practice, abuse would hardly occur, but if it was desired some suitable provision could be added to prevent abuses.

27. Mr. SCELLE had suggested the phrase "the number . . . which it [the sending State] considers necessary" instead of "requisite number". That formula would actually be open to a broader interpretation than the text as it stood, which did not confer excessive latitude on the sending State. The fact was that the sending and receiving States had to agree. He believed that there was general agreement in the Commission on the whole question, although the phrase "legal status" might be modified or settled by the Drafting Committee.

28. Mr. PAL said that, in view of the relationship between the present draft and the draft on diplomatic intercourse adopted at the tenth session and of the desirability of bringing into harmony two texts, the subject matters of which were substantially the same, he found it difficult to accept the present article in preference to the corresponding article 10 of the other draft. The Special Rapporteur had made it clear that the present article was also concerned with the size of the staff; but no substantial reason could be advanced to explain in what respect and for what reasons there should be so wide a difference between the provisions of the two drafts on the subject. The Special Rapporteur had claimed that the qualifying word "requisite" in his draft would ensure that some limitation would be placed on the size of staffs; but that word was at best equivocal and would only give rise to controversy as to who was to decide the matter. As it stood, the article seemed to leave the decision to the sending

State; but that would be quite contrary to the idea underlying the corresponding article in the other draft. The discussion had made it clear that it was generally felt that some limitation should be imposed on the size of staffs and that the matter should not be left to the unilateral decision of any of the parties concerned, without any objective criteria having been laid down. He proposed that article 19 should be referred to the Drafting Committee with the request that its wording be brought into line with article 10 of the draft on diplomatic intercourse and immunities.

29. Mr. BARTOŠ said that he had nothing to add to Mr. Pal's proposal. So far as the question of "legal status" was concerned he thought, as the Special Rapporteur apparently did, that some change was necessary in the text, bearing in mind article 8, paragraph 2, in which the question of the exequatur had been rather left in the air, and also article 15, paragraph 4, which stated that the heads of posts had precedence. Article 19 dealt with other officials of the consular service, and in determining their legal status the article also limited the number of consular officials. He therefore proposed that the Drafting Committee, should be asked to find a formula embodying the proposals of the Special Rapporteur, but one which would not give rise to difficulties in practice.

30. Mr. HSU remarked that it was customary in international regulations to leave some questions for negotiation, but in the matter under discussion he did not think that the Commission should adopt so neutral an attitude. If the two parties could not agree, authority should be given to one of them — in his view, the receiving State.

31. Mr. AGO said that if he had correctly understood what the Special Rapporteur had said, his view was that there was not much difference between the expression "reasonable and normal" in article 10 of the draft on diplomatic intercourse and immunities and the word "requisite" in the draft of article 19. The Special Rapporteur seemed to think that each might give rise to differences of interpretation and that, that being the case, some method of peaceful solution of such differences should be found. In his own view, however, the central problem was one of primary competence. In article 10 of the draft on diplomatic intercourse and immunities, the receiving State had that competence and would have power to limit the number of officials to a "reasonable and normal" number. The sending State, if it disagreed, could then raise the matter only as an international question. On the contrary, in the draft of article 19, the sending State appeared to have the freedom to decide. He agreed with Mr. Pal that the Commission should try to reconstruct article 19 on the lines of article 10 of the draft on diplomatic intercourse and immunities, giving the receiving State primary competence in the matter.

32. Mr. EDMONDS agreed with Mr. Pal that there should be definite criteria. If it was intended to give the receiving State the right to restrict the numbers of consular officials, the article should

be drafted in that sense. He did not see any difference between the meaning of the adjectives used in the draft on diplomatic intercourse and immunities and that proposed in the draft of article 19. He asked whether the receiving State was to have the right to place precise limitations on the number of officials. He did not read "legal status" so narrowly as some of the previous speakers, but he felt that it might be changed to "titles and scope of duties", although such a phrase was probably superfluous.

33. Mr. FRANÇOIS remarked that the Special Rapporteur had told the Commission that article 19 was concerned only with subsidiary staff and their legal status. According to article 1 (h), however, the expression "consular officials", included heads of missions and he thought, accordingly, that article 19 would have to be amended.

34. Mr. SANDSTRÖM agreed with Mr. Pal's proposal. He thought the final phrase of article 19 should be deleted.

35. Mr. SCALLE asked whether the Special Rapporteur considered that disputes between the States concerning the size of consular staffs should be settled by arbitration.

36. Mr. YOKOTA said that in so far as the Special Rapporteur had intended to qualify the general principle established in article 19 by a limitation concerning the size of the consular staff, the limiting provision was too vague and insufficient. Preferably, as there were really two distinct questions, each should be dealt with in a separate provision, the limiting provision being modelled on article 10 of the draft on diplomatic intercourse and immunities.

37. Mr. PAL emphasized that, if it was decided that article 10 of the draft on diplomatic intercourse and immunities and the draft of article 19 should contain analogous provisions, the Drafting Committee should follow the phraseology of that article 10. It was desirable to avoid the use of different expressions in two drafts on similar topics, especially when they were produced by the same body.

38. Mr. ERIM said that he himself had construed the first part of article 19 as explained by the Special Rapporteur. The number of persons employed on the staff of a consulate was a matter for the two States concerned. Unfortunately, it had already become apparent that the provision as it stood was likely to give rise to difficulties of interpretation when States came to apply it. He therefore shared the view expressed by Mr. Pal that the provision should be reworded along the lines of the corresponding clause in the draft on diplomatic intercourse and immunities.

39. As to the final phrase of the article, he agreed with Mr. François that the use of the term "consular officials" seemed to make it applicable to the whole staff of a consulate, including the chief of post. In fact, the titles and legal status of consular officials would be determined by the draft

articles; if there was a gap in the draft, it should be remedied.

40. For those reasons, he thought that the final phrase of the article should not be referred to the Drafting Committee until the Special Rapporteur had supplied some additional explanations thereon.

41. The CHAIRMAN said that his main objection to the wording of article 19 was that it appeared to have been conceived in a completely different spirit from that of article 10 of the draft on diplomatic intercourse and immunities. Article 10 of that draft was based on the principle that an agreement between sending and receiving States regarding the size of a diplomatic mission was desirable. If, however, there was no agreement on that point, the receiving State could object to a mission which it regarded as excessively numerous. Negotiations would then follow on the question. The terms of article 19 of the draft on consular intercourse and immunities, on the other hand, seemed to give the sending State an unlimited faculty to send consular officials, subject only to the limitations laid down in articles 9 and 20. For his part, he agreed with Mr. Pal that the best language for the purpose of expressing the idea generally accepted by the members of the Commission was one modelled on article 10, paragraph 1, of the draft on diplomatic intercourse and immunities.

42. With regard to the last phrase of article 19, he said it was clear that the sending State was not entitled to decide what titles and what legal status its officers would have in the receiving State. Their titles and status would be governed by article 6 and the other articles of the draft. If the intention of the Special Rapporteur had been to refer to the division of functions within the consulate itself, the provision was not absolutely necessary.

43. Mr. ŽOUREK, Special Rapporteur, said that Mr. François and Mr. Erim were right in pointing out that the expression "consular officials", in accordance with the definition in article 1, included the head of post. In fact, however, article 19 was intended to apply solely to the staff employed in a consulate other than the head of the post, as he had explained when introducing the article (see paragraph 8 above). The difficulty had arisen because article 1 did not as yet include all the requisite definitions, and he agreed that the wording of article 19 would have to be amended. In the corresponding article of the draft on diplomatic intercourse and immunities, the terminology adopted did not give rise to the same difficulties.

44. If the drafting was thus improved in order to clarify the scope of article 19, he thought that a reference to the titles and legal status of the staff employed in a consulate should be retained. Those words had been included in order to make it quite clear that subordinate staff, and the legal status of such staff within the consular service, were governed by the municipal law of the sending State and not by international law. The article might, for example, provide that the sending

State would be competent to determine, in conformity with international law and the provisions of the draft articles, the titles and functions of the staff in question. If, however, the provision were deleted, it might be possible for the receiving State to object to the title conferred by the sending State on a member of its consular staff.

45. He had no objection to Mr. Yokota's suggestion that article 19 should be divided into two: one article dealing with the appointment of staff and another with the question of the limitation of the size of the staff.

46. In reply to Mr. Scelle's question on the subject of the settlement of disputes, he said that, as he had stated in the course of earlier discussion, he regarded the question of the judicial settlement of disputes as outside the scope of codifying conventions: it was an entirely separate subject. There were multilateral and bilateral conventions which dealt especially with the question of the settlement of disputes. Moreover, it was premature to discuss that question at a time when the Commission was engaged only in the first reading of the draft for the purpose of its submission to governments. The task of codification was already an arduous one, and there was no point in making it still more difficult by introducing the problem of the peaceful settlement of international disputes.

47. Mr. MATINE-DAFTARY said that he had no objection to the proposition that the sending State should indicate the title of a consular officer, but with regard to the functions and duties of such officers he agreed with the Chairman. Perhaps, however, the intention of the Special Rapporteur had been to refer to the determination by the national law of the sending State of its consuls' jurisdiction in such matters as notarial functions, marriage and divorce.

48. Mr. ŽOUREK, Special Rapporteur, said that article 19 was not intended to deal with the points mentioned by Mr. Matine-Daftary. The functions of consuls were governed by article 4 of the draft, which left some scope to the national law of the sending State; that law, however, could not regulate those functions in a manner inconsistent either with international law or with the legislation of the receiving State.

49. Sir Gerald FITZMAURICE said that the matter had not been made any clearer by the Special Rapporteur's negative reply to Mr. Matine-Daftary's question.

50. The definition of the consular function as such was clearly a matter for international law. On the other hand, the question which particular person would carry out a particular duty (on the assumption, of course, that it was part of the consular function under international law) could properly be regarded as falling to be dealt with by the law of the sending State. In that connexion, the best course appeared to be, as suggested by Mr. Edmonds, to refer to the "scope of the duties" of consular officers. If a reference of that kind were to be included, article 19, which dealt mainly

with the size of the consular staff, was not the most suitable context.

51. Accordingly, the last phrase of article 19 should be omitted and, if it were desired to retain the idea which it contained, it should be introduced at another place in the draft. Perhaps the best place was article 8, paragraph 1; after stating that the competence to appoint consuls was governed by the national law of the sending State, it could be added that that law would also govern the scope of the duties of consuls and their staff.

52. Mr. LIANG, Secretary to the Commission, thought that article 19, which dealt with the size of the consular establishment, should have been placed much earlier in the draft.

53. The meaning of the term "fonctionnaire", which was used in article 19 for the first time in the draft, was not perhaps as clear as might be desired. Secondly, the expression "condition juridique", was used in connexion with the legal position of aliens, which was essentially governed by municipal law.

54. There was no doubt that the use of the expression "condition juridique" could give rise to much difficulty and to many diverse interpretations, as the discussion in the Commission had shown. If it were intended to refer to the legal position of consuls, the scope of article 19 would cover the whole draft on consular intercourse and immunities.

55. Mr. BARTOŠ agreed with the Secretary that the use of the expression "condition juridique" in article 19 was extremely dangerous. The sending State was certainly not entitled to determine the legal position of its consuls in the receiving State. Their position was governed by international law and custom; in the absence of any rules of international law on the subject, it was governed by the law of the receiving State. The sending State could, of course, determine the internal distribution of duties within the consulate.

56. He found the expression in question altogether unacceptable, and appealed to the Special Rapporteur to withdraw it.

57. The CHAIRMAN said that the suggestions made could perhaps now be referred to the Drafting Committee.

58. Mr. AGO agreed and said, in connexion with the suggestion for the division of the article into two separate articles, that the best course was to draft one article along the lines of the first part of article 6 of the draft on diplomatic intercourse and immunities, to deal with the appointment of the staff of the consulate, and another article along the lines of article 10, paragraph 1, of that same draft, to deal with the size of staff.

59. He thought that both those provisions, as well as those in article 20 (*Persons deemed unacceptable*) and in article 21 (*Notification of arrival and departure*), should be placed earlier in the draft, in conformity with the structure of the draft on diplomatic intercourse and immunities. The new

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.

year by the Institute of International Law.⁴ Indeed, those regulations even went so far as to provide that, when entering on his functions or when any important changes were made a consul was bound to send to the receiving State, through his diplomatic mission, a plan of the consular premises. Certain conventions and some national legislation also accorded inviolability to the official residence of consuls, as for example, the Convention on Consular Agents adopted by the Sixth International American Conference at Havana in 1928 (article 18).⁵ He doubted, however, whether the practice could be regarded as sufficiently developed to be codified in a general convention on consular intercourse and immunities; if the Commission did decide to include it in the draft, the provisions should preferably be placed in a later section dealing with personal immunities (section II, sub-section C).

3. He had intentionally repeated in the first sentence of paragraph 1 the somewhat vague terms employed in the definition given in paragraph 1. The Commission would have to decide later whether the principle laid down in the article was to apply only to the consular offices or whether it might be extended also to cover accommodation for staff acquired by the consul or by the sending State.

4. It was clearly desirable to lay down the principle of inviolability in a draft convention on consular intercourse and immunities, for there had been many cases of violation. The Commission should for the present simply decide whether the principle should be included in the codification. If it did so, the article might be referred to the Drafting Committee. The Commission itself should not, he thought, spend time in further drafting.

5. The CHAIRMAN said that the Spanish text of the final phrase of paragraph 1 did not concord with the English and French texts, since it implied that the authorities might not place the premises under seal, whereas the English and French made the prohibition apply to files, papers or other documents which were in the consular premises.

6. Mr. ŽOUREK, Special Rapporteur, confirmed that the English and French texts expressed his intention.

7. Mr. BARTOŠ said that he was in general satisfied by the draft article, but the Commission should consider certain questions of principle and substance. In countries where no capitulations existed, there was no general rule that consular premises enjoyed absolute inviolability. In Yugoslavia, for example, very broad toleration was exercised, but there was no absolute rule. In

customary law, local authorities could perform certain acts in parts of the consular premises which were not used solely for the purposes of a consulate, and the consular files, papers and other documents had therefore to be kept separate from non-consular papers. The inviolability of consular premises applied as a general rule when a career consul was appointed, but there could also be honorary consuls who performed other activities. A practice, begun by the USSR and later adopted by some of the People's Democracies, was to set up consulates which were at the same time the headquarters of trade missions. In its consular convention with the USSR, however, Yugoslavia had not recognized the inviolability of premises used for such a purpose. In western Europe also consular premises very often included offices which were not used for strictly consular purposes, such as travel agencies established on the consular premises for convenience. Such situations could not be disregarded.⁶

8. In certain circumstances, recognized in consular conventions between France and the United States of America and between France and the United Kingdom, the local authorities might enter consular premises in search of a fugitive from justice, if the consul refused to surrender him. Thus, even if the principle of the inviolability of the consular premises was laid down, it should be qualified by certain restrictions, especially with regard to non-consular acts and cases in which the receiving State retained some jurisdiction over foreign consuls. Obviously, consular premises could not be entitled to complete inviolability if the person of the consul himself did not enjoy inviolability. He considered that the Commission's draft should accord to consular premises inviolability to the greatest possible extent, subject, however, to certain specific exceptions.

9. Mr. AGO agreed with the general principle stated by the Special Rapporteur, but had some criticisms to make with regard to details. The Special Rapporteur had stated that he had deliberately drafted the first sentence of paragraph 1 in vague terms because it was not yet clear whether the principle of inviolability should cover only the consulate or the consulate and accommodation for the consular staff as well. In his (Mr. Ago's) opinion, the two kinds of premises should be completely separate. Article 25 should deal with consular premises as such, which were quite distinct from residential accommodation; the latter, in his opinion, did not enjoy inviolability. The phrase "consular premises" should be used instead of "the premises used for the purposes of the consulate", and the implications of the latter phrase should be discussed later.

10. The parallel phrase used in article 20 of the draft articles on diplomatic intercourse and immunities was a better formulation than the second sentence in article 25, paragraph 1, of the present draft, and should be followed. The

⁴ *Ibid.*, Albéric Rolin, *Tableau général de l'organisation des travaux et du personnel de l'Institut de droit international pendant la période décennale 1904 à 1914* (Paris, A. Pedone, 1919), p. 87; *Annuaire de l'Institut de droit international*, édition nouvelle abrégée (1928), vol. III, p. 1078.

⁵ League of Nations, *Treaty Series*, vol. CLV (1934-1935), p. 299.

⁶ See 545th meeting, para. 6.

provision should cover every case in which local authorities wished to enter the consular premises and not only cases in which they wished to inspect them, or "visit" them, as the French text put it.

11. The third sentence in paragraph 1 had no parallel in article 20 of the draft articles on diplomatic intercourse and immunities, but the basic principle was already well expressed in article 27 of the present draft. The separation was useful, especially as the archives and documents of the consulate might perhaps be physically outside the consular premises. The third sentence in paragraph 1 might therefore be deleted.

12. Paragraph 2 of article 25 had its parallel in paragraph 3 of article 20 of the draft articles on diplomatic intercourse and immunities, but the latter was considerably broader in scope. Paragraph 2 of the present text should cover more than military requisitioning or billeting, since it was conceivable that cases of search or attachment might occur unless provision was made against them.

13. Some drafting changes might be required in paragraph 3 to bring it into line with article 20, paragraph 2, of the draft articles on diplomatic intercourse and immunities.

14. Mr. FRANÇOIS agreed with Mr. Bartoš and Mr. Ago, but would wish to go further. He doubted whether the principle that the protection of consular premises was on a par with the extraterritoriality of embassies and legations was valid. There was, indeed, an essential difference. As the Special Rapporteur had well remarked in the commentary to his first draft, the logical corollary to the inviolability of consular correspondence and archives was the inviolability of the premises where such correspondence and archives were found. On the other hand, consulates could not enjoy the same degree of extraterritoriality as diplomatic missions. Undoubtedly, consular premises were given extraterritorial status in a number of conventions, but those conventions were the exception, whereas the Special Rapporteur wished to make them the rule. It was more than doubtful whether many countries would acquiesce in such a decision, and inviolability should therefore be restricted to certain consular offices.

15. Mr. YOKOTA noted a discrepancy between the English and French texts of draft article 25. In paragraph 1 the English wording was "wish to inspect" whereas the French was "désirent visiter". He asked the Special Rapporteur whether the two expressions meant the same thing and, if so, whether the authorities of the receiving State must obtain permission only when they wished to inspect the consular premises or, conversely, whether they did not need to obtain permission when they merely wished to enter them for other purposes. Under article 20 of the draft articles on diplomatic intercourse the agents of the receiving State were debarred from entering the premises of a mission, save with the consent of the head of the mission. The word "enter"

was a more general term than "inspect". The conclusion might be drawn that an agent of the receiving State was not allowed to enter a diplomatic mission's premises for any purpose, whereas he was allowed to enter consular premises provided that he did not intend to "inspect" them. He doubted whether it was true that the inviolability of consular premises was not so absolute as that of mission premises, as Mr. Bartoš had suggested. He personally thought that the principle of the inviolability of consular premises should be laid down. At any rate, he doubted whether the word "inspect" was appropriate, even if some restriction on inviolability was intended.

16. Mr. SANDSTRÖM observed that the Special Rapporteur had cited an imposing number of conventions in support of his view; but other conventions existed which did not accord consular premises the same degree of inviolability as mission premises. An apposite example was the Consular Convention between the United Kingdom and Sweden of 14 March 1952 (article 10, paragraph 3.⁷) The relevant provision in that convention might not represent customary law as it stood, but it would be interesting to know in how many conventions the inviolability of consular premises did not apply and in how many the principle was embodied.

17. Sir Gerald FITZMAURICE said that Mr. Sandström and Mr. François had raised the central issue. The text could not be sent to the Drafting Committee until the Commission had decided to accept the principle of the inviolability of consular premises. He had been rather surprised to find Mr. François agreeing with Mr. Ago, as Mr. Ago had based his argument on the view that consular premises enjoyed the same inviolability as mission premises, whereas Mr. François had taken a quite different stand. He hoped, with Mr. Sandström, that the Special Rapporteur would be able to inform the Commission how many conventions afforded consular premises complete inviolability and how many heavily qualified that privilege. It might be surmised, however, that practice was by no means uniform. The Commission itself was free to propose the practice which seemed best in what might be called modern circumstances. Mr. François had suggested that the inviolability of consular premises was the corollary of the inviolability of consular archives and was one of the methods of ensuring the latter. Some such idea might have existed, but he was not convinced that it was either logical or necessary. If it were assumed that there was no inviolability of consular premises, but only of consular archives, would it follow that the inviolability of consular premises would be necessary in order to secure protection of the archives? It might be possible to maintain that. On the other hand, it was conceivable that the local

⁷ United Nations, *Treaty Series*, vol. 202 (1954-1955), No. 2731, p. 168.

authorities might wish to enter the premises for some other purpose, and not to inspect the archives; and the fact that they entered the premises did not necessarily mean that they would interfere with the archives. However, he thought that inviolability of the premises should now be considered more objectively, not as a mere adjunct to the question of consular archives. As Mr. Sandström had pointed out, complete inviolability of premises had not been stipulated in the Convention of 1952 between the United Kingdom and Sweden. There was, however, a strong case for postulating the same kind of inviolability for consular premises as for a diplomatic mission's premises, and it was not easy to see where they differed fundamentally. Both were places in which a foreign State carried on its official activities. It was difficult to see why official premises controlled by a foreign State carrying out acts, some of them representative of the State, should not have the same status as mission premises. If the Commission concluded that some kind of independent inviolability should be provided for consular premises, he would agree with the criticisms made by Mr. Ago and Mr. Yokota with regard to the use of the word "inspect", which was certainly not a proper translation of the French word "visiter". Visiting did not necessarily imply any such drastic action as inspection. If, however, the Commission thought that consular premises should enjoy the same inviolability as mission premises, he agreed with Mr. Ago that the same language should be used as that in the draft articles on diplomatic intercourse and immunities.

18. Mr. VERDROSS said that the Institute of International Law had recognized in the Regulations on consular immunities which it adopted in 1896 that premises occupied by consuls were inviolable. Consular conventions undoubtedly existed in which that principle was not stated, but under article 1 of its Statute (General Assembly resolution 174 (II)) the Commission had for its object the promotion of the progressive development of international law. The only problem was whether the Commission believed that inviolability was necessary for the proper operation of a consulate or not.

19. Mr. SCELLE agreed with Mr. François that there was a difference between extraterritoriality and inviolability. Extraterritoriality was, of course, a pure fiction. There was a great difference between the inviolability of diplomatic missions, which was axiomatic, and the inviolability of consulates, which was necessarily subject to exceptions, especially if the consul was not a career consul. The withdrawal of the exequatur did not give the receiving State the right to consider the consular function abolished. It had, however, been used as a pretext for violating consular premises and archives. The Commission should therefore maintain the inviolability of consular archives and at least of that part of the consular premises which contained them.

20. Mr. SANDSTRÖM observed that there was a relation not only between the inviolability of the consular premises and that of the consular archives, but also between their inviolability and the immunity of the consular official. In the case of the premises of a diplomatic mission, most of the persons within them enjoyed inviolability and were immune from arrest. The position of the consular staff was quite different; even consuls themselves might be arrested or detained. That was the key to the difference between the diplomatic and the consular status.

21. Mr. MATINE-DAFTARY recalled that at the eleventh session (496th meeting, paragraph 37) he had expressed the opinion that, although any State could refuse to maintain diplomatic relations with another, it could not refuse to engage in consular relations with any country with which it had commercial ties.

22. Accordingly, since a State might find itself under a duty to accept the establishment of a consulate and since the consular function was unconnected with political activities and therefore did not require any secrecy, he supported the view, expressed by Mr. François, that the inviolability of consular premises should be limited to the strict minimum required for the accomplishment of the consular function.

23. He therefore suggested that the first sentence of article 25, paragraph 1, should be deleted and that the provision should do no more than specify the circumstances in which the local authorities could enter consular premises.

24. The CHAIRMAN said that the wording of the corresponding article 18 of the Havana Convention of 1928 was closer to that of article 20, paragraph 1, of the draft on diplomatic intercourse and immunities than to article 25, paragraph 1, under discussion. Article 18 of the Havana Convention laid down that permission from the consul was required for the purpose of "entering" the consular premises and drew a clear distinction between the acts performed by a consul in his official capacity and his private acts. It extended the inviolability, however, to the consul's official residence.

25. For his part, he considered that the Commission should recognize the principle of inviolability along the lines of the Havana Convention.

26. Mr. ŽOUREK, Special Rapporteur, said that the case of such offices as travel agencies and information centres housed in a consulate was an exceptional one and could be appropriately dealt with in the commentary to the article. The question which arose in that connexion was simply whether certain activities were part of the consular function or not.

27. With regard to the drafting of article 25, paragraph 1, he said he was prepared to change the second sentence to read "wish to enter" (instead of "to inspect") (in French, "pénétrer" instead of "visiter"). With regard to substance, however, in spite of the objections put forward

by Mr. François and Mr. Matine-Daftary, he believed that the arguments in favour of the inviolability of the consular premises were similar to those which applied in the case of diplomatic missions. The reason in both cases was the same: there must be no interference with certain functions carried on in the name of a foreign State. It was for that reason, and not by virtue of the obsolete notion of extritoriality, that a diplomatic mission enjoyed inviolability.

28. It would be difficult to reply to the question asked by Mr. Sandström, because it would be necessary to consult a large number of consular conventions concluded over the past three centuries. He did not believe that such a laborious inquiry would prove useful; a great many consular conventions made no reference to the question of inviolability and explicitly or implicitly left the matter to be governed by customary international law.

29. In conclusion, he said that, so far as the inviolability of consular premises was concerned, the Commission's draft could hardly be less liberal than the regulations of the Institute of International Law of 1896 or the Havana Convention of 1928. The comments which Governments would make on the Commission's draft would make it possible to prepare a final text.

30. Mr. ERIM said that he could not accept the first sentence of article 25, paragraph 1, which seemed to lay down the inviolability of consular premises in absolute terms. There was a difference of nature, and not merely of degree, between the premises of diplomatic missions and those of consulates. He agreed with Mr. François and Mr. Matine-Daftary that consular premises should be inviolable in so far only as the performance of the consular function demanded inviolability.

31. In practice, the provision in question could give rise to difficulties. Quite frequently, a consul's living quarters were in the same apartment as the consular office. In addition, information offices and travel agencies were often housed not only in the same premises as the consulate but actually in the same room in which consular functions were carried out.

32. Article 25, paragraph 1, did not express, in its first sentence, the existing practice in the matter. Indeed, international practice with regard to the inviolability of consular premises was not uniform and article 25 merely gave expression to one of several existing trends. The question before the Commission was whether the acceptance of the trend in question constituted progressive development of international law. For his part, he felt that the inviolability in question should be limited to what was needed for the exercise of the official functions of the consulate.

33. Mr. AMADO considered that the words "for the purposes of" were unsatisfactory; even a garage could be said to be used for the purposes of the consulate.

34. With regard to the principle, however, he considered there was no doubt that consular premises were inviolable. Of course, inviolability applied only to those premises in which the consular function was exclusively carried out.

35. Accordingly, subject to drafting changes, he was prepared to accept article 25.

36. Mr. FRANÇOIS said that the regulations adopted in 1896 by the Institute of International Law had attracted considerable criticism. In 1950, the Institute had even acknowledged that consulates had the right to give political asylum, which gave an idea of the sort of consequences to which such a concept could lead. For his part, he felt that it was extremely dangerous to give members of the consular staff the same treatment as diplomatic personnel by invoking the need to enable them to carry out their duties unhindered. The law of nations had established a very clear distinction between consuls and diplomats, and the Commission should respect that distinction.

37. Mr. AGO said that it was essential to recognize the inviolability of consular premises. That recognition would not have the effect of placing consuls on the same footing as diplomats, for, whereas not only the offices, but also the residential quarters, of diplomats were inviolable, only the offices actually used by the consulate were inviolable. There was a close parallel with the differences regarding the immunity from jurisdiction; diplomatic personnel were not amenable to the jurisdiction of the courts of the receiving State with regard to both private and official acts, whereas consular staff enjoyed immunity only in respect of acts performed in the exercise of their official duties.

38. He could not agree with Mr. Matine-Daftary with regard to the need for secrecy; a consul acted as registrar and notary public for his nationals, and therefore needed secrecy to carry out his duties adequately.

39. A majority of consular conventions laid down the inviolability of consular premises. Even in conventions which, like those concluded by the United Kingdom with Sweden and Italy, provided for exceptions to that inviolability, the relevant clause began with a clear statement of the principle (cf. article 10, para 3, of the Consular Convention between United Kingdom and Sweden, 1952). It was true that the clause went on to state that permission to enter would be assumed in the event of fire or other disaster, but an assumption of that kind was generally admitted even in the case of diplomatic missions. As to the provision that certain measures could be carried out in consular premises by the local authorities pursuant to appropriate writ or process, and with the consent of the Minister of Foreign Affairs of the receiving State, he said that provision was of an exceptional character and could not serve as a basis for the formulation of a general rule. The commentary to article 25 might well mention that the provisions of that article would not prevent States from concluding special conventions

authorizing the local authorities to enter consular premises in exceptional cases with the consent of the Ministry of Foreign Affairs of the receiving State.

40. Mr. HSU considered that the Commission's draft should expressly recognize the inviolability of consular premises, for that inviolability was necessary to protect members of the consular staff in the proper exercise of their functions.

41. The CHAIRMAN said that there seemed to be general agreement that the Commission's draft should recognize the inviolability of consular premises and records. From the terms of the consular conventions cited, even those between the United Kingdom and Sweden and the United Kingdom and Italy, it was evident that the status and privileges of diplomats differed from those of consular officials. The Havana Convention of 1928 (article 17) clearly laid down that consular staff were subject to the jurisdiction of the receiving State. It was obviously very difficult to establish the limits of inviolability, and in particular to define the circumstances in which the residence of a consular officer could properly be entered. If, as he believed, there was general agreement in the Commission on the principle of inviolability, that principle could only be qualified by exceptions stipulated in other articles of the draft.

42. Mr. MATINE-DAFTARY explained that he had not meant that consuls had no secrets; they might well have some, but such secrets were not state secrets, as they were in the case of diplomatic agents. Accordingly access should be allowed to their premises and their archives by order of the judicial authorities. For instance, a court might direct that a consulate's marriage register should be produced for the purpose of proceedings. He wanted to stress the difference between the work of a consular agent and that of a diplomat. A diplomat was a representative of the State which had accredited him, but a consul was only an official. He did not think that consular staff ought to have the complete inviolability enjoyed by diplomats.

43. Mr. BARTOŠ considered that the inviolability of consular premises should be recognized, subject to certain restrictions. In the period between the two world wars consular privileges and immunities had greatly increased, as consular conventions showed, and it was essential that the Commission should take account of that development. Consulates, however, were also performing many more commercial and other functions which could not properly be described as being of a consular nature, although they might be related to the work of the consulate. In Yugoslavia, for example, every effort was made to ensure that offices in which work of that kind was carried on were not under the same roof as the consulate, and, where they were in the same building, commercial offices were not treated as part of the consulate and did not enjoy consular

privileges although they did in fact enjoy some measure of protection. The books and archives relating to commercial activities should be kept separate from those of the consulate. He did not want to criticize recent developments or the proliferation of consular activities. Since the war new principles had been recognized in a number of consular conventions, notably the very recent one between Yugoslavia and Austria. Its object was to give as much freedom as was acceptable to the two States, but to avoid attaching consular privileges to activities which were not germane to the work of a consulate.

44. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Matine-Daftary, said that the draft articles adopted by the Commission at its eleventh session reflected the extension of consular functions, as was shown by article 4. Thus, consulates were now, for example, concerned with shipping and with the development of trade and cultural relations. He thought that Mr. Matine-Daftary took too narrow a view of the functions of a consulate. In nearly all consular conventions there was some provision concerning the consul's refusal to produce the records of the consulate in court, and that was why his draft article 40, paragraph 4, which the Commission would discuss later, provided that consular staff could decline to give evidence in court on the grounds of professional or State secrecy. A consul might, after all, know a good deal about the work of commercial firms concerning which he could legitimately refuse to give evidence.

45. Mr. SANDSTRÖM asked the Chairman whether, as the Commission appeared to be agreed that the inviolability of consular premises should be recognized, subject to certain exceptions, those exceptions could not be expressly defined.

46. The CHAIRMAN replied that, of course, the exceptions might be specified. He thought that the matter could best be left to the Drafting Committee.

47. Mr. EDMONDS said that members of the Commission clearly had no doubt concerning the inviolability of consular documents. He wondered, however, in what way it would be possible to differentiate between consular and non-consular documents in cases where papers of both kinds were in the possession of the consul and the local authorities wished to obtain access to those in the non-consular category. If permission were given to the local authorities to examine documents to see to which class they belonged, the whole principle of inviolability of consular archives would be destroyed.

48. Mr. ERIM thought that the examples which Mr. Bartoš had mentioned proved that article 25 would have to be drafted in less categorical terms. He personally did not think the inviolability was absolute. The discussion had really been concerned not with normal procedure but with extreme cases where conflict might arise between the head of a consular post and the local autho-

rities. Though rare, such extreme cases could occur, and hence provision for them should be made in the draft. He thought the discussion had given the Drafting Committee sufficient guidance, so that it could work out an acceptable text for article 25.

49. Mr. YOKOTA thought that article 25 should be referred to the Drafting Committee with more precise directives. The first two sentences of paragraph 1 would probably be acceptable with certain modifications. With regard to the third sentence, however, he said that, as the inviolability of consular premises was generally recognized, all consular papers within the consular premises were of course free from examination or seizure. Besides, an express provision concerning the inviolability of the consular archives and documents, was contained in article 27. Accordingly he thought that the sentence in question should be deleted, especially as the draft on diplomatic intercourse had no corresponding provision.

50. Mr. PAL said that the discussion had disclosed that there were several difficulties which affected the very principle of consular inviolability, the way in which it was to be formulated, observed and applied and the abuses to which it might give rise. The principle itself required cautious handling, inasmuch as, on the one hand, by its very nature, it involved some derogation of the sovereignty of the receiving State while on the other, the fact that state activities were constantly expanding — thus rendering consular offices ever more necessary and useful for the representation of State interests in international life — inevitably raised those offices to the diplomatic level in many respects, making it requisite that similar protection should be provided. Accordingly, for the progressive development of the law in that respect, guidance should be freely sought from state practices entailing deliberate and willing acceptance of the principle of the inviolability of consular offices. He therefore hoped that, in full awareness of the difficulties involved and with the help of state practice, the Drafting Committee would be able to overcome the difficulties that had been raised. He considered it most important, however, that the new draft should be discussed again by the Committee at some intermediate stage, before it came to the report stage.

51. Sir Gerald FITZMAURICE said that two possible difficulties could be disposed of. Firstly it was clear that a member of the staff of a diplomatic mission who was at the same time carrying out consular functions continued to enjoy his diplomatic status; secondly, the position of honorary consuls would raise no problem because their premises would not be inviolable. A problem might arise, however, if diplomatic and consular premises were in the same building possibly with intercommunicating doors. Even then, there would be no difficulty if, as was normally the case, each had separate entries and access to the street.

A more intricate problem arose when work which was not of a strictly consular nature was done in consular premises, for instance in the case of a commercial mission. It seemed impracticable that within a consular building some rooms could be described as inviolable and others not. But he did not think that that rather special problem should affect the general principle of the inviolability of consular premises.

52. Mr. MATINE - DAFTARY agreed with Mr. Yokota that the third sentence of article 25, paragraph 1, should be deleted. The local authorities could not be deprived of the power in all circumstances to have access to documents of the consulate which might constitute evidence in legal proceedings. He thought the Drafting Committee could define the necessary exceptions to inviolability.

53. The CHAIRMAN thought that article 25 could now be referred to the Drafting Committee. He took it that the Commission would accept Mr. Pal's suggestion that the Drafting Committee should prepare a revised text well before the end of the session.

54. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Pal, said that the revised draft would in any case come before the Commission some time before the commentary was discussed.

55. Mr. AGO hoped that the Drafting Committee would submit a revised text of all other articles on which there had been differences of opinion well before the report stage.

56. The CHAIRMAN proposed that articles 25 and 27 should be referred to the Drafting Committee, and the Commission should have an opportunity of discussing the text submitted by the Drafting Committee of all articles on which there had been any divergence of view.

It was so agreed.

The meeting rose at 6.10 p.m.

531st MEETING

Tuesday, 3 May 1960, at 10 a.m.

Chairman: Mr. Luis PADILLA NERVO

Co-operation with other bodies (A/CN.4/124)

[Agenda item 8]

1. The CHAIRMAN asked the Secretary to read relevant passages of a letter dated 14 March 1960 from the Secretary-General of the Pan American Union to the Secretary-General of the United Nations concerning relations between the Inter-American Council of Jurists and the Commission.

2. Mr. LIANG (Secretary to the Commission) summarized the letter, which referred to a reso-

lution adopted by the Inter-American Council of Jurists, at its fourth meeting, held at Santiago, Chile, in 1959 (A/CN.4/124, paragraph 159). He had attended that meeting as observer on behalf of the Commission and he had undertaken to bring the resolution to the Commission's attention as soon as possible.

3. The CHAIRMAN said it was urgent to take a decision on the question of inviting an observer for the Inter-American Juridical Committee, because he understood that a representative of that body was already in Geneva. He proposed that the committee's representative should be invited to take part in the Commission's meetings as an observer.

It was so decided.

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 26 (*Exemption of consular premises from taxation*)

4. Mr. ŽOUREK, Special Rapporteur, said that his draft of article 26 corresponded to article 21 of the draft on diplomatic intercourse, subject to a few modifications. He had considered the phrase "all national, regional or municipal dues or taxes in respect of the premises of the mission" in article 21 of the diplomatic draft as not quite broad enough. In draft article 26 he had therefore used the formula "taxes and dues levied by the receiving State or by any of its territorial sub-divisions". That formula covered every kind of territorial subdivision of a State, such as states forming part of a federal State, cantons, provinces, regions, departments, districts and communes. What was really involved was the sending State's exemption from all taxes and dues in respect of its consular premises. Nearly all consular conventions were uniform in that respect — e.g., that of 1952 between the United Kingdom and Sweden and several others recently concluded by the United Kingdom, and a number of consular conventions lately concluded by the socialist States, notably those entered into by the USSR with the People's Republic of Bulgaria on 24 August 1957 (article 8); with the Romanian People's Republic on 4 September 1957 (article 11); with the Czechoslovak Republic on 5 October 1957 (article 9); with the People's Republic of Albania on 18 September 1957 (article 9); with Austria on 28 August 1959 (article 10); and others. Some recent conventions, notably the Consular Convention of 1952 between the United Kingdom and Sweden and others entered into by the United Kingdom, went further in that they exempted the movable property of consulates from fiscal charges. He felt sure that the Commission would approve the principle of article 26 since it had been accepted by a majority of States. He did not think it

was necessary to draft the provisions in even broader terms, for it was open to States to stimulate more liberal conditions in bilateral conventions. He proposed that article 26 should be referred to the Drafting Committee.

5. Mr. EDMONDS fully agreed with the principle of article 26, but pointed out that the liability for the kind of taxation with which the article was concerned usually attached to the property and not to its owner or custodian. He thought that article 26 should make it clear that the property, the sending State and the head of post were all exempt from dues or taxes. In the United States, for instance, the article as it stood might be construed as not being broad enough to exempt the property from taxation.

6. Mr. PAL agreed with Mr. Edmonds: in his country also, income tax could be levied on the owner of a building who let it for consular purposes.

7. Mr. ŽOUREK, Special Rapporteur, said that he had followed the draft on diplomatic intercourse, but he saw no difficulty in accepting the suggestion made by Mr. Edmonds which Mr. Pal had supported. Ownership or leasehold property might be subject to special taxes, and he thought it better that the substance of article 26 should be the same as that of article 21 of the draft on diplomatic intercourse.

8. The CHAIRMAN felt confident that the wording of article 26, with the suggestions made by Mr. Edmonds and Mr. Pal, could be entrusted to the Drafting Committee. He suggested that it should be referred to that committee.

It was so agreed.

ARTICLE 27 (*Inviolability of the archives and documents*) [continued] *

9. Mr. SCALLE said that he had reflected on article 27 which had been referred, unamended, to the Drafting Committee at the previous meeting. He had in particular given some thought to the observations which Mr. François had made on the subject (530th meeting, paragraph 14). What was really important was the inviolability of consular archives. It was not merely a matter of old papers, as some might have thought, but also of the day-to-day correspondence of the consul. Their inviolability should be beyond question. The inviolability of consular premises was a more difficult matter, because it could obviously not, for instance, extend to the right of asylum or prevent the search for criminals. He thought the exceptions to the inviolability of consular premises ought to be clearly defined. Article 30 of the Harvard Draft on the Legal Position and Functions of Consuls¹ went to the root of the matter, and should be included in

* Resumed from the 530th meeting.

¹ *Harvard Law School, Research in International Law. (II): The Legal Position and Functions of Consuls* (Cambridge, Mass., Harvard Law School, 1932), p. 362.

article 27. Under that article, it was the responsibility of the sending State to require that the consular archives be kept separate from other correspondence or documents. That provision was applicable both to career and to honorary consuls, and it should be a fundamental rule in the administration of a consulate.

10. Referring in passing to the text of article 25, which had likewise been referred to the Drafting Committee and which was connected with article 27 he said that, in any case in which the consul refused to allow the local authorities to "enter" (a term which in French should be rendered by "pénétrer") the consular premises, there would probably have to be consultations at a higher level, either between the ambassador of the sending State and the Foreign Office of the receiving State, or even between the two governments. That case should be provided for in the article.

11. The CHAIRMAN said that Mr. Scelle's remarks would be taken into account by the Drafting Committee, especially those concerning the exceptions of inviolability; he definitely agreed that consular premises could not be used as asylum. In discussing articles 30 to 40 of the Special Rapporteur's draft, the Commission would have an opportunity of reviewing and defining the exceptions to consular privileges and immunities.

12. Mr. ŽOUREK, Special Rapporteur, thought that Mr. Scelle's suggestions might help in the drafting of article 27. He had not in his draft included a provision such as that embodied in article 30 of the Harvard Draft, because that provision seemed to be concerned with the position of consuls who were engaged in business, which had been the common situation in the seventeenth and eighteenth centuries. He had, however, included in article 56, paragraph 2 (*Legal status of honorary consuls*), a provision to the effect that the archives of honorary consuls would be inviolable provided that they were kept separate from private correspondence. He thought such a provision had become obsolete in the case of career consuls, but he would have no objection in principle to its inclusion in article 27.

13. Mr. SCELLE remarked that, at an earlier period, prior to the sixteenth century, trade had been carried on exclusively through governments, and consuls had been practically viceroys, or pro-consuls in the Roman sense. In the seventeenth and eighteenth centuries the position of consuls had changed; they had ceased to be viceroys except in the capitulation countries, and had become officials. In his opinion, the Commission should develop the law on the subject and recognize that, by virtue of the evolution in the consular function, the consul was entitled to an increasing degree of protection. It had to be borne in mind that a consul was the servant of a State, and that the question should be governed by the equality obtaining between sovereign States.

14. Mr. YOKOTA said that it was not quite clear from the wording of article 27 whether the archives

and documents which were to be inviolable were those of the consulate or those in the consulate. They might be in the consul's private residence. Many writers made a distinction between the archives and documents in the consulate and those in other places and recognized that, while the archives in the consulate were inviolable, those in other places were not necessarily so. No comparable provision existed in the diplomatic draft, because it had there been laid down that the residence of the ambassador was as inviolable as the mission premises, whereas under the consular draft articles the consular premises were inviolable, but the consular residence was not necessarily so. If article 27 was to mean that all archives and documents belonging to the consulate were to be inviolable, a provision should be inserted, similar to article 30 of the Harvard Draft, requiring that the consular archives in the consul's residence be kept separate from private archives.

15. Mr. LIANG (Secretary to the Commission) thought that a distinction might be drawn between archives and documents. Archives were more permanent and virtually part of the consular premises, whereas documents might be current consular papers. A similar distinction had been made in the commentary on article 22 of the draft articles on diplomatic intercourse and immunities. It might be validly contended that documents addressed to consuls could be opened by authorities of the receiving State only if they were willing to take the risk that they might prove to be official documents. So long as acts of consular offices were official acts, they must be recognized as such and hence as being outside the jurisdiction of the receiving State. The problem was whether a valid distinction could be drawn between draft article 27 of the consular articles and article 22 of the diplomatic articles. So long as the official acts of a consul were not subject to the jurisdiction of the receiving State, the consular documents and archives would be as inviolable as diplomatic documents and archives. When drafting article 22 of the diplomatic draft, the Commission had discussed at length whether documents might be regarded as part of the archives and had decided that they were not necessarily so.

16. Mr. SANDSTRÖM agreed with the Secretary. The point was developed at some length in the commentary to article 22 of the diplomatic draft.

17. The CHAIRMAN suggested that the Drafting Committee should be asked to take the comments on article 27 into account.

It was so agreed.

ARTICLE 28 (*Facilities*).

18. Mr. ŽOUREK, Special Rapporteur, explained that article 28 corresponded to article 23 of the draft articles on diplomatic intercourse and immunities. It was even more imperative to include a

statement of the principle in the consular than in the diplomatic articles, since consuls needed the authorities' help almost daily in order to exercise their functions. He would have preferred to make the article even more explicit, but had taken the text from the diplomatic draft article practically word for word, *mutatis mutandis*. The Drafting Committee might perhaps consider expanding the text, which stated as simply as possible the principle which must appear in the draft. Many consular conventions were more explicit, but a draft code such as the Commission was preparing could not go into so much detail as a bilateral treaty. There could be no doubt that without full facilities consuls could not exercise their functions properly. It might be asked what those facilities consisted in, but the Commission could not detail the practical facilities, which might range from help in finding accommodation to information about trade conditions in the receiving State. As stated in the commentary on diplomatic draft article 23, it was assumed that requests for assistance would be kept within reasonable limits, in conformity with practice in the relations between the States concerned. The Commission should first decide whether the principle should be retained and the actual drafting should then be entrusted to the Drafting Committee.

19. The CHAIRMAN suggested that the Drafting Committee might consider whether the wording should differ from that of the corresponding provision in the diplomatic draft and whether all the supporting reasons, which had been very fully discussed when that provision had been drafted, should be appended in the commentary.

It was so agreed.

ARTICLE 29 (*Freedom of communication*) and PROPOSED ADDITIONAL ARTICLE (*Freedom of movement*).

20. Mr. ŽOUREK, Special Rapporteur, explained that article 29 corresponded to article 25 of the draft article on diplomatic intercourse and immunities, but was drafted in more concise terms, since such questions as that of the consular courier did not arise in the context of consular intercourse. Article 29 was essential for the exercise of consular functions. Consuls made use of diplomatic couriers, whose privileges and immunities had already been determined by the draft articles on diplomatic intercourse and immunities. If the consul did not enjoy freedom of communication for all official purposes with the government of the sending State, its diplomatic missions and other consuls, his functions could not be performed. He did not insist on the precise wording, but believed that the principle should be included in the draft. Obviously, freedom of communication might be restricted in the event of disputes; provision was made for such restriction in certain conventions, as indeed for similar restrictions on the freedom of diplomatic communication. Attention might be drawn to that in the commentary. The second sentence of article 29 was the corollary

of the first and corresponded to current practice. Express stipulations as to the use of messages in code or cipher had been included in several consular conventions. The statement of the principle might be supplemented or developed, if the Commission so wished, but the text should first be referred to the Drafting Committee.

21. Mr. AGO asked the Special Rapporteur whether he had any special reasons for omitting a provision concerning freedom of movement such as appeared in article 24 of the draft articles on diplomatic intercourse and immunities or whether in his opinion the principle was implicit in other articles of the consular articles. Consuls required freedom of movement even more than diplomatic agents. Draft article 29 was well worded on the whole, but a clause similar to article 25, paragraph 2, of the diplomatic articles (relating to the inviolability of official correspondence) might well be reproduced in it.

22. Mr. ŽOUREK, Special Rapporteur, replied that he had not included an article on free movement because the competence of consuls was restricted to the consular district and was therefore much narrower than that of the diplomatic mission, which extended over the entire territory of the receiving State. The principle of free movement could be deduced from article 28 (*Facilities*), which undoubtedly gave consuls the requisite freedom of movement to travel within their consular districts and even outside them if that should prove necessary.

23. Mr. VERDROSS entirely concurred in the idea expressed in the first sentence of article 29, but thought the expression "in particular" went too far, since it implied the possibility of communications with authorities other than the government of the sending State, its diplomatic missions and consulates. He wondered whether the phrase was intended to cover vessels of the sending State, as in article 13 of the Harvard Draft.²

24. Mr. YOKOTA observed that the question of free movement had been thoroughly discussed in connexion with article 24 of the diplomatic draft, and the Commission had come to the conclusion that free movement was one of the necessary facilities that members of diplomatic missions must enjoy, subject, of course, to certain restrictions. The same should be true for consuls, at least within the consular district. It was a right of long standing and recognized all over the world. The fact that consular conventions did not usually make specific reference to it did not mean that free movement was not recognized, but was rather proof that the practice was so well established that the drafters of such conventions took it for granted. The provision appeared in the diplomatic articles; if it was not included in the consular articles, the inference might be drawn that diplomatic agents enjoyed that right whereas consuls

² *Ibid.*, p. 306.

did not. With regard to the freedom of communication, the slight difference in drafting between consular article 29 and diplomatic article 25, paragraph 1, was of substantive significance. The implication was that, while a diplomatic mission might use code or cipher in communicating with its government and the other diplomatic missions and consulates of the sending State for official purposes, consuls might use code in all their communications for official purposes, not only with the government and the diplomatic missions and consulates of the sending State, but even with nationals of the sending State living in the receiving State. To give consular officers greater privileges than diplomatic agents would be most inappropriate; the reverse should be the case, if any distinction was to be drawn at all, and he did not think there was any good reason for drawing one. With regard to the official correspondence of consulates, he agreed with Mr. Ago that a clause should be included providing that it should be inviolable. The concept of such inviolability could be regarded as a rule of international law and many writers so regarded it. Oppenheim did not draw a clear distinction between archives, papers and correspondence, but clearly held that the official correspondence of consulates was inviolable.³

25. The CHAIRMAN asked the Special Rapporteur whether he had any objection to including in the consular draft an article similar to article 24 of the diplomatic draft.

26. Mr. ŽOUREK, Special Rapporteur, replied that, as he had said before, he believed it would be sufficient to explain in the commentary the reasons why the Commission did not consider it absolutely necessary to include such an article in the body of the text. Its absence could not be construed to the detriment of consuls; but he had no objection to including the article if the majority so wished, though he doubted whether it would serve a useful purpose. Replying to Mr. Verdross's question about the phrase "in particular", he confirmed that allowance had also to be made for communications with vessels of the sending State and with the local representatives of international organizations.

27. Mr. SANDSTRÖM said that the article on free movement had been included in the diplomatic draft in order that governments might be kept informed of every aspect of conditions in the country concerned. Consuls should enjoy similar freedom of movement and that should be explicitly provided in the consular articles, although possibly with a proviso that such free movement should be confined to the consular district. He agreed with Mr. Yokota that the wording of article 25, paragraph 1, of the diplomatic draft was preferable. More than a mere drafting point was involved; besides, a provision modelled on that paragraph

might meet the point raised by Mr. Verdross. A provision stating that the official correspondence of the consulate should be inviolable might be included, as Mr. Ago had suggested. A consular bag was mentioned in some consular conventions, but a reference to it might take the Commission too far, as its use did not seem to be a general practice.

28. Mr. FRANÇOIS said that he preferred the draft article 23 in the Special Rapporteur's first report (A/CN.4/108). The Special Rapporteur had explained that the phrase "in particular" covered communications with vessels of the sending State and with international organizations; in fact it went much further and could be interpreted as including communications with private persons who were nationals of the sending State. The idea that communications for official purposes with private persons should be regarded as inviolable was quite unacceptable, and even more unacceptable was the idea, implicit in the final sentence of article 29, that consulates might be entitled to communicate with private persons in code or cipher. He wondered, too, whether it was the practice for consulates to correspond with each other in code or cipher.

29. Mr. AMADO considered that the draft should include an explicit provision on freedom of movement.

30. With regard to freedom of communication, he suggested that the drafting of article 29 might be improved by adopting the language of article 25 of the draft on diplomatic intercourse and immunities ("The receiving State shall permit and protect . . ." instead of "The receiving State shall accord and protect . . ."). Secondly, he thought Mr. Yokota's criticism was justified; the comma after the words "official purposes", coupled with the use of the unsatisfactory phrase "in particular", suggested that a consulate might be entitled to send messages in code or cipher to nationals of the sending State.

31. Lastly, he agreed that a provision on the inviolability of the official correspondence of the consulate should be included.

32. Mr. ERIM urged that the distinction between diplomatic and consular privileges be maintained in connexion with freedom of communication, in the same way as the inviolability of consular premises was differentiated from that of diplomatic premises. Just as the inviolability of consular premises was not absolute, so too the consul's privileges with respect to freedom of communication had to be considered within the limits set by the requirements of his official duties. He therefore suggested that article 29 should remain in substance as it stood, subject to some drafting amendments. First, a full stop should be inserted after the words "official purposes". The remainder of the article would then simply state that the consulate was entitled to employ all appropriate means, including messages in code or cipher, for its official communications. Although some members of the Commission had mentioned communica-

³ L. Oppenheim, *International Law: A Treatise*, 8th ed., H. Lauterpacht (ed.) (London, Longmans, Green and Co., 1955), vol. I, "Peace", p. 842.

tions with private individuals, he did not see how it was possible in practice to limit the use of those means to the correspondence of the consulate with certain categories of persons only, nor why it should be done.

33. With regard to freedom of movement, he agreed that an article modelled on article 24 of the draft on diplomatic intercourse and immunities should be included. Article 28 of the draft before the Commission did not suffice to ensure freedom of movement, for, inasmuch as it reproduced the terms of article 23 of the diplomatic draft, the omission of a provision similar to article 24 of that draft might be misconstrued. In that connexion, he noted that article 24 of the diplomatic draft empowered the receiving State to prohibit entry into certain zones for reasons of national security. In view of the vagueness of the term "national security", a provision along those lines would leave it open to the receiving State to restrict the freedom of movement of consuls if it so desired.

34. The argument put forward by the Special Rapporteur that consular districts were generally small was not always valid. Certain countries had, for example, only two or three consuls in the whole of the United States of America, so that a consular district could in those cases be larger than the aggregate areas of several European countries.

35. Mr. BARTOŠ said that the Commission, as a matter of principle, had decided to follow the pattern of the draft on diplomatic intercourse and immunities. Consequently, the omission of any of the provisions contained in that model would be interpreted as deliberate. For example, the omission of article 24 of that draft might be interpreted as meaning that a consul would have to give valid reasons before he was allowed to leave the seat of the consulate. Nor would it be sufficient to provide for the consul's freedom of movement within his consular district, for a consul often required to go outside his own district to obtain information or to confer with his colleagues in other cities.

36. Accordingly, he urged the Commission to weigh carefully any decision to make the text of the consular draft shorter than the diplomatic draft. The same was true of the provision on the inviolability of the official correspondence of the consulate. Article 27 covered only archives and documents, and it was customary in consular conventions and in State practice to draw a distinction between archives and documents on the one hand and correspondence on the other.

37. So far as means of communication were concerned, he said that it was the practice in western Europe, America, Africa and parts of Asia to allow consulates to make use of couriers and to avail themselves of the diplomatic bag. He gave as an example the practice regarding official correspondence to and from Yugoslav diplomatic missions and consulates in Canada and the United States. By virtue of an exchange of letters between the governments concerned,

it was the Yugoslav Consulate-General in New York, and not the Yugoslav Embassy at Washington, which acted as a collecting centre for all official correspondence to be sent by diplomatic bag to Yugoslavia and as a distribution centre for all official correspondence received from Yugoslavia and intended for Yugoslav diplomatic missions and consulates throughout North America. The use of the diplomatic bag was governed by the relevant provisions of the Universal Postal Convention.

38. For all those reasons, he thought that a provision along the lines of article 25, paragraph 2, of the draft on diplomatic intercourse and immunities should be included in the consular draft and that some reference should be made to the use of couriers and of the diplomatic bag.

39. Sir Gerald FITZMAURICE agreed that article 29 should be re-drafted along the lines of article 25, paragraph 1, of the draft on diplomatic intercourse and immunities. Although for his part he saw no objection to the use of messages in code or cipher by a consulate in its correspondence with its own nationals, there was no reason to give that privilege to consuls when it was being denied to diplomatic officers.

40. He agreed on the inclusion of a provision on freedom of movement but saw no reason to limit that freedom to the consular district. A consul might well have official business outside his own district and need to visit his country's diplomatic mission and its other consulates in the receiving State.

41. With regard to the use of a consular bag, he drew attention to the provisions of article 12, paragraph 4, of the consular convention concluded by the United Kingdom with Sweden which provided that bags containing the official correspondence of consulates were entitled to receive the same treatment as diplomatic bags and that the correspondence itself was inviolable.⁴

42. The purpose of those provisions was to reflect existing practice in the matter, and it would be noted that the inviolability of consular correspondence was the subject of a provision separate from that governing the inviolability of consular archives and documents. Other conventions likewise contained separate provisions on the two subjects; for example, article 9, paragraph 1, of the Consular Convention between Italy and Czechoslovakia laid down the inviolability of consular archives, while paragraph 4 of the same article specified that official correspondence was inviolable, and must not be censored.⁵

43. Accordingly, he agreed that a provision should be included along the lines of article 25, paragraph 2, of the draft on diplomatic intercourse and immunities.

⁴ United Nations, *Treaty Series*, vol. 202 (1954-1955), No. 2731, p. 172.

⁵ League of Nations, *Treaty Series*, vol. 34 (1925), No. 867, p. 63.

44. Mr. LIANG (Secretary to the Commission) said that in peacetime messages in code were often sent by individuals and commercial firms. The sending of messages in code was sometimes restricted in wartime, but the restriction then applied to diplomatic missions and consulates as well.

45. The right to send messages in secret language was often acknowledged as a privilege to which consulates, as well as diplomatic missions, were entitled.

46. In that connexion, he drew attention to article 12, paragraph 3 (a), of the Consular Convention between the United Kingdom and Sweden, which specified that a career consular officer could "use secret language" in his communications "with his government, with his superintending diplomatic mission or with other consulates of the sending State which are situated in the same territory", and in the official correspondence sent and received by him in consular pouches and bags. The relevant provision, however, went on to specify that in case of war or "imminent risk of war" the consular officer's right of communication and correspondence with the superintending diplomatic mission could be restricted if that mission was situated outside the territories of the receiving State.⁶

47. The CHAIRMAN agreed that an explicit provision should be included in the draft to safeguard freedom of movement. In line with the existing practice, that freedom of movement should not be restricted to the consular district; a consul should be at liberty to move throughout the territory of the receiving State on official and even private occasions.

48. He also agreed with the suggestion for the inclusion of a provision on the inviolability of official correspondence.

49. Lastly, with regard to means of communication, he suggested that the existing practice regarding the use of couriers and of the diplomatic bag should be recognized, along the lines of article 13 of the Harvard Draft. The right to make use of couriers was particularly useful to consulates in cases of earthquakes and other natural disasters and of strikes.

50. Mr. MATINE-DAFTARY said that, since the principle of the freedom of movement was recognized by all members of the Commission, the principle should be expressly stated and the freedom should not be limited to the consular district.

51. He agreed with the suggestion for the deletion of the words "in particular" from article 29, but suggested that the list of those with whom the consulate was free to communicate should be expanded to include the sending State's nationals; communication with its nationals was essential to the work of a consulate.

52. He recalled that he did not accept as absolute the inviolability of consular premises and archives; if that inviolability were to be expressed in the draft in general and absolute terms, he wished his dissenting views to be recorded in the Commission's report, since he considered that, for the purpose of the examination of evidence in judicial proceedings, the inviolability could not be absolute. With regard to the facilitation of the work of the consulate, however, he considered that the inviolability of official correspondence should be recognized.

53. As to the use of a consular bag, he felt that any refusal to permit it would lead to consulates using the diplomatic bag and would place at a disadvantage the consulate of a country which did not have a diplomatic mission in the receiving State concerned.

The meeting rose at 1.5 p.m.

532nd MEETING

Wednesday, 4 May 1960, at 10 a.m.

Chairman: Mr. Luis PADILLA NERVO

Co-operation with other bodies (A/CN.4/124) [continued] *

[Agenda item 8]

1. The CHAIRMAN welcomed Mr. Antonio Gómez Robledo, designated observer to the Commission for the Inter-American Juridical Committee by virtue of resolution XVI of the fourth meeting of the Inter-American Council of Jurists (A/CN.4/124, paragraph 159).

2. Mr. GÓMEZ ROBLEDÓ (Observer for the Inter-American Juridical Committee) said that it was a great honour for him to represent the inter-American organ entrusted with the progressive development of international law. He transmitted to the Commission the good wishes of the Chairman of the Inter-American Juridical Committee, and expressed the hope that the relations between the two bodies would become increasingly fruitful.

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 29 (*Freedom of communication*) and
PROPOSED ADDITIONAL ARTICLE (*Freedom of movement*) *

3. Mr. ŽOUREK, Special Rapporteur, said that, although still not fully convinced of the usefulness

⁶ United Nations, *Treaty Series*, vol. 202 (1954-1955), No. 2731, pp. 170-172.

* Resumed from the 531st meeting.

of such a provision, he was prepared to include in the consular draft an article on freedom of movement, employing, *mutatis mutandis*, the wording of article 24 of the draft on diplomatic intercourse and immunities. In any case, so far as the inclusion of the provision in the final draft was concerned, the Commission would be guided by the comments of governments.

4. So far as the inviolability of official correspondence was concerned he said he shared what seemed to be the general feeling in the Commission regarding the principle involved but considered that the matter was dealt with under article 27, the terms of which might be made more explicit. Accordingly, he was prepared to re-word article 27, which dealt with the inviolability of the archives and documents of the consulate. He suggested that it should be left to the Drafting Committee to recommend where the provision should be inserted.

5. With regard to the use of a consular pouch or bag, and also to the use of diplomatic couriers for carrying consular correspondence, he said that practice and opinion clearly admitted the use of such means of communication. He proposed to include a detailed commentary explaining the words "all appropriate means", and his intention had been to refer in that commentary to the use of the consular pouch or bag and of diplomatic couriers. If, however, the Commission considered that an express provision on the subject should be included in the article itself along the lines of that contained in article 13 of the Harvard Draft¹ he would have no objection.

6. With reference to the use of code in the communications of the consulate he agreed with the remarks of the secretary at the previous meeting (531st meeting, paragraph 44-46). So far as messages in cipher or secret language were concerned, however, he said that, though messages in cipher were certainly permissible between two consulates, the use of cipher was restricted by the postal administrations of some countries and by international conventions; hence it was desirable that the right of the consulate to send and receive them should be specified in the draft in order that difficulties might be avoided. The actual formulation of the provision could be left to the Drafting Committee.

7. Lastly, with reference to the general remarks of Mr. Bartoš (531st meeting, paragraph 35), he said that it had always been his intention to explain in the commentary to each article the reasons why any particular provision in the consular draft differed from the text of the diplomatic draft.

8. Mr. PAL said he was glad that the Special Rapporteur had agreed to include a provision on freedom of movement. The provision in question

should, he thought, be modelled as far as possible on article 24 of the diplomatic draft. The latter provision was the result of a compromise, and any attempt to depart from its language might reopen the controversy to which its subject matter had given rise in the Commission.

9. The questions raised in connexion with article 29 were largely concerned with drafting. For his part, he thought that article 29 should be as comprehensive as possible and that its text should be similar in all its provisions to that of article 25, paragraph 1, of the draft on diplomatic intercourse and immunities. Lastly, he considered that the use of the consular bag and couriers should be expressly mentioned.

10. Mr. VERDROSS said that Mr. François had doubted whether the consul's freedom of communication included the freedom to communicate with private persons (531st meeting, paragraph 28).

11. In his (Mr. Verdross's) opinion, in the exceptional case of communication with private persons, the privileges of consuls were wider than those of diplomatic agents. The main reason was that consuls, as distinct from diplomats, were concerned primarily with the protection of the interests of their nationals vis-à-vis the local authorities. In order to carry out his duties in that connexion, a consul had to be free to communicate with his nationals in the consular district. That freedom, of course, did not imply the right to use code or cipher in a consulate's correspondence with its nationals.

12. Accordingly, he proposed the deletion of the words "in particular" from article 29, which would thus specify the authorities with which a consul was entitled to communicate freely.

13. Secondly, he proposed that article 29 should be supplemented by a second paragraph which would provide that a consulate was entitled to communicate freely with private persons in the consular district, provided that those persons were its nationals or persons under its consular protection.

14. Mr. YOKOTA noted that there was agreement regarding the principles of freedom of movement, freedom of communication and inviolability of official correspondence.

15. It remained for the Commission to agree on the principle of the inviolability of the consular bag or pouch. He said that in Japan, although the law made no express provision for either the diplomatic or the consular bag, in practice no distinction was drawn between the two and both of them were exempted from inspection. He was therefore in favour of the principle of the inviolability of the consular bag.

16. Mr. ERIM said that article 25, paragraph 3, of the diplomatic draft stipulated the inviolability of the diplomatic bag in absolute terms. That provision represented in fact a progressive development of international law rather than an expression of existing practice. There had been occasions

¹ Harvard Law School, *Research in International Law. (II) The Legal Position and Functions of Consuls* (Cambridge, Mass., Harvard Law School, 1932), p. 306.

recently in which the authorities of a receiving State had gone so far as to order, at the risk of diplomatic complications, the opening of the diplomatic bag in cases where it was suspected that the bag contained material other than official correspondence.

17. If the consular draft was to contain a provision concerning the consular bag, such a provision should, accordingly, be less categorical than article 25, paragraph 3, of the diplomatic draft. He agreed that some measure of inviolability should be accorded to the consular bag, but safeguards against possible abuse were also necessary. A mere reproduction of the terms of article 25, paragraph 3, of the diplomatic draft was likely to lead to difficulties.

18. Mr. AMADO pointed out that, as stated in the commentary to article 25 of the diplomatic draft, a diplomatic courier was furnished with a document testifying to his status (normally the courier's passport). He asked whether a similar practice existed in the case of consular couriers.

19. He agreed with the principle embodied in article 29, but thought that the Commission should receive more information about existing practice before deciding to include a provision concerning the somewhat novel concept of a consular bag.

20. Mr. AGO thanked the Special Rapporteur for agreeing to include an article on freedom of movement.

21. Referring to Mr. Yokota's and his own remarks (531st meeting, paragraphs 24 and 21), concerning the differences between the terms of article 29 and those of article 25 of the diplomatic draft, he emphasized that those differences reflected more than a change in drafting. All members of the Commission agreed that consuls had the right to use code or cipher in their communications with official authorities. The language of article 29 as it stood, however, seemed to allow the use of code or cipher in correspondence with private individuals; he urged that article 29 should be amended so as to bring it into line with article 25, paragraph 1, of the diplomatic draft.

22. He was not entirely in favour of the suggestion of Mr. Verdross that a separate paragraph be added concerning correspondence between the consulate and private persons. The inclusion of such a provision was unnecessary, as the possibility that such correspondence might take place was self-evident. On the contrary, its inclusion, by contrast with the absence of a similar provision in the diplomatic draft, might be interpreted as meaning that diplomatic agents were not entitled to communicate freely with their nationals. In fact, the diplomatic protection of citizens abroad was a matter for the diplomatic missions of the sending State; accordingly diplomatic missions, as well as consular missions, needed to maintain contact with their nationals.

23. For all those reasons he considered that article 29 should be modelled on article 25, paragraph 1, of the diplomatic draft. The statement

in a first sentence that the receiving State must permit free communication on the part of the consulate for all official purposes would cover communication with the consulate's own nationals and with those persons to whom it owed protection. The second sentence would make it clear that the use of couriers and messages in code or cipher was limited to communications with the Government and other missions and consulates of the sending State.

24. He did not consider that a special provision was necessary on the subject of the consular bag; it would be sufficient to lay down the inviolability of official correspondence, since that inviolability would automatically apply to the bag containing such correspondence. The commentary to the article would, of course, mention that certain consular conventions made provision for a consular bag.

25. Mr. MATINE-DAFTARY said that he had intended to comment on Mr. Verdross's suggestion in much the same terms as Mr. Ago had employed. It was correct to say that the principal function of the consul was to protect the interests of the sending State's nationals who lived in the consular district. For that purpose the consul clearly had to be able to communicate with them, and article 29 should provide for that freedom of communication. However, he did not think that the difficulties mentioned in a debate would be disposed of if article 29 followed the language of article 13 of the Harvard Draft, to which the Special Rapporteur had referred, for that article 13 itself raised difficulties. For example, it spoke of communication with the vessels of the sending State, without specifying whether it meant vessels flying the flag of the sending State or vessels owned by nationals of the sending State; and it was well known that ownership and flag did not always coincide. Again, article 29 should not be drafted in excessively broad terms. To illustrate his point he said that, though consuls should undoubtedly be free to communicate with their nationals, it would be unthinkable that a consul should be able to communicate with a national who was in prison by code or cipher. He considered that article 29 should be based on the corresponding provision of article 25 of the diplomatic draft, possibly with the addition of a special clause concerning communications between the consulate and nationals of the sending State in the consular district.

26. Mr. SCALLE considered that there should be as close a parallel as possible between the diplomatic and the consular drafts. He could not accept Mr. Verdross's suggestion because, as Mr. Ago had pointed out, the scope of consular functions was less broad than that of diplomatic missions, and a consul was, of course, free at any time to apply to his embassy for assistance and in practice consuls often did so. Mr. Verdross's suggestion would make the interpretation of the article more difficult.

27. Mr. Erim had supported the orthodox view that the diplomatic bag and equally the consular bag should be used exclusively for official purposes. He (Mr. Scelle) did not think that it was worth while preventing the sending of a comparatively small number of duty-free presents by making express provision for the opening of the bag. Every government knew that there were abuses, but surely in any particular case in which abuse was suspected it would be far more desirable to draw the sending State's attention to the case in a friendly way without creating a diplomatic incident by opening the bag. He agreed with the Special Rapporteur on the way in which the article could be redrafted.

28. Sir Gerald FITZMAURICE feared it was obvious that Governments would take note of any differences between the Commission's draft of article 29 and the text of the corresponding article in the diplomatic draft. He therefore thought it better that in article 29 no reference should be made to the diplomatic bag which was mentioned in article 25 of the diplomatic draft. However, if the Commission agreed that official correspondence between consuls and their governments should be sent by diplomatic bag, it might be better to say so. The inviolability of the diplomatic bag was laid down in article 25 of the diplomatic draft, and in paragraph 5 of the commentary on that article the Commission had noted that the diplomatic bag had on occasion been opened with the permission of the Ministry of Foreign Affairs of the receiving State and in the presence of a representative of the mission concerned. It had in fact been recognized that, on rare occasions, despite its inviolability, the diplomatic bag could be opened. He recalled that in formulating that article in the diplomatic draft the Commission had agreed that it would be wrong, after having recognized the principle of inviolability, to refer in the text of the article to the possibility of the bag being opened. The reasons which had restrained the Commission in the past from qualifying the principle were equally cogent in the case of the consular draft.

29. Referring to Mr. Amado's question, he said that in practice there was no such person as a consular courier. In the practice of the United Kingdom, for instance, consular correspondence was always entrusted to members of the Queen's Messenger Corps, who were the diplomatic couriers and carried diplomatic bags containing both diplomatic and consular correspondence. Bags for consulates might be delivered direct or be fetched from the embassy or from some central point by other messengers or consular officials. Therefore, he did not think there was any need to mention a consular courier as such in article 29.

30. Mr. ŽOUREK, Special Rapporteur, confirmed Sir Gerald's explanation; there were normally no consular couriers but only diplomatic couriers, used also by consulates. Cases might arise, however, where special couriers were used to enable one consulate to communicate with another or

with a diplomatic mission. Some recent conventions, as for instance that of 28 February 1959 between the U.S.S.R. and Austria, expressly stated that consuls could communicate in cipher and by the diplomatic bag (article 13, paragraph 4). Similar provisions appeared in consular conventions entered into by the Soviet Union with Czechoslovakia on 5 October 1957 (article 6, paragraph 4); with the Mongolian People's Republic on 25 August 1958 (article 13, paragraph 4); with the Democratic People's Republic of Korea on 16 December 1957 (article 13, paragraph 4); with the People's Republic of Bulgaria on 12 December 1957 (article 13, paragraph 4); with the Romanian People's Republic on 4 September 1957 (article 13, paragraph 4); with the Hungarian People's Republic on 24 August 1957 (article 12, paragraph 4); with the People's Republic of Albania on 18 September 1957 (article 13, paragraph 4); with the People's Republic of China on 23 June 1959 (article 13, paragraph 4); and with the Federal Republic of Germany on 25 April 1958 (article 14, paragraph 2).

31. The CHAIRMAN agreed with previous speakers that freedom of movement should preferably form the subject of a special article. The Drafting Committee should be able to devise a text parallel to the corresponding provisions of the diplomatic draft.

32. So far as the subject of article 29 was concerned he said that the principle of freedom of communication should be laid down first and then the means of putting it into effect should be specified on the lines of article 25 of the diplomatic draft. He believed that the article should refer to the use of codes and ciphers, and the provisions of the consular and diplomatic drafts should be substantially the same. The need for the bag and a courier derived both from the inviolability of consular correspondence and from the principle of freedom of communication. Therefore consular correspondence should be placed in special envelopes bearing external marks and seals denoting its character; it would not be wise, however, to define the physical characteristics of bags of consular correspondence. The important thing was that the article should not exclude the use of consular bags, nor for that matter the use of consular couriers. Possibly, the wording of article 13 of the Harvard Draft (which referred to messengers holding *ad hoc* passports) might be followed in any provision relating to consular couriers.

33. With regard to the matter of communication between the consul and his nationals, he thought the article should not include any special mention of the consul's rights, for if it did governments would be bound to ask why the Commission had included such a provision in the consular draft but not in the diplomatic draft.

34. Mr. HSU doubted whether it was wise to extend protection to consular bags and couriers. It had for long been an accepted principle that diplomats must have those privileges, but he did

not believe that consuls had the same needs, and he feared that there would be much greater abuse by consulates than was the case among diplomatic missions. It could, of course, be argued that, if the Commission were agreed on the question of freedom of communication, consulates needed bags and couriers.

35. Mr. AMADO said it seemed clear that, in general practice, as Sir Gerald Fitzmaurice and the Special Rapporteur had explained, a consular courier was in fact a diplomatic courier. The Commission had agreed that the consul had a right to the secrecy of his official correspondence, but he had never heard of the use of the expressions "consular bag" and "consular courier" in any language.

36. Mr. BARTOŠ said it was obvious that unless the freedom of consuls to communicate with their nationals were guaranteed, a consul could not in fact give them the necessary protection. He strongly supported the opinion that a consul should have the right to travel and complete freedom to give advice to his nationals by post, telegram or telephone; otherwise it was impossible for a consul to know whether his nationals stood in need of protection. That right and that freedom should be expressly stated in the article, and it might also be advisable to add in the commentary that in the Commission's opinion diplomats equally had the right to communicate with their nationals. He had come to the same conclusion as Sir Gerald Fitzmaurice had, namely that in nearly all countries diplomatic and consular mail were virtually the same thing.

37. The question raised by Mr. Matine-Daftary with regard to the nationality of vessels had been settled in one of the conventions adopted by the First United Nations Conference on the Law of the Sea,² which, although not yet ratified, embodied the principle that the nationality of a vessel was that of the Power which exercised effective control over it. Besides, the International Court of Justice had been asked for an advisory opinion upon that problem, which came within the competence of the Inter-governmental Maritime Consultative Organization, and as the matter was *sub judice*, it should not be discussed by the Commission.

38. Mr. ERIM said that the expression "consular bag and pouch" was not used, so far as he knew, in any of the classic works on consular intercourse and immunities nor in the draft conventions prepared by various international organizations; it occurred in only two recent consular conventions concluded on 14 March 1952 by the United Kingdom with Sweden (1952) (article 12, paragraphs 3 and 4)³ and with Italy. Whereas the diplomatic

bag was recognized in international customary and treaty law, and was referred to in article 25 of the Commission's draft on diplomatic intercourse and immunities, the consular bag was an innovation. The examples given by Sir Gerald Fitzmaurice and Mr. Bartoš had not convinced him of the existence of a general practice in the matter of the consular bag. Provision for packages and envelopes carried by diplomatic couriers was sometimes made in regulations enacted under municipal law, as for example in Belgium,⁴ although certain very strict rules were laid down in those regulations concerning even the diplomatic bag. The very full Belgian regulations made no reference anywhere to consular bags. No one, of course, would deny that the official correspondence of consuls should be protected from all outside interference, but to accept the freedom of consular correspondence on the same footing as that of the diplomatic bag would be to go beyond the limits of what was required for the smooth operation of the consular functions. The consular conventions which mentioned the consular bag were too few to prove that the bag had received recognition in customary international law. To draw a distinction between the diplomatic bag and the consular bag would be an innovation which might not commend itself to many States. He agreed with Mr. Scelle that contraband might occasionally be passed in such bags. The Commission's draft should therefore reflect the reality in terms which would not restrict the freedom of consular correspondence, but which would prevent that freedom from being abused.

39. Mr. VERDROSS observed that the freedom of consuls to communicate with their nationals was far more important than the freedom of diplomatic missions to enter into such communication, because consuls intervened in the domestic procedures of the State of residence, whereas diplomatic missions could intervene only after the domestic remedies had been exhausted. In such cases, diplomatic missions were not protecting an individual as such, but defending the right of their State which had been injured in the person of one of its nationals. It was true that if there were no consulates in a State but only a diplomatic representative, the latter might exercise certain consular functions, but he could defend his nationals before the local authorities only if he had received an *exequatur* and was thus acting as a consular agent. That point might receive expression either in the commentary or in a special paragraph in the body of the text.

40. Mr. FRANÇOIS supported Mr. Erim's contention that to introduce the notion of a consular bag would be an innovation. If the Commission wished to be very liberal with regard to consuls, it was of course free to do so, but it must realize that it

² Convention on the High Seas (article 5). See United Nations Conference on the Law of the Sea, *Official Records*, vol. II, Plenary Meetings, Annexes (document A/CONF.13/L.53) (United Nations publication, Sales No. 58.V.4), p. 136.

³ United Nations *Treaty Series*, vol. 202 (1954-1955), No. 2731, pp. 170-172.

⁴ *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations *Legislative Series*, vol. VII (United Nations publication, Sales No. 58.V.3), p. 45.

would be making an innovation. The institution of consular couriers was likewise unknown to classic international law. The suggestion had been made that they might be recognized, but should be classed as diplomatic couriers. The two were, however, quite different. Diplomatic couriers enjoyed safeguards when carrying the diplomatic bag from their governments to the diplomatic mission, but it was not their business to distribute its contents to consulates and as diplomatic couriers they could not do so. It had also been argued that consuls were entitled to make use of diplomatic couriers; but it was undeniable that they could in no case issue diplomatic passports to such couriers. He also doubted whether the post office was bound to accept coded telegrams between consulates in the same country; in some countries it might certainly refuse to do so. If any such privilege was to be accorded to consulates, it must be stated explicitly in the draft. The Special Rapporteur seemed to be suggesting that there might be no objection to including such provisions even though they might perhaps be debatable, since the draft was merely provisional, and governments would be free to reject it. He (Mr. François) doubted the wisdom of such a course. The Commission knew from experience that very few governments commented on its drafts. The Commission should therefore exercise the greatest caution in taking the provisional drafts too lightly.

41. Mr. MATINE-DAFTARY supported Mr. Bartoš with regard to the consul's right to communicate freely with his nationals. However, he would wish to go further with article 29 and all other articles in the draft. Owing to the essential juridical difference between diplomats and consuls, the Commission should, as far as possible, draft exhaustive provisions. The suggestion that the Special Rapporteur's text be replaced by article 13 of the Harvard Draft was acceptable, since the phrase "for all official purposes" was appropriate only in connexion with diplomatic intercourse and immunities, and should therefore be deleted. The Harvard Draft was more restrictive. If the phrase was deleted, there would be no danger in adding a phrase at the end of article 29 to the effect that consuls were fully entitled to communicate freely with their nationals.

42. Mr. LIANG (Secretary to the Commission) observed that there was some doubt whether a provision concerning consular couriers or consular bags would be an innovation, since such provisions appeared in a few consular conventions. Still, he thought that many countries, especially those whose diplomatic missions had the function of supervising consulates or whose diplomatic and consular services both formed part of the foreign service, probably did in practice send their instructions to the consulates under their supervision in the diplomatic bag. Similarly the reports of consuls addressed to the Ministry of Foreign Affairs were probably transmitted through the same channel. The practice might not be in complete conformity

with article 25, paragraph 4, of the diplomatic draft, but that paragraph might be too restrictive, because, if a diplomatic mission had the function of supervising consulates, it would be very difficult to distinguish between documents in the diplomatic bag which were strictly diplomatic and those which were strictly consular. The concept of separate consular bags would be of only theoretical importance in such a case.

43. Mr. ŽOUREK, Special Rapporteur, did not agree that the concept of the consular bag was a complete innovation. Besides the two consular conventions cited by Mr. Erim, conventions between the United Kingdom and France, Mexico, Greece and Norway, contained similar provisions. The question at issue did not, however, depend solely on the existence of provisions in consular conventions, but also on practice. For decades, diplomatic couriers had carried consular bags. He did not agree with Mr. François that a diplomatic courier must in all cases deliver the bag at the diplomatic mission; it was often delivered at a consulate for practical convenience. The bag might also be entrusted to the captain of a commercial aircraft instead of being carried by a courier, as had been pointed out in paragraph 6 of the commentary on article 25 of the diplomatic draft. Since the concept was not an innovation, he could see no reason why it should not be included in a draft which embodied the two basic principles supporting it, free communication on the part of the consulate for all official purposes and the protection of consular correspondence. Furthermore, it should be noted that several States had no diplomatic relations *inter se*, only consular relations; such consulates were free to correspond by means of couriers. The Commission's function was not only to codify international law, but also to promote its progressive development; hence it was at liberty to state rules which had not yet been uniformly accepted by all States. The needs of international relations should be its guide. Although the use of the consular bag was not an innovation, but a matter of daily practice without which consulates could not properly conduct their business, the question was not of vital importance. If the Commission hoped to finish the draft at the current session it should not spend too much time on that question.

44. Sir Gerald FITZMAURICE agreed with the Special Rapporteur. He had been extremely surprised by Mr. François' statement, because all members of the Commission must surely be aware that many governments corresponded directly by consular bag with their consulates in Geneva. The Foreign Office in London did not send official correspondence to the United Kingdom consulate at San Francisco via Washington; to all intents and purposes, a consular bag was used. But in other cases, as the Secretary had pointed out, consulates received their correspondence through their diplomatic mission, which it had reached in the diplomatic bag. The idea of the

carriage of specifically consular correspondence — sometimes in bags containing nothing else and which were therefore in fact consular bags — was consequently no innovation. Admittedly, he had never heard of a consular courier as such, since all couriers were recruited as diplomatic couriers and were drawn from a corps of such couriers in the Ministry of Foreign Affairs; they carried both diplomatic and consular correspondence indifferently. The Drafting Committee might now find the form in which the concept might appropriately be expressed.

45. Mr. YOKOTA doubted whether the concept of a consular bag was an innovation; apart from the instances cited by Mr. Zourek and by Sir Gerald Fitzmaurice, he himself had already drawn attention to the practice in Japan (see paragraph 15 above). Consular couriers, on the other hand, were not widely used in practice. Some provision should certainly be made for the protection of the consular bag. No member of the Commission had as yet cited any instances in which protection had in practice been denied to the consular bag. Mr. Erim had said (paragraph 38) that the consular bag was mentioned in only a very few recent consular conventions. The explanation might be that the more recent conventions had begun to reflect the actual practice. It was hardly likely, for instance, in a case where a courier was carrying both a diplomatic and a consular bag, that the receiving State would differentiate between the two and inspect the one but not the other.

46. The question had been raised whether free communication between the consulate and nationals of the sending State should be mentioned explicitly. No member of the Commission thought that the principle should be excluded altogether. If the Special Rapporteur's draft was retained, with the modifications which he (Mr. Yokota) had suggested (531st meeting, paragraph 24) it would cover free communication with nationals of the sending State, just as the principle had been implicitly included in the first sentence of article 25, paragraph 1, of the diplomatic draft, as explained in paragraph 2 of the commentary. There had been no explicit reference to that freedom in the second sentence of article 25, paragraph 1, of the diplomatic draft, not because the principle was unimportant, but because code and cipher could not be used in communication with nationals of the sending State, whereas they could be used in communication with the government and the diplomatic missions and consulates of the sending State. A similar course should be followed in article 29 of the consular draft.

47. Mr. AGO said that the very general formula used in article 25, paragraph 1, of the diplomatic draft undoubtedly covered communication with nationals of the sending State, but if the Commission wished for an explicit reference and if Mr. Matine-Daftary was right in wanting a more restrictive formulation, the Drafting Committee could easily find a formula. The use of bags and

couriers for consular correspondence was certainly no innovation. The Italian Consulate at Geneva had for years had direct communication with Rome, and its bag had always been treated by the Swiss Federal authorities as a diplomatic bag. He had thought initially that the mere statement that consular correspondence was inviolable might be sufficient for the purpose. If, however, any doubts lingered, a phrase covering the protection of bags containing consular correspondence might be included, although the term "consular bag" itself should not be used, since it might not be accepted.

48. The CHAIRMAN asked the Commission's consent to refer article 29 forthwith to the Drafting Committee, with the following general indications: (i) the principle of the freedom of movement should be expressly stated in the draft; (ii) the general principle of freedom of communication should be expressed in article 29 in the terms used in article 25 of the diplomatic articles; (iii) a special mention should be made of the inviolability of the official correspondence of consulates. The Drafting Committee should also note that opinions were still divided on two points. First, the question remained open whether or not explicit reference should be made in the draft to free communication between consulates and the nationals of the sending State. It should be noted that it was the consensus that that was one of the main functions of a consulate and that the practice was general. The Drafting Committee should also consider whether the principle might be stated more appropriately in the text or in the commentary, and should bear in mind that the omission of that particular function in the diplomatic articles did not imply that diplomatic missions did not enjoy that right. Second, there was a difference of opinion about the manner of communication, including sending official correspondence by a messenger, whether called a consular courier or not and whether his inviolability did or did not derive from a passport or credentials issued by his government. All members agreed that the official correspondence of consulates was inviolable and should not be detained or opened. If that were true of a single envelope or package, it should be equally true regardless whether a number of envelopes or packages despatched together was called a bag or pouch. The Drafting Committee should bear in mind not only that the Commission was entrusted with the progressive development of international law, but that it was dealing with an established practice. The progress in the techniques of communications must be taken into account. In that connexion, he referred to paragraphs 2 and 3 of the commentary on article 25 of the diplomatic draft. He proposed that the article be referred forthwith to the Drafting Committee, on those terms.

It was so agreed.

The meeting rose at 1.10 p.m.

533rd MEETING

Thursday, 5 May 1960, at 10 a.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 29 (*Freedom of communication*) (continued)

1. Mr. LIANG (Secretary to the Commission) said that the question of communication between consuls and their nationals by messages in code or cipher raised at the previous meeting was covered by article 38 of the International Telecommunication Convention,¹ concluded at Buenos Aires in 1952 and widely accepted. Under that convention, government telegrams might be sent in secret language in all relations. Annex 3 to the convention,² defining the terms used, described government telegrams as telegrams originating with any authorities and included among them "diplomatic and consular agents", thus placing them on the same footing. A provision enabling consulates to employ messages in code or cipher would therefore be quite appropriate in the consular articles.

ARTICLE 30 (*Communication with authorities of the receiving State*)

2. Mr. ŽOUREK, Special Rapporteur, explained that draft article 30 dealt simply with the mode in which consuls communicated with the authorities of the receiving State. The laws and regulations concerning the procedure observable in such communications differed widely from country to country. His principal source had been *A Collection of the Diplomatic and Consular Laws and Regulations of Various Countries*, by A. H. Feller and Manley O. Hudson,³ since that work was more than twenty-five years old, he was not certain whether all the legislation cited in it was still in force, but in general it could be said that the procedure had remained unchanged. Certain laws and regulations permitted consuls to communicate with the central authorities through the diplomatic mission. The Honduras Act of 1906 (article 16) contained more elaborate provisions; it provided⁴ that a consular official did not have

the right to communicate directly with Departments of State or with any authorities outside his district except through his country's diplomatic mission, but if there was no mission or its seat was not in Honduras, he must communicate with such authorities through the consul-general of his country. If there was no consul-general, but not otherwise, he had the right to communicate with the Departments of State directly. Yet another procedure was laid down in article 11 of the Havana Convention regarding Consular Agents of 20 February 1928.⁵ The obligation to conform to local usage was stipulated in several national laws and regulations concerning consuls. The general provisions concerning consuls issued in Sweden in 1928 and in Denmark in 1942 provided for communication through the diplomatic channel, either in all cases or in certain cases specified in the provisions. Other regulations dealt only with the cases where there was no diplomatic mission in the receiving State and where consuls occasionally performed diplomatic acts — a case covered by article 16 (A/CN.4/L.86). The Brazilian regulations of 1928 authorized consuls of countries having no diplomatic mission in Brazil, when they were entrusted with the negotiation of an international agreement, to address certain officials of the Ministry of Foreign Affairs (article 31) while by the Haitian order of 1925 on foreign consuls (article 17), consuls of States which did not authorize direct correspondence had to resort to the good offices of a friendly legation.⁶ A similar diversity of procedure existed even with regard to communication with the local authorities in the consular district. Draft article 30 therefore merely recognized an established practice.

3. Mr. BARTOŠ said that he simultaneously entirely agreed with the Special Rapporteur and was entirely opposed to draft article 30. He accepted the principle that consuls must comply with local laws with respect to the procedure whereby they were to communicate with the authorities of the receiving State. On the other hand, an explicit guarantee had to be given that consuls would be able to approach the local authorities direct. The Commission's prime duty was to do everything possible to check the tendency of certain States to curtail free communication between consuls and the local authorities. The capacity of consuls to intervene with the local authorities was self-evident, but what was lacking in article 30 was any guarantee protecting that right, except a reference to usage and the laws of the receiving State — to which should of course be added a statement to the effect that that State's laws on procedure should conform with the general rules on the subject and with the terms of consular conventions.

¹ United Kingdom, *Treaty Series*, No. 36 (1958), p. 26.

² *Ibid.*, p. 35.

³ (Washington, D.C., Carnegie Endowment for International Peace, 1933).

⁴ For English translation of the Act, see *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations *Legislative Series*, vol. VII (United Nations publication, Sales No. 58.V.3), pp. 153-161.

⁵ League of Nations *Treaty Series*, vol. LLV (1934-1935), No. 3582, p. 297.

⁶ Cf. commentary to article 24 in the Special Rapporteur's first draft. *Yearbook of the International Law Commission*, 1957, vol. II (United Nations publication, Sales No. 1957.V.5, vol. II), p. 98.

4. Mr. EDMONDS observed that the purpose of the codification should be to make the rules governing procedure as definite as possible. If that principle was applied to the article under consideration, it was obvious that in order to exercise his functions, a consul must be able to address the local authorities on all matters within his competence. Article 12 of the Harvard Draft⁷ was preferable to draft article 30 as it stood, for it defined the scope of consular communication with authorities of the receiving State. It was far less vague than draft article 30 and covered the subject much more satisfactorily.

5. The CHAIRMAN asked the Commission to bear in mind the points raised by Mr. Bartoš and Mr. Edmonds. Even if the laws of receiving States varied, the right of consuls to communicate with the local authorities must have a minimum guarantee. With regard to communications with the central authorities, the Commission would have to consider whether the possibility of such communication should be left open by means of some general formula, as in draft article 30, or whether the exceptions should be specified. The Commission would be well advised to pay regard to article 11 of the Havana Convention as well as article 12 of the Harvard Draft.

6. Mr. YOKOTA agreed with Mr. Bartoš and Mr. Edmonds. The Commission should certainly establish the right of consuls to communicate at least with local authorities, even though the actual procedure might be subject to usage. The ability to address the central authorities should not be excluded. In Japan, for instance, the practice was that consular missions were as a rule permitted to approach the Ministry of Foreign Affairs directly, even if the sending State maintained a diplomatic mission in Japan. A statement should therefore be included in the commentary to the effect that consuls were able to address not only the local, but also the central, authorities of the receiving State.

7. Mr. MATINE-DAFTARY observed that the wording of draft article 30 was logical enough in appearance, but would in fact impede the exercise of consular functions. To make the procedure for communication dependent on the laws of the receiving State made it equally dependent on the will of that State, which might well change. He agreed with Mr. Edmonds that article 12 of the Harvard Draft was preferable since it gave consuls minimum guarantees. In some States consuls could presume to address any authority directly, but in others they could address only the local authorities owing to the rigidity of the laws and regulations on the subject. Some procedure for recourse should be provided for cases where the local authorities failed to heed a consul's representations. The Special Rapporteur might be willing

to include in the article an explicit reference to the principle of reciprocity, thus providing the sending State and the receiving State with mutual guarantees.

8. Mr. AGO said that he shared the apprehensions expressed by previous speakers. Draft article 30 as it stood gave undue freedom to the receiving State. The present wording might eventually be added at the end of an article which would first lay down the principle governing the possibilities open to consuls of communicating directly with the authorities. The question then arose what that principle was. The practice was by no means uniform. In certain countries consuls could address the authorities of the consular district, but not the central authorities, except through the diplomatic mission; but they could address the central authorities if there were no diplomatic mission or if the diplomatic mission was unable to act. According to the practice followed in other countries, consuls were denied direct access only to the Ministry of Foreign Affairs itself. Under such modern conventions as those between the United States and Costa Rica (1948), the Philippines and Spain (1948) and the United Kingdom and Sweden (1952) and the United Kingdom and Italy (1954), consuls could address not only the local authorities but also the central authorities, with the exception of the Ministry of Foreign Affairs, which could be approached only by the diplomatic mission. Those provisions represented a welcome development, for they enabled the consul to apply directly, for instance, to the central judicial authorities in cases where the procedure of applying through the diplomatic mission to the Ministry of Foreign Affairs might delay action to protect a national. The article should therefore first lay down the principle of direct communication both with the local authorities of the consular district and with the central authorities.

9. Sir Gerald FITZMAURICE agreed that the consul's right of communication should be defined. The relevant provision in the Consular Convention between the United Kingdom and Sweden, cited by Mr. Ago, appeared in article 18,⁸ which dealt very thoroughly with the protection of nationals by the consul. Inasmuch as very elaborate provisions were set forth in certain bilateral conventions, questions might be asked if the Commission's draft failed to deal in any detail at all with one of the most important of the consular functions. Article 19 of the Anglo-Swedish Consular Convention⁹ was equally important, for it dealt with the rights of a consular officer in cases where any national of the sending State was confined in prison awaiting trial or was otherwise detained in custody within his district. He was not suggesting that every detail of those provisions should necessarily be reproduced in the Commission's draft, but he thought the difference between the

⁷ Harvard Law School, *Research in International Law. (II) The Legal Position and Functions of Consuls* (Cambridge, Mass., Harvard Law School, 1932), p. 302.

⁸ United Nations *Treaty Series*, vol. 202 (1954-1955), p. 180.

⁹ *Ibid.*, p. 182.

detail in a bilateral convention and the complete absence of any detail in the draft before the Commission was very striking. The provisions concerning communication with the authorities of the receiving State appeared, in the bilateral consular treaties, in the context of provisions relating to the protection of the sending State's nationals; the inference was clearly that the two matters were very closely connected in the opinion of some governments. He wondered, therefore, why the Special Rapporteur had failed to include any provision on the right of the consul to communicate with a national who was in prison or under arrest.

10. Mr. AMADO observed that the Special Rapporteur had used the expression "consular representative" in his first report (A/CN.4/108), but the Commission had preferred the simple term "consul". In so far as the consul could be said to have a right to address the authorities of the receiving State, that right would hardly be exercised except by virtue of his representative character. The Commission was obviously very anxious to enhance the consul's status, but to afford consuls representative functions would be an innovation — a word quite rightly attacked with some vigour at the previous meeting. A consul should be able to address the local authorities for the reasons and purposes given by previous speakers, but procedures for communication with the State authorities were unacceptable, even in the circumstances described in the Brazilian Regulations cited by the Special Rapporteur — *viz.*, the absence of a diplomatic representative to the State. In such circumstances a consul could address only the head of the consular section in the Ministry of Foreign Affairs and, even then, he had to produce a note from his government guaranteeing the principle of reciprocity. If there was one principle running all through the regulation of consular relations it was the principle of reciprocity. Virtually no consular convention existed which made no reference to it. Yet there was no mention of that principle in the draft prepared by the Special Rapporteur. Draft article 30 was, therefore, unsatisfactory; even article 12 of the Harvard draft, which had been suggested as a substitute, did not precisely represent actual practice, for it failed to provide that when the head of a consular post addressed the government of the receiving State directly, in the absence of a diplomatic representative accredited to it, he had to produce a note from his government giving the consulate the status of an embassy or legation. If such latitude were permitted, the Commission might just as well proceed to the logical conclusion and eliminate any distinction between a consulate and a diplomatic mission.

11. The CHAIRMAN suggested that the Drafting Committee should be asked to prepare a draft embodying the right of the consul to address the local authorities in his consular district; the possibility of addressing the central authorities in certain cases and a reference to the principle of reciprocity to be placed either in the draft or in the commentary. In addition, it should be mentioned

at least in the commentary that the practice was not uniform. It should be stated, too, that nationals had the right to approach the consul of the consular district in which they resided and that consuls had the right to approach their nationals in their consular district at any time. Indeed, in some cases where a large number of the sending State's nationals lived in the territory of the receiving State, those rights formed the subject of special conventions. During the Second World War, for example, thousands of Mexicans had been employed in the United States, and special agreements had been concluded guaranteeing the right of Mexican consuls to have access to Mexican nationals in the consular district at all times for the purpose of defending their rights, protecting their interests and even appearing on their behalf before the courts. Some further guiding ideas would be found in article 12 of the Harvard draft and article 13 of the Havana Convention.

12. Mr. ŽOUREK, Special Rapporteur, referring to Sir Gerald Fitzmaurice's comment on the detailed provisions in the Consular Conventions between the United Kingdom and Sweden and between the United Kingdom and Italy, where those provisions appeared under the heading of the protection of nationals, explained that such detail was possible in a bilateral convention which contained elaborate provisions concerning the consular function. The majority of the members of the Commission had, however, preferred a very general definition of consular functions, which it had adopted as article 4 (A/CN.4/L.86). It would be perfectly feasible to mention a great many cases, such as access by consuls to imprisoned nationals, either in the text or in the commentary; but since the Commission had accepted the general definition of consular functions, he had thought it would be illogical to go into details and to introduce a special provision covering cases in which nationals of the sending State were arrested or imprisoned, when the draft was silent on such matters as succession, the guardianship of minors or vessels in distress. Such detail would be out of place if the draft articles were to be kept in due proportion. The point about reciprocity raised by Mr. Matine-Daftary might be inserted more appropriately in subsequent articles. It was unnecessary to refer to it in draft article 30, owing to the reference to usage and the laws of the receiving State. If a sending State found that the laws of the receiving State were not liberal enough, it would be perfectly free to impose equivalent restrictions. He agreed with the Chairman's suggestion that the Drafting Committee should be asked to redraft article 30.

13. Mr. SANDSTRÖM said that the questions raised by Sir Gerald Fitzmaurice concerned matters vital to the consular function. Unless his right to communicate with his nationals, and the right of those nationals to communicate with him, were recognized, and unless the receiving State's duty to inform him of certain occurrences was specifically laid down, the consul would not be able to carry out his duties efficiently. Since the article

on consular functions, as adopted by the Commission, was silent on those matters, it was necessary to introduce a provision to deal with them.

14. Mr. VERDROSS suggested that the words "by bilateral conventions" be introduced after the words "shall be determined": where bilateral conventions existed, they took precedence over local usage and local legislation.

15. Mr. PAL pointed out that the questions which had arisen in connexion with certain bilateral conventions were dealt with in the conventions concerned under the heading of consular functions. The Special Rapporteur's original draft article on consular functions (A/CN.4/L.108, article 13, second variant) had gone into considerable detail regarding the question of the protection of nationals, and the questions now raised would have been more pertinent if they had been raised in that connexion. The Commission, however, had preferred the shorter formulation contained in article 13 — now article 4 (A/CN.4/L.86) — which did not provide for the details in question. If it were now desired to introduce a provision giving details of the procedure to be followed for the protection of nationals, the most suitable place for it would perhaps be near article 4, although, given an adequate drafting introduction, it could also be inserted in the part of the draft which the Commission was now discussing.

16. Mr. ERIM asked whether the term "usage" in draft article 30 was intended to refer to local usages in the receiving State or to international usage.

17. For his part, he felt that the receiving State could not be left free to regulate at its discretion the matter of communication between consuls and the local authorities. Article 30 should state the procedure observable in communications between consuls and the authorities of the receiving State could be regulated by the laws of the receiving State in so far as the provisions thereof supplemented, but did not depart from, the applicable rules of international law.

18. The CHAIRMAN agreed that the Commission should formulate a rule of international law in the matter and specify in article 30 the right of the consul to communicate with the authorities of the receiving State in the exercise of the functions specified in article 4. Article 30 could then go on to state that the procedure to be observed in the exercise of that right was governed by the laws and usages of the receiving State.

19. Mr. SCELLE said that, although he was reluctant to introduce too much detail into the article, he felt that, as it stood, it was not only too brief but overstressed the role of the legislation of the receiving State.

20. He agreed that there should be some guarantee of the consul's right; the consul should be able to apply to a higher authority, either to the diplomatic representative of the sending State

or to the Ministry of Foreign Affairs of the receiving State.

21. Mr. AMADO drew attention to the rules in force in Switzerland, which specified that, where the sending State was not diplomatically represented and access by a consul of that State to the Ministry of Foreign Affairs of the receiving State was tolerated, no right of access could be inferred from that tolerance.¹⁰

22. For his part, he considered that the prerogatives of consuls should not be extended beyond what was normal practice.

23. Mr. AGO said that he agreed entirely with Mr. Amado's last remark but thought nevertheless that the Commission should devote a great deal of attention to those articles which affected the right of protection, since the protection of the sending State's nationals was the very essence of the consular function; in order to perform that function, it was therefore essential that the consul should have the right to communicate with the authorities of the receiving State.

24. The question of a consul's right of access to the Ministry of Foreign Affairs of the receiving State arose only in extreme and exceptional cases. A consul did not deal with the political authorities of the receiving State, but with the administrative or judicial authorities of that State and it was not sufficient in that regard to specify his right of communication with the local authorities. A consul, in the exercise of his duties, might well need to follow a case from the stage where it came before a local body or court to a later stage, when it came before a higher authority or court, possibly outside the consular district. By making provision for the consul's right to communicate with central administrations, the Commission would be favouring not so much the consul as the nationals of the sending State who were protected by him.

25. Mr. ŽOUREK, Special Rapporteur, said, in reply to Mr. Erim, that the term "usage" meant local usage, which applied in the absence of a provision of municipal law; it did not mean international custom.

26. He accepted the suggestion of Mr. Verdross that the words "by bilateral conventions" should be added after the words "shall be determined".

27. The suggestion by Mr. Scelle for a provision concerning recourse to a higher diplomatic authority by a consul who had failed to obtain satisfaction was an interesting one.

28. With reference to Mr. Amado's remarks concerning the rules in force in Switzerland, he recalled that in his first report (A/CN.4/108, paragraph 3 of the commentary to article 14) he had mentioned those rules as an example of the restrictive approach to the question of a consul's exercise of virtual diplomatic functions, e.g., communication with the Ministry of Foreign

¹⁰ See text in *Laws and Regulations*. . . , pp. 303 et seq., esp. p. 310.

Affairs of the receiving State. Actually, many States permitted the consul to have access to the Ministry.

29. Mr. AGO'S suggestion for the recognition of a consul's right of access to the central authorities would go beyond existing practice and would give consuls wider privileges than those enjoyed by diplomatic officers. It would be tantamount to recognizing that consuls had the right to approach the government of the receiving State.

30. Sir Gerald FITZMAURICE said that Mr. Pal was right in pointing out that the Special Rapporteur's original draft (A/CN.4/108, article 13, second variant) had dealt in greater detail with the question of the protection of his nationals by a consul. That text, however, did not specify the right of the sending State's nationals to have access to the consul or the consul's right of access to those nationals, or the ancillary obligation of the receiving State to inform the consul when one of his nationals was placed under arrest or detention. It might be said that those rights were implied, but the fact remained that they were not expressly mentioned in the original draft, still less in article 4 as adopted by the Commission. Although the Commission could not expect to include in the draft all the details which appeared in bilateral consular conventions, the rights and duties to which he had referred were so important that they should be stated in explicit terms.

31. Accordingly, he would submit a draft provision to fill the gap.

32. Mr. SCELLE, referring to Mr. Ago's suggestion for the recognition of the consul's right to communicate with higher or central authorities, said that the right of protection could only be exercised in accordance with the laws of the receiving State. It was difficult to see how a consul could act to support one of his nationals before the Supreme Court of the receiving State, otherwise than through the agency of a recognized legal practitioner.

33. Mr. YOKOTA said that more precise directives should be given to the Drafting Committee. State practice regarding the right of communication was admittedly not uniform, but the Commission should specify the minimum requirements in the matter.

34. In the first place, there was general agreement regarding a consul's right to communicate with local authorities. Secondly, it was generally agreed that, in the absence of a diplomatic mission of the sending State, the Ministry of Foreign Affairs of the receiving State could not refuse to deal with a consul.

35. Other points, such as the right to deal with the Ministry of Foreign Affairs in the presence of a diplomatic representative of the sending State, and the right to communicate with other branches of the central government of the receiving State, did not appear to be so well established and could be left for regulation, in the absence of a bilateral

agreement, by the laws and usages of the receiving State.

36. Mr. AGO said that he agreed with Mr. Scelle that a consul could not act otherwise than in accordance with the legislation of the receiving State. A consul could not take the place of a legal practitioner, either in the supreme court or in the lower or local courts. What he had suggested was that the consul should be able to follow through a case from the local stage to the stage before a higher or central authority, even outside the consular district.

37. In so doing, he was not suggesting that the consul should have wider powers than a diplomatic representative. The difference between the powers of a consul and those of a diplomatic representative was one of nature, not of degree. They exercised different functions and naturally required different facilities. A diplomatic representative, whose duties were political, dealt with the government of the receiving State; usually, he dealt solely with the Ministry of Foreign Affairs and had no direct access to other authorities, whether local or central. The consul, on the other hand, had a duty to protect his nationals within the framework of the municipal law of the receiving State, and hence had to be able to deal with the authorities of that State, whether local or central.

38. Mr. PAL said that, since the Commission had already dealt with the subject of protection of a consul's nationals and had given an indication of its views as to the pertinence and justice of the principles underlying the provisions under discussion, it would perhaps save time if Sir Gerald Fitzmaurice were to submit his proposed text through the Drafting Committee.

39. Mr. ERIM said that it was premature to refer article 30 to the Drafting Committee. The discussion had revealed a fairly general agreement that the article gave undue latitude to the receiving State to regulate the procedure for communication between a consul and the authorities of that State. Most members of the Commission felt that the receiving State's powers in that regard required clarification and that their scope should be restricted. Differences of opinion still remained, however, regarding the question of the consul's access to the central authorities of the receiving State. As to the right to communicate with the Ministry of Foreign Affairs of the receiving State, he, for his part, favoured the system embodied in the Consular Regulations of Switzerland.

40. Sir Gerald FITZMAURICE accepted the suggestion that article 30 should be referred to the Drafting Committee without further discussion. The problem he had raised was a separate although perhaps a related one, but in any case one of substance. He suggested that his draft provision might be discussed at the next meeting.

41. The CHAIRMAN said of the three questions round which the discussion of article 30 had prin-

cipally revolved, there appeared to be general agreement on two: the consul's right to deal with local authorities and his right to approach the central authorities if the sending State had no diplomatic mission in the receiving State. On the third question — whether the consul should have some recourse to the central authorities, not necessarily through the Ministry of Foreign Affairs — there had been considerable divergence of opinion. Perhaps after some further discussion of Mr. Ago's remarks, article 30 could be referred to the Drafting Committee.

42. Mr. ŽOUREK, Special Rapporteur, said he might be prepared to accept Mr. Ago's view that consuls should in certain circumstances have access to the various organs of the central government, but the Commission must appreciate that a provision to that effect would be a new departure in international law.

43. Mr. BARTOŠ felt the really important distinction was between what was and what was not consular business; whether the authority concerned was central or local was of minor importance. A good example of the problem raised by Mr. Ago could be found in the treatment of matters concerning patents and trade marks. The rights of the sending State's nationals in patents and trade-marks would normally be defended by the consul; for that purpose he would have to deal with the authorities of the receiving State competent for those matters, and in some countries — the United States and Germany, for example — those authorities were organs of the central government. Similarly, in most countries certain questions relating to shipping which came within the consul's jurisdiction could not be decided by the port authorities and hence would have to be taken up with the central authorities. Mr. Ago was correct in saying that the consul had to have sufficient power to ensure the protection of the interests of his nationals, whether through the local authorities or, if necessary, by approaching the central administration of the receiving State. The protection of the interests of nationals was properly a consular function and not a matter within the scope of diplomatic relations. The consul had the right to act on behalf of his nationals in whatever way was necessary, although he had of course to observe the administrative procedure of the receiving State. An interesting case had occurred recently in Yugoslavia, in which the question had arisen whether a consul had the right to appear before a parliamentary committee which was empowered to give decisions on petitions for a pardon received from persons convicted of a criminal offence. The case concerned a French citizen who had appealed to the committee after having exhausted all judicial remedies in appealing against a conviction. In that case both the French and the Yugoslav authorities had taken the exceptional view that an approach to the parliamentary committee was within the competence of the consul. Accordingly he considered that a consul, in order to protect his nationals, should be entitled in certain

circumstances to approach the competent authorities of the central government, either at the first stage or on appeal.

44. The CHAIRMAN asked Mr. Ago to clarify his views as to whether, and if so by what procedure, a consul could approach the central authorities on behalf of some national who was within his jurisdiction; as to whether the approach might not perhaps be effected through a consular official in the place where the central authority was situated; and on the provision that might be made for consular action when there was no representative in the district of the particular branch of the government concerned, or, if there were a representative, the matter went beyond his competence.

45. Mr. AGO, replying to the Chairman, said that, if the branch of the central authority concerned in the matter had a local office, obviously the consul would approach that office. Secondly, since a consul could only act on behalf of a person who resided in his consular district, a consul in the capital city could not properly act as an intermediary in dealing with a matter which concerned a national in another consular district. Nor for that matter did he think that the diplomatic mission should act as an intermediary for the consul in bringing a case with which the consul was concerned to the notice of the central authorities, for in that event the case would assume international proportions and possibly one of dispute between governments. It was in the interest of all concerned that the remedies open under the municipal law should be exhausted before a case was treated at the diplomatic level. Under the Swiss rules which had been referred to earlier in debate, the consul could apply to the central authorities, but it was expressly stipulated that it was only in the absence of a diplomatic representative that he could approach the Ministry of Foreign Affairs and such access was regarded as an *ex gratia* concession and not a right. Provision for such access in like circumstances was made in the Anglo-Swedish Convention of 1952, in addition to a provision entitling the consul to apply to the local and to the appropriate central authorities in connexion with the protection of nationals. In his view, a consul could not become a diplomat and approach the Minister for Foreign Affairs as a matter of course; but he could deal with both the local and the central authorities provided that he confined himself to consular matters.

46. Mr. ŽOUREK, Special Rapporteur, took it that by "central authorities" the members of the Commission meant ministries or other government departments; there was really no difference in that respect between the Ministry of Foreign Affairs and, for instance, the Ministry of Commerce. He thought it would be anomalous if a consul had direct access to the different departments of the central government, whereas the diplomatic mission had access only to the Ministry

of Foreign Affairs. It had been argued that consular business was distinct from political matters; it would be a mistake, however, to suppose that consular business was devoid of political features. But the fact was that despite the examples which Mr. Bartoš had cited, a direct approach by consuls to the central authorities was not the general practice. It had also been argued that it was the character of the matter which would be decisive. The answer to that argument was that consuls could only deal with consular business, which included the protection of nationals, and he did not think that there was any rule of international law giving them the right to approach the central authorities. The Commission could, of course, propose such a rule, and it might be accepted by a majority of governments, but it must realize that the rule would be a new departure in international law.

47. Mr. SANDSTRÖM, referring to the Anglo-Swedish Convention, said that the intention of the relevant provisions in that convention was probably to enable consuls to deal directly with certain branches of the government or with public authorities which enjoyed a large measure of independence. The consul's capacity to make on occasion a direct approach to government departments would depend to a large extent upon the structure of the receiving State's hierarchy.

48. Sir Gerald FITZMAURICE agreed with Mr. Ago that the Special Rapporteur's view would restrict consular protection. In Great Britain a number of authorities were highly centralized, and many matters which were in the consul's competence could not be dealt with except through authorities in the capital. The Special Rapporteur appeared to think that in such cases the embassy should intervene; surely, however, that view conflicted with the spirit of the diplomatic draft, which did not allow diplomatic missions to exercise consular functions involving contacts with local authorities. The embassy would have to approach the competent authority through the Ministry of Foreign Affairs.

49. Mr. BARTOŠ said the fundamental question was whether or not the Commission wished to facilitate the exercise of the consular function. Social insurance and immigration, for instance, were nearly always dealt with by the central organs of the government. Now, if in a country in which the denial of admission to an alien could be challenged by appeals (as was the case in Yugoslavia) that alien's consul were debarred from pursuing the appeal through all the courts, the case would be magnified into an international dispute which would not be in the best interests of good relations between States. On the contrary, consuls should be given every opportunity to have recourse to legal remedies before a case involving a foreign private individual became an international dispute. He proposed that Mr. Ago should be invited to prepare a new text of article 30. He considered that a matter of substance was

involved that should be discussed in the Commission before the article was referred to the Drafting Committee.

50. The CHAIRMAN said that his understanding of Mr. Ago's view was that, if in a consular district there was no local authority competent to act on a matter which the consul had raised, the latter might directly approach the competent organ of the central government.

51. Sir Gerald FITZMAURICE said there was a further point, namely that where a competent local authority did exist in the consular district but the consul had exhausted the local resources, the consul should be able to appeal to a higher authority.

52. Mr. ERIM pointed out that the provisions of article 13 (*Obligation to notify the authorities of the consular district*) as adopted seemed to limit the competence of the consul to his district. The view of Mr. Ago and Sir Gerald Fitzmaurice that the consul should be able to deal with a central authority outside his district was inconsistent with article 13, which would have to be revised if that view was adopted.

53. Mr. YOKOTA felt the question should be considered as a whole. There was general agreement that consuls dealt with local authorities in their district, and could approach the Ministry of Foreign Affairs if there were no diplomatic mission, and he believed that the right to communicate with other authorities should be settled by the law and practice of the receiving State.

54. Mr. AGO said that, in referring to the provisions of article 13, Mr. Erim had raised a delicate point; nevertheless, in practice difficulties would hardly arise. He would not, for instance, think it necessary for the government of the receiving State to inform all its authorities of the consul's appointment. He believed that article 30 could now be referred to the Drafting Committee.

55. Mr. LIANG (Secretary to the Commission) believed that the consul should in general have the right to pursue a matter to the very end in accordance with the law and practice of the receiving State. In the United States, for instance, patents, trademarks and immigration (including the expulsion as well as the admission of aliens) were federal matters, and a consul could do nothing to protect his nationals in those spheres unless he approached the appropriate branch of the central government.

56. The CHAIRMAN proposed that article 30 be referred to the Drafting Committee.

It was so agreed.

The meeting rose at 1.5 p.m.

534th MEETING

Friday, 6 May 1960, at 10 a.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)

ADDITIONAL ARTICLE 30 A

1. The CHAIRMAN drew attention to the draft of a new article, provisionally numbered 30 A, proposed by Sir Gerald Fitzmaurice in the following terms:

"In order to facilitate the exercise of the consul's function of protecting the nationals of the sending State resident or present within his district.

"(a) A consul shall have complete freedom of communication with and access to such nationals, and correspondingly they shall have complete freedom of communication with the consul, and also (unless subject to lawful detention) of access to him.

"(b) The local authorities shall inform the consul of the sending State without delay when any national of that State is detained in custody within his district; and the consul shall be permitted without delay to visit, converse privately with, and arrange legal representation for any national so detained. Any communications from such a national to the consul shall immediately be forwarded by the local authorities.

"(c) Without prejudice to the provisions of paragraph (b) of this article, when a national of the sending state is detained in custody in pursuance of his sentence, the consul within whose district he is detained shall, upon notification to the appropriate authority, have the right to visit him. Any such visit shall be conducted in accordance with the regulations in force in the institution in which he is detained, it being understood, however, that such regulations shall permit reasonable access to and opportunity of conversing with such national."

2. Sir Gerald FITZMAURICE said that his text was largely self-explanatory. Paragraph (a) dealt with freedom of communication between the consul and the persons under his protection. The object of the phrase "unless subject to lawful detention" was to stress that, if a national of the sending State was in prison, the consul could have access to him but that national would not have access to the consul. Paragraph (b) provided for visits by the consul to a national who was detained pending trial, and paragraph (c), which was perhaps the least important, for visits to a national who was in prison under a sentence

against which an appeal might be brought before a higher court, or who was simply serving his sentence. He had drawn upon the phraseology of a number of consular conventions, but did not think that the language used was important; if the substance were agreed the wording could be left to the Drafting Committee.

3. Mr. HSU supported the proposal, subject to possible drafting changes. The text embodied well established principles which were often forgotten in practice.

4. Mr. FRANÇOIS asked whether the provision in paragraph (b) that the consul should be permitted to converse "privately" with a national who had been detained meant that no warder or other prison official should be present, and also whether it was intended that the consul should have the right at all times to visit a national who was in custody.

5. Sir Gerald FITZMAURICE replied that the words "converse privately" in paragraph (b) were not meant to suggest that a warder or other official should not be present. According to the usual practice in most countries a warder was in the room, but the conversation could nevertheless be private. Replying to Mr. François's second question he said that paragraph (c) would not give a consul the unrestricted right to visit a national who had been sentenced, but the intention of paragraph (b) was that there should be no undue delay in allowing the consul to visit a national who had been detained but had not yet been brought before a court.

6. Mr. MATINE-DAFTARY said he was in full agreement with the substance of Sir Gerald Fitzmaurice's proposal, which had its roots in the principle of *habeas corpus* which in English law governed the rights of accused persons and prisoners. He thought, however, that paragraph (b) might in a number of countries conflict with the penal code, for most penal codes drew a distinction between detention for part of the period of investigation, during which the prisoner was often isolated from the outside world in order to ensure that the enquiry was objective and that there was no collusion, solely on the grounds of the seriousness of the charge. It was very doubtful whether governments would accept some of Sir Gerald Fitzmaurice's proposals; for instance it was not always possible to discover the identity or nationality of a person who had been detained, and it would therefore be wrong to impose upon the local authorities an obligation to inform consuls immediately and automatically.

7. Mr. EDMONDS said that, by analogy with paragraph (b), the word "privately" should be added after the word "conversing" in paragraph (c). Unless his conversation with the prisoner were private, the consul could not really give him help or the protection of which he stood in need. A private talk was particularly important in the period after sentence and pending appeal.

He could not agree that in any circumstances a consular visit should be denied if the prisoner were isolated.

8. Mr. VERDROSS expressed the view that Sir Gerald Fitzmaurice's proposal would broaden and strengthen the draft of the Special Rapporteur. A consul should be able to assist his nationals in preparing their defence, not only in the courts of his district but in all courts of law, and accordingly he thought the draft should expressly mention the possibility of an appeal to a higher tribunal.

9. Mr. TUNKIN said he only wished to make a few preliminary remarks as he had not yet had time to study Sir Gerald Fitzmaurice's draft. A consul was an official of a foreign power, whilst the government of the receiving State exercised territorial sovereignty. His first impression was that Sir Gerald's draft went too far in favouring the rights of the sending State, for it conferred very wide privileges which might conflict with local laws and regulations. He did not, at first sight, believe that the Commission should endorse Sir Gerald's view as reflected in the text, nor did he think that the text would be acceptable to a majority of States. Sir Gerald's text went far beyond the provisions of article 24 of the draft on diplomatic intercourse which defined the privileges of diplomats with regard to freedom of movement.

10. Mr. YOKOTA supported the principle embodied in the proposed new article, but agreed with Mr. Matine-Daftary that paragraph (b), in particular the passage "the consul shall be permitted without delay to visit" might conflict with the penal code of many countries. He suggested that the word "undue" should be inserted before "delay".

11. Mr. SANDSTRÖM supported Sir Gerald Fitzmaurice's proposal. Referring to the remarks of Mr. Tunkin and Mr. Matine-Daftary, he said that Sir Gerald's text was in conformity with general practice and covered a situation which was comparable to the relationship between lawyer and client; the lawyer's right to visit his client in prison was universally recognized. It was even more necessary to provide for the consul's right to visit a compatriot who was in prison, for the prisoner might not know the language of the receiving State, and might be ignorant of its law and of the mentality and customs of its people.

12. He doubted whether it was necessary, as Mr. Edmonds had suggested, to add the word "privately" in paragraph (c), since paragraph (b) was concerned with detention before trial and paragraph (c) with imprisonment after sentence.

13. Mr. SCALLE supported both the draft Sir Gerald Fitzmaurice had submitted and the liberal interpretation which Mr. Verdross and Mr. Edmonds had placed upon it. There was undoubtedly some degree of shared sovereignty between the two States concerned. From the very fact that it was the consul's duty to ensure that

the rights of his nationals were respected in the country of residence, it followed that it was one of his essential functions to promote internationalism; moreover, that was a survival from the time when consuls had exercised virtual sovereign jurisdiction over their nationals. It was inevitable, although regrettable, that in special cases, notably in the event of civil war, some temporary police restrictions might have to be accepted, but those should not be allowed to affect the general practice.

14. Mr. ŽOUREK, Special Rapporteur, thought that Sir Gerald Fitzmaurice's proposal went too far. The task of the Commission when codifying international law on a subject where the practice of States varied as widely as it did in the matter now before it was to study bilateral conventions and to see how far it was possible to make their provisions multilateral by incorporating in its draft those principles which imposed the least restrictions on States and which were therefore acceptable to the majority of them. If the Commission followed a different procedure, there was a danger that it would produce drafts which would not be acceptable to governments. Sir Gerald's text went further even than the conventions concluded by the United Kingdom. It was improbable that the great majority of States would accept the right of the consul to visit in all circumstances and at all times a fellow national who was in custody. In the early stages of criminal proceedings there was often a considerable period — as, for example, under the Swiss procedure — in which the *juge d'instruction* could forbid any person to visit the accused. In such circumstances a consul could not claim privileged treatment. Paragraph (b) made no reference to the provisions of municipal law, whereas prison regulations were mentioned in paragraph (c); it was essential that the whole article should be taken as coming under municipal law. He considered that the new draft article should be limited to the defence of nationals before the courts and to communication between consuls and their nationals.

15. Mr. AGO expressed surprise at the number of objections raised to the draft new article, for it was modelled on the corresponding provisions of a number of existing conventions. If consuls had one regular responsibility it was surely the protection of their nationals who were in difficulty; in that respect, their functions differed from those of diplomatic agents. Paragraph (a) of the draft new article was confined to communication or access and the practice which it advocated was so well established that it hardly required express affirmation.

16. So far as paragraphs (b) and (c) were concerned, he said it was true that difficulties might arise if the provisions of the local penal code did not permit prisoners to be visited. The fundamental question was whether there should be a provision making exceptions in certain cases in favour of the consul. He was convinced that such an exception should be made, because a foreigner who was in custody was usually in a more difficult position

than a national of the receiving State, and he (Mr. Ago) thought that the exception might even be made if the penal code of the receiving State required a prisoner to be isolated during the period of interrogation.

17. He thought the draft might be made more acceptable to governments by a few changes in wording. Governments should consider, however, that in accepting a sacrifice of their sovereignty in the matter, they would automatically be obtaining the advantage of reciprocity. That was the main reason for the liberal provisions to be found in many bilateral agreements. He thought the two paragraphs under discussion should deal only with visits to persons detained under the criminal law. It was unnecessary to make special provision for consular protection in civil litigation, as that was covered by the general provision in paragraph (a).

18. Mr. PAL said that he fully appreciated the justice of the principle underlying Sir Gerald Fitzmaurice's draft article, which he strongly supported. He agreed with the views expressed by Mr. Sandström. Some objection had been raised to the provision enabling consuls to converse privately with detained nationals; but article 19 of the Consular Convention between the United Kingdom and Sweden¹ explicitly gave consular officers such powers even when the national was detained for interrogation. A foreign national in such a situation would need to be able to talk and communicate freely with his consul without thereby jeopardizing his defence; justice certainly required that the opportunity for him to do so should be provided by law. Paragraph (c) was likewise derived from article 19, paragraph 3, of the same convention; it had been objected that its provisions found no support in general practice, even though they had appeared in some bilateral conventions, and that, by adopting them for the present draft, the Commission would be raising a bilateral convention to the status of a multilateral one. The Commission accepted the principle because it believed that the convention in question had correctly formulated the law in that particular respect. He did not agree with Mr. Ago's view that the rules under discussion should be made subject to the principle of reciprocity. If the Commission was to accept the provision on the grounds that it was just, then it should be inserted without any bargaining qualification. There should be no suggestion of bargaining in a matter pertaining strictly to justice.

19. Mr. TUNKIN observed that the principles embodied in Sir Gerald Fitzmaurice's draft were unobjectionable, but the discussion showed that the draft itself required amendment. From the legal point of view, it was well known that the practice of modern States was to afford to all aliens virtually the same civil rights as to their own nationals and that aliens would therefore

find all means of redress as open to them as to the nationals of the State of their residence. If the draft article were accepted as it stood, the Commission would be creating a special situation for resident aliens, whereas they should be wholly subject to the laws and regulations of the State of residence. To give consuls the rights suggested, without any reference to local laws and regulations, would be too sweeping. There was also a political aspect. When the Commission had discussed the diplomatic draft, Sir Gerald Fitzmaurice had raised approximately the same point in connexion with diplomatic agents. An animated discussion had ensued, and it had been pointed out that if the Commission was to create rules of general international law, not simply rules for multilateral conventions, it must take the existence of different situations into account. In the draft new article only a certain group of bilateral conventions had been taken into account, and no regard had been paid to another large group in which such provisions did not appear. There might be very strong reasons for the absence of such provisions. Considerations of national security might lead some States to close certain regions entirely to foreign officials. If the Commission accepted the draft article as it stood, many States would be unable to accept it. A reference to the laws and regulations of the receiving States should, therefore, be inserted.

20. Mr. ERIM observed that the principle stated in paragraph (a), of the proposed draft article 30 A was entirely acceptable, but, unfortunately, the actual practice differed from one State to another. As Mr. Tunkin had pointed out, certain States might deny foreign officials access to certain regions for reasons of national security; or they might be refused admittance to certain factories in which their nationals were working as technical advisers. Paragraph (b) should be amended because some codes of criminal procedure provided that an accused person might be held in isolation for a certain period at the beginning of the investigation. Paragraph (c) was acceptable since it contained the phrase "in accordance with the regulations in force". The provision that a consul must notify the appropriate authority before exercising the right to visit a national detained in custody was, however, superfluous, for article 4 (as adopted) of the consular draft provided that one of the principal functions ordinarily exercised by consuls was to help and assist nationals of the sending State. Where a national was in detention a consul would be in much the same position as a defending lawyer. Under the definition of article 4, consuls were bound to help and assist their nationals in civil and administrative as well as penal cases; a reference to that function might be inserted in the draft new article. He could not agree that the new article should refer to the principle of reciprocity. The Commission was preparing a draft code which was intended to set forth rules acceptable to the majority of States; a statement of the principle of reciprocity would be more appropriate in a bilateral convention, and indeed

¹ United Nations *Treaty Series*, vol. 202 (1954-1955), No. 2731, p. 182.

to mention it in the present draft would be tantamount to an invitation to conclude bilateral conventions. He assumed that the proposed article 30 A was concerned only with questions of criminal law, and he felt that for that reason it would be useful to add a sentence referring to the civil and administrative affairs of private persons and to the consul's right to give them advice and assistance in that connexion.

21. The CHAIRMAN, speaking in his personal capacity, said that the draft new article was the outcome of the discussion concerning the right of consuls to communicate with the authorities of the receiving State. It was intended to affirm the right of consuls to communicate with their nationals, and did not confer privileges on aliens in the State of residence. It did not impose on local authorities any duties towards resident aliens which they did not already owe to their own nationals. If the proposed new article were limited to the statement of general principle in paragraph (a), it would be an important step forward, since it asserted that the right of a consul to visit his nationals did not cease by virtue of the fact that a fellow national had been detained, whether for interrogation or after sentence. The right to communicate with the prisoner should, however, be qualified by a statement that the right was exercisable only in accordance with and subject to the general laws and regulations applicable to every person within the territory of the receiving State. If the system of detention *incomunicado* existed, there would also be constitutional guarantees that such detention could not exceed a certain period. If such a regulation existed, it should not be altered for the benefit of aliens. The insertion of a phrase such as "subject to existing laws and regulations" would meet the point raised by Mr. Matine-Daftary. Many governments would be unable to accept in a multilateral convention a provision requiring the local authorities to inform the consul immediately when a national of the sending State was detained in custody. All that the Commission was concerned with was that a consul should not be deprived of access to such a national, the right of access being subject, however, to the general provisions of the municipal law (a proviso which would also cover general regulations enacted for reasons of security or of emergency). With that qualification, he supported the principle underlying Sir Gerald Fitzmaurice's draft new article.

22. Mr. YOKOTA supported the draft new article because the protection of nationals of the sending State was a fundamental consular function. Even if the rules set forth in the draft were not recognized by all States in every particular, the Commission should adopt it, for the sake of the progressive development of international law. He agreed with Mr. Pal that the principle of reciprocity should not be referred to in the article. If it were, a State might lawfully refuse a consul access to a national in custody on the grounds that it did not request the same treatment for its nationals in the other

State. The denial of access would be a violation of international law. If the other State concerned took similar steps, it would merely be acting in reprisal because the receiving State had violated a rule of international law. To apply the principle of reciprocity would frustrate the whole spirit of the article. Furthermore, as the principle of reciprocity might operate in the case of other articles, the Commission should consider the general rule after it had finished drafting the articles, as it had in the case of the diplomatic articles. In paragraph (a) the words "complete freedom of communication" were too strong. Even in the diplomatic articles the phrase used had been "free communication", as also in article 29 of the consular draft. The word "complete" should therefore be deleted.

23. Mr. VERDROSS thought that some misunderstanding had arisen between Mr. Tunkin and other speakers. A consul necessarily acted in accordance with the laws and regulations of the State of residence and could never act contrary to them. He would in fact be assisting his nationals to make use of the remedies available to them under local laws and regulations. The points raised by Mr. Tunkin and Mr. Žourek might be met by reference to local laws and regulations in paragraph (b). If the local laws and regulations did not conform to international law, the only course open to the consul would be to advise his diplomatic mission and the matter would take the form of a diplomatic dispute.

24. Mr. AMADO remarked that the Chairman had covered all the points which he himself had intended to raise and had been entirely correct. He pointed out that it would be wrong to think that consuls were somehow in opposition to the State of residence when requesting to visit a national in detention. Actually, however, consuls would be assisting the State of residence in dealing with an alien who might not be acquainted with the local laws and regulations or even the language. The consul would in fact be collaborating with the local authorities in putting local laws and regulations into effect. The proposed article 30 A was based on the 1952 convention between the United Kingdom and Sweden, a most welcome advance in the legislation on consular relations. The Commission should certainly not retreat from the position set forth in that convention. A consul's right to visit one of his nationals who was in detention could not be refused except while the prisoner was held *incomunicado* for interrogation. The consul should be fully acquainted with the local regulations. The principle of reciprocity could not be disregarded, since it was the very basis of consular relations, but would be out of place in the proposed article. In general, since international law on the subject of consular relations was still in some confusion, the only source for a multilateral convention must necessarily be bilateral conventions. He would support Sir Gerald Fitzmaurice's draft, with the amendments and interpretation suggested by the Chairman.

25. Mr. LIANG (Secretary to the Commission) said that he agreed on the whole with the views expressed by Mr. Amado and Mr. Verdross, but for rather different reasons. Paragraph (a) belonged in the framework of article 30 (*Communication with the authorities of the receiving State*). It was the duty of the receiving State not to impede the consul's communication with the authorities, whether local or, in some cases, central, or with their nationals. Paragraphs (b) and (c), however, referred rather to the consular function of protecting nationals, defined in article 4 of the consular draft as "to help and assist". Although communication was involved, the content of those paragraphs went much further. While the substance was unobjectionable, the provision requiring the local authorities to inform the consul when any national of the sending State was detained in custody within his district might, if the draft was approved, call for the amendment of the code of criminal procedure of some States. In any case, paragraphs (b) and (c) would be given more weight if they were separated from paragraph (a) and amended as the Chairman had suggested.
26. Mr. BARTOŠ expressed strong support for the proposed article 30 A, the provisions of which specified the duties of States in the matter of the right of communication between the consul and his nationals. Such communications took the form not only of correspondence but also of actual contact between the consul and his nationals. In Yugoslavia, the question had been the subject of much discussion among international lawyers and criminal lawyers, and they had concluded that the great majority of States recognized the right of free communication between a consul and his nationals (subject of course, to exceptions in time of war).
27. It was true that certain systems of criminal procedure, as for example that applied in the Canton of Geneva, empowered the examining judge (juge d'instruction, to order the close or secret confinement (*mise au secret*) of an accused for a specified period and even to bar visits by the accused's lawyer. Where such confinement was allowed under the applicable system of criminal procedure, it should be recognized that the consul had at least the right to see the accused in the presence of the examining judge. In that way the consul could satisfy himself as to the state of health of his national and help him to obtain legal assistance, even if he could not confer with him.
28. The proposed provision was intended to safeguard human rights and the protection of those rights, particularly where the interests of justice were at stake, should prevail over purely national interests.
29. Not only for reasons of principle, but also for practical reasons, consular intervention was often essential, for example where there were language difficulties. In that connexion, he cited the case of two Yugoslav seamen who had been sentenced by a Chinese court for a crime which, according to other members of the crew of the Yugoslav ship, they had not committed. Without wishing to express an opinion on the question of guilt or innocence, he said it was apparent that the seamen had had no common language with their judges; the seamen did not know Chinese, and their language was unknown to the court. Requests by Yugoslav authorities for a copy of the judgement and for information regarding the language in which the accused had been examined had been rebuffed on the pretext that they constituted an interference with the internal affairs of China.
30. With regard to the provision contained in the first sentence of paragraph (b) of article 30 A, he pointed out that the practice in the majority of States was to inform the consul on the same day on which one of his nationals had been arrested.
31. As to the principle of reciprocity, he said it was very difficult to see how it could be introduced into the proposed article. The article was concerned with a fundamental institution of public international law: the right of consular protection. That right could not very well be made subject to reciprocity.
32. Mr. HSU asked for the date of the case cited by Mr. Bartoš, and also whether it had occurred on the Chinese mainland.
33. Mr. BARTOŠ replied that the case had occurred some two years previously on the Chinese mainland.
34. Mr. AGO, referring to the remarks of Mr. Pal and Mr. Yokota, said that he had not wished to suggest the introduction of a provision concerning reciprocity into the draft. He had merely said that any surrender of sovereign prerogatives which a State might consent to by accepting the principle embodied in the proposed article 30 A would be compensated by the reciprocal advantages to be derived from its provisions.
35. With regard to the objection that article 30 A might interfere with the application of certain provisions of criminal law concerning the close confinement of an accused or with security regulations regarding access to certain areas, he urged the Commission to remember that the main purpose of the rules of international law in the matter of consular protection was to provide assistance to persons in distress in a foreign country. The terms of article 30 A should give expression to that basic purpose rather than emphasize the protection of the interests of the receiving State in exceptional situations. He agreed with Mr. Tunkin's remark that the articles of the draft should formulate rules of general international law and that they were not intended to constitute clauses of a model multilateral treaty. He could not, however, agree that all the rights expressed in article 30 A should be made subject to the provisions of the laws of the receiving State, whatever they might be, for such language would defeat the whole purpose of article 30 A.
36. The provisions of article 30 A were drawn from the consular convention of 1952 between

the United Kingdom and Sweden, but that consular convention was by no means exceptional in that regard. Similar provisions were contained in the consular conventions signed in 1948 by Costa Rica and the United States of America, in the same year by the Philippines and Spain and in 1954 by the United Kingdom and Italy. All those States were interested in safeguarding their sovereignty but had nonetheless found it possible to accept provisions of the kind in the interests of the protection of individuals who experienced difficulties in a foreign country.

37. He agreed with the remarks of the Secretary regarding the context of article 30 A. The Drafting Committee would decide the appropriate context, probably after article 4. He could not, however, agree to any separation of paragraph (a) from the other two paragraphs of article 30 A. The three paragraphs were closely interrelated and all three concerned the assistance of the consul's nationals.

38. Mr. SCELLE said that it would be a grave mistake to whittle down consular protection in the name of the equality of aliens and nationals. In the remote past, aliens had been denied all rights in France. With the development of international law, it had now become possible to think of aliens as entitled to the benefit of human rights, even before the draft international covenants on human rights had been adopted. In that connexion, he felt that international law could lay down special rights and privileges for aliens which nationals did not always possess or did not possess as yet. He rejected, however, any suggestion that the draft new article should be based on reciprocity; a consul had an unqualified right under international law to protect the nationals of the sending State.

39. Nothing would be achieved by endeavouring to take into account the provisions of the various national legislations. It was the duty of the Commission to formulate the rule of international law in the matter, not to produce an international law which could be adapted to the laws of every other State.

40. To state in absolute terms that consuls must always comply with the laws of the receiving State in the exercise of their duties of protection would in his view be a grave mistake.

41. Mr. EDMONDS expressed concern at the resistance which the proposed new article had met and said that the protection of human rights by consuls in respect of their nationals should be the primary consideration for the Commission.

42. The fact that, under the laws of some States, it was possible to isolate an accused person from his own lawyer was all the more a reason to safeguard the right of his consul to visit him. In many respects, to a person who was often ignorant of the local language and laws, a visit by his consul was more important than that of a lawyer.

43. The provisions of paragraph (c) regarding a person serving a sentence were useful both in the

case of a prisoner wishing to appeal from his sentence and in that of a prisoner serving a final sentence. In the latter case, the form and rigour of imprisonment was a subject on which the prisoner might well need the advice of his consul.

44. Mr. TUNKIN said that he could not accept Mr. Scelle's argument, which was based on the erroneous assumption that the development of international law justified the establishment of a privileged situation in favour of aliens.

45. In his opinion, the principle, so strongly upheld by the Latin American States, of the equality of aliens and nationals came much closer to modern realities.

46. Reference had also been made to the growth of the idea of human rights. In that regard, too, it was certain that the formulation of covenants on human rights could only proceed on the basis of the equality of aliens and nationals.

47. The questions raised by the proposed new article were of vital importance to the whole draft and it would be advisable to give members of the Commission time to study the text more thoroughly and to introduce the necessary amendments.

48. Mr. MATINE-DAFTARY said that like Mr. Scelle, he would have been wholeheartedly in favour of the proposed new article if the Commission's draft were to constitute a model, as had been the case with the draft on arbitral procedure. In the present case, however, the Commission was expected to prepare a draft convention for submission to governments, and in order that its draft should receive general acceptance, its provisions should be more flexible, as had been suggested by Mr. Ago. In the first place, the local authorities should be required to inform the consul of the arrest of one of his nationals only if the national concerned so requested; it would be going too far to impose that duty on the local authorities as a matter of course. Secondly, some allowance had to be made for the fact that the rules of criminal procedure of many countries made it possible to prevent all communication between the accused and outside persons for a specified period while the investigation was proceeding. During that time, even the consul could not have a private interview with the accused person. In his country as in France the accused person was assisted by his counsel which often led to the confidential nature of the enquiry being abused. The principle that that preliminary investigation was confidential had been adopted by the codes of all civilized countries and had been made still more strict in the new French code. The accused person, however, always had the right of appeal.

49. The CHAIRMAN said that the differences of opinion within the Commission concerned not so much the actual text of the proposed new article as its interpretation.

50. He cautioned the members of the Commission against generalization. It was not possible to regard always an alien as a helpless person lost in foreign surroundings; in some cases, a foreign

resident of long standing was fully conversant with the language, laws and customs of the State of his residence. In the treatment of aliens, it was essential to avoid not only discrimination against them, but also discrimination in their favour. The fact that the right of communication was exercised subject to the observance of the laws of the receiving State did not, of course, mean that that State could, by its legislation, prohibit all communication between a consul and his nationals.

51. For his part, he agreed with all the principles embodied in the proposed new article, but doubted whether some of its provisions would be acceptable to governments. For example, some governments might not be prepared to accept it as a general duty of the receiving State to inform the consul of the sending State when any of his nationals were detained. Another possibility might be to state that, wherever the person detained so requested, his consul should be notified.

52. Lastly, the right of protection could not be interpreted as prevailing over the rules of municipal law concerning such matters as criminal procedure and security regulations in the vicinity of zones where there were atomic plants.

The meeting rose at 1.10 p.m.

535th MEETING

Monday, 9 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 (A/CN.4/L.86) (continued)

ADDITIONAL ARTICLE 30 A (continued)

1. The CHAIRMAN invited the Commission to continue its debate on Sir Gerald Fitzmaurice's draft new article 30 A.

2. Sir Gerald FITZMAURICE said the discussion had clearly shown that a great many members agreed that a provision along the lines of his article 30 A should be included in the draft. At the same time, the desire had been expressed that some measure of flexibility should be introduced into the wording of the article. He was prepared to give satisfaction to some extent to that desire provided that it could be done without detriment to the basic principle which the article enshrined.

3. It had been pointed out that the proposed new article could give rise to difficulties because its provisions might conflict with municipal law. He could not accept the implication that a provision should not be included in the draft merely because

it might call for some change in the municipal law of some participating countries. A treaty would serve no useful purpose if it contained only provisions which conformed with the existing law and practice of the participating countries; the whole point of signing a treaty was that it would involve some change for at least certain of the contracting parties.

4. Nor could he accept the suggestion that the whole draft article should be made subject to the provisions of the municipal law of the receiving State. Such an approach would completely nullify the purpose of his proposal. That consideration was particularly important because the provisions of his text were designed to prevent the circumvention of certain basic principles of justice which were safeguarded by international law.

5. Some members had expressed the view that his proposal embodied an innovation; others had rightly pointed out, in reply, that the proposed text was already included in a large number of existing consular conventions. In fact, there was an even more profound reason to justify the proposal: consular conventions contained a provision of the kind because under customary international law the receiving State had an obligation to respect the consul's right of access to his nationals and a duty to advise the consul whenever one of them was arrested. From his experience of over thirty years as legal adviser to a government, he could state that the failure to observe those obligations was a prime cause of friction between countries and a source of frequent incidents and much controversy. Accordingly, the Commission would be doing a real service to the international community by including in the consular draft definite provisions to deal with the matter.

6. With regard to the opening words of paragraph (b) he said he was quite prepared to accept some modification of language; nevertheless, he thought that it would not be sufficient merely to set forth the right of the foreign national concerned to request that his consul be informed of his arrest. In many instances, particularly in the case of a foreign visitor or temporary worker, the alien concerned had little knowledge of his rights and was unlikely to be aware of the provisions of a consular convention applicable in his case. In addition, even in highly developed countries, local authorities could in practice be indifferent to, or even ignorant of, any duties they might have under a consular convention. It was necessary to safeguard the right of protection in an effective manner and, to that end, the government of the receiving State should have at least an obligation to ensure that the local authorities took steps within a reasonable time to inform the consul of the arrest of one of his nationals.

7. Some speakers had referred to the questions of human rights and treatment of aliens which were indirectly affected by his proposal. In that connexion, he emphasized that his proposal, like the analogous provisions of consular conventions, related to the basic function of the consul to protect his nationals vis-à-vis the local authorities.

That was one of the main reasons for the existence of consuls, and a consul's duties in that regard could not be carried out effectively unless his right of access to his nationals, and the right of those nationals of access to him, were safeguarded. And it was precisely when one of those nationals was under arrest that the question of safeguarding those rights became vital.

8. To regard the question as one involving primarily human rights or the status of aliens would be to confuse the real issue. In that connexion, some members had expressed the view that an alien's right could not be greater than those of a national of the receiving State. In reality, the object of his proposal was to ensure that an alien had rights equal with a national's in the circumstances covered by the text. A foreign resident of long standing might, of course, have a sufficient knowledge of the local language, customs and laws, but normally an alien was at a disadvantage compared with the local inhabitants. His knowledge of the language was often inadequate, as was his knowledge of the local administration, customs and laws; he was often unaware of his rights and had no family or friends to arrange for his defence. It was only by means of the effective exercise of consular protection that he could expect to be placed in a position comparable to that of a national of the receiving State.

9. Of course, administrative difficulties might arise for certain countries with regard to some of the proposed provisions and he was quite prepared to accept drafting changes to meet those difficulties, provided that the basic principle of the proposal was maintained.

10. He agreed with those members of the Commission who felt that consular protection could not, in the draft under consideration, be based on the principle of reciprocity. Some countries had a greater interest in the subject than others because many of their nationals travelled or temporarily resided or worked abroad. The best course would therefore be to allow the normal rule to operate — viz., that where a country did not carry out a provision of a convention, it would naturally be estopped from invoking that provision against other participating countries.

11. With regard to the placing of article 30 A and to the remarks made on that question by the Secretary to the Commission, he agreed with Mr. Ago that, while the proposed new article might be better placed elsewhere in the draft, its three paragraphs were interdependent and should be kept together.

12. He agreed that the consul's right to protect his nationals and arrange for their legal representation existed also in civil proceedings. The reason, however, why that right, which was inherent in the general right of protection, was generally not mentioned in consular conventions was that an explicit provision on the subject was really unnecessary. A person involved in civil litigation was at liberty and could therefore make arrangements for his legal representation and apply to his consul

for help and advice. The position was, of course, altogether different in the case of criminal proceedings; the alien concerned was under arrest and would not, in the absence of express provisions, be free to communicate with his consul.

13. The Special Rapporteur had pointed out that the matters dealt with in the proposed new article were covered by the general terms of article 4 on consular functions (A/CN.4/L.86). Actually, article 4 dealt with the substance of the right of protection, whereas the proposed article 30 A was of a procedural character; its provisions were intended to provide a consul with the means of carrying out the function of protection set forth in article 4. It was not enough to proclaim the right of protection; that right could be frustrated or nullified by the local authorities if it were possible for them to cut off all communication between a consul and his nationals.

14. Mr. ERIM said he fully agreed with Sir Gerald Fitzmaurice that the proposed new article 30 A dealt with the rights and duties of consuls and not with the protection of human rights or the status of aliens. If the subject under discussion had been the protection of human rights, he (Mr. Erim) would not have hesitated to advocate the grant of those rights in their most advanced form and the taking of the most effective possible measures to protect them. But the discussion should be confined to the basic purpose of the proposed provision and should not be broadened to cover other subjects which were involved only incidentally in the proposed provision.

15. Secondly, he also agreed with Sir Gerald that the provisions of the proposed new article could not be made subject to municipal law. The proposal reflected certain existing rules of customary international law which should prevail over the national legislation of participating States.

16. While he thus agreed with the substance of the proposal, he considered that some of its more particular provisions should be expressed in less categorical terms. The consul's right of access to his nationals, set forth in paragraph (a), could not be stated in absolute terms. The person concerned might, for example, be engaged on defence work and hence be resident in an area to which access was restricted or prohibited for security reasons. In a case of that kind, it should be specified that the person concerned had the right to go and see his consul if his consul could not go and see him in the prohibited area.

17. As to the duty of the local authorities, under paragraph (b), to inform the consul of the arrest of one of his nationals, he said he would go so far as to suggest that the local authorities should be required to inform the consul of the arrest immediately. However, with regard to the right of access, he considered that some allowance should be made for the secrecy of the early stage of the investigation under the laws of criminal procedure of certain countries, where major crimes were involved. Perhaps the best solution would be to specify a time limit of, say, one or two days

beyond which the consul could not be denied access to the prisoner.

18. Lastly, in paragraph (c), he saw no reason why the consul's right to visit one of his nationals who was in custody should be conditional "upon notification to the appropriate authority". The opening words of the next sentence ("Any such visit shall be conducted in accordance with the regulations . . .") were surely quite sufficient, and there was no need to specify a separate obligation for the consul always to notify in advance the appropriate authorities of his intention to visit his national in custody.

19. Mr. ŽOUREK, Special Rapporteur, said that after listening to the discussion on the draft new article [30 A] proposed by Sir Gerald Fitzmaurice, he wished to propose a compromise text in the following terms :

"Communications with nationals of the sending State"

"In order to facilitate the exercise of the consul's function of protecting the nationals of the sending State resident or present within his district :

"(a) A consul shall, subject to the provisions of article 46 of these draft articles, have freedom of communication with and access to such nationals, and they shall have freedom of communication with the consul, and also (unless subject to detention) of access to him;

"(b) When a national of the sending State is committed to custody pending trial, or to prison, within the consular district, the local authorities shall be bound to notify the competent consul of the sending State if the person in custody or imprisoned so requests. The consul shall be permitted to visit a national of the sending State who is in custody or imprisoned and to arrange for that national's representation in court in conformity with the law of the receiving State."

20. He had been rather disturbed that the discussion had gone beyond what seemed to him the proper province of consular law and had impinged upon such matters as human rights and the legal status of aliens in a State. There was, of course, no question about the right of consuls to communicate with their nationals, but he had been surprised to note that some members of the Commission apparently thought it unnecessary to add a provision concerning respect for the receiving State's laws in terms similar to those used in the diplomatic draft. It was inconceivable that governments would accept a provision purporting to entitle a consul to see a prisoner in defiance of the local law. Because the Commission had decided that the consular and diplomatic drafts should, where such a course was warranted, be consistent, *inter se*, he had included in his draft article 46 (*Duty to respect the laws and regulations of the receiving State*) a parallel provision to that contained in article 40 of the diplomatic draft; and the new article 30 A he was now proposing contained a cross-reference to draft article 46.

21. In his draft of article 30 A he had combined paragraphs (b) and (c) of Sir Gerald Fitzmaurice's draft because there did not appear to be any real

distinction, so far as the consul's prerogatives were concerned, between a national who was in custody pending trial and one who had been sentenced. The main difference between his and Sir Gerald's draft was that, under his own text, the exercise by the consul of the right granted to him by the article in question was made dependent on the municipal law of the receiving State. Again, under his text, the local authorities' duty to inform the consul would be subject to the request of the national detained: he had inserted that provision because, during the discussion, some members of the Commission had requested it. Paragraph (c) of Sir Gerald Fitzmaurice's draft referred to prison regulations; he (Mr. Žourek) considered that the text should expressly provide that visits and arrangements for representation in court were governed by the law of the receiving State.

22. Mr. BARTOŠ expressed his appreciation of the spirit of compromise in which the Special Rapporteur had prepared a new draft of article 30 A. However, it must be recognized that compromises were sometimes unacceptable because they would conflict with vital principles at stake. Sir Gerald Fitzmaurice had explained why he believed that it should be the duty of the authorities of the receiving State to notify the consul of the detention of a national, and that such notification should be independent of the prisoner's request. If the local authorities had no duty to inform the consul unless requested to do so by the prisoner, the whole principle of consular protection would be undermined. It should normally be possible to inform the consul of the arrest within three hours by telephone or otherwise; if it took forty-eight hours for the local authorities to inform the magistrate and another three days for the magistrate to inform the consul, there would often be a disastrous delay in preparing a prisoner's defence.

23. In his opinion, there were two considerations involved. Firstly, the Commission's definition of the consul's functions should be comprehensive. A code such as the Commission was preparing was an integrated whole and in its definition of the consular functions the human rights of a foreigner could not be ignored, for it was precisely one of the consul's functions to protect those rights of his nationals. Secondly, while it was of course correct, as the Special Rapporteur had said, that the consular draft should take into account the corresponding provision of the draft on diplomatic intercourse, it was no less true that, both in diplomatic and in consular relations, international law prevailed — in case of conflict — over municipal law. Naturally, the receiving State would decide its own procedure and regulations, but they could not supersede the provisions of the international code of consular intercourse. Consular visits to nationals who had been detained must take place in accordance with the receiving State's regulations governing the arrangement of the visit, but those regulations must not stop the visit. The competence of the receiving State in that respect

was in fact limited by international law. Concluding, he said he would be prepared to support Sir Gerald Fitzmaurice's draft or a draft which combined Sir Gerald's with the Special Rapporteur's.

24. Mr. VERDROSS said that legal representation was a general right of foreign nationals who had been detained and it could not be made dependent on their request for consular assistance. Foreigners were often ignorant of their rights under consular treaties. The local authorities should have the responsibility of informing the consul of the arrest of one of his nationals without awaiting a request from the prisoner. He could not, therefore, approve the qualification in paragraph (b) of the Special Rapporteur's draft which read "if the person in custody or imprisoned so requests".

25. Mr. SCELLE agreed with Mr. Bartoš that the protection of individual and human rights was one of the consular functions. Inasmuch as the status of aliens was governed by law, and was not merely a de facto status, and as, in case of conflict, international law prevailed over municipal law, any local law that hampered the consul in his exercise of the essential function of protecting his fellow citizen's human rights in the receiving State would be superseded by the rules of international law as embodied in the Commission's code. Indeed, he would go so far as to say that a consul could provoke an international debate on the validity of a local law which conflicted with a principle of international customary or treaty law.

26. Nor did he think that the Commission should be influenced too much by the chances of its draft of securing the acceptance of a majority of governments. It was open to governments at any time to enter into bilateral agreements. But it was the Commission's duty to codify and also to promote the progressive development of international law.

27. Mr. TUNKIN said he was broadly in agreement with the view expressed by previous speakers concerning the relationship between international and municipal law. If the law of the receiving State concerning the matter under discussion conflicted with international law, that State's international responsibility might well be engaged; he thought, however, that that problem exceeded the scope of the Commission's draft.

28. There was both a national and an international aspect to the matter of communication between a consul and his nationals. The consul's protection of his nationals in his consular district was an international function, and the consul certainly should have the means of carrying out that responsibility — a rule which all States did in fact observe. On the other hand in communicating with his nationals and in arranging for their defence the consul had to respect the regulations in force in the receiving State. He thought that idea was very well expressed in article 10 of the Havana Convention of 1928.¹ The provisions of

that article were obviously regarded as being in keeping with existing international law. The legislation of all countries recognized the principle of communication between the consul and his nationals, but nevertheless in the codes of some countries there were restrictions which governed the procedures to be followed. The question was whether the Commission should depart from those accepted principles of international law. He did not believe that the suggestion that consuls should have complete freedom, and hence were not necessarily bound to observe the local legislation or procedures, would be generally accepted. He suggested that a formula might be found which would give expression to the principle of freedom but which would at the same time oblige the consul to respect the laws and procedures of the receiving State. The Special Rapporteur's new draft appeared to come nearer to that idea than Sir Gerald Fitzmaurice's, but he personally still had an open mind.

29. He doubted whether the majority of States would accept the proposition that it was the receiving State's duty to inform the consul immediately when one of his nationals was detained. On the other hand he questioned the wisdom of including the phrase "if the person in custody or imprisoned so requests", as the Special Rapporteur had done in paragraph (b) of his draft article.

Tribute to the memory of Sir Hersch Lauterpacht

30. The CHAIRMAN announced that news had just been received, in a telegram addressed to Sir Gerald Fitzmaurice, of the sudden death of Sir Hersch Lauterpacht, whose works and teaching were so well known to every student of international law.

The members of the Commission observed a minute of silence in tribute to the memory of Sir Hersch Lauterpacht.

31. Sir Gerald FITZMAURICE expressed his gratitude for the Commission's tribute to one whom, he believed, all who had known him had regarded as a truly great man. Sir Hersch had been brought up in the brilliant school of Austrian jurists, but had moved to England after the First World War as a result of painful circumstances, in which he had lost most of his family. For the remainder of his life he had made England — where he had become a naturalized British subject — and particularly Cambridge, his home, and had not relinquished his ties with the University of Cambridge even on his election to the International Court of Justice. Sir Hersch had taught brilliantly at the London School of Economics and at Cambridge, where he had held the Whewell Chair of International Law, in which he had been preceded by Lord MacNair. Hardly any man had made an equal impact on the study of international law during his lifetime, both as a writer, as a teacher and as a judge of the International Court, and no one had better combined great knowledge of the law, the deepest integrity and broad humanity. Both he (Sir Gerald) personally and the United Kingdom owed a very great deal

¹ League of Nations *Treaty Series*, vol. CLV (1934-1935), No. 3582, p. 297.

to Sir Hersch Lauterpacht, and his country was proud to be able to claim him as one of its nationals.

32. Mr. SCELLE said that, as a Frenchman and a professor of international law, he wished to express his esteem and friendship for Sir Hersch Lauterpacht and his widow. He hoped that Sir Gerald Fitzmaurice would transmit to Lady Lauterpacht his deepest and most sincere condolences.

33. Mr. LIANG (Secretary to the Commission), speaking as a representative of the United Nations Secretariat, expressed his deep regret at the passing of Sir Hersch Lauterpacht. Sir Hersch had been associated with the Commission's work even before its establishment, for he had been the author of a memorandum issued by the Secretariat comprising a survey of the topics suitable for codification by the International Law Commission. Sir Hersch had been a member of the Commission from 1952 to 1954 and its Rapporteur in 1953. The Commission's report from 1953 had been distinguished by unrivalled scholarship.

34. Mr. BARTOŠ said that only two days previously he had received a letter from Sir Hersch Lauterpacht from London on a matter they had been discussing, so that the news of his death had been a particularly unexpected blow. As a member of the Commission and a Yugoslav jurist, he wished to pay a particular tribute to the judge, the jurist and the man so greatly esteemed by all students of international law in Yugoslavia. Sir Hersch Lauterpacht's edition of Oppenheim was regarded in Yugoslavia as a classic.

35. Mr. VERDROSS recalled that Sir Hersch Lauterpacht had received his first doctorate of law from the University of Vienna. As the greatest modern authority on international law and as a very noble personality, Sir Hersch had been universally admired and respected.

36. Mr. AMADO said that the late Sir Hersch Lauterpacht had been a giant in the world of international law. On occasions when his views had been disputed, Sir Hersch had brought all his vast erudition to bear on all arguments to see whether his own views would stand improvement or correction. It had not been merely his erudition that had been so striking, but also his supreme quality of integrity and clarity of mind. He wished to pay a heartfelt tribute to Sir Hersch Lauterpacht on his own behalf and on that of Brazil.

37. Mr. EDMONDS associated himself with the tributes paid by members of the Commission to the late Sir Hersch Lauterpacht. He had enjoyed Sir Hersch's friendship as a fellow member of the International Law Commission and had found him always friendly, simple and gracious. Sir Hersch's professional talents were held in no less esteem in the United States than in the United Kingdom and were especially respected and admired by those in the State Department responsible for dealing with matters of international law. Sir Hersch had contributed as much to the study of international law as any jurist

in modern times. His sudden death was a grievous loss to his friends and to all scholars in the subject which he had pursued with distinction for so many years.

38. Mr. AGO said he had been honoured to enjoy the friendship of so great a man as Sir Hersch. When he had spent some days at Sir Hersch's home at Cambridge, he had been greatly struck by the exceptionally candid way in which it had been possible to communicate with him. International jurists had lost a master, but — what was sadder — they had lost a friend.

39. Mr. HSU deplored the passing of a great scholar and a warm-hearted man who had stood for ideals of which the world was so greatly in need at the present time. Sir Hersch's death was a great loss not only to international law in particular, but to the world in general.

40. The CHAIRMAN, speaking in his personal capacity, recalled the affection and admiration in which Sir Hersch Lauterpacht was held by students of international law in Mexico. It had been his ambition when young to travel to England and to study under Sir Hersch, and he had in fact been privileged to study under him at the London School of Economics. Many years later, he had received letters from Sir Hersch which he had always cherished. He wished to pay to the memory of the late Sir Hersch Lauterpacht a tribute on his own behalf and also on behalf of Mexican jurists, whom Sir Hersch had so greatly influenced.

41. Mr. PAL said that the sad news had come as a severe blow. He had known Sir Hersch Lauterpacht intimately since 1953. He wished to associate himself with the tributes paid by the previous speakers, and would suggest that, out of respect for the memory of Sir Hersch Lauterpacht, the meeting should adjourn.

42. The CHAIRMAN said that he was sure that the Commission would wish him to transmit its condolences to Lady Lauterpacht and to comply with Mr. Pal's suggestion.

The meeting rose at 5.30 p.m.

536th MEETING

Tuesday, 10 May 1960, at 10 a.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)

ADDITIONAL ARTICLE 30 A (continued) *

1. The CHAIRMAN invited the Commission to continue its debate on the two texts for a new

* Resumed from the 535th meeting.

article 30 A proposed respectively by Sir Gerald Fitzmaurice (534th meeting, paragraph 1) and the Special Rapporteur (535th meeting, paragraph 19).

2. Mr. PAL said that the Special Rapporteur's draft for a new article 30 A brought up the controversy as to the interrelationship of national and international law. There could be no doubt that international must always prevail over municipal law, but that was not the point in the present context. The Commission was trying to discover what the rule of international law was with regard to communication of consuls with nationals of the sending State. Two main divergent views had been expressed, one by Sir Gerald Fitzmaurice and the other by Mr. Tunkin. The Special Rapporteur's draft article was a compromise, but, by its very caution, it seemed in effect to deny the existence of a rule of international law by its cross-reference to article 46 and by its requirement that the request should come from the national; the implication was that the consul's very freedom of communication — a recognized principle of international law — would be subordinated to respect for the laws and regulations of the receiving State. Certainly, if the Special Rapporteur's text correctly stated the rule of international law, the Commission must accept it, but that was precisely the point to be settled. He preferred Sir Gerald Fitzmaurice's draft, which was based on recent practice. Although the practice did not necessarily amount to a rule of customary law, that draft would at least be more conducive to the progressive development of international law, bearing in mind the fact that, owing to the ever-growing number of functions which they had to perform on behalf of the State, it was necessary to give consuls a legal standing which adequately reflected their status as officials and their increasingly representative character.

3. Mr. TUNKIN said that he believed that there had been some misunderstanding by previous speakers who had claimed that any reference to the law of the receiving State would virtually deny the existence of a rule of international law. References to municipal law occurred very frequently in many international agreements. That was quite natural because all rules of international law were bound by their very nature to be extremely general and could not make provision for all the different situations which might arise. The usual practice was therefore that certain principles of international law when applied within States were applied in accordance with the national legislation. That obviously did not mean that a national law could negate international law. The Commission was trying to find a formula corresponding to existing practice; if it wished to change that practice, it must state so explicitly. No one, however, had proved that the existing practice needed to be changed or that any disputes between States had arisen on that particular point. Since the existing practice was satisfactory, the Commission should accept it; all it had now to do was to express in legal language what had to a very great extent become a rule of customary international law. The

principle of international law was that the consul had the right to communicate with his nationals within his consular district. The practice was that he exercised that right in conformity with the laws and regulations of the receiving State. Both the principle and the practice should be clearly stated. If a consul was entitled to disregard national laws and regulations, he would become a supra-national official. Even representatives of the international organizations had no such right; and a consul was merely the representative of the sending State. The Special Rapporteur's draft might not reflect the principle in the best possible way; a new formulation might be worked out, but, in any case, the text should contain some reference to the law of the receiving State.

4. Mr. AGO observed that the discussion was becoming diffuse and concerned with general considerations which were not entirely relevant. Mr. Tunkin had rightly said that a consul could never consider himself free to disregard the laws and regulations of the receiving State and that no disputes had ever arisen on that subject. An allusion had been made to the possibility that municipal law might be in conflict with international law, and that, if so, a consul should refuse to comply with the municipal law. It was, however, doubtful not only whether that would be acceptable from a legal point of view, but also whether such a situation could arise in practice, since the local authorities would certainly oblige the consul to comply with the local regulations. The consul might protest, but the most that he could do would be to ask his government to raise the matter at the international level. The Commission's task was to lay down a rule of international law ensuring that municipal legislations would provide for the right of consuls to communicate with their nationals, especially when the latter were detained in custody. In general, that right was undisputed, and on that point the drafts submitted by Sir Gerald Fitzmaurice and the Special Rapporteur were at one. The fact that the right was stated in two paragraphs in Sir Gerald Fitzmaurice's draft and in one paragraph in the Special Rapporteur's draft was essentially a difference in drafting. So far as substance was concerned, however, the Special Rapporteur's draft left too much freedom to the local law. Sir Gerald Fitzmaurice's intention with which several members of the Commission agreed, was precisely that of ensuring that consuls were empowered by the local law and regulations to communicate with nationals detained in custody. In fact, Sir Gerald's draft qualified the consul's right to visit such prisoners by the phrase "in accordance with the regulations in force in the institution in which (the national) is detained". Consequently, the intention was not to enable the consul to act in any way incompatible with local laws and regulations, but to ensure that the local authorities would be obliged under those laws and regulations to give foreign consuls reasonable opportunities of visiting nationals of the sending State who were under detention. A formula should be found to express the two

principles, firstly that consuls must comply with local laws and regulations, and secondly that the local authorities must give the consul reasonable access to a national of the sending State held in custody.

5. Mr. SCELLE pointed out that no speaker in the debate had meant to imply that a consul could take it upon himself to violate local laws and regulations which he believed to be contrary to international law. All he could do would be to advise his superiors of his opinion. The draft prepared by the Special Rapporteur was, unfortunately, not acceptable. What it gave with one hand it took away with the other. The phrase "subject to the provisions of article 46 of these draft articles" denied the unfettered right of the consul's access to his fellow-nationals. The phrase "unless subject to detention" implied precisely the opposite to the whole intent of Sir Gerald Fitzmaurice's draft. The phrase "if the person in custody or imprisoned so requests" deprived such prisoner of all recourse if he failed to make such a request, or, indeed, if he were unable to do so because he was held *incomunicado*. The whole practice of holding persons *incomunicado* was odious and barbaric, and amounted to a form of torture. Except in a few very special cases where it was used at the beginning of criminal proceedings and then only for a very short period, it must be condemned as a violation of human rights. In any case, contrary to what some people had asserted, there was in his opinion no great difficulty in stating what were the rules of international law on the subject. Even at the present time a State might, unfortunately, behave as it pleased with its own nationals, since they were its subjects, but he did not consider that international law should countenance such a state of affairs. To detain aliens in isolation for more than a very brief period was a clear violation of international law. Although a consul could not, of course, evade compliance with local regulations of purely minor importance, he (Mr. Scelle) could not agree that a consul should be compelled to abide by the provisions of any national laws which might be against humanity.

6. Mr. YOKOTA observed that the Commission had been discussing articles 30 and 30 A for four meetings. It was high time to refer article 30 A to the Drafting Committee. Two proposals had been placed before the Commission, both conceived on more or less the same lines. On that basis the Drafting Committee might be able to work out a formula satisfactory to many, if not all, members of the Commission. On three points, however, which involved matters of principle, opinion was divided. First, the clause in paragraph (a) of the Special Rapporteur's draft "subject to the provisions of article 46 of these draft articles", or, in other words, the consul's right to free communication with his nationals subject to the laws and regulations of the receiving State, a principle which had not been included in Sir Gerald Fitzmaurice's draft. Second, the final phrase, in paragraph (b), "if the person in custody or imprisoned so re-

quests", making the obligation of the authorities of the receiving State to notify the consul of the detention dependent on the will of the person in custody and implying that if he made no such request the local authorities might not have to inform the consul. Third, the phrase "in conformity with the law of the receiving State", which was a matter of the relationship of national to international law. The differences on the first and third points might be reconciled by a provision such as that in the final sentence in paragraph (c) of Sir Gerald Fitzmaurice's draft, but the second point would have to be settled by the Commission.

7. Mr. MATINE-DAFTARY agreed with Mr. Yokota that article 30 A should be referred to the Drafting Committee. Since, however, certain divergences persisted, the Commission should first settle certain questions, since the Drafting Committee could hardly work out a compromise. Those questions were: first, whether the authorities must notify the consul automatically when one of his nationals was detained or whether such notification should be dependent on the request of the person detained; second, where a judge had decided that a detained person must be kept in isolation for a limited period, the question whether the consul was nevertheless entitled to have a private interview with that person. He agreed with Mr. Scelle that, as a general rule, international law always prevailed over national law: but in such matters international law did not interfere with the application of national law. In codifying international law, the Commission had in mind the codes of criminal procedure in civilized countries, which closely resembled one another in their respect for fundamental human rights. In the case of countries where personal liberty was insufficiently safeguarded — to which Mr. Scelle had referred in connexion with the practice of holding persons *incomunicado* for lengthy periods — the sending State could refuse to maintain relations with a State guilty of such practices.

8. Mr. PAL wished to remove any misunderstandings with regard to his earlier remarks concerning the cross-reference to article 46 in the Special Rapporteur's draft. He had not meant that in general the rules of international law could not be made subject to national laws and regulations. In the particular case dealt with in the proposed article 30 A, however, to make the consul's right of communication with his nationals subject to compliance with the laws and regulations of the receiving State would be to destroy his freedom to communicate with his nationals.

9. Mr. HSU thought that the remaining divergences were not very great. The Special Rapporteur's draft had been intended as a compromise. The only question outstanding was that involved in the phrase "if the person in custody or imprisoned so requests". If that phrase were accepted, the obligation of the local authorities to notify the consul when one of his nationals was detained would become nugatory. To require the local

authorities to notify the consul was not to place a burden on them or to restrict their rights, but rather to help them; and it was no innovation. It would be consonant with the Commission's obligation under the United Nations Charter to defend fundamental human rights and freedoms. In any codification of international law the aim must be to bring the law up to date. The phrase "subject to the provisions of article 46 of these draft articles" did not mean very much and was perhaps ambiguous; it might well be deleted. Equally, the phrase "in conformity with the law of the receiving State" might also be deleted as unnecessary.

10. Mr. ERIM thought that the time was not yet ripe to send the proposed new article 30 A to the Drafting Committee. Three divergent views had been expressed. Some members considered that a reference to the laws and regulations of the receiving State should appear in the article. Others were prepared to accept Sir Gerald Fitzmaurice's draft, slightly amended. Yet others, including himself, considered that paragraphs (a) and (b) in that draft should be more flexible. The Drafting Committee might be able to work out a compromise between two divergent views, but not among three, and no formal amendments had been submitted to Sir Gerald Fitzmaurice's draft. He would therefore formally move that the phrase "(unless visits to the place in question are prohibited)" be inserted in paragraph (a) after the words "freedom of communication with and" and that the phrase "within a reasonable time" be substituted in paragraph (b) for the words "without delay". Under article 135 of the Italian Code of Criminal Procedure of 1931 — a very advanced code — the court had discretionary power, but was in no way bound, to authorize counsel for the defence to visit the prisoner during the preliminary proceedings. The Commission should refrain from further discussion of the theoretical aspects and devote its attention to the specific points he had mentioned.

11. Mr. AMADO said that he had not intervened in the discussion because he had thought that the Chairman had covered all the relevant points (534th meeting, paragraph 21). One question, however, had not been brought out, namely, whether the local authorities must automatically notify the consul when a national of the sending State had been detained in his district. That point was of particular importance in countries in which very large numbers of foreign residents might require the services of their consuls, as the Chairman himself had pointed out with reference to the Mexican nationals in the United States. The relevant provisions of the 1952 Consular Convention between the United Kingdom and Sweden might work very well as between two highly developed countries, but not so well in vaster and less developed areas. The Special Rapporteur had accepted the principle, postulated by Sir Gerald Fitzmaurice, that the local authorities were bound to inform the consul of the sending State when any national of that State was detained in custody within his

district. It was all very well for Mr. Scelle to object to the phrase in the Special Rapporteur's draft "if the person in custody or in prison so requests", but the Commission must decide whether to accept practice or not. Mr. Tunkin had seemed inclined to accept a formula fairly close to Sir Gerald Fitzmaurice's and not very far from that proposed by the Special Rapporteur. The formula used by Sir Gerald Fitzmaurice "in accordance with the regulations in force in the institution in which he is detained" was too narrow. Perhaps one way of reconciling the rather too sweeping formula suggested by the Rapporteur with the narrower formula proposed by Sir Gerald Fitzmaurice might be to say "in accordance with the regulations in force in the State of residence". If there was any consensus in the Commission at all, it was to the effect that the consul must be informed by the local authorities when one of his nationals was detained. If Sir Gerald Fitzmaurice's draft were adopted with the amendments suggested by Mr. Erim, he would have to demur at the expression "within a reasonable time". In his opinion the word "reasonable" defied precise interpretation.

12. The CHAIRMAN said that the discussion had confirmed his impression that the differences of opinion among the members of the Commission concerned not so much the text of the proposed new article as a question of interpretation. It was generally agreed that the provisions of the municipal law of the receiving State could not set at naught the requirements of international law, but that principle had been differently interpreted by different speakers.

13. He asked the Special Rapporteur to clarify the meaning of the phrase in paragraph (b) of his proposal "in conformity with the law of the receiving State". If the phrase meant simply that arrangements for the representation in court of the consul's national were to be made in accordance with the procedural law of the receiving State, the proposal did not in that respect differ very much from the relevant part of the text submitted by Sir Gerald Fitzmaurice, provided that it was understood that the procedural law in question could not deny the consul's right of access to his national.

14. With reference to Mr. Erim's amendment regarding prohibited or restricted areas, he thought that if the receiving State, though denying the consul access to such an area for the purpose of visiting his national, at the same time gave facilities to the national concerned to come out of the area and visit his consul, there would be no infringement of the right of access.

15. Mr. VERDROSS suggested that, in order to solve the difficulties facing the Commission, the proposed new article should be formulated in two parts. The first part would set forth those rights to which a consul was entitled under international law, regardless of the municipal law of the receiving State. The second part of the article would provide that the consul, when exercising those rights,

must conform with the procedures specified in the municipal law in question. Such an arrangement of the clauses would make it clear that the rights involved were guaranteed by international law, but that the manner of exercising those rights was governed by municipal law.

16. Mr. ŽOUREK, Special Rapporteur, agreed with the view that the article could not be referred to the Drafting Committee without a clear decision by the Commission on the points of substance on which opinion was divided.

17. Replying to the criticisms expressed regarding the reference in his proposal to article 46, he recalled that that article merely set forth the duty of persons enjoying consular privileges and immunities to respect the laws and regulations of the receiving State and not to interfere in the internal affairs of that State. The provisions of article 46 were similar to those of article 40, paragraph 1, of the draft on diplomatic intercourse and when the Commission had approved the latter article, no one had suggested that its provisions nullified the whole system of diplomatic privileges and immunities.

18. It was obvious, moreover, that a consul could not but observe the laws and regulations of the receiving State; in fact, he would have to observe them even if he considered that they conflicted with international law.

19. It was quite common for municipal law to regulate the exercise of a right existing under international law. He cited in that connexion the example of the right of passage, set forth in the 1958 Convention on the Territorial Sea and the Contiguous Zone; article 17 of that convention stated: "Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of international law . . ."¹

20. The cross-reference to article 46 would also cover the point which was the subject of Mr. Erim's first amendment. The general duty of a consul to respect the laws and regulations of the receiving State included, of course, the duty to observe regulations governing prohibited or restricted areas.

21. He explained that he had included the phrase "if the person in custody or imprisoned so requests" in paragraph (b) of his proposal in deference to the view expressed earlier by several members of the Commission. The passage was not indispensable, and he would be quite content to leave the decision on its retention to the Commission.

22. In reply to the Chairman's question (see paragraph 13 above), he said that the actual existence of the right of communication and access could not be contingent on the provisions of the

municipal law of the receiving State. The manner in which that right was exercised, however, was governed by the laws of the receiving State. In that connexion, while reserving his final opinion until he had considered more carefully its exact terms, he felt that the formula suggested by Mr. Verdross (see paragraph 15 above), which embodied the two basic principles in the matter, could offer a basis of general agreement.

23. Mr. SCALLE said that he could not agree to the formula suggested by Mr. Verdross. The substance of the right of communication and access could not be divorced from the exercise of the right. If the manner of the exercise of that right were left to be determined by the receiving State, that State could make the right subject to conditions which would completely nullify it.

24. The clause quoted from the 1958 Convention on the Territorial Sea and Contiguous Zone did not support the Special Rapporteur's argument. The whole purpose of that clause was precisely to regulate the exercise of the right of innocent passage; it meant that the coastal State was not free to enact whatever regulations it desired regarding the exercise of the rights existing in the matter under international law and the 1958 Convention.

25. For those reasons, he believed that the Commission's draft should contain specific provisions concerning the consul's right of access to his nationals; it should not be left to the receiving State to prescribe the conditions governing the exercise of the right in its absolute discretion.

26. With reference to Mr. Erim's description of the position under Italian law, he said that under French law the normal rule was that an accused, even if held in secret confinement for a very short period during the investigation, had the right to refuse to be examined except in the presence of his lawyer. In the case of an alien, it might be said that his consul, whose duty it was to defend and protect him, was his first advocate, and his consul therefore should be immediately advised of his arrest and given access to him in order to arrange for his defence.

27. In conclusion, he strongly supported the proposal submitted by Sir Gerald Fitzmaurice, which set forth in clear and precise terms the rules of international law governing the consul's access to his nationals.

28. Mr. SANDSTRÖM pointed out that paragraph (b) of Sir Gerald's proposal was very limited in scope: it dealt with the consul's right of access to his national in custody for the purpose of making arrangements for his defence. That very limited purpose was also an extremely important one, and it was only natural that the consul's right of access in that connexion should not be qualified. Of course, the consul would not himself defend his national and his first duty would be to seek a local lawyer for the purpose.

29. Paragraph (a) laid down the principle; it did not preclude the application of procedures specified in the municipal law of the receiving State, provided that those procedures did not in any way

¹ United Nations Conference on the Law of the Sea, *Official Records*, vol. II, Plenary Meetings, annexes (Document A/CONF.13/L.52) (United Nations publication, Sales No. 58.V.4, vol. II), p. 134.

impair the principle of the right of access and communication.

30. Mr. EDMONDS said that the Drafting Committee could not work effectively without some directive from the Commission on the points of substance on which opinion was divided. The Commission should take a vote on those points and so give the Drafting Committee the necessary guidance.

31. It was clear that a large majority of the members wished to include in the draft an article along the lines of that proposed by Sir Gerald Fitzmaurice. They disagreed, however, on the contents of the article.

32. With regard to paragraph (a) the only point of substance raised was that with which Mr. Erim's amendment was concerned. A vote could be taken on that amendment, unless Sir Gerald Fitzmaurice was prepared to introduce a proviso regarding restricted or prohibited areas.

33. As to paragraph (b), the fundamental issue was: should the local authorities be under a duty to advise the consul of the arrest of one of his nationals or should they only be required to notify him if the national concerned so requested? In order to clarify its position, the Commission should vote on the phrase "if the person in custody or imprisoned so requests". In his opinion a foreigner would have little protection unless the local authorities were in every case, and quite independently of the prisoner's request, under a duty to advise the consul.

34. With regard to visits by a consul to his national in custody, the relevant rules of criminal procedure would apply. But if those rules had the effect of delaying the consul's visit until the trial of his national had already begun, the whole purpose of the proposal would be frustrated.

35. Paragraph (c) of the proposal submitted by Sir Gerald Fitzmaurice was extremely important. It was essential to safeguard the consul's right to visit his national after the latter had been sentenced. Such a visit might be very necessary for the purpose of an appeal (if an appeal could still be prosecuted). In the case of a prisoner serving a sentence under a final judgement, the consul's visit might be equally necessary to ascertain the conditions under which he was imprisoned.

36. Lastly, he suggested that the word "privately" should be added after the word "conversing" in the last sentence of paragraph (c); only a private conversation could fulfil the purpose intended by the draft.

37. Mr. BARTOŠ thought that the Commission was on the verge of agreement. The provisions of article 17 of the Convention on the Territorial Sea and the Contiguous Zone which the Special Rapporteur had cited were very apposite, for they stipulated not merely that the exercise of the right of innocent passage was governed by the laws and regulations enacted by the coastal State, but also — and that was a point which he would emphasize — that those laws and regulations

should be in conformity with the rules of international law. He considered that the Commission could now refer article 30 A to the Drafting Committee with the direction that it should take into account the clause cited from the 1958 Convention on the Territorial Sea.

38. Sir Gerald FITZMAURICE, replying to the discussion, said that he did not favour the inclusion of a reference to article 46, but for rather different reasons from those given by other speakers. A reference to article 46 would be misleading, since article 46 covered all consular activities. If a special reference to article 46 were made in one place it would logically have to be inserted in almost every article, and that would be inappropriate and unnecessary.

39. Moreover, the only real objection that had been made to paragraph (a) of his draft concerned communication with nationals in areas to which access was prohibited on grounds of national security. There was really no other ground on which the right of a consul to visit his nationals could be in question. He agreed that the matter of prohibited zones should be considered, but he thought Mr. Erim's amendment was too broad. There had to be weighty reasons (such as considerations of national security) for declaring a particular area closed to the consul. It would be better to follow the provisions of article 24 of the draft on diplomatic intercourse. With those reservations, he was prepared to accept in his draft of paragraph (a) a reference to limitations that might be imposed by national security.

40. With regard to the question whether the local authorities of the receiving State should be under an obligation independently of the prisoner's request, to inform the consul of the detention of one of his nationals, he did not think that his proposal would be too onerous for those authorities. Mr. Amado had spoken of cases where a large number of the sending State's citizens lived in the receiving State. Was it likely, however, that hundreds of those persons would be detained simultaneously?

41. He would be prepared to amend the words "without delay" in paragraph (b) to read "without undue delay". But the point was an important one. Under the law of some countries a person arrested could be held incommunicado in the early stages of criminal proceedings. Usually the duration of such isolation was limited by statute law or by the constitution, and where such safeguards were enforced the prisoner's rights were probably not in jeopardy. However, the fact that certain consular conventions expressly stipulated that the consul's access to a detained fellow national must not suffer delay showed that the contracting parties wished to obtain specific assurances that those constitutional or statutory guarantees would really be respected.

42. Secondly, he said he was prepared to accept a provision on the lines of that suggested by Mr. Verdross concerning observance of the procedure prescribed by municipal law. On the other

hand he did not think he could accept the last sentence of the Special Rapporteur's draft because, put in that way, it might nullify the principle the Commission was trying to establish — if for instance a regulation of the receiving State restricted visits to, say, one in three months. He felt sure that agreement could be reached if some form of words could be found which established the right of consuls to visit their nationals but added that the procedures of the receiving State should be followed. He would be willing to accept the wording of the last sentence of paragraph (b) of the Special Rapporteur's draft if it included some provision on the lines of his own paragraph (c) — namely, "that such regulations shall permit reasonable access to and opportunity of conversing with such national".

43. Finally, he had no objection to the Special Rapporteur's proposal that paragraphs (b) and (c) of his (Sir Gerald Fitzmaurice's) draft should be combined, provided that it was clear that its provisions covered persons detained before trial, after sentence and before appeal, and while serving their sentence. As Mr. Edmonds had pointed out, consular visits were equally important at all three stages. He could accept the Special Rapporteur's wording if all three cases were covered, but as it stood, it was somewhat ambiguous and could be interpreted as covering only detention before trial or, alternatively, only the period of imprisonment after sentence.

44. Mr. HSU said that Sir Gerald Fitzmaurice had indicated his willingness to accept some modification of paragraph (a) of his draft to cover the case of the arrest of a national in a zone to which entry was barred on the grounds of national security, but he had not proposed a formula, and he (Mr. Hsu) believed it would be very difficult to devise one. The local authorities could surely transfer the person detained to some place outside the prohibited zone. It had been said that consuls must act in accordance with both international law and national legislation, but he felt it was unnecessary to state such a generally accepted principle in the draft. It would be better to say that consuls should recognize national law provided that it did not conflict with international law. In his view, the more general statement would be mischievous.

45. Mr. YOKOTA said that, while he agreed with the substance of Mr. Erim's remarks on the limitations affecting access to persons detained in particular areas, he thought it would be better not to refer to such cases in the article under discussion. The Commission had decided to include in the draft convention on consular intercourse a provision concerning freedom of movement similar to that in article 24 of the draft on diplomatic intercourse which referred to zones entry into which was prohibited or regulated for reasons of national security. That being the case, there was no need to make a further reference to those restrictions in the article now under discussion.

46. The CHAIRMAN, summing up the discussion for the guidance of the Drafting Committee, observed that all members of the Commission were agreed that the consul's right of communication with and access to his nationals, as well as the right of nationals to have freedom of communication with the consul, constituted a recognized principle of international law. With regard to the ways and means of making those rights effective, it seemed to be agreed that it was essential that the consul should be informed immediately or without delay of the detention or arrest of one of his nationals. On the other hand there was some division of opinion as to whether the local authorities of the receiving State should have an automatic responsibility of informing the consul when one of his nationals was detained or whether they should only have to inform the consul at the request of the person detained. He wished to know which alternative was favoured by a majority of the Commission. Secondly, he would like to know by which adjective — e.g., "reasonable" or "undue" — the Commission wished to qualify the word "delay".

47. Mr. TUNKIN felt it might be best to delete the words "without delay". There were cases in which it was impossible to inform the consul immediately of the arrest or detention of a national. Sometimes — for instance in espionage cases, where there might be accomplices at large — it might be desirable that the local authorities should not be obliged to inform the consul.

48. The CHAIRMAN remarked that a statement of a general principle of law could not possibly cover all conceivable cases. If the Commission went into the question of whether cases of espionage should be made an exception the whole principle of consular protection and communication with nationals would have to be re-opened.

49. Sir Gerald FITZMAURICE and Mr. TUNKIN said that they would accept the expression "without undue delay".

50. Mr. MATINE-DAFTARY said that he could not agree with the proposition that the local authorities should in all circumstances be obliged to inform the consul of the arrest of one of his nationals. The request should be made by the national himself, for there were cases in which he might not wish the consul to be notified. He would agree, however, to the inclusion of the words "without undue delay".

51. The CHAIRMAN put to the vote the proposal that the receiving State should have an automatic responsibility for notifying a consul of the arrest or detention of one of his nationals.

The proposal was adopted by 14 votes to 1 with 2 abstentions.

52. Mr. TUNKIN drew attention to the fact that if there was delay in communicating with the consul to inform him of the arrest of one of his nationals there might also be delay in forwarding communications from the person who had been

detained. If the words "without undue delay" were to be inserted in the passage dealing with the notification of the local authorities to the consul, the same words should be used in the provision concerning communications from the detained person to the consul.

53. The CHAIRMAN said he had assumed that the Drafting Committee would use the phrase "without undue delay" in both passages.

54. Turning to paragraph (c), he recalled that, in commenting on the suggestions of Mr. Erim and Mr. Edmonds, Sir Gerald Fitzmaurice had said it might be best to follow the provisions of article 24 of the draft on diplomatic intercourse. Mr. Yokota had taken the view that it was unnecessary to repeat those provisions in the present context. He wished to point out that any prohibited zones were usually specified by the receiving State at the time when the exequatur defining the consular district was granted. The question was whether the limitation on the consul's communication with his nationals imposed by the existence of areas into which access was prohibited should be specifically referred to in the draft article, or whether that point would be sufficiently covered by the article concerning freedom of movement which the Commission had already referred to the Drafting Committee.

55. Mr. SCELLE said he would not object to the inclusion of a special reference to prohibited zones so long as the definition of the consular district as contained in the exequatur remained unaffected. Unfortunately, prohibited zones changed from day to day and were often used as a pretext for limiting movement. Further it was possible for a receiving State to arrest a foreigner anywhere and then imprison him in a prohibited zone. It would be easy in that way for consular protection to be nullified.

56. Mr. BARTOŠ said he would oppose any provision that tended to hamper the consul in the exercise of his protective function. Persons could be arrested outside security zones or within them, especially in cases of espionage, and tried in military courts or in what were declared to be prohibited zones, to which they might be transported. In such cases the consul would really be powerless.

57. Mr. SCELLE shared Mr. Bartoš' fears, and reiterated his view that nothing in the Commission's draft should make it possible for the receiving State, by means of *ad hoc* changes in the number or extent of prohibited areas, to modify the delimitation of the consular district as specified in the exequatur. The exequatur had an international validity and could not arbitrarily be altered by the unilateral decision of one of the parties. Only those areas defined as prohibited zones at the time when the exequatur was granted fell outside a consul's district.

58. Mr. ERIM said that, if it was agreed that the Commission's object was to establish the best means of communication between the consul and

his nationals, he could see no reason why any national should not meet the consul at some place outside a prohibited zone. If, for instance, a new factory was being built with the help of foreign specialists, and the receiving State wished to prevent access to that factory for reasons of national security, the new prohibited zone could not of course have been mentioned at the time of the exequatur, although all consuls would subsequently have been notified of its existence.

59. Mr. SCELLE said that if a government had the right at any time to designate as a security zone an area to which there had previously been freedom of access, and could arrest anyone in the newly prohibited zone, it would drastically limit the consul's freedom of communication with his nationals and prevent him from carrying out his recognized functions.

60. The CHAIRMAN pointed out that in paragraph (a) of his draft, Sir Gerald Fitzmaurice was not proposing that the consul's visit should be made at any particular place. If the local authorities did not wish the consul to enter the district where the prisoner was detained, they could transfer the prisoner to an institution situated elsewhere.

61. Mr. ERIM wished to explain that his amendment ("unless visits to the place in question are prohibited") was not concerned with communication with one of the consul's nationals who was in custody but only with communication with such a national who was living or working at liberty in an area to which access was prohibited.

The meeting rose at 1.20 p.m.

537th MEETING

Wednesday, 11 May 1960, at 10 a.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)

ADDITIONAL ARTICLE 30 A (continued)

1. The CHAIRMAN said it was his understanding that it had been decided at the previous meeting to refer to the Drafting Committee paragraphs (a) and (b) of the new article, with the word "undue" before "delay", and he therefore proposed that the Commission should consider paragraph (c) of Sir Gerald Fitzmaurice's draft (534th meeting, paragraph 1).

2. Mr. ERIM believed that a misunderstanding had occurred at the previous meeting with regard to his amendments to Sir Gerald Fitzmaurice's draft. His first amendment ("unless visits to the

place in question are prohibited") was to be inserted at the end of the first line of paragraph (a), and should not be understood as an addition to paragraph (c) as some speakers seemed to have thought. So far as his second amendment was concerned, he said he was prepared to agree to the formula "without undue delay".

3. The CHAIRMAN doubted whether Mr. Erim's first amendment was necessary, for it had been decided to insert an article on freedom of movement in the consular draft, based on article 24 of the diplomatic draft; he would like to consult the views of the members of the Commission.

4. Mr. TUNKIN said his understanding was that no decision had been taken at the previous meeting on the adoption of any part of Sir Gerald Fitzmaurice's draft. One or two general principles had been agreed, and with regard to the substance of paragraph (a) some support had been expressed for Mr. Verdross's proposal that the article should provide that, in exercising his right to visit a national, the consul should act in conformity with local laws and regulations (536th meeting, paragraph 15). The precise wording could be left to the Drafting Committee, which could also consider the question of whether paragraphs (b) and (c) should be amalgamated.

5. Mr. ŽOUREK, Special Rapporteur, said that his understanding also was that nothing had been finally decided at the previous meeting, except the one matter upon which a vote had been taken. On the question of combining paragraphs (b) and (c) of Sir Gerald Fitzmaurice's draft, he did not think a distinction should be made in the text between persons detained or arrested and those who were serving a sentence, and if there were a distinction it would not justify an additional paragraph. He had understood that Sir Gerald Fitzmaurice had accepted the principle that consular visits to persons detained must take place in accordance with municipal legislation, and he therefore felt that matter could be referred to the Drafting Committee. He could not accept the view that to establish a prohibited zone for reasons of national security would be tantamount to introducing changes in the consular district; the nationals of the sending State were still within the consul's competence, subject to restrictions on movement and access to the zone.

6. Mr. AGO also thought there had been some misunderstanding with regard to the decisions taken at the previous meeting. As it had been agreed that an article similar to article 24 of the diplomatic draft was to be inserted in the consular draft, Mr. Erim's amendment seemed unnecessary. Whilst the Drafting Committee could consider the question of combining paragraphs (b) and (c) of Sir Gerald Fitzmaurice's draft, it should be realised that the cases which they covered differed greatly in importance. Consular action was most important before the trial, particularly in helping the prisoner to prepare his defence. The visit of a consul to a prisoner who was in custody pending trial was a proper consular function and it was

essential to provide that exercise of that function would not be unduly delayed; whereas a visit to a prisoner in gaol after he had been sentenced was merely a humanitarian act of much less importance, and in the passage dealing with such visits the words "without undue delay" were hardly applicable.

7. Sir Gerald FITZMAURICE said that as the principle had been accepted, it was necessary to include in the text of the article a reference to the limitation imposed on consular activities by prohibited zones. He had said (536th meeting, paragraph 43) that he had no objection to the amalgamation of paragraphs (b) and (c) of his draft, provided that all three types of detention (pre-trial, after sentence and before appeal, and after final judgement) were covered, but on reflection and after listening to Mr. Ago's arguments, he thought there should be two separate paragraphs. In the case of a person who had been detained but not yet brought before the court protection was one of the consul's vital duties, but when a person was serving a sentence a visit was a much less important matter and the words "without undue delay" were unnecessary.

8. In saying that he was ready to accept Mr. Verdross's proposal that in the exercise of his right to visit a national in prison the consul should follow the procedure laid down by local law, he must stress that it was important to find the right wording, for it must be made clear that no local rules or regulations could prevent the consul from doing his duty.

9. Finally, though he appreciated the force of Mr. Zourek's argument that a prohibited zone did not cease to form part of the consular district, he nevertheless considered the institution of such a zone amounted in practice to a unilateral restriction of the consular district, for the consul would be unable to exercise such of his functions as involved entering the prohibited zone, with consequences that would be hard to foresee.

10. Mr. MATINE-DAFTARY said he was under the impression that the Commission had agreed to settle a number of matters of principle and to ask the Drafting Committee to express them in suitable form. But Mr. Verdross's proposal related to a question of principle. It affected the whole of Sir Gerald Fitzmaurice's draft, for it meant that the consul had a right under international law to visit one of his nationals who was detained and that when exercising that right, he must conform with the procedures specified in the municipal law. He felt the time had come to take decisions on those matters of principle, especially that which Mr. Verdross had raised. If the Commission continued to discuss matters of wording, there was really no point in having a Drafting Committee.

11. The CHAIRMAN said he had tried to distinguish between substantive and drafting questions, but it seemed to him that questions of wording had become matters of principle. He thought it had been decided to refer paragraph (a) of Sir Gerald

Fitzmaurice's draft to the Drafting Committee and that paragraph (b) had also been referred to the Drafting Committee with the addition of the word "undue" before the word "delay". The principle that the authorities of the receiving State had an automatic duty to notify the consul of the arrest of one of his nationals had been settled by a vote (536th meeting, paragraph 51).

12. It seemed clear that, without prejudice to the question of whether paragraphs (b) and (c) should be combined, the Commission must decide upon the role of the local authorities. He would like to know whether, in the light of the discussion, Mr. Edmonds and Mr. Erim were of opinion that the restrictions imposed by a security zone should be referred to in the text of the article. Personally, he believed that, since the Commission had decided on the inclusion in the consular draft of an article corresponding to article 24 of the diplomatic draft, such a reference would be unnecessary. Besides, in strict logic, such a reference, if it appeared at all, should appear in every article of the consular draft, which was manifestly not practicable.

13. Mr. ERIM agreed with the Chairman and Mr. Ago that an article on freedom of movement on the lines of article 24 of the diplomatic draft would obviate the need for a special reference to prohibited zones in the article under discussion.

14. Mr. EDMONDS said that if the receiving State could declare certain zones to be restricted, as provided in article 24 of the diplomatic draft, all the objectives sought by the Commission could be nullified.

15. He would go further than Sir Gerald Fitzmaurice and Mr. Ago in opposing the Special Rapporteur's proposal that paragraphs (b) and (c) of Sir Gerald's draft should be combined. A consul's visit to a person who was serving a sentence after conviction was more than just a friendly or social call. In order to carry out his duty, the consul should satisfy himself that the conditions under which his national was imprisoned were as good as those under which the nationals of the receiving State were detained. He should make certain that the foreign prisoner was not subject to any restrictions not imposed upon other prisoners. The consul's right to make such a visit was as important as his right to visit the prisoner before trial or after sentence and before an appeal. Paragraphs (b) and (c) should remain separate and substantially in the form in which Sir Gerald had drafted them.

16. The CHAIRMAN, replying to Mr. Edmonds, referred to the commentary to article 24 of the diplomatic draft, which stated that the establishment of prohibited zones must not be so extensive as to render freedom of movement and travel illusory. He thought that in practice the exercise of consular functions would be hampered less than that of diplomatic functions by the existence of prohibited zones, for it would be a simple matter for the local authorities to arrange for the transfer of a person detained in such a zone to some place outside the zone. Personally he was of

the opinion that the inclusion of an article on freedom of movement on the lines of article 24 of the diplomatic draft would dispose of the difficulty which Mr. Edmonds had in mind.

17. Mr. PAL, referring to paragraph (a) of Sir Gerald Fitzmaurice's draft, said that the Commission must decide whether an explicit mention of security zones should or should not be included in the proposed draft article 30 A before it was sent to the Drafting Committee. It had been argued that since an article similar to article 24 of the draft articles on diplomatic intercourse and immunities would be inserted in the draft consular articles at some appropriate place, no reference to security zones would be required in the proposed draft article 30 A. An article on the lines of diplomatic article 24, however, would relate to the general principle of freedom of movement for consular officers, subject to the laws and regulations of the receiving State concerning zones entry into which was prohibited or regulated for reasons of national security, whereas the proposed draft article 30 A dealt with the particular rights of consuls for the particular purpose of communicating with their nationals when the latter were in certain given districts. The particular rule would not, therefore, necessarily be governed by the general rule. That was a construction familiar in most national systems. Therefore the principle should certainly be included in the draft article; the Commission should look reality squarely in the face, and should not flinch if it was unpleasing no indulge in any wishful thinking.

18. Mr. YOKOTA observed that the only question still to be decided was whether the free communication of consuls with their nationals should be subject to the laws and regulations of the receiving State. Mr. Tunkin had maintained that point related to paragraph (a) in both Sir Gerald Fitzmaurice's and the Special Rapporteur's drafts, whereas the Commission had so far discussed it mainly in connexion with paragraphs (b) and (c) of Sir Gerald's draft. Many members of the Commission had advanced objections to the phrase "subject to the provisions of article 46 of these draft articles"; in the Special Rapporteur's draft, and the Commission had adopted the principle set forth in paragraph (a) of Sir Gerald Fitzmaurice's draft. Many members had also opposed a categorical reference to the laws and regulations of the receiving State to govern consular access to nationals in paragraphs (b) and (c) of that draft. The acceptability of Mr. Verdross's proposal that the right of consuls to have access to their nationals be set forth clearly and independently and that only the procedure for such access be made subject to the laws and regulations of the receiving State would depend to a great extent on the drafting. Even so, the proposal was too sweeping, because the laws and regulations of the receiving State might be so restrictive as to nullify the consular right of communication. When article 24 of the draft diplomatic articles had been discussed, that question had been examined very thoroughly and a special proviso had been placed

in the commentary, to the effect that the establishment of prohibited zones must not be so extensive as to render freedom of movement or travel illusory. The same course should be followed in connexion with the matter before the Commission and, accordingly, Mr. Verdross's proposal would be acceptable if it was drafted on lines similar to the last sentence in paragraph (c) of Sir Gerald Fitzmaurice's draft.

19. Mr. HSU said that a fundamental principle was involved in the question of prohibited zones. The proclamation of a prohibited area could not, of course, alter the consular jurisdiction, since the local authorities could always remove a detained national of the sending State from the security zone so that the consul might have access to him elsewhere. The concept of the *exequatur* as an agreement was, however, erroneous; it was simply the document authorizing the consul to exercise his functions under the agreement which created the consular district. The sending State did not, *ipso facto*, lose its right to protect a national if the authorities of the receiving State admitted him into a prohibited zone or if he strayed there by mistake.

20. Mr. BARTOŠ observed that a relevant, though somewhat special, case in question was that of persons who enlisted in the French Foreign Legion and afterwards found conditions there uncongenial. The French authorities applied a distinction, which was neither new or illegitimate, between citizens and nationals, and held quite correctly that persons who enlisted under the French colours acquired the status of nationals. The question how such persons might be protected by consuls of their original nationality was germane to the general question of communication and access already discussed. He himself would not change the position which he had expressed at the previous meeting, but felt that the Commission should take that exceptional situation into consideration. Several serious cases had arisen, particularly where Belgians had been given severe sentences by French military courts for desertion from the Foreign Legion without the benefit of any protection from Belgian consuls, since the French Army had regarded them as French nationals.

21. Mr. SANDSTRÖM commended the Chairman's suggestion that the question of prohibited zones might be reconciled with the freedom of consuls to communicate with nationals in detention in such zones by a provision requiring that such nationals be brought out of the prohibited zones for the purpose. Another possible solution might be to provide that in such circumstances the consul should be accompanied by an agent of the receiving State. There could be no objection to that, since that State was fully entitled to impose conditions governing the admission of consuls to prohibited areas for the purpose of visiting detained nationals. He considered Sir Gerald Fitzmaurice's draft acceptable as it stood.

22. Sir Gerald FITZMAURICE observed that a proviso concerning security zones might affect the article as a whole. It was, of course, unlikely that the authorities would proclaim a prohibited area for the express purpose of preventing consuls from having access to their nationals, but, as Mr. Yokota had pointed out, a national might certainly be arrested for having strayed into a security zone. However, the consul's right to visit a national was independent of the question of the place where he visited him. The mere fact that a national might have been arrested in a security area did not affect that right; it did not mean that the local authorities could prohibit a consul from visiting him, but only that they could require that the visit should not take place in that area. But in that case they would be bound to allow the visit to take place outside the security area, for which purpose they would have to remove the detained national from the security area. On the basis of that interpretation the matter would be covered.

23. Mr. VERDROSS agreed with Mr. Yokota that the procedure according to local laws and regulations should not be so restricted as to make the right of communication illusory, but that point might best be made in the commentary rather than in the draft article itself. The actual drafting might now be left to the Drafting Committee.

24. Mr. AMADO emphasized that the question had been totally exhausted and moved that the discussion be closed forthwith and that the proposed article 30 A be referred to the Drafting Committee.

25. The CHAIRMAN agreed with Mr. Amado. He also agreed with Mr. Scelle that the Commission, being engaged in making rules of international law, must assume that governments would act in good faith. It could not possibly make provision for every conceivable contingency. On the one outstanding question of principle the Commission had virtually agreed that the procedure by which a consul communicated with his nationals should be subject to the laws and regulations of the receiving State provided that they were not so restrictive as to render the right of communication illusory. He proposed that, on that understanding, draft article 30 A be referred to the Drafting Committee.

It was so agreed.

ARTICLE 31 (*Consular fees and exemption of such fees from taxation*)

26. Mr. ŽOUREK, Special Rapporteur, said that the right to charge consular fees set out in draft article 31 had always been accepted in practice and was embodied in all national legislation concerning consuls. Even in the case of honorary consuls there were provisions by which they might use consular fees, or at least part of them, to cover the expenses of keeping up the office. The right should undoubtedly be stated in the consular draft articles since it was a rule of customary international law. It was evident that the fees were part of the revenue of the sending State, and, as they

were levied in foreign territory, they should not be taxed by the State of residence. Because in certain States receipts had to bear stamp duty, paragraph 2 specified that no tax or similar duty was chargeable in respect of receipts issued for the payment of consular fees. There was one point which might arise in the course of the official acts performed by consuls and which he had not dealt with in article 31 — viz., whether stamp duty could be charged by the receiving state on contracts concluded on consular premises between nationals of the sending State or between nationals of the sending State and nationals of the receiving State. He had not yet been able to collect all the source material, and would suggest that the question might for the moment be touched upon in the commentary and the decision whether or not to include a reference to it in the article itself should be postponed until the comments of governments had been received. His personal opinion was that such contracts should only attract stamp duty if they produced their effects in the receiving State. For the sake of orderly discussion, he thought the Commission should first concentrate on paragraphs 1 and 2 of draft article 31 and leave the further question until it came to discuss the commentary.

27. Mr. YOKOTA said he could accept paragraph 2, but had doubts about paragraph 1, which gave consuls the right to charge fees payable under the national laws of the sending State. That provision would make it obligatory for the receiving State to permit the charging of such fees in its territory; but in certain cases, it might be contrary to public policy or good morals in the receiving State to allow such fees to be charged. In such cases, the receiving State should be able to disallow the charging of such fees, even if they were payable under the national laws of the sending State. Paragraph 1 was, therefore, too sweeping, and he thought that some such phrase as "which are not inconsistent with national laws and good morals in the receiving State" should be added. A better solution would, however, be to follow article 26 of the draft diplomatic articles. At the previous session the Commission had discussed at some length the question whether diplomatic missions were entitled to levy any and every kind of fee, and had concluded that they could levy only those fees payable under the laws of the sending State which were not repugnant to national laws, public policy and good morals in the receiving State. The formula used in the diplomatic article left open the question what fees might be levied and covered the ground sufficiently.

28. Mr. ŽOUREK, Special Rapporteur, explained that the point raised by Mr. Yokota was fully covered by article 4, paragraph 1, of the consular articles, which laid down that consuls could only exercise the functions provided for in the articles formulated by the Commission and by any relevant agreement in force, and also such functions vested in them by the sending State as could be exercised without breach of the law of the receiving

State. The position of consuls differed from that of diplomatic missions, in that the latter enjoyed complete immunity, whereas the former did not. An article must be included defining the incontrovertible right of consuls to charge fees payable under the national laws of the sending State, since they might otherwise be prosecuted for performing perfectly legitimate acts. Article 4, paragraph 1, would furnish all the safeguards desired by Mr. Yokota.

29. Mr. AGO said that he was in agreement with the principle embodied in article 31. The English text of that article, which had been taken from a number of bilateral conventions, was quite clear, but the drafting of the French text stood in need of improvement. The use of the words "à l'occasion" in paragraph 2 could give the impression that the purpose of the provision was to avoid double taxation in connexion with the transaction on which the consular fees were levied. Of course, the provision was intended to exempt from local taxation the consular fees themselves. He suggested that the Drafting Committee should draw upon the language of the French text of article 26 of the draft on diplomatic intercourse.

30. Mr. BARTOŠ pointed out that the Special Rapporteur had not included in the draft the fundamental rule of international law whereby it was generally held that payment of consular fees was to be regarded as a voluntary act by the person concerned and one which could not result in the taking of any enforcement measures against him, or the infliction of any penalties, by the receiving State.

31. The actual collection of consular fees had not given rise to any difficulties in recent times; disputes had, however, arisen regarding the transfer to the sending State of the amounts collected, in consequence of exchange control regulations in the receiving State, and that was a question for which a generally-acceptable solution should also be found.

32. He agreed with Mr. Ago that the avoidance of double taxation was not the purpose of paragraph 2. Thus, consular fees might be charged in connexion with the drawing up by a consulate of documents relating to the estate of one of its nationals in the receiving State, but that estate was still subject to such estate, succession or inheritance duties as were chargeable under the laws of the receiving State. Moreover, the fact that the person concerned had paid the appropriate consular fee for drawing up a legal document and the *negotium juris* did not prevent the receiving State from making the validity of that document within its own territory subject to the payment of the fees normally levied by it for such services. It might perhaps be useful if the Drafting Committee also included a reference to that point in the commentary.

33. Mr. MATINE-DAFTARY said that he agreed with the substance of article 31, but had some doubts regarding the expression "official acts". That expression suggested acts performed in the

name of a government and did not appear to include such acts of private law as the solemnization of a marriage. It would perhaps be better to speak of acts performed by a consul which came within his exclusive jurisdiction; the use of the term "exclusive" was necessary because a document drawn up by a consul might require to be stamped if it was to be produced to the local authorities.

34. Mr. ŽOUREK, Special Rapporteur, said that the expression "official acts" was used in most consular conventions and covered all acts of a consul other than those of his private life. Accordingly, official acts included the registration of nationals, the drawing up of birth, marriage and death certificates and the granting of visas. He thought, therefore, that the questions raised by Mr. Matine-Daftary could be dealt with in the commentary to the article.

35. Mr. FRANÇOIS said that the question whether contracts entered into at a consulate were liable to stamp duty charged by the receiving State was closely connected with that of exemption from taxation, and he therefore suggested that it should be dealt with when the Commission came to consider article 37 of the draft. In that connexion, he pointed out that article 37 differed from the corresponding article 32 of the draft on diplomatic intercourse: it did not reproduce the terms of sub-paragraph (f) of article 32, which excluded stamp duty and similar taxes from the application of the exemption clause. The intention of the Special Rapporteur therefore appeared to be that local stamp duty should not be chargeable on contracts and similar documents drawn up at a consulate.

36. Mr. AMADO suggested that the Drafting Committee should consider amalgamating the two paragraphs of article 31 into one paragraph along the lines of article 26 of the draft on diplomatic intercourse.

37. Mr. ŽOUREK, Special Rapporteur, said that since consuls did not enjoy the same immunities as diplomatic agents, it was necessary to provide expressly for the exemption set forth in paragraph 1. He had, however, no fundamental objection to Mr. Amado's suggestion concerning the merger of the two paragraphs, provided that the provisions remained unaltered; in his view, the matter should be left to the Drafting Committee.

Sub-section C

PERSONAL PRIVILEGES AND IMMUNITIES

ARTICLE 32 (*Duty to accord special protection to consuls*)

38. Mr. ŽOUREK, Special Rapporteur, introducing article 32, said it set forth the important principle that the receiving State had a duty to accord special protection to consuls; that protection was particularly valuable in times of strained relations between a consul's own country and the receiving State. Some consular conventions went even

further than his draft and, for his part, he would not object to inserting in addition, as was being proposed by Mr. Sandström (see paragraph 41 below), a reference to the duty of the receiving State to treat the consul with due respect and to take all reasonable steps to prevent any attacks on his person, freedom or dignity.

39. The proposal of Mr. Sandström involved the replacement of draft articles 32, 33, 34 and 40 by only two articles. He could not agree to the inclusion in one and the same article of rules dealing with different subjects. The debate in the Commission would be simplified, he thought, if it examined the draft articles submitted by the Special Rapporteur and considered, in connexion with each one of them, the corresponding portions of Mr. Sandström's proposal. The question of the arrangement of the articles was largely a matter of drafting, but he (the Special Rapporteur) preferred his own subdivision of the subject-matter into four articles (32, 33, 34 and 40), each one dealing with a separate question.

40. Mr. VERDROSS said that he agreed with the terms of draft article 32, which expressed the generally recognized principle that consuls were entitled to special protection. He thought that the principle should form the subject of a separate article, because the protection of consuls was quite distinct from their personal immunity from jurisdiction.

41. Mr. SANDSTRÖM introduced his proposal that draft articles 32, 33, 34 and 40 should be replaced by the following provisions:

Article 32

RESPECT DUE TO THE CONSUL

Except by virtue of a judicial decision, rendered within the limits of competence specified in the articles of this draft, a career consular official shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all reasonable steps to prevent any attack on his person, freedom or dignity.

Article 33

IMMUNITY FROM JURISDICTION

1. Members of the consular staff shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of their functions.

2. Members of the consular staff may decline to give evidence on circumstances connected with the exercise of their functions and to produce correspondence and documents relating thereto, on the grounds of professional or state secrecy. In that event, the judicial or administrative authority shall refrain from taking any coercive measures against the person concerned, the rule being that all difficulties of this kind must be settled solely through the diplomatic channel.

3. In respect of acts other than those mentioned in paragraph 1, a career consular official who is not a national of the receiving State shall not enjoy immunity from jurisdiction, but he shall be liable to detention in those cases only in which he is charged with a serious offence punishable by imprisonment for a term of two years or more, or in which the object of the detention is to give effect to a judicial decision which has acquired the force of *res judicata* and which imposes a sentence of imprisonment for a term of not less than two years.

4. In the event of arrest of, or of criminal proceedings being instituted against, one of the consular officials referred to in paragraph 1 above, the receiving State shall immediately notify the diplomatic representative of the State to which the consular official belongs.

42. His proposal for article 32 did not differ in substance from that of the Special Rapporteur. He had omitted the reference to the consuls' "status as official representatives of the sending States" because that might have implied that consuls had a representative character, whereas most writers on international law considered that consuls did not have that character. In addition, he had drawn on the language of article 27 of the draft on diplomatic intercourse in order to define in greater detail the duties of the receiving State in connexion with the protection of consuls; he considered that the Special Rapporteur's draft stated that duty in far too general terms and did not provide enough guidance on the manner of carrying it out.

43. Mr. ŽOUREK, Special Rapporteur, said that the description "official agents of the sending State" was used in connexion with consular officers in article 5, paragraph 2, of the Consular Convention between the United Kingdom and Sweden, 1952,¹ as well as in a number of other conventions. For his part, he preferred the term "representative" to the term "agent", but the matter could be left to the Drafting Committee.

44. Mr. YOKOTA agreed with the principle embodied in both the Special Rapporteur's and Mr. Sandström's texts, but preferred the drafting of the latter. He suggested, however, that the word "career" might be omitted from the first sentence of Mr. Sandström's article 32; the term was redundant, because the whole section dealt with career consular officials. Honorary consuls were the subject of a special chapter (articles 54 to 58).

45. The Special Rapporteur's text of article 32 described the duty of the receiving State in excessively abstract terms; accordingly, he thought that the second sentence of Mr. Sandström's draft was a desirable amplification.

46. He agreed with Mr. Sandström that it was not advisable to refer to the representative character of consuls. He recalled in that connexion that the expression "consular representatives" had been used in articles 1, 2, 3, 4, 5 and other articles of the Special Rapporteur's original draft.² Much discussion had resulted during the eleventh session (496th and 497th meetings) and the expression in question had been finally dropped and replaced by the term "consul". In view of the controversy to which the concept of consular representation had given rise, he urged that the reference in question should be dropped.

47. Mr. AGO said that he also favoured the language of the second sentence of Mr. Sandström's

proposed article 32, which set forth the duties of the receiving State in concrete terms: he preferred that sentence to the text of article 32 proposed by the Special Rapporteur, which was merely in the nature of an introductory sentence.

48. The first sentence of Mr. Sandström's text was bound up with the question of exemption from arrest and detention and for that reason he thought it should be discussed in connexion with article 33 of the Special Rapporteur's draft.

49. Sir Gerald FITZMAURICE drew attention to an apparent contradiction between the terms of the first sentence of article 32 of Mr. Sandström's proposal and those of article 33, paragraph 3, of the same proposal. Article 32 provided for the complete immunity of consular officials from arrest, except by virtue of a judicial decision. According to article 33, paragraph 3, however, a consul was liable to detention if charged with a serious offence punishable by imprisonment for a term of two years or more. A provision similar to that paragraph existed in most consular conventions and constituted the normal situation. Therefore the first sentence of article 32, as proposed by Mr. Sandström, probably went too far.

50. Mr. SANDSTRÖM admitted that there appeared to be some inconsistency between the two provisions, but it was not so serious as had been suggested. Normally, a person charged with a serious offence was detained in custody by order of the examining judge, and that case would normally be covered by the first sentence of his proposed article 32. However, since that first sentence was only an introduction to the substantive provision contained in the second sentence, he was prepared to withdraw it.

51. The CHAIRMAN said that the Commission had now to decide only on the principle of article 32 as proposed by the Special Rapporteur and on the inclusion of the second sentence proposed by Mr. Sandström.

52. Mr. ŽOUREK, Special Rapporteur, suggested that the two texts might be combined into a single article. He accepted the second sentence of Mr. Sandström's draft article 32, provided that the article commenced with the statement of the duty of the receiving State to accord special protection to foreign consuls. That statement was essential in the case of consuls, whose position was much less strong in that respect than that of diplomatic officers. The inclusion of such a provision would also make it possible to obtain government comments on the question.

53. Mr. TUNKIN noted that there was general agreement on the inclusion of the second sentence of Mr. Sandström's draft article 32. As to the duty of the receiving State to accord special protection to foreign consuls, he believed it was essential to include a provision along the lines proposed by the Special Rapporteur. The fact that such a provision had not been included in the draft on diplomatic intercourse constituted an omission.

54. Mr. BARTOŠ said that he was in general

¹ United Nations *Treaty Series*, vol. 202 (1954-1955), No. 2731, p. 164.

² See *Yearbook of the International Law Commission* 1957, vol. II (United Nations publication, Sales No. 57.V.5, vol. II), pp. 83-103.

agreement with the substance of the articles proposed by Mr. Sandström.

55. Article 33, paragraph 1, of Mr. Sandström's proposal contained a rule which was regarded in Yugoslavia as an accepted principle of international law. Difficulties had, however, arisen regarding the interpretation of the phrase "acts performed in the exercise of their functions"; would the issuing of a false passport, for example, constitute such an act? Or the improper grant of a passport to a national of the receiving State who did not possess dual nationality?

56. As to article 33, paragraph 3, of Mr. Sandström's proposal, he said that most consular conventions defined serious offences as those punishable by imprisonment for a term of three or even five years; the reference to a term of two years in Mr. Sandström's draft was therefore unduly strict.

57. Lastly, with respect to cases of *flagrante delicto*, he preferred the text of the Special Rapporteur's draft, since the fact of being caught *in flagrante delicto* and the nature or gravity of the offence must be taken to be concurrent.

58. The CHAIRMAN said that the Commission would take a decision at its next meeting on the principle of the Special Rapporteur's proposal for article 32. If there were no objection, however, he would consider that the Commission agreed on the inclusion in the article of the second sentence of Mr. Sandström's draft article 32.

It was so agreed.

59. The CHAIRMAN announced that the Special Rapporteur might have to absent himself to attend a session of the International Court of Justice at the end of the month. As the Commission was making rather slow progress, he (the Chairman) suggested that it should authorize him to write to the President of the Court requesting that the hearings which Mr. Žourek was to attend should be postponed for a week or two.

It was so agreed.

The meeting rose at 1.10 p.m.

538th MEETING

Thursday, 12 May 1960, at 10 a.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 32 (*Duty to accord special protection to consuls*) (continued)

1. Mr. ŽOUREK, Special Rapporteur, suggested that the article be referred to the Drafting Com-

mittee with the request that it should combine his proposed article 32 with the second sentence of Mr. Sandström's draft article 32 (537th meeting, paragraph 41), as approved at the previous meeting (*ibid.*, paragraph 58). It would, of course, be for the Drafting Committee to decide upon the actual language to be used, but he suggested that the provision should be drafted along the following lines:

"The receiving State is bound to accord special protection to a foreign consul by reason of his official position and of the respect due to him. The receiving State shall take all reasonable steps to prevent any attack on his person, freedom or dignity."

2. The various terms used in the article would be explained in the commentary.

3. Mr. AGO said that, while he had no objection to the Drafting Committee being entrusted with the amalgamation of the two texts, he was somewhat concerned at the fact that the Special Rapporteur's draft had been defended at the previous meeting for two diametrically opposed reasons. The Special Rapporteur himself had explained that such a provision, although not included in the diplomatic draft, was necessary in the case of the consular draft because the position of consuls was less strong than that of diplomatic officers (*ibid.*, paragraph 52). Mr. Tunkin on the other hand, had stated that the fact that such a provision had not been included in the draft on diplomatic intercourse had constituted an omission (*ibid.*, paragraph 53) — no doubt even more serious in that draft than in the one on consular intercourse, but that in all probability it would be rectified by the plenipotentiary conference to be held in Vienna in 1961.

4. For his part, he was inclined to agree with Mr. Tunkin. If the provision were included in the draft on consular intercourse, it should, *a fortiori*, be introduced into the draft on diplomatic intercourse.

5. Mr. YOKOTA said that the substance of what special protection involved was set forth in the second sentence of Mr. Sandström's proposal.

6. In view of the suggestion that the sentence in question be combined with the Special Rapporteur's text, he wished to know whether the latter expressed anything more than was stated in the former. If it did, then the article should consist, firstly, of a clause based on article 32 of the Special Rapporteur's draft and, secondly, of the second sentence of Mr. Sandström's provision. If, however, the Special Rapporteur's text added nothing to Mr. Sandström's text, it was not only unnecessary, but even inadvisable, to include it; the statement contained in the second sentence of Mr. Sandström's text would suffice.

7. Mr. AMADO said that he was always opposed to the adoption of general formulas, which invariably led to difficulties of interpretation.

8. Like Mr. Yokota, he wished to know that was the specific content of the text proposed by the

Special Rapporteur. He was impressed by the fact that such eminent jurists as Mr. Verdross, Mr. Tunkin and the Special Rapporteur himself should consider it indispensable to include the text in question in the draft on consular intercourse; at the previous meeting Mr. Verdross (*ibid.*, paragraph 40) had described that text as the expression of a generally recognized principle of international law, and Mr. Tunkin (*ibid.*, paragraph 53) had even voiced regret at the absence of a similar provision from the text on diplomatic intercourse and had indicated that the conference at Vienna would probably rectify that omission.

9. For his part, he wished to know the purport of the provision and what it specifically implied that was not already expressed in Mr. Sandström's proposal, which the Commission had adopted; unless he was satisfied on that point, he would not be in a position to support the inclusion of the text in question.

10. Mr. ERIM said that the terms of article 27 of the draft on diplomatic intercourse gave a very full account of the content of the personal inviolability of a diplomatic agent and the respect due to him. The commentary to that article adequately explained its provisions.

11. Consular officers were in a different position, for they did not enjoy a comparable personal inviolability and were not completely immune from arrest or detention. It was necessary to make some provision for the special protection to be accorded to them by the receiving State.

12. The receiving State had a duty to protect all persons within its territory, but in the case of a foreign consul the protection should extend well beyond the limits of that normally accorded to all persons without exception.

13. Mr. SANDSTRÖM'S proposal for articles 32 and 33 differed in substance from the Special Rapporteur's texts. Mr. Sandström's proposal for article 32 contained two completely different ideas. The idea contained in the second sentence, which the Commission had adopted, was concerned with the duty to accord special protection to consuls. The idea contained in the first sentence, on the other hand, was connected with the question of personal inviolability.

14. As had been pointed out by Sir Gerald Fitzmaurice at the previous meeting (*ibid.*, paragraph 49), the statement in the first sentence of article 32 of Mr. Sandström's proposal was inconsistent with the provisions of article 33, paragraph 3, of the same proposal.

15. The first sentence of Mr. Sandström's proposal for article 32 did not cover the case of *flagrante delicto*, which was dealt with in article 33, paragraph 1, of the Special Rapporteur's draft. The Commission should take a decision on the question whether a consul would be liable to arrest or detention pending trial if apprehended *in flagrante delicto* in the commission of an act constituting a criminal offence against life or personal freedom.

16. The CHAIRMAN recalled that the Commission had, at its previous meeting (*ibid.*, paragraph 58), accepted the second sentence of Mr. Sandström's proposed article 32, but had reserved the question of the inclusion of a text along the lines of the Special Rapporteur's article 32. If such a provision were adopted, the commission should specify the content of "special protection". If, by reason of their official position, consuls were entitled to special protection, the Commission would have to examine what was the general practice in the matter.

17. The protection of a consul could include protection from interference by the judicial authorities of the receiving State, and so be connected with the question of immunity from jurisdiction, which was the subject of article 34 of the Special Rapporteur's draft. It could also include protection against acts incompatible with the consul's personal inviolability, which was dealt with in article 33 of that draft.

18. Mr. SANDSTRÖM said, with regard to the comparison which had been made between his proposed article 32 and article 27 of the draft on diplomatic intercourse, that he could not imagine any greater protection than that which was due to a diplomatic officer under that article 27.

19. He was prepared to accept that the idea contained in the Special Rapporteur's article 32 be combined with the second sentence of his (Mr. Sandström's) proposed article 32, provided it was made clear that the measures described in the latter sentence were precisely those which were called for under the duty to accord special protection.

20. Mr. LIANG, Secretary to the Commission, said that a provision based on the Special Rapporteur's draft article 32 would require the receiving State to do something more than simply refrain from infringing the consul's personal inviolability. Special protection would involve active and positive steps on the part of the receiving State for the purpose of ensuring the consul's inviolability and immunity. He drew attention in that connexion to commentary 1 to article 27 of the draft on diplomatic intercourse, which showed that the receiving State was under an obligation to take all reasonable steps to ensure the protection of a diplomatic agent. It would therefore be inaccurate to suggest that immunity covered special protection.

21. The term "special protection" as used in the context could only mean a greater measure of protection than that given to foreign nationals. If the need for special protection was recognized, it should logically apply to diplomatic agents. A clear example of such protection was given by the extraordinary measures which were taken on the occasion of a visit by a high dignitary from a foreign State.

22. He drew attention to the fact that the second sentence of Mr. Sandström's proposed article 32 made provision for more than respect for a consular officer and covered also protection: it specified

that steps should be taken to prevent any attacks on his person, freedom or dignity. As to the first part of Mr. Sandström's proposed article 32, it related to the subject matter of article 33 (*Personal inviolability*).

23. He shared the doubts expressed regarding the advisability of including a provision along the lines of the Special Rapporteur's article 32 at the proposed place, particularly since no such provision existed in the draft on diplomatic intercourse. Possibly, the proposed provision could be replaced by Mr. Sandström's second sentence for article 32, if only protection was envisaged.

24. Mr. PAL said that the expression "special protection" was to be found in article 5, paragraph 2, of the Consular Convention of 1952 between the United Kingdom and Sweden,¹ which, in many respects, had served as a model to the Commission. He therefore saw no reason why it should not be used in the Commission's draft. Even if the expression covered no more than did the various types of protection enumerated in the amendments which had been proposed, it was worth retaining as being both apposite and useful, in that it would be sufficiently flexible to meet unforeseen contingencies as well as those which were known to exist.

25. Mr. VERDROSS said, in reply to Mr. Amado's question, that the special protection covered such matters as the special guard and police patrols, which protected not only diplomatic missions and consulates, but even the private residences of diplomatic agents and consuls. It also covered such steps as police precautions taken on the arrival of a foreign dignitary, including possibly a consul, at a railway station.

26. With reference to Mr. Erim's remarks, he said that the principles of inviolability and immunity placed upon the receiving State an obligation to abstain from certain acts; the duty to provide special protection, on the other hand, placed upon the receiving State an obligation to take certain positive steps.

27. For those reasons, he supported the amalgamation of the Special Rapporteur's article 32 with Mr. Sandström's second sentence, which described the content of special protection.

28. Mr. SCELLE said that the discussion had convinced him that the Special Rapporteur's draft article 32 could suitably be combined with the second sentence of Mr. Sandström's text.

29. It would be most regrettable if the Commission's draft on consular intercourse and immunities omitted a provision expressing the duty of the receiving State to accord special protection to foreign consuls. The broad terms in which the Special Rapporteur's proposal was couched should not deter the Commission from adopting it; indeed, rules of international law often had to be expressed

in general terms. There was neither the time, nor the possibility, nor in some cases even the desire, to enter into detail. A term like "special protection" was valuable precisely because it could express a great deal more than a number of detailed provisions.

30. The essential principle underlying the duty to accord special protection was that a consul was not an alien like any other, but an official of the sending State. It was necessary to make that position clear in the case of consuls; as to ambassadors and other diplomatic agents, their position was well known and the terms of article 27 of the draft of diplomatic intercourse could suffice.

31. For all those reasons, he favoured, like Mr. Verdross, the adoption of an article which would combine the Special Rapporteur's text with the second sentence of Mr. Sandström's proposal, notwithstanding that the first of those texts had been described as vague, although in fact it conveyed its meaning quite as clearly as many of the articles which the Commission had already adopted.

32. Mr. ŽOUREK, Special Rapporteur, said that a general provision such as that contained in article 32 was necessary because it was not possible to provide for all the situations in which a consul might require special protection. A consul might need special protection in many cases which did not strictly speaking involve attacks on his person, freedom or dignity. The general provision would cover more than the reference to "steps" in Mr. Sandström's text.

33. It was a generally accepted principle of international law that the receiving State had a duty to grant to the consul, because of his official position, a protection greater than that accorded to an ordinary alien. The expression which he had used in his draft article 32 occurred in a number of consular conventions, such as those entered into by the United Kingdom with Norway (1951), Sweden (1952), Greece (1953), Italy (1954), and Mexico (1954). The fact that governments had considered it necessary to formulate the principle relating to special protection argued strongly in favour of its inclusion in the Commission's draft articles.

34. Replying to Mr. Ago, he said that the Commission should adopt the provision under discussion if it thought that provision necessary in the draft on consular intercourse. Whether the conference at Vienna in 1961 would consider the introduction of a similar provision into the draft on diplomatic intercourse was a separate question which should not affect the Commission's decision now.

35. Mr. AGO hoped the Commission would forgive his having broached a subject which was perhaps not of primary importance. The special protection of consuls, as the Secretary had pointed out (see paragraph 21 above), could only mean a greater measure of protection than that given to other foreign nationals. As to its content, however, it seemed to him that nothing had been suggested that went further than Mr. Sandström's proposal.

¹ United Nations *Treaty Series*, vol. 202 (1954-1955), No. 2731, p. 164.

Moreover, "Special protection" was an expression which had greater relevance to diplomats than to consuls. The penal codes of many States provided for particularly severe penalties in the case of attacks on the head of a State or a diplomat, but not in the case of an attack on a consul.

36. Mr. ERIM said he could not see much difference of substance between the Special Rapporteur's draft article 32 and the second sentence of Mr. Sandström's text; there was of course a difference of drafting. Secondly, in view of Sir Gerald Fitzmaurice's query concerning the first sentence of Mr. Sandström's text of article 32, he asked whether the whole of Mr. Sandström's text was to be referred to the Drafting Committee or only the second sentence. He personally preferred the Special Rapporteur's wording, as Mr. Sandström's seemed more restrictive.

37. The CHAIRMAN said that at the previous meeting (537th meeting, paragraph 58) it had only been agreed to refer the second sentence of Mr. Sandström's text to the Drafting Committee.

38. Mr. AMADO said that the phrase "special protection" in the Special Rapporteur's draft really required some definition, and the same was true of the words "all reasonable steps" in Mr. Sandström's amendment. He was prepared to agree with Mr. Scelle that international law was no more than a set of vague general principles, but, despite those objections, he thought that the Special Rapporteur's text together with Mr. Sandström's could now be referred to the Drafting Committee.

39. Mr. TUNKIN observed that in the opinion of a number of speakers the provision concerning special protection in the Special Rapporteur's draft reflected accepted practice. With reference to the criticism of the words "all reasonable steps", he thought that Mr. Sandström's phraseology acceptable.

40. Mr. YOKOTA asked the Special Rapporteur to explain the words "special protection", which nobody seemed able to define, and whether they had a different meaning from that intended to be conveyed by Mr. Sandström's text. Mr. Verdross had said that special protection might include such courtesies as an official welcome to a consul on his arrival at a railway station or assigning a policeman to guard his residence. Surely, however, the residence of a consul as such was not entitled to protection; only the person of the consul was entitled to protection, as was correctly stated in the passage "to prevent any attack on his person, freedom or dignity" in Mr. Sandström's text. He doubted whether the phrase "special protection" really had any meaning at all. The Chairman had expressed the view that special protection might be connected with immunity from local jurisdiction. His (Mr. Yokota's) personal view was that such matters as immunity from jurisdiction and exemption from taxation were quite distinct from protection. If the Commission considered, however, that they were part of pro-

tection, it would be better to draft two separate articles, one on special protection and the other embodying the substance of Mr. Sandström's text.

41. The CHAIRMAN explained that he had only tried to give a few examples of what "special protection" might comprise. Mr. Yokota had apparently construed the expression in a narrower sense. In any case, the question whether the words "special protection" should be included would probably be voted upon before the Commission referred the article to the Drafting Committee.

42. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Yokota, said that Mr. Sandström's text referred to "an attack on the person, freedom or dignity of a consul"; there were, however, less important matters, which did not involve an actual attack on his person but which would be covered by the phrase "special protection", and he hoped that those words would be included in the text which would be referred to the Drafting Committee.

43. The CHAIRMAN said that it was clear that some members of the Commission believed that "special protection" meant no more than what the draft explicitly said, whilst others, although they had had some difficulty in defining the wider meaning, thought that the words should be retained because they had some general significance. The receiving State was bound to treat consuls with some special respect and he thought the Commission could now vote on the question whether the words "special protection" should be included in the draft, which would not of course be a final one, to be referred to the Drafting Committee.

44. Mr. AGO thought it was not necessary to take a vote on the matter as most of the members of the Commission evidently wanted the words "special protection" included and he did not wish to raise any objection. He hoped that at the 1961 conference at Vienna Mr. Tunkin might perhaps himself take the initiative in proposing a corresponding provision for inclusion in the convention on diplomatic intercourse.

45. Mr. MATINE-DAFTARY said that the crux of the matter was that since consuls did not enjoy complete immunity or freedom from local jurisdiction in the same way as diplomatic agents they needed greater protection. He thought it would be better to agree upon a form of words for article 32 similar to that used in the diplomatic draft and then, in articles 33 and 34 to make some additional provision to obviate the possibility of the local authorities abusing their right of prosecuting or arresting a consul. He felt that, broadly, article 32 should follow the corresponding provision in the diplomatic draft.

46. Mr. SCELLE said that, as in the past the Commission had decided questions of substance by a vote, a vote should be taken on whether the words "special protection" should be included in the draft of article 32 before that article was referred to the Drafting Committee.

47. The CHAIRMAN said that he took Mr. Matine-Daftary's remarks to reflect opposition to the inclusion of the words "special protection". Accordingly he invited the Commission to decide by a vote whether article 32 should be referred to the Drafting Committee in the following terms:

"Special protection and respect due to consuls

"The receiving State is bound to accord special protection to the foreign consul by reason of his official position, and to treat him with due respect. It shall take all reasonable steps to prevent any attack on his person, freedom or dignity."

That text was approved by 10 votes to none, with 7 abstentions.

ARTICLE 33 (*Personal inviolability*)

48. Mr. ŽOUREK, Special Rapporteur, said that the personal inviolability of consuls had constituted a very difficult problem, both as to theory and as to practice, ever since the seventeenth century; until then, consuls, as public officials, had enjoyed immunity from jurisdiction in the State in which they carried out their duties. He had tried in his second report to the Commission (A/CN.4/131) to trace the historical evolution of the problem. In the seventeenth century Wicquefort had said that the prince protected consuls as being persons in his service, in the same way as any good master protected his servant, but not as public officials.² At that period consuls had usually been merchants in business on their own account, and they had gradually lost their responsibilities to the ever-increasing number of diplomatic missions. They had also lost their power of jurisdiction, at all events in Europe. Vattel had opposed the tendency to adopt a critical attitude towards consuls; in his well known work published in 1758 he had written that a consul was no longer a minister and could no longer claim the latter's privileges, but that he nevertheless still enjoyed the protection of the law of nations. Vattel had held that a sovereign who received a consul impliedly promised to give him such liberty of action and such protection as the duties of his office required; according to him, the nature of a consul's duties required that he should be independent of the criminal jurisdiction of the receiving State, unless he committed a "grievous offence" against the law of nations.³

49. A provision laying down the personal immunity of the consul had first appeared in the Pardo Convention of 13 March 1769 (Convention between the Courts of Spain and France for the better regulation of the functions of the Consuls and Vice-Consuls of the Spanish and French Crowns in their

respective ports and territories), which had stipulated that the consul could not be arrested or imprisoned except for "atrocious crimes". That provision had been followed by others such as that of the Consular Convention of 1853 between the United States of America and France. The so-called personal immunity clause had subsequently given rise to differing interpretations.

50. Although he had attempted in his second report to trace the ways in which consular conventions and custom had gradually defined consular privileges and immunities, it was perhaps more important, in establishing the present theory and practice to examine the provisions of recent consular conventions. Article 14 of the Havana Convention of 1928 provided that consuls "shall neither be arrested nor prosecuted except in the cases when they are accused of committing an act classed as a crime by local legislation",⁴ but article 17, which read "consuls are subject, in civil as well as in criminal matters, to the jurisdiction of the State where they exercise their functions"⁵ seemed to weaken the provision of the earlier article. Consular inviolability was in fact subject to exceptions which were defined differently in different conventions.

51. Several methods were employed for the purpose of defining the exceptions. One method very frequently used in consular conventions was to refer to the classification of the offence committed. Some of the conventions made an exception, where immunity from arrest was concerned, in the case of serious criminal offences, a very vague expression, open to very different interpretations. Others allowed the arrest of consuls in those cases only where they were charged with offences defined and punished as crimes by the criminal law of the receiving State. Sometimes the conventions specified that the offences must be offences which the local law defined as crimes as distinct from misdemeanours. Others again restricted the inviolability of career consular officials by allowing their arrest in all cases in which they were charged before a court with an act which constituted a crime or an offence under the law of the receiving country, but not in the case of acts which were regarded as mere contraventions and were dealt with administratively. Sometimes the offences by reason of which the immunity from imprisonment was removed were defined by reference to the type of penalty applicable.

52. The method of using the classification of the offence as a criterion had serious disadvantages. In many legal systems, the gradation "crime", "lesser offence" (*délit*) and "contravention" was not known. Furthermore, even in cases where the classification existed in the legislation of both contracting parties, the same unlawful act might well not be classified in the same way in both legislations.

² Abraham van Wicquefort, *L'Ambassadeur et ses fonctions*, vol. II, p. 63.

³ E. de Vattel, *The Law of Nations or the Principles of Natural Law applied to the Conduct and to the Affairs of Nations and of Sovereigns*, vol. III, translation of the 1758 edition by Charles G. Fenwick (Washington, D.C., Carnegie Institution of Washington, 1916), book II, chap. II, sect. 34.

⁴ League of Nations *Treaty Series*, vol. CLV (1934-1935), No. 3582, p. 299.

⁵ *Ibid.*

53. One group of treaties, instead of distinguishing between crimes and misdemeanours on the one hand and contraventions on the other, used as a criterion for determining the cases in which the arrest of consuls was permissible the term of the sentence prescribed for the offence committed. Sometimes the criterion was that the offences must be punishable under the local law by a penalty involving deprivation of liberty for a term of one year or more. Other conventions provided that consular officials could only be arrested or detained pending trial if they were apprehended *flagrante delicto*. Some conventions allowed provisional arrest in cases of prosecution for an offence punishable by imprisonment of a term of not less than three years, whereas in others the term was five years.

54. Some recent consular conventions laid down different conditions for immunity from arrest and detention pending trial for each of the two contracting parties. Several examples had been set out in paragraph 60(e) of the second report (A/CN.4/131).

55. Apart from provisional arrest, which was excluded under certain conditions, immunity from imprisonment was excluded in several conventions in cases where the execution of a penalty imposed by the courts was involved. Lastly, the enumerative method had sometimes been used for the purpose of specifying the offences the prosecution of which might justify provisional arrest.

56. It should be noted that many treaties which recognized immunity from arrest and imprisonment restricted the scope of that immunity in two ways by reason of the status or activities of the person concerned; they usually denied the benefit of the clause to consular officials who were nationals of the receiving State and they excluded consular officials who were merchants so far as acts were concerned which were connected with their business.

57. The consular conventions contained different definitions of the persons entitled to inviolability. Some dealt only with consular officers, some also referred to other consular officials and some even applied to certain classes of consular employees. Many conventions merely stipulated immunity from jurisdiction for acts performed in a consular capacity, but did not expressly provide for personal inviolability.

58. The examples he had given showed clearly that practice differed very greatly. The Commission would therefore be engaged in the progressive development of international law on that particular point rather than in codification. He had therefore embodied in draft article 33 certain elements which he thought would be acceptable to a fairly large number of governments. The draft article, like all the others in sub-section C, concerned only career consuls. Honorary consuls and career consuls who might under their national laws and regulations engage in business or a gainful profession would be dealt with in a special chapter.

59. He had thought that, in order to co-ordinate the various practices, a provision might be acceptable under which the person of the consular official would be inviolable, with certain exceptions — e.g., where the official was sentenced by a court decision possessing the force of *res judicata* for an offence punishable by a term of imprisonment of one year or more. Thus, if a consul was convicted of an offence punishable by a term of imprisonment of less than one year, he would be immune from arrest. The other exception concerned the case of a consul who was apprehended *in flagrante delicto* in the commission of an act, constituting a criminal offence against life or personal freedom. The object of the draft was that the exercise of consular functions should remain unimpeded as far as possible. If a consul was liable to arrest for a minor offence, the exercise of his functions would be endangered. The objection might be raised that a court sentence to a term of imprisonment of less than one year would have little practical effect; but, under the laws and regulations of many countries the courts had power to impose fines, alone or as an alternative to imprisonment. In many countries, furthermore, the institution of the suspended sentence (*sursis*) existed. In any case, it was always possible for the receiving State to demand the recall of a consul sentenced by a court. Draft article 33 was purposely restricted to consular officials; it did not apply to consular employees.

60. Paragraph 1 stipulated exemption from arrest or detention pending trial, with certain exceptions, in order to prevent interference with the consular functions if the consul had committed merely some minor offence such as a traffic offence. Paragraph 2 expressed the rule that consular officials could be committed to prison for the purpose of serving a court sentence, but only for an offence punishable by a term of imprisonment of one year or more and only if that sentence possessed the force of *res judicata*. In other words, it did not apply if the sentence was still subject to appeal. Paragraph 3 laid down the procedure to be followed in the event of criminal proceedings being instituted against a consular official. It had been drafted in accordance with the principle of the respect due to the consul and also with the ordinary principle of law that the accused was deemed innocent until convicted. Similar rules dealing with depositions by consuls appeared in many consular conventions. Paragraph 4 imposed the obligations on the receiving State to notify the diplomatic representative of the sending State immediately in the event of the arrest of, or of criminal proceedings being instituted against, a consular official. That provision, too, appeared in many consular conventions and should not give rise to much discussion.

61. Mr. Sandström had proposed (537th meeting, paragraph 41) somewhat similar phraseology in his draft for article 33, and the two texts might be discussed together. It would be advisable to defer discussion of paragraph 2 in Mr. Sandström's draft until the Commission came to discuss the

provisions dealing with attendance as witnesses in courts of law and before the administrative authorities in article 40 of the Special Rapporteur's draft, but all Mr. Sandström's other provisions dealing with the personal inviolability of consuls might be taken together, especially paragraph 3, since there was a difference of opinion on the question of the term of imprisonment involved. He would be prepared to accept a provision stipulating any particular term of imprisonment the Commission decided. Obviously, the longer the term the more favourable to the consul the provision would be, but the provision might in consequence be less acceptable to governments.

62. The Commission should therefore concentrate on the degree of consular inviolability in the case of a court sentence possessing the force of *res judicata* and on consular inviolability in the case of detention pending trial, on which the existing consular conventions differed so greatly.

63. Mr. SANDSTRÖM suggested that the discussion of draft article 33, so ably introduced by the Special Rapporteur, be divided into two parts: first, paragraphs 1 and 2, and, second the procedure to be adopted in the event of criminal proceedings being instituted against a consular official. The most important difference between his own text and the Special Rapporteur's draft lay in the length of the term of imprisonment specified, which was a minor question. Another difference was that the Special Rapporteur's text used more specific language to describe the nature of the criminal offence which would remove the immunity. Most consular conventions provided for exemption from arrest for offences of a given degree of seriousness but differed greatly in the criterion of the gravity of offence so far as detention pending trial was concerned. Exemption from imprisonment when a court sentence had already been pronounced was a far more difficult matter. The Commission might well hesitate to find any solution to that problem. It would not be very easy to combine a provision admitting criminal proceedings against consuls in certain cases with a provision exempting consuls from the penalties deriving from conviction in such proceedings. Perhaps the choice lay between making no provision for such exemption or creating an immunity from jurisdiction in the manner of article 14 of the Havana Convention, which provided that in the absence of a special agreement between two nations, the consular agents who were nationals of the State appointing them should neither be arrested nor prosecuted except in the cases when they were accused of committing an act classed as a crime by local legislation. That was a rational solution, whereas the Special Rapporteur's provision was a half-measure, since under it sentence might be pronounced but not executed.

64. Mr. YOKOTA submitted an amendment to article 33, paragraph 3, of the Special Rapporteur's draft in the following terms:

"In the event of criminal proceedings being instituted against a consular official, that official

may not be compelled to appear before the court. The judicial authority requiring his deposition shall take all reasonable steps to avoid interference with the performance of his official duties and, where possible or permissible, arrange for the taking of such deposition, orally or in writing, at his residence or office."

65. In principle, the amendment was similar to paragraph 3 of the Special Rapporteur's draft, but differed in two points. The wording had been taken in part from the Consular Convention between the United States of America and Costa Rica of 12 January 1948 (article II, 3)⁶ and in part from a draft convention between the United States of America and Japan to be signed shortly. The first sentence of the amendment was taken from the Special Rapporteur's draft. The provision in the second sentence was desirable and even necessary, if the consul was not to be hampered in the exercise of his functions. The procedure for taking a deposition from a consul should be left as flexible as possible; it should be possible for the consul and the receiving State to make their own arrangements. Paragraph 3 in the Special Rapporteur's draft was too rigid and too detailed. Depositions might normally be taken immediately at the consular office; there was no need for an invitation in writing to give his deposition in person.

66. Mr. AGO criticized the Special Rapporteur's draft on the ground that it went into greater detail than most bilateral conventions. Mr. Sandström's text, combining the ideas in paragraphs 1 and 2 of the Special Rapporteur's draft, was more nearly akin to the method used in most conventions. Moreover, the Special Rapporteur had been very liberal with regard to detention pending trial and excessively strict with regard to court sentences, in confining immunity to offences punishable by a term of imprisonment of less than one year. On the contrary there was less need for severity in the clause concerning imprisonment in pursuance of a court sentence than in the provision on detention pending trials, since court sentences imposed on consuls were often not executed, the consul being recalled. The detail of paragraph 3 of the Special Rapporteur's draft was not found in the consular conventions, but a provision dealing with the matter might be very desirable. It was difficult to see, however, how the receiving State could avoid asking for the presence at the trial of a consul who had already been detained in accordance with the provisions of paragraph 1. In such a case interference with the exercise of consular functions had already occurred and was therefore inevitable.

67. Mr. BARTOŠ observed that the Special Rapporteur had introduced draft article 33 with a detailed account of the subject, which its seriousness and complexity warranted, as did the wide variety in practice and the lack of uniformity

⁶ United Nations *Treaty Series*, vol. 70 (1950), No. 896, p. 32.

among the precedents. In performing its duty with regard to the progressive development of international law, the Commission would have to retain some practices and reject others. Codification in that particular case was out of the question in view of the lack of any universal rules of international law on the subject. He was inclined to support paragraph 1 of Mr. Sandström's text since the Commission must establish the principle that consular immunity existed and that members of the consular staff were not amenable to the jurisdiction of the authorities of the receiving State in respect of acts performed in the exercise of their functions. The second question that arose was to what extent that principle was subject to exceptions. He agreed with Mr. Ago that the Special Rapporteur's provision regarding court sentences was too restrictive. Furthermore, there might be offences other than crimes and offences against life or personal freedom which might be equally serious. Modern criminologists were in favour of establishing the widest possible spread between the severest penalty and the minimum penalty in the criminal code, for the same offence. The Drafting Committee should consider that point.

68. Consular conventions concluded by Yugoslavia after the Second World War, and even some earlier ones, contained a stipulation that any offence in respect of which a consul was amenable to the jurisdiction of the authorities of the receiving State must constitute an offence in the law of both parties ("double criminality"). Another factor to be taken into account was that under almost all modern conventions career consuls were granted the same immunities as diplomatic agents. That was the present trend, although, of course, it was not necessarily binding on the Commission. It was expressed particularly well in the series of consular conventions concluded by the United Kingdom with France, Italy and Sweden.

69. He agreed with Mr. Ago that the Special Rapporteur's provisions with regard to court sentences were too restrictive and did not wholly reflect the practice, since consuls who committed offences were nearly always recalled and left the territory of the State of residence with the consent of its government in order to avoid conviction or the execution of the sentence. That was true even if a consul was convicted of abuse of his official functions. The procedure of recall was in fact a method of escaping the rigid provisions of codes of criminal procedure.

70. With regard to depositions, he said that all members of the consular staff as well as the consul himself should have a right to refuse to give evidence on circumstances connected with the exercise of their official functions. Certain concessions might be made to consuls if they agreed to make depositions. To state, however, that the consul was not a compellable witness in matters not connected with the exercise of their functions would be very difficult, since it would involve depriving the courts of their powers to institute hearings and counsel for the defence of the right

to cross-examine a consul. Such a provision would be all the more unjust as the consul himself was in certain cases amenable to jurisdiction. If he could be prosecuted for a serious offence, there seemed to be no reason why he should not make a deposition in the regular way. According to Yugoslav jurists, more extensive privileges should be given to career consuls than were afforded them in the Special Rapporteur's draft and the procedure with regard to personal inviolability should be more elastic.

The meeting rose at 1 p.m.

539th MEETING

Friday, 13 May 1960, at 10 a.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 33 (*Personal inviolability*) (continued)
and ARTICLE 34 (*Immunity from jurisdiction*)

1. The CHAIRMAN invited the Commission to continue its debate on draft article 33 submitted by the Special Rapporteur (A/CN.4/L.86) and the amendments thereto submitted by Mr. Sandström (537th meeting, paragraph 41) and Mr. Yokota (538th meeting, paragraph 64).

2. Mr. EDMONDS said that he agreed with the general principles expressed in the Special Rapporteur's draft articles 33 and 34, but had some doubts about the arrangement and wording. The principle was that members of the consular staff were not amenable to the jurisdiction of the judicial or administrative authorities of the receiving State except in certain instances. Logically, the general rule should be stated before the exceptions, as had been done in paragraph 1 of Mr. Sandström's text. The Special Rapporteur seemed to be using the terms "consular officials" in article 33 and "members of the consular staff" in article 34 interchangeably. If any distinction were intended, it should be stated *expressis verbis*. If no such distinction were intended, the same term should be used throughout. He agreed with Mr. Amado that legal rules should be formulated in precise terms. He considered the phrase "*res judicata*" to be incorrect. In American, and probably also in English usage the expression was never employed in criminal law, a decision having the force of *res judicata* meant a judgement that barred a second suit on the same subject. The criticism that the Special Rapporteur's text was too detailed might have merit, but that was a matter of opinion which could be settled by the Drafting Committee.

3. Mr. ŽOUREK, Special Rapporteur, explained that the expression "consular officials" had been used, in accordance with the definition given in article 1, as adopted, to describe any person, including a head of post, who exercised consular functions in the receiving State and who was not a member of a diplomatic mission. That meant that article 33 did not apply to all members of the consular staff. He personally would have no objection to extending the principle so far, but feared that not many governments would accept so broad a provision.

4. Mr. SANDSTRÖM explained that the main reason for his amendment was his inability to accept the Special Rapporteur's provision that in a criminal case consular officials would "in no event be compelled to appear before the court". Such a provision would constitute a departure from regular judicial procedure. Surely, what would be compromising for a consular official was not to appear in court, but to be summoned before the court and to be convicted of a criminal offence. The argument that the exercise of consular functions would be impaired if the consular official was taken away from his work had been greatly exaggerated. It would in any case be a rare occurrence and arrangements could easily be made which would reduce interference with the performance of consular functions to a minimum. It would be preferable, therefore, to refrain from making an exception to the usual procedure.

5. Sir Gerald FITZMAURICE thought that the Drafting Committee might well consider placing the Special Rapporteur's draft article 33 after draft article 34 — the more logical order, especially as the question of immunity from jurisdiction might arise in connexion with article 33, paragraph 1. It was not clear whether the exception stated in that paragraph would apply even to cases where the act was committed in the course of the exercise of consular functions. Such cases were unlikely, of course, but not inconceivable; for example, a consul proceeding in his car on official business might by negligent driving kill or seriously injure some person. That would normally be classed as an offence, and in such a case the question would arise whether the principle of the consul's personal inviolability would apply. The effect of the exception stated in paragraph 2 of the Special Rapporteur's draft and in paragraph 3 of Mr. Sandström's draft (despite the difference with regard to the length of the term of imprisonment) would be that a consul convicted of the class of offence so defined would not have to serve a sentence. That would be tantamount to giving consuls complete immunity from the consequences of all except the most serious criminal offences and, virtually the same kind of immunity as diplomatic agents. There might be no great objection of principle to that, but it went a great deal further than most consular conventions. Most consular conventions granted no immunity if a consular officer was convicted of a criminal offence and provided immunity only from arrest and deten-

tion pending trial. Many consular conventions provided for no exemption from serving a sentence imposed by a final judgement. Theoretically, a consul would be liable to serve a sentence, even if it was only for a term of six months. Undoubtedly that rarely happened, since, at any rate where a career consul was involved, some means would be found to enable him to be recalled. The Special Rapporteur and Mr. Sandström now proposed to qualify that practice fairly drastically and to go considerably beyond the existing practice. Paragraph 3 of the Special Rapporteur's draft also went beyond the existing practice. There might be some inconsistency between the provision stipulating that a consular official could in no event be compelled to appear before the court and that in paragraph 1, under which in certain cases a consular official might actually be placed under arrest. It would be a curious situation if a person under arrest could not be compelled to appear in court. He supported the principle set out in paragraph 4 of the Special Rapporteur's draft, but doubted if the diplomatic representative of the sending State would have to be notified in all cases. He would naturally have to be notified if the case involved the head of consular post, but where some other member of the staff of the consulate was involved, the obvious person to notify would be the head of consular post. That slight inconsistency might easily be remedied by redrafting.

6. Mr. MATINE-DAFTARY said that the Special Rapporteur was greatly to be commended on the research he had lavished on draft article 33, but the fruits of that research had proved somewhat indigestible. The result was an anomaly in criminal law. The Special Rapporteur could not have it both ways. Either a consular officer could be prosecuted or he could not; either he enjoyed personal inviolability or he did not. It would be quite improper to try as it were to gag the courts. If a consular officer could be prosecuted, the rest of the procedure must follow. The word "and" in the phrase in paragraph 1 reading "except when they are caught *in flagrante delicto* and the act committed constitutes a criminal offence against life or personal freedom" was far too restrictive. Far more serious offences than those specified might be committed, notably offences against the security of the State of residence. Similarly, where a consular officer was implicated as an accomplice the criminal procedure would have to take its course even if he had not been caught *in flagrante delicto*. It would be quite impossible to place restrictions on the operation of that procedure. Paragraph 2 did not therefore really constitute an exception to paragraph 1. It was a matter of course that neither a consul nor anyone else would be imprisoned except as a result of a final judgement. The expression "committed to prison" was in any case too indefinite and not legally correct when used in connexion with a sentence in a criminal case. The expression "an offence punishable by a term of imprisonment of one year or more" in paragraph 2 was

also vague. It was not clear whether it meant the punishment prescribed in the penal code or that imposed by the court. If it meant the former, there might be aggravating or mitigating circumstances which might influence the court's judgement. The formula used in articles 14 and 16 of the Havana Convention of 20 February 1928 regarding consular agents¹ was preferable, for it established the two principles that if a consul committed an act classed as a crime by local legislation, he was liable to prosecution, and that consuls were not subject to local jurisdiction for acts done in their official character and within the scope of their authority. If the Special Rapporteur's draft were adopted as it stood, it would render the procedure of the courts of the State of residence unworkable.

7. Mr. FRANÇOIS also expressed his appreciation of the research carried out by the Special Rapporteur, but was not wholly in agreement with the result. The principle of immunity from jurisdiction in respect of acts performed in the exercise of consular functions was generally accepted. With regard to the placing of article 33 in subsection C (entitled "*Personal privileges and immunities*"), he was even more dubious than Sir Gerald Fitzmaurice. What was at issue was not really personal immunity. The Special Rapporteur himself in his commentary on article 27 in the first draft had remarked that the immunity from jurisdiction enjoyed by consular officers with regard to acts performed by them in the discharge of their functions was based on the respect due the sovereignty of the foreign State whose organs they were;² it was therefore not a personal immunity but an immunity attaching to every act of a sovereign State. Had the Special Rapporteur changed his view? Or had he come to the conclusion that his earlier view was open to too many objections and had he sacrificed logic in order to meet those objections? To accept the idea of personal immunity for acts performed in the exercise of consular functions would give rise to difficulties. In article 37, paragraph 1, of the diplomatic draft the expression "official acts" had been used; that was an apt way of qualifying the concept "acts performed in the exercise of their functions", which was too sweeping. Thus, a traffic offence committed in the course of official functions would not itself be an official act. Mr. Bartoš had said that in many recent consular conventions the trend was towards a more liberal treatment of consuls and their assimilation to diplomatic agents. Mr. Matine-Daftary had stated that he would even prefer to give consular agents diplomatic status rather than accept the Special Rapporteur's draft. He agreed with Mr. Bartoš that a trend existed towards broadening the prerogatives of consuls, but Mr. Bartoš himself would

have to admit that a reverse trend also existed. National authorities were coming increasingly to object to the number of persons claiming to enjoy diplomatic privilege especially in consequence of the growth of international organizations. The principle of immunity from jurisdiction was perhaps applicable to the head of a consular post, but the Special Rapporteur's draft seemed to extend it to all "members of the consular staff". The Special Rapporteur had explained that the expression did not include consular employees but even consular staffs tended to be very numerous in large cities and ports. To extend the scope of immunity would add to the difficulties of the administrative authorities of the State of residence. The Special Rapporteur had rightly not asserted absolute immunity, but had postulated only relative immunity in cases where consular officials could be arrested or detained. The principle that consular officials could be prosecuted and even fined should be upheld. In practice they rarely committed very serious criminal offences, but members of consular staffs not infrequently committed traffic offences. No concession should be made in such cases. He must therefore object to the Special Rapporteur's provision that consular officials could not be compelled to appear in court in person. There was really no reason why they should not appear. At the most, they might waste a morning or an afternoon, and the exercise of consular functions would not suffer more than if they happened to be ill. Judges would find it extremely inconvenient to go to a consulate to take a deposition. The situation was quite different in the case of diplomatic agents, owing to the principle of extraterritoriality. A diplomatic agent could not be required to attend a court hearing. The dignity of the high diplomatic function could not be jeopardized. Those two principles applied with far less force to consular officials. Furthermore, proceedings in writing were not accepted in the criminal procedure of many countries. Those countries could hardly be expected to amend their code of criminal procedure simply to save a consular officer from having to spend a morning in court. For the same reason, he could not concur with Mr. Yokota's amendment requiring the judicial authority to arrange for taking depositions in writing at the consul's residence or office. Like other speakers he could not accept the Special Rapporteur's proposal in draft article 33, paragraph 1, that consular officials were not liable to arrest except *in flagrante delicto* and if the act committed constituted a criminal offence against life or personal freedom. The Special Rapporteur had selected the provision from certain consular conventions, but his choice had not, perhaps, been a happy one. It was not clear why the exception for a criminal offence against life should apply only if the consular official was caught *in flagrante delicto* and not if the act was proved subsequently. The criminal offences listed in paragraph 1 were not the only serious offences that a consular official might commit. Mr. Sandström's wording was preferable. He agreed with Sir Gerald Fitzmaurice's criticism of the Special Rapporteur's provision

¹ League of Nations, *Treaty Series*, vol. CLV (1934-1935), No. 3582, p. 299.

² *Yearbook of the International Law Commission*, 1957, vol. II (United Nations publication, Sales No. 1957.V.5, vol. II), p. 99.

concerning committal to prison after judgement, but he was even more reluctant to accept it than Sir Gerald because it was an innovation. It might be asked whether the Commission should necessarily accept the new trend and whether the existing practice had really given rise to such drawbacks that the Commission must make innovations.

8. Mr. ŽOUREK, Special Rapporteur, explained that in his draft he had construed immunity from jurisdiction as meaning exemption from the jurisdiction of the State of residence in respect of those acts only which were performed by members of the consular staff in the exercise of their functions, as was stated in draft article 34. At that point he had been considering the principle rather from the point of view of the privileges and immunities of a sovereign State, as explained in his commentary on article 27 in the first report.³ The personal inviolability of consular officers in no way meant immunity from jurisdiction: it merely meant that they were exempt in the cases set out in article 33. Exemption should be regarded as applying also to any restraint on personal liberty which might be decided upon in the course of civil proceedings.

9. Mr. VERDROSS thought that the distinction drawn by the Special Rapporteur between personal inviolability and immunity from jurisdiction was not quite sound. Immunity for acts performed in an official capacity was absolute, whereas for other acts it was relative. In that respect the position of consuls differed from that of diplomats, who enjoyed immunity even for non-official acts. He could accept Mr. Sandström's amendment, which opened with the statement of the principle that immunity for acts performed in the exercise of consular functions was absolute, and went on to refer to their partial immunity where their private acts were concerned. Comparing the Special Rapporteur's draft article 33 (*Personal inviolability*) with draft article 34 (*Immunity from jurisdiction*), he said the Special Rapporteur used the expression "personal inviolability" in connexion with the relative immunity of consuls for acts performed in a non-official capacity. The title of draft article 33 was not correct. The expression "personal inviolability" was used quite differently in the literature. The German literature on the subject expressed the idea that diplomats and consuls had the right to "special protection", whereas the term "inviolability" was used only to mean that diplomats and consuls were fully or partially exempted from local jurisdiction. Furthermore, it should be stated that consuls were entitled to a certain degree of immunity in connexion with acts constituting a criminal offence, but not to immunity in civil cases.

10. Mr. YOKOTA agreed with Mr. Verdross that instead of the expression "personal inviolability" it would be more accurate to use "special protection" and that only diplomatic agents enjoyed immunity from jurisdiction with regard to private

acts. The final phrase in paragraph 1 of the Special Rapporteur's draft article 33 was at once too broad and too restrictive. It was too broad because an offence against life or personal freedom might sometimes not be sufficiently serious to justify the arrest of a consular official. It was too restrictive because it failed to cover far more serious criminal offences, such as espionage or offences against the security of the State of residence. The statement should therefore be qualified along the lines of the last part of paragraph 2. Precedents existed in several consular conventions, such as that between the United States of America and Costa Rica of 12 January 1948 (article II, paragraph 1),⁴ and a similar provision in the draft convention between the United States and Japan. It would be preferable, therefore, to follow the language of that convention and to define the offences for which a consular official was liable to arrest as crimes which, upon conviction, might subject the individual guilty thereof to a sentence of imprisonment for a period of one year or more. For all those reasons he would support Mr. Sandström's amendment; the question whether the term of imprisonment to be used as criterion should be one year or two years was a minor one.

11. Mr. AGO said that he agreed with the Special Rapporteur's approach. Draft article 33 did not raise any question of immunity from jurisdiction, whether absolute or relative. The only immunity from jurisdiction was that laid down in article 34 in respect of acts performed in the exercise of consular functions. Consuls enjoyed no immunity whatsoever from jurisdiction in respect of private acts.

12. It was in fact clear from the terms of article 33 that nothing stood in the way of proceedings being instituted against a consular official; the provisions of that article were merely intended to protect the official from arrest or detention while the trial lasted, and came under the heading of personal inviolability. In the draft on diplomatic intercourse, article 27, which provided that diplomatic officers were not liable to any form of arrest or detention, had been placed under that heading.

13. Mr. TUNKIN said that he agreed with the principle embodied in the Special Rapporteur's article 33, which broadly reflected existing practice.

14. With regard to the substance of paragraph 1, he said it was true that, as Mr. Yokota had pointed out, certain consular conventions contained different provisions, but it was equally true that a provision along the lines of paragraph 1 existed in a large number of other conventions.

15. As to paragraph 2, he shared the view expressed by Sir Gerald Fitzmaurice and Mr. François that it would be going too far to say that consular officials could not be committed to prison except under a final judgement for an offence punishable

³ *Ibid.*

⁴ United Nations, *Treaty Series*, vol. 70 (1950), No. 896, p. 32.

by a term of imprisonment of one year or more. Such a provision was unlikely to be generally accepted by governments.

16. With regard to paragraph 3, he said that while it was clear that a consular official could not be compelled to appear before a court, it was appropriate, as had been pointed out by Mr. François, to stipulate that the official concerned had an obligation to appear. He drew attention in that connexion to article 40, paragraph 1, which stated that members of the consular staff were liable to attend as witnesses in the courts. There was therefore no reason why a consular official should be exempted from appearing in court in the event of criminal proceedings being instituted against him.

17. He considered that the second sentence of Mr. Yokota's amendment (538th meeting, paragraph 64) contained a desirable provision, and suggested that that provision be referred to the Drafting Committee.

18. Similarly, the idea contained in the second sentence of Mr. Sandström's proposal for article 33, paragraph 2 (537th meeting, paragraph 41), was a useful one and could also be referred to the Drafting Committee.

19. As to paragraph 4 of the Special Rapporteur's article 33, he agreed with Sir Gerald Fitzmaurice that, in the case of subordinate consular officials, the head of consular post rather than the diplomatic representative should be notified of the arrest or of the institution of criminal proceedings.

20. Lastly, the arrangement of the articles could be left to the Drafting Committee. For his part, he thought that the provisions of article 34, which dealt with the more important question of immunity from jurisdiction, should precede those of article 33.

21. Mr. MATINE-DAFTARY suggested that the Commission might obtain guidance from the rules which in many countries governed the immunity from jurisdiction of members of Parliament and judges. Those persons were given such immunity in order to protect them from interference in the discharge of their important duties and from the possible consequences of mischievous accusations.

22. Normally, before criminal proceedings could be instituted against such persons a special procedure had to be observed. In the case of members of Parliament, the procedure in certain countries was for the Judicial Affairs Commission of the Senate or Chamber of Deputies, as the case might be, to examine the charges and the evidence. That Commission, if it found that there was *prima facie* evidence of an offence, would lift the immunity and the proceedings against the member of Parliament concerned could then take their course. A similar method was followed in the case of judges: the charges and the evidence were examined by a Supreme Council of the Judiciary, which considered whether there was sufficient evidence to justify criminal proceedings against the judge concerned.

23. Perhaps provision might be made in the case of consular officials for an authority or a body, entrusted with the examination of the evidence, the circumstances of the case and the seriousness of the alleged offence, for the purpose of deciding whether it was appropriate to bring a formal charge against the official.

24. He urged, however, that once it was decided that proceedings could be instituted against a consular official, he should be treated like any other accused person and the judicial process should not be changed for his benefit.

25. Mr. EDMONDS drew attention to the fact that article 34, paragraph 1, provided for immunity from liability in respect of acts performed by members of the consular staff in the exercise of their functions. In practice, it was often difficult to draw the distinction between such acts and private acts, and it was for the courts of the receiving State to determine whether or not an act had been performed in the exercise of a consul's official functions. Since the Commission did not lay down any criteria for the solution of that question, the best course would be to adopt a provision along the lines of the concluding passage of article 21 of the Harvard Draft,⁵ which stated that "the receiving State decides, subject to diplomatic recourse by the sending State, whether the act was done in the performance of such functions".

26. Mr. LIANG, Secretary to the Commission, said that he shared the doubts which had been expressed regarding the term "personal inviolability", which was not in frequent use as applied to consuls. The term used in the French Foreign Ministry's memorandum relating to consular privileges and immunities in France, was *immunité personnelle*; the memorandum stated that that personal immunity involved merely the exemption from arrest pending trial and that the privilege in question was granted for the purpose of enabling a consul to continue to protect the interests of his country and its nationals.⁶

27. If the expression "personal inviolability" was going to be used in the draft, the provisions of article 33, paragraphs 1 and 2, should normally appear in article 32, which dealt with respect due to a consul. The requirement that the consul should not be arrested or detained would thus be connected with the steps conducive to ensuring the inviolability of the consul; the drafting would be similar to that of article 27 of the draft of diplomatic intercourse.

28. For his part, he suggested that article 33 be divided into two separate articles. The first, consisting of paragraphs 1 and 2, would deal with

⁵ Harvard Law School, *Research in International Law. (II) The Legal Position and Functions of Consuls* (Cambridge, Mass., Harvard Law School, 1932), p. 338.

⁶ See *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No. 58.V.3.), p. 122.

immunity from arrest or detention (or personal immunity, to use the terminology of the French memorandum). The second article would deal with proceedings and lawsuits and would include paragraphs 3 and 4 of article 33; it might also deal with civil proceedings, which were not mentioned in the draft, although it could be inferred from the terms of article 34 that immunity from jurisdiction only applied to civil proceedings in respect of acts performed in the exercise of consular functions.

29. Mr. ŽOUREK, Special Rapporteur, said that article 33 covered all forms of restriction to personal freedom, including those which might in exceptional cases arise from civil proceedings.

30. He had used the expression "personal inviolability" in preference to "personal immunity" because the use of the latter expression in many consular conventions in the nineteenth century had led to much controversy. At least three widely different interpretations had been given to that expression as used in those conventions: it had sometimes been taken to mean complete immunity from jurisdiction; in other instances, it had been interpreted as protecting consular officials from all restrictions on their personal freedom; lastly, it had also been interpreted as meaning personal inviolability in the sense of exemption solely from arrest or custody pending trial.

31. The CHAIRMAN said that the arrangement and titles of the articles could be left to the Drafting Committee. The Commission would confine its decisions to points of substance; since it had been discussing both article 33 and article 34, he suggested that the Commission decide to refer the question of immunity from jurisdiction, as set forth in article 34, to the Drafting Committee, together with Mr. Sandström's proposed article 33, paragraph 1, and the suggestion by Mr. Edmonds to draw upon the terms of article 21 of the Harvard Draft.

32. Mr. SCELLE said that he had no objection to article 34 and the proposals connected with it being referred to the Drafting Committee, but suggested that article 40 should be dealt with by the Commission when it had disposed with articles 33 and 34. The provisions of article 40 expressed the existing practice and should give rise to no great difficulty.

33. Sir Gerald Fitzmaurice had no objection either to the suggestion of Mr. Scelle or to that of the Chairman. However, he pointed out that article 34 had a second paragraph which involved a novel point. Under that paragraph any court of law in the receiving State could be debarred from pronouncing upon the question of immunity, inasmuch as all difficulties of that kind must be settled solely through the diplomatic channel. In principle, such a rule might have its advantages but it would be difficult for many countries to accept it, particularly since there was no corresponding provision in the draft on diplomatic intercourse.

34. In the United Kingdom, under the Diplomatic Privileges Act, courts were able to pronounce on claims to immunity. When immunity was pleaded in the course of proceedings, the matter could be argued; a representative of the Crown could, as *amicus curiae*, sustain diplomatic immunity before the court and the court would pronounce on the immunity. That being the position in the case of diplomatic immunity, the immunity (if any) of consular officers would *a fortiori* be a proper matter for the courts to pronounce upon. It was difficult to see how a country having such a system could accept the proposition that the mere fact of immunity being invoked would prevent a court from pronouncing and that difficulties of that kind must be settled solely through the diplomatic channel.

35. Mr. ŽOUREK, Special Rapporteur, said that he had included the provision in question because it appeared in a number of consular conventions and because it served an eminently practical purpose.

36. A provision of that kind was particularly useful in the draft on consular intercourse because immunity from jurisdiction depended on whether the act involved was performed in the exercise of consular functions. The difficulties which might arise in connexion with that immunity were much more complex than those involved in the application of diplomatic immunity. With regard to diplomatic agents, immunity from jurisdiction applied to all acts, whether performed in the exercise of official functions or not, and therefore the only question which could arise was the much simpler one of determining whether the person concerned was entitled to diplomatic immunity or not.

37. Mr. SANDSTRÖM explained that he had not included in his amendment a provision corresponding to paragraph 2 of the Special Rapporteur's draft article 34 because he shared Sir Gerald Fitzmaurice's misgivings. The court should naturally consult the Ministry of Foreign Affairs, but it was for the court to decide whether or not the charge arose from an act committed in the course of the consul's official duties.

38. Mr. AGO also doubted the wisdom of inserting such a provision in the draft. Even under the provisions of the diplomatic draft, there were persons to whom immunity was granted only in respect of those acts performed in the course of their duties (article 36); and no provision similar to the Special Rapporteur's text of article 34, paragraph 2, had been inserted in that draft. In his view, such a provision would provoke a storm of criticism. Its practical effect would be that it would always be open to the person concerned to invoke immunity, and the matter would nearly always lead to a dispute at the diplomatic level. If the Commission were to adopt such an innovation in international law, the disadvantages would far exceed any advantages that might be gained.

39. The CHAIRMAN proposed that the first paragraph of article 34 of the Special Rapporteur's draft should be referred to the Drafting Committee.

It was so agreed.

40. Mr. FRANÇOIS agreed with Mr. Ago that paragraph 2 of the Special Rapporteur's draft article 34 constituted an undesirable innovation, and thought that it should be deleted.

41. Mr. YOKOTA thought that the position was correctly stated in paragraph 2 of article 36 of the diplomatic draft. In a well-known case which had occurred in Japan about twenty years earlier, involving a Chinese minister, the courts had decided in favour of respecting the minister's immunity; that should also be the case where a consul was concerned.

42. Mr. BARTOŠ said he would go even further than Mr. Ago. In any case in which the consul pleaded immunity the Attorney-General (procureur-général) should consult the Ministry of Foreign Affairs or the organ of the receiving State which dealt with matters of protocol; that was the practice in most countries, including Yugoslavia. When acquainted with the results of that enquiry, the courts must nevertheless have freedom to define their competence, subject of course to the terms of a duly ratified international convention between the two States. He cited the Castiglioni case which, after judicial proceedings, had finally been settled by negotiation. It showed that, even though the question whether or not an act performed by a consul as part of his official functions was one covered by immunity might be determined by the courts of the receiving State, and even though their decision might be in the negative yet, in the last resort, it was possible to settle the matter by negotiations between the two governments. In general he did not think that the interpretation of consular immunities and privileges should form the subject of diplomatic negotiation unless such negotiation finally became unavoidable. Compulsory arbitration was of course a possible method, but it was not the generally accepted practice, and in any case reference to arbitration or to the International Court of Justice was costly and cumbersome, and he did not believe that the Commission in drafting a multilateral convention would wish to recommend that procedure to States as a way of settling everyday matters involving the privileges and immunities of consuls.

43. Mr. ERIM said that attention had been drawn to article 21 of the Harvard Draft on the legal position and functions of consuls. Under that article, for the purpose of determining whether a consul was exempt from the local jurisdiction in respect of any particular act, the authorities of the receiving State decided whether the act in question had been performed in the course of official duty. Such a provision was particularly relevant to countries in which the separation of powers (executive and judicial) was strictly observed. The courts were jealous of their prerogatives, and in his country, for instance, the judi-

ciary would not accept a provision such as that embodied in paragraph 2 of article 34 of the Special Rapporteur's draft. The interpretation of consular immunities and privileges should be left to the courts of the receiving State; there could always be an appeal and finally, if necessary, a recourse to diplomatic negotiations. He thought the Drafting Committee should be asked to devise a form of words on the lines of article 21 of the Harvard Draft.

44. Mr. AMADO said that article 21 of the Harvard Draft only referred to a consul who was no longer in office. He drew attention to the Swiss practice under which consular officials, though not eligible to immunity from jurisdiction as of right, were not brought into court until after the authorities responsible for protocol had had an opportunity of expressing their opinion.

45. Mr. BARTOŠ remarked that the position in the United States of America was similar.

46. Mr. ŽOUREK, Special Rapporteur, explained that he had included paragraph 2 in his draft article 34 because he had thought that it would provide a practical way of cutting short any dispute which might arise about immunity from jurisdiction. Possibly the provision did not actually reflect the prevailing general practice, but it was nevertheless to be found in a number of consular conventions. He agreed with Mr. Amado that before proceedings were instituted against a consul the court should first consult the Ministry of Foreign Affairs or the authority in the receiving State responsible for protocol and the interpretation of international conventions. His object in drafting paragraph 2 of article 34 had been to find some way of forestalling disputes over consular privileges and immunities.

47. The CHAIRMAN asked the Commission to decide by a vote whether paragraph 2 of article 34 of the Special Rapporteur's draft should be retained and referred to the Drafting Committee.

By 11 votes to 2, with 3 abstentions, it was decided not to retain paragraph 2.

48. Mr. BARTOŠ proposed that the commentary on article 34 should mention the proposal which the Special Rapporteur had made in paragraph 2.

49. The CHAIRMAN felt sure it would be agreed that the proposal should be mentioned in the commentary.

50. Mr. ERIM said that the deletion of paragraph 2 of article 34 of the Special Rapporteur's draft left a vacuum. Who was to settle the question whether an act which was the subject of a court case fell within the consul's official functions?

51. Sir Gerald FITZMAURICE said that in his view disputes concerning the interpretation of the scope of consular immunity to jurisdiction would be settled in much the same way as other disputes concerning consular functions (e.g., visits to nationals in prison). The diplomatic draft envisaged arbitration or a recourse to the International

Court of Justice. In the last resort, disputes concerning consular immunities would probably be settled in like manner.

52. Mr. PAL did not feel that the Commission's rejection of paragraph 2 of article 34 would cause any difficulty. The courts of the receiving State must in the first instance decide their own competence; for that purpose they would also be competent to reach their own decision as to the basic facts.

53. Mr. SCELLE agreed with Sir Gerald Fitzmaurice and Mr. Pal, but thought that a special article might be drafted to cover any difficulty that might arise.

54. The CHAIRMAN asked the Commission to discuss any further points arising out of paragraph 4 of the Special Rapporteur's draft article 33. He personally felt that if a consular official was arrested the receiving State should inform the head of the consular mission rather than the diplomatic mission.

55. Mr. ŽOUREK, Special Rapporteur, agreed with the Chairman, and thought that the draft of the article could be referred to the Drafting Committee.

56. Mr. SANDSTRÖM reiterated his objections to paragraph 3 of the Special Rapporteur's draft article 33.

57. Sir Gerald FITZMAURICE thought there were a number of matters of substance on which the Drafting Committee would need guidance. For instance, he still felt considerable doubt whether the provision contained in the last sentence of paragraph 3, which required the judicial authority to visit the consul in his residence for the purpose of taking a deposition, was practical.

58. Mr. YOKOTA, speaking as Chairman of the Drafting Committee, said the Committee certainly needed some guidance. At its last meeting it had had to refer back to the Commission a question which seemed to be one of principle.

59. The CHAIRMAN drew attention to the fact that there were two alternative amendments to paragraph 3 of article 33, namely those of Mr. Yokota and Mr. Sandström.

60. Mr. ŽOUREK, Special Rapporteur, said that it had been asked for what reason the consul should enjoy special privileges if he were called upon to appear in court. A consul was, after all, the representative of a foreign country; newspaper publicity, for instance, might damage his reputation before the case was heard, and the incident might easily become a matter affecting international relations. He was prepared to follow Mr. Tunkin's suggestion and to insert a provision in the article to the effect that a consul must be answerable to the courts, but he was convinced of the need for laying down some special procedure.

61. Mr. BARTOŠ said that all members of the consular staff who were the subject of judicial proceedings should be treated in the same way

as the head of a consular post: the privileges which they enjoyed were not granted to them in a personal capacity but as a result of the office they held.

62. Sir Gerald FITZMAURICE doubted whether the Special Rapporteur could cite a single example in a consular convention of a provision of the kind he had proposed in paragraph 3 of article 33.

63. In many countries a consul, like any other person accused on a criminal charge, must be brought into court and, if he gave evidence, could be cross-examined. In England, where criminal trial was usually by jury, it would scarcely be practical to transport the whole jury to the consul's residence. The real choice seemed to be between complete immunity from arrest, or compliance with the normal procedure of the local courts.

64. Mr. AGO emphasized the fact that, while it might be possible to conceive of consular immunity from the obligation to appear before the court in a case where the consul enjoyed immunity from detention, it was certainly not possible to do so in a case where he had already been arrested. Even where the consul was at liberty during criminal proceedings which had been instituted against him, it was inadvisable to treat him as if he were a witness in a case in which he was not the accused but had merely been requested to give evidence. When criminal proceedings had been brought against a consul, it was going too far to ask the local authorities to go to his residence to take down a statement. He thought the matter could be solved by a more flexible formula, which might give expression to the principle that special care should be taken to avoid interference with a consul's work or with the exercise of his functions.

65. Mr. AMADO suggested that, to cover the case of the consul as witness in civil proceedings, the Commission's draft might follow article 22 of the Harvard Draft.

66. Mr. BARTOŠ reiterated his view that, whatever the wording used, all consular staff, irrespective of rank, should be treated as being on the same footing by the courts of the receiving State.

67. The CHAIRMAN, summing up the discussion, said that it seemed to him there were three points on which the Commission should take a decision. Firstly there was the question, on which Mr. Tunkin and the Special Rapporteur were now agreed, whether consuls should be obliged to appear in court. Secondly there was the question how and where they were to give their evidence. Finally, there was the proposal that when a consul was asked to appear in court interference with his official functions should be avoided.

68. Mr. ŽOUREK, Special Rapporteur, said that he would prepare a more general form of words for article 33, paragraph 3.

69. The CHAIRMAN welcomed the Special Rapporteur's offer, and hoped that he would take

into account the problem which Sir Gerald Fitzmaurice thought would arise if the local authorities were obliged to go to the consul's residence to take his statement of evidence.

The meeting rose at 1 p.m.

540th MEETING

Monday, 16 May 1960, at 3.55 p.m.

Chairman: Mr. Luis PADILLA NERVO

Filling of casual vacancy in the Commission (article 11 of the Statutes) [continued]*

[Agenda item 1]

1. The CHAIRMAN announced that the members of the Commission, meeting in private, had elected two persons to fill the vacancies caused by the appointment of Mr. Ricardo J. Alfaro to the International Court of Justice and by the resignation of Mr. Thanat Khoman. The new members were Mr. Eduardo Jiménez de Aréchaga of Uruguay and Mr. Mustafa Kamil Yasseen of Iraq. The Secretariat would communicate the results of the elections to the persons concerned.

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 33 (*Personal inviolability*) and ARTICLE 34 (*Immunity from jurisdiction*)

2. The CHAIRMAN, inviting the Commission to resume its consideration of article 33, paragraph 3, of the Special Rapporteur's draft (A/CN.4/L.86), referred to three points that had been raised in connexion with the evidence of consular officials against whom criminal proceeding were instituted. Mr. Tunkin had suggested (539th meeting, paragraph 16) that the obligation to appear before a court should be expressly stated. Some members had opposed the provision that the judicial authority requiring a consular official's deposition should take such deposition at the latter's residence or office. Lastly, Mr. Yokota had proposed an amendment (538th meeting, paragraph 64) stressing the desirability of avoiding interference with the performance of the consular official's duties.

3. Mr. ŽOUREK, Special Rapporteur, suggested tentatively that the paragraph should be replaced by the following text, which might be submitted to the Drafting Committee:

"In the event of criminal proceedings being instituted against a consular official of the sending State, that official shall appear before the court or before the administrative authorities. Nevertheless, the proceedings shall be conducted, except in the cases referred to in paragraph 1 of this article, with the respect due to the sending State and in a manner which will not hamper the exercise of consular functions."

4. Mr. SANDSTRÖM said that the "except" clause in the Special Rapporteur's tentative text was not satisfactory. Surely, the respect due to the sending State should be observed in all circumstances.

5. Mr. ŽOUREK, Special Rapporteur, said that he could not quite see how it would be possible to establish a distinction where detention was concerned. He thought the Drafting Committee would be able to draft a text acceptable to Mr. Sandström.

6. Mr. VERDROSS said that cases might occur where the sending State dismissed one of its consular officials owing to the nature of the offence he had committed.

7. Mr. AGO observed that in such cases the official concerned would be treated as an ordinary individual.

8. Mr. BARTOŠ agreed with Mr. Ago and thought that the draft fully covered the case referred to by Mr. Verdross.

9. The CHAIRMAN said that the tentative draft suggested by the Special Rapporteur and the opinions on paragraph 3 expressed in the Commission would be forwarded to the Drafting Committee.

10. Turning to paragraph 1, he recalled that Mr. Sandström had submitted a proposal (537th meeting, paragraph 41). Moreover, at the previous meeting (539th meeting, paragraph 5), Sir Gerald Fitzmaurice had questioned whether the provision also applied in cases where an offence was committed by the consular official while engaged on official business. Also at the previous meeting (*ibid.*, paragraph 6), Mr. Matine-Daftary had criticized the passage "the act committed constitutes a criminal offence against life or personal freedom", on the ground that consular officials might be liable to arrest or detention in the case of other criminal offences as well.

11. He invited members to comment on the principle raised in paragraph 1.

12. Mr. FRANÇOIS said he objected to the whole system set forth in the paragraph. In the first place, the provision seemed to imply that a consular official could be arrested in any case where he was taken *in flagrante delicto*, which had clearly not been the Special Rapporteur's intention. Naturally, an arrest should not be possible for minor offences. Secondly, the provision should not be limited to cases where a consular official was taken *in flagrante delicto*, for it was conceivable that conclusive evidence might be found, some time later, that the consular official had com-

* Resumed from the 527th meeting.

mitted a serious offence. He thought that the more general provision in Mr. Sandström's proposal was preferable.

13. Mr. BARTOŠ agreed with Mr. François that there was no reason why a consul's liability to arrest should be limited to cases of *flagrante delicto*. Moreover, he queried the second condition which, according to the Special Rapporteur's draft, had to be fulfilled before a consul could be arrested — *viz.*, that the offence must have been an offence against life or personal freedom; the Special Rapporteur himself had admitted some hesitation, in view of the varying severity of penalties under different legal systems. Accordingly, it seemed inadvisable to stipulate that the consul was liable to arrest in those two cases only. A broader formula would be closer to modern realities.

14. Sir Gerald FITZMAURICE said he was not sure that it was necessary to lay down the condition that, for the exception to operate, the consul must have been taken *in flagrante delicto*, especially in view of the further condition that the act must have constituted a criminal offence against life or personal freedom. If those two conditions were read together, it became obvious that the really effective condition was that the act committed must constitute a criminal offence against life or personal freedom — an extremely vague expression. Secondly, there might be cases not involving jeopardy to life or personal freedom in which arrest might be justified.

15. The Commission might follow a system, which appeared in a number of consular conventions, of relating liability to arrest to the question whether the offence with which the consular official was charged was liable to a certain type of penalty; for example, under some treaties, a consular official was liable to arrest or detention in those cases only in which conviction carried a minimum sentence of three or five years' imprisonment. That criterium had the advantage of being quite definite, of ensuring that the offence was serious (as measured by the severity of the penalty), and of not limiting the provision to offences against life or personal freedom, since other offences might also be extremely grave.

16. He pointed out that a consul who committed an offence while engaged on official business (if, for example, he committed a traffic offence when hurrying to intervene with the local authorities) would be immune from the jurisdiction of the receiving State under article 34. If the consular official was thus immune, it was hardly desirable to arrest or detain him; accordingly, the paragraph might be made subject to exceptions in cases falling under article 34. It might be argued that it would be difficult for the police to decide on the spot whether the official was immune from jurisdiction, but that difficulty arose in many other contexts also.

17. Mr. ŽOUREK, Special Rapporteur, pointed out that the situation covered by article 33, paragraph 1, was one where no judicial proceedings

had yet been instituted and where the police or administrative authorities were acting without a court order. Consular officials should be protected against arrest or detention for frivolous reasons, and it was essential to determine clearly the cases in which detention pending trial was justified. The provision should be liberal, rather than severe; if a criminal offence were committed, judicial proceedings would be instituted in each case. In his opinion, the provision concerning a criminal offence against personal life or freedom was absolutely essential, in order to limit the consul's liability to arrest to really serious cases and to avoid his detention for any trivial offence. The Drafting Committee might be asked to draft a broader formula; but he still thought that if paragraph 1 were omitted, the draft would lack a fundamental provision.

18. Sir Gerald Fitzmaurice had raised the question of the relationship between articles 33 and 34. He (Mr. Žourek) would point out that acts performed by consular officials in the exercise of their functions were exempt from the jurisdiction of the receiving State and could in no circumstances constitute grounds for the arrest of such persons. He agreed that it would be difficult for the police to distinguish between acts performed by consular officials in the exercise of their functions and other acts; it might however be possible to co-ordinate articles 33 and 34 in a suitable manner.

19. He believed that article 33 had been discussed sufficiently exhaustively and doubted whether an accurate text could be worked out in the Commission. In the light of the discussion, the Drafting Committee might be able to prepare a text acceptable to the majority.

20. The CHAIRMAN thought that the Drafting Committee might need further guidance concerning paragraph 1. The Commission did not seem to be agreed on whether a specific reference should be made to cases where the consular official was caught *in flagrante delicto*. That criterion was not mentioned in article 14 of the Havana Convention of 20 February 1928¹ or in article II of the Consular Convention between the United States of America and Costa Rica of 12 January 1948.²

21. Mr. AGO referred to his earlier remark (538th meeting, paragraph 66) that the Special Rapporteur had been very liberal with regard to detention pending trial and excessively strict with regard to court sentences. That view he would maintain and he agreed with Sir Gerald Fitzmaurice that a provision might be drafted under which the consul's immunity from arrest, whether prior or subsequent to the court sentence, would be limited to cases where the offence was punishable by imprisonment for, say, less than three years. Some doubt had been expressed whether immunity from jurisdiction as provided for in article 34,

¹ League of Nations *Treaty Series*, vol. CLV (1934-1935), No. 3582, p. 299.

² United Nations *Treaty Series*, vol. 70 (1950), No. 896, p. 32.

entailed personal inviolability with regard to immunity from arrest or detention. In his opinion, such immunity was self-evident in cases where the consul enjoyed immunity from jurisdiction. He could conceive of cases in which the consul might be tried without being arrested, but to be arrested without trial was inconceivable. As article 34 provided for immunity from jurisdiction, the consequences which it entailed were probably implicit in article 33. Apart from that, several speakers had considered the possibility of qualifying the word "acts" in article 34 by the term "official". The Drafting Committee should ponder the matter deeply before restricting article 34 too greatly. When once the immunity from jurisdiction was too severely qualified, the result might be a draft under which consuls would have virtually no immunity whatsoever. The key idea was that consuls were exempt from arrest and detention when acting as consuls, but not when they were acting as private individuals.

22. Mr. YOKOTA said that the Commission should decide whether it wished to retain the idea of capture *in flagrante delicto*, whether to retain in paragraph 1 the condition that the act committed must constitute a criminal offence against life or personal freedom, in order that the "except" clause could operate, or whether the condition should be replaced by some such phrase as that which appeared at the end of paragraph 2, and, if so, whether the term of imprisonment to be specified should be one year or two years.

23. Mr. ERIM observed that some points still remained obscure and should be cleared up before the article was sent to the Drafting Committee. In speaking about detention pending trial the Special Rapporteur had considered two possibilities, which should be dealt with separately. First, there was the case of capture *in flagrante delicto*, where the offender was taken in the act or immediately afterwards. Secondly, there was the offence where there was no flagrancy; in that case, it was the judge alone who decided whether detention in custody was necessary. When the case was one of a person taken *in flagrante delicto*, the situation might be complex: the offender would be arrested by the police and the juge d'instruction would not intervene until some twenty-four or forty-eight hours later. If the Commission's draft specified the criminal offences for which a consul could be arrested by reference to a minimum term of imprisonment — without contemplating cases where the offender was taken *in flagrante delicto* — the police would not be able to decide on the spot whether they could or could not make an arrest. The position was much more complicated than it would be in the case of a diplomatic agent, who had merely to identify himself to be released. If a consul committed an offence and the police arrested him in the act, it would not become apparent until later — *i.e.*, when he was brought before the judge and after the first stage of the investigation was over — whether the offence was punishable by imprisonment for one year, two years or three years. What would the police do in the

meantime? He thought the Commission could not ignore the impression which would be created in the public mind if under its draft an offender taken *in flagrante delicto* remained at liberty simply because the police had learned that the person concerned was a consul. The Commission must decide whether it wished to specify that the consul involved in a serious criminal offence and taken *in flagrante delicto* should remain free or liable to detention pending a court order. If the expression "*in flagrante delicto*" was retained, the police would by implication have power to arrest and detain a consul until the juge d'instruction had decided whether the offence was one punishable by imprisonment for the term specified and whether there was reason to detain the accused person in custody.

24. Mr. ŽOUREK, Special Rapporteur, replied that Mr. Erim's point was well taken and was a strong argument in favour of retaining the fundamental rule concerning the consul's liability to arrest for a flagrant offence. Perhaps a formula might be devised, not so precise as that used at the end of paragraph 2, to enable the police to arrest a consul when public opinion was roused. For that reason he was not in favour of the idea, mentioned by Mr. Yokota, that the last phrase in paragraph 1 might be replaced by the last phrase in paragraph 2. As he had explained in his second report (A/CN.4/131, paragraph 60), different conventions mentioned different terms of imprisonment as the criterion governing the consul's liability to arrest, and he had taken the shortest term as the one most likely to be acceptable to the majority of governments. He would certainly not have any objection to specifying a term of three years in the Draft, so that governments could comment thereon. The Commission might take its final decision on that point in the light of the governments' comments.

25. Mr. SANDSTRÖM did not agree that Mr. Erim's argument was such a strong one in favour of retaining the reference to flagrant offences. The police would of course always have to determine the nature of the crime in the light of circumstances. Once that had been done, it would be possible for them to refer to the penal code for the purpose of discovering the penalty.

26. Sir Gerald FITZMAURICE said that, despite the views expressed by some members and especially by the Special Rapporteur, he still harboured serious doubts about the wisdom of including the expression *in flagrante delicto*. The expression could not be taken in isolation but was coupled with the phrase "and the act committed constitutes a criminal offence against life or personal freedom". The second phrase appeared to limit the possibility of arresting a consul to cases in which he was caught *in flagrante delicto*; but, as Mr. François had pointed out, good grounds for charging him might be established subsequently. Hence the qualification *in flagrante delicto* seemed relatively useless in isolation, and if it stood in

isolation a consul might be arrested for a quite minor offence. If the passage "the act freedom" were retained, the immediately preceding passage became useless or restrictive. If it was established that a criminal offence had been committed, there was no reason why the alleged offender should not be arrested if *prima facie* grounds for a charge existed. The only criterion should therefore be the nature and gravity of the offence. As he had suggested before, it would be undesirable to limit the liability to arrest merely to criminal offences against life or personal freedom; there were other equally grave offences for which consuls should be equally liable to arrest and detention. The sole solution was not to specify the crime, but to make the liability to arrest dependent on the severity of the sentence. As soon as it was stated to be an offence punishable by imprisonment for a term of three or more years, the idea of the gravity of the offence was automatically present.

27. Mr. AGO observed that if each of the terms in paragraph 1 were considered in isolation, the stipulation that consular officials must be caught *in flagrante delicto* would be too broad and that concerning the criminal offence against life or personal freedom too narrow. Mr. Erim, on the other hand, had raised a pertinent question: Who could decide the arrest of a consul? In his own view, only the judicial authority had that power, never the police, at least not without a specific warrant from the judicial authority. If a consul was arrested, two questions arose: first, had he been acting in the exercise of consular functions or in a private capacity? And secondly, did the act committed render him liable under the penal code to a term of imprisonment sufficient to justify the arrest? Such serious questions could not be left to be answered by the police. The very fact that reference was made to an offence punishable by imprisonment for a certain term showed that only the judicial authority, not the police, could decide on the arrest.

28. Mr. AMADO said that he had been waiting to hear some reference to the "clameur publique" in connexion with the concept of arrest *in flagrante delicto*. In all codes based on the French and Italian codes of criminal procedure, the object of provisions concerning *flagrante delicto* was to prevent an escape. If a consul was arrested by reason of a flagrant offence, the decision concerning his release would be given later. He did not think that a provision concerning arrest *in flagrante delicto* actually appeared in any consular conventions. He had not found it himself and therefore preferred some such language as that of article 20 of the Harvard Draft³ or article 14 of the Havana Convention or the formula used in Mr. Sandström's amendment (537th meeting, paragraph 41). In some cases excessive precision might be more of a

disadvantage than an advantage. The key point was that the authorities responsible for maintaining public order must have power to arrest anyone caught *in flagrante delicto*. Detention pending trial was equally necessary for the protection of a suspect. Some general term might well be used, and governments might be allowed to interpret it as they thought best. The Commission would be ill-advised to drop the expression "*in flagrante delicto*" without pondering the issue deeply.

29. Mr. BARTOŠ agreed with the view that, for the purpose of determining the gravity of the offence, the decisive criterion should be the severity of the penalty. In that connexion, he said he preferred a reference to a term of imprisonment of two or three years to a reference to a one-year term.

30. He pointed out that, under the normal constitutional safeguards for personal liberty in most countries, a person was not liable to arrest or detention pending trial unless he was charged with an offence of some gravity, and the criterion of gravity was normally the fact that the offence was punishable by a certain term of imprisonment. It was therefore unthinkable that consuls should be deprived of what was an elementary constitutional safeguard. In their case, the protection should, if anything, be greater because any hasty decision to arrest a consul could be harmful to good relations between the sending State and the receiving State.

31. For similar reasons, he thought that a person's fate — and *a fortiori* the arrest of a consul — should not be determined by the *clameur publique*.

32. The role of the police was to maintain order, not to make arrests of their own accord. In the case of a flagrant crime, the police could, of course, apprehend a person and take him to the competent judge who would, if necessary, order an arrest. As a guarantee of personal liberty, however, it was normal to specify that the person apprehended must be brought before the competent judge within a short time. Indeed, it was customary in such a case to advise the judge on duty by telephone.

33. Most consular conventions signed between the two world wars, and since the Second World War, contained a provision to the effect that consular officers were not liable to arrest or detention pending trial, except in respect of offences so serious as to be punishable by imprisonment for a term of two, three or five years, as the case might be.

34. Mr. SCALLE expressed surprise at the range of the discussion on what had struck him as a relatively simple point.

35. Sir Gerald Fitzmaurice had given the key to the problem by pointing out that if an act committed by a consular officer constituted a serious criminal offence, there appeared to be no reason why that officer should be liable to arrest only if apprehended *in flagrante delicto*.

³ Harvard Law School, *Research in International Law. (II) The Legal Position and Functions of Consuls* (Cambridge, Mass., Harvard Law School, 1932), p. 335.

36. Mr. AMADO had drawn attention to the essential duty of the police, which was to prevent a breach of the public peace. In conformity with that essential duty, the police were expected to take action not only against flagrant offenders but also against madmen or drunken persons. It was clear that in cases of that sort the police would have to act, even if the person disturbing the peace was a consul, and any different view was untenable. The police had no power to arrest a person or place him in custody; their duty was to apprehend a person who disturbed the peace and take him to the competent judge, who could order that person's arrest. The police were concerned with "inhibition", not with jurisdiction.

37. For all those reasons, he was definitely in favour of retaining the reference to flagrant offences, but did not approve of the qualifying provision "and the act committed constitutes an offence against life or personal freedom". He did approve, of course, of a provision limiting the power to arrest consuls to cases of serious offences, the seriousness being measured by the severity of the penalty. Such a provision should, however, be kept separate from the one referring to flagrant offences.

38. The Drafting Committee could perhaps adopt a text laying down that judicial action could proceed against consuls in the event of grave criminal offences and, in particular, in the case of flagrant offences. The question of the gravity of the offence, and indeed also the question whether a flagrant offence had or had not occurred, would have to be settled by the appropriate judicial authority. At the early stage, when the police was called upon to intervene, it would have to act on the basis of appearances, but its action, even when restraining or apprehending a person, did not constitute an arrest or detention in custody.

39. Lastly, he would once more point out that the use of somewhat vague terms was often essential when formulating rules of international law.

40. Mr. MATINE-DAFTARY expressed disapproval of the whole system embodied in article 33 as proposed by the Special Rapporteur. The provisions of that article constituted an unwarranted limitation upon the action of the judicial authorities. Moreover, it attempted to replace, in respect of consuls, the whole of the code of criminal procedure and penal code by the provisions of a single article.

41. He submitted that the Commission should only be concerned with protecting consuls from malicious or slanderous accusations. He therefore saw no sense in a provision which limited the power to arrest a consul to the case in which he committed a criminal offence punishable by a term of imprisonment of one year or two years. It would be most anomalous to allow a consul to go unpunished for committing an offence such as embezzlement, which in certain countries was not punishable by more than two years' imprisonment.

42. As to the police, there could be no doubt that it had no power to issue warrants of arrest. The police had, however, the duty to apprehend flagrant offenders. In that connexion, he pointed out that the concept of a flagrant offence, as construed in modern criminal law, covered more than just the case of an offender caught in the act of committing his offence.

43. Since the intention of the Commission was to regulate, in relation to consular officers, the matter of detention in custody, he ventured to suggest that consuls might perhaps be placed on the same footing as a class of persons who, under the municipal law of the receiving State, enjoyed relative inviolability, such as members of Parliament and members of the judiciary, who could not be prosecuted under the criminal law without the authorization of Parliament or the Supreme Council of the Judiciary, as the case might be. To prevent mischievous accusations, those bodies did not lift the immunity of such persons until after they had thoroughly inquired into the evidence produced in support of the charges made against such persons. In the case of consuls, the *Chambre de mise en accusations*, sitting in private as a *Chambre de Conseil*, might hear the doyen of the consular corps or the diplomatic representative of the sending State.

44. Perhaps the suggestion might be included in the commentary on the article, and governments might be invited to submit observations thereon.

45. The purpose of his suggestion was that a judicial body should be responsible for sifting the charges and evidence against the consular officer concerned and to decide whether the evidence was sufficient for criminal proceedings to be instituted.

46. Mr. ŽOUREK, Special Rapporteur, recalled that the whole purpose of article 33 was to provide that, while criminal proceedings should be brought against consular officials in the ordinary way, such officials should be left at liberty except in cases where particularly serious offences were involved.

47. His reasons for drafting the article as he had done were twofold. First, a consular official, like any other accused person, was entitled to the benefit of the presumption of innocence. Secondly, in the interests of good international relations, it was desirable that an official of a foreign State should not, saving in exceptionally grave cases, be kept away from his duties while a trial against him was pending.

48. In reply to Mr. Amado, he said that a reference to flagrant offences was contained, for example, in the Consular Convention of 1 March 1924 between Italy and Czechoslovakia (article 7),⁴ and in certain other consular conventions.

49. In reply to Mr. Matine-Defatary, he emphasized the fact that the aim of the article was not to place consular officials outside the jurisdiction of the State of residence in respect of any offence,

⁴ League of Nations *Treaty Series*, vol. XXXIV (1925), No. 867, p. 65.

however slight. His sole object was to confine arrest and detention pending trial to particularly serious cases and to ensure that a consul was not compelled to serve a prison sentence when the offence involved was a minor one. If and when a consul was sentenced under a final judgment, he would have to serve his sentence like any other person, provided that the offence was one punishable by a term of imprisonment of a length which had still to be determined.

50. The CHAIRMAN suggested that paragraphs 1 and 2 of article 33 be referred to the Drafting Committee with the following general indications: the majority of the members had expressed the opinion that the notion of the gravity of the crime should be one of the main criteria; on the other hand, the explanations furnished by Mr. Amado and Mr. Scelle with regard to the expression *in flagrante delicto* and detention pending trial made it possible to consider both notions in the wording of article 33; it had been agreed that the decision to be taken with regard to the gravity of the criminal offence must be made by the judicial authority. The Drafting Committee's text would, of course, be by no means final, since the Commission would examine it and would subsequently receive comments from governments. The suggestion made by Mr. Matine-Daftary might perhaps be discussed separately.

51. Mr. YOKOTA objected that the Drafting Committee would simply have to go over the same arguments as the Commission unless the latter decided whether the expression "caught in *flagrante delicto*" was to be retained or not.

52. The CHAIRMAN replied that the explanations given by some members seemed to weigh in favour of its retention. Whatever the Commission's text might provide, the practice of arresting overt offenders would undoubtedly continue in real life, since the police was responsible for protecting public order. He proposed that article 33 be referred to the Drafting Committee with the indications he had outlined.

It was so agreed.

The meeting rose at 6.20 p.m.

541st MEETING

Tuesday, 17 May 1960, at 10 a.m.

Chairman: Mr. Luis PADILLA NERVO

Consular intercourse and immunities
(A/CN.4/131, A/CN.4/L.86) [continued]
[Agenda item 2]

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

ARTICLE 40 (*Attendance as witnesses in courts of law and before the administrative authorities*)

1. Mr. ŽOUREK, Special Rapporteur, introducing article 40, said that paragraph 1 expressed an

accepted principle of international law. The fact that members of the consular staff were obliged to attend as witnesses, either in civil or in criminal proceedings, was stated in virtually all consular conventions. In his view, the same rule applied to attendance before administrative authorities.

2. The next two paragraphs of the article dealt with the application of the principle stated in paragraph 1. The provisions of those paragraphs were based on those of a number of consular conventions and proceeded from the general idea that the evidence of the consular official or employee concerned should be taken in a manner consistent with the respect due to him and so as not to hinder the exercise of his official duties.

3. The rules governing the point in the conventions could be classified into four broad groups. In the first were the rules similar to article 7 of the 1928 Consular Convention between Belgium and Poland of 12 June 1928:¹ a consular official or employee was treated practically in the same manner as any other witness, except that the judicial authority requesting him to appear was not allowed to threaten him with penalties in the event of non-appearance. Provision was usually made for the possibility of postponing the consular officer's deposition on grounds of health or urgent official duties, but that provision was no more than the application of a general rule to the specific case of consuls.

4. The second group consisted of rules giving the consular officer the choice between appearing in person and having his evidence taken at the consulate or at his residence. His proposal for article 40 followed those precedents.

5. In the third or intermediate group of rules, the consular officer, if unable to appear, was allowed to make a deposition in writing. Some consular conventions added that a written deposition could be made in those cases only where it was permissible under the laws of the receiving State. A variant of that rule provided that the court would take all necessary steps to avoid interference with the performance of the official duties of the consular officer and, in the case of a head of consular post, would arrange for the taking of his testimony at the consulate.

6. A fourth or mixed rule, which was that of article 15 of the Havana Convention of 1928² drew a distinction between civil and criminal cases. Personal attendance by a consular officer as a witness was compulsory in criminal cases, and the only requirement was that he should be treated "with all possible consideration to consular dignity and to the duties of the consular office". In civil cases, on the other hand, provision was made for the taking of evidence at the residence or office of the consular officer concerned.

7. He thought that the Commission could adopt any of those solutions, except the first, which

¹ League of Nations Treaty Series, vol. CXXIII (1931-1932), No. 2803, p. 31.

² *Ibid.*, vol. CLV (1934-1935), No. 3582, p. 299.

gave no genuine advantage of any kind to consular officers, and the fourth; the distinction drawn in the latter was due to the special features which characterized judicial procedure in the American countries.

8. Paragraph 4 of his draft article 40 expressed a principle which was contained in various forms in most consular conventions. Some of those conventions also stated that a consul was entitled to refuse to give expert evidence as to the law of the sending State.

9. With regard to the persons entitled to the benefit of paragraph 4, he said that he had considered it inadvisable to exclude consular employees, on the grounds that all members of the consular staff should be exempted from any obligation to give evidence concerning circumstances connected with the exercise of their functions.

10. In the commentary to article 40, he proposed to cite the conventions which embodied the principles expressed in its various paragraphs.

11. He suggested that the Commission should take a decision on three main points. First, the obligation of the head of the post and members of the consular staff to attend as witnesses in the courts and before the administrative authorities. Second, the question of giving those persons a special treatment when they gave evidence. Third, the right to decline to give evidence and to produce correspondence in the cases set forth in article 40, paragraph 4.

12. Mr. EDMONDS said that the provisions of article 40 were much too broad. The article should only cover consular officials; consular employees should not have the right to decline to give evidence.

13. A much more serious matter was the failure of the article to distinguish between civil and criminal cases. Provisions of that kind had led to considerable embarrassment in the United States of America, for under American law the defendant was always entitled to be confronted with the witnesses against him. For that reason, the United States of America had made it a practice not to enter into any convention which exempted a person from the duty to attend as a witness at the trial of a criminal case.

14. He preferred the terms of article 22 of the Harvard Draft,³ which exempted a consul from attendance as a witness in civil cases only. He did not, of course, insist that the exact language of that provision be used, but he urged that the principle which it expressed should be adopted.

15. Mr. SANDSTRÖM said that there was general agreement on the principle contained in paragraph 4 of the Special Rapporteur's draft article 40, which was also laid down in the first

sentence of paragraph 2 of his own proposal (537th meeting, paragraph 41).

16. As was clear from his (Mr. Sandström's) proposal, he did not approve of the Special Rapporteur's rules regarding the duty of members of the consular staff to give evidence as witnesses. It was sufficient to state that the authorities concerned should refrain from taking any coercive measures against the consular officer and that any difficulties which arose should be settled through the diplomatic channel. He drew attention in that connexion to the Commission's decision not to exempt consular officers from attendance in court if they were prosecuted for acts performed outside their functions, and he suggested that they should be under a like duty to attend if summoned as witnesses.

17. Mr. AGO said that, on the understanding that the words "administrative authorities" meant administrative tribunals (as other administrative authorities could not summon witnesses), he was in agreement with the principle of article 40.

18. After reflexion, he agreed that the provisions of paragraphs 2 and 3 should apply also to consular employees. In the circumstances contemplated by those paragraphs those employees were treated by most consular conventions in the same manner as consular officials. The provisions of the two paragraphs in question were, however, too detailed and too rigid and he thought that a more flexible formula, in more general terms, would be preferable. The receiving State should have some latitude, so long as the object of those provisions was achieved.

19. Commenting on paragraph 4, he suggested that the first sentence should be amended to read: "Members of the consular staff are entitled to decline to give evidence . . ." (*ont le droit de se refuser à déposer*). The second sentence appeared to him completely unnecessary. Most consular conventions were content to state the right of members of the consular staff to decline to give evidence in the cases envisaged; it was quite obvious that the authorities of the receiving State could not take any coercive measures against a member of the consular staff who exercised that right. Nor was it necessary to specify that all difficulties must be settled solely through the diplomatic channel.

20. Sir Gerald FITZMAURICE said that he was inclined to agree with Mr. Ago's remarks concerning paragraph 4. He had no positive objection to the second sentence, but, while the first part of that sentence might be useful, the second part dealing with settlement of difficulties through the diplomatic channel was quite unnecessary.

21. He wished, however, to suggest that in the first sentence of paragraph 4 the words "on the grounds of professional or State secrecy" should be deleted. It was not necessary to specify the grounds on which a member of the consular staff could decline to give evidence. Besides, professional or State secrecy might not be the only grounds for

³ Harvard Law School, *Research in International Law. (II) The Legal Position and Functions of Consuls* (Cambridge, Mass., Harvard Law School, 1932), p. 341.

such refusal; very often the inviolability of the consular archives or correspondence would be the reason for the refusal.

22. With regard to paragraph 2 and 3, he said he shared to a large extent the views of Mr. Edmonds. The provisions of those paragraphs were much too complex and were not altogether consistent with the principle laid down in paragraph 1 (liability of the consular staff to attend as witnesses), a principle which in itself was quite satisfactory. For example, paragraph 2 appeared to give a consular official or employee the choice between having his evidence taken at the consulate or at his residence, and appearing in person before the court. Paragraph 3 did not state whether the court could request the consular officer concerned to attend in court if the circumstances of the case justified his attendance. Under many systems of law the personal attendance of a witness before the court was considered essential.

23. For his part, he did not think that any distinction should be made between civil and criminal cases in the matter of the attendance of consuls as witnesses. In defamation cases, for example, which were civil cases, it was just as important as in any criminal case that the court should see the witness, so that his demeanour could be studied and so that he could be examined and cross-examined by counsel.

24. Accordingly, he suggested that the Commission should draw upon the language used in a large number of consular conventions and redraft the provisions of paragraphs 1, 2 and 3 to the effect that members of the consular staff were liable to attend as witnesses in the courts; but every possible consideration would be shown to them by the courts and, so far as possible, evidence would be taken at their residence or office.

25. Mr. PAL said that he fully agreed with the principle underlying article 40 and was prepared to accept paragraph 1 of that article, subject to the understanding mentioned by Mr. Ago — *viz.*, that the expression “administrative authorities” meant administrative tribunals or administrative authorities expressly empowered to function as a court for the purpose of taking evidence.

26. With regard to paragraph 4, he agreed with the views expressed by Mr. Ago and Sir Gerald Fitzmaurice concerning the second sentence. As to the first sentence, he preferred a draft along the lines of article 12, paragraph 5, of the 1952 Consular Convention between the United Kingdom and Sweden.⁴

27. He agreed that paragraphs 2 and 3 were too detailed. The means employed by a court to avoid interfering with consular functions should be left for the court to decide. For example, a court might well decide to issue a commission to take evidence at the consulate, just as it did in the case

of a witness who was ill or was exempted from attending court because he was a high dignitary.

28. Accordingly, he thought that paragraphs 2 and 3 might be replaced by a provision along the lines of article 13, paragraph 3, of the Consular Convention between the United Kingdom and Sweden.

29. Mr. YOKOTA agreed with previous speakers that the last sentence of paragraph 4, or at least the final phrase of that sentence, should be omitted. The provision was similar to that of the Special Rapporteur's article 34, paragraph 2, which the Commission had decided to omit; accordingly, the consensus seemed to be that that kind of provision should not be included in the draft. Turning to paragraphs 2 and 3, he proposed that they should be replaced by the following provision:

“2. In the case of a consular official or employee who is not a national of the receiving State, the judicial or administrative authority requiring his testimony shall take all reasonable steps to avoid interference with the performance of his official duties and, where possible or permissible, arrange for the taking of such testimony, orally or in writing, at his residence or office.”

30. The detailed procedure should be arranged between the parties concerned; his amendment had, he thought, the merit of being simpler and more general than the Special Rapporteur's paragraphs 2 and 3. The amendment was based on similar provisions in several international instruments, such as the Consular Convention between the United States of America and Costa Rica (article II, 3), the Consular Convention between the United Kingdom and Sweden (article 13, 3) and the draft Consular Convention between Japan and the United States of America.

31. Mr. MATINE-DAFTARY agreed with Mr. Ago that consular officials were liable to attend as witnesses in the courts, not before the administrative authorities. Secondly, he considered that, for the purpose of the consul's liability to attend as witness, civil and criminal cases could not be treated on a par. In criminal cases, evidence should be given in the actual presence of the jury. Thirdly, he agreed with Mr. Pal and Mr. Yokota that paragraphs 2 and 3 should be combined, though he considered that there should be some provision concerning observance by the consular official or employee of the time-limit prescribed by the authority concerned. In any case, the decision whether the consul was to be heard in court or elsewhere must lie with the judicial authorities.

32. His main criticism, however, related to paragraph 4. Not all the functions of a consular official or employee were in fact governmental. While he might act as a State representative in commercial activities, his functions as a registrar of births, marriages and deaths and as a notary public did not involve State secrets. Accordingly, a distinction should be drawn between a consular official's right to decline to give evidence in any case that might involve disclosure of State secrets and that official's position in cases where his evidence was

⁴ United Nations *Treaty Series*, vol. 202 (1954-1955), No. 2731, p. 172.

required in matters dealt with by him as registrar or notary public.

33. Mr. ŽOUREK, Special Rapporteur, referring to the question concerning the expression "administrative authorities" raised by Mr. Ago, said that a member of the consular staff might be asked to testify not only in court but also in matters governed by administrative law. Administrative matters were undoubtedly within the jurisdiction of the receiving State. He suggested that the meaning of the expression might be interpreted in the commentary.

34. Mr. BARTOŠ thought that the reference to administrative authorities should be retained in paragraph 1. In support of that view, he cited the useful administrative procedure introduced in Austria after the First World War and subsequently adopted by several other countries, including Yugoslavia, for the purpose of protecting the rights of the individual vis-à-vis the administration. Under that system, the administrative tribunals, although not vested with full judicial competence, had been given power to deal with acts committed by public servants, who were under an obligation to observe a procedure which provided safeguards for the rights of the individual. Disputes at law, however, remained within the competence of the ordinary courts.

35. With regard to paragraph 2, he agreed with Sir Gerald Fitzmaurice and Mr. Ago that a more flexible formula should be found. Furthermore, the convenience of the consular official was not the only factor to be taken into consideration; the nature of the evidence mattered too. According to the circumstances, it was for the judge or the jury to decide whether the consular official should appear in person or not; nor should the interests of the other party in the proceedings be ignored. Nearly all modern consular conventions did not give the consular official full freedom to decide whether he should make his deposition at the consulate or his residence or in the court. The courts of the receiving State usually extended all due courtesy to the consular official; in most cases he was merely asked to give a deposition in writing. It therefore seemed inadvisable to lay undue stress on the consular official's option to appear in person.

36. While the principle contained in paragraph 4 was correct, it was perhaps inaccurate to say that difficulties of that kind must be settled solely through the diplomatic channel. In practice, such difficulties could often be resolved at a lower level, so long as no disclosure of professional or state secrets was involved in the giving of evidence. Furthermore, so far as some of their functions were concerned (even those not involving access to state secrets) consular officials were in much the same position as other public officials, whose disclosure of anything that came to their knowledge in the course of official business was governed by certain rules. The procedure then was for the court to inquire from the government concerned, through the channels of judicial assistance or

failing that through the diplomatic channel, whether the official in question was exempt from the duty of testifying.

37. Mr. FRANÇOIS considered that paragraph 2 of the Special Rapporteur's draft article 40 went much too far, for in effect it left it to the consular official himself to decide whether his evidence was to be taken at the consulate or at his residence or whether to appear in person. As Mr. Edmonds had pointed out, oral evidence taken outside the court was inadmissible under the law of some countries. The Special Rapporteur might cite many consular conventions in support of the provision, but those precedents merely meant that States whose law allowed evidence to be taken outside the court could embody such a provision in bilateral conventions; the Commission could not expect all States to accept the provision, and if it were included in the draft some States would be obliged either to abstain from signing the resulting convention or to change their whole system. Mr. Yokota's proposal (see paragraph 29 above) represented the furthest point to which the Commission could go. It was essential to provide that the final decision concerning the giving of evidence rested with the judicial authority, not with the consular official himself.

38. Mr. TUNKIN thought that the Commission was agreed on the principle that should be embodied in paragraph 1. The best course would be to use the broadest possible language, covering evidence both before administrative authorities and in court. The principle of liability to attend as a witness once stated, the question arose whether coercive measures could be used to compel members of the consular staff to attend as witnesses. The principle that with respect to consular officials no such coercive measures were admissible, which was laid down in many recent consular conventions, should also be stated in paragraph 1. If the official did not wish to attend as a witness, the matter could be dealt with through the diplomatic channel.

39. Paragraphs 2, 3 and 4 provided for exceptions to the rule laid down in paragraph 1. He believed that the right of members of the consular staff to decline to give evidence concerning circumstances connected with the exercise of their official functions was entirely acceptable. On the other hand, the exceptions stated in paragraphs 2 and 3 seemed to be unduly technical. In that connexion, he agreed in principle with Sir Gerald Fitzmaurice, Mr. Bartoš and Mr. François. The two paragraphs might be combined, and Mr. Yokota's text could be used, with an addition to the effect that testimony might be taken at the consulate or at the residence of the consular official, if the taking of evidence in that way was permissible under the municipal law of the receiving State. Finally, if the principle that the consul was not a compellable witness was accepted, it would apply to the article as a whole, and the second sentence of paragraph 4 would become redundant.

40. Mr. SCELLE thought the consensus of the Commission was that the article should be considerably simplified and that it was not satisfactory in its present form. He could not agree with Mr. Tunkin that nothing could be done if a consular official declined to give evidence, and believed that such an official must testify in person, particularly in criminal cases. A consular official's duty was not only to protect the nationals of the sending State but, as a liaison official, to collaborate with the receiving State; he was not necessarily an individual acting as defending counsel, especially in criminal cases.

41. He could not agree with Mr. Bartoš that administrative and judicial proceedings were comparable. At an earlier stage in French law, administrative jurisdiction had been vested in ministers acting in a judicial capacity; but the changes that had since taken place in French law were, in his opinion, progressive. He would prefer the reference to administrative authorities to be deleted from paragraph 1, since in some countries there was a danger that undue stress on administrative authority might lead to something resembling police jurisdiction. He considered, furthermore, that the reference to State secrecy should be omitted, for it was an anachronistic concept; whereas the staff of diplomatic missions might conceivably have access to State secrets that could not be divulged, he took the view that consular officials could not decline to give evidence unless their testimony would disclose some private secrets of persons under their protection.

42. He believed that the corresponding provision (article 22) of the Harvard Draft, which was in much more general terms, should be taken as a model and that the Drafting Committee now had enough data to formulate a satisfactory text of the article under discussion.

43. Mr. VERDROSS did not think that a reference either to the courts alone or to the administrative authorities alone would suffice in paragraph 1. Under the Austrian system, the courts and the administrative authorities were on a comparable footing in that both had the duty to apply the law; both, too, had similar rules of procedure. The only difference between them was that the judiciary was independent whereas the administrative authorities were answerable to ministries; but an administrative decision was challengeable in the final instance in an administrative tribunal.

44. He therefore suggested that both courts and administrative authorities should be mentioned, but should not be confused, in order to allay the fear that consular officials might be obliged to give evidence before a political organ. The phrase might read along the following lines: "administrative authorities whose procedures are similar to judicial procedures".

45. Mr. AGO agreed that it was possible to find an acceptable formula for paragraph 1 which would cover all possibilities. The important point, however, was not so much to cover all the possible

proceedings in which the consul might be obliged to attend as witness as to safeguard his position. The danger lay in making a general reference to administrative authorities, since that might lead to a situation incompatible with the dignity of the consular official and with the performance of consular functions.

46. Mr. EDMONDS said that there were many administrative tribunals and bodies in the United States which had the right to hear and determine controversies by decisions having the force of judgement. Thus, a multitude of persons or bodies might be included under the expression "administrative authorities". In the interests of precision, the Committee might follow Mr. Verdross's suggestion and limit the expression to bodies entitled to hear and determine controversies. The difficulty had been avoided in article 22 of the Harvard Draft by differentiating clearly the consular official's liability to attend in civil cases from his liability to attend in criminal cases. In his opinion, paragraph 1 as drafted by the Special Rapporteur meant that members of the consular staff should provide evidence in the trial of any case. However, that wording left open the exact status of the persons to be exempted. He did not believe that the provision should be extended to all the persons employed in the consulate: if the Commission held the same view, that should be stated *expressis verbis* in the draft.

47. Mr. ŽOUREK, Special Rapporteur, said that the Drafting Committee might well consider Mr. Verdross's suggestion that a fuller explanation be given of the phrase "administrative authorities". It might also consider Mr. Tunkin's suggestion that it should be stated that no coercion could be used to compel members of the consular staff to give testimony; that was a rule of customary law. He had inserted a provision to that effect in his first draft of the consular articles,⁵ but had made it implicit in the second draft since it was more detailed. In any case, if the Commission accepted the deletion of the final phrase in paragraph 4 or the proposed amalgamation of paragraphs 2 and 3 and drafted those two paragraphs in more general terms, that rule, which was found in many consular conventions and in general practice, would have to be stated *expressis verbis*.

48. Sir Gerald FITZMAURICE's objection that paragraphs 2 and 3 contradicted the principle stated in paragraph 1 was not well founded, since paragraphs 2 and 3 simply laid down the procedure for taking depositions from members of the consular staff when they were unable to attend as witnesses in the courts. A provision whereby members of the consular staff could give evidence without being obliged to appear in person before the court could not be held to interfere with the course of justice. In nearly all countries the codes of procedure provided for cases in which the per-

⁵ *Yearbook of the International Law Commission, 1957*, vol. II (United Nations publication, Sales No. 1957.V.5, vol. II), p. 101.

sonal appearance of witnesses was not essential; instances were to be found in such procedures as commissions rogatoires and the despatch of juges délégués.

49. With regard to paragraph 4, he said the Commission had agreed that members of the consular staff could decline to give evidence on circumstances connected with the exercise of their functions. He would have no objection to deleting the stated reasons: "on the grounds of professional or state secrecy"; but he doubted the wisdom of deleting the last sentence, as cases might arise where a judicial authority insisted that a member of the consular staff give evidence which in that person's opinion would amount to evidence concerning circumstances connected with the exercise of his functions. The sentence could be deleted only if the rule that there must be no coercion was expressly stated; otherwise the member of the consular staff might become liable to a fine or other penalty for declining to give evidence.

50. The Drafting Committee might well consider Mr. Yokota's proposal for a shorter form of words to replace paragraphs 2 and 3.

51. With regard to Mr. Edmonds's point about what persons should enjoy the privilege in question, he could only repeat what he had said when introducing the article, namely, that they would include the chief of post, the consular officials and the employees of the consulate, since there was no reason to make an exception for any of them. All the modern consular conventions covered all the members of the consular staff in that respect, notably that between the Soviet Union and Hungary of 1957 and that between the United Kingdom and Sweden of 1952.

52. Since most members of the Commission had now expressed their opinion and a consensus had been reached on the main principles, he thought article 40 might be sent to the Drafting Committee.

53. Replying to Mr. Matine-Daftary, he explained that to draw the requisite distinction between declining to give evidence on the grounds of State secrecy and consenting to do so when the consular official was acting as registrar would hardly be possible in the body of the article itself, which should be a concise statement of the rule of law and left no room for the statement of such exceptions. In both instances the member of the consular staff would be acting in his official capacity. Nevertheless it was hardly likely that he would refuse to give evidence in matters arising out of the registration of births, marriages and deaths. Mr. Matine-Daftary's point might, however, be referred to in the commentary.

54. Mr. AMADO said that he was sure that the draft article was now ripe for reference to the Drafting Committee.

55. The CHAIRMAN observed that the three points on which the Special Rapporteur had requested the Commission's views had been completely settled. It had been established that members of the consular staff were liable to attend as witnesses. It had been established that in certain

cases consular officials and employees had the right to decline to make certain depositions, as stated in the first half of paragraph 4. It had been established that consular officials ought to enjoy certain courtesies in keeping with their status and position. The Drafting Committee should consider the possibilities, already accepted by the Special Rapporteur, of amalgamating paragraphs 2 and 3 in a single provision drafted in more general terms. It should also consider how the phrase "administrative authorities" in paragraph 1 should be interpreted. Attention should also be paid to the point raised by Mr. Edmonds as to what members of the consulate were liable to attend as witnesses before the administrative authorities. In that connexion he would cite article 22 of the Harvard Draft. The Drafting Committee should likewise consider the desirability of including a provision stating that no coercive measures could be taken against consular officials who declined to make depositions, since it had been argued that such a provision might be unnecessary, as it was a logical consequence of the right of members of the consular staff to decline to give evidence on circumstances connected with the exercise of their functions; that principle might perhaps be stated in connexion with the general principle set forth in paragraph 1. The members of the Commission seemed to be agreed that the phrase "on the grounds of professional or State secrecy" in paragraph 4 should be omitted. The Drafting Committee should also bear in mind that the Special Rapporteur would embody in the commentary the point made by Mr. Matine-Daftary about the distinction between acts performed by the consul as a registrar and his acts performed in the name of the sending State. Lastly, the Drafting Committee might examine the placing of draft article 40 in relation to draft articles 33 and 34. With those indications, he proposed that article 40 should now be referred to the Drafting Committee.

It was so agreed.

ARTICLE 35 (*Exemption from obligations in the matter of registration of aliens and residence permits*)

56. Mr. ŽOUREK, Special Rapporteur, introducing article 35, said that the laws and regulations of almost all countries required both nationals and foreigners to register with the authorities and many countries required residence permits. Many countries exempted members of the consular staff who were aliens from those obligations, but required that their names be notified to the Ministry of Foreign Affairs, which issued a special identity card to such persons. Provisions similar to article 35 appeared in many consular conventions, such as the 1924 Convention between Italy and Yugoslavia and the 1929 Convention between Hungary and Italy. There were similar provisions in national laws and regulations, such as Argentine Decree No. 4660 of 18 March 1953 and Peruvian Decree No. 69 of 18 February 1954, which provided for consular identity booklets for career officers and their wives and identity cards for

other members of their families, honorary staff and their wives and for administrative employees and members of their immediate families. Since the Commission had already accepted the principle in article 21 (*Notification of arrival and departure*), it would be only logical to exempt the persons mentioned in that article from registration and residence permits.

57. The phrase "subject to reciprocity" was used in many bilateral consular conventions. It would be useful psychologically, but it also had a legal significance inasmuch as it implied that the State of residence might refuse the privilege to nationals of States which did not grant it without thereby violating the convention which the Commission was engaged in drafting. The result would be that the article would come to exist on its own. If a reciprocity clause were not included in the Commission's draft of article 35, the implication might be that it intended the receiving State to be obliged to accord exemption from registration in all cases while the other State would not be under a corresponding obligation and would be free not to accord the exemption. If, however, the Commission decided that the clause was undesirable, he would be willing to delete it, but as it might be required in other articles, such as those on exemption from taxation (article 37) and exemption from customs duties (article 38), it might well be retained, at least provisionally. The objection that no provision similar to article 35 appeared in the diplomatic articles was irrelevant, since diplomatic agents were completely immune from the jurisdiction of the State of residence, whereas consuls were subject to that jurisdiction in so far as they were not released from it by virtue of a provision in an international convention.

58. Mr. AGO supported the principle stated in draft article 35, even though it was rather more liberal than that to be found in certain consular conventions. He also agreed with the Special Rapporteur that the absence of a similar article in the diplomatic draft articles was no reason why article 35 should not appear in the consular draft. The reciprocity clause should, however, be deleted. Its effect would be to destroy the article's mandatory character and to leave each State free to do as it pleased. If the Commission really agreed that consular staff should enjoy the benefit of the prerogative intended to be conferred by article 35 and that the duty to register as aliens and to obtain residence permits was incompatible with the consular status, it should lay down a firm rule to that effect.

59. Mr. YOKOTA said that he could support article 35 in principle, but doubted whether the phrase "provided that their names have been notified to the Ministry of Foreign Affairs of the receiving State or to the office designated by that Ministry" was really appropriate. Naturally the names of members of the consular staff, members of their families and their private staff would have to be notified to the receiving State so that it would know that they were

exempted from registration, but they should not be deprived of that prerogative, perhaps by an oversight or accident on the part of the consular employee whose duty it was to make the notification in question. What really mattered was whether the person concerned was in fact a member of the consular staff; if so, the prerogative should be accorded automatically. The same point had been discussed in connexion with a similar article proposed for the diplomatic draft, particularly whether the notification of the names of the members of the diplomatic mission was the *sine qua non* of their right to diplomatic privileges and immunities, and in connexion with the question of the diplomatic list. The Commission had then decided that both notification and the diplomatic list were desirable, but that neither should be regarded as a *sine qua non*, as had been clearly stated in the commentaries to diplomatic article 9 and article 36, paragraph 13. Either, therefore, the proviso should be deleted or else the article should be split into two sentences, the first sentence ending with the words "residence permits" and the next beginning with "Their names should be notified . . ."

60. Mr. FRANÇOIS agreed with Mr. Ago's remarks concerning the reciprocity clause, which should be deleted as unnecessary; if it was retained in article 35, it would have to be inserted in several other articles. He also agreed with Mr. Yokota that the draft article might be divided into two separate sentences, as two separate obligations were involved. The statement of the second obligation was, however, superfluous in article 35 because it had already been adopted in article 21. He asked why the Special Rapporteur had included the qualification "if they are not nationals of the receiving State" in article 35 and in certain other articles, since the general principle was stated in article 42 (*Members of the consular staff who are nationals of the receiving State*).

61. Mr. ERIM agreed that, from the legal point of view, reciprocity would be ensured by the very acceptance of the convention. The reciprocity clause was therefore unnecessary, and, in fact, if retained, would annul the mandatory force of the article.

62. Mr. BARTOŠ agreed with previous speakers that the reciprocity clause was unnecessary, since the Commission was drafting a convention on the status of consuls and it was therefore self-evident that that status would be respected by all signatories. Nor did he think it was necessary to retain the phrase "if they are not nationals of the receiving State" for the position of consular staff who were nationals of that State would be dealt with in another article.

63. In almost all consular conventions the State of residence was obliged to issue to members of the consular staff who were not nationals of the receiving State special identity cards certifying that they were members of the consular corps. The private staff could not, however, be exempted from complying with all the regulations of the

receiving State of residence. A reference should therefore be included in the commentary to the fact that receiving States were bound to issue the identity cards, but that the cards themselves conferred no special privileges other than that of being exempted from the requirement to obtain residence permits and that all privileges and immunities enjoyed by consular staff derived from the notification that they were members of the consular corps. In several countries, and especially in France, the authorities declined to issue such an identity card to a person whom they considered *non grata*. That was something of an innovation, which the Drafting Committee might well consider, although no clause covering it need necessarily be included in the article itself.

64. Mr. AMADO observed that the reciprocity clause might be essential in bilateral conventions, but made no sense in a multilateral convention. In his opinion, the draft article was ready for reference to the Drafting Committee.

65. Mr. TUNKIN was generally in agreement with the previous speakers. He asked the Special Rapporteur why he had omitted the words "who formed part of their households", which appeared in similar provisions of the diplomatic draft, such as article 31, and he thought the phrase "their private staff" was too comprehensive.

66. Mr. ŽOUREK, Special Rapporteur, explained that he by no means insisted on the retention of the reciprocity clause, but did not agree that it was unnecessary, for it would enable parties to the convention to avoid going as far as the draft article without violating the terms of the convention. It would thus have some psychological value.

67. Mr. Yokota's criticism of the final phrase, based on the parallel with the diplomatic list, was not pertinent. The privileges and immunities of diplomatic missions were *ipso facto* recognized and could not, therefore, depend on notification, whereas in the case of consular officials, the Commission was establishing a rule on that particular point which might not yet have been accepted by all States. The authorities of the receiving State had to know who were the members of the consular staff, and only if their names had been notified to the Ministry of Foreign Affairs would the latter be exempt from registration. He would, however, have no objection to placing the proviso in the commentary.

68. Mr. FRANÇOIS had correctly pointed out that the position of members of the consular staff who were nationals of the receiving State was dealt with in draft article 42, but it was not yet known whether that draft article would be accepted. Such points might be cleared up later when all the articles were before the Commission.

69. In reply to Mr. Tunkin he said he had not used the phrase "who formed part of their households" in article 35 because he had believed that a broader term might be preferable. Not inconceivably, even a relation of one of the members of the consular staff paying a private visit to him

for several weeks (and hence not forming part of the official's permanent household) might be eligible for the benefit of the clause. With regard to the expression "private staff", he said the expression meant only the private staff brought in from abroad. It would hardly be practical to exempt members of the consular staff and members of their families from registration and residence permits, but to require such private staff — who would probably be domestic servants — to obtain them. In any case, that was a point which might be reviewed by the Drafting Committee.

70. The CHAIRMAN proposed that article 35 be referred to the Drafting Committee, on the understanding that, whatever the final wording, it would state the principle that members of the consular staff, members of their families and their private staff would be exempt from all obligations under local legislation in the matter of registration of aliens and residence permits. The Drafting Committee might consider adding a second clause, to the effect that the names of such staff should be notified to the Ministry of Foreign Affairs of the receiving State, though the Committee should, for that purpose, take into account the terms of article 21. The general consensus was that the phrase "if they are not nationals of the receiving State" should be deleted, since the draft convention would include a general article covering the position of consular staff who were nationals of the receiving State. By general agreement, and without objection on the part of the Special Rapporteur, the reciprocity clause would be dropped, though the commentary might possibly refer to the question of reciprocity.

It was so agreed.

The meeting rose at 1.15 p.m.

542nd MEETING

Wednesday, 18 May 1960, at 9.15 a.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 36 (*Exemption from social security legislation*)

1. Mr. ŽOUREK, Special Rapporteur, introducing article 36, explained that it followed very closely article 31 of the draft articles on diplomatic intercourse and immunities and had been included in another form as article 31 in his first

draft.¹ He had made slight changes in the terms of diplomatic article 31 in order to differentiate between the head of consular post as an insured person and the head of post as an employer. Diplomatic article 31 was perhaps rather too condensed; it postulated a rule and admitted exceptions in respect of servants and employees "if themselves subject to the social security legislation of the receiving State", but did not specify in what circumstances they would be subject to such social security legislation.

2. In paragraph 1 the expression "members of the consular staff . . . and their families" included the head of the post, consular officials, members of the consular staff and members of their families. When the definitions in draft article 1 were revised, some more appropriate expression would probably be used; the term need not be discussed in connexion with article 36. Two conditions were laid down in paragraph 2 for the private staff in the sole employ of members of the consular staff. The Commission should not, in his view, enter into questions of drafting, but should confine its discussion to the desirability of including such an article among the draft articles on consular intercourse and immunities.

3. Mr. VERDROSS accepted the principle expressed in article 36, but thought that it would be necessary to exclude from the privilege members of the families of consular staff who engaged in a profession or occupation in the State of residence. A phrase might therefore be inserted after the phrase "nationals of the receiving State" reading: "and not carrying on a profession or occupation in the receiving State".

4. Sir Gerald FITZMAURICE said he had no objection to the inclusion of article 36, but wondered whether the draft in its present form covered a question discussed at length during the drafting of diplomatic article 31. At that time if had been pointed out that, although a member of a diplomatic mission might be exempted from social security legislation, he might be employing persons who were subject to that legislation, under which part of the contribution was payable by the employer. As would be seen from the commentary, the Commission had taken the view that the member of the diplomatic mission should not be exempted from paying the employer's share of such contributions.

5. Mr. ŽOUREK, Special Rapporteur, replied that the point was in fact covered in draft article 36. If a member of a consular staff employed a person who was a national of or permanently settled in the receiving State, he was bound, as an employer, to pay the share of the contribution payable by the employer under the social security legislation in force in that State. If a member of the consular staff brought from abroad a member of his house-

hold who was not a national of the receiving State, he would be exempt from paying contributions in respect of that person under the social security legislation of that State, except as otherwise provided by bilateral agreement between the two States. Under paragraph 3, however, even if he was exempted from such payment, voluntary participation in the social security scheme was not excluded, in so far as such participation was allowed by the legislation of the receiving State.

6. Sir Gerald FITZMAURICE thought that it might be merely a matter of drafting, but was still not convinced that the point was covered in the Special Rapporteur's text. In order to cover it, the liability of a consular officer as an employer of a person who was a compulsorily insured person would have to be preserved. It was true that paragraph 2 did not extend the exemption to the private staff who were nationals of or settled in the receiving State, but it was the liability of the employer in respect of that staff that required to be expressly stated as a derogation from the immunity laid down in paragraph 1. The point was covered in diplomatic article 31.

7. Mr. SANDSTRÖM supported Sir Gerald Fitzmaurice's view. He suggested that the point might be taken into account by the Drafting Committee.

8. Mr. ERIM concurred in the principle of exemption. The point raised by Mr. Verdross, however, warranted special attention by the Commission before the draft article was sent to the Drafting Committee. The text as it stood might be simplified by concentrating on the principle that members of the consular staff and members of their families were not bound by the social security legislation of the receiving State. He agreed with Sir Gerald Fitzmaurice and Mr. Sandström. All members of the consular staff, whether private or not, might be dealt with together in a single paragraph offering them the same option — and, in view of the provisions of paragraph 3, it was an option rather than an exemption that was involved. It was only if members of the consular family engaged in an occupation in the receiving State that there would be an exception to the rule, as Mr. Verdross had rightly pointed out.

9. Mr. YOKOTA maintained that the point raised by Sir Gerald was not covered by the present text. Paragraph 2 implied that the social security legislation would not apply to private staff, whereas under diplomatic article 31 members of the mission and members of their families were bound to comply with the social security legislation in respect of their servants. In the Special Rapporteur's draft article 36 they were exempt even in regard to their private staff. The Commission seemed to agree that they should not be exempt. The Drafting Committee should redraft the article.

10. The CHAIRMAN, speaking in his personal capacity, said that the purpose of the article was to ensure that members of the consular staff were exempt in their personal capacity from the social

¹ *Yearbook of the International Law Commission, 1957*, vol. II (United Nations publication, Sales No. 1957.V.5, vol. II), p. 101.

security legislation of the receiving State, but not in so far as they were employers of servants and employees who were subject to such legislation; such a provision was contained in diplomatic article 31. An exception was provided for in paragraph 2, equivalent to the exception stated in diplomatic article 31. The Special Rapporteur seemed to believe that the terms of the exception in diplomatic article 31 had broader implications than paragraph 2 of draft article 36, which implied that members of consular staffs were not exempt from the payment of employer's contributions in respect of servants or employees who were nationals of, or permanently established in, the receiving State.

11. Mr. ŽOUREK, Special Rapporteur, confirmed Mr. Padilla Nervo's interpretation. The exemption conferred by diplomatic article 31 was qualified by an exception applicable to the employment of servants who were themselves subject to the social security legislation of the receiving State, but that article gave no criterion by which to decide who those persons were. The language was very broad. He had thought that the two conditions mentioned in paragraph 2 of draft article 36 would make it clear that, in cases where one of those conditions was fulfilled, members of the consular staff would be obliged to pay the employer's contribution. The exemption would operate in the case of staff brought in from abroad, though it would be possible for such staff to become voluntary contributors under paragraph 3. If that was not clear enough, a phrase such as "subject to the provisions of paragraph 2" might be inserted in paragraph 1. Mr. Verdross's suggested provision was acceptable, even though no similar provision appeared in diplomatic article 31; but lest such a provision be construed as covering unremunerated activities, it should specify that the occupation had to be gainful.

12. The CHAIRMAN, speaking in a personal capacity and referring to Mr. Verdross's suggestion, observed that certain privileges and immunities were recognized as attaching to consular officials if they were not engaged in commerce or other gainful occupation. That would also apply to their families and members of their household, although the term "household" was extremely broad. The Commission, in paragraph 11 of the commentary to diplomatic article 36, had stated, *inter alia*, that it did not feel it desirable to lay down a criterion for determining who should be regarded as a member of the family but had intended to make it clear that close ties or special circumstances were necessary qualifications.

13. Mr. EDMONDS concurred in the statement of the principle, but felt that the point raised by Sir Gerald Fitzmaurice should be carefully considered. In addition he said, the term "permanently established in the receiving State" used in paragraph 2 was far too indefinite. It might be asked whether anyone was ever permanently established in his residence or occupation and who was to decide whether a person was permanently

established. In many cases the decision of one court holding that a person was resident in a certain place had been reversed on appeal. Different tribunals often reached different conclusions upon the same facts relating to residence. The Drafting Committee should find more precise language.

14. Mr. SANDSTRÖM was not certain whether paragraph 2 of the Special Rapporteur's draft was indeed exactly equivalent to the exception stated in diplomatic article 31. There might be some differences as a result of a bilateral convention or under local legislation, and other persons concerned might also be subject to the social security legislation in force in the State of residence. He therefore found it difficult to accept the Special Rapporteur's draft as it stood. Mr. Verdross's suggestion had raised a much more difficult point. It was questionable whether a person belonging to the family of a member of the consular staff who was engaged in a gainful occupation was in fact a member of his household. It depended greatly on circumstances. If a person engaged in professional activities had other persons in his service, he might well be liable to pay social security contributions in respect of those persons, since there was no reason why they should be deprived of the protection of social security legislation. Mr. Verdross's suggestion was, therefore, not wholly acceptable.

15. Mr. BARTOŠ observed that a practical point arose which had, in recent times, caused many difficulties. It had happened, for example, that consuls employing local staff had, on the grounds of immunity, declined to pay the employer's share of the social security contributions in respect of that staff. By contrast with that attitude, the United States consulates in Yugoslavia, purely as a measure of goodwill and without any legal obligation, voluntarily paid the employer's share of contributions in respect of their Yugoslav employees. Payment was not made by them direct to the social security administration but through the employee who was covered by the insurance. Similarly, a special convention on a reciprocal basis covering that particular point had been signed with the United Kingdom. Those cases, however, were the exception. For practical reasons, therefore, the Commission's draft should provide that consular officers should not be exempted from the payment of the employer's share of social security contributions. Such a rule would be in conformity with the general principle that consular officers had to respect the laws and regulations of the receiving State.

16. Commenting on Mr. Verdross's suggestion he said the suggested provision was acceptable as far as it went; it should, however, be supplemented by a clause covering not only members of consular families engaged in gainful occupation, but also those engaged in other activities which were subject to compulsory insurance under, for example, international labour conventions. Such persons would include amateur pilots of aircraft, persons engaged in certain dangerous

sports and even voluntary trainees in hazardous activities. The phrase "or occupations or activities subject to compulsory insurance" should therefore be added to Mr. Verdross' form of words. To go into all the details in the body of the text would, however, make it too complicated.

17. The Special Rapporteur's paragraph 2 was broadly satisfactory, but it should contain a saving clause such as "except as otherwise provided by special bilateral agreement". Alternatively, the commentary might mention the possibility of different regulation by bilateral instrument. Private staff who were in the sole employ of members of the consular staff and who were not nationals of the receiving State should not be exempted from contributions unless an agreement existed to that effect between the States concerned. It would be inadvisable that such staff should be deprived of the protection of social security schemes.

18. The clause concerning voluntary participation in the social security system (paragraph 3) was generally acceptable, but some provision should be made to the effect that, at any rate where health insurance was concerned, the local authorities were under an obligation to accept such participation. Very serious situations had arisen, particularly in emergency cases, in countries in which no private medical practice existed and where members of the consular staff, being excluded from participation in the social security scheme of the State of residence, were thus unable to obtain hospital treatment. It was a rule of customary law that aliens had a right to medical assistance in emergencies. He was not sure how that rule might be expressed in the draft, but the Special Rapporteur should not disregard its existence.

19. Mr. ERIM observed that the points raised by Mr. Bartoš might cause more difficulty in the drafting of article 36 than had been anticipated. It would probably not be sufficient simply to instruct the Drafting Committee to prepare a draft article exactly along the lines of diplomatic article 31. That article was in very general terms, whereas it now seemed that in the consular draft the situations described by Mr. Bartoš and Mr. Verdross would have to be taken into account. The Commission, should, therefore, settle the main issue: was it desirable to introduce such an article in the draft articles on consular intercourse and immunities? The Commission was prepared to accept certain privileges and immunities for both diplomats and consuls. In the present instance, it was attempting to exempt consular officers from burdens that might impede the smooth exercise of consular functions, and it might also be able to cover certain exceptional cases such as those mentioned by Mr. Bartoš. The draft article should therefore either be complete or it should state that, with regard to social security legislation, members of the consular staff were free to choose to contribute or not to contribute to the social security scheme of the receiving State and that the details should be left for regulation by agreement between the States concerned.

20. Mr. VERDROSS said that Mr. Bartoš had raised questions of the utmost importance. A clear distinction should be drawn between the consular officer when paying social security contributions for himself and that officer when paying them for some other person. In Austria, for example, the employer and the employee each paid half the contribution. If the consular officer was not obliged to pay the employer's half, his employee would be deprived of protection under the social security scheme. The Special Rapporteur might be able to insert another paragraph covering that point, in some such terms as: "The exemption provided for in paragraphs 1 and 2 shall not relate to social security contributions payable on behalf of staff who are not nationals of the sending State". The point raised by Mr. Bartoš about health insurance was covered in paragraph 3, since under that provision it was open even to the consul himself to become a voluntary participant in the social security scheme of the receiving State.

21. Mr. BARTOŠ drew Mr. Verdross's attention to the qualification in paragraph 3, that voluntary participation would not be precluded "in so far as such participation is allowed by the legislation of the receiving State". Certain States did not allow participation unless the person concerned was permanently established in the territory.

22. Mr. AGO observed that the point raised by Mr. Verdross would be met if the Commission reverted to the construction used in diplomatic article 31. The Special Rapporteur and the Drafting Committee should base their redraft on that construction. However, the structure and wording of article 31 might well be improved. For example, the phrase should run "be exempt from the obligations provided for by the social security legislation", since "exempt from the social security legislation" was improper. The phrase concerning servants and employees in the article itself did not quite tally with what was said in the commentary; it was not clear whether it was the servants or the members of the mission who were exempted from the obligations in question. Mr. Bartoš had referred to a number of special circumstances. But surely the Commission should confine itself to the codification of general rules; otherwise, it would have to go to extremes, and might even have to consider whether a consul's hobbies should or should not be covered.

23. Mr. PAL suggested that, as the Commission was in general agreement on the substance of draft article 36 and had also agreed that it should be modelled on diplomatic article 31, the article should be referred to the Drafting Committee. The Special Rapporteur had agreed in substance with Sir Gerald Fitzmaurice but had considered that his own draft adequately covered the matter. The Drafting Committee should be particularly careful about the point raised by Sir Gerald Fitzmaurice and recognize the requirements of the situation and its inherent possibilities, to which Sir Gerald had drawn attention. It was

surely preferable to word the draft more clearly than to leave it open to differences in interpretation, thus maintaining the controversy. All the outstanding problems were thus matters of drafting.

24. Mr. AMADO said that Mr. Ago had brought the Commission back to the main issue to be decided which was, as Sir Gerald Fitzmaurice had pointed out, whether members of the consular staff were liable for social security contributions.

25. He thought that the discussion had ranged over many unessential details, and he urged that an early decision be taken to refer the article to the Drafting Committee. In that connexion, he agreed with the criticism which had been expressed regarding the drafting of article 31 of the draft on diplomatic intercourse.

26. Mr. ERIM agreed that the drafting of article 31 of the draft on diplomatic intercourse stood in need of improvement.

27. He considered it essential that members of the consular staff should be able to become voluntary participants in the social security scheme of the receiving State.

28. Mr. TUNKIN said that social security questions were extremely complicated and that if the Commission were to enter into detail in that respect, the draft would probably be unacceptable to many States.

29. Accordingly, he suggested that the Commission's draft should deal with two matters of principle. In the first place, it should provide for a system enabling persons covered by the draft to enjoy social security benefits. Members of the consular staff and employees and private staff brought in from the sending State were usually covered by the social security legislation of that State. Accordingly, it was appropriate to exempt those persons from obligations under the social security of the receiving State. In the second place, the Commission should deal with the question of obligations arising from the employment of local staff, who would not be covered by the social security legislation of the sending State.

30. Both questions of principle were adequately covered by the Special Rapporteur's draft and, as Mr. Pal had pointed out, the Commission was in general agreement with the principles embodied in article 36. The suggestions made by Mr. Verdross and other members of the Commission could accordingly be referred to the Drafting Committee.

31. The CHAIRMAN said that there appeared to be general agreement that article 36 should be referred to the Drafting Committee, together with the suggestion that article 31 of the diplomatic draft should be followed and the various other suggestions made. The Commission was agreed on the following points, namely: the rule set forth in article 36, paragraph 1; the obligation of members of the consular staff to pay the employer's contribution under the social security legislation of the receiving State in respect of local employees

and private staff; and the possibility of voluntary participation in the social security scheme of the receiving State.

32. If there were no objections, he would assume that the Commission agreed to those points being referred to the Drafting Committee.

It was so agreed.

ARTICLE 37 (*Exemption from taxation*)

33. Mr. ŽOUREK, Special Rapporteur, introduced his proposal for the following revised text of article 37:

"1. Subject to reciprocity, the receiving State shall exempt members of the consular staff and members of their families from all taxes and dues, personal or real, levied by the receiving State or by any of its territorial subdivisions, save:

- (a) Indirect taxes incorporated in the price of goods or services;
- (b) Taxes and dues on private immovable property, situated in the territory of the receiving State, unless held by a member of the consular staff on behalf of his government for the purposes of the consulate;
- (c) Estate, succession or inheritance duties levied by the receiving State, or by any of its territorial subdivisions, subject, however, to the provisions of article 44 concerning estates left by members of the consular staff or by members of their families;
- (d) Taxes and dues on income having its source in the receiving State;
- (e) Charges levied for specific services rendered;
- (f) Subject to the provisions of article 26, registration, court or record fees, mortgage dues and stamp duty."

34. The expression "members of the consular staff" used in that text included both heads of consular posts and subordinate staff; it would be replaced by another appropriate expression when article 1 (definitions) had been revised.

35. Subject to some slight drafting amendments, his revised text of article 37 was based on article 32 of the draft on diplomatic intercourse. In that connexion, he recalled that during the period between 1919 and 1939, it had been widely asserted that general international law recognized no immunity from taxation for consuls. In fact, however, many States granted the exemption and recent consular conventions confirmed that it had become part of State practice. He cited, in that respect, the consular conventions concluded by the United Kingdom with France (1951), Norway (1951), Sweden (1952) and a number of other countries, as well as the conventions entered into by the Soviet Union with Hungary (1957), Czechoslovakia (1957), the People's Republic of China (1959) and other countries. It could, therefore, be safely concluded that the principle set forth in article 37 was a rule of international law which should not be omitted from the draft.

36. The words "Subject to reciprocity" had

been introduced for the purpose of giving States a greater freedom of action in concluding bilateral agreements. He was prepared to delete those words if the majority of the Commission objected to them, but he felt that, if they were retained, there was a better prospect that States would accept the provisions of article 37.

37. Mr. BARTOŠ asked the Special Rapporteur whether it was the intention of his text that in the receiving State members of the consul's private staff who were nationals of the sending State should not be eligible for exemption from taxation. He had no objection to those persons being left outside the scope of the exemption but, in practice, it would be difficult for the fiscal authorities to assess the tax of such persons, for the terms of the contract between the consul and a member of his private staff brought from his home country would not be known to those authorities.

38. Secondly, he asked whether the expression used in article 37 (e) "charges levied for specific services rendered" was intended to cover services rendered to a consulate.

39. Lastly, he requested the Special Rapporteur to clarify the meaning of article 37 (f).

40. Mr. ŽOUREK, Special Rapporteur, said that in his first question Mr. Bartoš had raised a rather difficult point; if the Commission so desired, he was prepared to broaden the scope of the article by including private staff.

41. In reply to the second question, he said that article 37 (e) referred to charges (other than taxes) representing payment for specific services rendered to the consular officer concerned by the receiving State or by its public utilities.

42. In reply to Mr. Bartoš's third question, he said that the purpose of the proviso "Subject to the provisions of article 26" was to make it clear that, if the sending State or the head of consular post bought premises for use as a consulate, registration fees, which in some countries were very high, would not be payable in respect of such a transaction.

43. Mr. BARTOŠ thanked the Special Rapporteur for his replies and said that he would not press the point raised in his first question. As to the second point, he said that, unless it was made clear that the charges mentioned in article 37 (e) were those made for actual supplies received or for work performed, the provision might well cancel altogether the benefit of exemption from taxation.

44. On the third point, he wished to make a reservation regarding the taxability of the acquisition of immovable property by the sending State or by the head of consular post. The rule of international law was that the sending State and the head of consular post were not exempt from the payment of fees and duties chargeable in respect of such a purchase; they were only exempted from taxes in respect of the utilisation of the premises in question.

45. Mr. ERIM criticized the reciprocity clause;

such a rule, he said, would be appropriate only if the article represented an innovation. In fact, article 37 embodied a rule which was present in many consular conventions and which had become a part of accepted State practice.

46. With regard to the taxation of income having its source in the receiving State, he was not certain that the text of article 37 (d) covered all possible cases and drew the attention of the Drafting Committee to the much fuller text in article 16, paragraph 5 (b), of the Consular Convention between the United Kingdom and Sweden, 1952.

47. Mr. FRANÇOIS said that he was grateful to the Special Rapporteur for not insisting on the reciprocity clause.

48. The words "and members of their families" did not appear in article 32 of the draft on diplomatic intercourse. That draft, however, contained an article (article 36) which enumerated the persons entitled to privileges and immunities. He asked the Special Rapporteur whether he intended to include a similar provision in the consular draft.

49. He thanked the Special Rapporteur for including the provision in article 37 (f), thus ensuring that there was no longer any discrepancy between it and article 32 of the diplomatic draft. It was his impression, however, that the majority of States exempted consuls from the fees and duties mentioned in that clause. In that connexion, he said that in the Netherlands the rule was construed to mean that foreign consular officers were not required to affix Netherlands revenue stamps to documents issued by them. However, a person producing such documents to a judicial or other authority was required to affix those stamps at his own expense. He would be glad to have the Special Rapporteur's opinion on that question.

50. Mr. AGO said that the provisions of article 32 of the draft on diplomatic intercourse were unduly restrictive. Applied to consuls, however, the same provisions seemed unduly liberal. For example, the Special Rapporteur's article 37 provided that only transfers *mortis causa* were liable to tax or duty; but other transfers of property might be equally liable, and there appeared to be no grounds for exempting members of the consular staff from the payment of those transfer charges.

51. Secondly, he criticized the "unless" clause in article 37 (b). If a State saw fit to hold property not in its own name but through a consular officer, it should accept the tax consequences of that decision.

52. In conclusion, he suggested that the Drafting Committee should be asked to formulate the exemption of consular officers from taxation in terms less broad than those used in respect of diplomatic officers.

53. Mr. MATINE-DAFTARY said that he was in agreement with the principle embodied in article 37 but suggested that the opening provision be amended so as to refer to "all or some of the taxes and dues . . .".

54. Secondly, he asked the Special Rapporteur to elucidate the meaning of the term "real" as used in the context "personal or real taxes and dues". Inasmuch as article 37 (b) provided for an exception in respect of taxes and dues on immovables, it was not clear what other taxes could be meant by the expression "real taxes".

55. Sir Gerald FITZMAURICE said, in reply to the point raised by Mr. Ago, that the proviso ("unless he holds it . . .") contained in article 32 (b) of the draft on diplomatic intercourse had been introduced because, in certain countries foreign governments could not own real property in their own name. The practice in those cases was for the foreign government to purchase property either in the name of its National Bank or in the name of its ambassador personally. There appeared to be no reason for not adopting a similar provision in respect of consular premises.

56. Mr. TUNKIN said that the principle contained in article 37 was a sound one. He thought that the Commission would be adopting the right course in codifying the existing practice, which was to exempt members of the consular staff from taxation.

57. The point raised by Mr. Ago had been dealt with by Sir Gerald Fitzmaurice. He would cite in that connexion the example of two properties on Long Island, New York, which the Soviet Union had acquired in the name of its representatives to the United Nations because the laws of the State of New York did not permit foreign governments to own immovable property in that State. Although the properties in question were registered in the name of the individual representatives concerned, they were known to belong to the Soviet Union.

58. Mr. ŽOUREK, Special Rapporteur, replying to Mr. François, said that it would be difficult to formulate, in the consular draft, an article along the lines of article 36 of the draft on diplomatic intercourse. Some consular immunities, such as personal inviolability, attached only to consular officials. Others attached both to consular officials and to consular employees, together with their families. Lastly, certain other privileges extended to private staff. He had therefore considered it more appropriate to specify in each individual article the persons eligible for the benefit of the particular article.

59. The provisions of article 37 (f) meant that a consular official or a consular employee who was a party to a contract normally liable to local stamp duty would have to pay that duty. A completely different question arose in the case of a contract signed at a consulate and intended to take effect solely in the sending State or in a third State: such a document would not be liable to any stamp duty chargeable under the laws of the receiving State.

60. The point raised by Mr. Ago regarding article 36 (b) had been satisfactorily explained

by Sir Gerald Fitzmaurice and Mr. Tunkin. As to article 36 (e), he said that provision could be expanded so as to refer to specific services rendered by the receiving State or by any of its territorial subdivisions or public services.

61. With regard to Mr. Matine-Daftary's suggested amendment ("to exempt . . . from all or some of the taxes and dues"), he said he would find it difficult to accept the amendment for it would give the receiving State the power to restrict unduly the foreign consular officer's exemption from taxation.

62. In reply to Mr. Matine-Daftary's question concerning the word "real", he said that the words "personal or real" were intended to refer to the distinction between direct taxes on immovable property and direct taxes charged *ratione personae*.

63. The CHAIRMAN suggested that, if there were no objections, article 37 might be referred to the Drafting Committee with the comments made during the discussion; the Drafting Committee would also consider whether the exemption could be made somewhat less liberal, as suggested by Mr. Ago.

It was so agreed.

ARTICLE 38 (*Exemption from customs duties*)

64. Mr. ŽOUREK, Special Rapporteur, introducing article 38, said that, in drafting the article, he had taken as a basis the minimum exemptions from customs duties found in consular conventions. The exemptions in paragraphs (a) and (b) were generally recognized, but those in paragraph (c) were more controversial. In some countries, the items mentioned in paragraph (c) were admitted duty-free for six months, and in others for a year, after the arrival of the person concerned. He had thought, however, that the minimum exemptions he had enumerated would be acceptable to all States.

65. In practice, the staff of a consulate were often granted the same exemptions as the staff of a diplomatic mission and, since the Commission was not concerned only with the codification but also with the progressive development of international law, it might decide to propose a rule whereby for the purpose of Customs privileges members of the consular staff should be placed on a footing of equality with diplomatic missions. On the other hand, the Commission might consider it preferable that such provisions should form the subject of bilateral rather than of multilateral instruments. One argument in favour of modelling article 38 on the corresponding provision in the diplomatic draft was that only States which ratified the resulting convention would be bound by the article. In his own draft, however, he had not felt free to insert such a far-reaching clause; he had taken the view that the draft of a multilateral convention should incorporate rules that were acceptable to all States. In any case it was open to the Commission to amend his draft.

66. Mr. EDMONDS said he agreed in principle with article 38. Nevertheless, the wording of paragraph (b) was too restrictive, and it might be better to use a phrase which would cover whatever was required for the performance of consular duties, including such important items as motor vehicles. With regard to paragraph (c), he thought that the phrase "items for the personal use of members of the consular staff . . ." might be preferable to "personal possessions and effects". Finally, he considered that the establishment of a time limit for the duty-free import of personal items was inconsistent with the general principle of exemption.

67. Mr. BARTOŠ agreed with Mr. Edmonds. In practice, means of transport were of great importance to the consulate, and furniture for residence of members of the consular staff should also be exempted. Accordingly, paragraph (b) might be expanded to cover those items.

68. The practice of setting a time limit of three, and then six, months for the duty-free import of items for personal use was obsolete. For example, a member of the consular staff might marry and need new furniture for a larger residence; a consular official transferred, say, from the Far East to Europe would have to ship his furniture by sea and there would be no guarantee that it would reach his new post within six months of his arrival. Furthermore, the stipulation that personal possessions and effects must be brought in from the sending States was quite unnecessary; what mattered was that such possessions should be imported for the use of members of the consular staff. Finally, the provision should extend to service staff and private servants of the consular officials who were not members of their families.

69. Mr. MATINE-DAFTARY agreed with Mr. Bartoš that the references to the time limit and to importation exclusively from the sending State were unnecessary. He also thought that the same exemptions from customs duties should be accorded to members of the consular staff as to members of diplomatic missions. The two categories of officials should be distinguished, for the purpose of Customs treatment, solely by the reciprocity clause, which should be incorporated in the consular draft. Accordingly, the article should be brought more into line with article 34 of the diplomatic draft, particularly since the word "articles" used in paragraph 1 of that draft was much more general than the Special Rapporteur's enumeration.

70. Mr. ERIM observed that the reciprocity clause did not apply to paragraphs (a) and (b) of article 38, but might apply to paragraph (c). He agreed with the speakers who thought that the latter provision should be amplified: if that were done, a reciprocity clause might be of some value. On the other hand, he drew attention to article 17 (2) of the Consular Convention between the United Kingdom and Sweden of 1952, where exemption was granted for articles imported

exclusively for the personal use of the official concerned, and pointed out that paragraph (3) (b) of the same article contained the restriction that the exemption would not extend to articles imported for sale or for other commercial purposes. If the Commission decided to amplify article 38, it should add a similar qualifying phrase.

71. Mr. PAL drew attention to the difference between paragraph 1 of article 34 of the diplomatic draft and the opening passage of article 38 of the Special Rapporteur's draft. If the Commission decided to retain the phrase "Subject to reciprocity, the following items shall be admitted free of all customs duty and other taxes", it should add a paragraph along the lines of article 17 (3) (d) of the Consular Convention between the United Kingdom and Sweden of 1952, in order to compensate for the omission of the provision in the diplomatic draft that exemption should be granted in accordance with the regulations established by the legislation of the receiving State.

72. Mr. YOKOTA agreed with Mr. Erim that paragraphs (a) and (b) should not be subject to the principle of reciprocity. Anything intended for the use of the consulate was owned and used by the government of the sending State, not by the members of the consular staff. Accordingly, the items mentioned in those paragraphs were exempt from customs duties under the existing rules of international law. The personal possessions and effects referred to in paragraph (c), however, were owned by the staff members and their exemption from customs duties was not yet a generally-accepted practice. He drew attention to paragraph (2) of the commentary on article 34 of the diplomatic draft, which stated that the exemption concerned had been regarded as based on international comity. That part of the provision was therefore *de lege derenda* and that was still more the case where members of the consular staff were concerned. Accordingly, the provision in question should be subject to the principle of reciprocity if the provision were laid down as a rule of international law. Otherwise, a State failing to exempt personal possessions of the members of the consular staff from customs duties would be committing a breach of international law; that was a situation which the majority of States would hardly be likely to accept and it would therefore be advisable to retain the reciprocity clause as applicable to paragraph (c).

73. Mr. VERDROSS said that, although the principle of exempting personal possessions from customs duties could not yet be regarded as general practice, the Commission could accept it, especially since the Harvard Draft, prepared in 1932, set forth that principle in its article 25. The very general wording of that article seemed to him to cover all eventualities, but if the Commission wished to provide a wider formula, he would have no objection. Nevertheless, he agreed with Mr. Bartoš that the references to the six-month time limit and to importation exclusively from the

sending State should be deleted; furthermore, he suggested that the uses to which the articles imported free of duty would be put should be explained somewhat more clearly.

74. Mr. AGO agreed with Mr. Edmonds that paragraph (b) was unduly restrictive and that it should be broadened to include such important items as means of transport. Enumerations were in any case dangerous, and he agreed with Mr. Matine-Daftary that it would be better to use the wording of article 34 of the diplomatic draft.

75. With regard to paragraph (c), he agreed with the speakers who had urged the deletion of references to the time limit and the importations from the sending State, and also with those who considered that the article should be brought closer into line with the corresponding provision concerning diplomatic agents. Nevertheless, he thought the expression "members of the consular staff" might be too broad. The Special Rapporteur had said during the discussion on definitions that that expression also covered service staff; it should be borne in mind that the service staff of diplomatic missions were not eligible for exemption from customs duties under the diplomatic draft.

76. Finally, he did not think that reciprocity should apply to any of the provisions of article 38. The notion of reciprocity operated bilaterally; the result of applying reciprocity in the particular context would be a great diversity of practice. The Commission should therefore lay down a rule of international law, and should avoid introducing a serious and unnecessary complication.

77. Mr. SANDSTRÖM considered that the same exemptions should be granted to members of the consular staff as to diplomatic agents, since the living conditions of both categories of officials were similar, as were the difficulties that they would experience if the exemption were not granted. Draft article 38 should therefore be modelled on article 34 of the diplomatic draft. However, if the Commission decided to retain the form drafted by the Special Rapporteur, it might be advisable to follow Mr. Pal's suggestion and to add a clause along the lines of article 17 (3) (d) of the Consular Convention between the United Kingdom and Sweden of 1952.

78. It might also be desirable to add the phrase, "However, articles imported as samples of commercial products solely for display within a consulate and subsequently re-exported or destroyed shall not be regarded as excluded from the exemption provided in this article" appearing in article 17 (3) (b) of the Anglo-Swedish Convention; he would not move that as a formal proposal, however, since the Commission might not wish to draft so elaborate a provision.

79. Mr. FRANÇOIS said he quite understood the Special Rapporteur's reluctance to model draft article 38 too closely on the corresponding provision of the draft on diplomatic intercourse

and immunities. The practical reasons for granting different exemptions should always be borne in mind. For instance, the exemption of alcoholic beverages from customs duties was covered in the case of diplomatic agents, but not (article 38) in the case of members of the consular staff. The difference might be explained by the close connexion of such an exemption with the social obligations of diplomatic agents. Yet consuls-general in large towns also had social obligations and, although the granting of such an exemption to all members of the consular staff might be open to abuse, heads of post should have that facility. The Special Rapporteur might consider inserting a provision concerning exemption of alcoholic beverages from customs duties, for heads of post only.

80. Mr. TUNKIN said that, although he agreed with the principle contained in article 38, he thought it should be brought closer into line with the corresponding provision of the diplomatic draft. While the differences between diplomatic agents and consular officers were considerable, that was not sufficient reason for such a wide discrepancy between the two texts. The Drafting Committee could undoubtedly adjust the wording accordingly, but one point in connexion with the opening sentence seemed to him to be substantive. The opening sentence in article 34, paragraph 1, of the diplomatic draft specifically mentioned compliance with the regulations of the receiving State; that provision had been discussed thoroughly in connexion with the diplomatic draft and should be inserted in article 38 also. He agreed with the speakers who had urged that article 38 should not be unduly detailed and supported Mr. Bartoš's and Mr. Verdross's remarks on paragraph (c).

81. Mr. BARTOŠ, commenting on Mr. Yokota's remarks, said he did not believe that the Commission should differentiate between the rules of international law stated in paragraphs (a) and (b) and the exemption covered by paragraph (c), which was based on the comity of nations. It was the Commission's task to codify positive international law and also to propose rules *de lege ferenda*.

82. He could not agree with Mr. Ago that the expression "members of the consular staff" was too broad. While he agreed that the clause in which those words occurred should be brought more closely into line with the diplomatic draft, he thought that the number of persons enjoying the exemption concerned should be extended as far as possible.

83. Mr. LIANG, Secretary to the Commission, drew attention to the phrase "in accordance with the regulations established by its legislation" in article 34, paragraph 1, of the draft of diplomatic intercourse and immunities, and pointed out that it was too restrictive, in that although it took into account the legislation of the receiving State, it did not give due weight to the rules established by the practice of that State.

84. In reply to Mr. François's suggestion concerning the exemption of alcoholic beverages imported by consuls from customs duties, he said that in diplomatic and consular practice and in that of the United Nations, supplies were bought in the name of the institution concerned and were distributed to officials considered to have social obligations. The head of post was usually responsible for the proper distribution of supplies.

85. Finally, he agreed with Mr. Bartoš that a draft international convention prepared by the Commission must be both a consolidation of existing law and a proposal for the development of international law.

86. Mr. ŽOUREK, Special Rapporteur, observed that there seemed to be no substantive disagreement on paragraphs (a) and (b). He welcomed the desire of members for broadening the terms of paragraph (c); nevertheless, if his more restrictive wording were replaced by that of article 34 of the diplomatic draft, the provision would cover a number of articles, such as alcoholic beverages, tobacco and jewellery, the duty-free import of which might be limited by the regulations established by the legislation of the receiving State, or at any rate by a quota system.

87. With regard to the classes of persons eligible for exemption from customs duties, he pointed out that it was impossible to make distinctions in a general article. Moreover, service staff of diplomatic missions were dealt with in a separate section of the diplomatic draft, whereas no such distinction was made in the consular draft. In his opinion, the article had been discussed thoroughly and could now be sent to the Drafting Committee.

88. The CHAIRMAN, summing up the debate on article 38, observed that the Commission had agreed on the principle contained in the article, but had asked the Special Rapporteur to follow the corresponding provision of the diplomatic draft more closely and to use more general language, instead of an enumeration. The consensus was that the references to a six months' time limit and to importations of personal possessions from the sending State should be deleted. Finally, it was thought that, to prevent any possible abuses of paragraph (c), some wording similar to the phrase "in accordance with the regulations established by its [the receiving State's] legislation" in article 34 of the diplomatic draft should be inserted. He suggested that article 38 should be referred to the Drafting Committee with those indications.

It was so agreed.

The meeting rose at 1.5 p.m.

543rd MEETING

Thursday, 19 May 1960, at 9 a.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 39 (*Exemption from personal services*)

1. Mr. ŽOUREK, Special Rapporteur, introducing article 39 of his draft, said that it corresponded to article 33 of the draft on diplomatic intercourse and immunities. Under paragraph (a) of article 39, members of the consular staff, their families and private staff were exempted from all personal services, such as those imposed by the receiving State on all its nationals in cases of emergency, and from all public service, such as jury duty and similar obligations. The paragraph also covered exemption from military service.

2. The provision in paragraph (b) related to exemption from material military obligations and in particular, from requisitioning, taxation or billeting; it was based on similar provisions in many consular conventions.

3. Both paragraphs contained the proviso that to be eligible for the exemption the persons concerned must not be nationals of the receiving State. Although a separate article (article 42) contained general provisions concerning the position of members of the consular staff who were nationals of the receiving State, it seemed desirable, if not indispensable, to include that proviso in article 39. Besides, such persons were also the subject of express provisions in some of the articles of the diplomatic draft, despite a general provision covering them.

4. Mr. YOKOTA drew attention to the discrepancy between the categories of persons enjoying immunity under the consular and the diplomatic drafts respectively. Under draft article 39, the exemption was granted not only to consular officials, but also to service staff and private servants, according to the definition of "members of the consular staff" in article 1. Article 33 of the diplomatic draft, however, read in conjunction with article 36 of the same draft provided the exemption only for diplomatic agents and the administrative and technical staff of the mission. (Article 36 of the diplomatic draft specifically excluded service staff and private servants from the benefit of article 33.) It would seem either that the Commission had erred in failing to exempt service staff and private servants of diplomatic missions or else that the Special Rapporteur's draft was going too far in extending

the exemption to the service and private staff of consular officers.

5. Mr. BARTOŠ said that the main object of the exemption to be conferred by article 39 was to prevent the disruption of the consular functions by the imposition of personal and public services. The functioning of a consulate would be at least equally disrupted if a consul or his chauffeur were called upon to repair a bridge or a road destroyed in a natural disaster and were thus obliged to neglect their official functions. Accordingly, the exemption should be granted to the largest possible number of persons employed in or connected with the consulate.

6. The competent Yugoslav authorities also considered that the nationals of the receiving State employed in a foreign consulate should be exempted from all personal services and public service, other than military service. It might be argued that the position of nationals of the receiving State must be governed by the laws of that State, but the fact that nationals of the receiving State were attached to a foreign consulate should make the exemption applicable to them. The smooth operation of the consulate should be the paramount consideration.

7. Commenting further on paragraph (b), he said that it was not clear who was in fact exempted from taxation, and whether the consulate or the residences of members of the consular staff were to be exempt. If the premises used for the consulate were meant to be exempt, the intention should be stated expressly. That matter could, however, be settled by the Drafting Committee, while the question of the classes of persons eligible for the exemption had to be decided by the Commission itself.

8. Mr. VERDROSS thought that the principle contained in the article was acceptable, particularly in view of the comments of Mr. Bartoš. With regard to paragraph (b), however, he said that the reference to billeting was probably unnecessary, for requisitioning was used for obtaining not only billets but anything else that an army required.

9. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Yokota, suggested that in settling the terms of article 39 of the consular draft the Commission should not adhere too closely to article 33 of the diplomatic draft. As Mr. Bartoš had said, the purpose of the exemption was the overriding consideration, and that purpose was to avoid any disruption of the consular functions. The inconvenience to the consulate would be equally serious whatever member of its staff was required to perform the duties from which article 39 was intended to exempt them. Besides, the exemption would be a negligible disadvantage for the receiving State, which could easily substitute some other person for a member of the consular staff, while the inconvenience to the sending State would be considerable if the exemption were withheld. In the interests of equity, therefore, the

exemption should be granted to all members of the consular staff, including private staff who had been brought to the receiving State in order to facilitate the performance of consular duties.

10. Mr. BARTOŠ's point with regard to paragraph (b) might be clarified in detail in the commentary. Members of the consular staff and their families and private staff would not of course be liable for any of the obligations mentioned in respect of consular or residential premises; on the other hand, persons who leased premises to a member of the consular staff could not claim the exemption.

11. In reply to Mr. Verdross, he pointed out that under the legislation of some countries requisitioning was not essential for obtaining billets. It could be used for obtaining not only lodging but also food supplies and transport, while the obligation to provide billets could be enforced without any requisition order. In any case, that question might be settled by the Drafting Committee; the important issue so far as the article was concerned was what persons were entitled to the exemption.

12. Mr. TUNKIN said he was not sure that classes of persons entitled to the exemption should be extended beyond those mentioned in the Special Rapporteur's draft article 39. For example, he did not think that private servants who were nationals of the receiving State should be eligible for the exemption.

13. Mr. ERIM said he found the principle of article 39 acceptable, but observed that the point raised by Mr. Yokota had not been finally disposed of. The article went considerably further than the corresponding provision of the diplomatic draft, particularly since article 36, paragraph 3, second sentence, of that draft gave the receiving State some discretion in granting the exemption: no such discretion was provided for in article 39 of the consular draft.

14. Mr. YOKOTA observed that he had not meant to criticize article 39, but merely to draw attention to the discrepancy between the diplomatic draft and the consular draft in that particular respect. Incidentally, in the case of article 38, which the Commission had sent to the Drafting Committee, a serious error had been committed by exempting the personal possessions and effects of all members of the consular staff from customs duties; the service staff and private servants of diplomatic missions did not enjoy such exemption. The Commission should review its decision concerning article 38.

15. Mr. ŽOUREK, Special Rapporteur, thought that Mr. Yokota's anxiety was unfounded. While the service staff of diplomatic missions might not be expressly exempt from customs duties under article 34 of the diplomatic draft, in practice they could enjoy the benefit of such exemption through the head of mission. For his part, he could not see why a clerk in a consulate should be eligible for the

exemption and a chauffeur should not. In any case, the Drafting Committee would seek a proper solution in the case of article 38; the matter was one of laying down a rule which was in conformity with the practice.

16. The CHAIRMAN, observing that some members were in favour of extending the exemption intended to be conferred by article 39 to as many persons as possible, with a view to avoiding any disturbance of the functioning of the consulate as a whole, suggested that the article should be referred to the Drafting Committee.

It was so agreed.

ARTICLE 41 (*Acquisition of nationality*)

17. Mr. ŽOUREK, Special Rapporteur, said that the purpose of the article, which was modelled on article 35 of the diplomatic draft, was to prevent the automatic acquisition of the nationality of a receiving State which applied the *jus soli* by children born in that State of members of the consular staff, and also the automatic acquisition of the nationality by a woman member of the consular staff in consequence of marriage to a national of the receiving State. He would have preferred to limit the article to children born in *jus soli* countries, but had decided against departing from the article in the diplomatic draft. Since there had been no observations from governments on the subjects in connexion with the diplomatic draft, he thought that the article could be referred to the Drafting Committee.

18. Mr. LIANG, Secretary to the Commission, suggested that a passage be placed in the commentary on article 41 marking its departure from the trend of many national laws and the Convention on Certain Questions relating to the Conflict of Nationality Laws signed at The Hague on 12 April 1930. In the laws of many *jus soli* States only persons not subject to the jurisdiction of those States were not considered as nationals if born in territory. The relevant United States, United Kingdom and French laws might be cited. Article 12 of The Hague Convention stated :

“ Rules of law which confer nationality by reason of birth on the territory of a State shall not apply automatically to children born to persons enjoying immunities in the country where the birth occurs.

“ The law of each State shall permit children of consuls *de carrière*, or of officials of foreign States charged with official missions by their governments, to become divested, by repudiation or otherwise, of the nationality of the State in which they were born, in any case in which on birth they acquired dual nationality, provided that they retain the nationality of their parents.”¹

19. In principle, article 41 was a sound approach, inasmuch as it assimilated consular officers to diplomatic agents and was an advance over the

1930 Hague Convention, but if no explanation were given, it might seem that the provisions of that Convention had been disregarded. The Drafting Committee might base its text on the first sentence in the commentary on article 35 of the articles on diplomatic intercourse and immunities.

20. The CHAIRMAN suggested that article 41 should be referred to the Drafting Committee.

It was so agreed.

ARTICLE 42 (*Members of the consular staff who are nationals of the receiving State*)

21. Mr. ŽOUREK, Special Rapporteur, introducing article 42, said that the appointment of nationals of the receiving State to foreign consular missions required the consent of that State. For the purpose of defining the status of such persons, at least generally, in his draft article 42 he had broadly followed the terms of article 37 of the diplomatic draft in that connexion. The Commission, after extensive discussion, had decided that diplomatic agents who were nationals of the receiving State should have immunity from jurisdiction in respect of official acts performed in the exercise of their functions. The same rule should apply *mutatis mutandis* to consular officials in the exercise of their functions, since their official acts were acts of the sending State.

22. So far as other members of the consular staff were concerned who were nationals of the receiving State, he had felt that he could go no further than to suggest (paragraph 2) that the receiving State should have discretion (but no duty) to grant certain facilities.

23. Mr. VERDROSS thought that the word “ official ” should be inserted before “ acts ” in paragraph 1, in order that the wording might conform with that of earlier articles. In his opinion, paragraph 2 added nothing whatsoever to the text and should be omitted.

24. Mr. YOKOTA said he could not see why the second sentence of paragraph 1 and the second sentence of paragraph 2 of article 37 of the diplomatic draft had not been incorporated in article 42 of the consular draft. In particular, a passage concerning the privileges and immunities to be enjoyed by consular staff who were nationals of the receiving State by reason of the dignity of the office should be inserted, if only to encourage the receiving State to take reasonable steps to prevent attacks on the person, freedom or dignity of such staff. Similarly, a clause safeguarding such staff against interference with their official business was needed. Without such a provision, paragraph 2 of article 42 would be practically useless, as Mr. Verdross had pointed out.

25. Mr. AGO said that, in view of the generality of the terms of article 34, he had considerable doubts concerning the usefulness of article 42, though if the Commission considered that the position of consular staff who were nationals of the

¹ League of Nations *Treaty Series*, vol. CLXXIX (1937-1938), No. 4137, p. 103.

receiving State should form the subject of a special article, he would not object.

26. He also questioned the desirability of inserting the word "official" before "acts" in article 42; as he had already observed during the discussion on article 34, in so far as a consul performed certain acts in the exercise of his function, he was performing acts for which he enjoyed immunity and in so far as he was not acting as a consul, he was acting as a private citizen, and as such could claim no immunity. The use of the restrictive expression "official acts" would therefore introduce an element of uncertainty into the text.

27. Mr. ERIM said that article 24 would not only not be superfluous, it would be useful. Paragraph 1 as it stood was, however, open to objections. It accorded immunity from jurisdiction to the consular officers specified in respect of acts performed in the exercise of their functions; however, certain consular employees, as defined in article 1, sub-paragraph (i) of the consular draft might perform administrative, technical or similar work in a consulate, such as keeping the registry. If such an employee committed a breach of the law of the State of residence while exercising a consular function, he would not be covered by article 42, paragraph 1. In redrafting that paragraph the stress should be laid not on the person, but on the function performed by him.

28. Mr. MATINE-DAFTARY asked whether the Special Rapporteur had purposely used different terminology in article 34 and article 42. It was not clear whether the phrase "shall not be amenable to the jurisdiction" was intended to mean the same as the phrase "shall enjoy immunity from jurisdiction". He agreed with Mr. Verdross that the word "official" should be inserted before the word "acts" in paragraph 1 of article 34.

29. Mr. BARTOŠ recalled that he had objected to the notion that a national of the receiving State could be acceptable as the diplomatic agent of another State; but when the Commission had been discussing article 37 of the draft articles on diplomatic intercourse and immunities he had been in a minority in expressing the opinion that a diplomatic agent who was a national of the receiving State should be eligible for full privileges and immunities when once he had been accepted as such. With respect to consular officers, however, the case was entirely different and in his view nationals of the State of residence were entitled to act as consuls of a foreign State. In principle, he must therefore take precisely the opposite position, both in theory and in practice, to that he had taken with respect to the provisions in the diplomatic draft, more especially with regard to the grant of the same privileges and immunities to consuls who were nationals of the State of residence as to those who were nationals of the sending State.

30. He agreed with Mr. Ago that the use of the term "official acts" was undesirable, since it would be extremely difficult to distinguish between the official and the private acts of consular officers.

What was meant in fact was acts performed in the course of consular duties.

31. Commenting on the text of paragraph 2, he said that immunity should be accorded in respect of all acts performed in the course of consular functions. Once it was recognized that a person was entitled to exercise consular functions, the receiving State must show a certain respect towards that person. Either therefore paragraph 2 should be transferred to the commentary or else a further sentence should be added, similar to the second sentence in article 37, paragraph 2, of the diplomatic articles, placing the emphasis on the function rather than on the person. If the Commission had considered that the inclusion of such a sentence was necessary for the good conduct of a diplomatic mission's business, the reasons for the inclusion were equally valid in the case of a draft which was meant to ensure the good conduct of consular functions.

32. Sir Gerald FITZMAURICE agreed with Mr. Ago concerning the possible superfluity of paragraph 1. The Drafting Committee should be asked whether, purely as a matter of drafting, it was necessary, in view of the existence of article 34. It could not be plausibly argued that article 42 was needed in the consular articles because article 37 had been included in the diplomatic articles, for whereas diplomatic agents enjoyed complete personal immunity, a consular officer, whether a national of the sending State or a national of the receiving State, enjoyed immunity from jurisdiction only with respect to acts performed in the exercise of his functions, but not with respect to acts performed in a personal capacity. Since that principle applied equally to consuls who were nationals of the sending and to those who were nationals of the receiving State, no special regime was required for the latter. A mere reference to article 34 would suffice. If paragraph 1 was unnecessary, paragraph 2 was equally so. Consular officers were of course afforded certain immunities other than immunity from jurisdiction; for example, exemption from personal services, as prescribed in article 39. Article 39, however, explicitly excluded the members of the consular staff who were nationals of the receiving State from the benefit of the exemption conferred by that article. Article 42, on the other hand, dealt solely with immunity from jurisdiction and was therefore quite different in character from article 39.

33. Mr. SANDSTRÖM agreed with Sir Gerald that the whole article 42 was unnecessary.

34. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Yokota, explained that in article 42 he had not reproduced the second sentence of paragraph 1 of diplomatic article 37 because that sentence would not add anything in the context; the second sentence in paragraph 2 of article 37 of that draft was vague and likewise failed to add anything. He would not insist on the retention of article 42, paragraph 2, which did not state

any rule of law and might well be transferred to the commentary.

35. He could not agree with Mr. Erim's suggestion that the benefits of article 42 should be extended to consular employees, since the Commission could not in the consular articles go beyond the limits it had already set in the diplomatic articles.

36. The difference in terminology between articles 34 and 42 was explained by the technique of legal drafting. In article 34 it had been necessary to define what was meant by immunity from jurisdiction; once that meaning had been defined, it was possible to use a narrower term in article 42.

37. The argument that the expression "official acts" should not be used in article 34 was valid, as it was for all the articles concerning consular officials who were not nationals of the receiving State; with regard to consular officials who were nationals of the receiving State, however, the expression "official acts" was required. He referred to the Bigelow case (cited in A/CN.4/131, part I, paragraph 50), in which the judicial decision had hinged on the interpretation of "official act". While he agreed that the expression should not be used in other articles, it might be retained in the special case of article 42, at least until governments had had an opportunity to comment on it.

38. Mr. FRANÇOIS agreed with the Special Rapporteur that the expression "official acts" should be used in article 42. Mr. Ago should be aware that it was no innovation, since it had been used in article 37, paragraph 1, of the diplomatic articles. If the expression was not used in article 42, the phrase "in the exercise of his functions" might be construed as "during the exercise of his functions"; that was not the intention. It could hardly be said, for instance, that a consul who, while driving to the office in his own car, ran down and killed a pedestrian was performing an "official" act (even though the accident occurred during the time when the consul was engaged on official business). To cover precisely such cases the Commission had inserted the word "official" before "acts" in article 37, paragraph 1, of the diplomatic draft. For the Commission now to admit that the use of the term had been wrong and to delete it from the consular articles would be illogical.

39. Mr. AGO replied, that if the expression "official acts" was to be approved in the case of article 34, Mr. François was right in suggesting that the reason for its retention was to make article 42 consonant with article 37 of the diplomatic draft. His own objection to the expression had not been in connexion with article 42 so much as in connexion with article 34, which has been referred to the Drafting Committee. He would continue to oppose the retention of the expression "official acts" in that article in the Drafting Committee. The argument adduced by Mr. François itself reinforced the case for not including it in article 34. Consular officials rarely performed "official acts" but were constantly

exercising consular functions. Some consular conventions used the term "in his official capacity", or, in other words, linked the immunity to the function, not to the act. That might, however, be more properly discussed again in connexion with article 34.

40. Mr. YOKOTA disagreed with Sir Gerald Fitzmaurice's contention that article 42 was unnecessary. Under draft article 33 consular officials certainly enjoyed immunity, although opinions differed as to the kind of immunity they enjoyed. The Special Rapporteur considered that it was personal inviolability, but other members believed that it was immunity from jurisdiction. All members, however, agreed that consular officials enjoyed immunity from arrest and detention. If article 42 were deleted, consular officials who were nationals of the receiving State would enjoy the benefit of article 33, whereas diplomatic agents who were nationals of the receiving State would not enjoy the benefits of article 27 of the diplomatic draft.

41. Sir Gerald FITZMAURICE pointed out that the wording of article 33, paragraph 1, specifically excluded consular officials who were nationals of the receiving State from the benefit of that article. His own argument therefore remained valid. Article 42, paragraph 1, was really redundant, as it dealt with a matter already covered by article 34; immunity from jurisdiction in respect of acts performed in the exercise of consular functions, irrespective of the consul's nationality. All members of the Commission agreed on that.

42. Mr. Ago had rightly objected to the expression "official acts". It was unfortunate that the Commission had included it in article 37, paragraph 1, of the diplomatic draft, for it altogether destroyed immunity from jurisdiction, inasmuch as a truly official act was, by its very nature, most unlikely to constitute a criminal offence under local law. The use of the word "official", if accepted, would very narrowly restrict the scope of article 42. If a consul drove too fast when going to visit a national (i.e., in the performance of his functions), that might be deplorable, but he should be personally immune from process. If a consul's immunity was removed because running down a pedestrian, even in the performance of a consul's functions, was not in itself an official act, he would be liable for every petty motoring offence.

43. Mr. YOKOTA admitted that he had cited article 33 in error; he still thought, however, that, because other articles of the consular draft did not expressly differentiate between consular officers who were and those who were not nationals of the receiving State, article 42 should be retained. In that connexion he drew attention to article 37 concerning exemption from taxation and article 38 concerning exemption from customs duties.

44. Mr. PAL said that he was against any decision being taken offhand to delete article 42. The Commission should carefully compare the scheme of the present draft with that of the draft on diplomatic intercourse before taking any such action. If a comparison was made between certain articles in the two drafts which dealt with analogous subjects, it became apparent that the retention of a provision such as that contained in article 42 was necessary. Under the provisions of several articles in the diplomatic draft, nationals of the receiving State had been expressly mentioned and excluded from the particular privileges to which the article referred, while in other articles no such explicit provision had been made. A general provision relating to nationals of the receiving State had therefore been essential. Careful study of the consular draft would reveal a similar situation: in some articles nationals of the receiving State were expressly referred to — and excluded — whereas other articles were drawn up in general terms. Hence article 42 was necessary to cover the special case of consular officials who were nationals of the receiving State.

45. With regard to the expression “official acts”, he said it had been precisely Mr. Ago’s draft, submitted at the last moment, which, at its tenth session the Commission had adopted for article 37 of the diplomatic articles, by 9 votes to 2, with 4 abstentions (463rd meeting, paragraph 49).

46. Mr. AGO interposed to state that his proposal at the time had been intended as a last-minute compromise to deal with the very special case of diplomats who were nationals of the receiving State.

47. Mr. ŽOUREK, Special Rapporteur, said that he still believed that Sir Gerald Fitzmaurice was wrong in pressing for the deletion of draft article 42. It dealt with a special class of consular official, whereas article 34 dealt with members of the consular staff. The inclusion of an article such as article 42 would be expected. As the discussion on the expression “official acts” had revealed, the immunity of members of the consular staff who were nationals of the sending State should be wider than that accorded to members who were nationals of the receiving State. The final decision might, however, be deferred and the Drafting Committee might well consider whether there were good reasons for merging articles 34 and 42.

48. The CHAIRMAN suggested that draft article 42 be referred to the Drafting Committee. It should consider whether paragraph 1 was redundant and should make a recommendation on that point to the Commission. If a residual article were retained, the Drafting Committee should consider whether the additions suggested by several members of the Commission were desirable.

It was so agreed.

ARTICLE 43 (*Duration of consular privileges and immunities*)

49. Mr. ŽOUREK, Special Rapporteur, introducing article 43, said that, apart from some slight drafting changes, the article was similar to the first two paragraphs of article 38 of the diplomatic draft.

50. Article 43, paragraph 1, stated that any person entitled to consular privileges and immunities enjoyed them from the moment when he entered the territory of the receiving State, or if already in its territory at the time of his appointment, from the notification of that appointment.

51. Article 43, paragraph 2, stated that consular privileges and immunities normally ceased when the person who had enjoyed them had left the territory of the receiving State, or on the expiry of a reasonable period. The last sentence of the paragraph stated the important principle that with respect to acts performed in the exercise of consular functions, immunity subsisted without limitation as to time.

52. Mr. VERDROSS said that the principles embodied in article 43 formed part of general international law. He suggested, however, that the Special Rapporteur should consider the possibility of making provision for the case of the dismissal of a consul by reason of his commission of a criminal offence. In that event, there appeared to be no reason for stipulating that consular privileges and immunities would continue for a reasonable period after the termination of consular duties.

53. Mr. ŽOUREK, Special Rapporteur, thanked Mr. Verdross for drawing his attention to that special case, but said that it would be of extremely rare occurrence. He had the intention of submitting a separate article to deal with the question of waiver of consular immunities. Perhaps the question of the dismissal of a consul by reason of the commission of a criminal offence might find its place in that article, but he had no objection to examining with the Drafting Committee the possibility of dealing with it in article 43.

54. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 43 to the Drafting Committee, with the request that it should consider the point raised by Mr. Verdross.

It was so agreed.

ARTICLE 44 (*Estates of deceased members of the consular staff or of deceased members of their families*)

55. Mr. ŽOUREK, Special Rapporteur, said that the language of article 44 was based on article 38, paragraph 3, of the diplomatic draft; he had submitted it as a separate article because it dealt with the exemption from estate duty rather than with the duration of privileges and immunities. The exemption from estate duty in

the case dealt with by article 44 was quite justified; it would be wrong for the receiving State to charge estate duty on anything other than immovable property left in that State by a deceased consular officer or a deceased member of his family.

56. The question whether the matter dealt with in article 44 should be the subject of a separate article, and that of the placing of the article, could be left to the Drafting Committee.

57. Mr. SCALLE said that the most appropriate place for the provisions contained in draft article 44 was after article 38 (*Exemption from customs duties*). The main purpose of the provision was to enable the export of the movable property concerned from the territory of the receiving State, subject only to the exception relating to property which had been acquired in the country and the export of which was prohibited.

58. Sir Gerald FITZMAURICE said that the words "In that event" in the last sentence of the article were ambiguous, and asked the Special Rapporteur for clarification.

59. Mr. ŽOUREK, Special Rapporteur, said that the words in question referred to the event of the death of a member of the consular staff or of a member of his family mentioned in the first sentence: the words were intended as a link between the first and second sentences.

60. Mr. SCALLE said that, in French, the meaning could perhaps be made clearer by introducing the words "En ce cas" at the beginning of the sentence in place of the words "dans un tel cas".

61. Mr. SANDSTRÖM drew attention to paragraph 3 of the commentary on article 38 of the diplomatic draft, which explained the provision adequately.

62. The CHAIRMAN said that, with those explanations, the article could be referred to the Drafting Committee. If there were no objection, he would consider that the Commission agreed to that course.

It was so agreed.

ARTICLE 45 (*Duties of third States*)

63. Mr. ŽOUREK, Special Rapporteur, said that he had introduced article 45 in response to the Commission's desire to include in the consular draft, wherever possible, provisions similar to those contained in the diplomatic draft.

64. Article 45, paragraph 1, stated the principle that third States were required to facilitate the transit of consular officials.

65. Since members of the family of consular officials were not entitled to inviolability, it had been necessary to introduce a separate paragraph (paragraph 2) concerning their travel through third States.

66. Paragraph 3 dealt with the transit through third States of other members of the consular

staff and their families, and paragraph 4 with the transit of correspondence and other official communications.

67. Article 45 did not impose upon a third State the duty to allow consular officials to pass through its territory but merely stated that if a consular official passed through that territory while proceeding to take up or return to his post, or when returning to his own country, the appropriate privileges should be extended to him.

68. He thought that the rules formulated in article 45 could be accepted by governments because they tended to facilitate consular relations and were therefore in the interests of all States.

69. Sir Gerald FITZMAURICE said that the principle of article 45 was acceptable to him but that the Drafting Committee should examine closely the drafting of its provisions.

70. For example, the statement at the end of paragraph 1 that the third State was required to grant the consular official concerned "such immunities as may be required to ensure his transit or return" could only mean that the official would have to be granted complete immunity while in transit. In that event, the third State would be extending to him a greater measure of inviolability than that enjoyed by him "in virtue of the present articles", which was mentioned in the previous clause of the same sentence.

71. A somewhat similar difficulty arose in connexion with paragraph 2. In a draft which gave no privileges or immunities in the receiving State to members of the family of consular officials, it was strange to see a provision which appeared to confer upon them more or less complete immunity while in transit through a third State.

72. He fully agreed that facilities for transit and return should be granted to the persons mentioned in article 45, but perhaps paragraph 3 expressed that idea best by stating that a third State must not hinder their passage through its territory. A provision along those lines was all that was needed.

73. Mr. FRANÇOIS also considered that the provisions of paragraphs 1 and 2 went too far, for they appeared to exclude all possibility of arrest of the persons concerned. He could not accept provisions which gave those persons, while in transit through the territory of a third State, immunities greater than those enjoyed by them in the receiving State. Those paragraphs would have to be deleted or at least their drafting would have to be radically amended.

74. Mr. BARTOŠ approved of the idea contained in article 45 but, like several previous speakers, thought that the provisions of paragraphs 1 and 2 appeared to impose greater obligations on the third State than on the receiving State. The third State concerned could not be required to renounce, for example, its right to arrest a person

for an offence previously committed in its territory, nor to surrender its right of jurisdiction when the receiving State itself retained that right where the consul was concerned. That would mean that the obligations imposed on the third State in connexion with consular relations would be more severe than those imposed on the sending or receiving States involved.

75. Paragraph 3 was drafted in more satisfactory language in that it specified that the third State must not hinder the transit through their territory of members of the consular staff and members of their families. That idea was an excellent one: provision should be made for a kind of right of passage through the territory of the third State, subject to the observance of the laws of that State. All that could be required of the third State was that it should not obstruct consular relations between the sending State and the receiving State by hindering the passage of consular officials.

76. The CHAIRMAN said that the Commission appeared to approve the principle contained in article 45 on the understanding that it was not intended to impose greater obligations upon the third State than those owed by the receiving State; also, that that State was only required not to hamper the passage of the consular officials concerned, no waiver of its jurisdiction otherwise acquired previous to such passage being thereby implied. If there were no objection, he would consider that the Commission agreed to refer article 45 to the Drafting Committee on that understanding.

It was so agreed.

ARTICLE 46 (*Duty to respect the laws and regulations of the receiving State*)

77. Mr. ŽOUREK, Special Rapporteur, said that article 46 expressed the duty of consular officers to respect the laws and regulations of the receiving State and not to interfere in that State's internal affairs; it was self-evident that they could not be expected to obey provisions which conflicted with their consular privileges and immunities, such as legislation purporting to make them liable to personal services.

78. The provisions of article 46 were drawn from article 40, paragraph 1, of the diplomatic draft. As to paragraph 2 of that article 40, which stated that all official business of a diplomatic mission must be conducted with or through the Ministry of Foreign Affairs of the receiving State, its provisions could not, of course, apply to consular officers who, by definition, were in contact with the local authorities.

79. As to paragraph 3 of article 40 of the diplomatic draft, he had carefully considered the possibility of including its provisions in the consular draft, but had arrived at the conclusion that those provisions were not suited to the position of

consuls. In the case of a diplomatic mission, it was clear that its premises should not be used for purposes other than the functions of the mission, but the position of consuls was quite different. Some consuls, such as honorary consuls, might be engaged in a private gainful occupation. In addition, it had become a common practice for consulates to include other agencies, such as information and travel offices, in their own premises. For those reasons, he had preferred to formulate in article 46 only a general provision.

80. Mr. ERIM thanked the Special Rapporteur for his explanation, but felt that it was necessary to include some provision which, even in general terms, stipulated the duty of the sending State not to allow the consular premises to be used for any purpose incompatible with consular functions. A provision along those lines was necessary because, under article 25, the receiving State was required to grant inviolability to consular premises and to safeguard that inviolability. As a corollary of that privilege, the sending State should ensure that the premises were not used in a manner incompatible with the functions of the consulate.

81. In that connexion, he drew attention to the provisions of article 32 (b) of the Harvard Draft which required the sending State not to permit its consul to take advantage of his special position for any purpose not connected with the exercise of his consular functions. Indeed, it might be useful to consider the advisability of including also provisions along the lines of article 32 (a) and (c) of the Harvard Draft, which required the sending State not to permit its consul to use his position to protect fugitives from justice.

82. Mr. BARTOŠ said that article 46 gave expression to an existing rule of positive international law. It raised, however, the question whether a consul was required to respect legislative provisions of the receiving State which conflicted with the rules of international law governing the status of consuls. In that regard, there were two schools of thought. One considered that the consul must observe local legislation, while taking the necessary steps to ensure that the appropriate protest was made at the diplomatic level. The other held that the consul was entitled to ignore local legislative provisions which were at variance with the relevant rules of international law.

83. The consul's duty not to interfere in the internal affairs of the receiving State did not apply in the same manner to career consuls and to honorary consuls. An honorary consul who was a citizen of the receiving State was entitled to engage in political activities like any other citizen but, of course, was not allowed to use his title as foreign consul in that connexion. He considered that States should be left free to regulate, in accordance with their municipal law and constitutional provisions, the manner in which such persons could exercise their political rights as citizens.

84. With regard to the question raised by Mr. Erim, he drew attention to article 56, paragraph 1, which enumerated the privileges and immunities of honorary consuls. The inviolability of consular premises mentioned in article 25 did not appear in that enumeration. It followed that the inviolability of consular premises could not be invoked by honorary consuls. No argument could therefore be derived from that inviolability to impose upon such consuls duties comparable to those set forth in article 40, paragraph 3, of the diplomatic draft.

85. When the Commission had discussed article 25 he had drawn attention to the existence of mixed consulates, in which both career and honorary consuls served and also to the now frequent case of consulates in whose premises such agencies as information offices, travel offices, reading rooms, etc., were housed. He hoped that those questions would be dealt with at some place in the final draft.

86. Mr. YOKOTA recalled that article 25, dealing with the inviolability of consular premises, as adopted by the Commission, was almost identical in its terms with article 20 of the diplomatic draft. Accordingly, like Mr. Erim, he strongly supported the inclusion of a provision along the lines of article 40, paragraph 3, of the diplomatic draft, to preclude the use of consular premises in a manner incompatible with the functions of the consulate. Such a provision was more necessary in the case of consular premises than in that of diplomatic premises. Subject to that qualification, he could support draft article 46.

87. Mr. TUNKIN said that the relationship between international law and domestic law, mentioned by Mr. Bartoš, was a broad problem which was raised only incidentally by the provision under discussion. He did not feel that the Commission was called upon to deal with the many problems of international law raised incidentally by the various draft articles.

88. He had no particular objection to the proposal for the inclusion of a provision along the lines of article 40, paragraph 3, of the diplomatic draft. He also considered that some thought should be given to the question of activities conducted in consular premises which were unconnected with consular functions, such as the operation of a tourist office.

89. He noted that, at a previous meeting (530th meeting, paragraph 7), Mr. Bartoš had stated that a practice, begun by the USSR and later adopted by some of the People's Democracies, had been to set up consulates which were at the same time the headquarters of trade missions; he had gone on to say that, in its consular convention with the USSR, Yugoslavia had not recognized the inviolability of premises used for such a purpose. He (Mr. Tunkin) wished to point out that no such practice existed; on the contrary,

the consistent practice was that trade missions of the USSR were housed separately from consulates. Moreover, he was unaware of any consular convention such as that cited by Mr. Bartoš and assumed that the intention had been to refer to agreements relating to trade missions. Those agreements provided for the diplomatic immunity of the USSR trade mission premises.

90. Mr. BARTOŠ said that the agreement to which he had referred had been signed by Yugoslavia and the USSR in 1940.

91. Sir Gerald FITZMAURICE said that he also favoured the inclusion of a provision along the lines of article 40, paragraph 3, of the diplomatic draft.

92. With reference to the duty not to interfere in the internal affairs of the receiving State, he said it was evident that the duty could not fully attach to an honorary consul who was a national of the receiving State. When the provision under discussion was drafted in final form it should be made clear that honorary consuls owed that duty only while they were exercising their consular functions; as private citizens of the receiving State, they had the ordinary political rights.

93. A further point, however, arose in connexion with that provision. It was part of the functions of a consular officer, unlike a diplomatic officer, to concern himself with internal matters. It was accordingly desirable to make it clear that the duty not to interfere in the internal affairs of the receiving State was without prejudice to the performance of normal consular functions connected with matters of internal administration.

94. The CHAIRMAN said that there appeared to be no objection to the principle embodied in article 46. Three suggestions had, however, been made. First, that the Drafting Committee should consider the possibility of including a paragraph along the lines of article 40, paragraph 3, of the diplomatic draft. Second, that the Drafting Committee should formulate the duty of non-interference in the internal affairs of the receiving State in terms which would, so far as they related to honorary consuls, restrict the scope of the duty to acts performed in their capacity as consuls. Third, that the duty in question should be without prejudice to the carrying out of normal consular functions connected with matters of internal administration.

95. If there were no objection, he would consider that the Commission agreed that article 46, together with those three suggestions, be referred to the Drafting Committee.

It was so agreed.

96. The CHAIRMAN announced that he had received a reply from the President of the International Court of Justice to the letter which the Commission had authorized him to send (537th meeting, paragraph 59) requesting that the hearings which Mr. Žourek was to attend be postponed. The President of the Court had stated

that the case requiring Mr. Žourek's presence would not be proceeded with, and accordingly Mr. Žourek would not have to attend at The Hague.

The meeting rose at 1.5 p.m.

544th MEETING

Friday, 20 May 1960, at 10 a.m.

Chairman: Mr. Luis PADILLA NERVO

General Assembly resolution 1400 (XIV) on the codification of the principles and rules of international law relating to the right of asylum (A/CN.4/128)

[Agenda item 6]

1. The CHAIRMAN drew attention to resolution 1400 (XIV) of the General Assembly which requested the Commission to undertake, as soon as it considered it advisable, the codification of the principles and rules of international law relating to the right of asylum.

2. In that connexion, he pointed out that, during the Fourteenth Session of the General Assembly, a proposal made by the representative of Cuba during the discussion in the Sixth Committee, to the effect that the Commission should give priority to the codification of the subject (A/CN.4/128, paragraph 3), had not met with a favourable response and had been withdrawn by its sponsor. He invited comments from the members of the Commission on the question of the appropriate time for considering the subject.

3. Sir Gerald FITZMAURICE said that it was unnecessary for the Commission to take any decision in the matter beyond noting the obvious fact that it would not be able to consider the subject at the current session. It was not advisable for the Commission to bind itself to take up the subject at a specific date in the future for the Commission might at that date find itself unable to dispose of the subject.

4. The CHAIRMAN said that if there were no objection he would assume that the Commission agreed not to take up the subject at the current session, and that the question of the time when the subject would be considered would be left open.

It was so agreed.

General Assembly resolution 1453 (XIV) on the study of the juridical regime of historic waters, including historic bays (A/CN.4/126)

[Agenda item 7]

5. The CHAIRMAN drew attention to resolution 1453 (XIV) of the General Assembly, which requested the Commission to undertake, as soon

as it considered it advisable, the study of the question of the juridical regime of historic waters, including historic bays, and to make such recommendations regarding the matter as it deemed appropriate.

6. The subject of historic waters and historic bays seemed to give rise to the same problem as the topic of asylum; the Commission would hardly be able to consider it at the current session.

7. Mr. FRANÇOIS said that the topic of historic waters differed from that of asylum in that it was generally agreed that the former should be studied by the Commission. The First United Nations Conference on the Law of the Sea had adopted on 27 April 1958 its resolution VII requesting the General Assembly of the United Nations to arrange for the study of the juridical regime of historic waters, including historic bays¹, and, in pursuance of that request, the General Assembly had adopted its resolution 1453 (XIV) requesting the Commission to undertake the study of the question. The Commission had therefore a duty to undertake that study.

8. Of course, it would be for the Commission to decide (possibly after its composition had been determined by the Assembly in the autumn of 1961) exactly when it would take up the topic. It was essential, however, that the Commission should have before it full documentation on the subject. Experience had shown that such documentation was necessary for studies of the kind, and also, that the compilation of that documentation took much time. Accordingly, he suggested that the General Assembly be requested to invite States to send to the Secretariat all the available documentation concerning the historic waters, including historic bays, which were subject to their jurisdiction and to indicate the regime claimed by them for such historic waters and historic bays.

9. Sir Gerald FITZMAURICE said that he could not agree to the course suggested by Mr. François. The question of the régime of historic waters and historic bays was one of law and of principle; it was not a question of fact, or of ascertaining what claims were being made by the various States. As he saw it, the Commission's task was not to pronounce on the substantive merits of a long list of claims by States to specific bays or sea areas as historic bays or historic waters. The task of the Commission was to isolate and establish the principles on the basis of which claims of that nature could be made. If those principles were subsequently adopted by the General Assembly, or by some other authoritative body, they could serve for the purpose of sustaining State claims or of settling disputes relating to historic waters and historic bays.

10. Governments were unlikely to help the Com-

¹ United Nations Conference on the Law of the Sea, Official Records, vol. II: Plenary Meetings (United Nations publication, Sales No. 58.V.4, vol. II), p. 145.

mission with the formulation of principles in the matter; they would, instead, be more inclined to put forward specific claims to certain waters and bays as historic. He therefore strongly felt that the Commission should first determine the principles in the matter and then invite government comments on those principles. If governments wished to illustrate their comments by references to particular claims they could, of course, do so at that stage.

11. Mr. LIANG, Secretary to the Commission, said that if the Commission considered it necessary to ask governments for data or material of a factual nature it had full authority to ask the Secretary-General to request such information. There would be no need to refer the matter to the General Assembly.

12. He thought, however, that the difficulties which arose in the matter were not related to the availability of factual data, but rather to the nature of the problems involved. The first of those problems was that the distinction between historic bays and historic waters was somewhat blurred. In connexion with the preparation of the First United Nations Conference on the Law of the Sea, the Secretariat had prepared a memorandum (A/CONF.13/1)² which covered quite fully the subject of historic bays. The exact connotation of the term "historic waters" was, however, controversial, and the General Assembly discussions on the subject had not elucidated the question to any great extent. Perhaps if the Commission undertook work on the subject and appointed a Special Rapporteur, it might be able to limit its scope and make a clear distinction between the terms employed. After such a preliminary study it might be possible to ask governments for data. At the present moment he thought it was unnecessary to call on governments to do so; in the absence of a detailed questionnaire, governments would find it difficult to respond and the Commission was likely to receive theses on specific claims to certain waters as historic waters. For those reasons, he was inclined to believe that it would be more advisable for the Commission to define and limit the scope of its task, and to ascertain the nature of the work, before any request was made to governments for material.

13. Mr. PAL said that when the Commission, in accordance with its statute, appointed a Special Rapporteur on the topic, a preliminary study would be made by that Rapporteur who as a result would be in a position to tell the Commission what type of information, if any, was required from States. That could only be done if the Commission was prepared to deal with the subject immediately, in which case its first step should be to appoint a special rapporteur. If the Commission, however, was not going to take up the topic immediately it was premature to con-

sider the question whether governments should be asked for any information. In fact, it would not be consistent with the Commission's normal procedure to request information from governments at such an early stage.

14. During the discussions in the Sixth Committee at the fourteenth session of the General Assembly, the representative of Saudi Arabia had suggested that governments should be requested to supply the Secretariat with all relevant information on historic waters within their territories; that representative had added: "The International Law Commission would then be asked to prepare a code in the light of the opinions expressed and the information collected."³ That suggestion had not been followed by the Assembly, which had simply referred the topic to the Commission. There was no reason why the Commission, in its study of the subject, should not adhere to its normal procedure, which had been indicated by the then Chairman of the Commission, Sir Gerald Fitzmaurice, in his reply in the Sixth Committee to the suggestion made by the representative of Saudi Arabia.⁴

15. Mr. FRANÇOIS said that perhaps he had not made himself perfectly clear. He fully agreed that it was not the task of the Commission to decide on specific substantive claims. Nevertheless, for the purpose of determining the principles governing the question of historic waters and historic bays on the basis of existing international custom, it had to discover what bays were claimed as historic and on what grounds. It was only from the data provided by governments that the Commission could learn the rules of customary international law concerning historic waters.

16. For those reasons, he urged that the first step in the study should be to gather information and documentation. In that connexion, he agreed with the Secretary that it was not necessary for that purpose to apply to the General Assembly and that the Commission could itself ask the Secretary-General to obtain the necessary data. However, experience had shown that a period of more than five years was needed for the Commission to complete its work on any one topic, and it was therefore most desirable that the Commission should use the time until the autumn of 1961 to do some preparatory work. In that way, the Commission would be able to start the substantive work at its 1962 session and hope to complete it in the five-year term then commencing.

17. Mr. YOKOTA said that, in view of the remarks of the Secretary, he thought that the Commission should for the time being confine its study to the regime of historic bays, a subject on which an excellent memorandum had been

² *Ibid.*, vol. I: Preparatory Documents, pp. 1-38.

³ See *Official Records of the General Assembly, Fourteenth Session, Sixth Committee, 644th meeting, para. 9.*

⁴ *Ibid.*, para. 15.

prepared by the Secretariat. In that connexion he reminded the Commission that at the 1958 Conference on the Law of the Sea the Japanese delegation had proposed the insertion of a provision defining historic bays, which had been based on the Secretariat's memorandum.⁵ When the Commission had completed its study of that subject, it could undertake the study of historical waters, more or less as had been done with the subjects of diplomatic missions and *ad hoc* diplomacy. For those reasons, he suggested that the Secretariat be asked to continue its work on the subject of historic bays. The Secretariat might submit to the Commission in a year or two a new memorandum, which would form the basis of the Commission's preliminary study of the topic.

18. Mr. AGO agreed with Mr. François that the Commission should not remain totally inactive in the matter for the next two years. It would, therefore, be desirable if the Secretariat continued its studies and provide the Commission with a more precise account of the position in regard to the regime of historic waters and historic bays.

19. He also agreed that it was the Commission's task to ascertain the rules of customary international law in the matter, but he could not agree that those rules could be inferred from State claims as such. Only a claim by a State which had received some measure of acquiescence on the part of other States could contribute to the formation of an international rule of law. In that connexion, he thought that it would not be wise to ask governments to specify their claims to historic waters and historic bays. Governments might be tempted, as a matter of prudence, to protect their position by advancing all their claims, including possibly some totally new ones, so as not to prejudice their position at a future conference. Replies of that nature would have little significance from the point of view of the work of the Commission. It was, therefore, desirable that the Secretariat should continue its work on a strictly scientific basis without requesting any data from governments.

20. Mr. VERDROSS expressed support for the suggestion of Mr. François, with the qualification put forward by Mr. Ago: there was a considerable body of legal opinion which did not believe that there existed any rules of general international law concerning the regime of historic bays and which held that each historic bay had its own regime and was governed by its own special rules. If that view was correct, it would not be possible to formulate any general principles in the matter and it would be necessary to gather information on existing historic bays. He did not, of course, think that governments should be invited to give information as that stage.

21. Mr. AMADO said that he would be grateful to any jurist who could explain to him the exact regime of historic waters and also what was the customary rule on the subject of historic bays or, as Mr. Verdross had suggested, what were the different customary rules for the various historic bays.

22. The special situation enjoyed by some States in regard to certain bays was an undoubted historic fact but no one could say whether the position of those States was sanctioned by international law. There was no lack of factual material on the subject, but an obvious lack of applicable rules. The scarcity of legal literature on the subject had in fact been commented upon by many speakers during the discussions in the Sixth Committee of the General Assembly. Among other problems, the subject of historic bays raised the difficult question of the acquisition of title by prescription in the international law of the sea.

23. For those reasons, and in view of the fact that the subject was fraught with political implications, he suggested that it should be approached with great caution. Perhaps the simplest course of action for the Commission would be to gather documentation. In that connexion, he shared the view that information should not be solicited from governments, which were likely to supply a mere enumeration of factual information that they considered it in their interest to submit.

24. Mr. LIANG, Secretary to the Commission, observed that there was still no delimitation of the subject of historic waters. He drew attention to the Secretariat's study of historic bays in the preparatory documents for the First United Nations Conference on the Law of the Sea (see paragraph 12 above), which referred to a growing tendency to describe certain areas as "historic waters". Moreover, in recent years there had even been suggestions to describe as historic waters for fishing purposes areas of sea where distant-water fishing had been established by long usage. The passage he had referred to was merely an indication of the vagueness which surrounded the subject, and accordingly, the Commission's first step might be to define the relationship between historic bays and historic waters and to delimit the extent of historic waters. In the Anglo-Norwegian Fisheries case, historic waters had been mentioned in connexion with historic bays; there seemed to be a measure of agreement on the regime of historic bays, but the concept of historic waters was still widely disputed, particularly since such waters were claimed not only as a part of the territorial sea, but also as internal waters. Consequently the Commission might start by laying down some basic principles on the matters, and the Secretariat would seek the necessary documentation.

25. Mr. SCALLE agreed with Mr. François that the Commission should not waste time, but should decide what steps should now be taken. He also agreed with Mr. Ago and Mr. Amado that it would be inadvisable to start by asking governments

⁵ *United Nations Conference on the Law of the Sea, Official Records, vol. III: First Committee (United Nations publication, Sales No. 58.V.4, vol. III), p. 241.*

to communicate their opinions and claims, since the information received would be political, rather than legal or scientific.

26. Mr. BARTOŠ said that he had some experience of obtaining data on the question of historic waters from a number of governmental sources. The claims of States to different categories of historic waters could not be sifted by the Commission, which did not have the competence of a court in such matters. Before even deciding whether it was possible to codify the international law on the subject, much time would be needed to collect the necessary information. While he agreed with Mr. Verdross that it was hard to say that a body of international law on the subject existed, it was equally hard to say that it did not exist. He therefore endorsed the views expressed by Mr. François, Mr. Ago and Mr. Scelle; although he personally was somewhat pessimistic about the possibility of codification, the Commission should comply with the General Assembly's instructions and should not waste time. A compromise solution might be to appoint a preliminary rapporteur, who could work with the Secretariat on the subject for two years.

27. The CHAIRMAN, speaking as a member of the Commission, considered that at the present stage even the elaboration of a plan of work was a substantive decision which the Commission was not in a position to take. He agreed with the view that governments should not be asked for information, since in supplying information they would tend to fix their attitudes on the subject and would be reluctant to accept the Commission's proposals. Accordingly, the only solution seemed to be to ask the Secretariat to collect documentation on the subject, the Commission not being committed on any substantive issue.

28. Mr. HSU did not think that the Commission should be unduly influenced by the fact that its members were re-elected every five years, particularly since failure to be re-elected was only one of several contingencies in which a Special Rapporteur might no longer be available to the Commission. He thought that the Commission might appoint Special Rapporteurs forthwith for the codification of the principles and rules of international law relating to the right of asylum and for the study of the juridical regime of historic waters, including historic bays. Mr. Sandström might be asked to deal with the former subject and Mr. François with the latter. If those two members were willing to assume the responsibility, the Commission would not have to wait two years for a decision; if they refused, however, the Commission would have to postpone action on the two topics.

29. Mr. MATINE-DAFTARY pointed out that General Assembly Resolution 1453 (XIV) gave the Commission discretion to deal with the matter of historic waters as soon as it considered it advisable. The time element was the essential one; the Commission as now constituted had one

session and a half still before it, and there was nothing to prevent it from preparing the ground for the members who would be elected in 1961. The wisest course was to ask the Secretariat to carry out the preparation of the necessary research and to prepare the documentation. The good sense of the Secretariat would ensure that its research would be conducted in such a way as not to give rise to claims by governments.

30. Mr. SANDSTRÖM endorsed the view that the Secretariat should be asked to conduct the necessary research.

31. Mr. SCELLE observed that the Commission usually did not consult governments until after it had drawn up a document. Mr. Ago had rightly pointed out the disadvantages of first asking governments for information and then accommodating the Commission's articles to governmental claims.

32. Mr. AMADO agreed with Mr. Scelle and further pointed out that the Commission's terms of reference were to study the juridical regime of historic waters. There was therefore no reason to ask governments to supply information on their *de facto* situations in advance.

33. Mr. ERIM observed that there were four ways of solving the problem. The first was to do nothing until the Commission had been reconstituted in the autumn of 1961. The second course was to leave the Secretariat to prepare the preliminary documentation and to draft a plan of work on the basis of those data. The third suggestion had been to send a questionnaire to governments forthwith, inviting them to give their views and describe their legislation on the subject. Finally, Mr. Hsu had suggested the immediate appointment of two Special Rapporteurs, to study the topic of the right of asylum and that of historic waters, respectively.

34. He did not think that there was any decisive argument in support of the first course, since the Commission must comply with the General Assembly resolution, and it still had the remainder of the current session and the 1961 session before it. With regard to the second proposal, he said that, although the Secretariat should of course prepare documentation, the Commission should not content itself with delegating that research work but should take some action itself. The third suggestion seemed to him premature and he therefore supported Mr. Hsu's view that the Special Rapporteur should be appointed forthwith.

35. The CHAIRMAN observed that the Commission was concerned only with the question of the study of the juridical regime of historical waters (item 7 of the agenda).

36. Mr. FRANÇOIS admitted that it might be dangerous to apply to governments for information, since the consequence might be that they would take up rigid attitudes. Nevertheless, he could not agree with Mr. Scelle and Mr. Amado that the Commission should never begin work on a

particular topic with a request to governments for information. There was nothing strange or dangerous in asking governments for particulars of national legislation; that had been the course adopted in the case of the study of the regime of the territorial sea and the high seas. The question of the juridical regime of historic waters was an important one, since the claims of certain States would affect the whole work of conferences on the law of the sea. Until the Commission decided upon the validity of those claims, the success of any such conferences would be jeopardized, and the Commission must therefore not allow the question to remain outstanding too long.

37. Finally, he could not agree with Mr. Hsu and Mr. Erim that it was practicable to appoint a Special Rapporteur one year before the membership of the Commission was renewed.

38. Mr. EDMONDS said that the Commission normally appointed a Special Rapporteur to study a particular subject and to submit to the Commission proposals based on what the Rapporteur had found to be the generally accepted practice of States or the principles he could recommend for the progressive development of international law. The difficulty in the case of historic waters was that there seemed to be no established rules of international law — although possibly it was not wholly correct to say there were no such rules. If it was correct, the Secretariat or a special rapporteur might surely draw that conclusion and discover what principles should be recommended for the progressive development of international law. To inquire of governments what they believed to be their historic waters would invite them to commit themselves and would also commit the Commission to principles drawn from what governments had determined on the basis of widely differing principles and under widely differing conditions.

39. The Commission was not necessarily bound to act immediately, since General Assembly resolution 1453 (XIV) had requested the Commission "as soon as it considers it advisable, to undertake the study of the question". There might be several reasons why the Commission at that time considered it inadvisable to undertake the study, such as the fact that it still had many uncompleted subjects on its agenda, that the Commission was due to be reconstituted shortly or that the subject of historic waters was not of such vital importance as some others with which it had been entrusted. The Commission might draw attention to those reasons for not undertaking an immediate study and state that it would begin the study of historic waters as soon as the time was ripe. If the Commission was bound to take some action immediately, it should be a preliminary study by a special rapporteur or by the Secretariat, to be submitted in the form of a report to the Commission.

40. Mr. SCALLE regretted that he could not agree with Mr. François. The Secretariat normally furnished preliminary material and, in particular,

a compilation of existing laws and regulations on the particular subject. To ask governments how they interpreted their laws and regulations would be a work of supererogation. He must therefore maintain that the Secretariat should do the preliminary work before a special rapporteur was appointed and before the Commission itself dealt with the subject. To consult governments at the outset would be to commit the error of arousing political and polemical debate instead of remaining within the scientific and juridical limits within which the Commission should conduct its work.

41. Mr. AMADO remarked that Mr. François had gone too far in resuscitating the Conference on the Law of the Sea. The question of the juridical regime of historic waters, and especially historic bays, had never been particularly relevant to the Conference's work and had certainly not been a factor either in the success of the first conference, or in the lack of it at the second. The juridical regime of historic waters had been dragged in by the heels at the last moment; it was a purely marginal question. When the Commission had been preparing its reports on the regime of the high seas and the regime of the territorial sea,⁶ the Special Rapporteur had been able to base his study on abundant literature and other material. The literature on historic waters was scanty. On the other hand, the Commission was bound by General Assembly resolution 1453 (XIV), requesting it to undertake the study of the question "as soon as it considers it advisable". The Commission might quite well consider it advisable to undertake the study, but should observe the maxim *festina lente*; the question was by no means urgent. Thus the first step should be to ask the Secretariat to compile the requisite documentation. The Commission would then examine that documentation and could truly say that it was "undertaking" the study. Some lack of enthusiasm was excusable, since the matter was not one of the utmost urgency, although, of course, the Commission was not by any means bound to undertake only the most urgent studies. It was, however, safe to say that jurists were not at present very much preoccupied with the question of historic waters. The first step should therefore be left to the Secretariat.

42. Mr. Liang, Secretary to the Commission, said that the Secretariat would of course be very willing to make a preliminary survey of the juridical regime of historic bays. It had, however, already pointed out in paragraph 8 of the memorandum prepared for the First United Nations Conference on the Law of the Sea that the expression "historic bays" was of general scope. Historic rights were claimed not only in respect of bays, but also in respect of maritime areas which did not constitute bays, such as the

⁶ *Yearbook of the International Law Commission*, 1956, vol. II (United Nations publication, Sales No. 1956.V.3, vol. II), pp. 1-103.

waters of archipelagos and the water area lying between an archipelago and the neighbouring mainland; historic rights were also claimed in respect of straits, estuaries and other similar bodies of water. There was a growing tendency to describe those areas as "historic waters", not as "historic bays".

43. The term "historic waters" itself was admittedly controversial. Besides the concepts alluded to in the memorandum, Sir Gerald Fitzmaurice had pointed out in a comment on the Fisheries case between the United Kingdom and Norway that the International Court of Justice had recognized yet another basis of historic title, "a right to certain waters, deriving not from a historic claim to a given area of sea, as such, but from a historic system of delimiting territorial waters in general, which, even if it were otherwise contrary to international law, the State concerned could be said to have acquired a right to employ by long-continued usage and action in that sense, acquiesced in, or anyhow not objected to, by other States".⁷ The vagueness of the term had been the reason for the Secretariat's hesitation when it had first been called upon to express a view on the possibility of gathering material on historic waters. The juridical regime of historic waters and bays was, in fact, a marginal subject in comparison to such other subjects as diplomatic intercourse and immunities.

44. The CHAIRMAN said that it was his understanding that the majority of the members agreed that some action be undertaken forthwith, provided that it went no further than a request to the Secretariat to follow up the work begun along the lines set out in paragraph 8 of the memorandum to which the Secretary had referred. The Commission would, therefore, request the Secretariat to continue its work and would then consider undertaking a substantive study of the subject.

It was so agreed.

**Co-operation with other bodies
(A/CN.4/124) [continued]***

[Agenda item 8]

45. The CHAIRMAN asked the Commission to resume its consideration of item 8 of the agenda.

46. Mr. LIANG, Secretary to the Commission, drew attention to his report (A/CN.4/124) on the proceedings of the Fourth Meeting of the Inter-American Council of Jurists, which had been held at Santiago, Chile, from 24 August to 9 September 1959.

47. Within the framework of the collaboration established between the International Law Com-

mission and the Inter-American Council of Jurists he had attended the Third Meeting of the Council at Mexico City in 1956 and had submitted a report on its work to the Commission. In 1956, too, Mr. Manuel Canyes, Deputy Director of the Department of Legal Affairs of the Pan American Union, had attended the Commission's eighth session as an observer. At the invitation of the Government of Chile and of the Secretary of the Organization of American States, the Secretary-General of the United Nations, complying with the request made by the Commission in 1956 and again in 1958, had authorized the Secretary of the International Law Commission to attend the Fourth Meeting as an observer. He (Mr. Liang) had been present during the entire Fourth Meeting and wished to record his appreciation of the hospitality with which he had been received and of the courtesies extended to him during his stay at Santiago.

48. He had made a statement at the Fourth Meeting which was summarized in chapter III of his report (A/CN.4/124). The main body of that report was concerned with the matters discussed at the Fourth Meeting which were on the Commission's agenda — *viz.*, reservations to multilateral treaties and the principles of international law governing state responsibility. The Council's discussion of each of those items, following an account of the past treatment of the topic in the Organization of American States, had been reproduced as fully as possible.

49. With regard to reservations to multilateral treaties, the Council recommended by a resolution (paragraph 94) to the Eleventh Inter-American Conference a series of rules with respect to the procedure to be followed by the Pan American Union as depositary. The resolution also laid down the traditional "Panamerican rule" with respect to the juridical effects of the ratification of or accession to treaties subject to reservations and affirmed that the making and acceptance of reservations were acts inherent in national sovereignty.

50. With regard to the principles of international law governing the responsibility of the State, the Council confined itself to adopting a procedural resolution (*ibid.*, paragraph 140) requesting the Inter-American Juridical Committee to proceed with the study of the contribution of the American continent in that respect. It should, however, be added that the Council had made a point of listing the bases on which the Committee was to continue its tasks.

51. The Council had not been able to devote all the time it had intended to those topics. Its original programme had been altered by the inclusion of new topics, some of them urgent. Accordingly, for a correct understanding of its scope, its work should be looked at as a whole.

52. It could be stated that the Fourth Meeting of the Council had performed a considerable amount of important work. Among the twenty-one resolutions adopted containing substantive or procedural decisions, the most striking, for

⁷ *United Nations Conference on the Law of the Sea, Official Records*, vol. I: Preparatory Documents (United Nations publication, Sales No. 58.V.4, vol. I), p. 31, footnote 184.

* Resumed from the 532nd meeting.

their juridical value in the codification of international law, was a draft supplementary protocol to the Convention on Territorial Asylum of 1954, a draft convention on extradition, and, above all, a complete draft convention on human rights, consisting of eighty-eight articles, that was being sent to the Council of the Organization of American States for submission to the Eleventh Inter-American Conference (*ibid.*, paragraphs 23 and 24).

53. The Inter-American Council of Jurists was also discussed the question of collaboration with the International Law Commission and had affirmed the necessity of continuing such collaboration (*ibid.*, paragraph 159).

54. The attendance at meetings of the Commission of Mr. Gómez Robledo, a member of the Inter-American Juridical Committee, some days previously had been a welcome token of such continuous collaboration in the interests of the codification and progressive development of international law.

55. Sir Gerald FITZMAURICE thanked the Secretary for his informative report. He did not wish to comment on its substance but he thought the Inter-American Council of Jurists was to be congratulated on some very interesting work.

56. The CHAIRMAN said that the Commission would certainly welcome the reaffirmation of the Council's desire for continued collaboration and would have studied the report, and especially the draft resolutions, with the greatest interest. He proposed that the Commission should take note with satisfaction of the Secretary's report on the proceedings of the Fourth Meeting of the Inter-American Council of Jurists (A/CN.4/124).

It was so agreed.

The meeting rose at 12.30 p.m.

545th MEETING

Monday, 23 May 1960, at 3 p.m.

Chairman : Mr. Luis PADILLA NERVO

Welcome to new member

1. The CHAIRMAN, on behalf of the Commission, welcomed Mr. Mustafa Kamil Yasseen, who had been elected to fill a casual vacancy.

2. Mr. YASSEEN thanked the Chairman for his welcome. He said that the cause of peace was best served by respect for international and municipal law, but the law must be well grounded. To collaborate in making international law, as the International Law Commission was doing, was a discreet but effective contribution to the cause of peace. He appreciated the honour conferred on him by his election to membership of the Commission, but appreciated no less the

difficulties and complexities of the task. He hoped to merit the Commission's confidence.

3. Mr. MATINE-DAFTARY said that he was glad to associate himself with the Chairman in welcoming Mr. Yasseen, particularly as Mr. Yasseen came from a country neighbouring on Iran.

Expression of sympathy on the occasion of the natural disaster in Chile

4. Mr. MATINE-DAFTARY said that he wished to express, especially to all the Latin American members of the Commission, his sympathy with them on the occasion of the recent natural disaster in Chile.

5. The CHAIRMAN expressed his appreciation on behalf of the Latin American members of the Commission for that expression of sympathy.

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 25 (*Inviolability of consular premises*) (*continued*) *

6. Mr. BARTOŠ observed that some of his remarks at the 530th meeting (paragraph 7) had been recorded in an unduly condensed form, which might give rise to misinterpretation. At that meeting, he had advocated the principle that inviolability should be accorded to consular premises only if no activities other than consular activities were carried on on such premises, and the Commission had decided to include a clause to that effect in the draft articles. In that connexion he had cited on the one hand the practice followed by the USSR and other countries which in some instances carried on activities of a non-consular nature — such as the operations of the headquarters of a trade mission — in premises which were normally those of a consulate, and on the other hand the similar practice followed by Western countries, which installed information offices, travel agencies, libraries, reading rooms, permanent displays, etc. in their consulates. He had not intended in any way to criticize the use of those premises for such purposes, especially since it had not been due to any fault of the USSR but, in the case of his country, had in most instances been caused by the lack of available separate accommodation. All that he had asked was that the rule of inviolability should not apply to premises so used. The USSR had, in fact, asked for separate premises for its trade mission in Yugoslavia. He had certainly not meant to imply that the USSR's practices were in any way

* Resumed from the 530th meeting.

contrary to international law. Mr. Tunkin had pointed out to him that there was no consular convention between Yugoslavia and the USSR regulating that particular matter; actually, a convention had been concluded in 1940 on the status of trade missions, under which the consular premises received immunity, while the premises of the trade mission were recognized as falling under Yugoslav jurisdiction.

ARTICLE 47 (*Jurisdiction of the receiving State*)

7. Mr. ŽOUREK, Special Rapporteur, said that, as the Commission had emphasized on several occasions, one of the main distinctions between diplomatic and consular agents was that, with certain exceptions diplomatic agents enjoyed complete immunity from the jurisdiction of the receiving State, whereas consular officers were amenable to its jurisdiction, except for acts performed in the exercise of consular functions. He had thought that the rule should be enunciated in the draft on consular intercourse and immunities, since it was a rule of customary law, appeared in several consular conventions and was set forth in article 17 of the Havana Convention, amongst others. Even consular conventions which did not state the rule *expressis verbis* often contained provisions under which consular officials were exempted from jurisdiction for acts performed in the exercise of consular functions; it followed that they did not enjoy exemption in respect of any other acts. The principle was expressly stated in the consular conventions between the USSR and Albania of 1957 (article 7) and the USSR and Austria of 1959 (article 7), and in several other consular conventions. The recent series of consular conventions concluded by the United Kingdom contained provisions on similar lines, exempting the consul from the local jurisdiction in respect of acts performed in the exercise of consular functions. The consular draft would be incomplete if the basic rule stated in article 47 were omitted.

8. It should be noted that the phrase "members of the consular staff" was intended to mean all members of the consulate, including the head of post and his subordinate officials, and that a more appropriate expression would be used when the Commission had completed the definitions in draft article 1.

9. Mr. AGO agreed with the Special Rapporteur that consular officials were not exempt from the jurisdiction of the State of residence, except for acts performed in the exercise of consular functions. That had been stated extremely clearly in article 34, which was based on consular conventions defining the cases where immunity from jurisdiction was granted. Thus, it was self-evident that all other acts performed by consuls were not exempt from jurisdiction. Accordingly, article 47 was, superfluous and the best solution therefore would be to delete it.

10. In any case there was a considerable difference between stating that consular officers were

"not exempt" from jurisdiction and that they were "amenable" (*soumis*) to jurisdiction. For instance, a consular officer who committed a criminal offence in his own country would, like any other private person, normally be amenable to the criminal jurisdiction of his own country, not to that of the State of residence. Similarly, there were many cases in which a consular officer, although not enjoying any special immunity, would, in the same way as any one else, not be amenable to the civil jurisdiction of the country of residence. At all events the expression used in article 47 should be amended.

11. Sir Gerald FITZMAURICE agreed with Mr. Ago. If article 34 had not been included, article 47 would have been required; but to include both of them was unnecessary. The Special Rapporteur had incorrectly cited the recent United Kingdom Consular Conventions in support of his argument for the inclusion of article 47. They were based on the system used in article 34, not that used in article 47. The position was absolutely clear. All aliens in a country were automatically subject to the local law unless they possessed some title to exemption, as diplomatic agents did and, within limits, consular officers. It followed, therefore, that except in so far as they were specifically exempt, they would be automatically subject to the jurisdiction of the State of residence. To include article 47 might indeed be dangerous, for it might suggest that some positive statement was necessary to cause aliens to be subject to the local jurisdiction. Mr. Ago had rightly suggested that the article be deleted.

12. Mr. LIANG, Secretary to the Commission, thought that articles 47 and 48 should not, perhaps, have been placed in section III (*Conduct of the consulate and of the consular staff towards the receiving State*) of the Draft.

13. The article as drafted seemed to indicate that if a consul committed a criminal offence, the receiving State had a duty to see that he was prosecuted in the courts of that State. In practice, however, that was not always true, since consuls who committed such offences were frequently returned to the sending State on the assurance that under the law of the sending State the act charged was a punishable offence. That had often been done by mutual arrangement between the States concerned, in order to avoid publicity and strained relations. The wording of draft article 47 was perhaps too categorical and should be toned down.

14. Mr. SCALLE supported the views expressed by Mr. Ago and Sir Gerald Fitzmaurice. Draft article 47 duplicated article 34, and its wording was unacceptable. As career consuls, at any rate, were rarely nationals of the receiving State the word "amenable" (*soumis*) was far too strong; "passibles" would be a better term.

15. Mr. AMADO said that the previous speakers

had expressed precisely what he himself had had in mind. He doubted whether the word *assujettis* in the French version of article 17 of the Havana Convention, or even the English word "subject", correctly rendered the original intention.

16. Mr. ŽOUREK, Special Rapporteur, observed that the arguments advanced in support of the deletion of article 47 in fact spoke strongly for its retention. It was not enough to say in article 34 that members of the consular staff should not be amenable to jurisdiction in respect of acts performed in the exercise of their functions; that article was silent on the subject of other acts performed by them. Article 47 dealt positively with that subject, which had been discussed at length in the literature.

17. Although it was true, as Sir Gerald Fitzmaurice had said, that ordinary aliens were subject to local jurisdiction, unless expressly exempted, a consul was not an ordinary alien, but the representative of a State. If the Commission's definition of the legal status of consular officers was to be complete, article 47 would be required. The Havana Convention covered both aspects in separate articles, articles 16 and 17. If article 47 were deleted, there would be a gap in the consular draft.

18. He did not agree with the Secretary that the wording of article 47 might be construed as an obligation on the State of residence to see that a consul was prosecuted for a criminal offence committed in that State, for the judicial authorities had great latitude and frequently preferred to refrain from prosecution if diplomatic or international officials were concerned. The article could be interpreted only in the light of the acknowledged rules of international criminal law, which, save in exceptional cases, did not accept the idea that a crime committed in one country might be prosecuted in another.

19. Mr. MATINE-DAFTARY thought that, so long as article 34 stood as drafted, article 47 should likewise stand. If, however, the Drafting Committee revised article 34 so as to provide that consuls were not amenable to the local jurisdiction, subject to an exception concerning acts not performed in the exercise of their functions, then article 47 could be dispensed with.

20. Referring to a point raised by Mr. Ago, he said that the case of a criminal offence committed by the consul in the sending State was hardly relevant in the context. So far as civil proceedings were concerned, however, he said that the consul was not immune to suit brought by a fellow-national in the receiving State.

21. Mr. AGO thought that it was necessary to avoid confusing the idea that a consul might be subject to local law with the idea that he might be subject to local jurisdiction. The Commission had already agreed in connexion with article 46 that a consular officer when not exercising consular functions was on the same footing as an

ordinary alien in the country of residence and hence was subject to the local law. He was not, however, in all cases amenable to the local criminal or civil jurisdiction. As he (Mr. Ago) had already stated, if an alien committed a crime in his home country, he was normally amenable to his own country's jurisdiction, but not to that of a foreign country. Similarly, if proceedings were instituted with respect to some immovable property he held in his own country, the case would be amenable to the jurisdiction of that country. To state that members of the consular staff should be amenable to the jurisdiction of the State in which they exercised their function would open the way to very dangerous interpretations. The correct phrase should be "are not exempt from the jurisdiction". There was, however, no need at all to retain article 47. If necessary, the idea which it contained could perhaps be introduced as an addition to article 34.

22. Mr. VERDROSS agreed with Mr. Ago. Either article 47 should be deleted and the point that consuls did not enjoy exemption from jurisdiction for their private acts should perhaps be made in the commentary, or, if it were retained, the article might be supplemented by some such phrase as: "if jurisdiction in respect of such acts normally vests in that State under the rules governing conflicts of jurisdiction."

23. Sir Gerald FITZMAURICE observed that the Special Rapporteur had argued that the draft would be incomplete without article 47. If that argument were valid, it would be necessary to insert a great many more articles, because every time an exemption was stated, an article would have to be inserted providing that the exemption did not apply to acts which were not performed in the exercise of consular functions. That, however, was not the method which the Commission had adopted. For example, in article 33, which provided for immunity from arrest and detention, the Commission had not gone on to state that a consular official would not be immune from arrest or detention in all cases other than those specified; that followed automatically.

24. The Special Rapporteur had explained that ordinary aliens were always amenable to the local jurisdiction, but had claimed that consuls were not amenable to the jurisdictions because they were representatives of States. That argument seemed to postulate that in general representatives of States enjoyed some basic immunity; actually, only diplomatic agents had such immunity. Heads of trade missions, who might well be senior officials or even ministers in their own country, enjoyed no immunity unless special exemption was arranged by mutual agreement between the States concerned. Consular officials might be representatives of governments, but they enjoyed no basic general immunity except by virtue of the general rules of international law or under treaty. If they enjoyed exemption from jurisdiction in certain specified cases, it followed that they did not enjoy it in any other cases, but were in those

other cases in exactly the same position as any other alien. To retain article 47 would be dangerous, because it might suggest that aliens in a special position enjoyed some special form of immunity.

25. Mr. TUNKIN agreed in principle with Mr. Ago that article 47 should be deleted, but thought that the danger inherent in its retention had been exaggerated. Under international law aliens were amenable to the jurisdiction of the State of residence. There could be no danger in stating so. The addition suggested by Mr. Verdross was implicit in the text as drafted by the Special Rapporteur and was similar to the provision in article 17 of the Havana Convention. The omission of article 47 would not leave a gap. A similar provision appeared in certain conventions concluded by the U.S.S.R., but was absent in others. The absence of an article of that kind in a consular convention simply meant that, apart from the specified cases in which consular officials were declared exempt from jurisdiction, they did not enjoy it in any other. It was immaterial, therefore, whether article 47 was retained or deleted.

26. Mr. PAL did not agree with the Special Rapporteur that the omission of article 47 would leave a gap. Unless the exemption of consuls from the local jurisdiction in certain particular cases meant that there was no exemption in all other cases, the exemption would be meaningless. The very fact that provision for exemption had been made implied that in other respects the persons exempted were subject to the jurisdiction. It would be preferable, however to state the exemption negatively: that members of the consular staff should be amenable to the jurisdiction of the receiving State except in respect of acts performed in the exercise of their functions. Mr. Verdross's suggestion was not acceptable; it would lead to many difficulties and conflicts of law, especially in civil cases.

27. Mr. HSU agreed that the article was unnecessary, although the principle which it expressed was correct. The whole consular draft was an expression of the existing trend to regard the difference between diplomatic agents and consuls as merely one of degree. Accordingly, since the diplomatic draft contained no provision along the lines of article 47, the article should be dropped.

28. Mr. ŽOUREK, Special Rapporteur, said it was obvious that in cases in which a conflict of jurisdiction arose members of the consular staff were subject to the jurisdiction of the receiving State only to the extent that the courts of that State had jurisdiction under the rules of international law governing conflict. Obviously, article 47 did not mean that a consular officer would be subject to the jurisdiction of the receiving State for an offence in respect of which the courts of that State had no jurisdiction, nor could it mean that a civil suit was entertainable against him in the courts of the receiving State in respect of matters within the jurisdiction of that State's

courts under the rules of private international law. 29. In view of the importance of the principle involved, he considered it was essential to state, at some place in the draft, that members of the consular staff were amenable to the jurisdiction of the receiving State, or that they were not exempt from that jurisdiction, if the latter formula were preferred. For his part, he had no objection to the suggestion of Mr. Matine-Daftary that the principle should be expressed in an amended version of article 34 instead of in a separate article.

30. Mr. BARTOŠ said that the principle set forth in article 47 was part of positive international law but in the Special Rapporteur's draft it was expressed in far too absolute terms. Any alien could, under the rules of private international law, object in certain cases to local jurisdiction. He felt that the provision should be retained, but should be expressed by the Drafting Committee in a manner more consistent with the real position; one solution might be to redraft the article on the following lines: "Except as otherwise provided in these articles, in the relevant international agreements and by the rules of international law, the members of the consular staff shall not, by reason solely of their consular status, be exempted from the jurisdiction of the receiving State."

31. With reference to the example mentioned earlier, of a criminal offence committed by the consul in his home country, he said that the strict territoriality of criminal law, which was a feature of Anglo-Saxon law, was not so absolute elsewhere. The criminal law of a great many countries, including some very modern codes, vested jurisdiction in the national courts over criminal offences committed abroad in two types of cases: firstly, where the State concerned had a special interest in the punishment of the offence committed; and, secondly, in respect of certain crimes which were of concern to the international community. It was, therefore, not altogether accurate to suggest that national courts would never have jurisdiction to try a criminal offence committed abroad.

32. In conclusion, he suggested that article 47 should be referred to the Drafting Committee with instructions to redraft in less categorical terms and to bring those terms into line with the provisions of article 34.

33. Mr. SANDSTRÖM said that the deletion of article 47 would not leave any gap. Article 34, like many other articles of the draft, set forth an exemption, in other words an exception, for the benefit of consular officers, to a general rule. It was obvious that, outside the terms of the exemption laid down in article 34, the ordinary rules governing amenability to jurisdiction would apply.

34. Mr. ERIM said that article 47 merely stated the general principle that the laws of a country applied to aliens within its territory. However, the article, as drafted, was out of place. Nowhere else in the draft was a statement made regarding

the rights and duties of the consul as an ordinary alien. If that approach were to be adopted, the draft would have to commence with a statement of the general rights and duties of aliens and then proceed to state the exceptional rules applicable to consuls.

35. In conclusion, he thought that article 47 could not be accepted in the form proposed but he agreed that article 34 should be amended in the manner suggested by Mr. Matine-Daftary.

36. Mr. AMADO said that he could not accept the suggestion made by Mr. Matine-Daftary. The provisions of article 34, paragraph 1, were perfectly clear and therefore needed no interpretation. The statement that members of the consular staff were not amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of their functions implied, *a contrario sensu*, that, in respect of all other acts, they were amenable to that jurisdiction. There was no justification whatsoever for adding a provision to state that obvious fact. Accordingly, he urged that article 47 should be purely and simply deleted.

37. Mr. YOKOTA said that he was in full agreement with the proposal to delete article 47. It had been suggested that, since an exception to the jurisdiction of the receiving State was stipulated in article 34, the general principle of such jurisdiction outside that exception should also be stated. In that connexion, he pointed out that in articles 37 and 38, certain exemptions from taxation and customs duties were laid down. Nevertheless, the Commission had not considered it necessary to state anywhere the general principle that, apart from those exceptions, consular officers were subject to taxes and customs duties normally levied by the receiving State.

38. Mr. SCELLE said that there appeared to be no disagreement among members of the Commission with regard to article 47, which could therefore be referred to the Drafting Committee. The task of that Committee was to prepare a text which did not contain conflicting provisions. As drafted, however, article 47 conflicted with article 34. The reason was, as Mr. Bartoš had said, that it laid down the jurisdiction of the receiving State in far too absolute terms. There were cases in which the receiving State would not have jurisdiction over a member of the consular staff in respect of one of his private acts.

39. Furthermore, he thought the Drafting Committee should consider the placing of articles 46, 47 and 48, and also the wording of the title of the whole section. Section III was entitled "Conduct of the Consulate and of the Consular Staff towards the Receiving State"; naturally, however, article 48 dealt with obligations of the receiving State towards the consulate and was therefore outside the scope of the title.

40. He had no objection to the principles contained in articles 46, 47 and 48 but objected to the drafting of the first two of those articles. Like

article 47, article 46 was expressed in far too absolute terms. Consular officers were not always and in all circumstances obliged to respect the laws and regulations of the receiving State. If, for example, those laws and regulations conflicted with international law, it was the duty of the consular officer to take the necessary steps to raise the issue at the diplomatic level by advising his government or diplomatic representative.

41. Mr. ŽOUREK, Special Rapporteur, said that he had felt it necessary to state in explicit terms the principle contained in article 47 because that principle had on occasion been disputed in the past. He added that the Commission had at times thought it wise to state explicitly a principle which was virtually undisputed: for example, article 29, paragraph 4, of the diplomatic draft stated that the immunity of a diplomatic agent from the jurisdiction of the receiving State did not exempt him from the jurisdiction of the sending State, which was self-evident.

42. He agreed with Mr. Scelle that the subject matter of article 48 was not wholly covered by the title of the section; but that was a drafting point and the title would have to be altered by the Drafting Committee.

43. In conclusion, he agreed that article 47 should be referred to the Drafting Committee with instructions to reconcile its terms with those of article 34, and also to consider the possibility of including its provisions in article 34.

44. The CHAIRMAN said that the question of the title of section III and of the placing of the articles could be decided at a later stage. As to article 47, he believed that all members of the Commission agreed to both the principle embodied in that article and that embodied in article 34. Most members believed that the idea contained in article 47 was also contained in article 34, but some had said that much depended on the final wording of article 34. He thought that the debate provided enough guidance to the Drafting Committee. If there were no objections, he would accordingly consider that the Commission agreed that article 47, with the comments thereon, be referred to the Drafting Committee.

It was so agreed.

ARTICLE 48 (Obligations of the receiving State in certain special cases)

45. Mr. ŽOUREK, Special Rapporteur, introducing article 48, said that the article laid down the obligation of the receiving State to co-operate in a positive manner with the consulate in certain cases which involved matters of great importance to the exercise of consular functions.

46. The duty expressed in article 48 (a) to advise the consulate of the death of one of its nationals was stated in numerous consular conventions. It was part of the consular function to represent, in all cases connected with succession, the rights and interests of the nationals of the sending State and it was therefore very important that the

consul should be notified of the death of one of its nationals. Indeed, it could be added that the authorities of the receiving State had an obligation to inform the consul not only of the death of one of its nationals, but also of the extent of the property known to have been left by him, any available information concerning the existence of a will and the names of any known heirs and legatees.

47. Article 48 (b) and (c) specified the obligations of the receiving State in two other cases, which were also frequently mentioned in consular conventions.

48. The three cases mentioned in article 48 were the more important ones, but he would not object to the addition of references of other cases in which the receiving State had an obligation to facilitate the exercise of consular functions. It was particularly important that a multilateral convention should express the duty of the receiving State to notify the consulate in good time of events which affected the exercise of consular functions, and in that way to facilitate the co-operation between the consulate and the authorities of the receiving State.

49. Mr. EDMONDS said that, in his opinion, article 48, like article 47, was not suitably placed in the draft. So far as the substance of the article was concerned, he believed that the usual practice in consular conventions was to make the provision concerning the death of a national of the sending State applicable only when there was a property interest, as was done in article 14 of the Harvard Draft. Paragraph (a) might be brought closer into line with that provision; otherwise, the burden placed on the authorities of the receiving State would be too heavy.

50. Mr. MATINE-DAFTARY said that, while not opposed to article 48 in principle, he thought that article 28, which provided that the receiving State should accord full facilities for the purpose of the consular functions, fully covered the three cases mentioned. If, however, the Commission wished to particularize, then article 48 might be redrafted somewhat differently. It was sometimes impossible for the receiving State to fulfil the obligations in question, for owing to imperfections in the registration system, its authorities might not be aware of the death of a national of the sending State. Similarly, by reason of organizational inadequacies, it might not be possible for the receiving State to discharge the duty laid down in paragraph (b); for that matter, he was not convinced that that provision had any practical use.

51. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Matine-Defatary, did not consider that article 28 covered the three cases referred to in article 48, for the scope of article 28 extended only to the consular official's request to the authorities of the receiving State for assistance.

52. In reply to Mr. Edmonds, he pointed out that the sending State should be told of the

death of any of its nationals in the receiving State, not only because the death might affect the disposition of property, but also because it might affect the personal status of other nationals of the sending State. Nor did he think that the burden of the obligation imposed on the receiving State by article 48 should be exaggerated, for every death necessitated certain investigations on the part of the authorities for the purpose of determining whether the deceased had left any property, whether he had made a will and whether there were any heirs. Accordingly, with the exception of the rare case of a death occurring without anybody's knowledge, the authorities of the receiving State would have no difficulty in notifying deaths to the competent consulates.

53. With regard to Mr. Matine-Defatary's question concerning paragraph (b), he pointed out that the personal status of the national of the sending State was involved. The second variant of article 4, paragraph 6, relating to consular functions, provided that one of the consular functions was to appoint guardians or trustees, to submit nominations to courts for the office of guardian or trustee and to supervise guardianship and trusteeship. The obligation laid down in paragraph (b) was not so excessive and, besides, the courts of the receiving State were in any case obliged to deal with the appointment of guardians or trustees for minors or other persons lacking full capacity. The personal status of such persons who were nationals of the sending State was governed by the law of that State and, in the absence of a bilateral agreement, the consular official was in any case obliged under article 4 to supervise guardianship and trusteeship. Accordingly, the burden imposed on the receiving State by article 48 was not as heavy as it might seem.

54. Mr. VERDROSS proposed that the opening passage of article 48 should be amended to read "shall have the following obligations, among others: ". The object of the amendment was to make it clear that the enumeration in paragraphs (a), (b) and (c) did not exhaust the cases where the exercise of consular functions might be facilitated by the receiving State. Secondly, Mr. Matine-Defatary's point might be met by adding after the word "shall" in the opening passage the phrase "if circumstances permit".

55. Mr. SANDSTRÖM said that he was not unduly worried about the mandatory form of the provision, for after all a State could hardly be obliged to provide assistance which overtaxed its capabilities. He would not, however, object to the additions suggested by Mr. Matine-Defatary and Mr. Verdross. The most important point seemed to be the place of the article in the draft, and he thought that it might most appropriately be inserted as a clarification of article 28. Finally, he suggested that the new provision proposed by Sir Gerald Fitzmaurice, concerning visits by consular officials to arrested nationals of the sending State, should be added to that set of provisions.

56. Mr. MATINE-DAFTARY supported Mr. Verdross's amendments. It should be remembered that not all the States acceding to a multilateral convention had reached the same degree of development. His own country would have no difficulty in undertaking the obligations in question.
57. He added that cases might occur where the nationality of a minor was in dispute between the sending State and the receiving State; in such a case a notification under paragraph (b) would be tantamount to recognition of nationality. That difficulty would be obviated by the adoption of Mr. Verdross's formula.
58. Mr. ERIM did not think that Mr. Verdross's second amendment adequately covered the difficulties that had been indicated. A wiser course would be to follow the example of article 14 of the Harvard Draft and article 22 (7) of the Consular Convention of 1952 between the United Kingdom and Sweden, which provided that the person whose death was to be notified to the consular official should be known to be a national of the sending State.
59. Sir Gerald FITZMAURICE said he did not believe that in practice the provisions of article 48 were likely to give rise to the difficulties anticipated by Mr. Matine-Daftary. Furthermore, Mr. Verdross's second amendment might weaken the article. Mr. Erim's point seemed to be valid; the authorities of the receiving State might have no knowledge of the death of a particular person and, if they did, they might not know that he was a national of the sending State. Under international law, no absolute obligation could be imposed on the receiving State's authorities in those circumstances. Accordingly, any qualifying phrase in article 48 should refer to the knowledge available to the authorities of the receiving State.
60. Mr. Matine-Daftary had raised the question of persons having the nationality of the sending State and also that of the receiving State. In that case, no obligation would arise, because the principle of master nationality ensured that in the case of a person having dual nationality, living in one of the countries concerned, the nationality of that country prevailed for the time being.
61. Mr. SCELLE considered that the best place for the provision of article 48 might be in article 4 (*Consular functions*), after the enumeration contained in both variants. The provisions might be introduced by some wording based on article 28.
62. Mr. YOKOTA considered that the article should be more flexible. For example, in the case contemplated by paragraph (b), the question whether a person was a minor or was lacking full capacity had to be decided in accordance with the domestic law of that person's country. The provisions of municipal law concerning minority varied from country to country, and, moreover, the question of full capacity was extremely complicated. The local authorities of the receiving State could not be expected to know the domestic law of every country whose nationals might be in its territory, particularly in big cities where many aliens lived; they could therefore hardly be expected to notify the competent consulate immediately of the appointment of guardians or trustees for such persons.
63. Mr. MATINE-DAFTARY pointed out to Sir Gerald Fitzmaurice that he had not raised the question of dual nationality, but that of cases where the nationality of a person was in dispute between the sending State and the receiving State.
64. He endorsed Mr. Scelle's views concerning the placing of the article.
65. Mr. ŽOUREK, Special Rapporteur, said he could accept Mr. Verdross's first amendment. With regard to Mr. Verdross's second amendment, however, he shared the doubts expressed by Sir Gerald Fitzmaurice. The introduction of too many escape clauses would emasculate the text. Moreover, the maxim *ultra posse nemo tenetur* obviously applied: authorities which had no knowledge of the death of a national of the sending State or which did not know that a particular person was a national of that State could not be obliged to notify the competent consulate. Mr. Erim's suggestion that the obligation should be contingent on knowledge of the facts was a better way of allaying fears that an unduly great burden would be laid upon the authorities of the receiving State.
66. He could not share Mr. Yokota's misgivings concerning paragraph (b). In practice, authorities concerned with guardianship and trusteeship could apply to their Ministry of Justice for information concerning the domestic legislation of foreign States on the matter. The draft would not add to existing obligations in that respect. There was still less difficulty in determining whether a person lacked full capacity, and the task of the authorities of the receiving State would merely be to appoint a provisional trustee for the person concerned. If the question arose whether or not an alien could be kept in a mental institution to which he had been committed, it was surely in the interests of the receiving State itself to notify the competent consulate as soon as possible, in order to avoid bearing the maintenance costs for any length of time.
67. Mr. AMADO thought that, while Mr. Verdross's second amendment was acceptable from the point of view of the comity of nations, the provision would be sounder in law if Mr. Erim's suggestion were followed. The wording of article 22 (7) of the Anglo-Swedish Consular Convention of 1952 made it quite clear that a consular official should be notified only in cases where he had an opportunity to take action. In a country in which many aliens resided, it was impossible for the competent consular officials to keep themselves informed of the movements of all their nationals, and the receiving State should co-operate with consulates in such matters; on the other hand,

the article as drafted by the Special Rapporteur was difficult to accept owing to the fact that the obligation to provide information was made automatic.

68. The CHAIRMAN, summing up the debate, noted that Mr. Verdross's first amendment had been accepted by the Special Rapporteur. The consensus seemed to be that Mr. Verdross's second amendment tended to weaken the article and that Mr. Erim's suggestion would be preferable in that respect. Mr. Amado's reference to the Consular Convention between the United Kingdom and Sweden might find a place in the commentary, as a further explanation of the meaning of the article. The Drafting Committee might be asked to take into account the suggestions that had been made concerning the proper place of the article. He suggested that the article should be referred to the Committee with those comments.

It was so agreed.

ARTICLE 49 (*Termination of consular functions*)

69. Mr. ŽOUREK, Special Rapporteur, introducing article 49, drew attention to the fact that the termination of consular functions was treated separately from the severance of consular relations (which was the subject of article 50), for the termination of a consul's functions would not *per se* affect the consular relations between the countries concerned. The main reasons for the termination of a consul's functions were itemized in many consular conventions; for example, article 23 of the 1928 Havana Convention referred to the suspension of functions because of illness or leave of absence and to the termination of office by death, by retirement, resignation or dismissal and by the cancellation of the exequatur, and article 10 of the Harvard Draft added the rare cause of the extinction of the sending or the receiving State. The Commission might consider adding to article 49 a paragraph explaining that the causes of termination of functions mentioned, with the exception of item 4, applied to members of the consular staff as well as to consuls; alternatively, it might prefer to explain that point in the commentary.

70. Mr. VERDROSS observed that, if the article covered all the members of the consular staff, item I should begin with the words "Suspension or". While the functions of the head of post were normally terminated by recall, other members of the staff might be suspended or dismissed in certain circumstances, such as their conviction of a criminal offence.

The meeting rose at 6 p.m.

546th MEETING

Tuesday, 24 May 1960, at 9.30 a.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 49 (*Termination of consular functions*) (continued)

1. Mr. EDMONDS said that the wording and the title of the article were not sufficiently precise. In practice, it was not so much the consul's function as his status that might be terminated for the causes mentioned in article 49. Furthermore, item I should be clarified by specifying that the consul's status would be terminated on the date of recall. The same applied to item 2, since many national legislations provided that a consul's resignation did not become effective until accepted by the sending State. The difficulty had been avoided in the Harvard Draft, article 10 of which provided that a person ceased to be a consul under three distinct circumstances. That provision seemed much more explicit than article 49 and far more in keeping with reality. With regard to item 4, he said that in many cases a formal exequatur was not issued; it would be more appropriate to redraft the item to read: "withdrawal of consent by the receiving State to the person's acting as consul". The purpose of his suggested amendments was to state more exactly when a consul's duties terminated; the utmost precision was necessary in view of the commercial activities in which consuls were engaged, and the difficulties which might arise if the date on which a consul had certified a document were to be called in question.

2. Mr. YOKOTA observed that in article 1 a consul was defined as the head of post. Accordingly, article 49 dealt only with the termination of the functions of a head of post; by contrast, the article dealing with the termination of diplomatic functions in the draft concerning diplomatic intercourse (article 41) spoke of "diplomatic agents", an expression defined as meaning not only the head of mission but also the members of the diplomatic staff. He thought that article 49 of the consular draft should be brought into line with the provision in the diplomatic draft and that it should cover other members of the consular staff, or at least consular officials.

3. Moreover, there seemed to be a serious gap in the article. Under article 20, the receiving State could request the sending State to recall a member of the consular staff who was unacceptable or to terminate his functions, and if the

sending State refused to comply with that request or failed to fulfil its obligations within a reasonable time, the receiving State might refuse to recognize the person concerned as a member of the consular staff. Accordingly, such refusal constituted an additional method whereby functions could be terminated. Although such cases did not occur often, they nevertheless has a considerable effect on the diplomatic and political relations between the States concerned, and should be referred to explicitly, as had been done in article 41 (c) of the diplomatic draft.

4. Finally, although the causes stated in items 2 and 3 were the most common reasons of termination, they were so self-evident that they hardly needed to be mentioned, particularly since the words "*inter alia*" appeared in the introductory part of the article and since the two causes were not mentioned in article 41 of the diplomatic draft.

5. Sir Gerald FITZMAURICE said he shared Mr. Yokota's misgivings concerning the difference between the form of article 49 and that of article 41 of the diplomatic draft. He recalled that the latter article had originally been drafted in the way in which article 49 was formulated, but had been altered considerably at the final reading. The question whether death should be mentioned in that article as one of the causes had been discussed at some length, and it had been explicitly decided to omit it as being self-evident. He would suggest that item 5 — the breaking-off of consular relations — should also be omitted, since that occurrence transcended consular functions and, *a fortiori*, functions personal to the consul himself. Moreover, the severance of diplomatic relations was not mentioned expressly in article 41 of the diplomatic draft as a cause for the termination of a diplomat's functions, and in the consular draft now before the Commission the severance of consular relations was in any case dealt with in article 50. Finally, he agreed that the article should extend to all members of the consular staff and suggested that the Drafting Committee should consider whether the article could not be worded along the same general lines as article 41 of the diplomatic draft.

6. Mr. TUNKIN agreed with Mr. Edmonds that article 49 was concerned with the termination of a consul's functions, and not with that of consular functions generally.

7. With regard to item 2, he said that resignation was an internal matter between the consular official and the sending State. If the sending State accepted his resignation, he was recalled, but if it did not, the receiving State was in no way concerned. It would therefore be wise to delete item 2.

8. Finally, he agreed with Mr. Yokota that the article should cover all members of the consular staff, whose position would remain undefined if the article related only to the head of post. He therefore supported Sir Gerald Fitzmaurice's sug-

gestion that the Drafting Committee should endeavour to bring the article as far as possible into line with article 41 of the diplomatic draft.

9. Mr. AMADO supported Mr. Yokota's view that death as a cause of termination of a consul's function was too self-evident for mention in the article. It was regrettable that the Havana Convention of 1928 had included that provision, which verged upon the absurd.

10. Mr. MATINE-DAFTARY drew attention to the contradiction between the title of the article and its introductory phrase. Consular functions properly so-called ended only when consular relations were broken off. If a consul was recalled, resigned or died, or if his exequatur was withdrawn, his mission was terminated, but the consular functions persisted. It might therefore be better to substitute the word "mission" for "functions". He also agreed with Mr. Tunkin that the scope of the article should not be limited to the head of post, but should cover all consular officials.

11. Mr. BARTOŠ agreed with previous speakers that there was a theoretical distinction between consular functions and a consul's functions. Nevertheless, the Special Rapporteur had some grounds for drafting the article as he had done. With regard to item 1, he said the sending State was obliged to notify the receiving State of a consul's recall, but in practice the consul continued to perform his functions until the receiving State had been notified. Furthermore, he could not agree that resignation was always an internal matter. For example, if a country's regime changed suddenly or gradually, consuls appointed by the former regime might resign without recognizing the new one, or request the new regime to accept their resignation: it would be, so to speak, a "resignation of protest". The resignation would then be tantamount to an abandoning of functions and, since consular privileges and immunities would no longer attach to such a person, a number of problems of law and of principle would arise. The Special Rapporteur might consider providing for such cases or mentioning them in the commentary.

12. Another detail, connected with item 4, which might be mentioned either in the text or in the commentary was the case of a consul whose exequatur was in order, but whose consular district was changed either by the sending or by the receiving State. That consul's functions would not be terminated in the district where he remained in office, but they might end in respect of a district which had been transferred to another official for administrative reasons.

13. Turning to item 5, he observed that, although it was self-evident that a consul's functions would be terminated by the severance of consular relations, there might be cases where the receiving State would revoke its permission for the sending State to maintain a consulate in a certain town or port. In that case, a consul's functions would

come to an end because the post would cease to exist. Similarly, the sending State might decide to abolish a particular post. The Drafting Committee might decide whether such cases should be mentioned in the commentary, or whether the cessation of the existence of a consulate should form the subject of a separate article.

14. Mr. ŽOUREK, Special Rapporteur, said he could not agree with Mr. Edmonds that it was the legal status of a consul that was terminated, and not his functions, in consequence of the events itemised in article 49. The trend of the whole project was to dissociate functions from privileges, as was apparent, for example, in article 43 on the duration of consular privileges and immunities. He agreed however that the expression "functions of a consul" should also be used in the title of the article.

15. With regard to the causes of termination, he had said when introducing the article (545th meeting, paragraph 69) that the enumeration was not exhaustive. To those who had criticized some of the causes as being self-evident, however, he would point out that the Commission was in the process of codifying international law on the subject and that statements which were absolutely self-evident were found in all codes. Mr. Amado himself had said that the Havana Convention had included death as one of the causes of termination. A similar provision appeared in many other texts. The same arguments applied to item 5, the breaking-off of consular relations. If, however, the Commission preferred to relegate the self-evident causes to the commentary, he would have no fundamental objection.

16. He had also pointed out in his introduction to the article that the provisions referred only to consuls, or heads of posts. While it was true that article 41 of the diplomatic draft covered a wider category, it should be borne in mind that "diplomatic agents" did not comprise all the staff of a diplomatic mission. He had further suggested adding a paragraph to the effect that all the causes except the one in item 4 applied to all members of the consular staff. Mr. Yokota had observed that in comparison with article 41 of the diplomatic draft, article 49 had the serious shortcoming of not covering cases where the receiving State might refuse to recognize a person as a member of the consular staff if the sending State refused to comply with a request for his recall or for the termination of his functions or failed to do so within a reasonable time. It should be borne in mind, however, that article 20, in which that provision appeared, did not concern heads of post, but only other members of the consular staff.

17. He believed that Mr. Bartoš's points concerning items 4 and 5 would be best dealt with in the commentary, since they referred to exceptional cases which did not warrant the drafting of a special article. Finally, the case cited by Mr. Verdross—that of the dismissal of a member of the consular staff—though rare, might be mentioned

in the draft as a cause of termination; the dismissal of a diplomatic agent was not, however, provided for in the diplomatic draft. The Drafting Committee would undoubtedly consider the advisability of adding such a clause.

18. Mr. LIANG, Secretary to the Commission, supported the Special Rapporteur's formulation of article 49. In drafting an international convention on consular privileges and immunities, the important point was to study the causes of the termination of the functions of the head of post; the termination of those of subordinate officials was a relatively secondary matter. In that connexion, he would submit that article 41 (c) of the diplomatic draft was not quite accurate, since article 8 (2) of that draft merely provided that the receiving State might refuse to recognize the person concerned as a member of the mission. It was not for the receiving State to decide that the functions of subordinate members of the staff should be terminated, for that was an internal matter between the diplomatic agent, the head of mission and the Ministry of Foreign Affairs of the sending State. All that the receiving State could do was to refuse to recognize the person concerned as a member of the mission. The position of the head of a consular post, however, was different, since the relations between the sending and the receiving States were obviously involved. The receiving State was concerned with acts emanating from the consulate, as represented by the head of post, who was responsible to the receiving State for the functions of subordinate officials. In his opinion, it would be wiser to emphasize that point of view, rather than to broaden the scope of article 49 to cover members of the consular staff.

19. Mr. PAL said he could not share the Secretary's views. In its present context, article 49 had two purposes: to determine the validity of a consul's activities and to specify the duration of that official's privileges and immunities, which depended upon the termination of his functions. Consular privileges and immunities were enjoyed by heads of post and members of the consular staff alike, and the scope of article 49 should be drafted in broader terms, as was article 41 of the diplomatic draft.

20. He recalled that the original draft of article 41¹ had mentioned four causes of termination, which had not been objected to by twenty of the twenty-one governments which had sent observations (A/CN.4/114 and Add.1-6). At the second reading of the draft in Commission, however, it had been pointed out that the fourth cause was superfluous and a reference to article 8 in paragraph (c) had been proposed. Since those changes had been adopted unanimously, the Commission's best course would be to ask the Drafting Committee to adjust article 49 of the

¹ See *Yearbook of the International Law Commission*, 1957, vol. II (United Nations publication, Sales No. 1957.V.5, vol. II), article 34, p. 143.

consular draft to article 41 of the diplomatic draft, both in scope and in form.

21. Mr. ŽOUREK, Special Rapporteur, replied that Mr. Pal seemed to be confusing the duration of privileges and immunities with the duration of the exercise of consular functions. In his (the Special Rapporteur's) draft he had purposely dissociated the two because consular officials began to enjoy their privileges and immunities as soon as they entered the territory of the receiving State and continued to enjoy them until they had left it even after they and actually ceased to exercise consular functions or to belong to the consulate. Article 49 was concerned only with the termination of consular functions.

22. Mr. AMADO confirmed the view that a consular officer was afforded privileges and immunities precisely because it was his duty to exercise consular functions. That was why he enjoyed immunities as soon as he entered the receiving country and until he left it, regardless whether he was actually exercising the functions at the time.

23. Mr. ERIM thought that if the Drafting Committee was to bring article 49 of the consular articles into line with article 41 of the diplomatic articles, it might well bear in mind the fact that paragraphs (b) and (c) of the latter were, to all intents and purposes, already covered by articles 18 and 21 of the consular articles.

24. The CHAIRMAN proposed that draft article 49 be referred to the Drafting Committee with the suggestions made during the discussion. It had been agreed that the article should refer in general to the termination of the consular mission, rather than to that of consular functions. The majority of members, the Special Rapporteur concurring, had agreed that the article should relate not only to the head of consular post but also to all the consular officials, although the Drafting Committee might bear in mind the point made by the Secretary. The majority would also prefer the Drafting Committee to follow the wording and structure of article 41 of the diplomatic articles as far as possible. If the Drafting Committee retained the enumeration in the Special Rapporteur's draft, it should take into consideration the amendments and additions accepted by the Special Rapporteur, including a reference to the suspension of functions in item 1. The Drafting Committee might also consider the desirability of drafting a special article, or of placing a reference in the commentary, dealing with the abolition of a consular post.

It was so agreed.

ARTICLE 50 (*Breaking-off of consular relations*)

25. Mr. ŽOUREK, Special Rapporteur, introducing article 50, said that it stated a principle universally recognized in all treaties, both ancient and modern.

26. Referring to the proviso at the beginning of the article ("Except where a state of war . . .") he said that in the past, consular relations had not been affected by the existence of a state of war and the maintenance of consuls at their post had been justified, especially as the military risk had been negligible. Since the end of the nineteenth century, however, the existence of a state of war had always led to the severance of both diplomatic and consular relations, or at any rate to the withdrawal of consuls. An express provision to that effect occurred in certain recent consular conventions concluded by the United Kingdom, notably that with Norway of 22 February 1951. The "except" clause was in conformity not only with treaty law but also with current practice. He had purposely used the term "state of war" to avoid using "war", which had no meaning from the legal point of view since the prohibition of the use of force in international relations. He had avoided the expression "armed conflict", since every armed conflict did not lead to the breaking-off of consular relations. He had not thought it necessary to deal with the question of what the rules of international law were concerning a declaration of a state of war. While the expression "state of war" might seem inappropriate at the present time, it was employed both in State practice and in the literature. It was necessary to distinguish between a state of war and armed conflict. In certain cases consular relations had not been broken off automatically on the declaration of a state of war and such a declaration might be regarded as an act separate from that of withdrawing consuls. From the theoretical point of view, however, there could be no doubt that the existence of a state of war entailed breaking off both diplomatic and consular relations.

27. Mr. AGO said that the Special Rapporteur had quite rightly inserted an article on the breaking-off of consular relations, but the text was inadequate. The absence of an article on the breaking-off of diplomatic relations in the draft on diplomatic intercourse and immunities was a serious and almost inexplicable gap. However, the provision in the consular draft should not simply be formulated negatively; in other words, the article should not confine itself to providing that, if no state of war existed but diplomatic relations had been broken off, consular relations would not automatically be broken off. A clause should first of all be inserted dealing in a positive way with the possibility of breaking off consular relations in certain cases, and the procedure for doing so. The Commission had adopted article 2, paragraph 1, on the establishment of consular relations by mutual consent. It should now lay down that consular relations might be broken off—for very serious reasons, of course—by unilateral decision and that such a decision would be perfectly legitimate in international law. If no such provision was inserted in the draft, it might be possible to infer that the breaking-off of consular relations y unila-

teral act was a violation of the original agreement to establish such relations and was therefore a wrongful act in international law.

28. With regard to the "except" clause, the Special Rapporteur had probably meant [a state of war] "within the meaning of" rather than "in conformity with" international law; but such an expression would be open to a different interpretation. He thought that it would be best simply to delete the words "in conformity with international law".

29. Mr. YOKOTA said he had no objection to draft article 50 in principle, but thought the wording was not satisfactory. The expression "state of war" was anything but clear; did its meaning differ from that of the term "war"? The term "war" was well-defined and familiar to students of international law, whereas the expression "state of war" was recent and not so well defined or understood. He therefore preferred the term "war".

30. He agreed with Mr. Ago that the phrase "in conformity with international law" was undesirable. It was not at all clear what that phrase meant. It might mean war in the technical sense used in international law; but it could also mean that war was lawful in the eyes of international law. After the First World War many treaties had been prepared that outlawed war. The Special Rapporteur himself had said that he was unwilling to go into the question how war might be declared in conformity with international law, so that he seemed to have had in mind a war that was lawful in international law. If so, the inclusion of such a phrase would have the most serious consequences, since it would seem to follow that if a war was not in conformity with international law — or in other words if it was a violation of that law — the severance of consular relations would not follow automatically. Surely if a war broke out, both diplomatic and consular relations between the belligerents would be automatically broken off, whether the war was lawful or not.

31. Mr. VERDROSS agreed that the phrase "in conformity with international law" should be deleted. Naturally, consular relations would be broken off just the same if the war was contrary to international law. Besides, who could decide whether a war was or was not in conformity with international law? The attempts to define aggression had come to naught. Under Article 39 of the United Nations Charter, the Security Council would determine the existence of any breach of the peace or act of aggression, but if it failed to agree owing to the unanimity rule, each party to the dispute might give a different interpretation. The phrase should be deleted even if it was interpreted as the Special Rapporteur had explained, since the expression "a state of war" was unknown to the United Nations Charter, which employed only the words "threat or use of force".

32. He suggested that the more modern expres-

sion "armed conflict" should be used in article 50; the term "war" was extremely vague in law.

33. Mr. ŽOUREK, Special Rapporteur, could not agree with Mr. Yokota that the term "war" was more precisely defined than the expression "state of war". Since war had been outlawed, the term had lost its legal meaning. In modern doctrine distinctions were drawn between aggression, self-defence and international preventive or enforcement measures. A state of war could not be declared by an aggressor and at the present time aggression was a crime under international law; the Commission had pronounced it to be such at its sixth session, held in 1954, in the draft code of offences against the peace and security of mankind.² It was inadmissible that an aggressor, as a result of his crime, should be able to produce any effects in law capable of affecting the international position of the victim of an aggression. When an armed conflict broke out, the State which was the victim of aggression was fully empowered to close down the consulates of the aggressor State, a right which the aggressor did not possess. The latter might of course close consulates by force, but that would merely be another act forming part of the crime of aggression. Such a distinction did not perhaps have much practical importance, but it was legally decisive. If a State which was the victim of aggression declared a state of war, that declaration would produce all the corresponding legal effects under international law. That might be explained in the commentary: the phrase "within the meaning of" might be accepted in lieu of "in conformity with".

34. Mr. Verdross's suggestion that the term "armed conflict" should be used was unacceptable. Armed conflicts might break out which were not of such dimensions as to cause the victim of aggression to declare a state of war. They might be settled within a few days without such serious consequences as the severance of consular relations.

35. Thus the term "war" and the expression "armed conflict" were equally undesirable. War, although the term was used a great deal in the literature and in common parlance, was indeed a social phenomenon, but had little legal significance. Mr. Verdross's objection that it was not clear who should decide whether a state of war existed in conformity with international law was not very convincing, though it was true that a definition of aggression had not yet been worked out. If, for example, the question of who was responsible for an armed conflict was brought before some international tribunal, the tribunal would have to determine whether a state of war existed; one of the deciding features would be precisely the question whether consular relations had been broken off. Admittedly, the decision would not be easy to arrive at.

² See *Official Records of the General Assembly, Ninth Session, Supplement No. 9*, p. 10.

36. Mr. SCELLE urged that draft article 50 should be deleted. It was precisely in a state of war that consulates should be maintained. The Special Rapporteur had intimated that the rule expressed in article 50 was new; it was not only new, it was in flagrant contradiction with the universality of international law. War should be defined as a relation between States; but, if one article were adopted, the result would be a retrogression from international law which might go so far as to imply that war was a struggle between individuals or peoples. Only one kind of war was lawful, and that was a war waged in legitimate self-defence by the victim of an aggression. There might be other cases of violence, such as reprisals and raids, which might or might not be war in the legal sense. Surely in such cases it would be precisely the wrong time to withdraw consuls, when they were so badly needed to protect their nationals. Again, the rupture of trade relations automatically occurred in the case of hostilities; but it was then all the more necessary that consuls should be on the spot to see to it that the break did not lead to disputes among individuals. It was therefore quite impossible to vote for draft article 50 as it stood, since the text was incompatible with the true role of consuls and normal relations between nations. The idea expressed in that article was retrograde and even shameful.

37. Mr. EDMONDS said that the Commission should be wary of accepting an article concerning the severance of consular relations. He for one did not know what "a state of war in conformity with international law" meant. It seemed to be a contradiction in terms, given the provisions of the United Nations Charter. It was not clear whether by "a state of war" the Special Rapporteur meant a declaration of war or armed conflict. The Special Rapporteur himself had recognized the difficulty when he had said that the question whether a state of war existed would have to be referred to an international tribunal, which would find it difficult to reach a decision. In the United States of America after the Second World War many cases had come before the courts owing to use of similar language, dealing mainly with the suspension of rights and obligations in contracts in the event of a state of war. In the courts of last resort in the individual States of the Union and even in the United States Supreme Court varying interpretations had been given. The Commission should therefore refrain from using a term so indefinite as to give rise to great difficulties of interpretation. Mr. Scelle had rightly advocated the deletion of the entire draft article, which served no useful purpose and merely gave rise to confusion.

38. Mr. AMADO observed that the Commission had not disregarded the possibility of including an article similar to draft article 50 in the articles on diplomatic intercourse and immunities, but had deliberately omitted it. Mr. Scelle had raised the discussion to a very high level of idealism,

which did the Commission honour. He (Mr. Amado) objected to the phrase impugned on more modest grounds, namely those of ambiguity. The Special Rapporteur probably meant the phrase to refer to circumstances in which a state of war so manifestly existed that an international organization would be bound to take note of the fact. Article 50 probably did not really belong in a draft convention on consular intercourse and immunities at all, even if the ambiguous phrase were deleted. The breaking-off of consular relations was really an exceptional situation, and Mr. Edmonds and Mr. Scelle were therefore probably right in urging the article's deletion. On the other hand, Mr. Ago might be right in suggesting the addition of a preliminary clause which would give the whole article greater precision. In any case, the "except" clause should be deleted.

39. Mr. TUNKIN said that he did not think that Mr. Ago's proposal for a separate paragraph stating how and in what cases it would be legitimate to break off consular relations was necessary. Mr. Ago had, however, been right in drawing attention to article 2, paragraph 1, stating that the establishment of consular relations took place by the mutual consent of the States concerned. As the Commission had not laid down an obligation to maintain or even to enter into consular relations, the severance of such relations might in some cases be simply a legitimate act or a sanction. The discussion of such a situation was, however, more pertinent to the topic of the international responsibility of States.

40. The Special Rapporteur's text and explanations were quite sound. His reasons for using the phrase "in conformity with international law" were valid enough but the phrase should preferably be eliminated, since it might be ambiguous, might give rise to differing interpretations and was not essential for the purposes of the draft.

41. With regard to the general problem of war, he said that Article 2, paragraph 4, of the United Nations Charter prohibited the threat or use of force in international relations. A State might resort to the use of force only under Article 51 of the Charter, laying down the right of self-defence.

42. With regard to the choice between the terms "war" or "state of war" he said the latter might apply to certain cases which had occurred after the Second World War, when the war had not been officially terminated, but consular relations had been established with certain former enemies. The phrase "state of war" was therefore not adequate.

43. He thought it would be preferable to delete the whole phrase "except where a state of war has arisen in conformity with international law between the sending State and the receiving State" and to retain the remainder of the draft article.

44. Mr. BARTOŠ said that he was opposed to the use of the term "war" in the draft. It was generally agreed that the Charter of the United Nations had abolished the old concept of war;

indeed, it was significant that the term itself was not used in the Charter except in references to certain consequences of the Second World War, as in Article 107. The modern trend was to speak of an armed conflict, or of an armed conflict of an international character; examples of the use of that expression occurred in the four Geneva conventions of 1949, which dealt precisely with the treatment of the victims of war. He also objected to the expression "a state of war", which was used in the draft and the meaning of which was not absolutely clear.

45. However, he felt strongly that the whole phrase "except where a state of war . . . the receiving State" should be deleted. If the reference to war were retained, he would be obliged to vote against the whole draft.

46. Lastly, he agreed with Mr. Ago that it was perfectly lawful for a State to break off consular relations with another State. There was no obligation under the Charter to maintain consular relations that had been established. A State was free at any time to discontinue consular relations which it had established with another.

47. Sir Gerald FITZMAURICE said it would be useful to have in the draft an article stating that the breaking-off of diplomatic relations did not automatically entail the breaking-off of consular relations, in view of one fact that the opposite view had sometimes been expressed. Like Mr. Ago, however, he thought that the provision should be supplemented by some indication of the circumstances in which consular relations could be broken off. It was desirable that there should be somewhere in the draft an express provision to the effect that consular relations could be broken at any time both by the receiving State and by the sending State.

48. If a reference to war were to be retained in article 50, the words "in conformity with international law" should in any case be deleted because of the controversy to which they might give rise. Also, as suggested by Mr. Verdross, the words "a state of war" should be replaced by "an armed conflict" for the reasons given by Mr. Bartoš. The Special Rapporteur's objection that the expression "armed conflict" was much too general could be met by drafting the article more or less along the following lines: "Except where an armed conflict involving a breach of diplomatic relations has occurred, the breach of such relations shall not automatically entail. . ."

49. On balance, however, in view of all the difficulties and complications to which the reference to armed conflict had given rise, he was inclined to agree with Mr. Tunkin's suggestion that the first phrase of draft article 50 should be omitted altogether.

50. Mr. ERIM said the contents of article 50 did not correspond to the title of the article. The title was "Breaking-off of consular relations", but the provision contained in the article stated only

that the breaking-off of diplomatic relations did not automatically entail that of consular relations.

51. It was clear from the terms of article 2, paragraph 1, and article 3, paragraph 1, which the Commission had already adopted, that the maintenance of consular relations was subject to the consent of the two States concerned. At any moment, either of the two States could revoke that consent and break off consular relations; that fact should be stated. A clause might be added to the effect that a State was entitled to break off consular relations with another which had committed some violation of international law.

52. A separate provision might then stipulate that the severance of consular relations had to be effected by explicit act and, in particular, was not implied in the rupture of diplomatic relations.

53. Lastly, he agreed to the deletion of the provision relating to the state of war. Apart from the reasons given by other speakers, he thought that the term was too restrictive: the case could occur of a grave conflict which did not altogether amount to a state of war but which did involve the severance of diplomatic and consular relations.

54. Mr. FRANÇOIS said that he could not subscribe to Mr. Verdross's view that the idea conveyed by the word "war" could be dispensed with. When the Netherlands had been invaded in 1940, the aggressors had claimed that no state of war existed; it had become necessary for the Netherlands Government to proclaim the existence of a state of war in order to exercise its rights as a belligerent. The existing position in international law was that a state of war existed whenever one of the parties to an armed conflict so declared. In the event of war, however, the maintenance of consular relations would serve no practical purpose and he could not agree with Mr. Scelle's suggestion that in such an eventuality consular relations should subsist. The only protection possible for enemy nationals was that afforded by the protecting Power. That protection was more effective than the illusory protection which would be provided by the consulate of a sending State which was at war with the receiving State.

55. Nevertheless, he favoured the deletion of the proviso relating to the state of war, mainly for the reason that the Commission had always maintained that questions regarding the state of war were outside its competence. Although a few incidental references to armed conflict, such as that in article 43 (a), appeared in the diplomatic draft, the Commission had prepared that draft in contemplation of the time of peace only. Accordingly, it would be consistent with the Commission's practice to delete the proviso in question from article 50 of the consular draft.

56. Mr. HSU said that in view of Mr. Scelle's desire that consular relations should not be affected by the vicissitudes of international relations, he had been surprised at his suggestion for the

deletion of article 50. The best solution was, of course, to draft an improved provision.

57. For his part, he had no objection to a reference being made to war, since he felt that the Commission should face realities. War had been outlawed, but unfortunately it had not been eradicated. However, he preferred the term "state of war" both to "war" and to "armed conflict". He also agreed with the suggestion that the words "in conformity with international law" should be deleted, for they could give rise to difficulties of interpretation. Nevertheless, he did not insist on the proviso under discussion being retained and felt that, if the Commission could not agree on a formula, the best course was to delete the proviso, as had been suggested by Mr. Tunkin.

58. Mr. SANDSTRÖM also considered that the contents of article 50 did not correspond to its title. To bring the article into line with its title it should contain a provision regarding the circumstances in which the severance of consular relations was possible.

59. He agreed with the suggestion by Mr. Tunkin for the deletion of the reference to the state of war and suggested that the rest of the article could then perhaps be incorporated into article 49 as a special sub-paragraph.

60. Mr. YASSEEN supported Mr. Ago's suggestion that a general provision should be included concerning the severance of consular relations. The inclusion of an initial paragraph along those lines would make the contents of article 50 concord with its title. The paragraph would state that either of the two States concerned could by unilateral action break off consular relations. A proviso might perhaps be added limiting the exercise of that right to cases in which serious grounds or plausible reasons for the rupture existed.

61. Lastly, he concurred with Mr. Tunkin's suggestion for the deletion of the proviso relating to the state of war. Until the end of the nineteenth century, it had not been the general practice for consular relations to be broken off as a result of the outbreak of hostilities. The more recent concept of total war had led to the adoption of a different practice but he did not think that the proviso in question expressed an established principle of international law. He therefore agreed that the Commission should not insert such a proviso in an international convention and thus make it a rule of law. The best course would be that the draft should be silent on the subject; the future would decide along what lines international law would develop in that regard.

62. Mr. SCALLE said that, in view of the suggestion for the deletion of the proviso relating to the state of war, he would not press his suggestion for the deletion of the whole article. He urged, however, that the word "automatically" be dropped from the text, and suggested that it be replaced by the words "in principle".

63. He had objected to the use of the term "war" because that term could be taken to refer to what had been regarded in the past as the inherent right of the State, in other words the right of a government to take the law into its own hands if it considered that a violation of international law had been committed. The United Nations Charter had clearly abolished that right: and it did not even allow the use of force for the purpose of asserting a legitimate right; he recalled that such had been the interpretation placed by the United States of America on the terms of the Charter at the time of the Suez affair in 1956. No jurist, no teacher of international law, could hold any other view. Accordingly, he had been glad to note the unanimous approval in the Commission of the suggestion for the deletion of the reference to war in the draft.

64. Under the Charter, the use of force was legitimate in two cases only. Firstly, in the case of measures under chapter VII of the Charter to deal with threats to the peace, breaches of the peace and acts of aggression; as yet, the United Nations had taken only very limited police action of that type. Secondly, recourse to force was permissible in the exercise of the right of individual or collective self-defence against armed attack under Article 51 of the Charter. Just as action in self-defence was permissible internally in those cases only in which the public authorities failed to act, so internationally individual or collective self-defence was possible in the absence of international action, or until such action materialized.

65. Notwithstanding the objections put forward by Mr. François, he considered that the role of consuls should not end with the outbreak of hostilities; indeed, in that event, the role of consuls became, if anything, more important. Of course the action of consuls would not be the same as in time of peace; they would be called upon, for example, to restrain their own nationals from carrying out activities objectionable to the receiving State. A consul who was himself a national of the receiving State might have a useful role to play in that connexion. Action by their own consul was more effective where nationals were concerned than any that could be undertaken by a protecting power, or even by the Red Cross authorities. He felt very strongly that such action could mitigate the evil consequences of war and that the international role of consuls should therefore not be confined to peace time.

The meeting rose at 1.10 p.m.

547th MEETING

Wednesday, 25 May 1960, at 9.30 a.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 50 (*Breaking-off of consular relations*)
(continued)

1. Mr. ŽOUREK, Special Rapporteur, referring to the discussion on article 50 at the previous meeting, said that he did not share the view of those members who considered that, in the present state of development of international law, it was not possible in the consular draft to refer to a state of war. A State which was the victim of an aggression was entitled to declare that a state of war existed between it and the aggressor State, for the purpose of exercising all the rights of a belligerent. Some countries which had been the victims of aggression by the Axis Powers during the Second World War had taken precisely that course. However, since the proviso relating to the state of war was not essential to article 50, he was prepared to withdraw it for the sake of securing agreement in the Commission.

2. Mr. Ago's suggestion (546th meeting, paragraph 27) for the inclusion of a provision concerning the right to break off consular relations by unilateral act raised a difficult question. When preparing the draft articles, he had given considerable thought to the question but had decided that such a provision was not necessary in a draft intended to regulate the conduct of consular relations after those relations had been established.

3. The severance of consular relations was an abnormal act which would only occur in very exceptional circumstances. For his part, he could not subscribe to the view that a State was entitled to break off those relations at any time without cause. There could be no doubt that such a unilateral act would be inconsistent with the Purposes of the United Nations, which included, under paragraphs 2 and 3 of Article 1 of the United Nations Charter, the development of friendly relations among nations and the achievement of international co-operation. Consular relations should therefore not be broken off except for very grave reasons. Unfortunately, it was very difficult to specify the cases in which so serious a step could be taken. The insertion in the draft of a provision dealing with circumstances implying the existence of a crisis in international relations would not be in the interest of consular intercourse. Perhaps the best course was to deal with the matter in a commentary.

4. Mr. AGO said that he fully understood the reasons for the Special Rapporteur's reluctance to include a provision concerning the circumstances in which consular relations could be broken off. Nevertheless, he did not think that the matter could be disposed of in a mere commentary.

5. The position at present was that a State was entitled to break off consular relations with another by unilateral act. The act might, of course, be the sanction for the commission by the other State of an act which was unlawful under international law. However, consular relations could also be broken off by reason of an unfriendly act not constituting any violation of international law.

6. He agreed, particularly in view of the terms of the Charter, that the right to break off consular relations should not be exercised lightly. It was necessary, however, to set forth that right explicitly in the draft; otherwise, if the draft was silent on that point, it would inevitably be inferred that the agreement of both the States concerned was necessary for the severance of consular relations and hence that the unilateral severance of those relations constituted a breach of the agreement between the two States regarding the establishment of those relations, a breach which would constitute an unlawful act giving rise to international responsibility. For those reasons, he suggested that the Commission should delimit the scope of the exercise of the right in question by means of a broad and purposely vague provision, which, if the Commission so preferred, could be drafted in a negative form along the following lines: "Consular relations once established shall not be broken off by one of the parties except for extremely serious reasons."

7. Mr. MATINE-DAFTARY said that article 50, if it was to deal only with the effect on consular relations of the rupture of diplomatic relations, would no longer correspond to its title. For his part, in the light of recent State practice, particularly since 1914, he did not believe that a State which decided to break off diplomatic relations with another would consent to the maintenance of consular relations, even if it were stated in article 50 that under international law the breaking-off of diplomatic relations did not necessarily involve that of consular relations.

8. He agreed with the view that the reference to the state of war should be dropped. He had no faith in the international law of war; war was an international crime, and the outbreak of hostilities meant virtually that the rule of law was in abeyance.

9. He agreed with Mr. Ago that the important question of the severance of consular relations could not be ignored in the draft. In that respect, a distinction would have to be drawn between the complete severance of consular relations and the closing of one or several specific consulates. The closing of a consulate could be the consequence of the sending State's deciding that the consulate was no longer necessary; on the other

hand, he pointed out that a particular consulate might be closed at the request of the receiving State, which considered that the consul in charge had no genuine consular business and was engaging in political activities. In connexion with the closing of a consulate, or several consulates, it was desirable to lay down in the draft the procedure for liquidating their affairs.

10. The CHAIRMAN, speaking as a member of the Commission, said that there were two questions involved. Firstly, the general problem whether it was appropriate to include in the draft a provision concerning the severance of consular relations, in view of the fact that the draft contained a provision on the establishment of those relations. Secondly, there was the concrete problem raised by the Special Rapporteur's draft provision to the effect that the breaking-off of diplomatic relations did not automatically entail the breaking-off of consular relations.

11. On the first, or general, question, he had serious doubts regarding the advisability of including an article concerning the breaking-off of consular relations. None of the bilateral or multilateral consular conventions which he had seen contained a provision dealing with the breaking-off of consular relations as such. The First Protocol of Signature of the Consular Convention of 1952 between the United Kingdom and Sweden, however, stated:

“In the event of war or of the rupture of [diplomatic] relations between two States, either State shall be entitled to demand the closure of all or any of the consulates of the other State in its territory. It shall also be entitled to close all or any such consulates of the latter State as are situated in other countries which come under its military occupation.”¹

12. The fact of the matter was that the maintenance or severance of consular relations was closely connected with the existence of a state of peace or of armed conflict between the two States concerned. According to the Honduran Act No. 109 of 14 March 1906 regarding foreign consular missions, any State at peace with Honduras might appoint consuls-general, consuls, vice-consuls and consular agents in Honduras even though their appointment was not the subject of a prior convention.²

13. It was clear from that clause that the severance of consular relations would be the result of the rupture of peaceful relations between the two States concerned and not of the severance of diplomatic relations. The position was rather that a state of war would involve the termination of all peaceful relations between the two States concerned and hence the severance of both diplomatic and consular relations.

14. In view of the distinction between the actual

severance of consular relations and the closing of a consulate, and also because the severance of those relations was a rare occurrence in peacetime, the Commission should ask itself whether it was appropriate that a multilateral instrument such as that which it was drafting should indicate the circumstances in which such a rupture could occur. In other words, the question was whether the Commission's draft would state, as a treatise on international law might do, that the severance of consular relations could result from the act of the receiving State, from the act of the sending State, or from the act of both.

15. For his part, both from the point of view of codification and from that of the progressive development of international law, he did not consider that any useful purpose would be served by recording the regrettable fact that the cessation of peaceful relations between two States led to the breaking-off of consular relations between them. Accordingly, he would prefer the question not to be mentioned in the consular draft, as indeed it was not mentioned in the diplomatic draft.

16. Moreover, even though it was true to say that either of the States concerned had the right to break off consular relations by unilateral act, it would be undesirable in the draft to give undue emphasis to that right. It would not serve the interests of the progressive development of international law or those of peaceful relations between States to mention that possibility in a multilateral convention.

17. As to the second question, he believed that all members agreed that the statement in the concluding phrase of article 50 did not correspond to the title of the article; the phrase contemplated not so much the severance of consular relations as the maintenance of those relations despite the occurrence of certain events. He recalled that at its eleventh session the Commission had reserved its decision on paragraph 2 of article 2,³ he would suggest that it should consider incorporating the relevant provision of article 50 into the said paragraph 2, if it finally accepted that paragraph as a rule *de lege ferenda*. The whole provision would, in that event, be drafted along the following lines: “The establishment of diplomatic relations includes the establishment of consular relations, but the breaking-off of diplomatic relations shall not automatically entail the breaking-off of consular relations.”

18. Mr. YOKOTA pointed out that the main purpose of article 50 as drafted by the Special Rapporteur was to regulate the effect on consular relations of the outbreak of an armed conflict. Therefore, the deletion of the reference to the state of war, a deletion which had now been accepted in principle by the Special Rapporteur, would greatly diminish the significance of article 50. Accordingly, he suggested that the provision be

¹ United Nations Treaty Series, vol. 202 (1954-1955), No. 2731, p. 204.

² *Ibid.*, p. 153.

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

amended to read: "The breaking-off of diplomatic relations shall not automatically entail the breaking-off of consular relations, even in case of armed conflict."

19. Commenting on Mr. Ago's suggestion that the draft should set forth the right of a State to break off consular relations unilaterally for serious reasons, he thought that such a provision would serve little purpose. In practice, consular relations were usually based on bilateral consular conventions. So long as a consular convention was in force, the parties thereto were bound to maintain consular relations; either of them could, of course, denounce the convention by reason of the outbreak of an armed conflict, or by reason of a breach of the terms of the convention committed by the other party. Outside those cases, however, the parties could not, in accordance with the rules of international law, denounce the convention.

20. Actually, even if it were true to say that under general international law a State was free to break off at any time its consular relations with another State, it would be dangerous to formulate such a principle in the draft. A provision along those lines might give the impression that consular relations could be broken off at any time regardless of existing consular conventions.

21. Of course, he did not suggest that, where two States maintained consular relations, those relations could never be broken off without the consent of both parties. He did say, however, that the question of principle involved was an extremely complex one and should preferably not be mentioned in the draft.

22. Mr. PAL pointed out that the passage quoted by the Chairman (see paragraph 11 above) from the First Protocol of the 1952 Consular Convention between the United Kingdom and Sweden, relating to the effects of war or of the rupture of diplomatic relations, was preceded by a paragraph in the following terms:

"The high contracting parties wish to put on record that in their view the following principles are applicable to consulates and consular officers under the general law of nations in the event of war or of the rupture of diplomatic relations."⁴

23. Thus statement that war or the rupture of diplomatic relations gave either of the two States concerned the right to demand the closing of all or any of the consulates of the other State was intended not as a clause of the Convention itself but as an expression of a rule of general international law. It would, therefore, not have been irrelevant for the Commission to include a proviso dealing with the effect of hostilities on consular relations. He agreed with Dr. Hsu (546th meeting, paragraph 57) that the Commission should not hesitate to use the term "war". In any attempt to achieve a genuinely rational order in the political side of human culture, the minimum moral

requirement was to have the courage and sincerity, however unpleasant reality might be, to look it in the face and not to essay to evade it by indulging in any wishful thinking. The task which now confronted the Commission was, however, a somewhat different one; the Commission was required to formulate a provision covering a specific matter and, if the term "war" had in fact been excluded where that matter was concerned it would have been quite justifiable to omit any reference to that term. But, as he had just pointed out, as late as 1952 two States had referred to the "event of war" as being relevant to that very matter. Nevertheless, he concurred with the deletion of the proviso in question since the Special-Rapporteur had himself agreed to that course. It was not, of course, essential to the Commission's present purpose to deal with the question of the effects of the state of war.

24. With reference to the Chairman's suggestion that the last part of article 50 be incorporated into paragraph 2 of article 2, he recalled that the Commission had reserved its decision on article 2, paragraph 2. If the Commission eventually decided to maintain that paragraph, it might be quite logically inferred from the statement therein that the establishment of diplomatic relations included the establishment of consular relations, that the severance of diplomatic relations would similarly include that of consular relations; it would therefore then be appropriate to specify that that was not necessarily the case. As a matter of drafting, he suggested that the word "automatically" should be replaced by the words "by itself". However, since article 2, paragraph 2, had not yet been adopted, the question of incorporating the relevant phrase of article 50 into the said paragraph 2 should be postponed until the Commission had taken a decision on the latter paragraph.

25. Lastly, with regard to Mr. Ago's suggestion, he agreed that if the right to break off consular relations unilaterally existed, the Commission should not hesitate to mention that right; but he could not concur in the view that the absence of such a provision would inevitably mean that severance of relations would always require the agreement of both the States concerned.

26. Mr. BARTOŠ considered that the obligation under the Charter to maintain friendly and good neighbourly relations among nations did not constitute an obligation to maintain diplomatic or consular relations. Accordingly, although the severance of consular relations might have some practical value, it could not be regarded as a violation of a rule of law. If there was no obligation to establish consular relations, there could also be no obligation to maintain them. Moreover, the right to break off diplomatic relations was understood to exist, although those relations, like consular relations, were based on mutual consent between the countries concerned. In an armed conflict, the nationals of foreign countries might need consular protection, but it was an uncontested rule that a third State could undertake to provide such protection. If the right to

⁴ *Ibid.*

break off diplomatic relations was recognized, the same right must be recognized in respect of consular relations also; the maxim that the greater covered the less, although not always applicable, applied in the case at issue, in the absence of a concrete rule.

27. Some members had doubted the advisability of including an article concerning the severance of consular relations in the draft, but they had not queried the existence of the right to break off those relations. As yet, there was no established rule of international law obliging States to maintain consular relations, and from the absence of a clause giving either party to a consular convention the right to break off consular relations with the other party it could not be inferred that the right did not exist. For example, if the case of a State wishing to break off consular relations with another State were brought before the International Court of Justice, the Court could not oblige that State to maintain its consular relations with the other, since there was at present no rule of international law on which such a judgement could be based.

28. It was most important that the Commission should settle the questions of principle involved in article 50 and not leave them to the Drafting Committee, which was not competent to create a rule of international law. Nor could the Commission state that consular relations, once established, should be maintained even when diplomatic relations had been broken off.

29. With regard to the first phrase of article 50, he said that the United Nations Charter had rendered the state of war an unlawful state of affairs, which should not be mentioned in the draft. Moreover, a State which had been attacked was not obliged to allow consulates to remain in its territory.

30. In conclusion, he thought that only the second part of article 50 should stand and that the commentary should explain that there was as yet no legal obligation for States to establish or to maintain consular relations. Mr. Ago's suggestion should also be taken into account in the commentary.

31. Mr. TUNKIN observed that the majority of the Commission wished to retain the second phrase of article 50 as drafted by the Special Rapporteur. He believed that an article consisting of that phrase would be useful and should be referred to the Drafting Committee. Nevertheless, since some members seemed to feel strongly on the matter, the Commission might instruct the Drafting Committee to prepare an article on the lines indicated by Mr. Ago and submit it to the Commission for a final decision.

32. Mr. LIANG, Secretary to the Commission, said that some of the observations made on article 50 seemed to raise doubts as to the nature of the act of establishing and breaking off consular relations. It was recognized in international law that certain acts could be performed by a State without committing a breach of international law; for example, it was quite proper for a State

to refuse to enter into diplomatic relations with another State, and the Commission's draft on diplomatic intercourse confirmed that view. It was equally proper to break off diplomatic or consular relations by unilateral act. The question of violation of a treaty establishing consular relations did not arise, since mutual consent was required only for the establishment of such relations. The purpose of the treaty concerned was achieved upon the establishment of relations. If States were held to have a duty to maintain consular relations, Mr. Ago would be justified in saying that the unilateral severance of those relations constituted a breach of international law; in his (Mr. Liang's) opinion, however, the unilateral severance of consular relations, though possibly an unfriendly act, was not an illegal one. The provisions of the consular conventions would be suspended if relations were broken off. Moreover, he did not believe that any consular conventions contained even an implicit clause to the effect that consular relations must be maintained; only if such a clause existed could it be argued that the severance of consular relations by unilateral act would constitute a breach of the convention.

33. The question before the Commission was whether a provision concerning the severance of consular relations should be inserted in the draft. He would submit that, since the draft was based on the assumption that consular relations had been established, the severance of those relations fell outside the scope of the draft. Moreover, it would be contrary to precedents in consular conventions to include an article referring to the unilateral severance of consular relations.

34. Sir Gerald FITZMAURICE agreed with Mr. Tunkin that the problem raised by article 50 had been largely reduced to one of drafting. It was entirely because the Special Rapporteur's wording raised doubts concerning the existence of the right to break off consular relations that he (Sir Gerald) had difficulty in deciding on the advisability of including a clause concerning the severance of consular relations. Mr. Yokota's suggested wording (see paragraph 18 above) would also cause the inexperienced reader to wonder whether there were any circumstances at all in which consular relations could be broken off. It should be made clear that the right existed, but such a provision would have to be drafted in terms which did not seem to invite the breaking-off of relations. The Chairman's suggestion that the provision should be inserted in article 2, paragraph 2, seemed to be sound, even though article 2 had not yet been finally agreed upon. That text might state that the establishment of diplomatic relations included the establishment of consular relations, but that the severance of diplomatic relations should not automatically entail the severance of consular relations. There would then be no special article concerning the severance of consular relations and the provision would be less conspicuous.

35. With regard to the issue of consular conventions raised by Mr. Yokota, he believed that the

draft would contain a provision to the effect that nothing in the draft affected existing bilateral arrangements. It was obvious that such a provision should be inserted, since otherwise no State would be able to accept the text which the Commission was preparing.

36. Finally, he said he had refrained from discussing any of the implications of the first phrase of the Special Rapporteur's draft article 50, because the whole question of the legitimacy of a state of war was totally irrelevant to the debate. Whether a state of war was regarded as legitimate or not, the truth was that, if it existed, the maintenance of both diplomatic and consular relations was impracticable.

37. Mr. SCELLE said he had been greatly surprised by some of the statements that he had heard on article 50. It had been said that under international law a State was free to maintain or not to maintain diplomatic and consular relations with other States. He believed that the contrary was true. In his opinion, a government had the right to recognize or not to recognize a particular State, but having recognized that State, it was under an obligation to maintain diplomatic and consular relations with it. The international dealings of States *inter se* constituted an essential feature of the law of nations; a State which refused to maintain such dealings with another committed a violation of international law. Many wars had been waged in Europe in order to oblige certain States to enter into dealings with others; thus, conflicts had been based on the principle that a State which refused to maintain certain relations with another placed itself outside international law and no longer had any grounds for claiming protection under that law. If there were any doubts concerning the existence of such an absolute and customary rule, the Commission itself would lose its *raison d'être*. Such doubts conflicted with the conception of the international community and in effect questioned the reality of international law, for an international law not based on international relations was inconceivable. There could be no discussion on the point, particularly in a meeting of the International Law Commission.

38. He had previously expressed the opinion that it might be better to omit article 50 altogether, and he still believed that that would be the wisest course. Nevertheless, some members had indicated that the article would be acceptable if the first phrase were deleted, and he would have no objection to following Mr. Tunkin's suggestion, but he was afraid that the Drafting Committee would meet with the same difficulties as the Commission had done.

39. Mr. ŽOUREK, Special Rapporteur, observed that in conformity with the consensus in the Commission the first phrase of article 50 would obviously be deleted; in that case, the title would have to be amended. He thought the text should be referred to the Drafting Committee, which would also decide upon the best place for the provision. The

Chairman's suggestion that it should be included in article 2, paragraph 2, might be followed.

40. Commenting on the views expressed by earlier speakers, he said that an agreement to establish consular relations was an international treaty in the broad sense and could be modified in accordance with international law. For example, it could be amended or extinguished by agreement between the parties and also by unilateral acts recognized by international law. Accordingly, he could not agree that the abrogation of an agreement establishing consular relations was always a breach of international law. The fundamental object of such an agreement was the establishment of consular relations, and also, as Mr. Matine-Daftary had pointed out, the establishment of individual consulates; the Commission had decided to deal in the commentary with cases where an agreement to establish a consulate could be rescinded if it was not possible to agree on the delimitation of the consular district. So far as the more general problem of the severance of consular relations was concerned, he said that consular conventions, and hence also their termination, would continue to be governed by general international law, even if no explicit mention was made of the severance of those relations.

41. Mr. Bartoš had said that if the faculty of breaking off diplomatic relations was recognized, the faculty of breaking off consular relations must, *a fortiori*, be recognized also. Surely, however, the severance of consular relations, like that of diplomatic relations, was an abnormal, emergency measure, which should not be taken in peace-time. Accordingly, it would be better not to deal with the contingency in a separate article. Inasmuch as the operation of consular conventions was governed by general international law, it was impossible to create a rule on the subject of the severance of consular relations, since agreements were terminable by notice.

42. He could not agree with the Secretary that the draft convention which the Commission was preparing was concerned only with the establishment of consular relations and hence should not deal with the termination of those relations. Furthermore, the unilateral severance of consular relations should invariably be regarded not as an unfriendly but as an illegal act: any unilateral modification of an agreement on consular matters must be made in accordance with international law.

43. Sir Gerald Fitzmaurice had rightly pointed out that the article as it stood might mislead the reader into thinking that no right to break off consular relations existed. Finally, the commentary should contain references to the regrettable cases which sometimes arose from the breaking-off of consular relations.

44. Mr. AMADO did not consider it advisable to refer the article to the Drafting Committee in its present form, since the Committee would be faced with the same difficulties as the Commission. He was convinced that the best course would be to omit the provision altogether.

45. The CHAIRMAN observed that the consensus of the Commission was to retain the last phrase of the Special Rapporteur's draft and to leave it to the Drafting Committee to decide where the provision should be placed. Sir Gerald Fitzmaurice had pointed out that the article as it stood might give the impression that the right to break off consular relations did not exist; that point might be met by treating the whole concept more incidentally in article 2, paragraph 2.

46. Mr. AMADO, supported by Mr. SCELLE, proposed that the Commission should vote on whether or not an article on the breaking-off of consular relations should be included in the draft.

47. Sir Gerald FITZMAURICE thought that a vote would be premature because the Commission had not yet decided on the text of article 2, paragraph 2, which might even be omitted. If so, a separate article on the severance of consular relations might still be needed.

48. Mr. ŽOUREK, Special Rapporteur, agreed with Sir Gerald Fitzmaurice and pointed out that the text now before the Commission related to the maintenance, rather than to the severance, of consular relations.

49. The CHAIRMAN said that he was reluctant to put the question to the vote at that stage. The Drafting Committee's task would be to find the best place and title for the clause and to word it so as to allay Sir Gerald Fitzmaurice's doubts.

50. Mr. AMADO could not see why the Drafting Committee should be given a task which was so imprecise. Many doubts had been expressed by members and several seemed to agree with him that the article should not be forwarded to the Drafting Committee. Nevertheless, he withdrew his proposal.

51. The CHAIRMAN observed, with reference to the Special Rapporteur's remarks, that cases of severance of diplomatic relations could occur which were not connected with the suspension of peaceful relations. There had been instances where diplomatic relations between two States had been severed but consular relations had been maintained. The aspect of the question exemplified by those cases was the only one with which the Commission should be concerned.

52. Mr. AMADO pointed out that international law did not prevent States from committing certain political acts. He did not think that the Commission could draft rules governing the behaviour of States. The provision added nothing of value to the draft.

53. Mr. YOKOTA, speaking as Chairman of the Drafting Committee, said that a repetition of the Commission's discussion in the Drafting Committee would place a heavy additional burden on the Committee. He suggested that the Committee might consider only the placing and the title of the article.

54. The CHAIRMAN, supported by Sir Gerald FITZMAURICE, did not think that the Drafting Committee should limit its task to the placing and title of the article, since its wording was bound to differ according to whether it was attached to article 2, paragraph 2, or left as a separate article.

55. He suggested that article 50 should be forwarded to the Drafting Committee with those comments.

It was so agreed.

56. Mr. EDMONDS expressed concern at the procedure followed by the Commission at the present and at the eleventh sessions. Before the eleventh session, the Commission had always taken a vote on the principle embodied in each article and had then referred the text to the Drafting Committee with directions simply to review the language. In 1959 the Commission had departed from that procedure and had begun to refer all articles to the Drafting Committee without taking a decision on the substance. At the present session only one vote had been taken on a matter of principle, with the result that a number of articles on which sharp divergences of opinion subsisted had been referred to the Drafting Committee, which must therefore take decisions on matters of principle not settled by the Commission itself. The result was necessarily a considerable waste of time and effort. A comparison with the records of earlier sessions would show that, quantitatively at least, the Commission had produced much less in the current year and the previous year than it formerly had. The Commission would very likely be confronted in the closing weeks of the session with draft articles on which opinions would still be sharply divided. That being the situation, either the Commission would have no time to consider them again thoroughly or else its members would vote, in a spirit of conciliation, in favour of the Commission's report. Such a report would not constitute a report based upon the considered opinions of a majority of the members.

57. The CHAIRMAN replied that he was always willing to submit a matter to the vote if members so requested. Naturally the Commission wished to avoid a repetition of the discussions when the Drafting Committee reported back, but the situation would be difficult if every matter was put to the vote at the initial discussion and a final draft emerged accompanied by a large number of minority opinions. If such a draft was submitted to the General Assembly, the Commission would run into trouble later.

58. Mr. EDMONDS assured the Chairman that he had not intended to cast any reflection on his conduct of the proceedings. It was the Commission as a whole which had drifted into a procedure which prevented it from producing as much work as it might.

ARTICLE 51 (*Right to leave the territory of the receiving State and facilitation of departure*)

59. Mr. ŽOUREK, Special Rapporteur, introduced his revised text of article 51 :

" 1. Upon the termination of the functions of members of the consular staff, the receiving State shall, save as otherwise provided in the present articles, allow the said persons, the members of their families and the private staff in their employ, to leave its territory, even in case of armed conflict, provided that they are not nationals of the receiving State.

" 2. The receiving State shall grant to the persons referred to in paragraph 1 above the necessary time and facilities for preparing their departure. It shall treat the said persons with respect and protect them up to the moment when they leave its territory. If need be, the receiving State shall place at their disposal the necessary means of transport for themselves and their personal effects."

60. The revised text differed from the original (A/CN.4/L.86) only in drafting, by the elimination of some unnecessary detail. In the main, it corresponded to article 42 of the draft articles on diplomatic intercourse and immunities, but with certain differences.

61. The draft article laid down the principle that the State of residence was bound to allow all members of the consular staff, members of their families and their private staff to leave its territory upon the termination of their functions. The objection might be raised that the principle was self-evident. Although it was self-evident in the case of diplomatic agents, who enjoyed inviolability and immunity, it was not so for members of the consular staff, especially in the case of armed conflict. At the beginning of the First World War many British consuls had been held by the German Government in order to force the British Government to repatriate German nationals. Some of them had been held for as long as six months while negotiations were carried on by a neutral government. Similar events had also happened during the Second World War. Because some doubt had been expressed concerning the principle even in the literature, notably in the Harvard Draft, he had concluded that it should be expressly stated in the draft before the Commission. Those were the considerations underlying the terms of paragraph 1, for which there was no equivalent in the corresponding diplomatic article.

62. Since consular staff did not enjoy inviolability or complete immunity, and were accordingly liable to restraint on their personal liberty, he had included in paragraph 1 a proviso : " save as otherwise provided in the present articles ". The proviso would cover cases such as that of a consular employee who was serving a term of imprisonment at the time when the functions of the consular staff were terminated.

63. Paragraph 2 reproduced a provision found

in many consular conventions and dealt with a situation which often arose in practice. The last sentence in paragraph 2 was taken from article 42 of the diplomatic draft, except that the term " property ", which was too broad, had been replaced by the expression " personal effects ", which should certainly be sufficient to cover the needs of consular service staff.

64. Mr. VERDROSS observed that the principle embodied in article 51 was quite correct and corresponded to practice; it would be salutary to stress it, especially in connexion with armed conflict.

65. One case, however, was apparently not covered — that of a consular official dismissed locally by the sending State for some offence. It was obviously not the duty of the receiving State to facilitate the departure of such a person; on the contrary, it would probably wish to hold him in prison. The situation might be covered by the phrase in paragraph 1 " save as otherwise provided in the present articles ". It certainly would be, if draft article 47 were retained in the wording originally proposed by the Special Rapporteur, but that article had been referred to the Drafting Committee. Furthermore, would article 51 cover such a person after his release? Certainly it could not do so, since once a consular official had been dismissed, his privileges and immunities were immediately extinguished and could not be revived. An additional paragraph in the following terms might be added to cover that particular case :

" 3. The provisions of paragraph 2 [paragraphs 1 and 2] of this article shall not apply in a case in which a consular official is discharged locally by the sending State."

66. Mr. YOKOTA supported the principle of the article and had no objection to paragraph 1. He had no objection of principle to paragraph 2, but thought that the second sentence was not appropriate and should be deleted. That sentence was incompatible with draft article 32 which had already been adopted. Article 32 accorded special protection only to " foreign consuls ", which expression meant, in accordance with the definition in article 1, heads of consular posts. Under article 51 protection would be accorded not only to consuls, but also to members of their families and the private staff in their employ.

67. It was going rather too far to prescribe that even private servants of members of the consular staff must, on departure, be treated with respect and receive protection. They did not enjoy such privileges while they were actually in service, and by the time they left the country their service would have terminated. If they were to enjoy respect and protection when their service had been terminated, why should they not equally enjoy them while they were in service?

68. The sentence was also redundant in the light of article 43, paragraph 2, which stated that consular privileges and immunities would normally

cease when the person enjoying them left the country, but should subsist until that time. The right to treatment with due respect was one of those privileges. Furthermore, no similar provision was to be found in article 42 of the diplomatic draft, which made no reference to respect and protection.

69. Mr. FRANÇOIS thought that the phrase "save as otherwise provided in the present articles" should be carefully examined by the Drafting Committee. The Special Rapporteur had explained that he had had in mind former consular officials serving a term of imprisonment. The text of the article as it stood might not exclude such persons from the privileges stated in it.

70. The Special Rapporteur had rightly recalled the cases which had occurred in the Second World War, when consular staff had been detained by the receiving State for long periods. The stipulation was therefore necessary, but was not perhaps quite effectively stated. The main cause of the delay had been the tendency of governments to wait until they were assured that their own consular staff in the hostile country had been released. The principle of reciprocity had thus applied. He hoped that the Special Rapporteur might find some way of excluding the operation of the reciprocity rule in article 51, which should lay down the obligation to allow consular officials and their service staff to leave the country and provide that they must not be detained on the pretext that another State was not fulfilling, or might not fulfil, its similar obligations.

71. Mr. LIANG, Secretary to the Commission, wondered whether two paragraphs were required in article 51, since the principle had been stated in one paragraph in article 42 of the diplomatic articles.

72. The Special Rapporteur had had good reason for introducing the notion of respect and protection up to the moment of departure. The term "protection" was not used in article 51 in the same sense as in article 32. The term "special protection" in article 32 presumably had a technical meaning, to cover instances where States had laws and regulations which imposed heavier penalties on persons who violated the inviolability of foreign consuls, whereas in article 51 it would seem to mean protection against mobs in times of stress. Article 51 was not therefore incompatible with article 32.

73. The termination of the functions of members of a consular staff could not be equated with the case where a consular officer was recalled or resigned and thus lost his status. The termination of functions was within the determination of the sending State. The point made in article 51 was that when a consular official was recalled, he no longer enjoyed consular status and therefore left the country. Article 42 of the diplomatic articles simply covered the case where diplomatic

agents left the receiving State, without any reference to the functions having been terminated.

74. Mr. BARTOŠ pointed out that the principle embodied in draft article 51 had been very important during the Second World War and the rules had not changed. It must be stated very firmly and precisely that States were bound to protect and facilitate the departure not only of consuls, but of all their dependants. He disagreed with Mr. Yokota's view. The terms of the article should be as broad as possible, in order to guarantee all the staff of a consulate, even the private service staff of its members.

75. The application of the reciprocity rule had sometimes been very difficult and dangerous. United Kingdom consuls in Yugoslavia had been detained by the Italians for a very long time, until the Portuguese mediating government had been able to guarantee the departure of certain Italian consuls from territories held by United Kingdom forces. The Drafting Committee should stress that a State was under an obligation to allow consular officers, their families and service staff to remain at freedom and to provide them with facilities to leave the country as soon as possible. If the government of the receiving State should have the power to delay their departure for as much as six months and even then to create very unfavourable conditions, the rule of international law would be sadly impaired.

76. Some provision should also be made to cover the property of consular officials which they could not carry with them and which was placed in storage. Yugoslav consuls had had considerable difficulties when their property had been withdrawn from storage warehouses by the German secret police on the alleged grounds that it was the property of enemy aliens.

77. Mr. ŽOUREK, Special Rapporteur, pointed out to Mr. Yokota that there was no contradiction whatever between article 32 and article 51, for the simple reason that article 32 dealt with consuls who were exercising their functions whereas article 51 was expressly concerned with members of the consular staff "upon the termination of their functions." Article 51 dealt with the interval between the time when they had been exercising their functions and the time when they left the country, which might be an extremely critical time for consular staff.

78. Mr. Yokota had complained that private staff of consular officers would, under article 51, receive greater protection than they had received during their service. There was a very good reason for that. There might be great tension between States on the occasion of the termination of a consular mission and the staff would naturally need greater protection than they had enjoyed while the consular functions were being exercised, when such danger had not existed.

79. Mr. Yokota had also drawn attention to the fact that no such provision existed in article 42

of the diplomatic articles. That was quite true; but the situation was quite different, since it had been recognized for centuries that diplomatic staff enjoyed inviolability there had been no need to emphasize the rule in the diplomatic draft, whereas consular staff did not enjoy such inviolability and therefore needed a special provision enjoining respect and protection for them. He entirely agreed with the Secretary that the situations contemplated in article 32 and in article 51 were quite different.

80. Mr. Verdross had rightly raised the special case of a member of the consular staff who had been dismissed in the country of residence. He had been quite correct in maintaining that such a person no longer enjoyed consular privileges and immunities, since he no longer was a member of the consulate, nor could those immunities be revived. It might not, however, be necessary to draft a special paragraph to cover that situation; it might be referred to in the commentary.

81. The point raised by Mr. Bartoš about consular property left behind in storage might also be dealt with in the commentary.

82. Mr. AMADO strongly disagreed with Mr. Yokota. Service staff of consulates had left their native country with full faith in the guarantee that they should enjoy respect and protection; that must be secured for them.

83. The CHAIRMAN suggested that draft article 51 might be referred to the Drafting Committee.

84. Mr. BARTOŠ observed that Mr. Yokota was still in disagreement with several other members of the Commission on the point in question; the Drafting Committee could hardly reconcile two radically conflicting views. The question was whether the receiving State was bound to recognize the right of members of the service staff of a consulate to leave its territory upon the termination of the consular functions.

85. Mr. YOKOTA replied that he did not object to the clause affording such persons the right to leave the territory of the receiving State, but simply felt that it was going too far to prescribe that private servants of consular officials must be treated with special respect.

86. Mr. ERIM suggested that further discussion of draft article 51 be deferred until the next meeting.

It was so agreed.

The meeting rose at 1.20 p.m.

548th MEETING

Friday, 27 May 1960, at 9.40 a.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 51 (*Right to leave the territory of the receiving State and facilitation of departure*) (continued)

1. The CHAIRMAN asked the Commission to continue its consideration of the revised text of article 51 proposed by the Special Rapporteur (547th meeting, paragraph 59).

2. Mr. SANDSTRÖM said that he agreed with Mr. François that the phrase "save as otherwise provided in the present articles" should be redrafted. The phrase "at the earliest possible moment", from article 42 of the diplomatic draft should be added in the first sentence of draft article 51, paragraph 2.

3. It was not entirely clear whom the phrase "provided that they are not nationals of the receiving State" in paragraph 1 qualified. It should not exclude wives of members of consular staffs who were nationals of the receiving State or any of their children who were nationals of that State. The principle applicable to the facilitation of their departure was implicit in article 42 of the diplomatic draft read in conjunction with article 37 of that draft (*Diplomatic agents who are nationals of the receiving State*).

4. After hearing the Special Rapporteur's reply (*ibid.*, paragraph 77) to the question raised by Mr. Yokota (paragraphs 66-68) with regard to the second sentence in paragraph 2, he had concluded that the Special Rapporteur had been right to include it. The situation might perhaps be made clearer by adding the phrase: "even if they do not enjoy the privileges set forth in article 32" at the end of the paragraph.

5. Sir Gerald FITZMAURICE agreed with the principle stated in article 51, but also with the drafting points made by Mr. Sandström.

6. The case, mentioned by Mr. Verdross, in which a consular official had been discharged locally by the sending State might easily be included by careful drafting.

7. Mr. Sandström had been perfectly right in arguing that the wives and children who were nationals of the State of residence should not be excluded from the application of the article. The provisions should be as broad as possible and should cover both those who enjoyed privileges and immunities and those who did not.

8. The second sentence of paragraph 2 should be retained, for it was in a sense the *raison d'être* of the entire article. The explanation for the difference between article 51 of the consular draft and article 42 of the diplomatic draft was that the very nature of diplomatic privileges and immunities necessarily gave diplomatic personnel the right to leave the territory, whereas it was by no means so clear that some of the consular staff had an absolute right to leave the territory of the receiving State at the termination of the consular mission, and in practice such persons had on occasion not been treated with due respect.

9. He was not sure that the reciprocity rule should be excluded by an express provision. While he fully appreciated Mr. François' reasons for suggesting it, he doubted whether the addition of such a provision would in fact improve the position. It might rather create a situation of which any State that might be tempted to fail to fulfil the obligation laid down in article 51 at the outbreak of armed conflict would have the advantage. The only sanction available to the sending State if the receiving State failed to facilitate the prompt departure of the former's consular officials was to retaliate in kind. If the sanction were removed and if even the possibility of relying on the principle of reciprocity was denied, the article might operate in favour of a State which was willing to disregard its obligations under article 51.

10. Mr. HSU observed that Sir Gerald Fitzmaurice had placed the Commission in a dilemma. If its draft admitted the principle of reciprocity, the departure of members of consular staffs would undoubtedly be liable to delay; but if it omitted the principle, the receiving State might grasp the pretext to disregard its obligation. Since a choice had to be made, the Commission should omit all reference to the principle of reciprocity. The principle of reciprocity had been one of the means of the development of international law, but once the present stage had been reached, it was possible to pass over the principle in silence and let the absolute rule stand. If the receiving State ignored the rule, there would be many means of enforcing it, including refusal to allow members of the consular staff to depart.

11. Mr. FRANÇOIS said that Sir Gerald Fitzmaurice's point was well taken, but Mr. Hsu was right. The question of reciprocity was pertinent to almost all the provisions in the consular draft, and the whole draft would be adversely affected if the provisions were not executed by the receiving State until the sending State had done likewise. There had been instances where members of consular staffs had received all technical facilities for departure, but had been held up at the last moment because the receiving State had not been sure that the sending State had also fulfilled its obligation. The object of a provision expressly excluding the principle of reciprocity would be to ensure that the obligation was fulfilled promptly, if it was technically possible to do so.

12. Mr. ŽOUREK, Special Rapporteur, said that

the case mentioned by Mr. Sandström of women nationals of the receiving State who, though married to foreign consular officials, retained their nationality was rather marginal and exceptional. It would be difficult to provide for that case in the body of an article which was to form part of a multilateral convention.

13. The Drafting Committee should bear in mind the various drafting points raised, especially the possibility of inserting the phrase "at the earliest possible moment" as suggested by Mr. Sandström. Those words would, of course, become important mainly in cases of armed conflict; in other cases, on the contrary, the departing staff would undoubtedly prefer to have the necessary time and facilities for preparing their departure (paragraph 2).

14. With regard to the principle of reciprocity, he said that he had included references to it in certain draft articles on the assumption that many States would wish it to appear, since it was to be found even in bilateral consular conventions. Even though the Commission had decided in most cases to eliminate the reference, he still felt that many governments would wish to see it restored. In the particular case in question in article 51, however, experience indicated — and the Commission should realize — the fact that States would in any case apply the principle of reciprocity in case of armed conflict.

15. Mr. MATINE - DAFTARY observed that diplomatic and consular relations were in principle based on reciprocity, but it would be dangerous to say so expressly in article 51 in so far as it related to freedom of movement. Article 51 did not deal with the severance of consular relations, but with the termination of the functions of the consular mission. It would rarely happen that both States concerned would wish to terminate their consular missions at the same time.

16. Mr. SANDSTRÖM pointed out to the Special Rapporteur that the question of members of a consular official's family who were nationals of the State of residence was not simply marginal; it was humanitarian in essence and should therefore be expressly provided for.

17. Sir Gerald FITZMAURICE agreed with Mr. Sandström. He could not see why the Special Rapporteur thought that no provision covering the point could be placed in the body of the article. The Drafting Committee would certainly find no great difficulty in drafting a suitable provision.

18. Mr. AGO shared Mr. François' concern about the principle of reciprocity and agreed that the rule in article 51 should be made absolute. For that purpose, however, it would not, he thought, be necessary to insert a special clause excluding the principle of reciprocity. Such a clause might, in fact, be dangerous, since a State might by interpretation hold that all the other articles not containing a like clause were subject to the principle of reciprocity — an interpretation which

the Commission would surely reject. In any case, the obligation provided for in article 51 stood as an absolute one, whether a clause such as that suggested by Mr. François was inserted or not. A State might, of course, as a sanction against another State's breach of international law, refuse to fulfil the obligation, but that refusal would not affect the reality and the absolute character of the obligation.

19. The Commission, by amending the original draft of the Special Rapporteur, had decided that in article 49 the breaking-off of consular relations would not be mentioned as one of the causes of the termination of consular functions. The draft of article 51, however, provided for the special obligation already mentioned, only with regard to the case of a termination of consular functions. The question might arise whether the obligation subsisted in case of a breaking-off of consular relations. The Drafting Committee which had been given considerable latitude with regard to article 49, might well ponder that point in order to find a drafting of article 51 avoiding an interpretation which would not be admissible.

20. Mr. FRANÇOIS agreed with Mr. Ago. He had been shocked by the Special Rapporteur's statement that States would be certain to apply the principle of reciprocity. All members of the Commission agreed that reciprocity should be excluded from article 51, since it dealt, not with an exchange of consular officers, but with an obligation binding on every State to allow consular officers to leave its territory. It was to be hoped that the expression of that obligation would not be weakened by such statements as that made by the Special Rapporteur.

21. Mr. ŽOUREK, Special Rapporteur, replied that his remark had not in any way related to the theory, on which he entirely agreed with Mr. François and Mr. Ago. He had simply meant that he was doubtful whether the practice would change as a result of the acceptance of article 51, since if an aggressor State had violated the most important rules of international law, it would be unlikely to have many scruples about violating the principle stated in article 51 as well. In such cases, the only way in which the victim of the aggression could ensure compliance with the rule would be to apply the principle of reciprocity. Article 51 was, however, concerned in the first place with the termination of consular functions, and he quite agreed that in that case the obligation could not be made subject to reciprocity.

22. Mr. YOKOTA wished to explain a remark he had made at the previous meeting (547th meeting, paragraph 68). He had not meant to say that the receiving State was not under a duty to treat consular officials with respect, but merely that the point in time up to which they were entitled to such treatment was specified in an earlier provision (article 43, paragraph 2) and hence did not have to be specified again in article 51. He had no objection to the principle;

it was merely a matter of drafting with which he was concerned.

23. The CHAIRMAN proposed that draft article 51 be referred to the Drafting Committee. No objection had been raised to Mr. Sandström's suggestion that the article should cover all members of the families of consular officers, even if they were nationals of the State of residence. The objection raised at the 547th meeting by Mr. Yokota might now be regarded as having been disposed of. The Commission seemed to be agreed that it was undesirable to embody in the text of the article a provision excluding the principle of reciprocity, and that the absence of such a provision in no way weakened the absolute character of the obligation laid down in the article.

It was so agreed.

ARTICLE 52 (*Protection of premises, archives and interests*)

24. Mr. ŽOUREK, Special Rapporteur, explained that he had thought it essential to include in the consular draft an article concerning protection of premises, archives and interests in the circumstances described in the article, since a similar article (article 43) existed in the diplomatic draft.

25. The closing of a consulate by the sending State might be an act quite distinct from the severance of consular relations. The protection of premises, archives and interests was a rule established in international law and, as in the case of diplomatic missions, it subsisted even in the case of armed conflict. The inclusion of a reference to armed conflict had been discussed at length in connexion with the diplomatic draft; the Commission had concluded that the inclusion of such a reference would be of great practical value and that the draft convention's efficacy would be greatly impaired by its absence. The principle need not be debated again.

26. Three changes had been made in article 52 as compared with the text of diplomatic article 43; first, in the case of consulates the sending State might entrust custody to the consulates or diplomatic mission of another State; secondly, if a third State was entrusted with the protection of the interests of the sending State, such protection might be exercised either by consulates or by the diplomatic mission; thirdly, he had used the expression "d'un Etat tiers accepté par" ("of a third State accepted by") instead of the expression "d'un Etat tiers acceptable pour" ("of a third State acceptable to") in the French text, since a study of the practice of States which had represented the interests of foreign States after the severance of diplomatic and consular relations showed that in the vast majority of cases those States secured the consent of the State in whose territory they were asked to protect foreign interests (cf. A/CN.4/131, part III, article XII, commentary). That had been notably

so in the case of Switzerland, which had protected the interests of thirty-four States during the Second World War. The consent might be express or tacit. From a practical point of view it would not make much difference whichever wording was adopted. The phrase "acceptable pour" seemed to put the onus on the protector State, since a subjective factor was involved. If the receiving State took the view that the protector State was not acceptable, it could refuse to recognize it in that capacity.

27. Mr. YOKOTA observed that there appeared to be a mistake in the English version of article 52, which used the words "acceptable to".

28. The merits of the phrases "accepted by" and "acceptable to" had been discussed at considerable length in connexion with diplomatic article 43, and the Commission had concluded that the sending State was not obliged to approach the receiving State to ascertain whether the third State was acceptable or not. There was no good reason to treat the question of consulates differently from that of diplomatic missions in that respect.

29. Mr. FRANÇOIS concurred in Mr. Yokota's view. The ordinary practice was not to ask the opinion of the State of residence in advance. The practice of inquiring whether the protecting State would be acceptable might result in a great deal of delay which should be avoided.

30. It should be clear that sub-paragraph (a) did not preclude the receiving State from using the consular premises for other purposes during an armed conflict, provided that the archives remained inviolable. That question had been discussed during the drafting of diplomatic article 43. In the case of embassies or legations, the dignity of the State might be said to be at issue, but the same was not true of consular premises, especially as there was only one embassy or legation in a receiving State, but there might be many consulates (often in rented premises which the receiving State might not be able to leave empty and unused). The Special Rapporteur might add an observation in the commentary to the effect that it would not be a violation of the rule of international law if during the suspension of consular relations consular premises were used for other purposes, provided that the archives remained inviolable.

31. Mr. AGO drew attention, in the first place, to the need for a drafting change in sub-paragraph (b), so as to make the provision apply to "the said consulate", namely that referred to in sub-paragraph (a). Normally, the custody of all the consulates of the sending State would be entrusted to the consulates or diplomatic mission of the same protecting State.

32. As to the language used in sub-paragraphs (b) and (c), he recalled that the Commission had at its tenth session (465th meeting, paragraphs 30-55), discussed at considerable length the question of replacing the words "acceptable to"

(acceptable pour) by "accepted by" (accepté par), in the then article 36 of the diplomatic draft. The Commission had finally agreed to keep the words "acceptable to", chiefly with the aim of excluding the possibility of the provision being interpreted as meaning that the receiving State's prior consent, and possibly even its express consent, was necessary for the designation of the protecting State. In that particular respect, there appeared to be no difference between the position of consulates and that of diplomatic missions and the words "acceptable to" should therefore be used in the consular draft, as in the diplomatic draft.

33. With regard to the question of the custody of the premises, he pointed out the difference which usually existed between consulates and diplomatic missions. A diplomatic mission was normally housed in a single detached building which was often the property of the sending State and the provisions of article 43 (b) of the diplomatic draft were easy to apply to such premises. So far as consulates were concerned the position was altogether different: the sending State might have a large number of consulates, often housed in rented premises and sometimes situated in small localities. It would be difficult to require the receiving State to leave the premises in question unoccupied during the possibly long period of the cessation of consular relations, especially if there was a housing shortage. He suggested that the Drafting Committee should consider the formulation of a text which placed the emphasis on the protection of the archives.

34. Mr. ERIM said that the provisions of sub-paragraphs (a), (b) and (c) contemplated the situation arising from a complete breaking-off of consular relations. However, the introductory paragraph of article 52 referred also to the case where "a consulate is closed temporarily or permanently", in other words to a case in which consular relations as such were not necessarily broken off. Such a situation arose when, for example, a consulate was abolished on grounds of economy. The usual practice in those cases was to enlarge the consular district of the remaining consulate or consulates.

35. With regard to the duty of the receiving State under sub-paragraph (a) "to respect and protect the premises of the consulate, together with its property and archives", he said those provisions should be brought into line with the terms of article 25 on the inviolability of consular premises. Clearly, the inviolability enjoyed by consular premises and archives after the severance of consular relations could not be broader in scope than that set forth in article 25.

36. Lastly, he shared the preference expressed by several members for the use of the words "acceptable to" in sub-paragraphs (b) and (c). The choice of a protecting Power when relations were broken off was often a matter of extreme urgency. The sending State frequently did not have the time to consult the receiving State on

that point. The best solution was therefore for the sending State to choose the State to which it wished to entrust the protection of its interests and the custody of its consulates; if the receiving State subsequently rejected that choice another protecting Power would of course have to be sought.

37. Mr. SCELLE recalled that in the discussion at the tenth session he had stated (*ibid.*, paragraph 45) that he regarded the word "acceptable" in French as not at all suitable. The use of that term would make the provision meaningless in French: in the correct sense of the word, all States which were neutral in the dispute between the two States concerned were "acceptable", but the real issue was whether the State chosen by the sending State as protecting Power was going to be accepted by the receiving State. It was only after the receiving State's acceptance that protection became effective, and that State was sole judge of the acceptability of the proposed protecting Power. If it refused to accept the one chosen by the sending State, that choice would have no effect. Moreover, the receiving State was not required to give any reasons for its refusal to accept the choice in question.

38. That being so, the full meaning in French would only be conveyed by an expression such as "acceptable et accepté".

39. Mr. MATINE-DAFTARY, while recognizing the force of Mr. Scelle's arguments, said that every effort should be made to keep the language of article 52 as close as possible to that of the corresponding provision of the diplomatic draft, so as to avoid any possible misconstruction.

40. Sub-paragraphs (b) and (c) referred to the question of acceptability in identical terms in the context of two different situations. The acceptance of the receiving State did not appear to be so necessary for the purpose of entrusting, as provided in sub-paragraph (b), the custody of the premises and archives of a consulate to a third State. The choice of a State to be entrusted with the actual protection of the sending State's interests, under sub-paragraph (c) was quite a different matter; here, the need for the consent of the receiving State was understandable.

41. Mr. PAL recalled that, during the lengthy discussion at the Commission's tenth session on the proposal that the words "acceptable to" should be replaced by "accepted by", Mr. Ago (*ibid.*, paragraph 51) had suggested a third solution, involving the use of some such phrase as "unless the receiving State refuses". In the end, however, the Commission had adopted the relevant article of the diplomatic draft, with the words "acceptable to" in its sub-paragraphs (b) and (c), by fifteen votes to none with one abstention (*ibid.*, paragraph 58).

42. He considered that, although the words "acceptable to" might be stylistically inelegant, particularly in the French text, the Commission should not reopen the question and should main-

tain in article 52 the language it had adopted for the corresponding provision of the diplomatic draft.

43. With regard to Mr. Erim's remarks concerning the relationship between article 52 and article 25 of the consular draft, he pointed out that the terms of article 25, paragraph 3, stood in the same relation to article 52 as did article 20 of the diplomatic draft to the terms of article 43 (a) of that draft. Since the Commission was agreed on the substance of article 52 (a), he suggested that it should be left to the Drafting Committee to compare the language of that provision with the terms of article 25, paragraph 3, and of articles 43 (a) and 20 of the diplomatic draft and arrive at a satisfactory formulation.

44. Lastly, he suggested that the Commission should consider the advisability of including in the draft a provision stating the right of the consular officers of the sending State, in the event of the closure of all or any of its consulates, to take with them their archives and official papers. He drew attention to the reference to that right contained in the First Protocol to the 1952 Consular Convention between the United Kingdom and Sweden. That reference was not a mere bilateral clause but the expression of what the two contracting Parties regarded as "principle . . . applicable to consulates and consular officers under the general law of nations in the event of war or of the rupture of diplomatic relations".¹

45. Mr. ERIM reiterated the need to take into account the situation of extreme urgency which often arose when relations were broken. There had been cases during the Second World War when only a few hours had been available in which to find a consulate to which the keys of their premises could be entrusted by the consular officers of the sending State who were abruptly called upon to cease their functions. He therefore insisted on the need to formulate the provisions of article 52 in such a manner as not to make it necessary to obtain the consent of the receiving State for the purpose of entrusting the consular premises and archives to a third State in case of urgency. If the receiving State found the choice objectionable, it could later negotiate for a change in the protecting Power.

46. The CHAIRMAN, speaking as a member of the Commission, agreed with Mr. Scelle that the word "acceptable" was unsuitable. He thought that many of the difficulties to which article 52 had given rise were due to the fact that, like article 51, the article covered three different situations — *viz.*, armed conflict; severance of consular relations, whether or not in consequence of the severance of diplomatic relations; and temporary or permanent closure of a consulate in the absence of any conflict or rupture of consular relations.

47. Where a consulate was closed temporarily

¹ United Nations *Treaty Series*, vol. 202 (1954-1955), No. 2731, p. 204.

or permanently, the choice of a protecting Power would normally form the subject of negotiations at the time when the sending State notified the receiving State of its intention to close its consulate. That practice would not change, even if there was no express provision on the subject in the draft.

48. In the event of the breaking-off of consular relations, the practice was for the sending State to entrust the custody of its consulate to a third State of its choice; when that State notified the receiving State of its designation, the receiving State had an opportunity to object.

49. For those reasons, he thought that the whole article might be made clearer if the three cases to which he had referred were kept separate.

50. Mr. ŽOUREK, Special Rapporteur, referring to Mr. Pal's remarks, said that where a consulate was closed, the sending State had obviously the right to remove the archives and official papers of the consulate. Sometimes, however, it was difficult for the sending State to do so and occasionally, as in the case of a temporary closure, such a removal was unnecessary. It was therefore much more practical to entrust the archives to the consulate of a third State.

51. With regard to the question raised by Mr. François and Mr. Ago on the subject of the utilization of the consular premises after the closure of the consulate, he said that where the premises in question were the property of the sending State he saw no reason why those premises should not be protected by the receiving State in the same manner as those of a diplomatic mission in the case of severance of diplomatic relations. If the consulate concerned, on the other hand, occupied rented premises, the protecting Power would have the choice between continuing to pay the rent (in which case the premises would receive the same treatment as those of the consulate of the protecting Power) and giving up the lease and storing the property and archives of the sending State in a safe place.

52. In reply to Mr. Matine-Daftary he said that the receiving State might well, for political reasons, object to the choice of a particular State either as the Power entrusted with the protection of the sending State's interests or as the custodian of the premises of the consulate. Accordingly, the language of sub-paragraph (b) could hardly be very different from that of sub-paragraph (c).

53. With reference to Mr. Erim's earlier comments (see paragraph 35 above) he said that draft article 52 was certainly not meant to give the premises of a closed consulate an inviolability greater than that conferred by article 25 on a consulate which was functioning. He thought that the Drafting Committee would take the relationship between the two articles into account; an explanation would be given in the commentary.

54. Lastly, with regard to the question raised by Mr. Pal, he said that under article 59 of the consular draft, the provisions of article 52, or of any other article of the draft, were not intended to affect existing conventions.

55. Mr. PAL said that the passage he had quoted from the First Protocol of the 1952 Consular Convention between the United Kingdom and Sweden had been intended by the parties not as a clause in a bilateral treaty but as an expression of their opinion regarding the principles applicable to consulates under the general law of nations. He therefore urged the Special Rapporteur to mention in the draft the right of the sending State to remove the archives of a consulate which had been closed.

56. Mr. SCALLE said that nothing in the draft articles prevented the sending State from removing the archives in such a case. He suggested that the matter might be dealt with by inserting a comment to the effect that, wherever possible, the sending State could remove the archives if it so desired.

57. Mr. ERIM said the draft should cover the case where a consulate was closed by a sending State which continued to maintain a diplomatic mission, and possibly also other consulates, in the receiving State. It was not appropriate to use in article 52 the same terms as in article 43 of the diplomatic draft. If a diplomatic mission was recalled, even temporarily, diplomatic relations were severed or at least suspended. If a consulate was closed and diplomatic relations (possibly also consular relations) subsisted between the two States concerned, the sending State did not need to entrust the protection of its interests to a third State. Its own diplomatic mission and other consulates would remain to protect those interests.

58. Mr. BARTOŠ supported Mr. Pal's proposal for the inclusion of a provision concerning the right to remove the archives and said that the proposed provision should also refer to the restitution of archives. Many States, including Yugoslavia, had requested the return of archives which had been seized as enemy property during the Second World War and had met with a refusal. He suggested that the provision in question should contain a reference to the duty of the receiving State to hand over the archives, as far as possible, to the State concerned.

59. The point raised by Mr. Erim was also of considerable practical importance. He recalled that when the Netherlands had closed its consulates in Bulgaria, the consular archives had been transferred to the Netherlands diplomatic mission at Sofia. More recently, when a number of United Kingdom consulates had been closed for reasons of economy, nowhere had the right been disputed to transfer the consular archives to other United Kingdom consulates or to remove them to the United Kingdom.

60. He felt certain that, with regard to substance, the Special Rapporteur was in agreement with him and that only the drafting of suitable provisions remained to be settled.

61. Mr. MATINE-DAFTARY said that he was not fully satisfied by the Special Rapporteur's reply to his remark and could not agree that sub-

paragraph (c) could be supported by the same arguments as sub-paragraph (b). When diplomatic relations were broken off as the result of an armed conflict, urgent measures for the emergency protection of property and archives would often be required, while the protection of the interests of the sending State by the consulates or diplomatic mission of a third State was a more continuous operation. He hoped that the Special Rapporteur and the Drafting Committee would take those considerations into account.

62. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Erim, said that he had intended to refer in the commentary to cases where a sending State, after closing a consulate, still had a diplomatic mission or another consulate in the receiving State. In view of Mr. Erim's observations, however, he thought that a suitable phrase might be added to sub-paragraph (b) or (c) in the body of the article. It might be even better for the sake of clarity to separate the two cases of the severance of consular relations and the temporary or permanent closure of a consulate.

63. The CHAIRMAN thought that the Drafting Committee might take into account the remarks made in the course of debate concerning consulates which occupied rented premises and concerning the removal of archives. The Committee should also take into consideration the view of some members that article 52 should be brought more closely into line with article 43 of the diplomatic draft and that the provisions of article 52 should not confer a greater inviolability than article 25. Finally, the suggestion made by the Special Rapporteur to meet Mr. Erim's point should be taken into account. He suggested that article 52, with those comments, should be forwarded to the Drafting Committee.

It was so agreed.

ARTICLE 53 (*Non-discrimination*)

64. Mr. ŽOUREK, Special Rapporteur, introduced the following revised text for article 53:

"1. In the application of the present rules, the receiving State shall not discriminate as between States.

"2. However, discrimination shall not be regarded as taking place:

"(a) Where the receiving State applies one of the present rules restrictively because of a restrictive application of that rule to its consulate in the sending State;

"(b) Where the action of the receiving State consists in the grant, on the basis of reciprocity, of greater privileges and immunities than are required by the present rules."

65. His main reason for preparing the revised text was that references to the principle of reciprocity had been deleted from previous articles of the draft. He had therefore decided to adhere more closely to article 44 of the diplomatic draft, in accordance with the Commission's wish that

the consular draft should follow that text as far as possible. Nevertheless, he had some doubts about the wording. Paragraph 1 of course called for no comment, since it stated a universally-recognized rule of international law, but in paragraph 2, the principle of reciprocity was, so to speak, reintroduced through the back door. While it was obvious that a State granting greater privileges and immunities than those expressly provided for was entitled to require reciprocity, as was stated in paragraph 2 (b), the case described in paragraph 2 (a) might give rise to practical difficulties, since the reference to restrictive application restored in a different form the principle of reciprocity that had been deliberately eliminated from all the other articles of the draft. He suggested that the best course might be to delete paragraph 2 (a).

66. Mr. ERIM supported the Special Rapporteur's suggestion. The rules of the draft (when it became a multilateral convention) could not be applied restrictively; a State which did not apply the rules as laid down would be violating its obligations under the convention and the State which was the victim of such a violation might have recourse to reprisal or retortion. Paragraph 1 was useful and necessary, since it stated a general rule of international law. Paragraph 2 (b) also stated the general rule that a signatory State, while accepting certain rules which constituted a necessary minimum as between all the Parties, would be free to enter into bilateral agreements providing for more generous treatment as between the two Parties, so long as there was no discrimination vis-à-vis other signatories of the multilateral convention.

67. Mr. AGO agreed with Mr. Erim. Paragraph 2 (a) added nothing to the article and was dangerous in so far as it referred to "restrictive application": in many cases that might be a wrongful application. If, however, the Commission wished to retain the provision for the sake of conformity with the diplomatic draft, he would recommend the Special Rapporteur to provide a very clear explanation of the provision in the commentary. The only situation in which the possibility of restrictive application could be entertained was that where the signatory States had some latitude to choose between a liberal and a restrictive interpretation; but it was obvious that the Commission could not allow any restrictive application constituting a violation of the convention which it was drafting.

68. Mr. SANDSTRÖM agreed with Mr. Ago in principle, but pointed out that some of the provisions allowed the States applying the convention some latitude. For example, in the matter of exemption from customs duties paragraph 2 (a) might be applied.

69. Mr. VERDROSS considered that paragraph 2 (b) was already covered by the provision in article 59, paragraph 2, that acceptance of the articles of the convention should be no impedi-

ment to the conclusion in the future of bilateral conventions concerning consular intercourse and immunities. It seemed unnecessary to state that idea twice in the same draft.

70. Mr. TUNKIN agreed with Mr. Erim and Mr. Ago that paragraph 2 (a) was dangerous and out of place in a general multilateral convention. In reply to Mr. Sandström, he observed that in so far as a rule of the draft itself allowed some latitude, a State would be applying the rule correctly if it availed itself of that latitude; the question of a restrictive or liberal application did not arise in that case. On the other hand, if a particular rule were applied restrictively, the rule itself was changed. Inasmuch as it was the Commission's task to formulate definitive rules of international law, and as paragraph 2 (a) did not answer that description, he thought that provision should be omitted.

71. Mr. YOKOTA said he understood the preoccupations of previous speakers with paragraph 2 (a). Nevertheless, he agreed with Mr. Ago that it would be wise to retain in the consular draft a provision which had been adopted in the diplomatic draft, provided that it was stated with the utmost clarity in the commentary that the rule itself must be applied. Moreover, an adequate explanation of that point was already included in paragraph 3 of the commentary to article 44 of the diplomatic draft.

72. Sir Gerald FITZMAURICE said that, although he shared some of the doubts that had been expressed with regard to the article, and particularly with regard to paragraph 2 (a), he thought that omission of the provision might create some confusion, since a similar provision had been adopted in the diplomatic draft. The wisest course might be to postpone a decision on the article until after the conference on diplomatic intercourse and immunities, to be held in the spring of 1961, and then, if article 44 of the diplomatic draft was modified or even omitted by that conference, to take corresponding action with regard to article 53 of the consular draft.

73. Previous speakers had mentioned the relationship between the draft and bilateral agreements. He observed that, while there were virtually no bilateral agreements affecting diplomatic intercourse, the many existing consular conventions would continue in force after the draft under discussion had become a multilateral convention. Accordingly, because all bilateral treaties were based on reciprocity, there would be many concrete cases falling under paragraph 2 (b). It might be wise to add a paragraph 2 (c), stating that discrimination would not be regarded as taking place where greater privileges and immunities were given in consequence of a bilateral treaty. The Drafting Committee might decide, however, that such a provision should be included in the commentary, or that a reference to article 59, paragraph 2, should be inserted in the article.

74. Mr. LIANG, Secretary to the Commission, observed that the question that Mr. Erim and Mr. Ago had raised in connexion with paragraph 2 (a) had been thoroughly discussed at the tenth session in connexion with article 44 of the diplomatic draft. He had pointed out at the time (467th meeting, paragraph 19) that it was quite logical to argue that the question was not so much one of liberal or restrictive application of rules as of according liberal or strict treatment within the framework of the rules. If the matter were strictly one of application, no objections could be raised, for a State would have done everything within its power under the rules; on the other hand, if treatment within the framework of the rules was liberal or strict and differed among various sending States, there might be cause for objection and reprisal. Since the meaning of the provision seemed to be clear, he thought it would be invidious to use a different approach in the consular draft from that used in article 44 of the diplomatic draft. Accordingly, paragraph 2 (a) should be retained, but the attention of governments should be drawn to it and article 53 might be brought into line with article 44 of the diplomatic draft after the conference on diplomatic intercourse and immunities.

75. Mr. YASSEEN associated himself with the doubts expressed concerning paragraph 2 (a). The expression "restrictive application" was inappropriate, since each rule of law had its definite field of application. Nevertheless, the State applying a particular rule had a certain margin of discretion for liberal or strict application; if the Special Rapporteur had that margin in mind, the Drafting Committee should clarify the matter.

76. The principle in paragraph 2 (b) was perfectly admissible, since the draft would provide an irreducible minimum of privileges and immunities, which might be exceeded by virtue of bilateral agreements.

77. Mr. HSU considered that paragraph 2 (a) should be omitted. The provision could not well be defended and it was unfortunate that a similar clause had been adopted in the diplomatic draft. To admit its mistake, so far from doing the Commission's repute any harm, would add to its prestige, for the world would realize that the views of an international body, like those of an individual, could evolve.

78. Mr. MATINE-DAFTARY said that he had originally been in favour of deleting paragraph 2 (a), but that the debate had convinced him that the difficulty lay in the wording of the paragraph. The wording must be changed radically if the provision were to be retained. He suggested that paragraph 2 (a) should be amended to read: "In the case of the rules which allow a certain latitude to the receiving State, the scope of their application shall be based upon the principle of reciprocity."

79. With regard to paragraph 2 (b), he said that in some ways he preferred the Special Rapporteur's

teur's original text (A/CN.4/L.86) to the revised text. The original paragraph, in referring to "other relevant international agreements", had taken reciprocity into account and had at the same time ensured that other States concerned could not obtain the advantage of most-favoured-nation treatment. He suggested that the Special Rapporteur might consider restoring the reference to "other relevant international agreements".

80. Mr. TUNKIN thought that the Commission was agreed on the substance of the article. Clearly, the words "one of the present rules" in paragraph 2 (a) could only mean a rule that allowed a certain latitude; the Special Rapporteur's text might be improved to bring out that meaning. He thought that Mr. Matine-Daftary's suggestion concerning paragraph 2 (a) was sound, and that the Drafting Committee might be asked to prepare a final text and to explain in the commentary why the article differed from the corresponding provision of the diplomatic draft.

81. He still had some doubts, however, concerning paragraph 2 (b). In the first place, the reference to reciprocity might be unnecessary, for it was questionable whether the voluntary granting of greater privileges and immunities than those expressly required by the multilateral convention should be regarded as discriminatory. Secondly, he wondered whether the paragraph should be regarded as eliminating the application of the most-favoured-nation clause in the case of existing treaties containing such clauses. If State A granted State B greater privileges than did the convention and had a treaty containing a most-favoured-nation clause with State C, was State B to regard that situation as discriminatory?

82. Mr. ERIM could not agree with the course suggested by Sir Gerald Fitzmaurice and endorsed by the Secretary. The best way of drawing attention to the possible shortcomings of article 44 of the diplomatic draft was to improve the wording of article 53 of the consular draft and to explain in the commentary why the two texts differed. Since the consensus of the Commission seemed to be that the wording of paragraph 2 (a) was undesirable, it would be dangerous to leave it unamended. He also doubted whether the word "latitude", suggested by Mr. Matine-Daftary, was acceptable, since even if some latitude of application was recognized, governments were not free to use that margin for discriminatory purposes. If a State enacted a general law on customs duties which applied to all States equally, that was tantamount to imposing a restriction, and the question of discrimination arose only if that State interpreted its margin of discretion liberally vis-à-vis some States and restrictively vis-à-vis others. In any case, all members seemed to agree that paragraph 2 (a) must not give States the opportunity to restrict any rule *per se*. Accordingly, the article could be forwarded to the Drafting Committee, with the proviso that paragraph 2 (a) should be clarified if it were retained.

83. Mr. AMADO observed that the complex ques-

tion of the interpretation of the text of a treaty was once again before the Commission. Paragraph 2 (a) as now drafted amounted to a least-favoured-nation clause; since it was notoriously difficult to insert a most-favoured-nation clause in a multilateral treaty, it was obviously even more difficult to formulate such a treaty on the basis of a least-favoured-nation clause.

The meeting rose at 1.5 p.m.

549th MEETING

Monday, 30 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
(A/CN.4/L.86) (continued)

ARTICLE 53 (*Non discrimination*) (continued)

1. The CHAIRMAN invited the Commission to continue its discussion of article 53.

2. Mr. SANDSTRÖM drew attention to the explanation given in commentary 3 to article 44 of the diplomatic draft.

3. Since some of the articles in the consular draft allowed for a measure of discretion in their application by the receiving State, the provisions of article 53, paragraph 2, would be useful in that draft.

4. Mr. PAL said that he had reached the conclusion that the whole of paragraph 2 should be dropped. The paragraph had been suggested by the most favoured nation clause, which was resorted to in international relations in order to extend to other States the applicability of the terms of treaties. The use of such a clause helped to promote the stability and uniformity of commercial treaty law, and made it possible for a typical commercial treaty to play its part in establishing general legal certainty in the particular sphere with which it dealt. On the present occasion, however, the Commission was engaged in formulating rules of law which were intended to provide that very certainty where the subject under discussion was concerned. In so doing, it had not left much scope for the discretion of the receiving State. Some of the rules laid down in the draft were dependent on the consent of the receiving State; some others depended on the provisions of the municipal law of the receiving State; lastly, some of them were enabling provisions and merely stated that a certain course of action was open to the receiving State. As far as he could see, in none of

those cases would the provisions of paragraph 2 serve any purpose. None of the other articles contained any reference to the particular disadvantage against which the paragraph was designed to provide a remedy; hence, its retention in the draft would quite unnecessarily introduce a new disadvantage, in that it would obscure the meaning of the earlier provisions.

5. Mr. TUNKIN said that, on reflection, he tended to agree that it was not advisable to maintain paragraph 2 (a). The statement in paragraph 1 that, in the application of the rules laid down in the draft, the receiving State must not discriminate as between States, expressed quite fully the idea that the rules should not be applied differently to different States.

6. As to paragraph 2 (b) he did not think its provisions necessary. It was open at any time to the receiving State to grant greater privileges and immunities than those specified in the draft articles. Even in the absence of a provision like paragraph 2 (b), it could hardly be said that the granting of greater privileges and immunities than those required by the draft constituted a discriminatory application of the rules of the draft.

7. Lastly, he wished to know whether Sir Gerald Fitzmaurice maintained his suggestion for the addition of a paragraph 2 (c) stating that discrimination would not be regarded as taking place where greater privileges and immunities were given in consequence of a bilateral treaty. The question seemed to be covered by article 59, paragraph 2, and he therefore wished to have some clarification regarding the suggested addition.

8. Mr. YOKOTA recalled that at the previous meeting the great majority of members had agreed on the need to retain the provisions of paragraph 2 (b); it was only paragraph 2 (a) that had been criticized.

9. For his part, he thought that paragraph 2 (b) should definitely be retained. Where a receiving State granted, on the basis of reciprocity, greater privileges than those specified in the draft, it could not be expected to extend those additional privileges to all foreign consulates. For example, Japan exempted consulates from electricity, gas and water charges on a basis of reciprocity and naturally did not grant that exemption to the consulates of States which did not extend a similar privilege to Japanese consulates. It was essential to make it clear that a distinction of that type did not constitute an act of discrimination; the provisions of paragraph 2 (b) were therefore necessary.

10. He felt much less strongly about paragraph 2 (a), though he wished to point out that some of the articles of the draft were formulated in quite general terms, thus leaving room for differences in interpretation. For example, article 32 provided that the receiving State was bound to accord special protection to a foreign consul and was to take all reasonable steps to prevent any attack on his person or freedom. Such expressions as

“special protection” or “all reasonable steps” were open to a wide variety of interpretations. Another instance was article 43, paragraph 2, which provided that for “a reasonable period” pending his departure a consular officer’s privileges subsisted. If country A were to construe “a reasonable period” as meaning one week, country B two weeks, and country C one month, it would be proper for country X to give one week to the consul of country A, two weeks to that of country B and one month to that of country C to leave its territory.

11. For all those reasons, and because a provision similar to paragraph 2 existed in the diplomatic draft, he urged that the paragraph be maintained in the consular draft, at least for the time being, and that the article should be accompanied by a commentary along the lines of commentary 3 to article 44 of the diplomatic draft.

12. Mr. ŽOUREK, Special Rapporteur, said that in introducing article 53 he had expressed his doubts regarding paragraph 2 (a). He did not feel that there had emerged from the discussion any strong argument in favour of maintaining that provision. He did not think that the case mentioned by Mr. Yokota argued in favour of maintaining the provision; the “reasonable period” mentioned in article 43 must be taken to depend on the circumstances of each case; it would therefore be determined in the light of objective factors and not in accordance with the principle of reciprocity. It would seem dangerous to introduce an idea of reciprocity into the application of provisions of that kind.

13. Mr. SANDSTRÖM said that there was another case which perhaps brought out better the usefulness of paragraph 2 (a). Article 38 of the draft provided for some measure of exemption from customs duties, whereas it was clear from commentary 3 to article 34 of the diplomatic draft that the customs authorities of the receiving State would have considerable discretion in the application of the exemption from customs duty. The receiving State could very well make the customs treatment in question subject to reciprocity and it was necessary to preclude the interpretation that such action was discriminatory.

14. Sir Gerald FITZMAURICE said that, as he had pointed out at the previous meeting (548th meeting, paragraph 73), while there were virtually no bilateral agreements regarding diplomatic intercourse — which was governed by general international law — the position was quite different in the matter of consular intercourse. The latter rested very largely on bilateral conventions. Since those conventions were not uniform, differential treatment was very likely to result. It had been for that reason that he had suggested the possibility of adding a third sub-paragraph. However, the Drafting Committee should be asked to consider whether, in view of the terms of article 59, paragraph 2, a provision of the kind he had indicated was necessary in article 53.

15. With regard to paragraph 2 (a) of article 53,

he remained of the view that the provision in question should be retained because it could have some utility. There were many provisions in the consular draft which were capable of being applied in different ways without any breach of the article. For example, article 28 stated that the receiving State was required to "accord full facilities for the performance of the consular functions". That phrase might be very differently construed in different countries. For example, in the matter of customs privileges, it was a matter of common knowledge that some countries were more liberal than others.

16. For those reasons, he thought that, on the whole, paragraph 2 (a) should be retained, at least for the time being, particularly since there existed a corresponding provision in the diplomatic draft. He suggested that special attention should be drawn in the commentary to the fact that paragraph 2 had elicited a rather full discussion, in the course of which a number of members had expressed doubts as to whether paragraph 2 (a) should be retained but that, on the whole, it had been decided to retain it for the time being, inasmuch as a corresponding provision occurred in the diplomatic draft.

17. Mr. BARTOŠ said that he could not very well oppose an idea which sprang from the concept of the comity of nations and which was intended to ensure equality of treatment to all foreign consular officers. Nevertheless, since consular privileges and immunities were accorded not in consideration of the person of the consular officer but in consideration of his functions, it was difficult to see how such privileges and immunities as were necessary for the performance of consular functions could be subordinated to the condition of reciprocity. The Commission should give the matter very close consideration before it accepted the principle that the action of a State of withholding certain privileges and immunities from foreign consular officers would debar that State from claiming similar privileges for its consuls.

18. For his part, he favoured the doctrine known in contemporary international law as the doctrine of effective reciprocity, but with certain reservations. In the first place, there were certain cases in which humanitarian reasons prevented recourse to reprisals. In the second place, if a State had recognized a certain privilege as necessary to the exercise of consular functions, the act of withholding that privilege from the consular officers of States which did not grant a similar privilege to the consular officers of the receiving State would seem inconsistent with the duty of the sending State to accord full facilities for the performance of consular functions.

19. For those reasons, he wished to go on record as holding a separate opinion: he was neither for, nor against, the idea under discussion, and held that consular privileges and immunities could not, on grounds of non-reciprocity, be withheld in such a manner as to prevent a consular officer from effectively discharging his functions.

20. The CHAIRMAN said that there seemed to be general agreement that the receiving State should not discriminate in the application of the rules laid down in the draft. The question was what acts did not fall within the definition of discrimination. It appeared to be the opinion of the majority that article 53, paragraph 2 (a), should mean that the rules could not be applied restrictively and that a statement should be made in the commentary to the effect that any restriction must be within the strict limits allowed by the rule in question.

21. The Commission had to decide whether article 59 or an additional paragraph in article 53 on the lines suggested by Sir Gerald Fitzmaurice at the 548th meeting (*ibid.*) would cover the cases where a receiving State granted greater privileges than those specified in the present draft under a bilateral agreement.

22. Some thought would also have to be given to the cases, mentioned by Mr. Yokota and Mr. Sandström, where the rules seem to leave some latitude of action by the receiving State, and to Mr. Bartoš' view that that State must not on any account impede the exercise of consular functions.

23. He suggested that those three points should be referred to the Drafting Committee for consideration; later, the Commission could discuss whether to delete any part of paragraph 2. He did not believe there was a fundamental difference of opinion on principle but it was doubtful whether the text was sufficiently clear.

24. There had also been the suggestion that a statement be made in the commentary concerning paragraph 2 (a) on the lines of that contained in the commentary to article 44 of the diplomatic draft.

The Chairman's suggestions were approved.

Chapter II

PRIVILEGES AND IMMUNITIES OF HONORARY CONSULS AND OFFICIALS ASSIMILATED TO HONORARY CONSULS

ARTICLE 54 (*Honorary consuls*)

25. Mr. ŽOUREK, Special Rapporteur, introducing chapter II of his draft, explained that it was necessary within the framework of his whole scheme to devote a special chapter to honorary consuls and officials assimilated to honorary consuls, as distinct from career consuls. It was generally agreed that honorary consuls (and persons having like status), did not enjoy the same privileges as career consuls and it would be confusing not to deal with them in a separate chapter. Another reason for adopting that method was that certain States neither appointed nor accepted honorary consuls. A number of consular conventions stipulated that consuls must be career officials. The regulations concerning the diplomatic and consular missions of foreign States in the territory of the Union of Soviet Socialist Republics, promulgated in 1927, provided that consular

representatives to the Soviet Union must be citizens of the State which they represented.¹ Certain States, though prepared to accept honorary consuls, did not themselves appoint any. In view of the diversity of international practice, for purposes of reaching agreement, the whole subject had to be dealt with in a separate chapter so as to enable those countries which did not accept the practice of appointing or receiving honorary consuls to exclude that chapter when ratifying the draft.

26. At its eleventh session (523rd meeting, paragraph 9) the Commission had provisionally adopted the article on definitions, which had included a definition of the term "honorary consul". It must now reach a final decision regarding that definition. Once that had been done the substance of article 54 would be transposed to the definitions clause (article 1); it had merely been inserted in order to facilitate the discussion.

27. The institution of honorary consuls had originated several centuries before the common era and its main development dated from the twelfth century when the expansion of trade had necessitated the establishment of warehouses along the trade routes and when merchants had acquired the right to elect agents to look after their interests. It was interesting to note from the extremely diverse legislation on the subject that the term "honorary consul" was not often used and that category was usually designated by reference to certain criteria. Edouard Engelhardt, in his draft submitted to the Institute of International Law in 1896, listed five categories of honorary consuls: nationals of the sending State with exclusively consular functions; nationals engaged on other functions as well as consular, but not in commerce or industry; nationals of the sending State engaged in commerce and industry; nationals of the receiving State some engaged in commerce and industry and others not; and finally persons who were not nationals of either of the two States and who were not engaged in commerce in addition to their consular functions.

28. In seeking a uniform definition which it should be noted might affect other provisions in the draft, the Commission must review a wide number of differing criteria. For instance, according to Swiss legislation the decisive criterion was that honorary consuls did not receive remuneration; according to Finnish legislation, on the other hand, honorary consuls were distinguished from *consules missi* in that they were appointed locally, though they might receive remuneration. In certain legislations an honorary consul was one who in addition to his consular functions carried on another gainful occupation, while others such as that of Peru provided that an honorary consul could not be a national of the receiving State.

29. The decisive criterion, he thought, was that a consular official who was an established member of a consular service, who was in receipt of a regular salary, who was entitled to pension rights and who was subject to disciplinary action by the sending State must be regarded as a career consul. All other consular officials were honorary.

30. Perhaps the definition provisionally adopted at the eleventh session and set out in the present text of article 54 might, with some simplification, adequately cover the main criteria.

31. Lastly, he drew attention to the fact that, in certain legislations — though they were not numerous — career consuls were allowed to engage in commercial pursuits or other private activities of a gainful nature. A study of the consular conventions showed that such consuls, who were in an intermediate category, were always assimilated to honorary consuls in the matter of privileges and immunities.

32. Mr. VERDROSS thanked the Special Rapporteur for his lucid exposition of the subject, but considered that the definition contained in article 54 went too far. The two criteria — that an honorary consul did not receive a regular salary and that he was authorized to engage in commerce or other gainful occupation — could not be regarded as criteria valid in law, though they described what was normally the case. Surely wealthy persons exercising no profession or retired officials living on a pension could be appointed honorary consuls.

33. In his view the sole legal difference between career consuls and honorary consuls was that the former were established officials who formed part of their country's administrative service and the latter were not.

34. Mr. EDMONDS said that the term "honorary consul" was a familiar one in his country where they were nearly always United States citizens who, instead of a salary, received the fees they were authorized to charge for services rendered.

35. The words "is authorized" in article 54 might give rise to ambiguity: by whom was the authority to be given? In certain instances not only the sending but also the receiving State's authority was necessary to allow the honorary consul to carry on commercial or other gainful activities. Of course, the receiving State had the right to revoke its acceptance of any honorary consul who, having been authorized to engage in one occupation, turned to another or in some other way exceeded the rights granted to him by the receiving State. The authorization both of the sending and of the receiving State was necessary if an honorary consul was to engage in business activities, and in his opinion that should be made very clear in the draft.

36. Mr. FRANÇOIS said that chapter II was of special interest to countries like his own where honorary consuls accounted for about 30 per cent of the total consular strength. A small country like the Netherlands with a large merchant

¹ *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No. 58.V.3), p. 338, para. 9.

² *Annuaire de l'Institut de droit international*, vol. 15 (1896), p. 132.

fleet needed a consul in almost every large port, but there was not enough work to occupy the consul full-time, and accordingly honorary consuls were indispensable.

37. The Special Rapporteur had indicated that certain countries refused to accept honorary consuls: those were presumably mainly the people's democracies, but what alternative could they offer? The institution was far from obsolete and would always be needed so long as there were consular functions to perform.

38. There were many categories of honorary consuls. Formerly they had often been merchants but in modern times they were quite often persons not engaged in a gainful occupation or commerce. In his opinion the definition put forward in article 54 was inadequate. Many honorary consuls received a salary, for instance in the form of fees for services up to a given sum: the matter was merely a question of the mode of payment. Nor was the criterion of authority to engage in a gainful occupation decisive: some career consuls were so engaged and on the other hand there were honorary consuls who were not. Lastly, many honorary consuls were not appointed locally but came from the sending State.

39. The only decisive criterion was the answer to the question: had the person in question been designated as an honorary consul by the sending State?

40. Mr. BARTOŠ observed that the Special Rapporteur had expressed two somewhat contradictory conclusions. Though admitting that it was difficult to classify all the distinguishing characteristics of honorary consuls, he had included in article 54 certain qualifications which did not correspond to the practice of all States. For example, honorary consuls did not always engage in commerce or other gainful occupation in the receiving State. Those persons might be in public professions; thus, the Yugoslav Government had appointed university professors, notaries public, bank officials and even directors of hospitals as honorary consuls. Yugoslavia was not wealthy enough to have career consuls in every country and therefore considered the system of honorary consuls to be useful.

41. With regard to the receipt of a regular salary from the sending State, he pointed out that honorary consuls received the wherewithal to maintain their offices and were regularly reimbursed for expenses incurred in the course of their official duties; indeed, there were some honorary consuls who were in charge of consulates and through whom other consular officials attached to the staff were paid.

42. It was obvious that the practice varied from country to country, and that the whole subject of honorary consuls was governed more by municipal than by international law. He was therefore inclined to favour Mr. François' suggested criterion, since the main characteristic of honorary consuls was the fact that they were appointed by the sending State and accepted as such by the

receiving State. The question was largely one of the convenience of the sending State; the Special Rapporteur's enumeration was by no means exhaustive.

43. Sir Gerald FITZMAURICE doubted whether a separate chapter on honorary consuls was necessary. Perhaps the term "honorary consuls" was not a very happy one; what really mattered was that the person concerned was not a career consul. Three different points of view were possible. First, it might be decided that there was no need to distinguish between career consuls and other consuls. Secondly, if it were thought that a distinction should be made on the basis of authorization to engage in commerce or other gainful occupation, that distinction might be made in the relevant articles of the draft. Thirdly, it might be argued that a distinction was necessary where the consular official was a national of the receiving State. It was obvious that the second and the third distinction applied equally to career and non-career consuls, and it would be easier to make the distinction in the particular articles concerned.

44. Mr. AGO agreed with Sir Gerald Fitzmaurice. When drafting that section, the Special Rapporteur had thought mainly in terms of honorary consuls who were nationals of the receiving State and who were at the same time engaged in gainful occupations. Mr. François on the other hand had said that the Netherlands used the institution of honorary consuls extensively and that the persons concerned were mainly nationals of the sending State, who were officials, but not members of the consular service and in many instances were not engaged in other occupations. The question was whether such officials received different treatment from career consuls. If an honorary consul was a national of the receiving State, he obviously could not be treated on the same footing as a career consul who was not a national of that State, but the difference in treatment was accounted for by his nationality and not by his honorary status. Similarly, if an honorary consul engaged in commercial or other gainful activities in the receiving State, certain provisions of the draft, such as those of article 33, would not apply to him, but again the reason would be the fact of engaging in commerce, and not the person's status as an honorary consul. Accordingly, for the purposes of privileges and immunities, the two decisive criteria were nationality and the fact of engaging in commerce or other gainful occupation, and those criteria would best be stated in the context dealing with the specific privileges and immunities involved.

45. It had been said that some countries did not admit honorary consuls. In his opinion, however, if the receiving State in accordance with its own system, objected to the appointment of an honorary consul, it could base its objection solely on his nationality and his particular occupation, not on the fact that he was an honorary consul. All the necessary safeguards could there-

fore be applied without devoting a special chapter to honorary consuls.

46. Mr. YASSEEN observed that a number of States appointed and accepted honorary consuls and that the system could be justified by necessity. The difference between a career consul and an honorary consul did not lie in any difference in the nature of their functions, but in the extent of their powers and in the difference in the bond attaching them to the government of the sending State. Mr. Verdross had suggested that the definition of an honorary consul might be based on the notion of public functions—i.e. a career consul was a public servant, while an honorary consul was not. He would point out, however, that the notion of public functions belonged to municipal law and was liable to vary from one country to another. In some countries an official might not be paid a salary, while in others the law permitted him to engage in a gainful occupation. It was therefore a mistake to base the definition of an honorary consul on the notion of public functions prevailing in any given State. The best course would be to limit the definition to the formal criterion suggested by Mr. François, namely, that an honorary consul was a person designated as such by the sending State.

47. Mr. AMADO pointed out that all drafting bodies were constantly faced with the great difficulties of definition and with the great dangers of enumeration. The wide variety of activities carried on by persons who were appointed as honorary consuls added to the difficulty of both enumeration and definition. While he could not agree with Sir Gerald Fitzmaurice that the expression "honorary consuls" was not a happy one, he was inclined to share the general views expressed by that speaker and Mr. Ago. Nevertheless, an even better way of avoiding the difficulties might be to retain only article 56, on the legal status of honorary consuls, which seemed to provide the indispensable minimum. Despite recent developments, the institution still existed and was very important to some countries; accordingly, some mention of honorary consuls should be made in the draft.

48. Mr. MATINE-DAFTARY said that the institution of honorary consuls had been well known to his country under the capitulations system, but after that system had been abolished very few honorary consuls had been sent to Iran, which had decided not to appoint them abroad.

49. It was extremely hard to find a definition that would cover all the aspects of an honorary consul's status; in his opinion, such a definition fell largely within the administrative legislation of the sending State, and had little connexion with international law. The receiving State was affected only by the status of the person concerned as defined by the sending State, and he agreed with Mr. Amado that article 56 contained the necessary provisions. Nevertheless, if the Commission decided to retain some definition of the

expression "honorary consul", that definition should state simply that an honorary consul was a person appointed as such by the sending State and might be a national or a non-national of that State.

50. Mr. SANDSTRÖM agreed with previous speakers that the Commission would gain little by defining the expression "honorary consul", in view of the many different meanings attached to the expression in different countries. He pointed out, however, that in article 2 (6) of the Consular Convention between the United Kingdom and Sweden of 1952 it was stated that a consular officer might be a career officer (*consul missus*) or an honorary officer (*consul electus*). Furthermore, if he was not mistaken, the Convention distinguished between the functions and privileges and immunities of career officers and honorary officers in three cases: that of communications with the government of the sending State, in which case the honorary consul was deemed not to have the necessary training to exercise the right in question with discretion; that of exemption from detention pending trial, which was granted only to career consuls; and that of exemption from taxation, which was not extended to honorary consuls because they were not permanent employees of the sending State.

51. In his opinion, the Commission might either accept the Special Rapporteur's enumeration or state that honorary consuls enjoyed all the privileges and immunities provided for in the draft, with the exception of certain privileges yet to be listed.

52. Mr. TUNKIN expressed surprise at the ideas advanced by Sir Gerald Fitzmaurice and Mr. Ago. It could hardly be said that career and honorary consuls belonged to the same class of officers, since both the expression "career consul" and the expression "honorary consul" were defined in many consular conventions; and he had not heard any convincing arguments against making a distinction between the two classes. He endorsed Mr. Yasseen's view that the two classes were not distinguishable by reason of their functions alone. The Commission should examine the question of the legal status of honorary consuls and then decide whether the difference between the status of career consuls and that of honorary consuls justified the drafting of a separate chapter dealing with honorary consuls.

53. With regard to the definition of the expression "honorary consul", he agreed that it would be hard to work out a definition. However, Mr. François's and Mr. Matine-Daftary's ideas might provide a basis for a conclusion and the Commission might decide to define an honorary consul as a person appointed as such by the sending State and accepted as such by the receiving State.

The meeting rose at 6 p.m.

550th MEETING

Tuesday, 31 May 1960, at 9.30 a.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 54 (*Honorary consuls*) (continued)

1. The CHAIRMAN, observing that article 56 had been mentioned during the debate on article 54 (549th meeting, paragraphs 47 and 49), drew attention to the Special Rapporteur's new text for article 56, which read as follows:

"1. The provisions of section I of this draft, insofar as they concern consular relations, shall also, with the exception of article 17, apply to honorary consuls, save as otherwise provided in the present section.

"2. In the matter of privileges and immunities, honorary consuls shall enjoy the benefits provided for in articles 22, 23 (a), 28, 29, 30, 31, 34, 38 (a) and 43.

"3. The official correspondence, archives and documents of honorary consuls shall be inviolable and may not be the subject of any search or seizure, provided that they are kept separate from the private correspondence of the honorary consuls and from books or documents relating to their non-consular occupation.

"4. Honorary consuls may decline to give evidence before a judicial or administrative authority or to produce documents in their possession, should the evidence or production of documents relate to their consular functions. No coercive measures may be taken in such cases."

2. Mr. HSU observed that the two questions before the Commission were whether it should deal with honorary consuls in the draft and, if so, whether it should define the term "honorary consul". He felt that the answer to both questions should be in the affirmative.

3. Honorary consuls could not be regarded as exceptional; Mr. François had said (549th meeting, paragraph 36) that about 80 per cent of all Netherlands consuls were honorary, while he himself could claim without exaggeration that, in some foreign countries, all his country's consular officials were honorary. Of course, the activities of those consuls were controlled by the consular sections attached to the embassy, but the status, privileges and immunities of the personnel of those sections were covered by the diplomatic draft. Accordingly, omission of any reference to honorary consuls would represent a serious gap in the Commission's codification.

4. He also considered that a definition of the term "honorary consul" should be included. Honorary consuls fell into two main categories, those whose duty it was to protect the nationals of the sending State and those engaged in facilitating commerce. The Special Rapporteur's definition seemed to cover the first category only and in that limited sense would be acceptable with a few drafting changes, such as, perhaps the substitution of the word "free" for the word "authorized". Nevertheless, in view of the existence of two categories, the definition required some amplification. The Special Rapporteur's definition might be described as deductive, but that approach did not suit the Commission's purposes; the synthetic approach would be more appropriate. An honorary consul was a person who engaged in activities other than consular functions; the important point of any definition, therefore, was to make it clear that honorary consuls were part-time officials, who performed consular functions in addition to their own profession or, if they were retired persons, performed those functions in their spare time. The fact that an honorary consul did not receive regular pay need not, in his opinion, be a material factor in the definition. The Drafting Committee might find a satisfactory text on the basis of those considerations.

5. Mr. YOKOTA observed that the Commission's debate had not been confined strictly to article 54, but had related to the structure of the draft as a whole; he would therefore deal with those two matters separately.

6. With regard to the article, he thought it would be extremely difficult to formulate a definition of honorary consuls which covered all categories. It would therefore be wiser to provide no definition and simply to refer to honorary consuls in individual articles where their treatment must differ from that of career consuls.

7. With regard to the structure of the draft, he shared the doubts of previous speakers concerning the Special Rapporteur's treatment of honorary consuls in a separate chapter, which could be excluded from ratification under article 60. That method was based on two assumptions, first, that there was a wide difference between the functions, privileges and immunities of career consuls and honorary consuls and, secondly, that most States opposed the institution of honorary consuls. As regards the first assumption he did not believe that the difference between honorary and career consuls was as great as it seemed at first sight. In paragraph 1 of his new draft of article 56, the Special Rapporteur admitted that the provisions of section I applied to honorary consuls with the sole exception of article 17. In connexion with privileges and immunities, the Special Rapporteur had enumerated the articles which in his opinion applied equally to career and honorary consuls, but he (Mr. Yokota) considered that the list was by no means exhaustive and that many other articles also applied to honorary consuls, either wholly or in part. Accordingly, the difference between

the two classes of consul was not great and there was no need to deal with them separately.

8. Nor could he agree with the second assumption that most States in principle opposed the institution of honorary consuls. On the contrary, a great majority of countries appointed and received such consuls. Even if certain States did raise such objections, that was not a sound reason for placing the provision in a separate chapter, subject to separate ratification. A State which opposed the system had only to refrain from appointing or receiving honorary consuls; the fact that the draft contained provisions relating to those officials did not constitute an obligation for the parties to appoint or receive them. The case was analogous to that of consular agents, who were not appointed or accepted under the municipal law of certain countries; but those States were not prevented thereby from acceding to conventions containing provisions on consular agents.

9. His objection to the Special Rapporteur's structure was based on method rather than on principle: he would not be against including honorary consuls in a separate chapter if article 60, under which States might refrain from ratification, were not adopted.

10. Mr. PAL said that the debate had shown the impossibility of passing over the institution of honorary consuls, an institution which was generally recognized. The entire approach would be unrealistic if, despite past and present practice, no provision was made to cover it. The question, however, was how to deal with that institution and in what place to insert the necessary provisions. A decision could be taken only after considering whether and, if so, for what reasons the functions, powers, responsibilities, privileges and immunities of honorary consuls differed from those of career consuls. If it was found that there was no substantial difference, the Commission could follow the example of the Anglo-Swedish Convention of 1952 and limit itself to stating in the article on definitions that both honorary and career consuls existed. Should it be found, however, that differences were substantial, then a mere mention in the article on definitions would hardly be sufficient. If the definition was to be precise and to meet the purpose, it was essential that it should bring out what the differences were and to what they were due. It was only then that it would be possible to judge whether honorary consuls should receive the different treatment that was proposed in the draft. The question whether honorary consuls should form the subject of a separate section in the draft or whether attention should be drawn to their different status—if such existed—where the subject-matter of the articles already dealt with was concerned, was not of much consequence. The main point was to ascertain to what extent the two institutions resembled one another and to what extent they differed. The Commission should therefore first examine wherein and on what grounds the incidents of honorary consuls differed from those of career consuls.

11. Mr. SCALLE pointed out that, from the strictly legal point of view, countries employed both career officials and contractual officials. The status of career officials existed independently of their own will and was entirely governed by law; statutory officials could change none of the conditions of their service. But all countries also had contractual officials, whose legal status was regulated by contract: that was the case with honorary consuls. In the international sphere, their status could be determined not by the transformation of municipal into international law, as provided in the draft, but by bilateral agreement, since some States admitted and appointed honorary consuls and others did not. The general definition, therefore, should not be based solely on the difference between statutory and contractual status.

12. Another question before the Commission was whether a separate chapter should be devoted to honorary consuls. He was rather against a separate chapter and could not agree with the Special Rapporteur that reservations might be permitted for each country. That procedure seemed unnecessary in such a short draft, particularly since reservations could be made in a multilateral consular convention.

13. The main point to be considered was the functions performed by the officials concerned; those functions were exactly the same in principle, and the only difference arose from the manner of appointment. The principal function performed by both career and honorary consuls was to protect nationals of the sending State; cases where an honorary or a career consul was the national of the receiving State was fully covered by article 42. It seemed obvious that a consul's functions were always consular, and the privileges and immunities enjoyed should therefore be the same for career and honorary consuls, except where otherwise provided in consular conventions.

14. Mr. TUNKIN considered that in practice there was a clear distinction between the institutions of career consuls and of honorary consuls, particularly where their legal status was concerned. Accordingly, it was only logical to deal with the two institutions separately in the draft.

15. He doubted whether the majority of the articles already accepted applied wholly or in part to honorary consuls as well as to career consuls. For example, article 17 (*Grant of diplomatic status to consuls*) could scarcely apply to honorary consuls; with regard to article 23 (*Use of the national flag*), it was doubtful whether a part-time consul should be allowed to fly the flag of the sending State on all means of transport used in the exercise of his functions as provided in sub-paragraph (b); it was also doubtful whether honorary consuls should enjoy such wide privileges as those set forth under article 29 (*Freedom of communication*); and the same doubts extended to article 33 (*Personal inviolability*), article 37 (*Exemption from taxation*), article 38 (*Exemption from customs duties*), article 39 (*Exemption from*

personal services), article 40 (*Attendance as witnesses in courts of law and before the administrative authorities*) and article 41 (*Acquisition of nationality*). Moreover, most consular conventions contained certain restrictions with regard to the privileges and immunities of honorary consuls.

16. He could not agree with the view that the difference was based only on nationality and the fact of engaging in commerce or other gainful occupation; in his opinion, the difference was one of status and he endorsed Mr. Pal's view that only after differences of legal status had been examined could the Commission agree on the best structure for the draft. If it were found that those differences were considerable, it would be better to deal with honorary consuls separately.

17. He was not concerned with the position of his country in the matter, agreeing as he did with Mr. Yokota that any State which did not appoint or receive honorary consuls could continue in that policy. Accordingly, his approach to the whole question was purely scientific.

18. With regard to defining the term "honorary consul", all definitions were dangerous and it was difficult, in a Commission of twenty-one members, to agree even on the most elementary definition. Nevertheless, it had often been found useful to accept a formal and general definition for practical purposes.

19. Sir Gerald FITZMAURICE considered that the articles cited by Mr. Tunkin were applicable to honorary consuls, provided they were not nationals of the receiving State and were not engaged in commerce or other gainful occupation. In many cases, honorary consuls were nationals of the receiving State or were engaged in gainful occupations, but the consequent difference in treatment was based exclusively on grounds of such nationality or occupation. Moreover, those conditions did not apply to a number of honorary consuls. For example, in places where there were large permanent residential foreign communities, consisting of retired nationals of the sending State not engaged in commerce, the status of a person asked to act as an honorary consul would be a matter between him and his own government, and his position vis-à-vis the government of the receiving State was exactly the same as that of a career consul.

20. The definition in article 2 (6) of the Consular Convention between the United Kingdom and Sweden of 1952 described a career officer as a *consul missus* and an honorary officer as a *consul electus*—i.e., one who was engaged on the spot. He did not believe that distinction to be fully satisfactory, since a government might send a national of its country to act as consul on an honorary basis. In his opinion, the only fundamental legal difference between the two categories was that one comprised career consuls and the other did not. There was no other basis for distinction, since the factors of nationality of the receiving State and of engaging in commerce or other gain-

ful occupation might theoretically apply to career consuls as well as to honorary consuls.

21. He agreed that some reference to honorary consuls must be made in the draft, but doubted whether a separate chapter should be devoted to them. If the Special Rapporteur's reason for drafting such a chapter was to make it subject to separate ratification, he felt obliged to object to that method. If a State ratified the remainder of the Convention but failed to ratify the chapter on honorary consuls, the official correspondence, archives and documents of consular posts headed by honorary consuls would not be inviolable though having the status of State archives, and such a situation would be absolutely inadmissible. If, however, the Commission decided to eliminate article 60, his objection would of course disappear.

22. Examining the Special Rapporteur's new text of article 56 from that point of view, he said he was in general agreement with Mr. Yokota, but would be prepared to go even further. Where paragraph 1 was concerned, there seemed to be no reason for excepting article 17 (*Grant of diplomatic status to consuls*) since the provision was in any case subject to the consent of the receiving State, which might agree to allow an honorary consul to discharge diplomatic functions.

23. The list of articles applicable to honorary consuls in paragraph 2 of the new text of article 56 (see paragraph 1 above) seemed to him restrictive, since other articles of the draft were equally applicable to such officials. For example, there seemed to be no reason why, under article 23 (*b*) (*Use of the national flag*), an honorary consul should not be entitled to fly the flag of the sending State on all means of transport used by him in the exercise of his functions. With regard to article 24 (*Accommodation*) the right to procure the necessary premises for a consulate was a right of the sending State, and not of the individual consul; it could not be assumed that an honorary consul always had suitable premises of his own. Freedom of communication (article 29) was just as necessary for an honorary consul as for a career consul. If the honorary consul was a national of the receiving State, he would already be excluded from benefits under article 35 (*Exemption from obligations in the matter of registration of aliens and residence permits*), but if he were a national of the sending State, he should be treated on the same footing as a career consul. The same applied to article 36 (*Exemption from social security legislation*).

24. In his opinion, paragraph 3 was quite unnecessary, since it was already provided earlier in the draft that all consular archives were inviolable. Its only useful provision was that the honorary consul should keep his private correspondence and documents relating to his non-consular occupation separate from official consular correspondence, archives and documents. That could be provided for elsewhere.

25. Finally, he failed to see any reason for the special regime for honorary consuls in paragraph

4, since under article 40, paragraph 1, all consuls, whether honorary or not, were liable to attend as witnesses, although certain facilities were extended to them under other paragraphs of that article. It was unnecessary to repeat the provision in respect of honorary consuls, who performed the same functions as career consuls.

26. In conclusion, he thought that article 1 might contain a definition of a consular official which would cover honorary consuls, along the lines of the definition in the Consular Convention between the United Kingdom and Sweden of 1952. In the last analysis, however, the difference between career and honorary consuls lay in the fact that honorary consuls were not career officers. The Commission could then consider whether it was really necessary to provide for the distinction in any individual article. For his part, he thought that there would be few, if any, such cases.

27. Mr. ŽOUREK, Special Rapporteur, speaking on a point of order, pointed out that the Commission had not yet considered article 60, which provided for the possibility of excluding from ratification the chapter on honorary consuls. The Commission could not prejudge article 60, and he urged that the discussion be confined to article 54, on the definition of honorary consuls. When the Commission had dealt with that article, it could proceed to deal in turn with article 55 (*Powers of honorary consuls*) and article 56 (*Legal status of honorary consuls*).

28. Mr. MATINE-DAFTARY said that, for his part, he had no objection to considering article 56. The Commission had now discussed at some length the contents of that article and a decision on its provisions might assist it in finding a definition for honorary consuls.

29. Mr. AGO said that the discussion had shown how impracticable it would be to consider article 56 without prior agreement on the notion of honorary consuls, a matter on which there was clearly no unanimity. The Special Rapporteur, on the one hand, regarded it as an essential characteristic of honorary consuls that they could be nationals of the receiving State or engaged in commerce or other gainful occupation and consequently subject to a series of exceptions in regard to consular privileges and immunities. Mr. Scelle, on the other hand, thought that the only difference between an honorary consul and a career consul lay in the nature of his legal ties with the sending State. A career consular officer had a permanent relationship with the sending State, a relationship governed by the law of that State; an honorary consul's relationship with the sending State was contingent and based on contract. That, in his opinion, was the proper way of expressing the difference between the two categories.

30. There were, of course, many instances of consular privileges or immunities not applying to a consular officer who was a national of the

receiving State, or was engaged in commerce or other gainful occupation in that State; such exceptions, however, were not peculiar to honorary consuls. A career consul, if a national of the receiving State, or engaged in commerce or other gainful occupation therein, would be in the same position and would not be entitled to claim the privileges and immunities in question.

31. The CHAIRMAN said that he did not believe that the Commission's difficulties would be solved by considering article 56 before article 54, which might involve duplicating its discussion of certain points of substance.

32. There appeared to be general agreement on one important point, that consular functions could be performed by either career consuls or honorary consuls.

33. It had been suggested during the discussion that certain restrictions on consular privileges and immunities arose not out of the title given to a consul by the sending State but out of the nationality of the consul or the fact that he was engaged in commerce or other gainful occupation in the receiving State. If the commission would take a decision on that point, its task might be easier.

34. Mr. PAL said that, after hearing Mr. Tunkin and Sir Gerald Fitzmaurice, the course to be followed had seemed clear, but since it had been suggested that agreement on a definition was essential before proceeding with the discussion, the Commission seemed in danger of getting caught in a vicious circle. Personally, he did not think that the mere title "honorary" justified any difference in treatment; any difference in that respect usually arose from other causes, such as the nationality or the extraneous activities of the person concerned.

35. He therefore urged the Commission to take no decision at that stage on article 54 and to follow its usual method by not taking a decision on the question of a definition until the other relevant articles had been adopted. That method had been followed in regard to article 1, on definitions. The Commission should now examine articles 55 *et seq.* and determine what were the distinctive features of honorary consuls. When those distinctive features had been determined, then only could a definition of honorary consuls be formulated. It might even be found that there were no such distinctive features.

36. Mr. ŽOUREK, Special Rapporteur, said that the Commission had to agree on the meaning of the term "honorary consul" before it could discuss articles 55 *et seq.* In referring to the definition given in article 54, some members of the Commission had described it as being his. In fact, however, the present draft of article 54 differed considerably from the text proposed by him in his first report; it was the work of the Drafting Committee and had been provisionally adopted by the Commission at its eleventh session.

37. Like Mr. Verdross, he considered that the distinctive feature of honorary consuls was the

fact that they were not members of the regular civil service (*cadre régulier*) of the sending State. In that connexion, he could not accept the objections which had been made to the words in article 54 "who does not receive any regular salary from the sending State". Some members had referred to the fact that an honorary consul might receive an allowance for his office expenses or be allowed to retain part of the consular fees collected by him. That made no difference to the situation: the term "traitement" was a technical term used to designate the emoluments of a public servant; it was one of the basic criteria of their membership of the civil service of their country.

38. With regard to Sir Gerald Fitzmaurice's remarks that many of the differences in treatment which had been noted arose out of the fact that the consul concerned was a national of the receiving State, or was engaged in commerce or other gainful occupation in that State, he said that those two criteria, whether separately or combined, were precisely those adopted in many consular conventions for the purpose of defining honorary consuls. Carried to its logical conclusion, the objection thus made could lead to the dropping of all distinction between honorary consuls and career consuls; but such a conclusion would be contrary not only to doctrine but to general State practice.

39. It had been suggested that the question whether a consul was a career officer or not was a matter which only concerned his relations with the sending State. That was a suggestion which could not be accepted and it was at variance with State practice; the fact that an honorary consul was not a career civil servant of the sending State and that he was engaged, or could engage, in a gainful occupation concerned also the receiving State. Under a great many consular conventions, numerous consular privileges and immunities were withheld from honorary consuls, even when they were nationals of the sending State and were not engaged in any gainful occupation; the reason was that such a person could, if he wished, engage in other activities than the exercise of his duties as an honorary consul.

40. He believed it was possible to find an adequate definition of honorary consuls but felt that it could not be sought in the distinction drawn by Mr. Scelle between persons having a contractual, and those having a statutory relationship with the sending State. Members of the career consular staff often included locally engaged employees who served on a contractual basis.

41. In view of the diversity of existing State practice, and considering that the draft was only provisional, he urged the Commission to adopt Mr. François' definition of an honorary consul as a person designated as such by the sending State and accepted as such by the receiving State. Such a definition would not be purely formal, because it would make it clear that the decision to appoint an honorary consul rested with the sending State, while the decision to grant him recognition rested with the receiving State. The adoption of a definition along those lines would enable the Commission

to proceed with its discussion of articles 55 *et seq.* The actual arrangement of the articles was of secondary importance.

42. Mr. VERDROSS said he supported Mr. François' definition of an honorary consul as a person designated as such by the sending State and recognized as such by the receiving State. Only a formal definition of that type, which referred back the question to the municipal law of the sending State, would embrace all existing practice.

43. The question of the legal consequences of that definition was a different matter. In his opinion, honorary consuls had the same rights and duties as career consuls and, so far as their official acts were concerned, enjoyed the same privileges, except where otherwise provided by a consular convention or by a special agreement between the sending State and the receiving State.

44. The CHAIRMAN said that the idea contained in the suggestion by Mr. François could be expressed by omitting article 54 from the draft and considering that the matter had been dealt with in article 1 (*f*). The definition of the term "consul" in that sub-paragraph contained the two elements of the definition suggested by Mr. François—i.e., the appointment by the sending State and the acceptance by the receiving State.

45. Accordingly, he suggested that the Commission consider dropping article 54 and deleting from article 1 (*f*) (*ii*) the words "if he does not receive any regular salary from the sending State and is authorized to engage in commerce or other gainful occupation in the receiving State".

46. Mr. EDMONDS proposed that the term "honorary consul" be added in the third line of article 1 (*f*), so that the passage would then read: "consul-general, consul, vice-consul, consular agent or honorary consul."

47. He further proposed the deletion of the whole of the second part of article 1 (*f*). Such an amendment would reflect the views of the majority of the Commission by deleting all reference to the criteria of the non-receipt of a salary and the exercise of professional activities other than those arising from the consular function.

48. Mr. ŽOUREK, Special Rapporteur, supported the Chairman's suggestion.

49. Mr. Edmonds's proposal would create a new class of consuls. The question whether honorary consuls constituted a separate class of consuls had been already discussed at length in connexion with article 1 and the Commission had arrived at the conclusion that they constituted a category and not a class of consuls. There could be four classes of honorary consuls: honorary consuls-general, honorary consuls, honorary vice-consuls and honorary consular agents. It would be difficult for the Commission to go back on its decision on that point without altering the structure of the whole draft.

50. Mr. AMADO said that the discussion had shown that widely different conceptions were held

by members of the Commission regarding honorary consuls. He himself had always considered the matter of honorary consuls as pertaining to the comity of nations and he had been somewhat surprised to hear it suggested, for example, that the receiving State might have a duty to provide accommodation for such consuls. It had also become clear from the discussion that honorary consuls were more important to such countries as the Netherlands than they were to others like Brazil.

51. For those reasons, it would be very difficult to formulate a generally acceptable definition of honorary consuls, and he suggested that the simplest course would be to delete from article 1 (f) the definitions of the terms "career consul" and "honorary consul" respectively, and to abridge correspondingly the second part of that provision to read: "A consul may be a career consul or an honorary consul".

52. The CHAIRMAN said that it would be difficult to accept in its actual form the proposal submitted by Mr. Edmonds. In the first place, the Commission had not yet adopted the final text of article 1 and could not therefore adopt a proposal relating to the actual wording of that article. In the second place, the addition of the term "honorary consul" in the first part of article 1 (f), combined with the proposed deletion of the second part would mean that there could only be honorary consuls, but no honorary consuls-general, vice-consuls or consular agents.

53. The idea contained in the proposal by Mr. Edmonds, however, could be expressed without deleting the whole of the second part of article 1 (f). If the Commission agreed, the matter could be referred to the Drafting Committee with the guidance that, in article 1 (f), honorary consuls would be characterised only by the fact that they were appointed as such by the sending State and accepted as such by the receiving State. That result could be achieved by deleting the descriptive passages from the second part of article 1 (f) and leaving only the sentence: "A consul may be a career consul or an honorary consul".

54. There also appeared to be general agreement that the two criteria laid down in article 54 were not related to characteristic features of honorary consuls. Accordingly, if there were no objection, he would consider that the Commission agreed to drop article 54 and to instruct the Drafting Committee to word article 1 (f) as he had suggested.

It was so agreed.

ARTICLE 55 (*Powers of honorary consuls*)

55. Mr. ŽOUREK, Special Rapporteur, introducing article 55, said that generally speaking honorary consuls did not exercise such wide functions as career consuls. Matters with which honorary consuls were not empowered to deal included legal questions, the issue of passports and nationality problems. The limited powers of honorary consuls were determined by the sending State in accordance with international law, and

the definition of consular functions contained in article 4 ensured that those powers could not conflict with the municipal law of the receiving State. The receiving State, which was under an obligation to guarantee to honorary consuls certain privileges and immunities, must know what the powers of honorary consuls were in order to be able to pass on the information to its own nationals and local authorities. Hence the practical importance of the provision contained in paragraph 2.

56. Paragraph 1 of article 55 reflected present practice, while paragraph 2 met the needs of both the sending and the receiving State: he hoped therefore that both would be acceptable.

57. Mr. FRANÇOIS proposed the deletion of article 55 which was wholly superfluous. The requirement contained in paragraph 1 was entirely an internal matter for the sending State and that contained in paragraph 2 did not appear to accord with practice and would impose a quite unnecessary burden on the sending State. If the authorities or nationals of the receiving State needed information about the powers of a particular honorary consul they could address their enquiries to his office direct.

58. The CHAIRMAN, speaking as a member of the Commission, suggested that article 55 should be examined in the light of the provisions contained in article 4. The only new element introduced in article 55 was the requirement contained in paragraph 2.

59. Mr. VERDROSS observed that paragraph 1 did not indicate what were the rules of international law according to which the powers of honorary consuls should be determined. He therefore suggested that the words "and recognized by the receiving State" be substituted for the words "in accordance with international law" in that paragraph. That amendment would render paragraph 2 unnecessary.

60. Sir Gerald FITZMAURICE supported Mr. François's proposal for the deletion of article 55, the essence of which was already covered in article 4. The Commission had already defined the term "consul" to include honorary as well as career consuls and therefore, in the absence of any express provision to the contrary, every article in the draft applied to both. If honorary consuls were accepted by the receiving State, there was no reason why they should not exercise all the functions specified in article 4. He was unable to see why the receiving State should wish to know exactly what powers had been conferred on its honorary consuls by the sending State. Career consuls equally, at certain posts, might not be authorized to exercise all the functions covered by article 4, and he had never encountered a case where the receiving State had been informed of such a limitation. Similarly there was no case for the requirement contained in article 55, paragraph 2, where honorary consuls were concerned.

61. Mr. BARTOŠ considered that in normal circumstances the functions exercised by career and honorary consuls were the same. Any limitation in regard to the latter was usually determined in advance by the sending State in the letter of appointment or contract. Certain restrictions on the functions of honorary consuls had been laid down in some consular conventions, but that was exceptional. Accordingly he saw no objection to deleting article 55 altogether or adopting a text on the same lines as article 4.
62. If honorary consuls were included in the definition contained in article 1 there was no need for the special provision proposed in article 55, paragraph 2. So far as he was aware the Yugoslav Government had never been informed by a sending State that the functions of a particular honorary consul were limited. It was true that certain sending States were averse to authorizing their honorary consuls to issue visas, but that was a purely internal matter, as was the manner in which authority was delegated to them. Thus the requirement laid down in paragraph 2, though sometimes included in some conventions, did not reflect universal practice and need not be imposed on all States in the form of a general rule. Moreover, it could cause some embarrassment to those honorary consuls who were purely ceremonial figureheads.
63. Mr. ŽOUREK, Special Rapporteur, said in reply to those members of the Commission who had questioned the need for article 55, that in the vast majority of cases honorary consuls now exercised limited functions. In view of that practice, therefore, the argument that the powers of honorary consuls were already covered in article 4 could not be sustained, nor could he agree that it was unnecessary for the receiving State to be informed of what those powers were. If that were not done, local authorities might be involved in protracted and possibly fruitless correspondence. The requirement laid down in paragraph 2 might mean some extra work for officials of the sending State, but that was surely of minor importance in the light of the advantages which it could bring both to the sending State and the receiving State. The task of the Commission was not only to codify, but also to frame rules of international law that might help to smooth relations between States. Since information about the functions of an honorary consul would be purely official and would not be made public, no embarrassment of the kind mentioned by Mr. Bartoš would result.
64. He was prepared to accept Mr. Verdross's amendment which would render paragraph 2 unnecessary.
65. The CHAIRMAN, speaking as a member of the Commission, pointed out that article 55, paragraph 1, as amended by Mr. Verdross would stipulate first that the powers of an honorary consul were determined by the sending State, which had already been done in article 4, and secondly that those powers should be recognized by the receiving State, which again had already been laid down in article 4 and article 1 (f). Surely the main concern of the receiving State was to ensure that an honorary consul did not exercise functions which violated its legislation, and that point was fully met in article 4.
66. He also had misgivings about article 55, paragraph 2, which seemed to imply the possibility of honorary consuls exceeding their powers; that was an undesirable assumption.
67. For those reasons he neither favoured paragraph 1 as amended nor paragraph 2.
68. Mr. AMADO agreed with Mr. Padilla Nervo. Article 4 fully covered all the requirements which the Special Rapporteur had had in mind when drafting article 55. Article 55 made no positive contribution either to codification or to the constructive development of international law and he therefore supported Mr. François's proposal for its deletion.
69. Mr. VERDROSS said that he had no objection to the deletion of article 55 if its substance was covered in other articles of the draft, but it seemed to him to be doubtful whether that was in fact the case.
70. Mr. TUNKIN suggested that there was some misunderstanding about the purport of article 4 which enumerated the principal functions ordinarily exercised by consuls. Clearly the Special Rapporteur had thought it necessary to insert article 55 because, as practice indicated, only some of those functions were exercised by honorary consuls. The article therefore filled a real need and he agreed with the view that the receiving State must know what functions an honorary consul was authorized to exercise.
71. Mr. AGO did not consider that Mr. Tunkin need fear the consequences of deleting article 55. Though the principal functions ordinarily exercised by consuls were listed in article 4, they could at any time be limited by the sending State both for career and honorary consuls.
72. There was some danger that honorary consuls would not be in a position to carry out their duties properly if the requirement laid down in article 55, paragraph 2, were rigidly imposed. He therefore favoured Mr. François's proposal.
73. Mr. ŽOUREK, Special Rapporteur, said that Mr. Tunkin had brought out the real question at issue. In his own opinion article 55 must be retained, though perhaps in a different form, above all in order to take into account the fact that in general honorary consuls exercised limited functions. He was willing to prepare a new draft in the light of the discussion while retaining the fundamental concept that underlay the present article.
74. Mr. PAL supported the deletion of article 55 because article 4 also covered honorary consuls. There was no need for a separate article dealing

with their functions which need not necessarily be narrower in scope than those of career consuls. Under article 56, as proposed by the Special Rapporteur, the whole of Section I of the draft, including the articles on functions and on the need for an exequatur, was made applicable to honorary consuls.

75. Mr. LIANG, Secretary to the Commission, observed that there was considerable force in the contention that honorary consuls usually exercised more restricted functions than career consuls. He was uncertain whether all honorary consuls were granted exequaturs. He had noted from the United Kingdom's Aliens (Foreign Representatives) Direction of 1954, paragraph 4, that a "consular officer" was defined as a person holding a United Kingdom exequatur or otherwise recognized by the United Kingdom Government as authorized to act as a consular officer in that country.¹

76. If an honorary consul were appointed but did not receive an exequatur or recognition as a consular officer, then the provisions in article 1 (f) would not apply because consular functions could only be exercised in conformity with articles 11 or 12 which required an exequatur or recognition. It would be desirable to investigate further whether all honorary consuls received exequaturs or were recognized as consular officers. Perhaps the Special Rapporteur should take that consideration into account in preparing his new text.

77. The CHAIRMAN observed that the Special Rapporteur was strongly of the opinion that some provision was necessary to indicate that honorary consuls exercised limited functions whereas other members of the Commission held the contrary view. In any event further consideration of article 55 would have to be deferred until the Special Rapporteur's new draft had been circulated.

The meeting rose at 1.5 p.m.

551st MEETING

Wednesday, 1 June 1960, at 9.30 a.m.

Chairman: Mr. Luis PADILLA NERVO

Welcome to new member

1. The CHAIRMAN welcomed Mr. Eduardo Jiménez de Aréchaga, whose experience and knowledge would make a valuable contribution to the Commission's work.

2. Mr. JIMÉNEZ DE ARÉCHAGA thanked the Commission for the honour it had done him in electing him to membership. He looked forward to taking part in its important discussions.

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 55 (Powers of honorary consuls) (continued) *

3. The CHAIRMAN, inviting the Commission to continue its consideration of article 55, said that the new text which the Special Rapporteur had undertaken to prepare was not yet ready for circulation.

4. Sir Gerald FITZMAURICE said that the United Kingdom Aliens (Foreign Representatives) Direction of 1954,¹ mentioned by the Secretary at the previous meeting (550th meeting, paragraph 75), illustrated well the proposition he himself had sought to defend that, as far as the performance of consular functions was concerned, there was no difference of principle between career and honorary consuls. The purpose of the Direction had been to give effect to provisions in consular conventions so as to exempt certain categories of persons from the need to comply with the Aliens Order, 1953. A consular officer was defined there as "a person holding Her Majesty's exequatur or otherwise recognized by Her Majesty's Government as authorized to act as consular officer in the United Kingdom" and the entirely different category of consular employee had been defined as a person employed on consular duties who was a permanent employee of the State by which he was employed and who was not engaged in private occupation for gain in the United Kingdom. Entitlement to exemption from the provisions of the Aliens Order and the extent of that entitlement thus depended on the terms of article 4. It was true that article 1 (1) of the Direction only exempted honorary consuls from the provisions of articles 14 to 17 of the Aliens Order, which referred to the registration of aliens, whereas career consuls were exempted from certain additional provisions of that order; that, however, was due to the fact that those additional provisions referred for the most part to matters connected with the arrival of aliens which did not apply to honorary consuls as they were usually appointed *sur place*. Only in respect of deportation did the career consul receive a special exemption.

* Resumed from the 550th meeting.

¹ *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No. 58.V.3), p. 357.

5. Mr. LIANG, Secretary to the Commission, agreed with Sir Gerald Fitzmaurice's interpretation of the United Kingdom Aliens (Foreign Representatives) Direction in which the term "consular officer" comprised both career and honorary consuls. Where the provisions of that Direction did not apply to the latter category, an express statement to that effect was made as in paragraph 1 (1). That restriction related to immunities and not to the functions of honorary consuls.

6. According to the Consular Convention between the United Kingdom and Sweden of 1952,² article 2, paragraph 6, a "consular officer" was any person who had been granted an exequatur or other authorization to act in such capacity by the appropriate authorities of the territory and could be a career or honorary officer. The Swiss regulations concerning diplomatic and consular privileges and immunities made no distinction between career and honorary officers.

7. Where the provisions of a consular convention did not apply to honorary consuls, express mention was made of that fact as in the Treaty of 1948 between the Republic of the Philippines and the Spanish State on civil rights and consular prerogatives, article IV, paragraph 2.³

8. Mr. TUNKIN, on a point of order, moved that the Commission defer further discussion of article 55 until the Special Rapporteur's new draft had been circulated and that it pass on to article 56. That procedure would save time since article 56 was a key provision and once disposed of it would be easier to reach a conclusion on articles 54 and 55.

9. Mr. EDMONDS was unable to see how the Commission could discuss article 56 before it had disposed of article 55.

10. The Commission he thought, was unnecessarily complicating a simple matter. In practice an honorary consul was any person appointed to that office with the consent of the receiving State and performing functions to which that State had assented. Article 2, paragraph 6, of the Convention between the United States and the United Kingdom relating to consular officers of 6 June 1951⁴ defined a "consular officer" as any person who was granted an exequatur or provisional or other authorization by the appropriate authorities of the territory and paragraph 7 defined a "consular employee" as a person employed at a consulate for the performance of executive, administrative, clerical, technical or professional duties. No distinction was made between career and honorary consuls. Some of the consular functions were enumerated in the Convention, but not exhaustively. Provisions of

the kind found in that Convention were simple to understand and easy to apply. There was no need for the Commission to spend much time discussing unnecessary definitions.

11. Mr. TUNKIN felt that, in the interests of orderly discussion, it would be desirable to adopt his motion and tackle the concrete problems at issue.

12. The CHAIRMAN suggested that, as article 55 had already been discussed in considerable detail, perhaps it would suffice for purposes of continuing the debate if the Special Rapporteur could explain what was to be the content of his new draft. The question was whether or not to include a special article on the powers of honorary consuls. Several members of the Commission considered it unnecessary because the matter was already covered in earlier articles.

13. Mr. ŽOUREK, Special Rapporteur, said it would be preferable to defer further discussion on article 55, which was concerned with a question of principle, until his new text had been circulated. The Commission could in the meantime take up article 56, which dealt with an entirely different matter.

14. Mr. EDMONDS said that, in his opinion the majority was opposed to introducing any definition of honorary consuls or specifying what should be their duties. If that were the case, much time could be saved if a vote on the issue could be taken forthwith.

15. Mr. ŽOUREK, Special Rapporteur, considered that procedure to be quite unacceptable: the Commission must discuss the draft before it article by article.

16. Mr. YOKOTA pointed out that Mr. Edmonds's point had already been met by the decision taken at the previous meeting with regard to article 1 (f) (550th meeting, paragraph 54).

17. The CHAIRMAN said that, after discussing article 56, the Commission could decide whether a special section should be devoted to the legal status of honorary consuls. In the absence of any objection he suggested that the procedure proposed by Mr. Tunkin be followed.

It was so agreed.

ARTICLE 56 (*Legal status of honorary consuls*)

18. Mr. ŽOUREK, Special Rapporteur, drew attention to the new text he was proposing for article 56 which read as follows:

"1. The provisions of section I of this draft, in so far as they concern consular relations, shall also, with the exception of article 17, apply to honorary consuls, save as otherwise provided in the present section.

"2. In the matter of privileges and immunities, honorary consuls shall enjoy the benefits provided for in articles 22, 23 (a), 28, 29, 30, 31, 34, 38 (a) and 43.

² United Nations Treaty Series, vol. 202 (1954-1955), No. 2731, p. 160.

³ *Ibid.*, vol. 70 (1950), No. 903, p. 146.

⁴ *Ibid.*, vol. 165 (1953), No. 2174, p. 126.

“3. The official correspondence, archives and documents of honorary consuls shall be inviolable and not liable to search or seizure, provided they are kept separate from the private correspondence of the honorary consuls and from books or documents relating to their non-consular occupation.

“4. Honorary consuls may decline to give evidence before a judicial or administrative authority or to produce documents in their possession should the evidence or production of documents relate to their consular functions. No coercive measures may be taken in such cases.”

19. Article 56 was the most important in chapter II. During the discussion of articles 54 and 55, one or two members of the Commission had maintained that no distinction had been made in past or present practice between the legal status of career and honorary consuls. The fact was that practice varied widely. Some States accorded no special privileges to honorary consuls, while others were more liberal, but he had found no instances of the same privileges and immunities being accorded to career and honorary consuls.

20. He had sought to frame a provision that would be acceptable to the majority of States. His researches had confirmed his opinion that the full range of consular privileges and immunities was never accorded to honorary consuls. On the other hand he considered that the provisions contained in sections I and IV of the draft concerning consular relations in general also covered honorary consuls — in so far, of course, as they applied to them.

21. Some account should be taken of the fact that the sending State might appoint a career consular officer or clerk to act as assistant to an honorary consul. When that occurred, such career officials had the advantage of the more favourable conditions applicable to them under international law, whereas the honorary consul would be subject to a different set of rules.

22. After reviewing the different provisions contained in section II of the draft, he had selected those which were applicable to honorary consuls and had listed them in paragraph 2 of the new text. Perhaps he might have gone a little far in that paragraph and it would be useful to have the comments of governments on existing practice since at present, apart from national legislation, there was not enough information to enable the Commission to decide what privileges and immunities honorary consuls did in fact enjoy. Sir Gerald Fitzmaurice had already criticized him for not having been liberal enough, but national legislation did not bear out Sir Gerald's view.

23. The view that honorary consuls did not possess the same legal status as career consuls was upheld in the legislation of certain countries. For example, under the 1955 Direction of the Belgian Ministry of Finance⁵ honorary consuls who were classified as not being permanent officials

of the sending State and who were entitled to follow other occupations did not enjoy certain financial exemptions. Under the Turkish law of 1948⁶ honorary consuls were not entitled to tax exemption. The Peruvian decree of 1954⁷ did exempt honorary consuls from taxes on salaries, emoluments and allowances but such exemptions were not likely to involve large sums. In the Netherlands Antilles,⁸ honorary consuls, unlike members of the diplomatic and consular corps, had to comply with the formalities required on temporary or permanent admission. Iraq Law No. 26 of 1949⁹ excluded honorary consuls from enjoyment of any of the immunities or privileges accorded to foreign consuls. Similarly article 12, paragraph 3, of the Consular Convention between the United Kingdom and Sweden of 1952 showed that career and honorary consuls were not treated on the same footing.

24. The question whether or not honorary consuls could be defined by reference to nationality or to the fact whether or not they were engaged in some gainful occupation besides exercising consular functions was irrelevant to the question of their status. He had wished to avoid a narrow definition and thought it preferable to leave the matter to domestic legislation.

25. Some members seemed to favour a move to assimilate honorary consuls to career consuls but surely that would prove unacceptable to most governments. He had prepared the present draft on the assumption that it would ultimately form the basis for a multilateral convention and that existing bilateral consular conventions would remain in force, while others would be concluded in the future which might differ from the multilateral convention. He had therefore been guided by the conviction that the Commission should not seek to regulate what could better be settled on a bilateral basis between States. It was also important not to seek guidance from a particular group of consular conventions; the result of adopting such a course would be a one-sided draft which for that reason would prove unacceptable to a large number of States.

26. It was with those considerations in mind that he had re-drafted paragraph 2 of article 56.

27. Turning to paragraph 3, he said that official correspondence and papers would only be inviolable if they were kept separate from the honorary consul's private correspondence and from books or documents relating to any business or other activity in which the honorary consul might be engaged.

28. Under paragraph 4, an honorary consul could decline to give evidence or to produce official correspondence or papers in his possession, should the evidence or the correspondence and papers relate to his consular functions. The safe-

⁶ *Ibid.*, p. 326.

⁷ *Ibid.*, p. 234.

⁸ *Ibid.*, p. 211.

⁹ *Ibid.*, p. 168.

⁵ *Laws and Regulations regarding Diplomatic and Consular Privileges*, p. 41.

guards he proposed in that paragraph should be adequate both for the sending and the receiving State.

29. Mr. YASSEEN considered that the drafting of article 56 was imprecise because it seemed to confuse facilities granted to consulates and immunities granted to consuls as such. He would have thought that consulates run by honorary consuls should at any rate enjoy the same facilities as those provided for in articles 23, 28, 29, 30 and 31, regardless of the attitude that might be adopted towards the extent of the personal privileges and immunities to be accorded to honorary consuls.

30. Mr. EDMONDS agreed with the views expressed by Sir Gerald Fitzmaurice during the discussion on articles 54 and 55 about the privileges and immunities of honorary consuls.

31. Referring to paragraph 3 of the new text of article 56 he wondered whether it was not a little stringent since private correspondence might by an oversight find its way into official files. Perhaps it would be desirable to delete the latter part of the paragraph starting from the words "provided that".

32. Mr. YOKOTA, speaking on a point of order, proposed that the Commission go through the draft article by article, or perhaps sub-section by sub-section, to decide which provisions applied to honorary consuls as well as to career consuls. That procedure would be appropriate for the formal consideration of article 56; in paragraph 1, the Special Rapporteur stated that the provisions of section I of the draft should apply to honorary consuls, with the exception of article 17, and the Commission would therefore only have to take a decision in respect of that one article. It could then proceed to consider the articles in section II from that point of view also, with the exception of the articles that the Special Rapporteur had listed in paragraph 2.

33. The CHAIRMAN said that, while he sympathized with the purpose of Mr. Yokota's proposal, he could not give a ruling on it, since the ensuing discussion in the Commission might be so broad as to defeat its very purpose.

34. Mr. MATINE-DAFTARY thanked the Special Rapporteur for his clarification of the new text of article 56, and particularly for his anxiety not to go too far, in order that the draft might be acceptable to the largest possible number of governments. The main issue before the Commission, however, seemed to be the general structure of the article. There had been a trend towards assimilating honorary consuls to career consuls; he would submit that the advocates of assimilation came from countries which took the institution of honorary consuls seriously, but that many small States did not take such great care not to abuse the institution. Indeed, he knew of many cases where honorary consuls performed no consular functions whatsoever, but had been appointed merely in order that they might enjoy certain privileges and immunities.

35. The Special Rapporteur had unfortunately not succeeded in his gallant attempt to find a formula acceptable to all. As an attempt to provoke observations from governments, his endeavour was praiseworthy; but it should be borne in mind that the practice of granting privileges and immunities to honorary consuls varied widely and it could not be assumed, as the Special Rapporteur seemed to assume, that honorary consuls were never treated on an equal footing with career consuls. On the other hand, the advocates of complete assimilation of the two categories could not generalize so far as to include cases where an honorary consul performed no consular functions whatever.

36. In his opinion the essential point was to distinguish between honorary consuls who were nationals of the sending State and those having the nationality of the receiving State. The criterion of a regular salary did not apply, since in many cases a national of the sending State who was appointed honorary consul was unpaid. In the interests of equity, therefore, the Commission should make the initial distinction of assimilating to career consuls only honorary consuls who were nationals of the sending State and who did not engage in commercial or other gainful occupations. That provision would meet the requirements of governments which wished to appoint a consul, but could not afford to send a career consul to a given country. He drew attention to the fact that the French text of paragraph 1 referred to chapter I, while the English text referred to section I.

37. Turning to paragraph 3, he pointed out that the distinction between private and official correspondence of honorary consuls was somewhat impractical, since it was difficult to ensure that an official was in fact keeping his official correspondence, archives and documents separate from his private correspondence, books and documents.

38. With regard to the reference to production of documents in paragraph 4, he said that his remarks in connexion with article 40 (*Attendance as witnesses in courts of law and before the administrative authorities*) (541st meeting, paragraph 32) applied, *a fortiori*, to honorary consuls. There were a number of documents relating to consular functions, such as birth, death or marriage certificates, which should not be exempt from production before a judicial or administrative authority.

39. In conclusion, he thought that once the Commission had decided on the applicability of the article to honorary consuls who were nationals of the sending State, Mr. Yokota's proposal might usefully be followed.

40. Mr. ŽOUREK, Special Rapporteur, said it was the English text of paragraph 1 that was correct; the articles concerned were Nos. 2 to 21. He had not distinguished between honorary consuls who were nationals of the sending State and those who were nationals of the receiving State because national legislations, whatever criteria they might adopt as a basis for their definition of an honorary

consul, did not as a rule differentiate between the various categories of honorary consul. It should also be borne in mind that nationals of a third State could also be appointed as honorary consuls. In any case, the Commission should not disregard the practice of States in the matter.

41. Sir Gerald FITZMAURICE said he could agree with Mr. Yokota's approach to the question, but not with that of the Special Rapporteur, whose introduction of the new text of article 56 showed that he still had at the back of his mind the idea that an honorary consul was usually a national of the receiving State and, as such, should be given inferior treatment. The Special Rapporteur started out from the view that none of the provisions of the draft should apply to honorary consuls unless it were proved that they should so apply, and he had selected several such articles, thus inferring that the unlisted articles were inapplicable to that category of official. He himself took the opposite view: while he did not assert that the treatment of honorary and career consuls should never differ, he believed that cases when they should were very few indeed. The distinction based on having the nationality of the receiving State was false, since both honorary and career consuls could have that nationality.

42. He did not believe that a separate article on honorary consuls was necessary, but if the Commission decided otherwise, he considered that the text should adopt a different course. It should state not what was applicable to honorary consuls but what was not applicable.

43. The Special Rapporteur had argued that the practice of States must be taken into account, but the examples he had given did not support the thesis that most States distinguished clearly between the two categories. He had yet to find a consular convention which made the distinction at all frequently, and many such conventions did so very seldom. For example, the Consular Convention between the United Kingdom and Italy of 1954¹⁰ stated in article 2, on definitions, that a consular officer might be a career officer or an honorary officer, but it contained no other reference to honorary consuls, except by negative implication in one or two places where career consuls only were specified. For instance, there was the provision in article 9 which stated that the sending State might acquire land and buildings "for use as a consulate or as a residence for a career consular officer;" the assumption there was that an honorary officer would normally have or acquire his own residence in the receiving State.

44. The Special Rapporteur had implied that the Consular Convention between the United Kingdom and Sweden of 1952 contained many distinctions between honorary and career consuls, but again, apart from one or two provisions specifying career consuls only, the only clear distinction was made in the article on communications; the other articles

cited by the Special Rapporteur based the distinction entirely on criteria which were not peculiar to honorary consuls. For example, article 11 (5) of that Convention provided that a person exempted from certain services should be a national of the sending State and not possess the nationality of the receiving State, should not be engaged in any private occupation for gain in the territory and should not have been ordinarily resident in the territory at the time of his appointment to the consulate. The Special Rapporteur would be entitled to say that those criteria usually applied mainly to honorary consuls, but in actual fact the provision would apply equally to a career consul if circumstances brought him under one of the categories listed. The inference that the Special Rapporteur had drawn from that article was a telling example of his approach to the whole question. The Commission's best course would be to recognize that the case of local nationality was, in principle, equally applicable to career and honorary consuls and, if there were any individual article in respect of which a special regime should be provided for honorary consuls, to say so in that article. Alternatively, a general article might be included, listing the few cases where special treatment of honorary consuls was warranted.

45. Mr. AGO observed that the wide difference between Sir Gerald Fitzmaurice's approach and that of the Special Rapporteur proved that the Commission had reached a deadlock. Certain members had stressed that the essential distinction did not lie between the titles of honorary and career consul, but between persons who were nationals of the sending State and those who were nationals of the receiving State, and between those engaging in gainful occupation those not doing so. The main point was that the categories of nationals and non-nationals of the sending State did not coincide with those of career and honorary consuls, as the Special Rapporteur was inferring. Unless agreement could be reached on that point, no useful result could be achieved.

46. At the previous meeting (550th meeting, paragraph 41), the Special Rapporteur had accepted Mr. François' suggestion, but his introduction of his new text showed that his original idea of the distinction between honorary and career consuls remained unchanged.

47. Mr. Yokota's proposal seemed the most likely to lead the Commission out of the deadlock. Thus, if article 17, referred to as an exception in the new text of paragraph 1, were considered in the light of its applicability to honorary consuls, it would, in his opinion, be applicable to honorary consuls or at least any honorary consul having the nationality of the sending State and engaged in no gainful occupation. While it might be maintained that no honorary or career consul who was a national of the receiving State and was engaged in gainful occupation should be entrusted with diplomatic functions, in the contrary case there was no reason why an honorary consul fulfilling the necessary conditions should not be granted diplomatic status, particularly since many

¹⁰ United Kingdom, *Italy No. 1 (1954)* (Cmd. 9193).

States appointed as their ambassadors persons who were not connected with the diplomatic service.

48. Mr. TUNKIN, speaking on a point of order, observed that, despite a general agreement to follow Mr. Yokota's proposal, discussion still ranged very wide. Would it not be advisable to limit discussion to the individual paragraph of the new text of article 56 ?

49. Mr. SANDSTRÖM, also speaking on a point of order, said that, while endorsing Mr. Yokota's proposal to examine the draft article by article, he did not consider it out of place to begin by stating the general principles to be followed.

50. Mr. TUNKIN, again speaking on a point of order, said he had not meant that no general observations should be admitted, but thought that the Commission should try to limit discussion to the text before it.

51. Mr. PAL, observing that his remarks were not on a point of order but referred to the method to be adopted in discussing article 56, said that the Commission's task in considering that article paragraph by paragraph would be vast, in view of the fact that each paragraph would present positive and negative aspects, each involving the possibility of wide discussion. For example, a discussion of paragraph 1 could not be limited just to a decision on article 17, but must involve a review of all the other articles in section I — unless the Commission was prepared to accept without question what the Special Rapporteur declared to be applicable to honorary consuls. The Special Rapporteur's enumeration in paragraph 2 implied that the unlisted articles were not applicable to honorary consuls and consequently opened the door to a review of all the articles in section II of the draft — unless, again, the Commission took a decision *in limine* not to question what was stated by the Special Rapporteur to be applicable to consuls and furthermore to discuss only those articles, if any, the possible applicability of which to honorary consuls had been specifically raised by means of an amendment. Otherwise he apprehended that the discussion of that article alone would occupy the remainder of the session.

52. In his opinion, the Commission had two courses open to it. Either it could act upon the method adopted at earlier sessions, though never actually followed, and consider only written amendments to the Special Rapporteur's text; or, preferably, it could pass the article on to the Drafting Committee with the request that that Committee scrutinize all the articles of the draft and consider which of them were applicable to honorary consuls. That was a task which could the more fittingly be performed by the Drafting Committee, since all the articles had been submitted to it for drafting purposes.

53. Mr. MATINE-DAFTARY, speaking on a point of order, recalled his earlier suggestion that the Commission should first decide whether the exceptions applied only to honorary consuls

who were nationals of the sending State and did not engage in commercial or other gainful occupations. It was important to make that distinction before proceeding along the lines proposed by Mr. Yokota.

54. Mr. SCHELLE endorsed Mr. Yokota's proposal and thought the same method should be used to fill a serious gap in article 55, which in his opinion, should be completed by a provision reading as follows :

“When honorary consuls are vested with more limited special powers than the general powers of career consuls, they shall enjoy in the exercise of their official functions the same privileges and immunities as career consuls, subject to . . .”

55. The Commission should examine the whole draft to ascertain whether any restrictions should be placed on the privileges and immunities of honorary consuls and if so, what those restrictions should be. In the exercise of special and limited consular functions, however, honorary consuls should enjoy exactly the same privileges and immunities as career consuls, since they could not exercise their consular functions satisfactorily without such privileges and immunities. The consular function was indivisible, and as a rule, was the same, whether performed by honorary or career consuls; the main difference was that honorary consuls might not be competent to exercise all the functions, and might be nationals of the receiving State; that, however, was another question.

56. Mr. VERDROSS drew attention to the difference of treatment of honorary consuls in respect of consular relations and privileges and immunities. In principle, the same rules were applied to honorary and career consuls with regard to consular relations, but the Special Rapporteur had made considerable distinctions with regard to privileges and immunities. Sir Gerald Fitzmaurice and Mr. Ago were right in saying that in a number of bilateral conventions no distinction was made merely according to whether an official was an honorary or a career consul, but in the domestic legislation of many countries the position was quite different. For example, article 5 of Iraqi law No. 26 of 1949 on the privileges of foreign consuls provided that an honorary consul should not enjoy any immunity, privilege or distinction and should receive the same treatment received by ordinary persons, foreigners or nationals, practising the same profession. Consequently, it would be inadmissible to assimilate honorary consuls to career consuls in all respects and a formula acceptable to all signatory States must be found.

57. A distinction might be made in paragraph 2 between privileges and immunities essential for the performance of consular functions and privileges and immunities which were strictly personal, by providing that honorary consuls should be granted only the personal privileges and immunities conferred upon them by bilateral agreements or by the law of the receiving State. He

would be prepared to submit a written amendment to that effect, in accordance with Mr. Pal's suggestion.

58. Sir Gerald FITZMAURICE said that the Iraqi legislative provision cited by Mr. Verdross did not quite bear out Mr. Verdross's argument. It stated that an honorary consul would be given "the same treatment received by ordinary persons, foreigners or nationals, practising the same profession". The final phrase of that passage appeared to indicate that the provision was based on the assumption that the honorary consul would be practising a profession, in other words, that he would be engaged in a gainful occupation. In fact, however, an honorary consul could well be a local resident who was not engaged in any gainful occupation.

59. Mr. YASSEEN said that article 5 of the Iraqi Law No. 26 of 1949 which had been cited by Mr. Verdross and referred to by Sir Gerald stated the principle in general and absolute terms: "the honorary consul shall not enjoy any immunity, privilege or distinction." In pursuance of that article, the practice in Iraq was to treat an honorary consul as an ordinary person, regardless of his nationality or occupation. It followed that an honorary consul who was a national of the sending State and was not engaged in any gainful occupation did not enjoy any immunity, privilege or distinction either.

60. The CHAIRMAN drew attention to article 26 of the Harvard draft which read as follows:

"A receiving State is not required to grant the exemptions provided for in articles 20, 23, 24 and 25 to a consul who is a national of the receiving State or to a consul who is not a consul of career, provided that it shall exempt every consul from taxes upon his income as a consul and from customs duties upon property imported for official use."

The Harvard draft thus assumed that all consuls were to be treated in the same manner and only specified those privileges or immunities which were not applicable to consuls who were not career officers.

61. Many different suggestions had been put forward by members and perhaps the best way of co-ordinating them would be for the Commission to decide on certain general principles. It could start by deciding on the principle that certain privileges which were necessary for the exercise of the consular function should apply to all consuls, on the ground that the receiving State should not interfere with the exercise of that function, regardless of whether it was performed by a career consul or by an honorary consul. It could then examine the various provisions of the draft which restricted the scope of consular privileges and immunities on the ground that the consul was a national of the receiving State or was engaged in a gainful occupation. Finally, it could then take a decision on the general question whether an honorary consul who was

not a national of the receiving State and was not engaged in a gainful occupation therein should be treated differently from a career consul, merely by reason of the fact that he had been designated as an honorary consul.

62. However, from the opinions expressed by the various members, it appeared that they wished to follow the method suggested by Mr. Yokota. If there were no objection, the Commission would therefore proceed to discuss exclusively paragraph 1 of article 56, on the understanding that that procedure did not imply any definite decision to include in the draft a separate section dealing with honorary consuls.

It was so agreed.

63. Mr. EDMONDS proposed the deletion from paragraph 1 of the words "with the exception of article 17". Article 17 stated that "in a State where the sending State has no diplomatic mission, a consul may, with the consent of the receiving State, be entrusted with diplomatic functions", and added that the consul would in that case "enjoy diplomatic privileges and immunities". As was clear from the terms of that article, a consul could only be entrusted with diplomatic functions with the consent of the receiving State. If that consent were granted, there was no reason why article 17 should not apply to any consul, whether a career consul or an honorary consul. The two States concerned were free to enter into an agreement on the subject and he saw no reason why the Commission should state in effect that such an agreement was not permissible.

64. Mr. MATINE-DAFTARY felt it was essential to decide whether article 56 referred only to honorary consuls who were nationals of the sending State or also to honorary consuls who were nationals of the receiving State. The point was perhaps not very important as regards paragraph 1, but as regards paragraph 2 he could not express a view on the advisability of applying the various articles of the draft to honorary consuls until he knew whether or not paragraph 2 was to apply also to honorary consuls who were nationals of the receiving State.

65. Mr. ŽOUREK, Special Rapporteur, said that the Commission, at its previous meeting, had agreed to consider as honorary consuls those persons who were designated as such by the sending State and accepted in that capacity by the receiving State (550th meeting, paragraphs 44 and 54); it had accordingly agreed to delete the definitions of "career consul" and "honorary consul" from sub-paragraph (f) of article 1, on the understanding that those definitions and the whole position would be explained in the commentary. As a result of that decision, the sending State had been left free to decide whether it would give a consul the title of honorary consul or of career consul.

66. Sir Gerald FITZMAURICE said that there could be no question of excluding article 17 from the provisions of paragraph 1 because that article

was only permissive; it further stipulated that the consent of the receiving State was necessary for the purpose of entrusting a consul, even a career consul, with diplomatic functions. He therefore supported Mr. Edmonds's proposal for the deletion of the words "with the exception of article 17". Retention of that proviso would imply that, even with the consent of the receiving State, an honorary consul could not be entrusted with diplomatic functions.

67. Mr. TUNKIN favoured the retention of the proviso. If it were deleted, article 17 would apply to honorary consuls; the result would be to suggest, quite simply, that a practice existed of entrusting an honorary consul with diplomatic functions, subject of course to the consent of the receiving State. That, however, was not the case.

68. Mr. BARTOŠ recalled that when the Commission had discussed article 7 of the diplomatic draft, he had voted with the minority against the provisions of that article, which made it possible for a national of the receiving State to be appointed a member of the diplomatic staff, subject to the express consent of the receiving State. The situation under discussion, however, was entirely different where consuls, especially honorary consuls were concerned, since it was generally agreed that the sending state could even appoint a national of the receiving state as consul. Accordingly, if the Commission wished to be consistent with its earlier decision, it should delete the proviso. In the interests of consistency he supported Mr. Edmonds's proposal.

69. Mr. SANDSTRÖM said that he also supported the proposal for the deletion of the proviso for the reasons adduced by Mr. Edmonds and Mr. Bartoš.

70. Mr. HSU said that, while there was much force in the arguments submitted by Mr. Edmonds and Mr. Bartoš, he was inclined to favour the retention of the proviso because he felt that the privileges of honorary consuls should be limited as much as possible. Honorary consuls were part-time consuls only and were allowed to engage in activities other than their consular duties; quite naturally, States wished to limit the privileges granted to those consuls. Of course, if the two States concerned wished to grant greater privileges and immunities to an honorary consul than those specified in the draft, they could always do so by agreement between themselves.

71. Mr. SCELLE said he doubted whether anyone could quote a specific case of an honorary consul being entrusted with diplomatic functions; the question under discussion was therefore purely academic.

72. He would vote for the deletion proposed by Mr. Edmonds because he saw no practical reason to include in paragraph 1 a reference to article 17.

73. Mr. AGO agreed with Mr. Scelle that the question was of little practical importance but

felt that, if honorary consuls were expressly excluded from the proviso, the Commission would in effect be laying down an imperative rule that an honorary consul could not be entrusted with diplomatic functions even with the consent of the receiving State.

74. Mr. YOKOTA, with reference to the concern expressed by Mr. Hsu, said that if a receiving State did not wish to grant diplomatic privileges to an honorary consul, it could always refuse its consent to his being entrusted with diplomatic functions. For the reasons already given, he supported the proposal to delete the proviso.

75. Mr. ŽOUREK, Special Rapporteur, pointed out that diplomatic functions were incompatible with the exercise of any other profession; neither in existing international law nor in the Commission's draft on diplomatic intercourse and immunities was any provision made for part-time diplomatic officers. If the Commission were to accept the idea that article 17 should apply to honorary consuls, it would be accepting the altogether novel conception of a part-time diplomatic officer, a conception hitherto unknown to State practice. However, he agreed with Mr. Scelle that the proviso was not of great practical importance.

76. Sir Gerald FITZMAURICE said that the Special Rapporteur assumed that an honorary consul was engaged in another occupation. In fact, an honorary consul might well be a person who was not engaged in any occupation at all and the Special Rapporteur's arguments therefore did not apply.

77. Mr. ŽOUREK said that the provisions of paragraph 1 applied to all honorary consuls and not merely to a single class of them. There could be no question of basing a draft which was intended as a codification on exceptional cases; the Commission had to take into account what normally occurred—i.e., those cases where consuls were engaged, or could engage, in a private occupation of a gainful nature.

78. The CHAIRMAN invited the Commission to take a decision regarding paragraph 1 of the new text of article 56. The only question which had been raised in connexion with it had been Mr. Edmonds's proposal to delete the words "with the exception of article 17", and he therefore called for a vote on that proposal.

The proposal was adopted by 11 votes to 5, with 2 abstentions.

79. The CHAIRMAN said that paragraph 1 of the new text of article 56, as thus amended, would be referred to the Drafting Committee.

The meeting rose at 1 p.m.

552nd MEETING

Thursday, 2 June 1960, at 9.30 a.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 56 (*Legal status of honorary consuls*)
(continued)

1. Mr. VERDROSS introduced his amendment to replace paragraph 2 of the Special Rapporteur's draft article 56 (551st meeting, paragraph 18) by the following text:

"2. In the matter of privileges and immunities, honorary consuls shall enjoy the same benefits as career consuls in so far as they are necessary for the exercise of their function. As regards the other privileges and immunities they shall enjoy those conferred upon them by treaties or the law of the receiving State."

2. He did not insist on the actual wording of the amendment, but urged that the idea contained in it should be accepted. The purpose of the amendment was to draw a distinction between the privileges without which an honorary consul could not perform his duties as a consul and those which were granted to the person of the consul and which were not essential to an honorary consul. For example, acts performed by an honorary consul in the name of the sending State could not be made subject to the jurisdiction of the courts of the receiving State. The exemption from taxation and customs duties, on the other hand, was a privilege attaching to the person of the consul and was not indispensable for the performance of their duties. However, under the second sentence of his amendment, even the more extensive privileges and immunities could be conferred upon an honorary consul if the receiving State was prepared to do so.

3. Mr. ŽOUREK, Special Rapporteur, said that he was prepared to accept the amendment proposed by Mr. Verdross, subject to drafting adjustments, particularly in the last phrase of the first sentence. The acceptance of that amendment would have the great advantage of speeding up the work of the Commission on article 56.

4. Sir Gerald FITZMAURICE said that he could not support the amendment proposed by Mr. Verdross because it would tend to restrict the privileges of honorary consuls far more than did the Special Rapporteur's text. Paragraph 2 as proposed by the Special Rapporteur at least specified some of the privileges to which honorary

consuls were entitled, but under Mr. Verdross's amendment, it might be argued that the only privilege necessary for the exercise of the consular function was the immunity from court jurisdiction in respect of acts carried out by the honorary consul in the exercise of that function.

5. For his part, he saw no reason for limiting the privileges of honorary consuls as such. There could be limitations due to a consul's having the nationality of the receiving State, or to the fact that he was engaged in a gainful occupation in that State, but where those conditions were not present, there was no valid reason for treating an honorary consul in any way differently from a career consul. The question whether he received a regular salary or not, and the question whether he belonged to a career service or not, were matters entirely between him and the government of the sending State.

6. He insisted that the only correct basis on which the provision could be drafted was not to enumerate the privileges to which an honorary consul was entitled but to state that he enjoyed all the privileges laid down in the draft articles and to stipulate, by way of exception, those privileges to which an honorary consul was not entitled.

7. Mr. FRANÇOIS shared the misgivings expressed by Sir Gerald Fitzmaurice. The adoption of the text proposed by Mr. Verdross would certainly speed up the work of the Commission but it would destroy the whole value of the articles as far as honorary consuls were concerned. Such a text could lead to much misunderstanding. It was likely to be interpreted very restrictively by some States, but it could also be interpreted very broadly by others: it was arguable that all the privileges and immunities set forth in the draft articles were necessary for the exercise of the consular function, on the grounds that otherwise the Commission would not have included them in the draft articles.

8. The second sentence of Mr. Verdross's amendment showed, however, that the author's intention was rather to place a very strict limitation on the privileges and immunities of honorary consuls. That sentence provided that, so far as other privileges and immunities were concerned (meaning other than those necessary for the exercise of their function), honorary consuls would enjoy those conferred upon them by bilateral treaties or by the law of the receiving State. No reference was made to international custom, although there existed a body of customary law on the subject of honorary consuls. It would accordingly be necessary, if the text proposed by Mr. Verdross were adopted, to conclude hundreds of bilateral treaties to cover benefits which were at present recognized by international customary law and State practice.

9. Mr. YOKOTA said that he could not accept the formula proposed by Mr. Verdross because it was far too vague and general. For example, it was not clear whether, under that formula, honorary consuls would be entitled to the privileges

set forth in articles 24 and 25, provisions which, under the Special Rapporteur's draft article 56, would not apply to honorary consuls. Certain other privileges, such as those specified in articles 37 and 38, could be said to be necessary to the exercise of consular functions. The text proposed would give rise to disputes between receiving States and sending States concerning the eligibility of an honorary consul to a specific benefit.

10. Mr. AMADO recalled that he had already pointed out (550th meeting, paragraph 50) that honorary consuls were much more important to countries such as the Netherlands than to countries like Brazil, which relied almost exclusively on career consuls. Small countries such as the Netherlands, which had widespread commercial and maritime interests, found it essential, on grounds of economy, to make considerable use of honorary consuls. He urged that the Commission should recognize the needs of those States; the adoption of a text such as that proposed by Mr. Verdross might have the effect of obliging those States to maintain career consuls at a large number of places.

11. Honorary consuls should be eligible not only for the benefits inherent in the consular function but also for those inherent in the consul's position. The formula proposed by Mr. Verdross was too vague; it was extremely difficult to tell when an act was performed in the exercise of the consular function. An honorary consul might be asked by the diplomatic representative of the sending State to convey a written communication to an important citizen who was passing through the consular district. It was not clear whether such an assignment would be covered by the proposed formula.

12. For those reasons, he could not accept the proposed formula, although its adoption might have shortened the discussion.

13. Mr. JIMÉNEZ DE ARÉCHAGA shared the view of those who held that honorary consuls should be treated, in principle, in the same manner as career consuls and should enjoy, as a rule, consular privileges and immunities. The only difference between an honorary consul and a career consul was that an honorary consul could, if he so wished, engage in a gainful occupation apart from his consular duties. That fact justified his exclusion from some of the benefits laid down in the draft articles. He accordingly suggested that paragraph 2 should be redrafted along the following lines: "In the matter of privileges and immunities, honorary consuls shall not enjoy the benefits provided for in articles 24, 25, 26, 27, 32, 37, 38 (b) and 38 (c)."

14. He thought that such a text would set forth much more clearly the legal status of honorary consuls and might help to reconcile the divergent views which had been expressed.

15. Mr. MATINE-DAFTARY asked the opponents of the amendment proposed by Mr. Verdross to identify the specific benefits, among those

granted to honorary consuls under the Special Rapporteur's draft, which they considered would be excluded by the application of the amendment. He recalled, in that connexion, that the function had been adopted by the Commission as a criterion in the diplomatic draft.

16. Mr. SCELLE said that the amendment proposed by Mr. Verdross, although criticised by some as too vague, had at least the merit of laying down the principle that, in the performance of their official duties, honorary consuls were on the same footing as career consuls. He was glad to note that the new member of the Commission, Mr. Jiménez de Aréchaga, held views similar to those which he (Mr. Scelle) had expressed at an earlier meeting (550th meeting, paragraphs 11-13) regarding the equality, in principle, of the status of honorary consuls and that of career consuls.

17. In his view, the only significant difference between honorary and career consuls was that the former might not be entrusted with all consular functions, but only with certain special functions. To meet that case, he had suggested at the previous meeting (551st meeting, paragraph 54) a provision to the effect that where honorary consuls were invested with such a limited competence, they enjoyed, in the performance of their official duties, the same prerogatives as career consuls, subject to the limitations specified in certain articles of the draft. If such a provision were approved, it would, of course, become necessary to specify in the text of the various articles concerned, the benefits from which honorary consuls exercising limited functions would be excluded.

18. Mr. VERDROSS, replying to Mr. François, said he would agree to the addition of the word "custom" after the words "bilateral treaties" in the second sentence of his amendment.

19. In reply to Mr. Amado, he stressed that, under the second sentence of his amendment, the receiving State would be free to grant even the full measure of privileges and immunities to an honorary consul, if it so desired.

20. He recognized that his formula was somewhat vague but, as he had said before, he was quite prepared to accept drafting changes. For example, for the sake of greater precision, the particular articles which laid down benefits necessary for the exercise of the consular function might be specified in brackets.

21. The purpose of his amendment was to reconcile differences in the provisions of municipal law. The form in which his idea was expressed was relatively immaterial; he was prepared to express it in a negative form if that should be more acceptable to the Commission. It was essential however, to specify that honorary consuls enjoyed the same benefits as career consuls in so far as those benefits were necessary for the exercise of the consular function and that, with regard to the other privileges and immunities, honorary consuls would enjoy those benefits conferred upon them by

agreement between the two States concerned or by the municipal law of the receiving State.

22. Mr. YASSEEN recalled that, at the previous meeting (551st meeting, paragraph 29) he had stressed the difference between the facilities accorded by reason of the consular function as such — which should be accorded regardless of whether that function was exercised by an honorary consul or by a career consul — and the privileges and immunities accorded to the person of the consul. The formula proposed by Mr. Verdross proceeded from that distinction and recognized the principle, also expressed in Mr. Scelle's proposal, that like functions should imply like facilities.

23. Whereas that principle was generally accepted, there was no such consensus about the privileges attaching to the person of the consul. There existed no generally recognized rule of international law to the effect that honorary consuls enjoyed the same personal privileges as career consuls. State practice was not uniform in that respect, and the position in municipal law varied greatly from one country to another. Some States accorded no privileges whatsoever to honorary consuls, while others gave them extensive privileges. In the circumstances, the wisest course was that proposed by Mr. Verdross, whose amendment would leave the question of the extent of the personal privileges and communities of honorary consuls to be settled by bilateral treaties or by the municipal law of the receiving State.

24. The formula proposed by Mr. Verdross would have the added advantage of securing for the draft articles a wider acceptance by States. It would also favour the institution of honorary consuls for, if those consuls were to be recognized as possessing the same personal privileges and immunities as career consuls, many States would be unwilling to receive them.

25. For those reasons, he strongly supported the amendment submitted by Mr. Verdross, subject to drafting adjustments.

26. Mr. SANDSTRÖM said that Mr. Verdross's amendment did not solve the problem of honorary consuls; it provided no ready criterion for the purpose of determining the benefits to be enjoyed by those consuls. The explanation given by Mr. Yasseen had not made the matter any clearer. The personal privileges granted to consuls were extended to them precisely because of their consular function and it was therefore difficult to separate the benefits which were necessary for the exercise of those functions from those which constituted purely personal privileges.

27. It had been estimated that honorary consuls were in charge of half of the existing consulates throughout the world. If therefore the Commission were to adopt the formula proposed by Mr. Verdross, it would in effect be failing to deal with one-half of the subject-matter of its draft.

28. In conclusion, he agreed with those members who felt that the Commission should adopt a formula along the lines proposed by Mr. Jiménez

de Aréchaga, and specify in article 56, paragraph 2, that honorary consuls enjoyed the same benefits as career consuls, with the exception of those laid down in certain specified articles.

29. Mr. PAL said that there seemed to have been some misunderstanding about the scope of the proposal made by Mr. Verdross. It had not been the intention of Mr. Verdross, as he had explained when introducing the proposal, to formulate a rule but rather to provide a satisfactory test — as indeed he had — for the purpose of determining for which privileges and immunities honorary consuls should be eligible and which of the actual rules should be applied to honorary consuls. The difficulty was, however, that the Commission had not specified anywhere in the draft that privileges and immunities were granted on the basis of the general principle set forth in Mr. Verdross's formula. The Commission had merely enumerated in each article the circumstances in which the privilege mentioned in the article existed; no general criterion had been laid down in that regard. Mr. Verdross's formula would not therefore reduce the Commission's labour, since each relevant article would, even so, have to be scrutinized.

30. For his part, he would prefer a provision along the lines of that suggested by Sir Gerald Fitzmaurice and elaborated by Mr. Jiménez de Aréchaga. For the purpose of determining which articles should be mentioned as not applicable to honorary consuls, the Commission should go through the various articles of its draft, one by one, and see whether any of them were in fact not applicable to honorary consuls.

31. Lastly, he suggested that the formula put forward by Mr. Jiménez de Aréchaga be supplemented by a provision, similar in purpose to the second sentence of Mr. Verdross's text, along the following lines :

“As regards the privileges and immunities mentioned in the aforesaid articles [i.e., the articles declared by the immediately preceding sentence as not applicable to honorary consuls], they shall enjoy those conferred upon them by bilateral treaties, custom or the law of the receiving State.”

32. Mr. EDMONDS said that he could not accept the text proposed by Mr. Verdross. That text was somewhat confusing; in particular he could not accept the idea, implicit in the second sentence, that there existed consular privileges and immunities which were not necessary for the exercise of the consular function. He thought that all the privileges specified in the draft articles had been granted to consular officers precisely because they were necessary for the exercise of the consular function.

33. For those reasons, he could not accept the amendment proposed by Mr. Verdross and he urged the Commission to adopt the course, suggested by Sir Gerald Fitzmaurice and other speakers, of examining the various articles for the purpose of determining which ones should not apply to honorary consuls.

34. Mr. HSU expressed support for the amendment proposed by Mr. Verdross. He thought that the Commission could not adopt any broader provision than that which it contained. That formula would also have the advantage of making the draft more acceptable to those States which were not willing to extend to honorary consuls all the facilities desired by Mr. François.

35. In most cases, an honorary consul was also a merchant, and many States found it difficult to grant to such consuls the same treatment as to career consuls. In all justice, the position of those countries should be recognized. He considered that the text proposed by Mr. Verdross met the situation and the wisest course of action for the Commission was to adopt that text.

36. Mr. YOKOTA explained that his main reason for not accepting the amendment proposed by Mr. Verdross was that he could not see what specific privileges were covered, and which ones were excluded by that formula. The Special Rapporteur, for his part, only appeared to regard as necessary for the exercise of the consular function the benefits provided for in the articles enumerated in paragraph 2 of his draft. In fact, many members, including himself (Mr. Yokota), held that many other articles should apply to honorary consuls. It was therefore apparent that there existed a considerable difference of opinion among the members of the Commission as to what privileges were really necessary and if the members, who were well versed in international law, differed so widely on the subject, the position would be even more unsatisfactory when the formula came to be applied by less informed persons.

37. The suggestion made by Mr. Verdross that his amendment could serve as an introduction, to be followed by an enumeration of the articles which would apply to honorary consuls, would not be of great assistance to the Commission. The Commission would still have to examine the various articles to determine which of them applied and which did not apply to honorary consuls.

38. Mr. AGO said that he agreed on the desirability of finding a formula which would take into account all the various systems in existence. He could not, however, accept that proposed by Mr. Verdross, mainly because it made the very grave implication that there existed consular privileges and immunities, the justification for which did not lie in the need for facilitating the exercise of the consular function. In fact, the only justification for granting to consuls the various privileges and immunities specified in the draft articles was precisely that they were necessary for the exercise of the consular function. Of course, some of those privileges were more directly related than others to the consular function, but the Commission had already recognized that all of them were to some degree necessary for the exercise of that function by mentioning them in the draft articles.

39. He recalled that the much greater personal

privileges of diplomatic agents were based on the principle of *ne impediatur legatio*. In like manner, the less extensive privileges of consuls were granted not out of mere courtesy but in order to facilitate the exercise of the consular function.

40. Accordingly, he would prefer a provision to the effect that honorary consuls enjoyed the same benefits as career consuls, with the exception of those mentioned in certain specified articles. For the purpose of such a formulation, it would be necessary for the Commission, as suggested at the previous meeting by Mr. Yokota (551st meeting, paragraph 32), to examine the various articles one by one in order to determine whether they contained any provisions which did not apply to honorary consuls as such. He emphasized that the provisions to be excepted should be those which did not apply to honorary consuls, regardless of their nationality and occupation. Where a consul was denied a particular benefit because he was a national of the receiving State, or because he was engaged in a gainful occupation, that fact was already stated in the relevant article, and applied to all consuls, whether career consuls or honorary consuls.

41. If the examination of the various articles revealed that there were very few provisions which did not apply to honorary consuls as such, it might not be necessary to have a separate article dealing with honorary consuls in general terms. It would be quite sufficient to specify the exception in the relevant articles.

42. Mr. LIANG, Secretary to the Commission, said that the amendment proposed by Mr. Verdross would be unobjectionable if it was assumed that honorary consuls were always nationals of the receiving State. A corresponding provision appeared in article 37 of the diplomatic draft which stipulated that "a diplomatic agent who is a national of the receiving State shall enjoy inviolability and also immunity from jurisdiction in respect of official acts performed in the exercise of his functions". The word "official" had been singled out for special comment earlier in the discussion. However, honorary consuls were not necessarily nationals of the receiving State, and the effect of Mr. Verdross's amendment would be restrictive.

43. In connexion with the question which articles were applicable to honorary consuls he observed that the enumeration in the Special Rapporteur's draft article 56, paragraph 2, did not mention article 41. Was it to be inferred, then, that a child born in the receiving State to an honorary consul who was a national of the sending State would acquire the nationality of the receiving State? Under Canadian law, for example, which was based mainly on *jus soli*, a child born in Canada of foreign diplomatic or consular officers — an expression which would include honorary consuls — did not by that fact acquire Canadian citizenship.

44. Mr. MATINE-DAFTARY, expressing support for Mr. Verdross's amendment, said he had

not been convinced by its critics that the amendment was narrower in scope than the Special Rapporteur's text. There seemed to be no force in the contention that Mr. Verdross's amendment did not ensure for honorary consuls the enjoyment of privileges and immunities necessary for the performance of their duties. He considered that the provisions concerning the inviolability of consular premises and archives (articles 25 and 27) should be applicable to honorary consuls.

45. Owing to the tendency to give preferential treatment to honorary consuls who were nationals of the sending State it was important to define clearly the legal status of honorary consuls who were not nationals of that State.

46. Mr. VERDROSS said in reply to Mr. Ago that not all consular privileges and immunities were founded on international law. Some, such as those connected with customs exemptions, had originated as a matter of international courtesy and had later been included in some bilateral conventions, but they normally applied only to career consuls.

47. Mr. ŽOUREK, Special Rapporteur, observed that the Commission would have to decide whether article 56 was to be *de lege lata* or *de lege ferenda*. He agreed with Mr. Yasseen that there was no rule of international law according to which honorary consuls enjoyed the same privileges and immunities as career consuls, nor, as far as he knew, had any authority on international law maintained such a proposition. On the contrary it was generally accepted that the privileges and immunities extended to honorary consuls were much more limited. The question was an extremely thorny one and the Commission was unlikely to find an answer in customary law. It was, therefore, bound to approach the task as one of the progressive development of law; but if it were not to work in a vacuum it must select those elements of general practice that would be acceptable to the majority of States, and proceed cautiously. The relevant provisions of municipal law and of consular conventions were so diverse that he was sure the members of the Commission would express very varied opinions concerning the distinguishing characteristics of honorary consuls. Criteria such as nationality or carrying on gainful activities were important, but were not sufficient *per se* to distinguish honorary from career consuls. He would have thought that for receiving States the fact that honorary consuls were not subject to disciplinary action by the sending State, did not form part of their national administrative services, and could at any time embark on private activities of a gainful nature was of far greater importance and was the reason why receiving States refused to extend the same privileges to honorary as to career consuls. The Commission should bear in mind State practice in that particular matter and should refrain from purely theoretical conjecture.

48. The CHAIRMAN suggested that, as the different views of members had now been expounded

at length, the Commission should consider its procedure.

49. Sir Gerald FITZMAURICE said that if the Commission decided that article 56 would have to be examined in the light of the earlier articles concerning privileges and immunities, that review article by article might be entrusted to the Drafting Committee.

50. It might eventually be found that all views could be reconciled by a provision stipulating, first that honorary consuls not nationals of the receiving State and not engaged in commerce or in some other gainful occupation should enjoy the same privileges as career consuls; secondly, that honorary consuls who were nationals of the receiving State should only enjoy certain specific privileges; and, thirdly, that honorary consuls, whatever their nationality, who engaged in commerce or in some other gainful occupation should enjoy only certain privileges.

51. Mr. SCELLE maintained the view that a consular service was made up of career and honorary consuls and that the sending State enjoyed the same prerogatives in respect of both categories. If a receiving State issued an exequatur to either a career or honorary consul that State was bound by the exequatur.

52. He favoured the procedure suggested by Sir Gerald Fitzmaurice and withdrew his own tentative proposal (551st meeting, paragraph 54).

53. Mr. TUNKIN said that the Commission would never escape from the vicious circle in which it found itself if it persisted in the attempt to frame a general definition of "honorary consul". It should follow the method advocated by Mr. Yokota and examine the draft article by article so as to establish which applied to honorary consuls.

54. Mr. MATINE-DAFTARY said that, in order to bring to an end the fruitless discussion in which the Commission was engaged, he would not oppose the proposal made by Mr. Yokota and supported by Mr. Tunkin; but he wished to point out that, if the necessary distinction between the two categories was to be established, the procedure suggested by Sir Gerald Fitzmaurice should be followed.

55. The CHAIRMAN said that it was clear from the discussion that there was no avoiding a review of all the articles relating to privileges and immunities so as to decide which applied to honorary consuls. He had intended to make the same suggestion as Sir Gerald Fitzmaurice so that at least the first stage of the exploratory review could be carried out by the Drafting Committee. It would still remain for the Commission, of course, to take the final decisions and to determine which articles did not apply to honorary consuls and for what reason. It seemed hardly practical to pursue further discussion on article 56 until that review had been completed.

56. Mr. YASSEEN considered that it was outside the competence of the Drafting Committee

to discharge such a task. It was for the Commission to reach agreement first on what criteria should be applied for the purpose of deciding what privileges and immunities should be enjoyed by honorary consuls.

57. The Commission should examine the prevailing practice and remember that usually honorary consuls, if nationals of the receiving State, enjoyed limited privileges and even if they were not nationals of the receiving State did not always enjoy all the privileges extended to career consuls. The distinction he had drawn between facilities granted to consulates and privileges granted to consuls as such might be a useful criterion to embody in a rule of international law.

58. The CHAIRMAN pointed out with all due respect to the views expressed by Mr. Yasseen that, since wholly contradictory opinions had been put forward in the Commission, it would be difficult to agree on the guidance to be given to the Drafting Committee. The purpose of the procedure he had had in mind was for the Drafting Committee to clear the ground by reviewing *seriatim* all the articles relating to privileges and immunities so as to simplify the Commission's task of deciding which provisions should apply to honorary consuls. It was, of course, not for the Drafting Committee to establish what should be the law on the matter. If there were any objection to that procedure the Commission could conduct the review itself.

59. Mr. TUNKIN said that he had no objection of principle to referring article 56 to the Drafting Committee, though he doubted whether the time was ripe for doing so. The Commission's usual practice was to discuss a subject thoroughly before asking the Drafting Committee to frame its conclusions in appropriate language.

60. Since the Commission had not yet settled the fundamental principles which would govern its future decision concerning the applicability of certain articles to honorary consuls, it should first consider the existing practice. In the light of that preview it might be able to select the appropriate criteria, after which the actual wording of article 56 could be left to the Drafting Committee. The procedure advocated by Sir Gerald Fitzmaurice and the Chairman might mean that the Commission would have to renew the present discussion after the matter had been studied in the Drafting Committee for one or two days.

61. The CHAIRMAN noted that all members were agreed on the need for reviewing the articles on consular privileges and immunities to see which should apply to honorary consuls; the only matter at issue was whether that review should be carried out in the Commission itself or in the Drafting Committee.

62. Mr. BARTOŠ considered that the issue concerned the Commission's terms of reference and the duties of its members. He favoured Mr. Verdross's amendment and the procedure suggested by Mr. Yokota. To refer the whole question of the applicability of the draft articles to

honorary consuls to the Drafting Committee would be to delegate to that Committee a power to make decisions of substance which was quite unacceptable. On the other hand it would clearly be difficult to vote on each article without further study. Accordingly, if it was impossible to undertake such a study in the Commission, the best procedure might be to establish an *ad hoc* committee which would then report back to the Commission. It was only when the decisions of principle had been taken that the wording of article 56 could be left to the Drafting Committee.

63. Mr. EDMONDS emphasized that the Commission should not refer any matter of principle to the Drafting Committee until a clear decision had been reached. At earlier sessions, before 1959, the Commission had voted on texts of articles and amendments thereto before sending them to the Drafting Committee. In the present instance the only permissible procedure was for the members of the Commission to vote on the issues of substance. Otherwise, the Commission would either have to accept the Drafting Committee's report, which would not necessarily represent the considered views of the majority, or do the work over again.

64. The CHAIRMAN did not consider that it was contrary to United Nations practice to refer a problem to a small group for preliminary review. That method was frequently followed in the General Assembly. Technical questions could not easily be decided by vote and it was desirable for the Commission to aim at unanimity.

65. Mr. AMADO considered that the Commission should follow the procedure proposed by Mr. Yokota, but impose a time-limit of five minutes on each speaker. That should enable its learned members to expound their views.

66. Mr. AGO agreed that there was some force in Mr. Tunkin's and Mr. Yasseen's argument that the subject was not ripe for reference to the Drafting Committee, but he was certain that no member had ever suggested that the Commission should delegate powers to that body. In the past the Drafting Committee had been used to perform two entirely different functions, drafting in the strict sense and preparatory examination of material. On the present occasion that preparatory review could be carried out by the Commission itself, but that would be a lengthy process. If it were clearly understood that the Drafting Committee would only be asked to clear the ground he would have thought the procedure suggested by Sir Gerald Fitzmaurice might be the simpler one.

67. The CHAIRMAN confirmed that Mr. Ago had rightly interpreted his conception of what should be the Drafting Committee's task in the present instance.

68. Mr. YOKOTA associated himself with those members who were opposed to referring the matter to the Drafting Committee since it was beyond that committee's competence. In the interests of

speed it might be advisable to establish an *ad hoc* committee which would be more representative of the Commission as a whole.

69. Mr. SANDSTRÖM agreed with Mr. Ago but had no objection to the establishment of an *ad hoc* committee.

70. Mr. TUNKIN considered that the procedural problem was closely connected with the substance of the question. The members who wished to examine existing international practice wanted the matter discussed in the full Commission, while those who thought differently wished to refer the article to the Drafting Committee or to another small group. In his opinion, existing practice must be taken into account, and the plenary Commission alone could hold the necessary exchange of views. All that the Drafting Committee or the suggested *ad hoc* committee could do would be to resume the abstract discussion that had taken place in the Commission. Much time could have been saved if it had been decided earlier to confine the debate to the articles of the draft; but the discussion was still ranging very widely, and no real progress had been made.

71. Mr. AGO, speaking on a point of order, considered that, as many members of the Commission were not in favour of forwarding the article to the Drafting Committee or to an *ad hoc* group, it would be preferable to discuss it in the Commission itself.

72. Mr. BARTOŠ, speaking on a point of order, thought that the article should be forwarded to the Drafting Committee or to an *ad hoc* group, with the proviso that the body concerned should submit a special preliminary report on the article to the Commission.

73. The CHAIRMAN observed that the majority of the Commission seemed to be in favour of considering the draft article by article in plenary meeting.

74. The Commission would not need to discuss the applicability of article 17 to honorary consuls, for that article had been adopted earlier and was the only article expressly declared inapplicable to honorary consuls by the Special Rapporteur's draft of paragraph 1 of article 56.

75. Turning to paragraph 2 of the Special Rapporteur's article 56, which dealt with section II of the consular draft, he suggested that, in the absence of any objections, article 22 (*Use of the state coat-of-arms*) should be regarded as applicable to honorary consuls.

It was so agreed.

76. The CHAIRMAN suggested that, in the absence of any objections, paragraph (a) of article 23 (*Use of the national flag*), which the Special Rapporteur had included in his enumeration, should be regarded as applicable to honorary consuls.

It was so agreed.

77. The CHAIRMAN pointed out that the Special Rapporteur's enumeration did not mention article 23 (b).

78. Mr. GARCÍA AMADOR asked the Special Rapporteur to explain why he had made a distinction between two questions which were so similar, and which both related to the exercise of consular functions.

79. Mr. ŽOUREK, Special Rapporteur, said that the differentiation was based on State practice; of course, it was difficult to obtain all the necessary information on that practice, and the data would be more complete after governments had sent in their observations. The right to fly the national flag of the sending State on all means of personal transport was an important privilege and it had to be borne in mind that honorary consuls were very often nationals of the receiving State or of a third State and, as such, could not be held to represent the sending State. Moreover, in the great majority of cases, they were engaged in business or other private activities of a gainful nature which indeed was their main occupation. It would be very difficult to establish when they were using a means of transport in the course of their consular duties and when they were using it for private purposes.

80. Sir Gerald FITZMAURICE could not agree with the Special Rapporteur's view that it was not the general practice of States to allow heads of consular posts to fly the flag of the sending State on all means of transport. Many consular conventions in which consular officers were defined as career officers and honorary officers made no distinction between the two in that respect. The whole provision was governed by the phrase "used by them in the exercise of their functions"; that phrase might be further clarified by inserting the word "when" before "used". The nationality of the consul and the fact of his engaging in a gainful occupation were quite irrelevant in that context.

81. Mr. AGO thought that the Special Rapporteur's explanation of his reason for distinguishing between the two paragraphs of article 23 merely confirmed once again his (Mr. Ago's) earlier contention that the reason for any distinction did not lie so much in the honorary status of the honorary consul: in reality, it lay rather in his nationality or in the fact that he engaged in a gainful occupation. He agreed with Sir Gerald Fitzmaurice that those criteria were immaterial to the applicability of article 23 (b) to honorary consuls. Any consul, when performing consular functions, was acting as an agent of the sending State and there seemed to be absolutely no reason why an honorary consul should be allowed to fly the flag of the sending State on the premises of the consulate and not on means of transport used in the exercise of consular functions. For career as well as for honorary consuls, the flag indicated that they were engaged upon the business of the sending State, and was

in no way an indication of their personal nationality or occupation.

82. Mr. JIMÉNEZ DE ARÉCHAGA thought that the privilege referred to in article 23 (b) should be enjoyed by honorary consuls, particularly since it was to be extended only to heads of consular posts.

83. Mr. BARTOŠ observed that in many cases, such as solemn public occasions, the consul, whether career or honorary, was acting on behalf of the sending State and that it was difficult to distinguish between career and honorary consuls in the matter. Accordingly, he considered that article 23 (b) should apply to honorary consuls.

84. Mr. MATINE-DAFTARY said that, though not strongly opposed to extending the applicability of the provision to honorary consuls, he considered that it would be difficult in practice to prevent such officials from flying the national flag of the sending State when engaged in business having nothing to do with the exercise of their consular functions. There was no way in which a local authority could establish whether a car being driven through the streets and flying such a national flag was on its way, say, to a government department or to the private business office of the honorary consul.

85. Mr. SANDSTRÖM agreed that the provision should be applicable to honorary consuls. In many consular districts, particularly in large ports, it was important that the local authorities should be able to recognize the vehicle, vessel or aircraft used by a foreign consul, in order to give him the privileges to which he was entitled.

86. The CHAIRMAN, speaking as a member of the Commission, endorsed Mr. Sandström's view. Moreover, in matters of precedence, it would be invidious to deprive an honorary consul of the right to fly the flag of the sending State, when the career consuls of other sending States could exercise that right.

87. Speaking as the Chairman, he observed that the majority of the Commission considered that article 23 (b) should apply to honorary consuls and drew attention to Sir Gerald Fitzmaurice's suggestion to insert the word "when" before "used".

88. Mr. HSU asked for a vote on the question of the applicability of article 23 (b) to honorary consuls, in view of the dissenting opinions that had been expressed.

It was decided by 12 votes to 3, with 1 abstention, that article 23 (b) should be applicable to honorary consuls.

89. The CHAIRMAN invited the Commission to consider the applicability of article 24 (*Accommodation*) to honorary consuls.

90. Sir Gerald FITZMAURICE pointed out that, since the private residence of the consular officer was not mentioned in the article and since the

right was accorded to the sending State itself, no differentiation should be made in cases where the sending State was represented by an honorary consul. The purpose of the article was to facilitate the procurement of premises necessary for a consulate, irrespective of the status of the head of post. There seemed to be no reason, therefore, why that provision should not be applicable to honorary consuls.

91. Mr. YASSEEN and Mr. YOKOTA agreed with Sir Gerald Fitzmaurice that the provision should be applicable to honorary consuls, since its purpose was to facilitate the exercise of consular functions.

92. Mr. MATINE-DAFTARY said that he was in favour of extending the applicability of article 24 to honorary consuls who were not engaged in activities of a gainful nature, but he could not endorse Sir Gerald Fitzmaurice's arguments. In his opinion, honorary consuls seldom required the assistance of the receiving State in procuring suitable premises for consulates.

93. Mr. SANDSTRÖM said that, while he was in favour of applying article 24 to honorary consuls, it was in fact illogical to state that the provision was applicable to such officials. The way in which the question was put to the Commission confirmed that the Special Rapporteur's formulation of article 56 was inappropriate, and that it would have been wiser to enumerate the articles which were not applicable to honorary consuls.

94. Mr. BARTOŠ thought that article 24 should apply to honorary consuls. Countries such as his own, which employed honorary consuls and often found it difficult to obtain premises for their consulates, were particularly interested in the extension of the facilities of the receiving State to all consular officers.

95. Mr. ŽOUREK, Special Rapporteur, explained that he had not included article 24 in his enumeration because, in the vast majority of cases, the sending State was not faced with the question of procuring premises where honorary consuls might perform their consular functions. Such officials usually exercised those functions at their own business premises and, at most, might be obliged to rent an extra room for consular purposes. Moreover, under the municipal law of most States, inviolability was not extended to the premises of honorary consuls. The Commission should be on their guard against the notion that there existed only one kind of consulate and that any difference between them depended solely on the question whether the head of the post was a career or an honorary consul. He stressed the fact that there were two kinds of consulate, viz. ordinary consulates and honorary consulates.

96. Mr. VERDROSS thought that all possible cases should be covered by the provisions of a multilateral convention. Accordingly, the right of a sending State to acquire buildings where

necessary should be provided for, even if the head of post were an honorary consul.

97. The CHAIRMAN, speaking as a member of the Commission, observed that the question to be decided was whether the sending State had the right to procure the necessary premises irrespective of the status of the head of post, even if the majority of States did not exercise that right.

98. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Verdross, said that, in cases where consular activities were so extensive as to justify the purchase of a building by the sending State, that State would establish an ordinary consulate and would appoint a career consul to the post. As a matter of principle, he considered that the extension of the benefit of article 24 to honorary consuls could not be justified as a general rule substantiated by national legislation.

99. Mr. AGO thought that the Special Rapporteur was over-simplifying the issue. An honorary consul who was a national of the sending State but a resident of the receiving State could not necessarily accommodate a consulate in his private office space; often such a consul had to find additional premises for the performance of the consular functions.

100. With regard to the whole of sub-section A, he pointed out that the sub-section related, not to consuls but to consulates, irrespective of the status of the head of post.

101. Mr. ŽOUREK, Special Rapporteur, could not agree with Mr. Ago. By the article concerning classes of heads of consular posts, heads of post were divided into four classes, which did not include honorary consuls, and the appointment of those officials was subject to the consent of the receiving State.

102. The CHAIRMAN, speaking as a member of the Commission, said that he knew of cases where States appointed a career consul to a given post, rented premises for his office, and later replaced the career consul by an honorary consul, who performed consular functions on the same premises. If article 24 were not applicable to honorary consuls, the question arose whether the sending State would be obliged to vacate the premises concerned on appointing an honorary consul to the post.

103. Mr. TUNKIN said that, while he had no particular objection to extending the applicability of article 24 to honorary consuls and would abstain from voting on the issue, he could not agree with Mr. Ago's argument, which was based on the as yet unproved premise that a consulate was a consulate, irrespective of the status of the head of post. It should be borne in mind that the Commission had not decided to place honorary consuls on the same footing as career consuls; Mr. Ago's assumption was therefore premature.

104. Mr. BARTOŠ, referring to the Yugoslav Government's practice in consular relations with Switzerland prior to the Second World War, said that in one case a consul-general had been an honorary consul, while the vice-consul serving under him had been a career consul, because the honorary consul had not fulfilled certain conditions of the Yugoslav consular service. In another consular post, a career consul had been withdrawn and a banker had been appointed as honorary consul, on condition that the consular archives were kept separate from his private documents. In another State, an honorary consul had at first exercised his functions on his own premises but subsequently other firms which were in competition with his and which had connexions with Yugoslavia had objected and had asked him to obtain separate accommodation for his consular duties, and the Yugoslav authorities had been obliged to procure such premises for him.

105. Article 24 related to consulates *per se*, without differentiating between honorary or career consulates. Accordingly, the provision should be applicable to honorary consuls as well as to career consuls.

106. Mr. AGO fully agreed with the Special Rapporteur that the choice of an honorary or a career consul depended upon agreement between the sending and the receiving States. Nevertheless, he regarded that as yet another argument in favour of equal treatment of the two categories for the purposes of article 24: if a career consul was replaced by an honorary consul at a given post, with the agreement of the receiving State, the honorary consul should be entitled to the same facilities, so far as consular premises were concerned.

107. In reply to Mr. Tunkin, he observed that, in referring to sub-section A as a whole, he was not assuming that the Commission had already decided to place honorary and career consuls on the same footing, but merely pointing out that the sub-section related to consular premises only, and not to the status of the head of post. There were honorary and career consuls, but there were no honorary or career consulates.

108. Mr. ŽOUREK, Special Rapporteur, pointed out to the members who had quoted examples from national practice that a clause of a multi-lateral treaty could not be based on exceptions. Mr. Ago's case for equality of treatment for honorary and career consuls could be proved only when the observations of Governments had been received. His study of the large number of provisions appearing in national legislations led him to doubt very much whether Mr. Ago's views would find support in the observations of governments. Personally, he considered that the status of the head of post determined the character of the consulate; he had as yet heard no convincing proof that the same rules applied to consulates headed by honorary consuls and to those headed by career consuls.

109. Mr. VERDROSS pointed out that the provision in article 24 was particularly necessary for the effective performance of consular functions by honorary consuls in socialist States, where real property was owned by the State. For the purpose of obtaining premises the honorary consul would be obliged to rely on facilities offered him by the receiving State.

110. The CHAIRMAN called for a vote on the applicability of article 24 (*Accommodation*) to honorary consuls.

It was decided by 12 votes to 2, with 2 abstentions, that article 24 should be applicable to honorary consuls.

The meeting rose at 1.10 p.m.

553rd MEETING

Thursday, 2 June 1960, at 3.30 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 56 (*Legal status of honorary consul*) (continued)

1. The CHAIRMAN invited the Commission to discuss the question of the applicability to honorary consuls of the principle embodied in article 25 of the draft on consular privileges and immunities.

2. Sir Gerald FITZMAURICE suggested that the Commission should simultaneously consider the applicability of article 25 (*Inviolability of consular premises*), 26 (*Exemption of consular premises from taxation*) and 27 (*Inviolability of the archives and documents*) to honorary consuls. Whatever conclusion was reached in relation to one of those provisions would logically be valid for all, inasmuch as they had in common the essential element of the direct interest of the sending State in the premises and archives in question.

3. Mr. JIMÉNEZ DE ARÉCHAGA thought it would be better to deal with the applicability of the three articles to honorary consuls separately. Those three articles dealt with the most important issues; in addition, in connexion with article 27, the Commission would have to consider paragraph 3 of article 56 in the Special Rapporteur's revised text (551st meeting, paragraph 18).

4. Mr. YOKOTA also thought the applicability of each of the three articles to honorary consuls

should be discussed separately, for various reasons. For example, he considered that the principle of the inviolability of consular premises required some qualification in so far as it was to apply to consulates headed by an honorary consul. Inviolability should attach only to an office used exclusively for the exercise of the consular function and kept separate from the premises used by an honorary consul for his private business.

5. In theory, even where a career consul was in charge, the principle still applied that consular premises should not be used for non-consular purposes. In practice, however, there was seldom occasion to apply that rule to career consuls, whereas honorary consuls were very often engaged in commerce or some other gainful occupation. Accordingly, he thought that a special provision should be added to the effect that consular offices must be kept separate from premises used by an honorary consul for other activities.

6. Mr. YASSEEN said that he was prepared to accept the inviolability of the premises of a consulate in the charge of an honorary consul, with the addition of the following proviso: "if those premises are assigned exclusively for the exercise of consular functions."

7. Mr. MATINE-DAFTARY said that in practice it would be extremely difficult to apply such a provision. It would not be at all easy to check whether a consul who had outside activities did in fact use the consular premises for purposes other than the exercise of consular functions.

8. Accordingly, for practical reasons, he was prepared to accept the applicability of all the provisions of articles 25, 26 and 27 to an honorary consul on condition that the consul was a national of the sending State and did not engage in commerce or in some other gainful occupation in the receiving State.

9. Mr. SANDSTRÖM said that it was immaterial whether from the point of view of their applicability to honorary consuls, articles 25, 26 and 27 were discussed separately or together. The result would be the same in both cases.

10. As to the proviso proposed by Mr. Yasseen, he said the condition which it specified seemed much too strict. A consul might be engaged in research or study which was outside his official duties; if he carried on that research or study in the consular premises there would be no reason to deprive the consulate of inviolability. Perhaps the condition to be laid down should be that the premises must not be used for the conduct of trade. He was not, however, prepared to propose a definite formula at that stage.

11. The CHAIRMAN said that, in view of the differences of opinion, it would be preferable to deal with each article separately. He therefore invited members to discuss the applicability of article 25 to honorary consuls, together with Mr. Yasseen's proposal.

12. Mr. ŽOUREK, Special Rapporteur, sup-

ported the principle embodied in the proviso proposed by Mr. Yasseen, but thought that the proposal would not solve the practical difficulties involved.

13. He explained that, after careful reflection, he had decided not to mention article 25 in his new draft article 56, paragraph 2, because it was very difficult in practice to ascertain whether consular premises were being used by an honorary consul for purposes other than the exercise of his consular duties. After all, an honorary consul could engage in other activities; because of their honorary character, his consular duties were compatible with an outside occupation. In the circumstances, it could easily happen that, under pressure of time, the person concerned might be brought to use the consular premises for his other activities.

14. Mr. FRANÇOIS recalled that the Commission had not yet settled the final text of article 25. It was probable that the Drafting Committee would replace the expression "premises used for the purposes of the consulate" by the words "consular premises". The language used would thus make it clear that the premises should be used exclusively for the purposes of the consulate. A provision such as that proposed by Mr. Yasseen would be necessary if consular and non-consular activities were carried on in the same premises.

15. Mr. TUNKIN said it was important to find out what was the prevailing State practice in the matter. Perhaps those members who belonged to countries making extensive use of honorary consuls might comment on the practice. The Soviet Union had no practice in that field, but from his reading, he had formed the opinion that States were somewhat reluctant to grant inviolability to premises used by honorary consuls; the reason for that reluctance was that the honorary consul was often a citizen of the receiving State and it was difficult for that State to accept the proposition that one of its own citizens should occupy premises which were inaccessible to the local authorities. If the consular draft contained a provision barring access to premises occupied by honorary consuls many States would probably not accept the draft.

16. Sir Gerald FITZMAURICE said that he was quite prepared to accept the condition laid down in the proviso proposed by Mr. Yasseen. In cases where that condition was fulfilled, there was no valid reason why any distinction should be drawn, for the purpose of the inviolability of the premises, between consulates headed by an honorary consul and those headed by a career consul. He recalled, in that connexion, the common practice of entrusting a consulate sometimes to a career officer and sometimes to an honorary consul. Unless the applicability of article 25 to honorary consuls was accepted, the extraordinary situation would result that the same consular premises which were inviolable one day would not be inviolable the next, although the same

functions continued to be performed inside the premises.

17. As to the practice of States, he said that the large number of consular conventions signed by the United Kingdom made little or no distinction, so far as the inviolability of premises was concerned, between consulates headed by honorary consuls and those headed by career consular officers. He had examined the various multilateral treaties and the fourteen bilateral conventions reproduced in the United Nations publication *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*¹ and had been unable to find a single one which specified anywhere that consular premises ceased to be inviolable because they were in the charge of an honorary consul. The Treaty between the Philippines and Spain of 1948 dealt only with career consular officers; other conventions covered honorary consular officers as well as career officers, but made no distinction between them with regard to the inviolability of consular premises and archives.

18. The 1924 Consular Convention² between Italy and the Czechoslovak Republic stated (article 1, paragraph 1) that consular officials could be either career or honorary officers and that those who were not career officers could be appointed from among nationals of either — or of neither — of the two States. That Convention did not deal with the inviolability of consular premises but contained provisions (article 9) on the closely related question of the inviolability of consular archives and, in that respect, did not differentiate between consular posts in the charge of honorary consuls and those in the charge of career consuls.

19. Another interesting example was provided by the 1948 Convention between the United States of America and Costa Rica.³ That Convention laid down in paragraph 6 (a) of its article II the inviolability of "the buildings and premises occupied by the sending State for official consular purposes". It was significant that paragraph 7, which provided for the somewhat exceptional privilege of a similar inviolability for the personal residence of a consular officer, limited that privilege to "a consular officer or employee who is a national of the sending State and not a national of the receiving State and is not exercising a private occupation for gain in the receiving State". He pointed out that the distinction drawn in that provision was not based on any differentiation between career officers and honorary consular officers as such but on the nationality or occupation of the person concerned. It would be noted that no distinction of any kind was

¹ United Nations *Legislative Series*, vol. VII (United Nations publication, Sales No. 58.V.3).

² League of Nations *Treaty Series*, vol. XXXIV, No. 876, p. 56.

³ United Nations *Treaty Series*, vol. 70 (1950), No. 896, p. 28.

made in the Convention in the matter of the inviolability of the consular premises themselves.

20. Mr. BARTOŠ said that the premises of a consulate, so long as no other activity was carried on therein, were inviolable. The Commission had already accepted the principle that consular premises should not be used for purposes other than the exercise of the consular function. Subject, therefore, to the condition laid down in the proviso proposed by Mr. Yasseen, consular premises in the charge of an honorary consul should be declared inviolable in the Commission's draft.

21. The principle that the premises used as a consulate, together with the consular archives, were inviolable, went back to the Middle Ages. The earliest consular conventions laid down that inviolability and specified that consular premises and consular archives must be kept separate from business premises and records. It was significant that that ancient tradition related to honorary consuls (*consules electi*).

22. The basic criterion was therefore that of the exclusive use of the premises for the exercise of the consular function. In the absence of such exclusive use, it would be difficult to admit that the premises were inviolable.

23. In Yugoslavia, there were no actual legislative provisions or regulations governing the question of the inviolability of consular premises in which non-consular activities were also carried out. The practice as laid down in instructions was that such premises were not searched without the consent of the Protocol Division of the Ministry of Foreign Affairs. The purpose of the practice was to forestall international friction.

24. From his fifteen years' experience, he could say that other States had always shown the utmost consideration for Yugoslav consulates abroad, which were very often in the charge of honorary consuls. Only in two cases had any search been made of such premises and in both cases the political consequences had been very serious. He could therefore say that the general trend seemed to be in favour of the inviolability of consular premises in the charge of honorary consuls, provided, of course, that the premises in question were used solely for the purpose of carrying out consular functions.

25. For those reasons, the Commission would be well advised to admit the applicability to honorary consuls of the provisions of article 25, paragraph 1, subject to the proviso that the premises concerned were used exclusively for the purpose of carrying out consular functions. For similar reasons, paragraphs 2 and 3 of article 25 should be declared applicable to consulates headed by honorary consuls. Paragraph 3 in particular set forth an obligation of the receiving State which practically went without saying.

26. Mr. LIANG, Secretary to the Commission, pointed out that in the memorandum submitted

by the Ministry of Foreign Affairs of Belgium, concerning the rights, privileges and prerogatives enjoyed by foreign diplomatic and consular officers in Belgium, it was specified in paragraph 14 that the official premises of career consular posts (*postes consulaires de carrière*) were inviolable.⁴ As could be seen, the inviolability of consular premises was laid down in Belgium in the case where the person in charge was a career consular officer.

27. He also drew attention to the formula used in the 1952 Consular Convention between the United Kingdom and Sweden⁵, which differed from that proposed by Mr. Yasseen. Article 10 (3) of that convention, which set forth the inviolability of consular premises by stating that "a consular office shall not be entered by the police or other authorities of the territory except with the consent of the consular officer in charge" added: "The provisions of this paragraph shall not apply to a consular office in the charge of a consular officer who is a national of the receiving State or who is not a national of the sending State." He recalled that, in article 2 (6) it was stated: "A consular officer may be a career officer (*consul missus*) or an honorary officer (*consul electus*)". The Convention thus made no distinction (so far as their treatment was concerned) between honorary consuls and career consuls and, therefore, if an honorary consul in charge of a consulate was not a national of the sending State, the police could enter the consular premises without his consent.

28. The two examples which he had given did not reveal the existence of a uniform State practice in the matter of the inviolability of consular premises in the charge of an honorary consul. From the logical point of view, however, it might seem appropriate to state that where a consular office was maintained by the sending State in the charge of an honorary consul and where the receiving State had been advised of the existence of an independent office, the office in question should be inviolable. Perhaps the Commission might wish to consider the possibility of a formula derived from the language of article 10 (3) of the 1952 Consular Convention between the United Kingdom and Sweden as an alternative to the text proposed by Mr. Yasseen.

29. Mr. ŽOUREK, Special Rapporteur, said that the discussion had shown that it was of vital importance to gather information on State practice in the matter. The wisest course for the Commission might therefore be to request governments for their views, before coming to any

⁴ *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No. 58.V.3), p. 24.

⁵ *United Nations Treaty Series*, vol. 202 (1954-1955), No. 2731, p. 158.

decision. However, he advised prudence in accepting the provisions of bilateral conventions as evidence of existing rules of general international law. For example, it would be interesting to see what degree of inviolability would be accorded in the United Kingdom to a consulate in the charge of an honorary consul if the sending State had not signed with that country a convention along the lines of the Anglo-Swedish Convention of 1952. Some conventions, like that entered into by the United States of America and Costa Rica, provided for privileges which went far beyond those recognized by general international law. It was essential to ascertain the practice of States in cases which were not governed by the provisions of a bilateral convention.

30. As to the 1924 Convention between Italy and the Czechoslovak Republic, he said it contained no reference to consular premises. However, in regard to the inviolability of consular archives and documents, set forth in article 9, paragraph 1, of that Convention, the following paragraph of the same article specified that "official books, documents or objects must always be kept separate from private correspondence, books and documents relating to the trade or industry in which consular officers not in the regular consular service may be engaged". Paragraph 5 of the same article laid down that the privilege of receiving and despatching cipher messages in relations with the Government authorities of the sending State belonged solely to heads of consular offices in the regular consular service. It could not therefore be maintained that, in the Convention in question, honorary consuls had been placed on the same footing as career consuls.

31. Mr. MATINE-DAFTARY pointed out to Mr. Bartoš that the legal status of consuls had changed radically since the Middle Ages. One could hardly expect the newly-independent States which were so jealous of their sovereignty to accord to consuls the treatment accorded in earlier centuries. Furthermore, the fundamental changes in international law which had taken place in the twentieth century had to be taken into account.

32. He regretted the division of opinion in the Commission, which was perhaps largely due to its failure to distinguish clearly between the different classes of honorary consuls. He agreed with the view that a receiving State would not accord inviolability to consular premises headed by an honorary consul of its own nationality, and accordingly he thought that the Commission's draft should make allowance for that very natural attitude of the State.

33. Mr. PAL observed that some members now appeared to think that article 25 went beyond what was warranted by practice and bilateral conventions. Such a criticism however, not only came too late but was not quite accurate; it was besides somewhat out of place where the present purpose was concerned. There were at least some bilateral conventions which supported the principle enunciated in the article. So far as it

related to the inviolability of premises, article 10 of the Anglo-Swedish Consular Convention of 1952 contained similar provisions and made no distinction between consulates headed by career consuls and those headed by honorary consuls, and indeed no case had been made out during the discussion for differential treatment of the latter. On the assumption that article 25 correctly stated the rule applicable to consulates in the charge of career consuls it should also be applicable to consulates headed by honorary consuls. The absence of practice should not be over-emphasized, particularly in view of the fact that part of the Commission's task was to promote the progressive development of law. In the same way as a person could be so blinded by the bright light of an ideal as to lose sight of practical matters, a person who forgot ideals altogether in his pursuit of practical achievement would never make his due contribution to progress.

34. Mr. TUNKIN said that the Commission must examine the practice of States in order to determine whether there was any legal distinction between ordinary and honorary consulates. His impression was that a receiving State was not normally prepared to do more than accord inviolability of premises to the latter if the head of post was not a national and if the premises were used exclusively for consular purposes. In the main those two conditions seemed to be generally accepted.

35. Mr. Yasseen's proposal would have to be expanded by reference to the additional criterion of the nationality of the head of post.

36. Mr. BARTOŠ said that Mr. Matine-Daftary seemed to have misunderstood his remarks. He had meant to emphasize that the inviolability of consular premises was a rule of customary law which applied even in the absence of any express provision to that effect in consular conventions. Yugoslavia also had had experience of the system of capitulations, but that was now a matter of the past. His country maintained consular relations with nearly all States and had not encountered difficulty in the application of the rule he had mentioned even vis-à-vis countries with which it had not yet concluded consular conventions.

37. If the Commission were to carry out its task of promoting the progressive development of international law it must recognize that the modern trend was towards an extension of consular privileges. If the institution of honorary consuls were accepted at all, the proper safeguards for the discharge of their functions by honorary consuls must be admitted. Any receiving State was free to refuse an exequatur to one of its own nationals or to revoke such an exequatur without giving reasons. In his opinion, the protection offered in article 25 with the proviso proposed by Mr. Yasseen was indispensable for honorary consuls.

38. Sir Gerald FITZMAURICE pointed out that, in so far as article 10 of the Anglo-Swedish Con-

ular Convention of 1952 differentiated between consular offices, the difference was based on the nationality of the head of post. Though he disagreed with the proposition that inviolability of premises should be refused on the grounds that the head of a post was a national of the receiving State, the distinction could be regarded as a rational one — as was not the case with the distinction based on whether the officer was a career or honorary consul. Mr. Tunkin had rightly observed that in many cases an honorary consul was a national of the receiving State, but he (Sir Gerald Fitzmaurice) had drawn the opposite conclusion from that fact. Surely, rather than interpret that fact as a ground for excluding honorary consuls from the enjoyment of inviolability of premises it should be regarded as proof that the institution of honorary consuls met a real need, particularly of smaller and less prosperous States. He agreed with Mr. Bartoš that the modern trend was towards inviolability, provided that the consular premises were used exclusively for consular purposes, and in that respect the nationality of the head of post was immaterial.

39. The Special Rapporteur had admitted the principle of the inviolability of archives in his new text of article 56. That inviolability could not be secured unless the premises of honorary consuls were also inviolable. It was in the general interest to enable them to perform their functions.

40. If the Commission found that practice varied should it not select those provisions which best met the common need and which were most in accord with latest trends? If governments were dissatisfied with its proposals they would have an opportunity of submitting observations and, at a later stage, of suggesting amendments. He thus adhered to the principle that consular premises of honorary consuls should be inviolable, provided they were used exclusively for consular functions.

41. Mr. JIMÉNEZ DE ARÉCHAGA observed that there seemed to be general agreement that article 25 should apply to honorary consuls with the proviso proposed by Mr. Yasseen. That view was confirmed in article 18 of the Convention regarding Consular Agents adopted at Havana in 1928.

42. Mr. TUNKIN did not think there was enough evidence to substantiate the contention that the modern trend was to grant inviolability of consular premises irrespective of the nationality of the head of post.

43. Mr. SANDSTRÖM said that there were weighty reasons for according inviolability to consular premises even if the consulate was directed by an honorary consul, for without such inviolability consular functions could not be carried out in freedom. The provision contained in article 10 of the Anglo-Swedish Consular Convention was disquieting.

44. Mr. VERDROSS agreed with Mr. Sandström and supported Mr. Yasseen's proposal. A receiving State was not bound to accept an honorary consul of its own nationality, but having accepted him

that State must recognize that the honorary consul had to perform official duties on behalf of the sending State which he could not perform freely unless his consular premises were inviolable. Naturally, it was an implied condition of the enjoyment of the privilege that the premises must not be used for non-consular purposes.

45. Mr. ŽOUREK, Special Rapporteur, suggested that in the light of existing practice the Commission's draft should stipulate that the provisions of article 25 would not apply to premises used by honorary consuls for their consular functions. It had to be remembered that, in the great majority of cases, honorary consuls had no consular premises, in the sense in which that expression was used in the draft, but carried out their consular functions in conjunction with their private occupations.

46. The CHAIRMAN, speaking as a member of the Commission, pointed out that the overriding consideration was the consent of the receiving State to accept an honorary consul. If a government thought that article 25, if applied to consulates in the charge of honorary consuls, was too liberal, that government's course would be simple: it would decline to admit honorary consuls. Moreover, no one could contend that archives, whether in the care of an honorary or a career consul, were not inviolable; in his opinion, the meaning of article 25 was in effect that one of the guarantees of the inviolability of archives and documents was the inviolability of the consular premises, if those were exclusively devoted to consular functions.

47. The only question left outstanding was what was the position of a consulate directed by an honorary consul who was a national of the receiving State and who used the premises exclusively for the performance of consular functions? Opinions seemed to differ on whether the authorities of the receiving State were empowered to enter those premises on the grounds that the honorary consul was a national of that State. His own interpretation of article 10 of the Consular Convention between the United Kingdom and Sweden of 1952 was that the exception mentioned in it was not general, but operated only in cases where asylum was given in a consulate to fugitives from justice. The authorities pursuing the fugitive were, in his opinion, entitled to enter the consulate without the prior consent of the head of post, if the latter was a national of the receiving State; the provision did not, however, lay down a general rule applicable solely to honorary consuls *qua* honorary.

48. Speaking as Chairman, he observed that the Commission seemed to be agreed that the inviolability stated in article 25 applied to honorary consuls, provided that the premises were used exclusively for consular functions. There also seemed to be no difference of opinion on the fact that the consular archives were in all cases inviolable. The only outstanding point seemed to be whether the criterion of nationality should be

introduced, in the form of a proviso concerning the case where the head of post was a national of the receiving State. The Commission might first vote on the proviso concerning the exclusive use of the premises for consular purposes and defer its decision on the proviso concerning nationality, which had not been exhaustively discussed.

49. Mr. PAL said that if article 25 itself were amended as the Chairman had suggested, he would have no objection; but if article 25 were made applicable to consulates headed by honorary consuls, subject to the sole qualification suggested — viz. the exclusive user of the premises for consular purposes, then the consequence would be that the permission of the head of the consular post would not be required to enable the local authorities to enter premises not so qualified, if the head of the post happened to be an honorary consul. He emphasized the fact that, as it stood, the article did not insist on exclusive user, though it did require user for consular purposes. The introduction of such a qualification where honorary consuls were concerned might materially affect the meaning of the article as applied to career consuls.

50. The CHAIRMAN said that he had not suggested any precise wording for that qualification; he had merely recommended the Commission to accept the principle and to defer a decision on the wording of the proviso.

51. Mr. AMADO thought that the Commission would be taking an unduly far-reaching decision in connexion with article 25. The very possibility that a national of the receiving State might be rendered immune from the legislation of that State by his appointment as honorary consul made him extremely uneasy. The results of the Drafting Committee's study and the observations to be made by governments should be awaited before the Commission made any decision on such an important matter.

52. Mr. EDMONDS observed that, in accordance with the Chairman's suggestion, the Commission would have to decide whether article 25 applied to honorary consuls, but should leave aside the question of nationality. In those circumstances, it was difficult for members who believed that the application of article 25 should be general to vote on the proposition as it had been stated.

53. Mr. YOKOTA believed that the Commission could well follow the Chairman's suggestion and vote at once on whether article 25 should be applicable to honorary consuls, with the proviso that the premises must be used exclusively for consular functions. The question whether the premises enjoyed inviolability if the head of post was a national of the receiving State was extremely complex and should be discussed further before any decision was taken.

54. Mr. EDMONDS thought that members who believed that the proviso concerning exclusive use for consular functions was unnecessary would not be given a fair opportunity to express that view.

55. The CHAIRMAN suggested to Mr. Edmonds that he should either vote against the proposition or else submit an amendment to test the opinion of the Commission.

56. Mr. ŽOUREK, Special Rapporteur, pointed out that the problem of nationality was implied in the first proposition on which the Chairman had suggested a vote. The debate had shown that a number of members could not accept the principle of according inviolability to consular premises if the head of post was a national of the receiving State. He agreed with Mr. Amado that the Commission did not yet have enough information at its disposal to decide that the premises of all consular posts headed by honorary consuls were inviolable. There was no need to take a decision on the question immediately, and it could be deferred until observations had been received from governments.

57. The Commission seemed to be agreed that the consular archives were inviolable; in any case, inviolability of archives and documents was provided for in article 27.

58. Mr. VERDROSS agreed with other members that the consular archives were inviolable, whether or not the head of post was an honorary consul or a national of the receiving State. Accordingly, there seemed to be no reason not to extend the inviolability to all consular premises devoted exclusively to consular functions, since such premises constituted nothing but a repository of archives.

59. Mr. ŽOUREK, Special Rapporteur, pointed out that archives might be kept outside the premises of a consular or diplomatic mission.

60. Mr. TUNKIN observed that the authorities of the receiving State could not enter consular premises without special permission in certain cases, but in other cases, where they could enter without such permission, that did not mean that the archives were not inviolable.

61. Mr. YOKOTA urged members to avoid discussion of substance at that stage. A decision should be taken forthwith on the first point defined by the Chairman, particularly since the Commission seemed to be agreed on that point. The question of the nationality of the head of the post might be discussed later if necessary.

62. Mr. MATINE-DAFTARY did not consider that the vote could be divided.

63. The CHAIRMAN thought that a vote on the first point he had mentioned would clarify the views of members. Any member who believed that even premises used exclusively for consular functions should not be inviolable unless the head of post was a national of the sending State would have to vote against the proposition.

64. Sir Gerald FITZMAURICE could not agree with that interpretation. The two questions were entirely separate, since the nationality issue arose equally in the case of honorary and in that of career consuls. If the Commission decided that

consular premises headed by consuls who were nationals of the receiving State did not enjoy inviolability, that decision would apply to both classes of consuls. That was a separate point, and might be decided upon later. The first decision to be taken, however, was whether there was any bar to inviolability on the grounds of the honorary or career status of the head of post.

65. Referring to the remarks of Mr. Edmonds he said that, according to Mr. Yasseen's proposal, the article would apply to consulates headed by honorary consuls in those cases only where the premises were used exclusively for consular functions. Mr. Edmonds could vote against that proposition and, if the Commission adopted that wording, a vote could be taken on whether the article was applicable to honorary consuls on that basis. At that stage, the only outstanding issue would be that of the nationality of the head of post, irrespective of his honorary or career status.

66. Mr. PAL said that his difficulty lay in the fact that the word "exclusively" did not appear in the Special Rapporteur's wording of article 25. From its absence it might be inferred that exclusive use for consular functions was not a necessary condition for the inviolability of premises so long as the head of post was a career consul. He could see no reason for such a distinction and, in those circumstances, he would find it difficult to vote for Mr. Yasseen's proposal.

67. Mr. YOKOTA pointed out that the difference was really one of practice rather than of theory. In theory, no consular premises, whether in charge of a career or an honorary consul, could be used for other purposes, but in practice, honorary consuls often used such premises — or, to be exact, part of such premises — for other activities, while career consuls did not. Accordingly, the insertion of the word "exclusively" was a necessary precaution in cases where the heads of post were honorary consuls.

68. Mr. LIANG, Secretary to the Commission, doubted whether the notion of exclusive use for consular functions applied at all to many consulates. For example, consuls at many posts lived in the buildings in which they had their offices and they might also share the premises with the trade mission of the sending State. Mr. Yasseen's proposal should therefore be amended so as to provide that the inviolability of the consular premises would depend on whether or not private business was conducted on the premises in addition to consular functions.

69. Mr. AMADO recalled that he had originally been agreeable to the idea of making separate provision for the institution of honorary consuls in the draft. Then a strong trend had become apparent in the Commission towards placing honorary and career consuls on the same footing, which constituted in effect an attempt to create a new rule of international law; now objections to that trend were crystallizing, in the light of purely practical considerations. The institution

of honorary consuls was an important part of the general consular system, but the lengthy debates in the Commission had shown that there was a fundamental difference between honorary and career consuls.

70. Mr. MATINE-DAFTARY, commenting on article 10 of the Consular Convention between the United Kingdom and Sweden of 1952, said he did not believe that a general rule of international law could be based on a bilateral agreement, particularly on one concluded between two countries with such similar backgrounds. In any case, he construed that article to mean that the inviolability of consular premises did not apply if the head of post was an honorary consul.

71. Sir Gerald FITZMAURICE assured Mr. Matine-Daftary that the exception provided for in the article he had cited applied to career consuls as well as to honorary consuls.

72. Mr. MATINE-DAFTARY considered that the reference to a consular officer "who is a national of the receiving State or who is not a national of the sending State" was an implicit reference to honorary consuls.

73. Mr. FRANÇOIS considered that any vote taken at that stage would be based on misconceptions. It would be wise to follow the Special Rapporteur's suggestion and for the time being to take no decision on the question of the applicability of article 25 to consulates headed by honorary consuls. The commentary might state that the question had been discussed at length and that opinion had been divided; and governments might be asked to give their views on the question before a final decision was taken.

74. The CHAIRMAN recommended the Commission to adopt Mr. François's suggestion.

It was so agreed.

The meeting rose at 6 p.m.

554th MEETING

Friday, 3 June 1960, at 9.30 a.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 56 (*Legal status of honorary consuls*)
(continued)

1. The CHAIRMAN invited the Commission to discuss the question of the applicability to hono-

rary consuls of the principle embodied in article 26 (*Exemption of consular premises from taxation*).

2. Mr. YOKOTA proposed that the rule expressed in article 26 should apply to honorary consuls. The privilege involved in that rule belonged not to the consul personally but to the sending State itself.

3. Mr. YASSEEN said that he favoured the exemption of consular premises from taxation on condition that those premises were assigned exclusively for the exercise of consular functions.

4. Mr. TUNKIN recalled that the Commission had discussed at great length the meaning of the expression "mission premises" when it had considered the diplomatic draft and had arrived at the conclusion that the expression should be construed in a broad sense and include, for example, the embassy's garage.

5. In considering the question of the applicability of article 26 to the premises used by an honorary consul, the approach should be different. The term "consular premises" should be construed as meaning not a whole building in which perhaps only one room was used as a consular office, but only that part which served for the exercise of the consular function. Accordingly, he suggested that the term "consular office" should be used instead of "consular premises".

6. Mr. YOKOTA supported Mr. Tunkin's suggestion, which, he thought, involved a drafting point that could be left to the Drafting Committee.

7. Mr. YASSEEN said that the condition which he had suggested was intended to achieve the same purpose as Mr. Tunkin's amendment, in that it implied that exemption from taxation was limited to the office actually used as a consulate.

8. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed that article 26 should apply to honorary consuls and that the Drafting Committee should be instructed accordingly; in addition, the comments of Mr. Yasseen and Mr. Tunkin should be referred to that committee.

It was so agreed.

9. The CHAIRMAN invited the Commission to consider the question of the applicability to honorary consuls of the principle contained in article 27 (*Inviolability of the archives and documents*).

10. Mr. SANDSTRÖM drew attention to the provision contained in paragraph 3 of the Special Rapporteur's article 56, a provision which affected the application of the rule expressed in article 27.

11. Mr. ŽOUREK, Special Rapporteur, said that the principle of article 27 was contained in paragraph 3 of his draft article 56, subject to the additional condition that the official papers of honorary consuls must be kept separate from their private correspondence and from books and documents relating to any non-consular occu-

pation in which they might be engaged; such a condition was stipulated in a large number of consular conventions. The reason was that the vast majority of honorary consuls were engaged in commerce or some other gainful occupation.

12. He thought that the Commission, instead of discussing the applicability of article 27 to honorary consuls, should consider his proposal for paragraph 3 of article 56.

13. Mr. YOKOTA agreed on the need to lay down the rule that the official correspondence, archives and documents of honorary consuls should be kept separate from their private correspondence and from books or documents relating to their non-consular occupation. He suggested, however, that that rule should be expressed in a separate sentence by replacing by a full stop the comma after the word "seizure" deleting the words "provided that" and commencing a new sentence with the words: "They shall be kept separate from . . .".

14. Official correspondence, archives and documents of honorary consuls should not be liable to seizure or search merely because they happened to be mingled with private documents and papers. For those reasons, he proposed that the obligation to keep official material separate from private papers should be laid down as a separate rule and not as a condition *sine qua non* of their inviolability.

15. Mr. BARTOŠ said he would support the Special Rapporteur's text for article 56, paragraph 3, if after the words "relating to their non-consular occupation" a phrase along the following lines was added: "or to non-consular activities carried on in the premises of the consulate". There were many instances of non-consular activities being carried on by persons other than the honorary consuls in the premises used by the consulate. The case had occurred in Yugoslavia of the consular documents and records being mixed with the books and documents pertaining not to a profession exercised by the honorary consul himself, but to the activities of a commercial or industrial undertaking.

16. He strongly opposed Mr. Yokota's suggestion that the duty of the receiving State to respect unconditionally the inviolability of the archives should be established as an absolute rule and that the honorary consul's duty to segregate official from private papers should be enunciated separately, thus transforming what should be a condition into a mere recommendation.

17. In fact, the two duties involved — that of the receiving State to respect the consular archives and documents and that of the honorary consul to keep them separate from his private papers — were mutually complementary. If the honorary consul failed in a duty which was placed upon him by a rule going back to the earliest days of consular intercourse, the receiving State could not be accused of a breach of international law if, for example, its income-tax inspectors examined the books and documents of the honorary consul

which contained both official and private material. In one case which had occurred in Yugoslavia the expenses and receipts of a consulate had actually been entered in the books of a commercial undertaking.

18. Moreover, for practical reasons, it was obvious that if the honorary consul neglected to segregate official from private papers, the competent official of the receiving State who was carrying out an inspection would have to examine, at least cursorily, all the documents concerned in order to ascertain which were official and which private. In his opinion, an official of the receiving State who found a consular document should not only not examine it any further but was under a duty of secrecy with regard to any information he might have obtained in the course of the inspection.

19. Lastly, there was a very strong argument in favour of making the segregation of papers a condition of inviolability: unless honorary consuls realized that inviolability might be lost through neglect, they might be tempted to be careless in carrying out their duty not to mingle official with private papers.

20. Sir Gerald FITZMAURICE supported Mr. Yokota's suggestion and recalled that the Commission had discussed at great length whether the inviolability of the diplomatic bag should be made conditional on its being used exclusively for official material. The Commission had, on that occasion, reached the conclusion that it should express in one paragraph (article 25, paragraph 3, of the diplomatic draft) the rule that the diplomatic bag must not be opened or detained and, in a separate paragraph (article 25, paragraph 4) the rule that the diplomatic bag should only contain diplomatic documents or articles intended for official use. It had been rightly felt that where abuse of the privilege was suspected by the receiving State, the correct course would be to make representations at the government level. The suspicion should not provide grounds for disregarding the rule of the inviolability of the diplomatic bag.

21. Accordingly, he agreed that the rule on the separation of official and private papers should not be a condition of inviolability. The archives and documents of the consulate were the property of the sending State and should be inviolable in all circumstances. If an abuse were suspected, the government of the receiving State could request that of the sending State to recall or discharge the consul, but it would not be correct to proceed to a violation of the consular archives.

22. Mr. EDMONDS said that the rule proposed by the Special Rapporteur was much too harsh. In his opinion there was much force in the arguments put forward by Mr. Bartoš but it was a general principle of law that an innocent party should not pay the penalty for another's dereliction. Honorary consuls often had no special training for their work and it would be too stringent to deprive the sending State of the benefit of the

inviolability of its archives and documents because of some neglect by its honorary consul which had led to an intermingling of papers.

23. For those reasons, he agreed with Mr. Yokota's suggestion; the duty to segregate official from private papers should not be made a condition of inviolability.

24. Mr. SANDSTRÖM said that he had not been convinced by the arguments put forward either by the supporters or the opponents of the Special Rapporteur's draft for article 56, paragraph 3. In his opinion, the real test of inviolability should be the answer to the question: were the archives and documents concerned kept in the consular office? Material kept in the private residence of the honorary consul, and not in premises exclusively used as a consulate, could hardly enjoy complete inviolability.

25. Mr. BARTOŠ said that there was no analogy between the case under discussion and the diplomatic bag. Diplomatic correspondence was sent either in a closed diplomatic bag or by diplomatic courier. If diplomatic correspondence was enclosed with non-diplomatic papers sent through the post as an ordinary parcel and not as a diplomatic bag, there could be no guarantee that the customs authorities might not open the parcel for inspection. The Commission had therefore laid down in article 25 of the diplomatic draft, as a condition of inviolability, that diplomatic correspondence should be sent either by means of the diplomatic bag or by diplomatic courier.

26. He recalled he had already expressed the view that if a consul indicated that certain cabinets or safes contained only consular archives, his statement should be accepted. If, however, the consul mixed his official documents with his private papers, and certain officials of the receiving State were entitled to inspect the latter, it was obvious that some examination would have to be made, superficially at least, of all the documents in order to tell them apart. Even such a cursory examination would be a departure from the strict rule of inviolability.

27. The position was in fact that inviolability applied wherever archives and documents were clearly shown to be official archives and documents. He mentioned, by way of analogy, the case of a diplomat in Yugoslavia who had refused to show his special identity card when challenged for a traffic offence; he had been taken to the police post where he had shown his card. Upon his subsequent protest and its rejection, it had been agreed by his ambassador that he had been at fault in not producing the evidence of his status from the outset. In like manner, consular archives and documents, in order to enjoy inviolability, needed to be clearly identifiable as such. If the honorary consul responsible for them made the mistake of rendering their ready identification impossible, the sending State would have to bear the consequences of that neglect.

28. Mr. ŽOUREK, Special Rapporteur, said that

he regretted that he was unable to accept Mr. Yokota's amendment. The argument put forward by Mr. Edmonds seemed to him to militate for the strict enforcement of the rule on the separation of official from private documents. Honorary consuls might be inclined to neglect the discharge of the duty imposed by that rule if they did not know that the loss of inviolability of consular archives and documents might result from their neglect.

29. The formula proposed by Mr. Yokota was not practicable. If, in the case of a routine inspection, the revenue officials of the receiving State found the commercial books and documents of the honorary consul mixed with his consular documents, they could not abstain from carrying out their duties, for if they did they would in effect be granting inviolability to private papers.

30. Sir Gerald FITZMAURICE said that he could not understand the Special Rapporteur's illustration. If the revenue officers, when inspecting private ledgers and documents, found consular material, the principle of inviolability should apply to that material, but would not apply to any other. Neither he nor Mr. Yokota had suggested that private books and documents should be inviolable because an official document had been found among them. It was the consular archives and documents which were inviolable.

31. If the Special Rapporteur's argument was a valid one, it should surely apply not only to honorary consuls but also to career consuls who engaged in commerce. Logically, then, a proviso should be added in article 27 to the effect that the inviolability would not attach to the papers of a consul, whether career or honorary, who engaged in commerce.

32. Mr. ŽOUREK, Special Rapporteur, drew attention to article 58 of his draft (A/CN.4/L.86), under which the provisions relating to honorary consuls were to apply, *mutatis mutandis*, to career consular officials who were authorized to engage in commerce or other gainful occupation in the receiving State. Therefore, in the rare event of a career consul being engaged in trade, that consul would be treated in the same manner as an honorary consul and inviolability would be conditional upon his keeping the official archives and correspondence separate from his private correspondence and from his business books and documents.

33. Sir Gerald FITZMAURICE said that logic would then require that elsewhere an exception should be made for the case in which an honorary consul was not engaged in commerce.

34. Mr. ŽOUREK, Special Rapporteur, said that an honorary consul might be engaged in an occupation other than commerce. He did not believe that States would accept the rule of inviolability of the archives in regard to such consuls unless it was made conditional on the segregation of official archives and documents from private papers.

35. The CHAIRMAN said that three points of view appeared to have been expressed. Some members held the opinion that the inviolability of consular archives and documents was absolute and that the obligation to keep them separate should be expressed as a distinct rule but should not be made a condition *sine qua non* of such inviolability. The Special Rapporteur and some other members considered that the inviolability should be conditional on the separation of official from private papers, as laid down in article 56, paragraph 3. Lastly, Mr. Sandström considered that the test of this inviolability was whether the archives and documents were kept in the consular office.

36. Mr. FRANÇOIS said that he held a fourth view: where consular documents and archives were not kept separate, they still enjoyed a measure of inviolability. Inspection was not precluded, but if a document was found to relate to the consular function, its inviolability should be respected.

37. Mr. PAL drew attention to the actual terms of article 27. The article contained the simple statement that "the archives and documents of the consulate shall be inviolable". How could such a provision be held to be inapplicable because an honorary consul was in charge?

38. On the specific question of the applicability of article 27, he thought that all the members of the Commission were agreed that the rule laid down in that article applied to honorary consuls.

39. Mr. EDMONDS, referring to Mr. François's remarks, said that the draft article would allow consular documents to be examined before they were protected by inviolability. In other words, the inviolability would attach at a moment when all the damage might well have been done.

40. He admitted that the question was fraught with difficulty. Nevertheless, he thought that if an honorary consul failed to separate official from private papers the sending State was very largely an innocent party and should not suffer for the neglect of its honorary consul. Besides, who was to judge whether the occasional mingling of some documents justified the total disregard of the inviolability rule?

41. Mr. MATINE-DAFTARY said that if the discussion continued along its present course, the Commission might find that it would have to amend article 27, which related solely to career consuls.

42. Mr. TUNKIN said that the discussion had been needlessly complicated by the attempt to cover all conceivable eventualities. There seemed to be general agreement on the principle that the archives and documents of the consulate should be inviolable, which meant that the authorities of the receiving State had no access to them. If those authorities could scan or handle archives and documents in order to establish whether they were official ones connected with consular business there would be no effective inviolability. Accord-

dingly, he considered that the inviolability should be dependent on the fulfilment of two conditions only: firstly, the official documents must be kept separate from private papers, and secondly, they must be kept in the consular office.

43. Mr. JIMÉNEZ DE ARÉCHAGA agreed that article 27 was applicable to honorary consuls with a proviso on the lines contained in article 56, paragraph 3. The only outstanding question was whether that proviso should be drafted as a condition or as a separate obligation. That question might well be referred to the Drafting Committee.

44. Mr. AMADO considered that Mr. Yokota's view was not far removed from that of the Special Rapporteur. It was essential to require that sending States and honorary consuls exercised a proper sense of responsibility in handling their archives and documents, which must be kept separate from private papers if the provisions of article 27 were to apply.

45. The CHAIRMAN, speaking as a member of the Commission, said the fact that the principle of inviolability might be genuinely misconstrued or abused did not affect the validity of the principle itself. It was impossible in a legal text to enunciate a general principle in such a way as to cover all possible contingencies. Hence he saw no force in the argument that the privilege of inviolability should be withheld because an honorary consul might hide private documents in official files so as to avoid lawful investigation by local authorities. In such a case, whatever the status of the consul, the courts of the receiving State were entitled to demand the production of the documents in question; but the proposition that the authorities of the receiving State could demand to see consular files so as to make sure that they contained only official papers was utterly incompatible with the principle of inviolability.

46. He considered that article 27 should be applicable to all consuls, whether career or honorary, and that a stipulation should be added to the effect that official papers should be kept separate from private papers and that they should be kept in the consular office. That formula would, he thought, be broad enough to satisfy most members, and yet would not qualify the generality of the principle of inviolability.

47. Mr. YOKOTA suggested that perhaps the Commission could agree that in principle article 27 was applicable to honorary consuls and insert in the commentary a summary of the different views expressed. After the observations of governments had been received the Commission would find it easier to decide subject to what conditions the article would apply to honorary consuls.

48. Mr. EDMONDS agreed that if the majority voted in favour of article 27 being applicable to honorary consuls it would be desirable to explain in the commentary the views expressed about the conditions governing the application of the article.

49. Mr. MATINE-DAFTARY disagreed with Mr. Yokota. The true purpose of the commentary was to explain the meaning of provisions which needed explanation. It was not the proper place for reservations, as had been demonstrated in the case of the Commission's draft on the law of the sea, where reservations stated in the commentary had been overlooked at the United Nations Conferences on the Law of the Sea.

50. Mr. SCELLE said that there seemed to be general agreement on the principle that article 27 should apply to honorary consuls but thought that the condition that official documents should be kept separate from private papers would be valid vis-à-vis career consuls as well, for the latter were, after all, just as liable to hide compromising papers in official files. If a consular officer, whether career or honorary, were interrogated by the authorities of the receiving State as to whether certain documents were official or not, his word would have to be accepted because if the documents could be examined the principle of inviolability would have no meaning.

51. Mr. ŽOUREK, Special Rapporteur, observed that since honorary consuls were often engaged in gainful occupation, certain conditions had to be fulfilled in order that they could enjoy the benefit of article 27. Once those conditions were decided upon the Commission could consider whether article 27 itself called for modification. With a few exceptions, career consuls were exclusively engaged on official business and hence, in general, it was not necessary to lay down the same conditions as for honorary consuls. The latter, on the other hand, were in the great majority of cases engaged in private occupations of a gainful nature, and that was their main activity. In that respect the position of career consuls was the exact opposite of that of honorary consuls.

52. Mr. SCELLE, disagreeing with the Special Rapporteur, said he failed to see why the integrity of honorary consuls should be questioned and why it should be assumed that career consuls would never abuse their privileges and immunities.

53. The CHAIRMAN said that the Commission would probably have to establish what was the majority view by voting. Since it had decided to conduct an exploratory review of earlier articles in order to decide which applied to honorary consuls, it was not at present concerned with the final wording of article 56, paragraph 3, but with the question whether the principle of article 27 was applicable to honorary consuls and whether the latter's enjoyment of the benefit of the article should be subject to certain conditions.

54. Mr. TUNKIN agreed that the Commission must first come to some conclusion about the applicability of article 27, but as the inviolability of archives and documents was also the subject of article 56, paragraph 3, the Commission had somewhat confused the discussion by dealing with that text as well. However, he saw no diffi-

culty in voting on the principle and subsequently on the conditions to which it should be subject.

55. The CHAIRMAN pointed out that one of the questions that would have to be settled was whether the requirement that official documents should be segregated from non-consular papers was a condition *sine qua non* of the application of article 27 to honorary consuls.

56. Mr. BARTOŠ said that it would be difficult to vote on the issue of whether or not article 27 was applicable to honorary consuls — and he believed it was generally accepted to be so applicable — until the Commission had decided whether the enjoyment of the benefit that provision was contingent on the fulfilment of certain conditions. What those conditions should be was not a subsidiary question but an important issue of substance. Accordingly if the applicability of article 27 to honorary consuls were put to the vote first (before the conditions, if any, had been settled) he would be compelled to abstain.

57. Mr. ŽOUREK, Special Rapporteur, asked whether it might not be desirable to vote first on Mr. Yokota's amendment to article 56, paragraph 3 (see paragraph 13 above), since there appeared to be no fundamental disagreement about the applicability of the principle of the inviolability of archives and documents to honorary consuls.

58. Mr. EDMONDS said that, logically and in keeping with the procedure it had adopted in discussing article 56, the Commission should first decide whether article 27 was applicable to honorary consuls.

59. Mr. AMADO said that members could only vote in favour of article 27 being made applicable to honorary consuls on the understanding that its applicability might be subordinated to certain conditions.

60. Sir Gerald FITZMAURICE considered that the procedure suggested by the Special Rapporteur would be simpler. It seemed to be the general consensus that article 27 applied to both career and honorary consuls, and hence it seemed hardly necessary to vote on that issue. The crucial question was whether the application of the article to honorary consuls should be subject to certain conditions.

61. Mr. TUNKIN pointed out that there was a well established procedure in the United Nations for voting on amendments. Perhaps the present difficulty could be resolved if article 59, paragraph 3, were treated as an amendment to article 27.

62. Mr. EDMONDS asked how members who did not think the application of article 27 to honorary consuls should be subject to conditions could express their view if the procedure suggested by the Special Rapporteur were followed.

63. Sir Gerald FITZMAURICE believed that those members would prefer to vote in favour of article 27 being applicable to honorary consuls

even at the risk of its being subsequently made subject to conditions, rather than allow the principle of inviolability to be rejected.

64. The CHAIRMAN, speaking as a member of the Commission, thought that the obligation to keep official documents separate and in the consular office should not be regarded as an absolute condition of the applicability of article 27 to honorary consuls. That point would be met if Mr. Yokota's amendment were adopted. Perhaps it would be simpler if that preliminary issue were put to the vote first.

65. Mr. TUNKIN observed that that might constitute a departure from the usual procedure whereby amendments were voted in the order of their submission. The Special Rapporteur's text of article 56, paragraph 3, if treated as an amendment to article 27, had not only been presented earlier than Mr. Yokota's amendment but was also furthest removed from the original. Personally, he would find it difficult to support Mr. Yokota's amendment if it were put to the vote first. On the other hand he might be willing to vote for it if the Special Rapporteur's text were rejected.

66. Mr. YOKOTA pointed out that since the Special Rapporteur's text of article 56, paragraph 3, constituted the original proposal, his (Mr. Yokota's) amendment should be voted on first.

67. Mr. LIANG, Secretary to the Commission, considered that, from the procedural point of view, article 27 was not involved. In effect, paragraph 3 of article 56, when approved, would be added to article 27, because it would contain the provisions concerning honorary consuls not yet included in that article. Since the Commission's purpose at the moment was to decide which of the earlier articles in the draft were applicable to honorary consuls, paragraph 3 of article 56 was an independent proposal; Mr. Yokota's proposal was an amendment to that paragraph and should therefore be voted on first. While it might be argued that paragraph 3 of article 56 was an amendment to article 27, since it was an addition to that article, it should be borne in mind that the other articles of the draft had not been treated in the same way.

68. Mr. TUNKIN said that such a procedure would be acceptable to him, on the understanding that the Commission had paragraph 3 of article 56 before it as a separate proposal.

69. Sir Gerald FITZMAURICE wished to make an emphatic reservation with regard to the Secretary's interpretation of the procedural situation. The point was essentially one of drafting. In the case of certain earlier articles (e.g., articles 25 and 26) the question of their applicability to honorary consuls had already been decided, but the Commission might subsequently agree to word those articles differently; in the case of article 27, too, it might decide to refer only to the official correspondence of the consulate. It was not really correct to speak of the official correspondence of honorary

consuls; the correspondence they conducted in the exercise of their consular functions was the official correspondence of the consulate. Accordingly, the matter was one of placing and drafting, and the substance of the question was not affected.

70. The CHAIRMAN said he would call for a vote on Mr. Yokota's amendment.

71. Speaking as a member of the Commission, he said that his vote in favour of the amendment should be construed simply as support for the proposition that the inviolability of the documents of honorary consuls should not be subordinated, absolutely and categorically, to the condition that official papers must be segregated from private papers. Nevertheless, he was willing to accept a provision obliging the honorary consul to separate the two categories of documents.

72. Mr. SANDSTRÖM said he would vote against Mr. Yokota's amendment, even though it related to a rule of behaviour for honorary consuls which could hardly be contested. The statement of that rule in article 56, paragraph 3, would not, however, solve the problem of how to distinguish between the official archives, which were inviolable, and the private correspondence of the honorary consuls, which obviously did not enjoy that immunity.

73. Mr. SCALLE said that he would vote against Mr. Yokota's amendment for yet another reason. The question of separating official archives from private correspondence was not mentioned in article 27, which referred only to the archives and documents of the consulate. Since the Commission was discussing the applicability of the articles of the draft to honorary consuls, it could only consider an amendment to article 56, paragraph 3, if an analogous provision existed in article 27. Otherwise, the position of career consuls who did not keep their private papers separate from the consular archives would not be covered, and the provision would discriminate against honorary consuls as such.

74. The CHAIRMAN put Mr. Yokota's amendment to the vote.

The amendment was rejected by 12 votes to 3, with 1 abstention.

75. The CHAIRMAN put the Special Rapporteur's text of paragraph 3 of article 56 to the vote.

The paragraph was adopted by 12 votes to 2, with 3 abstentions.

76. Mr. SCALLE said that he had voted against both the amendment and the paragraph because both were unsatisfactory. Furthermore, he considered that a sentence requiring the separation of private documents from the consular archives should be added to article 27, in order to make it clear that the condition applied to career consuls as well as to honorary consuls.

77. Mr. BARTOŠ said that he had voted in favour of paragraph 3 of article 56, on the understanding that the rule concerning the separation of official

from private papers should apply to career consuls as well.

78. The CHAIRMAN pointed out that the Special Rapporteur had included article 28 in the enumeration in article 56, paragraph 2. He therefore suggested that, if there were no objections, article 28 should be regarded as applicable to honorary consuls.

It was so agreed.

79. Mr. YOKOTA, speaking as Chairman of the Drafting Committee, pointed out that the Commission had approved and referred to the Drafting Committee a new article (28 A) on freedom of movement, which was not mentioned in the Special Rapporteur's enumeration.

80. Mr. ŽOUREK, Special Rapporteur, explained that he had not included the new article in his enumeration because it would be difficult for States to accept in a multilateral convention a clause which allowed certain broad facilities to honorary consuls, who were in many instances nationals of the receiving State. The article was yet another illustration of the difference between the *de jure* and the *de facto* position of honorary consuls and he had not felt justified in including the new provision in his enumeration.

81. After a brief procedural discussion, the CHAIRMAN suggested that no decision should be taken on the applicability of article 28 A to honorary consuls until the Commission had had an opportunity to discuss the clause in its final form.

It was so agreed.

82. Mr. ŽOUREK, Special Rapporteur, observed that article 29 (*Freedom of communication*), which he had included in his enumeration, had since been considerably extended in scope during the Commission's discussions. Until the Drafting Committee submitted its final text of that article, the Commission was hardly in a position to decide whether the article in its revised and much amplified form should be applicable to honorary consuls; personally he strongly doubted whether it should be so applicable. For practical reasons, therefore, he suggested that, as in the case of article 28 A, a decision concerning the applicability of article 29 to honorary consuls should be held over pending receipt of the Drafting Committee's text.

83. Mr. FRANÇOIS thought it was extremely difficult to discuss the applicability to honorary consuls of articles that had been referred to the Drafting Committee. It might be wiser to defer the whole debate until the final texts were before the Commission.

84. The CHAIRMAN thought that the Commission could proceed with its discussion in the case of articles to which no substantive changes had been proposed. He suggested that the decision on article 29 should be deferred.

It was so agreed.

85. Mr. ŽOUREK, Special Rapporteur, said that the scope of article 30, which he had included in his enumeration, had been considerably amplified; it now consisted of three paragraphs instead of one.

86. The CHAIRMAN suggested that a decision on the applicability of article 30 to honorary consuls should be deferred.

It was so agreed.

87. Mr. YOKOTA, speaking as Chairman of the Drafting Committee, said that article 31, which was included in the Special Rapporteur's enumeration, had not been substantially altered.

88. Sir Gerald FITZMAURICE said that, while he was in favour of extending the applicability of article 31 to honorary consuls, the fact that the Commission had to take a decision on the question proved that the Special Rapporteur's conception of the whole structure of the draft was fundamentally false. The question whether or not article 31 should apply to honorary consuls did not really arise; the article dealt with official acts of the sending State performed by its representatives, and those acts were exactly the same whether they were performed by honorary or career consuls.

89. The procedure which the Commission was following was incorrect; it was entirely unnecessary to decide whether a provision having nothing to do with the consul's status (the subject of article 56 being the "legal status of honorary consuls") should or should not apply to an honorary consul. The correct procedure would have been to decide upon the few cases where an honorary consul would be placed in a special position by reason of his honorary status.

90. The CHAIRMAN pointed out to Sir Gerald Fitzmaurice that the Commission had agreed to review all the earlier articles of the draft in order to determine later whether or not honorary consuls had a distinct status.

91. He suggested that in the absence of any objections, article 31 should be regarded as applicable to honorary consuls.

It was so agreed.

92. Mr. YOKOTA, speaking as Chairman of the Drafting Committee, recalled that an amended text of article 32 (*Duty to accord special protection to consuls*) had been approved by the Commission and referred to the Drafting Committee; the Commission should therefore have no difficulty in considering the applicability of the article to honorary consuls. The Special Rapporteur had not included article 32 among those enumerated in article 56, paragraph 2.

93. Sir Gerald FITZMAURICE thought that, while the article might not be applicable to consuls who were nationals of the receiving State, it should apply to honorary consuls as such because many of them were nationals of the sending State. If the Commission were to decide

that the article was not applicable to honorary consuls, the receiving State would be debarred from according special protection to any honorary consuls — a state of affairs which yet again illustrated the shortcomings of the system that the Special Rapporteur had followed.

94. Mr. TUNKIN considered that Sir Gerald Fitzmaurice's conception of the whole question was not in keeping with existing practice. An honorary consul might possibly be a national of the sending State, but the essential point was that he was not a State official; his performance of consular functions was merely incidental. Such a person might devote a few hours a week to his consular functions; the receiving State could not be expected to accord him special protection while he was engaged on private business or was at leisure. It would be no more than realistic to differentiate between honorary and career consuls by reason of their status as officials, and not by reason of their nationality. Accordingly, he did not consider that article 32 should be made applicable to honorary consuls.

95. The CHAIRMAN, speaking as a member of the Commission, could not agree that it was the practice of States never to regard honorary consuls as officials or members of the consular service. For example, under the relevant Mexican regulations honorary consuls and vice-consuls were defined as members of the foreign service.

96. Mr. BARTOŠ agreed with the Chairman. In Yugoslav municipal law, too, Yugoslav honorary consuls, in view of the functions which they performed, were in many cases deemed to be public officials; they had a duty to uphold the dignity of the State they represented by their personal behaviour, and they could be recalled or dismissed, or could even be brought before a disciplinary board, if their behaviour was considered improper.

97. The CHAIRMAN, speaking as a member of the Commission, urged members to ponder the practical consequences of excluding honorary consuls from the provisions of article 32. Honorary consuls were bound to attend State functions together with other foreign consuls. In certain international situations, there might be a reaction of public opinion in a given State against a country represented by an honorary consul. In that event, would the receiving State be absolved from the duty to prevent attacks on the person, freedom or dignity of the honorary consul?

98. Mr. SCALLE said he could not agree with Mr. Tunkin that honorary consuls devoted only a small part of their time to consular functions. They might have exactly the same duties to perform as full-time career consuls, and for that matter career consuls might also have a considerable amount of leisure time at their disposal. Moreover, article 32 referred to "foreign consuls", an expression which did not necessarily mean a national of the sending State. The consul might be a national of a third State, but his

duty would be to protect the interests of the nationals of the sending State, whatever his own nationality. Admittedly, the provision should not apply to consuls who were nationals of the receiving State, but subject to that exception all consuls should have the same special protection, because they exercised the same functions. In law, the only basis on which the different classes of consular officials could be distinguished was the difference in the mode of appointment. He reiterated his view that career consuls and honorary consuls were all officials and consequently had the same basic legal status. Accordingly, special protection was due to them all, with the exception of those who were nationals of the receiving State, and even they were in many respects entitled to such protection.

99. Mr. AMADO said that Mr. Scelle had stated some undeniable facts. Nevertheless, it should be borne in mind that the position of a business man or a banker would be considerably strengthened by his appointment as an honorary consul. To extend yet further privileges to persons whose standing in the community was already high was a step not to be taken lightly. He could appreciate the arguments in favour of both the opposing schools of thought, and would therefore find it extremely difficult to vote on the question of the applicability of article 32 to honorary consuls.

100. Mr. SCELLE observed that, if the receiving State believed that the appointment of an honorary consul might lead to an abuse of privileges, it could refuse to grant him the exequatur. Once it had consented to the appointment, however, it could hardly refuse to accord the honorary consul special protection; up to a point, that was also the case even if he was a national of the receiving State.

101. The CHAIRMAN, speaking as a member of the Commission, observed that members seemed to envisage specific persons in specific positions when referring to hypothetical appointments of honorary consuls. For example, Mr. Amado seemed to see the honorary consul as a man of property and high standing in the foreign community; surely, however, not all honorary consuls were in that position. In his opinion, the question of the applicability of article 32 to honorary consuls hinged on the possibility of public reaction against a consul by reason of the fact that he represented the sending State, even if he was a national of the receiving State. If such a person incurred any danger through representing the sending State, he should be protected from attack against his person, freedom or dignity, and it should not be assumed *a priori* that a national of the receiving State, who was subject to the laws of that State, would abuse such protection in order to evade the jurisdiction of his country.

The meeting rose at 1.5 p.m.

555th MEETING

Tuesday, 7 June 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 56 (*Legal status of honorary consuls*) (continued)

1. The CHAIRMAN invited the Commission to continue its discussion on the applicability of article 32 (*Special protection and respect due to consuls*) to honorary consuls, and drew attention to the text of the article as provisionally adopted by the Drafting Committee, in the following terms:

"The receiving State is bound to accord special protection to the foreign consul by reason of his official position, and to treat him with due respect. It shall take all reasonable steps to prevent any attack on his person, freedom or dignity." *

2. Mr. MATINE-DAFTARY observed that the text was identical with that approved by the majority of the Commission (538th meeting, paragraph 47); he had not voted for it because it was so vague. The objections he had made at the time (*ibid.*, paragraph 45), applied *a fortiori* to honorary consuls, who might enjoy certain guarantees against abuse of authority under articles 33 (*Personal inviolability*) and 34 (*Immunity from jurisdiction*), but should not be given special protection, particularly if they were nationals of the receiving State. He therefore did not think that article 32 should be made applicable to honorary consuls, and reserved the right to refer to the matter again in connexion with articles 33 and 34.

3. Mr. JIMÉNEZ DE ARÉCHAGA observed that at the moment the Commission's task was not to review article 32, but to decide whether it was applicable to honorary consuls. He had been impressed by the view that an honorary consul often had the dual personality of a foreign resident of the receiving State and of honorary representative of the sending State. In the former capacity, the honorary consul enjoyed in any case the ordinary protection accorded to resident aliens, and to grant him special protection under article 32 would be going too far. Like Mr. Amado, he did not oppose the institution of honorary consuls, since over 50 per cent of all Latin American consuls

* References to article 32 in this summary record should be construed as references to the text reproduced above.

were honorary officers; but precisely for that reason he considered that the Commission's draft should not extend too many privileges to honorary consuls, lest States should refuse to grant them the *exequatur*.

4. While, in principle, he did not oppose the idea of extending the applicability of article 32 to honorary consuls, he thought that two points should be borne in mind. In the first place the absence of a provision granting special protection to honorary consuls would not mean that they would have no protection, for they enjoyed the protection normally granted to all foreign residents; secondly, honorary consuls should be protected against any attack to which they might be exposed by reason of their official position and their performance of official acts of the sending State. Since the Commission was not approving a text on the subject, however, the wording could be left to the Drafting Committee or to the Rapporteur of the Commission.

5. Mr. YASSEEN drew attention to the title of sub-section C, "Personal Privileges and Immunities". It was logical to hesitate before recognizing the same personal privileges and immunities for honorary consuls as for career consuls, not only because honorary consuls were often nationals of the receiving State and were often engaged in gainful occupation, but precisely by reason of their honorary status. In principle, career consuls were distinguishable from honorary consuls in that their respective relationships with the government of the sending State were different and the difference of relationship necessarily had some effect on the personal position of the consul concerned. States should normally appoint career consuls, but, for various reasons, such as financial reasons or shortage of qualified personnel, they sometimes resorted to appointing honorary consuls, who were usually recruited from among persons who could not or did not wish to be career consuls, either because they were not qualified for the service or because they wished to carry on a gainful occupation. The persons enjoying consular privileges and immunities should be worthy of those privileges: the system of selecting career consuls, which was frequently the same as that used for selecting diplomatic agents, took that fact into account. The purpose of that system was to select persons who would merit the privileged position that they would enjoy abroad. The method of choosing honorary consuls, however, did not offer the same guarantees and it was therefore difficult to grant them the same personal privileges and immunities as those enjoyed by career consuls.

6. Mr. VERDROSS said that he would refer only to article 32, and not to the general question of the privileges and immunities of honorary consuls. Opinions in the Commission seemed to be divided concerning the applicability of the article to honorary consuls; general agreement might perhaps be reached by restricting the extent to which article 32 would apply to such officers. Inasmuch

as honorary consuls were usually engaged in additional activities extraneous to their consular functions, it might be said that in principle they should be treated as private persons; in the exercise of their consular functions, however, they might be accorded special protection. Therefore, the receiving State would not normally be bound to accord to honorary consuls protection in excess of that granted to other foreign residents. The provision in article 32 was quite different from those appearing in the subsequent articles, since, under article 32, the receiving State was bound to take certain action, whereas under the rules dealing with immunities that State was bound to abstain from certain acts.

7. Mr. AGO agreed with Mr. Verdross that reference should be made only to article 32 and not to the general question of the privileges and immunities of honorary consuls. He thought that article 32 provided an excellent illustration of the fact that a distinction often had to be made, not between honorary and career consuls, but between consuls who were nationals of the sending State and those who were nationals of the receiving State. Special protection within the meaning of the article meant protection greater than that given to ordinary foreign residents, and such special protection ought to be extended to all consuls, whether honorary or career, who were not nationals of the receiving State. He could not agree with Mr. Yasseen that the relationship with the sending State had anything to do with the position of a foreign honorary consul. Nor could he agree with members who asserted that the privilege accorded by article 32 was excessive for honorary consuls, for in his opinion honorary consuls were also representatives of the sending State; it was because consuls possessed that characteristic that special protection was provided for in the article in question.

8. Mr. SANDSTRÖM thought that, in discussing article 32, the Commission should consider the practical implication of extending its applicability to honorary consuls. If it was decided that the article was applicable to honorary consuls, many of them would not (because it spoke expressly of "the foreign consul") qualify for the benefit of the provision, by reason of having the nationality of the receiving State. Moreover, the "special protection" would not consist in stationing a policeman at the consulate; it would be extended only in the rare cases when the consul would be threatened with danger. If those practical considerations were borne in mind, it would be seen that the privilege conferred by the article was not as extensive as some members seemed to think.

9. In his opinion, the article should apply to foreign honorary consuls as representatives of the sending State, and he could not agree with Mr. Verdross that the protection should be extended only to the honorary consul on the performing of his official functions.

10. Mr. BARTOŠ considered that the protection of the consular function was the predominant

consideration. Even consuls who were nationals of the receiving State had to perform certain acts as representatives of the sending State and should receive special protection in such cases. The key phrase of the article was "by reason of his official position". Accordingly, he thought that article 32 should be one of the provisions applicable to honorary consuls.

11. Mr. FRANÇOIS agreed with Mr. Bartoš that the nationality of the consul should not be unduly stressed, and that the fact that the consul represented a foreign State was the real basis of his right to special protection, even if he was a national of the receiving State. He could not agree with Mr. Yasseen that honorary consuls should be treated on an equal footing with ordinary foreign residents, or with Mr. Verdross that protection should be accorded only in the exercise of consular functions, for a consul might stand in need of special protection because he was representing a certain State. Nevertheless, the protection to be extended to career and honorary consuls should not be exactly the same, and simply to render article 32 applicable to honorary consuls would imply identical protection. Accordingly, the text should state that honorary consuls needed some special protection, but not quite the same protection as career consuls.

12. Mr. TUNKIN said that Mr. Ago was contending, in effect, that except on grounds of nationality or of non-consular activities, consuls were indistinguishable from each other so far as status was concerned; actually, however, they might be distinguishable according to the manner in which they performed their functions. The two criteria of nationality and engaging in gainful occupation had certainly played a vital part in the evolution of the special status of honorary consuls, since those had been the main reasons for withholding certain privileges and immunities from such consuls. However, the institution of honorary consuls had undoubtedly come into being, and it was now well established that honorary consuls had a specific legal status. Thus, a person appointed as an honorary consul enjoyed only the privileges and immunities due to that class of officials, and even if he was a national of the sending State, the practice was not to give him greater privileges and immunities than any other honorary consul. Even though some States might not distinguish between honorary and career consuls, the general practice was to make a distinction between them.

13. It had been argued that if a receiving State accepted an honorary consul, it should grant him all the necessary privileges and immunities; but the question was in what capacity the person concerned had been accepted. If the legal status of the two categories was distinct, as he believed, acceptance of an honorary consul did not, *ipso facto*, involve granting him the privileges and immunities to which a career consul was entitled. He therefore did not consider that article 32 as a whole was applicable to honorary consuls, although he might be prepared to agree that it should be

made applicable to them with the qualification proposed by Mr. Verdross.

14. Mr. AMADO reiterated that he was not opposed to the institution of honorary consuls, whom he regarded as persons appointed to render a certain type of service, which might even be very similar to that of career consuls. Nevertheless, even Mr. François, who was in favour of granting honorary consuls as many privileges as possible, had just said that it would be an exaggeration to extend exactly the same protection to honorary consuls as to career consuls. If there was one conclusion to be drawn from the debate in the Commission, it was that a difference between the two categories undeniably existed. The Drafting Committee should be asked to draft a text granting a measure of protection to honorary consuls, but not to the same extent as to career consuls.

15. Mr. SCELLE agreed with Mr. Bartoš that the vital point was that a consul performed consular functions. It was relatively immaterial whether the person concerned was a national of the sending State, a third State, or even the receiving State; what mattered was that the consular function as such should be protected, not necessarily against the government of the receiving State, but perhaps against hostility on the part of the population of that State. All reasonable steps should therefore be taken to prevent any attack on the person, freedom or dignity of an honorary consul, even if he was a national of the receiving State. Mr. Verdross's proposal did not go far enough, and an honorary consul should be protected not only in the exercise of his consular functions, but as the representative of the sending State. Finally, he did not believe that the expression "foreign consul" was appropriate.

16. Mr. HSU agreed with speakers who had pointed out that the question of nationality was immaterial in the context, but he did not believe that article 32 should be regarded as applicable to honorary consuls. The functions of an honorary consul differed from those of a career consul in that the former was a part-time official. Special protection for honorary consuls should therefore be limited to times of emergency, when such officials might be in danger, but it was unnecessary in ordinary circumstances.

17. Mr. AGO pointed out to Mr. Scelle that the expression "foreign consul" meant simply the consul of a foreign country.

18. He observed that the Commission, in its attempt to find common ground, seemed to be agreed that honorary consuls should have some special protection, but not the same protection as career consuls. He did not believe, however, that Mr. Verdross's proposal should be followed, since the second sentence of the article could not apply to the consul only in the exercise of his functions. In any case, he believed that the Drafting Committee should have no difficulty in finding a formula acceptable to all members.

19. Mr. ŽOUREK, Special Rapporteur, noted that few speakers had suggested that the provisions of article 32 should apply to honorary consuls without any qualification. For his part, he did not believe it was possible to give honorary consuls the special protection set forth in article 32. The majority of those consuls devoted only a small part of their time to their consular duties and the bulk of it to their private activities. A few of them might not perhaps be engaged in a gainful occupation, but the essential fact was that they were allowed to engage in such an occupation. Some national legislations, like that of Peru (Decree No. 69 of 1954), actually defined honorary consular officers as those who could lawfully carry on, in addition to their official activities, some gainful occupation in the receiving State, it being immaterial whether or not in fact they carried on such an occupation.

20. He did not believe it was desirable to distinguish between several categories of honorary consuls, and in particular to draw a distinction based on their nationality. As to the distinction between honorary consuls and career consuls, the Commission had decided to leave it to the States concerned to decide what criteria to apply.

21. Those members who had defended the applicability of article 32 to honorary consuls had not cited any State practice in support of their views. In fact, if the article were to be applied to honorary consuls, the Commission would be going further than it had done in the case of diplomatic agents. Article 36, paragraph 1, of the diplomatic draft excluded persons who were nationals of the receiving State from the benefit of article 27 on personal inviolability, which was the article of the diplomatic draft corresponding to article 33 of the consular draft.

22. For those reasons, the Commission should exclude article 32 from the list of articles applicable to honorary consuls, and state in the commentary that honorary consuls were entitled to the same measure of protection as other persons, and, in addition, to such protection as was essential to enable them to carry out their duties and shield them from any adverse effects resulting from the exercise of those duties. He considered that the Commission could not go any further in the direction of granting special protection to honorary consuls.

23. Mr. YASSEEN said that in his earlier remarks he had concentrated on the question of the applicability to honorary consuls of the whole sub-section on personal privileges and immunities. With regard to article 32 specifically, he considered that the first sentence of the article could only apply to a limited extent to honorary consuls and suggested that, in so far as it related to such consuls, the sentence should be qualified by a proviso along the following lines: "for the performance of their functions" (*pour l'accomplissement de leurs fonctions*). Like Mr. Bartoš, he thought that all facilities should be extended to

the consular function as such, regardless of who exercised it.

24. As to the second sentence of article 32 he had no difficulty in accepting its application to honorary consuls because he felt that all States were under a duty to "take all reasonable steps to prevent any attack" on the "person, freedom or dignity" of all persons within their borders, nationals and aliens alike.

25. Mr. YOKOTA noted that on the particular subject under discussion there was a large measure of agreement in the Commission. Most members considered that honorary consuls could not be given the same special protection as that afforded to career consuls, but all agreed that some minimum protection must be given. The difficulty was largely that of drafting a provision which would adequately express the consensus of the Commission.

26. In principle, he agreed with Mr. Verdross's proposal that honorary consuls should be entitled to special protection in the exercise of their consular functions but thought that that formula was somewhat too restrictive. If, for example, special protection had to be given to a consul against a hostile mob, it was difficult to relate that protection to the actual exercise of his functions as a consul. He therefore suggested that special protection should be granted as far as was necessary by reason of the honorary consul's official position and the exercise of his functions. The actual wording could be left to the Drafting Committee.

27. Sir Gerald FITZMAURICE said that he remained convinced that there was no logical reason for drawing a distinction between honorary consuls as such and career consuls. He could have understood some difference in treatment between a consul who was a national of the receiving State and one who was not a national of that State; but that distinction would apply regardless of whether the consul served in an honorary capacity or was a career official.

28. However, he was prepared to bow to the majority opinion and accept a provision along the lines suggested by Mr. Yokota. It was essential that the honorary consul should be protected not only when actually performing his duties, but also at all times because of his position. He pointed out that the receiving State was not bound to accept a person as honorary consul; if it did so, it should give him the necessary protection.

29. Mr. MATINE-DAFTARY recalled that he had not voted in favour of the first sentence of article 32 as applied even to career consuls. As to the second sentence, he agreed with Mr. Yasseen that it described a measure of protection which a State had a duty to afford to everyone within its borders.

30. For his part, if article 33 (*Personal inviolability*) were not to apply to an honorary consul, he would be prepared to accept the applicability of article 32 to such consuls, subject to qualifi-

cations. He suggested that the Drafting Committee consider qualifying the protection as being granted to the honorary consul solely in his capacity as a consul.

31. The CHAIRMAN, speaking as a member of the Commission, said that, like other members, he saw no difficulty in applying the second sentence of article 32 to honorary consuls without any qualification. As to the first sentence, it appeared to express a general principle which embraced the various privileges set forth in that second sentence and in article 33 *et seq.*

32. He was prepared to agree with the majority view that the prerogatives of honorary consuls in the matter of special protection should not be as extensive as those of career consuls, even though in principle he did not like to see a distinction being drawn between career consuls and honorary consuls as such.

33. He pointed out that the kind of protection to be afforded, as well as the extent of that protection, and the circumstances in which it would be granted were left to the judgement of the receiving State. It was the duty of that State to protect a consul from any possible attack which might proceed from the very fact of his holding an official position and his connexion with a foreign State; accordingly, the protection would not be limited to the occasions on which the honorary consul was actually performing his consular duties.

34. Moreover, there would be no reason to draw a distinction between honorary consuls who were nationals of the sending State and those who were nationals of the receiving State; clearly, the police protection to be given in case of a hostile demonstration against the foreign country represented by the consulate would have to be the same, regardless of the nationality of the honorary consul.

35. Speaking as Chairman, he said that, if there were no objection, he would consider that the Commission agreed to instruct the Drafting Committee to draft a provision qualifying the privileges granted to honorary consuls under article 32 by comparison with those afforded to career consuls; the qualifying provision would operate so as to limit the scope of special protection to those situations which were produced by the fact of the consul's official position.

It was so agreed.

36. The CHAIRMAN invited the Commission to consider whether article 33 (*Personal inviolability*) should be applicable to honorary consuls. The text of that article had been provisionally adopted by the Drafting Committee in the following terms :*

" 1. Consular officials who are not nationals of the receiving State and do not engage in commerce or any other gainful private occupation shall not

be liable to arrest or detention pending trial, except in the case of a criminal offence punishable by a maximum sentence of not less than 5 years' imprisonment.

" 2. Save in the case specified in paragraph 1 above, the officials referred to in that paragraph shall not be committed to prison or subjected to any other restriction upon their personal freedom except under a final sentence of at least two years' imprisonment.

" 3. In the event of criminal proceedings being instituted against a consular official of the sending State, that official shall appear before the competent authorities. Nevertheless the proceedings shall be conducted with the respect due to him by reason of his official position and, except in the case referred to in paragraph 1 of this article, in a manner which will not hamper the exercise of consular functions.

" 4. In the event of the arrest or detention pending trial of, or of criminal proceedings being instituted against, a member of the consular staff, the receiving State shall notify the head of consular post. Should the latter be himself the subject of the said measures, the receiving State shall notify the diplomatic representative of the sending State."

37. Mr. ŽOUREK, Special Rapporteur, explained that he had not proposed in article 56, paragraph 2, that article 33 should be applicable to honorary consuls, though he did consider that they should enjoy immunity from jurisdiction as provided in article 34.

38. Mr. VERDROSS agreed with the Special Rapporteur that the immunities laid down in article 33 were extended as a matter of international courtesy and by virtue of a rule of international law; consequently, the provisions of that article could not be applied to honorary consuls.

39. Sir Gerald FITZMAURICE did not share the Special Rapporteur's view. The most important provision in article 33, namely that contained in paragraph 1, was in any case expressly declared not to be applicable to officials who were nationals of the receiving State, even if they were career consuls. If that condition was imposed, he was unable to see on what grounds a distinction should be made between career and honorary consuls for the purpose of personal inviolability.

40. Mr. PAL said that he had not anticipated that there would be any disagreement in the Commission on the need to extend the application of article 33 to honorary consuls. Even where career consuls were concerned, the immunities laid down in the article were not stated in unqualified terms. In so limiting its operation, the article took into account the very reasons which had hitherto been advanced for according different treatment to honorary consuls. He could see no reason why the article should not apply to honorary consuls.

41. Mr. YOKOTA agreed with Sir Gerald Fitz-

* References to article 33 in this summary record should be construed as references to the text reproduced above.

maurice and Mr. Pal. Honorary consuls who were not nationals of the receiving State and did not carry on any gainful private occupation should be entitled to personal inviolability.

42. Mr. ŽOUREK, Special Rapporteur, said that the members who considered that article 33 should apply to honorary consuls started from the premise that honorary consuls did not constitute a separate category. That thesis, being contrary to doctrine and practice, was untenable. Moreover, in the face of the diversity in practice where the definition of an honorary consul was concerned, the Commission had itself decided that that definition should be left to governments.

43. In saying that there was no reason why personal inviolability should not be accorded to honorary consuls who were nationals of the sending State, Sir Gerald Fitzmaurice had overlooked the great difference between career consuls, who formed part of a permanent consular service and who were exclusively engaged on the performance of consular functions, and honorary consuls, who were not subject to the disciplinary powers of the sending State and who were private persons carrying out consular functions for what was often a mere fraction of the time which they devoted to their other occupations. Those distinctive features were the essential ones and the nationality or the fact that the person in question might or might not be engaged in gainful private occupation was secondary. Obviously the privileges conferred by article 33, which were the most important in the draft, could not be granted to private persons who at any moment might be reverting to their private occupation or who might be engaged in clandestine activities.

44. Mr. LIANG, Secretary to the Commission, said that, having decided in principle to extend the application of article 32 on special protection to honorary consuls who were not nationals of the sending State, the Commission would be acting illogically if it withheld the benefit of article 33 from honorary consuls who were nationals of the sending State and not engaged in private occupation. Article 33 in a sense supplemented article 32.

45. He also wished to point out as a matter of drafting that paragraphs 3 and 4 would have to be modified so as to indicate clearly that they applied to the same categories of officials as those specified in paragraphs 1 and 2.

46. Mr. TUNKIN contended that there was no real link between articles 32 and 33. The purpose of the former was to protect consular officials from attacks on their freedom and dignity, whereas the latter imposed on the authorities of the receiving State an obligation not to commit certain acts. Even if the Commission agreed in principle that article 32 should apply to honorary consuls, that did not mean that it must necessarily follow the same course in the case of article 33.

47. Those members of the Commission who did

not consider that honorary consuls formed a separate category had implied that it would be otiose to discuss whether article 33 was applicable to them, since paragraph 1 already explicitly excluded honorary consuls who were nationals of the receiving State, or who engaged in gainful private occupation, from the privileges provided for in that article. But surely in practice States did not accord such exceptional privileges as those specified in paragraphs 1 and 2, even to honorary consuls who were nationals of the sending State or of a third State and who were not gainfully occupied, since such officials exercised consular functions part of the time only. Nor did he think that States would grant the far-reaching privilege specified in paragraph 3 to honorary consuls, though they might be willing to accord the privilege referred to in paragraph 4.

48. In support of his view he referred to the provisions contained in the Anglo-Swedish Consular Convention of 1952 (article 14), the Consular Convention of 1951 between the United Kingdom and France (article 15) and the Consular Convention between the United Kingdom and Norway of 1951 (article 15) all of which provisions explicitly excluded honorary consuls from the privileges extended to career consuls in the matter of personal inviolability.

49. Mr. ERIM said that he did not propose to follow Mr. Tunkin and to enter into the question whether the provisions of the consular conventions were indicative of a uniform practice of granting the privileges in question to honorary consuls; nor did he propose to ask himself whether States would be prepared to agree to such an extension of the privileges. What he but wished to emphasize was that the Commission should approach the problem from the point of view of the progressive development of international law. No general practice existed; but it was necessary to study a question in the abstract and to see whether a new development was logical or not. The Special Rapporteur had based his defence of the view that article 33 should not apply to honorary consuls on the argument that their distinguishing characteristics were that they exercised consular functions temporarily, that they were private persons and that there was no means of ascertaining at any given moment whether or not they were engaged on a private occupation. Those criteria did not provide a convincing reason for drawing a distinction between the treatment of career consuls and that to be accorded to honorary consuls, and it was difficult to see why a receiving State should wish to deny the privileges provided for in article 33 to honorary consuls who were not its nationals and were not gainfully occupied. Those were the two decisive conditions governing the operation of article 33, and the question whether the official was a career or honorary consul was not relevant. The only aspect of the matter which was important was the function exercised, and that was the same whether a consul was career or honorary. If an honorary consul was a national of the receiving State, that

ceased to be the dominant aspect; but otherwise, in all cases where an honorary consul gave his whole time to his consular functions, the requirements of those functions must prevail. That being so, it was only logical to extend the privileges to honorary consuls and to await the reactions of governments.

50. Mr. VERDROSS emphasized that the Commission was at the moment engaged in transforming privileges and immunities which had formerly been accorded by international courtesy into rules of law. Article 33 was already a bold step as far as career — i.e. full-time — consuls were concerned, and it could not be made applicable to officials acting on a part-time basis.

51. Mr. JIMÉNEZ DE ARÉCHAGA referring to the point made by the Secretary, considered that if the Commission was to deny the special protection provided for in article 32 to honorary consuls, then, *a fortiori*, it could not extend to them the privileges accorded under article 33. The principal distinguishing feature of an honorary consul as recognized in the Anglo-Swedish Consular Convention was that he was not a *consul missus* but was chosen from the community in which he worked, and it would be going too far to grant the privileges of article 33 to honorary consuls who were not nationals of the receiving State, such as foreign merchants for example. Exceptional cases of that kind should be taken into account in addition to those covered in paragraphs 1 and 2.

52. Mr. ŽOUREK, Special Rapporteur, in reply to the Secretary, said that articles 32 and 33 dealt with quite separate questions and in any case the Commission had not decided that article 32 should be made applicable to honorary consuls but had asked the Drafting Committee to draft a more restrictive formula concerning the special protection to be accorded to honorary consuls.

53. Mr. Erim's argument that the decisive criterion was, in effect, whether or not an honorary consul was a national of the receiving State was an oversimplification and if accepted would be tantamount to imposing on States a single criterion. He was uncertain whether Mr. Erim's own country applied that criterion, and in that connexion he referred to the Turkish Act of 1 July 1948; he also recalled the Instruction of the Belgian Ministry of Finance of 1955. In any event the Commission had already decided that it should be left to States to establish the definition of honorary consuls and it could not go against its own decision. It would be wholly contrary to practice to stipulate that honorary consuls who were not nationals of the receiving State must enjoy all the privileges laid down in article 33.

54. The discussion would take a considerable time if the substantive arguments about the distinction between career and honorary consuls were brought up repeatedly in connexion with each article. The Commission was engaged in the first reading of the draft and the members who

had not been convinced by his arguments might perhaps wait until governments had sent their observations.

The meeting rose at 6 p.m.

556th MEETING

Wednesday, 8 June 1960, at 9.30 a.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 56 (*Legal status of honorary consuls*) (continued)

1. The CHAIRMAN invited the Commission to continue its discussion on the applicability of article 33 (*Personal inviolability*) (555th meeting, paragraph 36) to honorary consuls.

2. Mr. YASSEEN said that the personal immunities granted under the first three paragraphs of article 33 were so extensive that they should not be granted to honorary consuls, even if they were nationals of the sending or of a third State and even if they did not engage in commerce or in a private occupation, for the mode of appointment of honorary consuls was such that it offered little if any safeguard against malpractices. The institution of honorary consuls was a useful one, particularly for a State which could not afford to appoint career officials to all consular posts, and for that very reason governments were not always scrupulous in their choice. The immunities granted in article 33 formed a serious exception to the principle of the territoriality of criminal jurisdiction and should not be lightly accorded.

3. Mr. MATINE-DAFTARY said that the Commission must not go too far in attempting to place honorary consuls on the same footing as career consuls, for the legal status of the two differed greatly. Those members who considered that the two classes of consul were on a par — a view which, if it were embodied in the draft, would constitute a considerable development — probably had little knowledge or experience of the type of persons sometimes appointed honorary consuls, particularly in the East. It had been argued that there was no reason to deprive the small number of honorary consuls who were not nationals of the receiving State and who did not engage in commerce or in a gainful private occupation of the privileges laid down in article 33; his answer to that argument was that it would be wrong

to lay down so general a principle for so small a group.

4. The Commission should take existing practice into account and formulate a draft which had some chance of general acceptance. He could not therefore agree that article 33 should be made applicable to honorary consuls, for their relationship with the sending State was contractual and the latter had little control over them and could disclaim responsibility for their prejudicial acts. Career consuls, on the other hand, were government officials — often with the same training as diplomats — who were subject to the disciplinary board of the Ministry of Foreign Affairs; their status as established civil servants offered certain guarantees, which was not the case with honorary consuls.

5. Mr. AMADO said that the argument that article 33 should be applicable to honorary consuls left him in a state of perplexity. He was unable to see how a person whose link with the sending State was so tenuous and who was only temporarily invested with the dignity of acting on behalf of that State could be granted the personal inviolability attaching to a career consul who had been specially trained and who acted under the direct instructions of his government or the head of the diplomatic mission. The argument that honorary consuls not engaged in commerce or a gainful private occupation should enjoy certain privileges was untenable, because other members of their family might be gainfully occupied. Nor could he agree that the receiving State by the mere fact of accepting an honorary consul was bound to grant him personal inviolability.

6. He would have liked to be more liberal in the matter, but the arguments advanced by Sir Gerald Fitzmaurice (*ibid.*, paragraph 39), Mr. Erim (*ibid.*, paragraph 49) and the Secretary (*ibid.*, paragraph 44) had not convinced him. On the other hand he had considerable sympathy for Mr. François's view that honorary consuls who were needed by certain States must be accorded suitable conditions for the exercise of their functions.

7. Mr. FRANÇOIS said that, though prepared to champion the cause of honorary consuls, he recognized that all due weight must be given to existing practice and that the Commission could not introduce innovations unless it could show good reason for doing so. The issue was not as simple for him as it appeared to be for such members as Sir Gerald Fitzmaurice and Mr. Erim who considered that because of the restrictions already laid down in article 33 there was no need to distinguish between career and honorary consuls in its application.

8. Even if an honorary consul was not a national of the receiving State and did not engage in commerce or any other gainful private occupation, his status was essentially different from that of a career official. The fact that an honorary consul only exercised consular functions on a part-time

basis was not decisive; what was really decisive was the fact that a career consul formed part of an established service, had been specially trained for his important duties and was subject to the disciplinary action of the sending State. In many countries, such as his own, the preliminary training of consuls and diplomats was the same and could lead to an appointment in either the consular or the diplomatic service. To the best of his knowledge it was not the practice to assimilate honorary consuls who were nationals of the sending State and were not engaged in commerce or any gainful private occupation to career consuls.

9. Another point which might be taken into account was the fact that the dignity of the sending State would not be damaged in the same way by a criminal act committed by an honorary consul as it would be if the act had been committed by a career official.

10. There was no force in the argument put forward by the Secretary particularly as the Commission had decided that the relevant provision would accord only a qualified special protection (under article 32) to honorary consuls.

11. By reason of those considerations, he was unable to agree that article 33 should be made applicable to honorary consuls. Moreover, if the Commission declared the article to be so applicable, the entire draft might well be unacceptable even to States which were prepared to receive honorary consuls.

12. Mr. AGO said that the question before the Commission should be discussed not in any partisan spirit but dispassionately and from a strictly practical point of view.

13. Analysing the text of article 33 he pointed out that the provision contained in paragraph 4 in no sense represented a special privilege but was a common usage that should obtain for both career and honorary consuls. Equally, the duty to appear before the competent authorities in the circumstances described in the first sentence of paragraph 3 was a duty surely owed by honorary consuls. And there were no reasons for excluding honorary consuls from the provision in the second sentence of paragraph 3.

14. On the other hand, he did not consider that the first two paragraphs of article 33 should be declared to be applicable to honorary consuls. In any event, the benefit of those two paragraphs was expressly stated not to extend to consuls who were nationals of the receiving State or who engaged in business; and as the majority of honorary consuls were nationals of the receiving State and carried on business, the number who would qualify for the benefit of the two paragraphs — if they were declared applicable to honorary consuls — would be very small.

15. Mr. ERIM said that he had yet to be convinced that honorary consuls who were not nationals of the receiving State and did not engage

in a gainful occupation should be treated differently from career consuls. In so far as honorary consuls performed the same functions as career consuls, it would surely be wrong to deny them the privileges and immunities necessary for the performance of those functions. The fact that honorary consuls were not subject to the disciplinary action of the sending State was hardly relevant. If the Commission found that the existing law was deficient, then under the terms of its Statute it should fill the gap with a new rule. Perhaps those members who doubted whether States would be prepared to extend additional privileges to honorary consuls should wait to see what observations governments would submit on the subject. It was far from certain that States would necessarily be reluctant to accept such a provision as applicable to honorary consuls, particularly since it would benefit only a very small number, namely those who were not nationals of the receiving State and who did not exercise a gainful occupation.

16. Mr. HSU disagreed with the deduction made by the Secretary about the consequence to article 33 of the decision taken on article 32. Special protection was not in the usual course of events vital and was only necessary in an emergency when a consular officer might be attacked because he was a foreigner and serving a foreign country. Personal inviolability was altogether another question. Anyone acquainted with the East would realize that the crucial fact was that consular privileges and immunities represented an encroachment on the jurisdiction of the receiving State rather than on its sovereignty. The reason for the deep-seated resentment against such privileges and immunities was that they had the effect of exempting persons of foreign nationality from the duty to appear before the local courts. To perpetuate such a situation would be inadmissibly retrogressive. There were already serious reasons for not granting very extensive immunities and privileges to career consuls, and there was even less cause to be liberal towards honorary consuls who carried on non-consular occupations and who were not subject to the disciplinary control of the sending State. Accordingly, there was a strong case for withholding from them the privileges accorded under article 33; that course should not lead to any serious difficulty in practice.

17. Mr. SANDSTRÖM said that Mr. François's arguments had not persuaded him to alter his view that honorary consuls who were not nationals of the receiving State and were not engaged in gainful occupation should be assimilated to career consuls. Moreover, as Mr. Ago had said, if article 33 applied to honorary consuls, the number who would come within its terms would be very small.

18. Mr. YOKOTA thought that article 33 should apply to honorary consuls who were not nationals of the receiving State and were not engaged in gainful private occupation. He could not agree

with the Special Rapporteur's view that if the Commission declared article 33 to be applicable to such honorary consuls it would be disregarding State practice and the terms of consular conventions. For example, the Consular Convention between the United States of America and Costa Rica of 1948, which did not distinguish between career and honorary consuls, stated in its article II, paragraph 1, that a consular officer who was a national of the sending State and not engaged in a private occupation for gain in the receiving State was exempt from arrest or prosecution in the receiving State except when charged with the commission of a crime punishable by imprisonment for one year or more. Nevertheless, he would not press the point and would be prepared to accept Mr. Ago's suggestion that only paragraphs 3 and 4 of article 33 should be applicable to honorary consuls. The Drafting Committee might make the necessary adjustment to the article.

19. Mr. ŽOUREK, Special Rapporteur, said the Commission seemed to be agreed that the question of the applicability of article 33 to honorary consuls was of little practical importance and the majority apparently considered that the article should not be mentioned in article 56, paragraph 2, among the provisions applicable to honorary consuls.

20. In reply to Mr. Yokota, he said that the provisions of bilateral conventions could not be taken as evidence of a general practice; besides, bilateral conventions of a particular group could not be accepted as guidance in the drafting of a multilateral convention. It was no solution to proceed on the premise that the definition of "honorary consul" was based on the criterion of nationality. In that case it could easily be argued that the article should be applicable to honorary consuls having the nationality of the sending State, but that argument provided no solution for cases where the definition of "honorary consul" was based on different criteria. Such a rule would not in any case reflect the general practice of States.

21. Nor could he agree with Mr. Ago that article 33, paragraph 3, should be applicable to honorary consuls. While it was perfectly clear that honorary consuls could not escape the duty laid down in the first sentence of that paragraph, the second sentence obviously contemplated career consuls only. An "official position" in the full sense of the expression was held by career consuls only, for honorary consuls performed official functions in addition to their private activities. Furthermore, the position of honorary consuls would not suffer any prejudice if paragraph 3 was not applicable to them.

22. He wished to dispel any idea that he was opposing systematically the institution of honorary consuls as such. After a thorough study of the practice and doctrine of States in the matter, he had concluded that many States resorted to the institution of honorary consuls and he had assigned

a suitable place in the draft to honorary consuls. He was sure that his approach would be confirmed by further research into State practice. He wished to warn the Commission against the tendency to place career consuls and honorary consuls on the same footing, for that tendency was patently at variance with the practice of States.

23. The CHAIRMAN, speaking as a member of the Commission, said that he had not been convinced by arguments in favour of establishing entirely different treatment for honorary and career consuls. Those arguments did not seem to be entirely juridical, but to be based on political considerations and on the convenience of States in special situations. It was hard to agree that different treatment should be given to honorary and career consuls, when any consul was obviously placed in an official position by reason of his performance of consular functions. If it were taken as a premise that article 33 would not apply to consular officials who were nationals of the receiving State or engaged in commerce or in some other gainful occupation, the logical conclusion should be drawn, and all consuls, whether honorary or career, who did not answer that description should be treated on an equal footing. Nor could it be objected that a consul might engage in a gainful occupation in secret, for such a person would not come within the terms of the original premise.

24. In his opinion, the privilege of personal inviolability was accorded by reason of the consul's official position, which was closely connected with the general principle of maintaining the dignity of the sending State. It could not be said that the dignity of that State would be prejudiced to a lesser extent by disrespectful treatment of an honorary consul than by similar treatment of a consul belonging to the career service. He knew of a case where a State which had appointed an honorary consul having the nationality of the receiving State had regarded its dignity as having been so prejudiced by an attack on the sister of that honorary consul that it had broken off diplomatic relations with the receiving State.

25. State practice in the matter was obviously not uniform, and he agreed that it was for the sending and receiving States to agree on any privileges and immunities in excess of those laid down in the draft. Nevertheless, lack of uniformity should not prevent the Commission from taking a decision; it had done so in the past without proving conclusively what the general practice in a given case really was. He did not believe that, from the legal point of view, one could differentiate between honorary and career consuls in the matter of personal inviolability. Even if the Commission accepted the fact that the privileges and immunities and the functions of honorary consuls were more limited than those of career consuls, he still believed that honorary consuls should be given the same treatment as career consuls in respect of the functions which they performed. For his part, he considered that all the paragraphs of article 33 should be applicable to honorary consuls; while he would accept the majority view, that would

not mean that he had been convinced by the arguments presented.

26. Speaking as Chairman, he called for a vote on the applicability of paragraph 1 of article 33 to honorary consuls.

It was decided by 10 votes to 7, with 3 abstentions, that paragraph 1 should not be applicable to honorary consuls.

27. The CHAIRMAN called for a vote on the applicability of paragraph 2 of article 33 to honorary consuls.

It was decided by 10 votes to 7, with 3 abstentions, that paragraph 2 should not be applicable to honorary consuls.

28. The CHAIRMAN said that the Commission would now decide on the applicability of paragraph 3 of article 33 to honorary consuls.

29. Mr. TUNKIN observed that the text of article 33 had been adopted provisionally only by the Drafting Committee; it had not yet been adopted by the Commission. It had been suggested in earlier debate in the Commission that, although consular officials were under a duty to appear before the competent authorities, a provision should be added to the effect that they could not be forced to appear. Since the Commission might yet decide to include such a provision in paragraph 3, Mr. Ago's argument in favour of its applicability to honorary consuls might be proved invalid.

30. Sir Gerald FITZMAURICE pointed out that the paragraph had been referred to the Drafting Committee in substantially the same form as that in which that Committee had provisionally adopted it. The consensus of the Commission had been that there was no situation in which career consuls were exempted from liability to appear before the competent authorities.

31. The CHAIRMAN drew attention to the fact that the Special Rapporteur had submitted a tentative text of the paragraph for forwarding to the Drafting Committee (540th meeting, paragraph 3), and the latter had not greatly changed that text.

32. Mr. YOKOTA endorsed the Chairman's remarks. Furthermore, the Drafting Committee had considerably altered paragraphs 1 and 2 of the article.

33. Mr. VERDROSS proposed that the vote on the paragraph should be postponed until the final text of the article had been adopted by the Commission. The ideas contained in paragraphs 1 and 2 were much clearer than that of paragraph 3; furthermore, that paragraph contained a reference to paragraph 1, which might be misleading in view of the result of the vote on the applicability of paragraph 1 to honorary consuls.

34. Mr. AGO appealed to Mr. Verdross not to press his proposal. That procedure might set a dangerous precedent, since all the articles of the

draft had been referred to the Drafting Committee and had not yet been adopted by the Commission. Moreover, if paragraph 1 was ultimately not adopted, the reference to it in paragraph 3 would automatically be deleted.

35. Mr. EDMONDS said that it would not be proper to vote on the applicability of any provision in chapter I of the draft to honorary consuls before the Commission had adopted a final text for that chapter.

36. After a procedural discussion, Mr. ŽOUREK, Special Rapporteur, pointed out that paragraph 3 of article 33 contained two sentences, each stating a different rule of international law. He therefore proposed that separate votes should be taken on the two sentences.

37. Mr. VERDROSS withdrew his proposal.

38. The CHAIRMAN called for a vote on the applicability of the first sentence of paragraph 3 of article 33 to honorary consuls.

It was decided by 16 votes to none, with 3 abstentions, that the sentence should be applicable to honorary consuls.

39. The CHAIRMAN called for a vote of the applicability of the second sentence of paragraph 3 of article 33 to honorary consuls.

It was decided by 10 votes to 6, with 4 abstentions, that the sentence should be applicable to honorary consuls.

40. The CHAIRMAN called for a vote on the applicability of paragraph 4 of article 33 to honorary consuls.

It was decided by 17 votes to none, with 3 abstentions, that paragraph 4 should be applicable to honorary consuls.

41. Mr. YASSEEN said that he had abstained from voting on the applicability of the first sentence of paragraph 3 of article 33 because that sentence was unnecessary now that the Commission had decided that paragraphs 1 and 2 should not apply to honorary consuls. He was not of course in any way opposed to the principle set forth in the sentence in question; he merely considered that a provision of that nature was not necessary. It went without saying that an honorary consul was under a duty to appear before the competent authorities in the event of criminal proceedings being instituted against him.

42. The CHAIRMAN invited the Commission to discuss the question of the applicability to honorary consuls of the principle embodied in article 34 (*Immunity from jurisdiction*) of the draft on consular privileges and immunities, and drew attention to the text for that article as provisionally adopted by the Drafting Committee:

"Members of the consulate shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of their functions."

43. Mr. VERDROSS said that the formula "in respect of acts performed in the exercise of their functions" was much too broad and could include an ordinary crime committed during the performance of official duties. He suggested the replacement of the words in question by the phrase "in respect of their official acts" (*à raison des actes de leur fonction*). If so amended, the provision would cover acts of State only.

44. The CHAIRMAN said that Mr. Verdross's suggestion related to the substance of article 34, whereas at the moment the Commission was considering only the applicability of the article to honorary consuls. If there was no objection, he would take it that the Commission agreed that article 34 should apply to honorary consuls, as indeed was proposed in the Special Rapporteur's new article 56, paragraph 2. (551st meeting, paragraph 18).

It was so agreed.

45. The CHAIRMAN invited the Commission to consider the question of the applicability to honorary consuls of the principle embodied in article 35 (*Exemption from obligations in the matter of registration of aliens and residence permits*) of the draft, and drew attention to the text provisionally adopted for that article by the Drafting Committee:

"Members of the consulate, members of their families and their private staff shall be exempt from all obligations under local legislation in the matter of registration of aliens, residence permits and work permits."

46. He noted that the Special Rapporteur's draft article 56, paragraph 2, did not mention article 35 among the provisions applicable to honorary consuls.

47. Mr. ERIM thought it was not unreasonable that honorary consuls should enjoy the relatively minor privileges provided for in article 35. The reason why career consuls were exempted by the article from certain formalities regarding registration and residence permits was that the formalities were unnecessary since the consul's arrival was notified to the Ministry of Foreign Affairs.

48. Mr. BARTOŠ said that it was the practice in many countries, including Yugoslavia, to exempt foreign honorary consuls from the duty to register as ordinary aliens and that exemption applied also to their families. The practice did not represent a serious concession on the part of the receiving State, for the persons concerned were in fact registered with the Protocol Division of the Ministry of Foreign Affairs, as were of course career consular officers and their families.

49. Naturally, the position of an honorary consul who was a national of the receiving State was quite different. Such a person would, for example, have a duty to register for military service.

50. Mr. ŽOUREK, Special Rapporteur, said that he had excluded article 35 from the enumeration in article 56, paragraph 2, because honorary

consuls could be nationals of the sending State, of the receiving State or of a third State; in addition they were authorized to engage in a gainful occupation. Even if they were not nationals of the receiving State, they generally carried on an occupation in that State and, in the particular matter with which article 35 was concerned, were subject to the same regulations as applied to other resident aliens. In the circumstances, no State would agree to a general rule relieving all honorary consuls of the duty to obtain residence permits and work permits.

51. The wisest course was therefore to exclude article 35 and to await the replies of governments, which would provide some information on the existing practice of States.

52. Sir Gerald FITZMAURICE said that it was clear from the terms of article 35 that in no event would a person who was a national of the receiving State be eligible for the exemption conferred by the article. The article was concerned exclusively with persons who were aliens in the receiving State.

53. In the circumstances, there should be no difficulty in exempting an honorary consul from the requirement of a residence permit. It would be most strange if the receiving State, after consenting to receive a particular person as consul, were to require him to obtain a residence permit. The consent of the receiving State should, *ipso facto*, imply permission for the honorary consul to reside in the country as long as his duties lasted.

54. With regard to the matter of work permits, he thought there would be no special difficulty if the honorary consul engaged in commerce or some other gainful occupation: for the purpose of carrying on those activities, he would require a permit in the same way as any other alien. However, it should be made clear that on no account would an honorary consul need a work permit for the purpose of exercising the consular function itself.

55. Mr. BARTOŠ agreed that the grant of an exequatur by the receiving State should relieve the honorary consul of all obligations under local legislation in the matter of immigration and residence permits. If it were not so, the aliens control authorities would be in a position to nullify the effect of the grant of an exequatur.

56. The practice could hardly affect the interests of the receiving State, for that State was free at any time to withdraw the exequatur, if necessary. There could also be no doubt that if an honorary consul wished to engage in a gainful occupation, he would have to conform with local legislation and the authorities concerned could, if need be, decline to give him a work permit for such occupation; in no circumstances, however, could the authorities cancel his residence permit so long as his exequatur was still in force.

57. For those reasons, the only possible conclusion was that article 35 should apply to honorary consuls who were not nationals of the receiving State.

58. Mr. TUNKIN drew attention to article 13,

paragraph 5, of the Consular Convention between the United Kingdom and Sweden of 1952, which implied (by its silence on the subject of honorary consuls) that it was not the State practice to exempt honorary consular officers — as distinct from career officers — from the requirements of local legislation regarding the registration of aliens and residence permits. The reason was that such an exemption was not essential for the purpose of the honorary consul's official duties. For his part, he would agree that an honorary consul who was a national of the sending State should be exempted from the requirement of a residence permit, provided that he was not engaged in any non-consular activity. As to work permits, they were of course not required for the exercise of consular duties but the fact that a person was an honorary consul would not exempt him from the duty to obtain a work permit for his other activities.

59. Lastly, he could not accept the extension of the benefit of article 35 to all the members of a consulate, members of their families and their private staff. Whatever exemptions were granted under the article should apply only to the honorary consul himself.

60. Mr. ŽOUREK, Special Rapporteur, explained that an honorary consul to whom an exequatur had been granted would obviously not require a work permit to perform his consular duties. The question of a residence permit was, however, different. Under the law of the receiving State, the honorary consul might be required to obtain such a permit although it would be surprising if the responsible authorities were to refuse him such a permit when he had already been granted the exequatur. There was a parallel in the treatment accorded in certain countries to international officials. Those officials were, in the practice of certain countries, given special identity cards which took the place of residence permits. The card was not refused when once the international official had been admitted into the country.

61. Lastly, he drew attention to the fact that article 35 did not cover only an honorary consul who was a head of post, but also other members of the consulate, members of their families and even their private staff. Those persons were ordinary aliens in the receiving State and could not be exempted from the requirements of local legislation in the matter of registration of aliens and residence permits.

62. Mr. LIANG, Secretary to the Commission, said that he knew of no case of a member on the staff of an international organization having been subjected to the requirement of applying for a residence permit, either in New York or at Geneva. Such a requirement would be inconsistent with all the agreements at present in force between the United Nations and the host States.

63. So far as the position of an honorary consul was concerned — on the assumption of course that he was not a national of the receiving State — he said it would be inconsistent with the grant

of the exequatur to require him to register as an alien and to apply for a residence permit. The very fact of his being accepted as an honorary consul should suffice.

64. Mr. YASSEEN noted that article 35 referred to several distinct questions some of which were more important than others. It was understandable that an honorary consul should be exempted from the requirement of registration as an alien because honorary consuls were registered with the Ministry of Foreign Affairs. As to residence permits, he felt that the authorization to act as a consul should imply permission to reside in the country since such permission was necessary for the exercise of the consular function.

65. By contrast, he could not agree to the exemption of honorary consuls from the duty to obtain work permits if they wished to engage in any kind of occupation; such an exemption was not necessary for the performance of consular duties.

66. Mr. AGO pointed out that the question of registration as an alien would only arise in the case of an honorary consul who entered the receiving State for the first time. As a general rule, an honorary consul was already a resident at the time of appointment and, if not a national of the receiving State, would by then have carried out his obligations in the matter of registration as an alien. In the case of an honorary consul who entered the country for the first time, there was no reason to require him to register as an alien; the notification of his arrival under article 21 of the draft should suffice.

67. The question of exemption from residence permits should not give rise to difficulties either. If the receiving State granted the exequatur to an honorary consul, it should not make any difficulties regarding his residence permit.

68. So far as work permits were concerned, he said it could simply be explained in the commentary that the exemption referred only to the honorary consul's work as a consul and not to his other activities, if any.

69. The CHAIRMAN said that in view of the remarks of some of the members, the question of the applicability of article 35 to honorary consuls could not perhaps be considered without qualification. The question should perhaps be put to the Commission whether an honorary consul who had been granted an exequatur was thereby relieved of the duty to obtain a residence permit and also of the duty to obtain a work permit in regard to his duties as a consul.

70. Mr. ŽOUREK said that even in that form he could not vote in favour of the applicability of article 35 to honorary consuls because the result would be to exempt an honorary consul who entered the country for the first time of the obligation to register as an alien and to obtain a residence permit, whereas honorary consuls resident in the receiving State at the time of their appointment would be subject to that obligation.

The consequence would be a strange situation, for the same class of consuls would be subject to two different sets of regulations owing to accidental circumstances, according to whether they arrived in the receiving country before appointment as honorary consuls (which was generally the case) or after their appointment (which was rare).

71. Mr. MATINE-DAFTARY proposed that the exemption should apply only to an honorary consul who was a national of the sending State and who did not engage in any gainful occupation. It should not apply to members of his family or staff.

72. The question of a work permit in regard to consular duties did not arise; it had never been suggested that a consul, whether honorary or not, required a work permit to perform his duties.

73. Sir Gerald FITZMAURICE said that he saw no basis for establishing a distinction between honorary consuls and honorary consular officers. If a person was accepted in a consular capacity he should not need a residence permit or a work permit for carrying out his duties. Otherwise, a situation could arise where police action might nullify the grant of the exequatur. Once a person was accepted as an honorary consular officer, he would only need a work permit for his non-consular activities, if any, but the exercise of his consular duties could not be made conditional on his obtaining a residence or work permit.

74. Mr. ŽOUREK, Special Rapporteur, pointed out that not all honorary consular officials were subject to the procedure of the granting of an exequatur. In certain countries, for example, the appointment of a consular agent was merely notified to the Ministry of Foreign Affairs and required no exequatur or express authorization.

75. Mr. PAL said that, if a work permit was not demanded under any local law for the purpose of discharging consular duties, the reference in article 35 to exemption from the need for such permits would appear to be unnecessary and somewhat misleading even in relation to career consular officers. Subject to that, there was no reason why honorary consuls as such should be placed on a different footing in that respect.

76. Mr. VERDROSS suggested that the Special Rapporteur's proposal to omit article 35 from the enumeration in article 56, paragraph 2, be accepted, on the understanding that the commentary would explain that the grant of an exequatur dispensed an honorary consul from all obligations under local legislation in the matter of registration of aliens and residence permits.

77. Mr. LIANG, Secretary to the Commission, drew attention to the considerable difficulties which had arisen, particularly during the First and Second Conferences on the Law of the Sea, whenever the Commission had introduced into the commentary on an article significant qualifications to its provisions. Representatives had been led to speak on the text of articles without making

allowance for qualifications contained in the commentary.

78. He stressed the inadvisability of a practice which had been unfavourably commented upon both in the General Assembly and in academic circles.

The meeting rose at 1.5 p.m.

557th MEETING

Thursday, 9 June 1960, at 9.30 a.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 56 (*Legal status of honorary consuls*) (continued)

1. The CHAIRMAN said that the Commission had to take a decision on the question of the applicability to honorary consuls of the principle embodied in article 35 (*Exemption from obligations in the matter of registration of aliens and residence permits*) (556th meeting, paragraph 45).

2. Mr. ŽOUREK, Special Rapporteur, said that the best procedure for the Commission would be to take a decision on the suggestion made at the previous meeting by Mr. Verdross (*ibid.*, paragraph 76) that article 35 should not be mentioned among the provisions the benefit of which was to enure to honorary consuls under article 56, paragraph 2, and that it should be explained in the commentary that an honorary consul who had been granted an exequatur was, *ipso facto*, relieved of the duty to register as an alien and to obtain a residence permit.

3. He drew attention to the fact that an honorary consul had a dual capacity, and that, in view of his private activities, which constituted his principal occupation, it was difficult for the receiving State to exempt him from the legislative provisions governing the entry and residence of aliens.

4. The CHAIRMAN said that the majority of the members appeared to agree that article 35 should apply to an honorary consul, provided that he was not a national of the receiving State and that he did not engage in commerce or in any

other gainful occupation. He suggested that the Commission take a decision on that point and then proceed to deal with the proposal made by Mr. Matine-Daftary at the previous meeting (*ibid.*, paragraph 71) that the provisions of article 35 should not apply to members of the family and private staff of an honorary consul.

5. Mr. AGO said that proceedings would be greatly simplified if article 35 were divided into two paragraphs; the first paragraph would deal with the questions of registration of aliens and residence permits and the second with the question of work permits.

6. If the provisions of article 35 were divided in that manner, it would be easy for the Commission to decide that the enumeration in article 56, paragraph 2, would include article 35, paragraph 1, but would not include article 35, paragraph 2.

7. Mr. ŽOUREK, Special Rapporteur, stressed that a great many States did not draw any distinction based on the nationality or occupation of honorary consuls, and, to distinguish them from career consuls, defined them as consuls who did not belong to the career consular service.

8. That being so, it would be difficult to apply any provision which differentiated as between various kinds of honorary consuls for the purpose of the applicability of the various privileges and immunities set forth in the draft articles.

9. Mr. TUNKIN said that an honorary consul was at the same time a private citizen and it might be necessary for the local authorities to apply to him their aliens' control legislation. He suggested that the Commission should vote first on the original proposal, implied in the Special Rapporteur's new draft of article 56, paragraph 2 (which did not mention article 35), that the benefit of article 35 should not extend to honorary consuls.

10. The CHAIRMAN, speaking as a member of the Commission, agreed that the scope of the functions of an honorary consul, as defined by the sending State, could be more limited than those of a career consul; he also agreed that an honorary consul might in State practice not have as many privileges as a career consul. However, such privileges as were granted to a consul were always based on the same grounds viz., his official position and the need to facilitate the performance of the consular function. The basis of those privileges was the same, whether the person concerned was a career officer or an honorary consul.

11. For those reasons, he could not accept the exclusion of an honorary consul from the benefit of a particular privilege for no reason other than his honorary status. He would therefore vote in favour of the applicability to honorary consuls of the exemption from obligations in the matter of registration of aliens and residence permits.

12. Mr. AMADO said that he had been originally under the impression that the draft on consular intercourse and immunities dealt primarily with career consuls. Now, as a result of the discussion,

the question of honorary consuls had assumed extraordinary prominence. He considered that the more limited conception of an honorary consul, which had been suggested by Mr. François, was in keeping with State practice. For that reason, he had welcomed the Special Rapporteur's approach of including in the draft a separate article on the legal status of honorary consuls, thereby emphasizing the special character of those consuls and their distinct position.

13. He would therefore vote against the applicability to honorary consuls of article 35, notwithstanding the argument that the grant of the exequatur should entail that of a residence permit. The enumeration contained in article 56, paragraph 2, should be kept to a minimum so as not to place honorary consuls in a position almost similar to that of career consuls — a situation which was totally at variance with existing State practice.

14. Mr. LIANG, Secretary to the Commission, suggested that the difficulties which had arisen were largely due to the failure to distinguish clearly in the draft between the various types of honorary consuls.

15. If a national of the sending State who was not engaged in any gainful occupation was accepted by the receiving State as an honorary consul, it was difficult to see how he and his family and servants could be subjected to the normal formalities of aliens' registration and residence permits. Nor should the question of work permits arise unless some member of the honorary consul's family sought employment outside the consulate.

16. It was apparent that some members of the Commission had taken it for granted that an honorary consul was necessarily a part-time consul and was engaged in a private occupation for gain.

17. Mr. YOKOTA said that the proposal that article 35 should apply to honorary consuls, provided that they were not nationals of the receiving State and were not engaged in a gainful occupation, should be treated as an amendment to the Special Rapporteur's new draft of article 56, paragraph 2, which excluded article 35 from the enumeration. As an amendment, it should be voted upon first.

18. The CHAIRMAN said that that was precisely the reason why he had suggested that the Commission should vote on the qualifying formula in question rather than on the Special Rapporteur's text which omitted article 35.

19. Mr. ŽOUREK said that the formula in question tended to replace rather than to amend draft article 56, paragraph 2. However, he would not insist on that point and was prepared to vote in the manner indicated by the Chairman.

20. He drew special attention to the fact that article 35 covered not only the consul but also members of his family and private staff.

21. State practice showed that the decisive

criterion in regard to honorary consuls was the fact that they were not members of the regular consular service and that they could lawfully carry on, in addition to their official activities, some gainful occupation in the receiving State, it being immaterial, as indicated in Peruvian decree No. 69 of 8 February 1954, whether or not in fact they carried on such an occupation.

22. The CHAIRMAN put to the vote the proposal that the exemption from obligations in the matter of registration of aliens' and residence permits should apply to honorary consuls who were not nationals of the receiving State and who were not engaged in any gainful occupation.

The proposal was adopted by 12 votes to 4, with 3 abstentions.

23. Mr. ŽOUREK, Special Rapporteur, said that the Commission had still to decide whether the exemption extended to members of the family and private staff of an honorary consul.

24. Mr. EDMONDS agreed that the Commission had still to vote on that issue and pointed out that under the Consular Convention in force between the United States of America and the United Kingdom the exemption in question was extended to honorary consuls and members of their families.

25. Mr. MATINE-DAFTARY emphasized that the object of his proposal was to render article 35 applicable only to the honorary consul himself, as distinct from members of the family and private staff, provided of course that the honorary consul was not a national of the receiving State and that he was not engaged in any gainful occupation. The reason for the distinction was that the name of the honorary consul was notified at the time of his appointment: that notification could serve in lieu of the normal registration procedure; so far as members of the honorary consul's family and private staff were concerned the position was different.

26. Mr. AMADO pointed out that, since the Commission had agreed that the honorary consul himself should be exempted from the obligation to register as an alien and obtain a residence permit, the exemption should logically apply to his family as well. When the draft was circulated to governments, the latter would comment upon those provisions.

27. Mr. SCALLE said that there could be no difference in treatment between the honorary consul and his family; the exemption of the honorary consul from the normal aliens control should entail a similar exemption for his family.

28. Sir Gerald FITZMAURICE and Mr. YASSEEN suggested that separate votes be taken on the applicability of article 35 to the honorary consul's family and on its applicability to the private staff of honorary consuls.

29. The CHAIRMAN put to the vote the proposal to render applicable to members of the family of an honorary consul, on the under-

standing that they were not engaged in any gainful occupation, the exemption from obligations in the matter of registration of aliens and residence permits.

The proposal was adopted by 13 votes to 2, with 4 abstentions.

30. Mr. AMADO said that he had abstained because, in view of the Commission's earlier decision to render the exemption applicable to honorary consuls, it would not be logical to exclude members of the honorary consul's family from the exemption.

31. The CHAIRMAN put to the vote the proposal to render applicable to the private staff of an honorary consul the exemption from obligations in the matter of registration of aliens and residence permits.

The proposal was rejected by 10 votes to 6, with 4 abstentions.

32. Mr. YASSEEN said that the Commission had still to decide whether the exemption from work permits applied to honorary consuls and members of their families and private staff.

33. Mr. YOKOTA pointed out that the Commission had agreed that the exemption would only apply to persons who were not engaged in any gainful occupation.

34. The CHAIRMAN further pointed out that by the vote just taken the Commission had decided that private staff should not be eligible for the benefit of article 35; accordingly the question raised by Mr. Yasseen did not appear to apply.

35. Mr. ŽOUREK, Special Rapporteur, said that the honorary consul might have certain obligations as an employer under the legislation governing the employment of aliens.

36. Mr. AGO said that Mr. Yasseen's question required an answer. For example, would the son of an honorary consul have to obtain a work permit if he wished to engage in outside employment? He (Mr. Ago) thought that he would. As he understood it, the decision taken by the Commission applied the qualification regarding gainful occupation to the honorary consul himself, not to the members of his family.

37. Mr. BARTOŠ said that he had been obliged to vote against the proposal for the qualified application of article 35 to honorary consuls because he maintained that that article should apply to all honorary consuls, whether engaged in a gainful occupation or not. The only qualification was that the exemption from obligations under local legislation in the matter of work permits only applied to the consular function itself but not the honorary consul's other activities, if any.

38. So far as the honorary consul's family was concerned, the position was that members of his household were in practice exempted from the obligation to register as aliens or obtain resi-

dence permits; a permit would, however, be necessary for a member of the family who sought employment outside the consulate. As to members of the private staff, it was customary to allow an honorary consul to bring private servants from his own country without obtaining a residence permit for them. The right to choose freely his domestic servants was not only a convenience for the honorary consul: it also served to protect his privacy and the confidential nature of his functions.

39. For those reasons, he regretted that he had been placed in the position of having to vote against, or abstain, on proposals for the qualified application of article 35 and he reiterated his view that all the provisions of that article should apply to honorary consuls.

40. The CHAIRMAN said it would apparently be necessary for the Commission to vote on the question whether the benefit of the provisions of article 35 should apply to members of an honorary consul's family who sought employment in the receiving State outside the consulate.

41. Mr. MATINE-DAFTARY said that to vote on that question would nullify the Commission's decision that the benefit of article 35 applied to honorary consuls, their family and private staff, provided that they were not nationals of the receiving State and were not engaged in a gainful private occupation.

42. Mr. AGO said there seemed to be some misunderstanding. According to his understanding of the Commission's earlier vote the proviso in question was intended to apply to the honorary consul personally, not to members of his family. If a member of the honorary consul's family wished to enter employment outside the consulate in the receiving State, the person concerned would have to obtain a work permit.

43. Mr. YOKOTA said that he had voted on the understanding that the exemptions provided for in article 35 were to be extended to members of the family as well, if not engaged in an outside occupation.

44. Mr. PAL said that he interpreted the Commission's decision as meaning that the exemptions in the matter of aliens' registration and residence permits should extend to honorary consuls who were neither nationals of the receiving State nor engaged in other gainful occupation: the Commission had not taken a decision on the question of the members of the families of such consuls. In the diplomatic draft, that question had been kept apart and had been dealt with in a separate article. That was the more satisfactory arrangement. So far as consular immunities were concerned, it was obvious that members of families did not necessarily occupy the same position.

45. Sir Gerald FITZMAURICE endorsed Mr. Ago's interpretation of the Commission's decision; accordingly, as he understood it, the decision meant that any member of an honorary

consul's family who wished to work in the receiving State would have to apply for a work permit. But that requirement should not be allowed to affect that person's exemptions in the matter of aliens' registration and residence permits.

46. Mr. MATINE-DAFTARY considered that a member of an honorary consul's family who wished to take up employment outside the consulate in the receiving State would not only have to obtain a work permit but would also lose his exemption from obligation in the matter of aliens' registration and residence permits. In other words, such a person would be on the same footing as any other alien in that country.

47. Mr. ŽOUREK, Special Rapporteur, observed that Mr. Yokota's interpretation of the Commission's decision was not quite correct. The meaning of the decision was that the benefit of article 35 should extend to an honorary consul if he was not a national of the receiving State and did not engage in a private gainful occupation; the benefit attached to the honorary consul personally and did not extend to members of his family.

48. It should not be difficult to settle the question whether honorary consuls had to obtain a work permit if they engaged in an occupation outside the consulate functions. As there was no rule of international law exempting them from the obligation, they were undoubtedly bound — if the law of the receiving State so required — to obtain a work permit if they should wish to employ a person having a nationality other than that of the receiving State.

49. Mr. LIANG, Secretary to the Commission, said it was unfortunate that the question of work permits had been introduced into article 35 because to register as an alien and obtain a residence permit was an obligation, while the grant of a work permit conferred a right. It was absurd to imply that an honorary consul needed a permit to exercise his consular functions. The requirement that he or any member of his family would have to obtain such a permit if they wished to engage in another occupation should be embodied in a separate provision.

50. Mr. ŽOUREK, Special Rapporteur, emphasized that neither he nor the Drafting Committee had intended to convey in article 35 the implication mentioned by the Secretary. Nevertheless, since honorary consuls were likely to engage in private activities it was necessary to stipulate that they would then have to comply with the legislation of the receiving State in regard to work permits and the same held true of members of their private staff.

51. After further discussion, the CHAIRMAN said he understood the Commission to have decided that the exemptions in the matter of registration and residence permits should be accorded to honorary consuls and members of their families on condition that they were not nationals of

the receiving State and did not engage in an outside occupation.

52. He would now put to the vote the proposal that the draft should stipulate that an honorary consul or members of his family who engaged in a gainful private occupation outside the consulate was not exempt from the obligation to apply for a work permit.

The proposal was adopted by 16 votes to 1, with 3 abstentions.

53. The CHAIRMAN suggested that the Drafting Committee should be requested to prepare a text reflecting that decision.

It was so agreed.

54. The CHAIRMAN invited the Commission to consider whether article 36 (*Social security exemption*) should be applicable to honorary consuls. He drew attention to the text of article 36 as provisionally adopted by the Drafting Committee in the following terms:

"1. Subject to the provisions of paragraph 3 of this article, the members of the consulate and the members of their families belonging to their household, if they are not nationals of the receiving State, shall be exempt from the social security system in force in that State.

"2. The exemption provided for in paragraph 1 of this article shall also apply to members of the private staff who are in the sole employ of members of the consulate, provided

"(a) That they are not nationals of or permanently resident in the receiving State, and

"(b) That they are covered by the social security system in the sending State or in a third State.

"3. Members of the consulate who employ persons to whom the exemption provided for in paragraph 2 of this article does not apply shall be subject to the obligations which the social security system of the receiving State imposes upon employers.

"4. The exemption provided for in paragraphs 1 and 2 of this article shall not preclude voluntary participation in the social security system, provided that such participation is allowed by the legislation of the receiving State."

55. Mr. YOKOTA, speaking as Chairman of the Drafting Committee, said that the new text of article 36 did not differ substantially from the original text presented by the Special Rapporteur. Paragraphs 1 and 4 did not contain any new element. Paragraph 2 dealing with members of the private staff was simply framed in a more detailed form. Paragraph 3 was new and was modelled on an analogous provision in the diplomatic draft.

56. Mr. BARTOŠ considered that honorary consuls should enjoy the exemption provided for in article 36. If, however, they engaged in a gainful outside occupation in a receiving State in which social insurance was obligatory they should,

even if not nationals of that State, be subject to its social security legislation, as should be members of their family and private staff. He recalled that he had expressed the same opinion in the discussion of article 36 as applied to career consuls (542nd meeting, paragraphs 15-18).

57. In reply to a question by Mr. MATINE-DAFTARY, Mr. ZOUREK, Special Rapporteur, said that he had not included article 36 among the provisions enumerated in article 56, paragraph 2, because he had based that list on the consideration that many States regarded all consular officials who were not career consuls as honorary consuls. Those States ascribed honorary status to consular officers who were not in the career service and whose activities were not all controlled by the sending State; the differentiation was not based exclusively on the criterion of nationality or on the fact of engaging in gainful occupation. Moreover, as a general rule honorary consuls were appointed from among persons permanently resident in the receiving State and subject in that State to the regulations concerning social security. By contrast with career consuls, who were posted to various countries in the course of their career, honorary consuls remained in one particular country and hence there was no reason why they should be eligible for the benefit of the exemption provided for in article 36, the object of which was precisely to avoid the disadvantage of one and the same person being subject, successively, to several systems of social security. Accordingly, he had thought it impossible to regard article 36 as applicable to honorary consuls. Moreover, the exemption was not indispensable for honorary consuls in the exercise of their consular functions, which were in any case usually part-time; and a provision could not be based on the exceptional cases where honorary consuls carried on no activities other than their consular functions.

58. Mr. AGO thought that a distinction should be made between the paragraphs of the article. Paragraph 1 referred to consular officials themselves and members of their families; he could not regard the difficulty raised by the Special Rapporteur as valid, and if the proviso that the consular officials concerned should not engage in any gainful occupation were added, the provision could well apply to honorary consuls who performed no activities other than consular functions. Otherwise the conclusion would be that such honorary consuls would not be exempt from the social security obligations of the receiving State in respect of their consular duties.

59. With regard to paragraph 3, he said that if the article was not declared applicable to honorary consuls, the result would be that honorary consuls would be absolved from the obligations imposed by the social security system in respect of persons they employed, and would thus be placed in an oddly privileged position vis-à-vis career consuls.

60. Finally, paragraph 2 applied to the exemp-

tion of the private staff of consular officials, under certain conditions, and it could make no conceivable difference whether such persons were employed by a career or by an honorary consul.

61. Mr. TUNKIN thought it unnecessary and undesirable to go into the details of the social security systems of various countries and to discuss all the possible cases that might arise. The correct approach would be to determine the rules which more or less corresponded to general practice and the privileges and immunities which were really indispensable for the honorary consul in the exercise of his functions. In that way, the Commission would not depart too far from State practice and could produce a draft acceptable to the majority of States. Following those general lines, the Commission might decide that article 36 was not in principle applicable to honorary consuls, but that the exemption which it conferred would extend to such in respect of their consular functions.

62. Mr. JIMÉNEZ DE ARÉCHAGA said that article 36 clearly did not apply to honorary consuls. The social security system of most countries was connected with wages and salaries and an honorary consul who was not paid was obviously not covered by such systems. Furthermore, nationals of the sending State or of a third State who enjoyed the exemption might not be covered by the social security system of their own country and would as a consequence have no social protection whatsoever.

63. Mr. BARTOŠ did not consider that the purpose of the provision was to avoid double social security coverage, since that could be achieved through International Labour Conventions and bilateral agreements. The problem with which article 36 was concerned was that of persons residing in a foreign country who were left outside the social security systems of both the sending and the receiving State. He thought that the article should be applicable to honorary consuls who were engaged exclusively in consular functions. In other cases, however, honorary consuls should not enjoy the exemption, and a provision to that effect would ensure their solidarity with other nationals of the receiving State and would avoid the situation, mentioned by Mr. Jiménez de Aréchaga, where exemption from the social security system of the receiving State and non-eligibility for coverage in the sending State might leave them unprotected.

64. Mr. SANDSTRÖM asked Mr. Ago whether, if the Commission decided that paragraph 1 was not applicable to honorary consuls, there would be any need to decide on the applicability of paragraph 3 to honorary consuls, since it was self-evident that all members of the consulate, whether honorary or career, should be subject to the obligations imposed upon employers by the social security system of the receiving State.

65. Mr. AGO agreed that the decision on the applicability of paragraph 3 depended on the decision taken on paragraph 1.

66. Mr. AMADO considered that every attempt to place honorary consuls on a footing of equality with career consuls led the Commission into greater confusion. In his opinion, the benefit of article 36 should not be extended to honorary consuls, for the exemption conferred by that article obviously applied only to career consuls, as officials.

67. Mr. SANDSTRÖM thought that the whole question was so complex that it should be subjected to expert examination before the Committee took any decision. His own feeling was that article 36 should not be applicable to honorary consuls.

68. Mr. AGO said that no great hardship would arise if article 36 were not expressly mentioned among the provisions applicable to honorary consuls. He proposed that a statement should be embodied in the commentary explaining that the absence of a reference to article 36 should not be construed as intended to relieve honorary consuls of certain obvious obligations.

69. The CHAIRMAN suggested that Mr. Ago's proposal should be followed.

It was so agreed.

70. The CHAIRMAN invited the Commission to discuss the applicability to honorary consuls of article 37 (*Exemption from taxation*), which was not mentioned in the Special Rapporteur's new draft of article 56, paragraph 2. The Drafting Committee had provisionally adopted the following text of the article:

"1. Members of the consulate and members of their families shall be exempt from all dues and taxes, personal or real, national, regional or municipal save:

"(a) Indirect taxes incorporated in the price of goods or services;

"(b) Taxes and dues on private immovable property, situated in the territory of the receiving State, unless held by a member of the consulate on behalf of his government for the purposes of the consulate;

"(c) Estate, succession or inheritance duties and duties on transfers, levied by the receiving State, subject, however, to the provisions of article 44 concerning the succession to movable property left by members of the consulate or by members of their families;

"(d) Taxes and dues on private income having its source in the receiving State;

"(e) Charges levied for specific services provided by the receiving State or the public services;

"(f) Registration, court or record fees, mortgage dues and stamp duty, subject to the provisions of article 26.

"2. Members of the private staff who are in the sole employ of members of the consulate shall, if they are not nationals of the receiving State, be exempt from taxes and dues on the wages they receive for their services."

71. Mr. VERDROSS thought that an honorary consul receiving compensation for consular services should be exempt from taxation on those payments. Otherwise the sending State would be obliged to pay taxes to the receiving State, which was unacceptable.

72. Mr. SANDSTRÖM agreed with Mr. Verdross and drew attention to article 62 of the Peruvian Decree No. 69 of 18 February 1954, which stated that honorary consuls should be exempted from taxes on salaries, emoluments and allowances received in compensation for consular services.

73. Mr. ŽOUREK, Special Rapporteur, said that, apart from exceptional cases, the compensation received by honorary consuls for the maintenance of an office, for example, was not taxable, even though the compensation could not be regarded as a salary (or remuneration) of a public official. The honorary consul's income from sources other than his consular functions was of course taxable. The rule granting the exemption did not, however, apply to honorary consuls who were nationals of the receiving State.

74. Mr. AGO agreed with the Special Rapporteur and observed that honorary consuls should enjoy no fiscal immunity, with the sole exception of immunity from taxation on the compensation which they received in respect of their consular functions.

75. Mr. TUNKIN could not share Mr. Ago's views. Article 36 of the diplomatic draft extended privileges and immunities to those persons only who were not nationals of the receiving State. To extend the application of article 37 under discussion to honorary consuls would be going much further than the diplomatic draft.

76. Mr. VERDROSS considered that article 37 should be supplemented by the provision that payments made to honorary consuls by the sending State should be exempt from taxation. With that addition, the article could be made applicable to honorary consuls.

77. Mr. EDMONDS said that much of the confusion that had arisen in the Commission stemmed from the fact that certain members persisted in regarding all honorary consuls as part-time consuls, engaged in some other occupation. In many cases, however, honorary consuls were fully occupied by their consular functions; in other words, they had no outside business or occupation. They were in a position to exercise their duties without some of the restrictions which affected the duties of career officers. He could see no reason why there should be any differentiation between consular officers in matters of tax exemption; if the honorary consul was a national of the sending State, representing the government of that State, his status and the amount of compensation he received was of no concern to the receiving State. In his opinion, article 37 should apply to honorary consuls.

The meeting rose at 1 p.m.

558th MEETING

Thursday, 9 June 1960, at 3.30 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 56 (Legal status of honorary consuls)
(continued)

1. The CHAIRMAN invited the Commission to continue its discussion on the question of the applicability to honorary consuls of the principle embodied in article 37 (*Exemption from taxation*) (557th meeting, paragraph 70).
2. Mr. JIMÉNEZ DE ARÉCHAGA said that in his opinion article 37 on exemption from taxation should not apply to honorary consuls. Such consuls were often chosen from among persons who were substantial tax-payers and any suggestion that they enjoyed some measure of exemption from taxation might lead to competition for appointments as honorary consuls. Ultimately, the result would be that countries would be very reluctant to admit such consuls and the institution of honorary consuls might disappear.
3. He agreed that the article should contain a provision, as suggested by Mr. Verdross (*ibid.*, paragraph 76), exempting from taxation any emoluments received by an honorary consul by reason of his consular duties. He suggested that the Commission should first vote on the Special Rapporteur's proposal that article 37 should not be mentioned, among the provisions the benefit of which extended to honorary consuls; it would then vote on the proposal of Mr. Verdross.
4. Mr. ŽOUREK, Special Rapporteur, said that he was prepared to agree to a provision to the effect that honorary consuls who were not nationals of the receiving State and not carrying on a private gainful occupation in that State were exempt from all dues and taxes on the emoluments received by them in their capacity as honorary consuls.
5. Mr. SANDSTRÖM said that it was not necessary for the Commission to take a vote since no member had suggested that article 37 should apply to honorary consuls.
6. The CHAIRMAN said that, if there were no objection, he would take it as agreed that the benefit of article 37 would not apply to honorary consuls, and that a provision should be added to the draft to the effect that an honorary consul who was not a national of the receiving State was not liable to taxation in that State in respect of emoluments received from the sending State for his services as consul.
It was so agreed.
7. Mr. BARTOŠ said that, although he had not pressed the matter to a vote, he wished to place on record his view that the receiving State was not entitled to tax any indemnity or emoluments received by one of its own nationals in his capacity as honorary consul of a foreign State.
8. The CHAIRMAN invited the Commission to consider the question of the applicability to honorary consuls of the principle contained in article 38 (*Exemption from customs duties*). He drew attention to the text provisionally adopted for that article by the Drafting Committee:
“In accordance with the provisions of its legislation, the receiving State shall grant exemption from customs duties, and from all other charges and taxes chargeable at the time of customs clearance, on
“(a) Articles intended for the use of a consulate of the sending State;
“(b) Articles for the personal use of the members of the consulate, and of members of their families belonging to their households, including articles intended for their establishments.”
9. Mr. ŽOUREK, Special Rapporteur, said that, in his new draft of article 56, paragraph 2, he had proposed that honorary consuls should benefit from the provisions of article 38 (a) as originally drafted by him (A/CN.4/L.86), but not from those of sub-paragraphs (b) and (c) of the same article.
10. As now re-drafted, article 38 (a) corresponded to the original sub-paragraphs (a) and (b), but possibly he could accept its applicability to honorary consuls, because of the addition in the introductory paragraph of the words “In accordance with the provisions of its legislation”.
11. As to the provisions of article 38 (b) (the former sub-paragraph (c)), there could be no question of applying them to honorary consuls. The law of all States was very strict on that point and granted personal exemptions from customs duties to career consular officials only.
12. Mr. BARTOŠ said that from his experience he could say that the facilities mentioned in the original Special Rapporteur's draft for article 38 (a) and (b) applied also to honorary consuls. The personal privileges specified in sub-paragraph (c) were sometimes granted as a matter of courtesy.
13. Mr. SANDSTRÖM said that the former text of article 38 (a) had the advantage of mentioning specifically coats-of-arms. Perhaps it should be explained in the commentary that coats-of-arms were included in the exemption.
14. The CHAIRMAN, speaking as a member of the Commission, said that certain bilateral conventions provided for the exemption from cus-

toms duties of articles imported as samples of commercial products solely for display within a consulate and subsequently re-exported or destroyed (cf. article 17, paragraph 3(b), of the Anglo-Swedish Consular Convention of 1952). Perhaps some reference might be made to that question at the appropriate place in the draft.

15. Mr. YASSEEN said that it was not desirable to enter into too much detail in the draft articles. Perhaps the point mentioned by the Chairman could be dealt with in the commentary.

16. Mr. ŽOUREK, Special Rapporteur, said that it was preferable to leave the question of samples outside the scope of the draft altogether. Exemption from customs duty on commercial samples was usually granted in commercial treaties and had strictly no place in a multilateral instrument relating to consular intercourse and immunities.

17. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed that the principle embodied in article 38 (a) should apply to honorary consuls.

It was so agreed.

18. The CHAIRMAN invited the Commission to consider the question of the applicability to honorary consuls of the principle embodied in article 39 (*Exemption from personal services and contributions*). He drew attention to the text provisionally adopted for article 39 by the Drafting Committee:

“The receiving State shall :

“(a) Exempt members of the consulate, members of their families, and members of the private staff who are in the sole employ of members of the consulate, except those who are nationals of the receiving State, from all personal services and from all public service of any kind whatsoever;

“(b) Exempt the persons referred to in subparagraph (a) of this article, provided that they are not nationals of the receiving State, from material military obligations such as those connected with requisitioning, taxation and billeting.”

19. Sir Gerald FITZMAURICE pointed out that the benefit of the exemptions specified in article 39 was expressly limited to persons who were not nationals of the receiving State. He therefore suggested that article 39 should apply to honorary consuls as it stood; in other words, an honorary consul who was not a national of the receiving State would under the draft be exempted from personal services and contributions. It would be most undignified if a person received in the capacity of an honorary consul could be required to furnish such services by the receiving State.

20. Mr. SANDSTRÖM supported the suggestion of Sir Gerald Fitzmaurice.

21. Mr. ŽOUREK, Special Rapporteur, said that article 39 covered not only members of the consulate but also members of their families and members of their private staff. It was extremely unlikely that States would accept a provision extend-

ing the privileges specified in article 39 to the families and private staff of an honorary consul.

22. It was significant that, under the provisions of article 11, paragraph (5) of the Anglo-Swedish Consular Convention of 1952 the exemption from personal services and contributions did not apply to persons who were engaged in a gainful private occupation or who had been ordinarily resident in the receiving State at the time of appointment. The provision in effect debarred virtually all honorary consuls from the benefit of the exemption.

23. Since a bilateral convention of that type could go much further than a multilateral instrument, the provision which he had quoted was a strong argument against the applicability of article 39 to honorary consuls, even if they were not nationals of the receiving State. In the circumstances, the wisest course would be not to extend the application of article 39 to honorary consuls and to explain the reasons in the commentary. Government comments would then throw some light on the existing practice and perhaps suggest whether the exemption in question could to some extent be granted in the final text to honorary consuls, and, in particular, what conditions should be specified for the granting of the exemption.

24. Mr. YOKOTA recalled that the Commission had adopted in article 32 a provision to the effect that the receiving State should treat the honorary consul with respect and grant him special protection. It would be inconsistent with that duty, and derogatory to the dignity of the honorary consul, to subject him to the personal services and contributions mentioned in article 39. He accordingly proposed that an honorary consul who was head of consular post should, together with his family, receive the benefit of the provisions of article 39.

25. Sir Gerald FITZMAURICE referred to the provisions of paragraph 4 of article 11 of the Anglo-Swedish Consular Convention, which drew a clear distinction between consular officers and consular employees. It was only the latter who did not qualify for the exemption if they were ordinarily resident or engaged in a private occupation for gain in the receiving State. With regard to consular officers, the only requirement was that they should be nationals of the sending State and not of the receiving State.

26. He did not consider it necessary to follow the actual terms of that Convention. Bilateral conventions were negotiated between the two governments concerned and embodied mutual concessions. For his part, he thought that the head of consular post, even if a national of the receiving State, should not be subjected to public service of any kind so long as he was discharging his consular functions. If a person was accepted as an honorary consul by the receiving State, it was not compatible with that acceptance for that State to subject him later to services which might well interfere very seriously with the performance of the consular function.

27. However, the very least that could be accepted was that an honorary consul who was not a national of the receiving State should be exempt from personal services.
28. Mr. ŽOUREK, Special Rapporteur, said that the expression "consular employee" as used in the Anglo-Swedish Consular Convention included all consular officials other than the head of post. The restriction laid down in article 11, paragraph 5, therefore applied to all the consular staff, with the exception of the head of post; moreover, members of the family and private staff were also excluded from the benefit of the exemption.
29. As to military service, he pointed out that as a general rule only nationals could be required to perform such service, and he proposed to mention that fact in the commentary.
30. Mr. SANDSTRÖM said that aliens who entered the United States of America as immigrants were liable to military service.
31. Mr. BARTOŠ added that New Zealand, Australia and a number of other countries applied a similar rule to immigrants.
32. Mr. YOKOTA said that paragraph 4 of article 11 of the Anglo-Swedish Convention referred not only to military, naval and air services but also to police, administrative or jury service of every kind.
33. Mr. EDMONDS said that he saw no reason why the benefit of article 39 should be limited to the head of post alone; he proposed that all the provisions of article 39 should apply to honorary consuls.
34. Mr. BARTOŠ proposed that a separate vote should be taken on the eligibility of honorary consular officials other than heads of post to the benefit of the exemptions accorded by article 39. Those persons should, in his opinion, likewise enjoy exemption from personal services and contributions.
35. Mr. PAL said that the Commission should also decide whether the benefit of the exemptions extended to members of the families of honorary consuls and their private staff.
36. The CHAIRMAN said that the Commission would therefore vote separately on the principle of the exemption from personal services and contributions of an honorary consul who was head of consular post; members of the family of an honorary consul who was head of post; honorary consular officials; the families of honorary consular officials; and employees and private staff.
37. He called for a vote on the proposal that the exemption should apply to honorary consuls who were heads of post.
The proposal was adopted by 15 votes to 1, with 1 abstention.
38. The CHAIRMAN called for a vote on the proposal that the exemption should apply to members of the family of an honorary consul who was head of post.
The proposal was adopted by 11 votes to 2, with 3 abstentions.
39. The CHAIRMAN called for a vote on the proposal that the exemption should apply to honorary consular officials.
The proposal was adopted by 9 votes to 3, with 5 abstentions.
40. The CHAIRMAN put to the vote the proposal that members of the families of honorary consular officials should enjoy the exemptions laid down in article 39.
The proposal was adopted by 7 votes to 5, with 5 abstentions.
41. The CHAIRMAN said that the Commission would now have to decide whether or not the exemption should be extended to the employees and private staff of honorary consuls.
42. Mr. ŽOUREK, Special Rapporteur, observed that there were no employees in consulates headed by honorary consuls.
43. Mr. ERIM disagreed with the Special Rapporteur. He had voted in favour of extending the application of article 39 to honorary consular officials on the ground that the exemptions provided for were necessary for the exercise of consular functions. Accordingly no distinction could be drawn between the various grades of honorary consular officials that should enjoy those exemptions: they could only be withheld from staff who were nationals of the receiving State.
44. Mr. ŽOUREK, Special Rapporteur, pointed out that if exemptions were to be granted on the sole ground that they were necessary for the exercise of consular functions, there was no reason whatever for granting the exemption to families of honorary consuls. Furthermore, he said that the Commission had not subordinated the enjoyment of the exemptions laid down in article 39 to the condition that the person in question must not also be otherwise gainfully occupied.
45. Mr. MATINE-DAFTARY said that, if the Special Rapporteur's interpretation of the Commission's decision was correct, he (the speaker) would have to withdraw his affirmative vote in favour of making article 39 applicable to honorary consuls.
46. Mr. ERIM emphasized that if the exemptions provided for in article 39 were necessary for career consuls, their families and staff, they were no less necessary for honorary consuls, their families and staff, since the same functions were being performed in both cases. It was exceptional for States to require aliens to perform the services referred to in article 39.
47. There remained the question whether or not the exemptions in article 39 should be subordinated to the condition that the person concerned did not engage in another gainful private occupation.

48. Mr. YOKOTA said that the Commission should vote on whether or not the employees and private staff of honorary consuls should enjoy the exemptions laid down in article 39.

49. The CHAIRMAN put to the vote the proposal that the benefit of the exemptions accorded by article 39 should extend to the employees and private staff of honorary consuls.

The proposal was rejected by 11 votes to 2, with 4 abstentions.

50. The CHAIRMAN invited the Commission to consider whether the benefit of article 40 (*Attendance as witnesses in courts of law and before the administrative authorities*) should be extended to honorary consuls.

51. Mr. ŽOUREK, Special Rapporteur, explained that he had not included article 40 in the enumeration contained in his draft article 56, paragraph 2, because he thought that article 56, paragraph 4, provided sufficient protection for honorary consuls in the matter of attendance as witnesses. Indeed, the Commission could hardly go further since honorary consuls, whether nationals of the receiving State or not, were subject to the jurisdiction of that State. The fact that they had undertaken to perform certain functions on behalf of another State could not affect their obligations vis-à-vis the local courts in any matter not involving the exercise of their official functions.

52. A rule of that sort should be acceptable to all States, whatever criteria they employed for the definition of "honorary consuls". The discussion should be directed primarily to article 56, paragraph 4, though of course members might wish also to refer to article 40.

53. Mr. YOKOTA observed that the duty laid down for career consuls in article 40, paragraph 1, was, *a fortiori*, owed by honorary consuls as well.

54. Paragraphs 2 and 3 of article 40 had not yet been considered by the Drafting Committee, but, as members would recall, the Commission had decided that they should be amalgamated and that they should include a stipulation on the lines of that inserted in article 33, paragraph 3, to the effect that all due respect should be paid to the official position of the honorary consul and that local authorities should refrain from acts liable to hamper the exercise of his consular functions. If paragraphs 2 and 3 were to be re-drafted on those lines they should also be made applicable to honorary consuls, as should paragraph 4.

55. Mr. ŽOUREK, Special Rapporteur, agreed with Mr. Yokota that article 40, paragraph 4, should apply to honorary consuls. The purpose of that paragraph had been to introduce the succeeding provisions establishing the privileges and immunities consequent upon the requirement contained in paragraph 1. It was self-evident that the rules concerning the conduct of criminal or civil proceedings applied automatically to honorary consuls if no express exception were

made. He had not intended to accord a privileged position to honorary consuls which was unlikely to obtain the assent of States. Accordingly, he believed that article 56, paragraph 4, which reproduced in summary form the substance of article 40, paragraph 4, would suffice to cover the position of honorary consuls.

56. After a brief procedural discussion, the CHAIRMAN suggested that article 40, paragraph 4, should apply to honorary consuls, and that article 56, paragraph 4, should be accepted, on the understanding that paragraphs 2 and 3 of article 40 would be considered after they had been adopted by the Drafting Committee.

It was so agreed.

57. The CHAIRMAN invited the Commission to consider the applicability to honorary consuls of article 41 (*Acquisition of nationality*), which the Special Rapporteur had not included in the enumeration in article 56, paragraph 2.

58. Mr. ŽOUREK, Special Rapporteur, said that he had omitted article 41 from his enumeration because, in the vast majority of cases, honorary consuls were residents of the receiving State. There was therefore no reason to exempt such persons from the nationality laws of the country in which they had settled for reasons independent of their consular functions. The fact that they had agreed to act on behalf of the sending State did not alter their status of foreign residents; that was the essential point of difference between career and honorary consuls, since the former were appointed to different countries to occupy an official position and the choice of the country where they resided was not their own, but that of the government of the sending State.

59. The CHAIRMAN suggested that article 41 should be regarded as inapplicable to honorary consuls.

It was so agreed.

60. The CHAIRMAN observed that article 42 (*Members of the consular staff who are nationals of the receiving State*) was also omitted from the Special Rapporteur's enumeration and that a tentative suggestion had been made in the Drafting Committee that the substance of that article should become paragraph 2 of article 34.

61. Sir Gerald FITZMAURICE thought that the case might be covered by the Special Rapporteur's proposal that article 34 should apply to honorary consuls. In any case, the provision had no direct relevance to the position of honorary consuls, and could be passed over.

62. The CHAIRMAN suggested that the Commission should take no decision on article 42, pending its final wording and placing by the Drafting Committee.

It was so agreed.

63. The CHAIRMAN observed that article 43 (*Duration of consular privileges and immunities*) was included in the Special Rapporteur's enu-

meration. He suggested that the article should be held to be applicable to honorary consuls.

It was so agreed.

64. The CHAIRMAN invited the Commission to consider the applicability to honorary consuls of article 44 (*Estates of deceased members of the consular staff or of deceased members of their families*), which was not mentioned by the Special Rapporteur in the new article 56, paragraph 2.

65. Mr. ERIM pointed out that, while the general practice was not to grant the exemption conferred by article 44 to honorary consuls, there might be cases where an honorary consul who was a national of the sending State would agree to transfer his residence to the territory of a receiving State where his country had appointed him as consul. In that case, the transfer would be made for the express purpose of the exercise of consular functions. If the honorary consul concerned was not engaged in gainful occupation and carried on no activities other than his consular functions, there seemed to be no reason to deny him the exemption.

66. Mr. ŽOUREK, Special Rapporteur, observed that the case cited by Mr. Erim was a very exceptional one. It was impossible to base a general rule, intended to be acceptable to all States, on so rare an occurrence. He considered that the Commission should not recommend that the benefit of article 44 should be extended to honorary consuls, for in the overwhelming majority of cases honorary consuls themselves elected to reside in a certain country and were in no way eligible for the privilege in question.

67. Mr. ERIM said that, since the Commission did not seem anxious to extend the exemption to honorary consuls, he would not press his point, although the cases to which he had referred might well arise.

68. Mr. EDMONDS said that, for the purpose of the exemption accorded by article 44, he could see no logical basis for distinguishing between honorary consuls and career consuls or members of their families, provided that the persons concerned were not nationals of the receiving State.

69. Mr. JIMÉNEZ DE ARÉCHAGA pointed out that the Commission had already decided not to extend the benefit of tax exemption to honorary consuls; it was therefore only logical and consistent not to extend the exemption from estate, succession or inheritance duties to honorary consuls.

70. The CHAIRMAN, speaking as a member of the Commission, thought that the article was connected with paragraph (c) of article 38 (*Exemption from customs duties*), which the Commission had decided not to apply to honorary consuls. Since an honorary consul's property was usually acquired in the receiving State that property fell under the exception in the first sentence of article 44. He agreed with the Special Rapporteur

that the position of career consuls in that respect differed from that of honorary consuls.

71. Mr. EDMONDS pointed out that "a member of the consular staff" might be a person employed by an honorary consul and not a national of the receiving State. Accordingly, if the employees of a career consul enjoyed the exemption, there seemed to be no basis for making any distinction between them.

72. Mr. ŽOUREK, Special Rapporteur, drew Mr. Edmonds's attention to the fact that the members of the consular staff to whom article 44 applied were career officials and employees. The members of an honorary consul's family were, like the honorary consul himself, residents of the receiving State, and as such should not be exempted from estate duty. With regard to employees of the honorary consul, he pointed out that in so far as such employees were engaged in the honorary consul's private business, they were obviously not entitled to benefit by the exemption; if they were career consular employees, they enjoyed in any case the exemption conferred by article 44.

73. The CHAIRMAN suggested that article 44 should be held not to be applicable to honorary consuls.

The meeting rose at 6.15 p.m.

559th MEETING

Friday, 10 June 1960, at 9.30 a.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 56 (*Legal status of honorary consuls*)
(continued)

1. The CHAIRMAN asked Mr. Yokota, Chairman of the Drafting Committee, to explain the position regarding the drafting of article 45 (*Duties of third States*), so as to enable the Commission to consider the question of the applicability to honorary consuls of the provisions of that article.

2. Mr. YOKOTA said that the Drafting Committee had not yet considered article 45. He recalled that when the article had been discussed, the Commission had agreed that the only duty of a third State was that of not hindering the transit through its territory of consular officers and members of their families (543trd meeting, para-

graph 77). Accordingly, the Drafting Committee would proceed on the basis that a provision along the lines of article 45, paragraph 3, was all that would be required.

3. Mr. ŽOUREK, Special Rapporteur, said that in the vast majority of cases, an honorary consul would already be a resident of the receiving State at the time of his appointment and would intend to remain there upon relinquishing his consular functions. Article 45, paragraph 3, was not therefore relevant to the case of honorary consuls.

4. He drew attention to article 45, paragraph 4, which dealt with the question of official communications in transit through a third State; the provisions of that paragraph should, he thought, apply to honorary consuls. He recalled that the Commission had decided to postpone consideration of the applicability of article 29 (*Freedom of communication*) to honorary consuls (554th meeting, paragraph 84). Inasmuch as article 45, paragraph 4, was related to the question of communications, he proposed that the applicability of that paragraph to honorary consuls should be discussed later in connexion with the applicability of article 29.

5. Mr. YOKOTA thought that the best course would be for the Commission to postpone consideration of the applicability of the whole of article 45 to honorary consuls. For his part, he reserved the right to propose that paragraph 3 of that article should apply to honorary consuls.

6. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to defer consideration of the applicability of article 45 to honorary consuls.

It was so agreed.

7. Mr. JIMÉNEZ DE ARÉCHAGA said that the Commission had now completed its consideration of the new draft of article 56. No proposal had been made to exclude the application to honorary consuls of any of the articles in sections III and IV of the Special Rapporteur's draft (A/CN.4/L.86). The only proposals which had been made were those of the Special Rapporteur for the exclusion of the application to honorary consuls of certain articles in section II. There had been no such proposals with regard to the various articles in sections III and IV.

8. Mr. ŽOUREK, Special Rapporteur, said that, as the Commission would be aware, the draft would be rearranged. Chapter I, dealing with consular intercourse in general, would include most of the articles now appearing in sections III and IV. The new chapter II would deal with the privileges and immunities of career consuls; the new chapter III would deal with the legal status of honorary consuls. Lastly, the new chapter IV would contain general provisions.

9. He accordingly suggested that the Drafting Committee should be authorized to consider which of the articles of sections III and IV would, in the rearranged text, be incorporated in the new chapter I and to determine whether they

should apply to honorary consuls as they stood or subject to certain amendments.

10. Mr. PAL pointed out that, as the draft for article 56 now stood, and more especially in the light of its paragraph 1 dealing with the applicability of section I of the draft, the Commission would also require to take some formal decision on the question of the applicability to honorary consuls of sections III and IV.

11. Mr. YOKOTA said that there would be no difficulty if the Special Rapporteur agreed that all the provisions of articles 46 to 53 should be declared applicable to honorary consuls. Otherwise it would be necessary for the Commission to examine them article by article.

12. After a brief discussion on procedure, in which Mr. SANDSTRÖM, Mr. MATINE-DAFTARY, Mr. ŽOUREK, Mr. JIMÉNEZ DE ARÉCHAGA, Sir Gerald FITZMAURICE, Mr. SCHELLE, Mr. YOKOTA and Mr. TUNKIN took part, the CHAIRMAN said that the Commission would at some stage have to decide on the applicability to honorary consuls of articles 46 *et seq.* He suggested that it should do so forthwith, while all the arguments relating to the legal status of consuls were still fresh in the minds of members.

13. He asked whether there was any observation on the question of the applicability to honorary consuls of article 46 (*Duly to respect the laws and regulations of the receiving State*).

14. Mr. ŽOUREK, Special Rapporteur, said that the first sentence of article 46 clearly applied to honorary consuls. On the other hand, the second sentence, which specified the duty not to interfere in the internal affairs of the receiving State, should be qualified in so far as it was to apply to honorary consuls, for in many cases the latter were nationals of the receiving State and, as such, had political rights and duties as citizens.

15. The CHAIRMAN pointed out that when the Commission had discussed article 46 itself, the question mentioned by the Special Rapporteur had been raised and the article had been referred to the Drafting Committee together with three suggestions, one of which was that it should formulate the duty of non-interference in the internal affairs of the receiving State in terms which would, so far as they related to honorary consuls, restrict the scope of the duty to acts performed in their capacity as consuls (543rd meeting, paragraph 95). In that connexion, he drew attention to the meaning of the term "to interfere". The citizen's normal participation in his country's political life was not an act of interference; the provision under discussion referred to the act of a person who availed himself of his official position to influence the internal affairs of a country in an unwarranted manner.

16. Sir Gerald FITZMAURICE said that the question at issue concerned not honorary consuls as such but any consul, including a career consul,

who happened to be a national of the receiving State.

17. Mr. TUNKIN said that the qualification cited by the Chairman had been formulated with reference to an honorary consul who was a national of the receiving State. In fact, he might be a national of a State other than the sending or the receiving State.

18. Mr. EDMONDS saw no difficulty in applying the provision under discussion to honorary consuls. If a person accepted an appointment as honorary consul, he might well be required to surrender some of his ordinary civic duties, in much the same way as members of the judiciary and certain other public servants in some jurisdictions had to renounce all active participation in politics.

19. Mr. AMADO said that the article could without difficulty be applied as it stood to honorary consuls. It was clear that the consul was not allowed to interfere in the internal affairs of the receiving State in his capacity as a consul.

20. Mr. ŽOUREK, Special Rapporteur, said that the purpose of the second sentence of article 46 was rather to prevent acts of interference in the internal affairs of the receiving State from being committed outside the exercise of consular functions. Since the sentence could give rise to some difficulty if applied to honorary consuls, he thought that some explanation should be given in the commentary on that point.

21. The CHAIRMAN noted that the Commission agreed that the first sentence of article 46 should be applicable to honorary consuls. So far as the second sentence was concerned, he suggested that the comments made in debate should be referred to the Drafting Committee together with the Commission's opinion that article 46 should apply to honorary consuls.

It was so agreed.

22. The CHAIRMAN invited the Commission to consider the question of the applicability to honorary consuls of the principle embodied in article 47 (*Jurisdiction of the receiving State*).

It was agreed that the principle embodied in article 47 should apply to honorary consuls.

23. The CHAIRMAN invited the Commission to consider the question of the applicability to honorary consuls of the principle embodied in article 48 (*Obligations of the receiving State in certain special cases*).

24. Mr. ŽOUREK, Special Rapporteur, said that the application to honorary consuls of the provisions of article 48 could give rise to some difficulty. The article laid down the duties observable by the receiving State in certain cases concerning questions of inheritance, guardianship and shipping. Now, honorary consuls were not always authorized to deal with such questions, and hence it was doubtful whether article 48 could without qualification be declared applicable with respect to honorary consuls generally.

25. Sir Gerald FITZMAURICE said that there could be no conceivable objection to the application of article 48 to honorary consuls. If a national of the sending State died in the receiving State, the obligation to notify was towards the sending State and it was immaterial whether the recipient of the copy of the death certificate was an honorary consul or a career consul.

26. Similarly, in the event of the shipwreck of a vessel flying the flag of the sending State, it was that State as such, or the shipowners, who would be vitally interested in being promptly advised of the occurrence. He pointed out in that connexion that it was precisely at seaports that honorary consulates were often found. The rights concerned resided in the State: they were not personal privileges of consuls.

27. Mr. VERDROSS proposed that the Commission should decide that article 48 was applicable in principle to honorary consuls and state in the commentary that the notifications provided for in the article would, of course, be sent only to an honorary consul who had competence in the particular matter.

28. Mr. AMADO said that he could not see what harm would be done if the receiving State advised an honorary consul of the death in its territory of one of the nationals of the sending State, so that the consul could make the necessary arrangements with the appropriate authorities of the sending State.

29. Mr. YOKOTA pointed out that the notifications mentioned in article 48 (b) and (c) were to be made to "the competent consulate". The words "in whose district the death occurred" in sub-paragraph (a) of the article contained the same idea. It was therefore obvious that if an honorary consul did not have the necessary competence to receive such notifications, the notifications would then be made to another consulate which possessed such competence.

30. Mr. FRANÇOIS expressed surprise at the Special Rapporteur's statement that a great many honorary consuls were not empowered to deal with questions of inheritance, guardianship and shipping. Netherlands honorary consuls, at any rate, always possessed full competence regarding the matters referred to in the three sub-paragraphs of article 48.

31. Even where a country limited the powers of one of its honorary consuls in the manner suggested by the Special Rapporteur, no difficulty would arise if the receiving State still notified the consul in the cases specified in article 48. The honorary consul would convey the notification to the competent authority or consular officer of the sending State.

32. Mr. BARTOŠ said that, from his experience regarding both honorary consuls of Yugoslavia abroad and honorary consuls of foreign countries in Yugoslavia, he could say that, whatever restrictions might be placed on the powers of an honorary

consul, they would rarely, if ever affect any of the matters involved in the provisions of article 48.

33. For a country like Yugoslavia, many of whose nationals migrated abroad, it was essential to maintain a network of honorary consuls, one of whose functions was to take note of the death of Yugoslav nationals abroad and to take the necessary steps to safeguard the rights of heirs living in Yugoslavia.

34. Seafaring countries also maintained honorary Consuls at a large number of seaports to deal, among other matters, with those mentioned in article 48 (c). If a vessel flying the flag of the sending State was wrecked or ran aground, the honorary consul, acting in agreement with the master of the vessel, took the necessary steps with damage appraisers (*commissaires d'avaries*) to assess the damage.

35. The obligations mentioned in article 48 were owed by the receiving State to the sending State itself, not to the consul. It mattered little whether the sending State entrusted the protection of its interests to a career consul or to an honorary consul: the facilities to be extended by the receiving State should be the same in both cases.

36. There were, of course, cases in which under the law of the sending State the honorary consul might not be empowered to take certain measures. For example, the inventory of the estate of a deceased national of the sending State whose death had occurred in the receiving State might have to be drawn up by a career consul. Those questions were, however, internal matters of the sending State.

37. He was firmly of the opinion that all the provisions of article 48 should apply to honorary consuls.

38. Mr. ŽOUREK, Special Rapporteur, said that he had only sought to emphasize that there might be some difficulty in making article 48 applicable to honorary consuls because the matters enumerated in the three sub-paragraphs did not always fall within their competence. For example, under Japanese legislation, honorary consuls were not empowered to concern themselves with enquiries into accidents at sea. Some honorary consuls were purely figureheads, and in such cases it would be quite inappropriate to impose on the receiving State the duty to make the notifications mentioned in article 48 to honorary consuls.

39. The suggestion made by Mr. Verdross (see paragraph 27 above) would be quite acceptable to him.

40. The CHAIRMAN, speaking as a member of the Commission, doubted whether the question of the applicability of article 48 to honorary consuls could be settled by reference to the competence of such consuls. The article described certain obligations which the receiving State owed towards the sending State. It would not be for the former to decide whether a particular matter lay within the competence of an honorary consul.

41. Mr. AMADO shared that view. The receiving

State had a duty to report certain events occurring in its territory and affecting nationals or interests of the sending State to a consulate of the latter.

42. He criticized the word "immediately", which occurred in sub-paragraphs (b) and (c), as not sufficiently precise in a legal text.

43. Mr. JIMÉNEZ DE ARÉCHAGA considered that article 48 should apply to all honorary consuls without exception, because it related directly to the exercise of their functions. Since it was not concerned with privileges and immunities, no distinction should be made in its application as between career and honorary consuls. If in any individual case the matters referred to in article 48 did not come within the competence of an honorary consul, the requisite reservations would presumably be made by the receiving State before granting the *exequatur*.

44. Mr. SANDSTRÖM agreed with the Chairman's interpretation of the purport of article 48 which certainly ought to apply to honorary consuls since the receiving State must be obliged to make the specified notifications.

45. Mr. SCALLE said that manifestly article 48 should apply to honorary consuls and thought that some of the arguments aired during the discussion were not relevant. The fact that an honorary consul might not have competence in one or other of the matters mentioned in article 48 was purely a question for the sending State and in no way affected the obligations of the receiving State to notify a consulate of the sending State. He would have thought that, in the absence of express objections, such provisions of the draft should be assumed to apply to honorary consuls.

46. Mr. ŽOUREK, Special Rapporteur, referring to Mr. Amado's criticism to the word "immediately" said that although that particular term might not be sufficiently precise, some such term was absolutely necessary, for unless the notification were made promptly the obligations laid down in article 48 would become meaningless. In the case of a shipwreck, for example, every hour might count.

47. Mr. MATINE-DAFTARY hoped that the Drafting Committee would bear in mind his criticism of the title of article 48 which he had made during the discussion on its application to career consuls. The Drafting Committee should also bear in mind that, since the Commission had now gone somewhat further than the Special Rapporteur had contemplated in his new draft of article 56, paragraph 2, a reference to section III of the draft would have to appear in that clause.

48. He agreed that article 48 should be applicable to honorary consuls.

49. The CHAIRMAN suggested that, as it was generally agreed that article 48 should be applicable to honorary consuls, the text would now be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.

50. The CHAIRMAN asked whether there was any objection in principle to the proposition that the provisions of section IV (*End of consular relations and immunities*) should apply to honorary consuls, subject to such drafting changes as might be necessary; for example, article 49, item 1, would not apply.

51. Mr. ERIM asked whether it should be inferred from the Chairman's remarks that, except as otherwise expressly provided, the articles in section IV would apply to honorary consuls. If so, the Drafting Committee would certainly have to amend the Special Rapporteur's text of article 56.

It was agreed that section IV should apply to honorary consuls.

52. The CHAIRMAN invited the Commission to consider whether article 53 (*Non discrimination*) should apply to honorary consuls.

53. Mr. BARTOŠ suggested that article 53 should be transferred to chapter III since it properly belonged among the general provisions. That procedure should not give rise to difficulty for any State which did not wish to ratify chapter II because it did not favour the institution of honorary consuls.

54. Mr. ŽOUREK, Special Rapporteur, said he had no objection to Mr. Bartoš's suggestion. The principle of non-discrimination should certainly apply to honorary consuls. The wording of article 53 had been discussed at length at an earlier stage and should not be considered now.

55. Mr. BARTOŠ suggested that it might suffice for the Commission to decide that article 53 should apply to honorary consuls, leaving it to the Drafting Committee to decide what should be the proper place of that provision in the draft.

It was so agreed.

56. The CHAIRMAN stated that the Commission had now completed its discussion on the applicability of the articles of the draft to honorary consuls.

57. Mr. BARTOŠ asked whether the Commission had expressly stipulated the condition that, for the purpose of the application of the articles to an honorary consul, the latter must not be a national of the receiving State or be engaged in a gainful occupation.

58. After consulting Yugoslav jurists he had come to the conclusion that, for the proper performance of their consular functions, certain minimum privileges and exemptions must be accorded even to those honorary consuls which did not fulfil the conditions he had mentioned. In other words, the intention of the draft should be not so much to grant personal privileges and immunities to honorary consuls as to ensure that their consular functions could be performed without impediment. Some clear stipulation to that effect should appear in the draft.

59. Mr. VERDROSS observed that the point had been dealt with by the Commission which had considered in relation to each article whether it was applicable even to those honorary consuls who were nationals of the receiving State and who were engaged in a gainful occupation.

60. Mr. SCALLE agreed with Mr. Verdross.

61. Mr. ŽOUREK, Special Rapporteur, also considered that the matter raised by Mr. Bartoš had been settled by the Commission.

62. Mr. BARTOŠ suggested that it might be more satisfactory if the Drafting Committee be requested to consider whether or not explicit provision were necessary on the subject.

63. Mr. TUNKIN thought that procedure would be acceptable.

64. The CHAIRMAN suggested that article 56 could now be referred to the Drafting Committee for revision in the light of the foregoing discussion and with a request to consider the point raised by Mr. Bartoš.

It was so agreed.

ARTICLE 57 (*Precedence of honorary consuls*)

65. Mr. ŽOUREK, Special Rapporteur, explained that article 57 was based on existing practice. At its eleventh session the Commission had adopted certain rules concerning precedence (see article 15 in document A/CN.4/L.86) and he had therefore thought it sufficient to refer to those rules in article 57. The only objection to which such a provision might be open would be that a distinguished person who acted as an honorary consul would not have precedence over a career consular official. But whatever rules concerning precedence were adopted might well be open to like objections.

Article 57 was approved.

ARTICLE 58 (*Officials assimilated to honorary consuls*)

66. Mr. ŽOUREK, Special Rapporteur, introducing article 58, said that, in studying the position of honorary consuls, he had been struck by the fact that certain national legislations and consular conventions placed career consuls who were authorized by the sending State to engage in commerce or other gainful occupation in the receiving State on the same footing as honorary consuls so far as eligibility to privileges and immunities was concerned. Where that was the case the receiving State could not grant to such persons all the privileges and immunities which career consuls enjoyed. Accordingly, he had thought it advisable to include in his draft a special article, stipulating that career consular officials who were authorized to carry on a business or profession should be treated on the same footing as honorary consuls. He added that the number of career consuls answering that description was much smaller than that of honorary consuls.

67. He had been able to find few instances of national legislation allowing career consuls to engage in gainful occupation in addition to their consular functions, and the examples that he had found usually dated back a considerable time. In that connexion, he said it would be most desirable if the United Nations Secretariat published in its *Legislative Series* extracts from laws and regulations concerning the diplomatic and consular services; he thought that some very interesting provisions touching on the subject of article 58 could come to light.

68. Some members might criticize the article as unnecessary on the ground that the condition that a career consul must not engage in outside occupations was laid down elsewhere in the draft. His (the Special Rapporteur's) answer to that possible criticism would be that the condition was not stipulated in all the articles in which it should be laid down. For example, it was not stipulated in article 37 (*Exemption from taxation*), nor in article 38 (*Exemption from customs duties*). If the Commission accepted the principle stated in article 58, it would be possible to dispense in the other articles with a provision stating the principle. From the point of view of legislative technique that would certainly be a sounder procedure than to repeat the condition in question in numerous articles of the draft. If, however, the Commission should prefer not to accept article 58 as a "blanket" provision, the condition would necessarily have to be specified in the individual articles.

69. The CHAIRMAN, speaking as a member of the Commission, thought that the presence of a special article would be confusing and would tend to reopen a discussion on the comparability of honorary and career consuls. Secondly, he thought that a separate provision was unnecessary because the privileges of career consuls engaged in commerce or other gainful occupation were, under the terms of the relevant articles, restricted by that very fact. To review all the articles afresh for the purpose of considering in what circumstances career consuls might be assimilated to honorary consuls would be a most undesirable and wasteful procedure.

70. Mr. BARTOŠ said the Special Rapporteur had made a commendable effort to draft a rule concerning a question that had not been settled by doctrine. Whereas under the practice of most States career consuls were not allowed to engage in business, it was true that the legislation of some countries allowed such officials to exercise professions or to act as commercial agents. Accordingly, practical difficulties might arise in cases where the subject was not regulated by bilateral agreements.

71. Nevertheless, for the purpose of the assimilation of career consuls to honorary consuls the mere fact that a career consul was authorized by the law of the sending State to engage in commerce or other gainful occupation did not constitute sufficient grounds. If the career consul did not

in fact carry on a business, he should have the same privileges and immunities as other career consuls. Besides, for the purpose of carrying on a non-consular occupation a consul needed not only the permission of the sending State but also the consent of the receiving State. And even if both States permitted the consul to carry on outside activities, his status should be in no way affected, and his privileges in no way diminished, so long as he did not in fact engage in commerce or gainful occupation.

72. Mr. MATINE-DAFTARY thought that the effect of article 58 was to create yet a third category of consul. The fact that such a strange and peculiar institution existed in a few national legislations did not justify the Commission in encouraging its perpetuation by referring to it in a multilateral convention. Accordingly, he thought the article should be omitted from the draft.

73. Mr. ERIM agreed with the Chairman and Mr. Matine-Daftary that the article might be omitted; alternatively, he suggested that its substance might be expressed quite differently in the draft. One further reason for omitting the article was the language used in article 1 (*Definitions*), paragraph (f) (i), where a career consul was defined as a government official of the sending State, receiving a salary and not exercising in the receiving State any professional activity other than that arising from his consular function. And in paragraph (h) of the same article the expression "consular official" described any person, including a head of post, who exercised consular functions in the receiving State. Accordingly, the persons referred to in article 58 could not be regarded as coming within the definition of career consuls. That objection might, however, be overcome by a redrafting of article 58.

74. A more serious objection, in his view, was that the Commission had decided in connexion with article 56 that honorary consuls might enjoy certain privileges and immunities, provided that they did not engage in gainful occupation and were not nationals of the receiving State. If, however, article 58 was adopted as drafted by the Special Rapporteur, those privileges and immunities would be granted to certain consular officials even if they engaged in commerce or in some other gainful occupation.

75. Sir Gerald FITZMAURICE said that article 58 was both unnecessary and undesirable. The complete assimilation of a category of career consuls to honorary consuls was hardly consistent with the Special Rapporteur's theory that there was an inherent difference of status between honorary consuls and career consuls. If, as the Special Rapporteur contended, the fact that a career consul was an official of the sending State was a sound basis for distinguishing between the two categories, the fact that a career consul was engaged in commerce or other gainful occupation should not obliterate the difference.

76. In his opinion, the best solution would be,

not to assimilate career consuls who were allowed to engage in business to honorary consuls, but rather to modify the application of certain individual provisions to such persons. Certain articles of the draft obviously applied only to those consuls (whether career or honorary) who did not engage in commerce or other gainful occupation. If a general article on the lines of article 58 were included, however, it might be inferred that certain provisions of the draft which did not contain any such limitation should nevertheless be read as implying one, as a result of the proposed article, and that would give rise to considerable difficulties of interpretation.

77. Mr. VERDROSS said he was in favour of omitting article 58. In the first place, it was illogical to exclude career consuls engaged in gainful occupations from the benefit of some of the articles and to provide a general article as well concerning such consuls. Secondly, he agreed with Mr. Bartoš that the mere permission to engage in commerce or other gainful occupation was an insufficient criterion for differentiation; the true test should be: did the person in question in fact carry on an outside occupation? Lastly, it was not only the articles conferring some material advantage that contained a proviso that their benefit did not extend to consuls who engaged in business in the receiving State; the proviso also occurred in article 33 (*Personal inviolability*). Accordingly, the Drafting Committee should be asked to review all the articles of the draft and to insert the proviso concerning career consuls who engaged in gainful occupations wherever it was required.

78. Mr. EDMONDS said that article 58 should be omitted. He had understood Mr. Erim to say that the article on definitions should be modified to meet the Special Rapporteur's point; if the definition of the expression "honorary consul" were involved, such officials could not in his opinion be defined as persons not receiving any regular salary from the sending State. In the United States, for example, some honorary consuls received a modest but regular compensation for their services; in article 58, however, the career consuls concerned were distinguished from honorary consuls by the phrase "although officials of the sending State receiving a regular salary". It should be borne in mind that many honorary consuls were not authorized by the laws of the sending State to engage in commerce or other gainful occupation and did not in fact engage in such occupation. He took the position that an honorary consul was a person authorized to perform consular functions, and his title, designated by the sending State, was of no concern to a receiving State.

79. Mr. ŽOUREK, Special Rapporteur, observed that the definition of "honorary consul" was not in issue. Article 58 related to career consular officials only.

80. Mr. PAL considered that article 58 should be omitted from the draft. The Special Rapporteur

had simplified the Commission's position in the matter by anticipating possible difficulties and offering alternatives. He (Mr. Pal) believed that the simplest course would be to omit article 58, since in his view the necessary provisions had already been made in individual articles in the draft; otherwise, a discussion similar to that held in connexion with article 56, paragraph 2, would ensue, and that would be most undesirable at the present stage. Any attempt to assimilate career consuls to honorary consuls in the circumstances specified in the article would also involve re-examining all the articles dealing with honorary consuls which had already been adopted.

81. Mr. SCELLE thought that the Special Rapporteur, after having sought to minimize the privileges and immunities of honorary consuls, was going too far in attempting to relegate career consuls engaged in commerce or other gainful occupation to the same unfavourable position. He (Mr. Scelle) maintained the view that there was no difference in legal status between the two categories of officials; but a discussion of article 58 might raise difficulties which had already been settled and it would be wise to omit the provision, to avoid further complications.

82. Mr. MATINE-DAFTARY, while maintaining his original opinion on article 58, suggested that the Special Rapporteur might redraft the article to provide simply that career consuls authorized by the laws of the sending State to engage in commerce or other gainful occupation should be assimilated to honorary consuls. Unless it was so revised, it might be best to omit the article.

83. Mr. ŽOUREK, Special Rapporteur, pointed out to Mr. Scelle that when introducing article 58 he had offered the Commission two alternative procedures in the matter; Mr. Scelle's strictures could therefore hardly be justified.

84. He did not believe that the problem of officials assimilated to honorary consuls would be eliminated by deleting the article. If the Commission dropped article 58, the problem of the legal status of career consuls who carried on a private gainful occupation would remain unsolved. Mr. Erim had discerned a seeming contradiction between article 58 and article 1 on definitions, but it should be borne in mind that article 1 would subsequently be reviewed. Furthermore, article 58 was concerned with provisions to be applied to career consuls, and not with provisions applicable to honorary consuls who were engaged in commerce or other gainful occupation. In assimilating certain career consuls to honorary consuls, the rules governing honorary consuls were applicable; accordingly, where certain restrictions had been introduced for honorary consuls, those would apply equally to the career consuls concerned.

85. In reply to Mr. Verdross, he pointed out that he had at no time considered both including a "blanket" article concerning career consuls who engaged in commerce and inserting a proviso

concerning such consuls in all the relevant articles in the draft. Precisely because he had drafted the special article 58, he had omitted the proviso from certain articles where it was indispensable, such as the articles on exemption from taxation and from customs duties. Such a proviso would obviously have to be inserted if article 58 were omitted; but he had thought it would be more convenient to have a separate article than to repeat the provision in many clauses.

86. He had included the criterion of authorization by the laws of the sending State to engage in commerce or other gainful occupation because it appeared in some of the national laws he had studied. Nevertheless, he agreed that an acceptable decisive test might be whether the consul, if permitted to do so, in fact engaged in a gainful occupation apart from his official function. He would therefore be prepared to amend article 58 on those lines.

87. The debate had led him to conclude that the article was indeed necessary. Inasmuch as the category of career consuls referred to in that clause existed, they should be governed by certain rules, if only for the sake of avoiding practical difficulties. Even if the Commission decided that the provision should be repeated in every relevant article, it would seem advisable to follow Mr. Matine-Daftary's suggestion and to state that members of the consular staff, or at least consular officials, who engaged in commerce or other gainful occupation in the receiving State should cease to enjoy the status of career consular officials and should benefit only by the privileges and immunities applicable to honorary consuls. That minimum provision would correspond to State practice, as expressed in national legislation and in consular conventions. He added that it was an unsound procedure — in any case in which a difficulty arose — simply to omit the provision intended to resolve the difficulty.

88. Mr. LIANG, Secretary to the Commission, said he did not see how any career consul could be assimilated to an honorary consul. It might be provided, for example, that honorary consuls who were nationals of the sending State and were not engaged in gainful occupation should be assimilated to career consuls; but there was no need for such a provision, since the question was usually covered by bilateral agreements. Moreover, it would be difficult to cover all the possible situations in a single article. The difference of status between career consuls who engaged in gainful occupation and other career consuls in certain respects was also dealt with in national legislations and bilateral agreements; in view of the amorphous character of the category of honorary consuls and in the absence of uniformity of practice, it would be best to omit any general provision concerning the assimilation of certain career consuls to honorary consuls.

89. Mr. ŽOUREK, Special Rapporteur, could not agree with the Secretary that the situation of honorary consuls was amorphous. The Com-

mission had decided that every State should decide for itself on the criteria to be used in defining honorary consuls; in addition, the privileges and immunities applicable to honorary consuls had been settled during the Commission's review of all the articles of the draft. Lastly, the fact of engaging in gainful occupation did not deprive the official in question of this status of career consul; if he engaged in such occupation, he would cease to enjoy some of the immunities of career consuls, but would be eligible for the partial immunities accorded to honorary consuls. Nor did he agree that the matter was entirely covered by national legislations and by bilateral agreements.

90. The CHAIRMAN thought that the Commission was in a position to take a decision on article 58.

91. Mr. AMADO agreed that the Commission should take a decision on the article. The majority of members seemed to think that a general provision on the lines of article 58 was undesirable. He appealed to the Special Rapporteur and Mr. Matine-Daftary not to insist on the introduction of a new text, since the Commission's long debates on the subject had shown that the position of honorary consuls should be distinguished from that of career consuls. A reference to any assimilation of the two categories would nullify the work of several weeks.

92. Mr. MATINE-DAFTARY, speaking on a point of order, thought that, in view of the fact that the Special Rapporteur had in effect agreed to withdraw his draft article, the Commission should give him an opportunity to submit a new text of article 58. He therefore moved the adjournment of the debate.

The motion was rejected by 10 votes to 7, with 1 abstention.

93. Mr. BARTOŠ moved the adjournment of the meeting.

The motion was rejected by 10 votes to 6, with 1 abstention.

94. The CHAIRMAN called for a vote on whether a separate article on officials assimilated to honorary consuls should be included in the draft.

It was decided by 10 votes to 6, with 5 abstentions, not to include such an article in the draft.

**Co-operation with other bodies
(A/CN.4/124) [continued] ***

[Agenda item 8]

95. Mr. LIANG, Secretary to the Commission, reported that on 3 June 1960 he had received a letter from the Secretary of the Asian-African

* Resumed from the 544th meeting.

Legal Consultative Committee — an intergovernmental body — stating that the fourth session of that Committee was to be held at Tokyo in March 1961 and that among the topics on that session's agenda were the status of aliens, including the question of diplomatic protection of nationals abroad and State responsibility; extradition; arbitral procedure; and the legality of nuclear tests. In addition, other questions raised by the governments of participating countries might be discussed.

96. The letter added that, at its third session held in January 1960, the Committee had adopted provisional recommendations concerning the admission, treatment and expulsion of aliens, and provisional recommendations concerning the principles of extradition. In addition the reports adopted at its second session on the functions, privileges and immunities of diplomatic agents and the immunity of States in respect of commercial transactions had been reconsidered in the light of comments received from governments. The summary report of the proceedings, which was expected to be ready by July, would be forwarded to the Commission. Finally, the Committee's Secretary had asked whether the Commission wished to send an observer to the fourth session.

97. He recalled that in 1958 and 1959 the Commission had received similar invitations to send an observer to attend the Committee's sessions. On those two occasions the Commission had replied that it was unable to do so because the Committee's sessions had been too close to the General Assembly and because it had been impossible to obtain the necessary credits.

98. Subsequently, a number of representatives of Asian and African countries had expressed the hope, both to him and to members of the Commission, that the Commission would send observers as it had done in the case of the Inter-American Council of Jurists. They had intimated that the Committee would try to schedule its sessions for a period when the General Assembly was not meeting and that it was anxious that its work of codification should be of service to the Commission.

99. He suggested that if the Commission decided to send an observer a statement to that effect should be included in its report so that the necessary financial arrangements could be made. He hoped that it would be possible to obtain more information about the duration of the Committee's session and about the subjects to be discussed.

100. The CHAIRMAN suggested that the matter should be taken up at a later meeting after members had had time for reflection.

It was so agreed.

The meeting rose at 1.20 p.m.

560th MEETING

Monday, 13 June 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 58 (*Officials assimilated to career consuls*) (continued) *

1. The CHAIRMAN invited members to explain their votes on article 58 (559th meeting, paragraph 94).

2. Mr. HSU said he had voted against the omission of article 58, because its omission would deprive the Special Rapporteur of the opportunity he had requested to present an improved version of the article for the Commission's consideration. He had voted as he had in the belief that the Special Rapporteur deserved the courtesy of being allowed to submit a new article and because he thought that article 58 had an intrinsic value which the Commission could not ignore without provoking criticism. By successive decisions of the Commission the privileges and immunities of the honorary consul, in so far as they were not directly related to his functions as an official, had been limited by earlier clauses of the draft for two reasons. In the first place, since an honorary consul was usually a part-time official, engaged in commerce or in some other gainful occupation, and often a national of the receiving State, the privileges and immunities granted to him would be more open to abuse; secondly, since honorary consuls had not in the past been entitled to the same privileges and immunities as diplomats or career consuls, they could be denied those privileges and immunities without undue hardship. Accordingly, if career consuls were by their own acts to assimilate themselves to honorary consuls in certain important respects, it would be only logical and proper for the Commission to assimilate them to honorary consuls in the matter of privileges and immunities.

3. He could not share the views of members who had voted against article 58 on the ground that the substance of the article was covered by other provisions of the draft. It could not be correct in principle merely to gloss over problems of codification or to treat them in a haphazard manner. When a suitable general article on a particular problem existed, the task of the codifiers was to give it adequate consideration, with

* Resumed from 559th meeting.

a view to its adoption; they could not rely upon scattered and uncertain references, since those were unlikely to be exhaustive.

4. Mr. VERDROSS explained that he had voted against the Special Rapporteur's draft article 58 because he considered it impossible, for two reasons, to render all the articles which were applicable to honorary consuls equally applicable to career consuls authorized to engage in gainful occupation. In the first place career consuls were different in nature from honorary consuls; and secondly, the Commission had decided that article 45 (*Duties of third States*) should not be applicable to honorary consuls but only to career consuls, even if the latter were gainfully employed, because it was not known in advance whether or not they would be engaged in commerce or other gainful occupation. In view of that and other differences between the two categories, he had been obliged to vote for the omission of article 58.

5. Mr. MATINE-DAFTARY felt obliged to explain why he had abstained from voting on the omission of article 58, although he had spoken against the article during the debate. At the preceding meeting (559th meeting, paragraph 87), the Special Rapporteur had in effect agreed to withdraw his text of article 58 and had endorsed his (Mr. Matine-Daftary's) suggestions, in order to meet objections which had been made. Under the procedure normally followed in such cases, the original article 58 no longer existed. He had been surprised that the Chairman, usually so courteous and indulgent, had somewhat hastily put to the vote a text which had already been withdrawn.

6. Mr. BARTOŠ explained that his vote against the omission of article 58 did not mean that he approved of the Special Rapporteur's wording of that clause. He had been obliged to vote against the omission to indicate his objection to such a cursory perusal of the serious practical problem of assimilating *consules missi* to *consules electi* in certain cases. The question deserved more exhaustive discussion than the Commission had held.

7. The CHAIRMAN pointed out to Mr. Matine-Daftary that he was always reluctant to take a vote on any subject without first trying to reach agreement; indeed, members had frequently requested him to take a vote on a given matter. In the case of article 58, he had had no other choice than to take a vote, in view of the motions and points of order that had been submitted: if those motions had been withdrawn, the discussion would undoubtedly have taken a different course. With regard to the question whether article 58 had in fact been before the Commission, he said that originally the Special Rapporteur had implied that if the Commission did not want a separate article on the subject he would not insist on his text, and Mr. Matine-Daftary, in putting forward his suggestion, had made it contingent on whether the Commission wanted to include

any article on the matter in the draft. The Commission had decided by its final vote that it did not want to include a separate article on officials assimilated to honorary consuls.

ARTICLE 59 (*Relationship between the present articles and previous conventions*)

8. The CHAIRMAN invited the Commission to consider article 59, which was the first article in chapter III (*General provisions*).

9. Mr. GARCÍA AMADOR thought that the Commission should first consider the advisability of including in the draft general provisions which in effect had the character of final clauses, especially since according to the note to chapter IV the final clauses would be formulated later. Moreover, it was the Commission's practice not to include final provisions in the drafts it prepared for plenipotentiary conferences. It might be better simply to draw the attention of governments to the question in the report, and to ask them for guidance.

10. Sir Gerald FITZMAURICE said he was in favour of inserting a clause along the lines of the Special Rapporteur's draft article 59, although it could be argued that what it provided for was self-evident. The subject of consular privileges and immunities and functions was, however, very commonly regulated by bilateral agreements, and the first question that many governments would ask in connexion with the draft would be to what extent the proposed multilateral instrument would affect existing conventions and the possibility of concluding future bilateral conventions. They would need reassurance on that point in explicit terms before agreeing to sign the proposed instrument. A clause on the subject should therefore be included, and while he did not regard the wording as ideal by any means, he thought that the drafting could easily be settled by the Drafting Committee.

11. Mr. YOKOTA agreed with Sir Gerald Fitzmaurice that the clause should be retained, and also that its wording could be improved. For instance, it hardly seemed necessary to go into so much detail merely to convey the idea that the provisions of the draft would not affect existing bilateral conventions. It could simply be stated that the articles would not affect conventions concluded or to be concluded between the States concerned. That, however, was a matter of drafting, and the Drafting Committee could no doubt produce a satisfactory text.

12. Mr. PAL considered that some points of substance, as well as of drafting, were involved. He inquired whether the passages "the present articles shall in no way affect conventions previously concluded" and "the present articles shall be no impediment to the conclusion in the future of bilateral conventions" meant that the privileges and immunities provided for in the draft could be limited by existing or future bila-

teral agreements, or whether they meant only that such agreements could extend greater privileges and immunities than those stipulated in the draft. According to his understanding, the Commission's task was to lay down the minimum provisions; but the article as it stood might involve restrictions on those provisions.

13. Sir Gerald FITZMAURICE considered that States should have discretion to grant greater or less extensive facilities. In some respects, the Commission had gone beyond some of the existing bilateral consular conventions, and some of the parties to those bilateral conventions would sign the proposed multilateral instrument only on the strict understanding that it would not affect the provisions of conventions granting less extensive privileges and immunities. The point to be set forth in clear terms by the Drafting Committee was that no bilateral consular convention, whether more or less extensive than the draft, would be affected, with the proviso that those conventions applied exclusively as between the parties concerned and that the proposed multilateral instrument would be fully applicable as between those parties and third States with which they had no bilateral convention, if such third States had themselves ratified the multilateral instrument.

14. Mr. PAL observed that, if that interpretation was correct, the whole draft should be read as subject to existing or future bilateral consular conventions, and would operate only in the absence of such conventions. The matter was in fact left to the agreement of the States parties, the present convention being intended only to provide for cases of omission.

15. Mr. MATINE-DAFTARY doubted the desirability of including a provision which would in no way encourage the formation of general international law, since the upshot would be that the entire field of consular relations would be governed by bilateral conventions. In that event, there seemed to be no need for a multilateral instrument. The question might be raised at the plenipotentiary conference, when States Parties to many bilateral conventions might make reservations if they saw fit, but an express provision on the lines of article 59 would not advance the cause of the development of general international law and would destroy the whole structure of the draft.

16. Mr. TUNKIN said that, while he understood Mr. Matine-Daftary's preoccupation, in his view the ideal of a uniform instrument, accepted by all States to replace the vast network of bilateral conventions, was a case of *le mieux est l'ennemi du bien*. In the absence of a clause along the lines of article 59, many States parties to bilateral conventions which wanted to keep them in force would be obliged to exchange notes stating that the conventions were not automatically abrogated by signature of the multilateral instrument. In actual fact, while there might be a trend for the time being towards keeping bila-

teral conventions in force, States might gradually depart from that trend by concluding fewer such conventions, and the multilateral instrument would gradually take their place. In the meanwhile, however, the fate of the draft might be jeopardized by the omission of a clause along the lines of article 59.

17. Mr. ŽOUREK, Special Rapporteur, said that for practical and psychological reasons he considered the article indispensable. States which were bound by many bilateral conventions, containing different rules for consular officers and going much further than the Commission's draft did in some respects, would not be prepared to abandon their consular conventions in favour of the proposed multilateral instrument. The Commission itself had stressed that the draft should stipulate only the essential provisions and should not go into too much detail; certain questions had deliberately been left for settlement by bilateral convention. Nevertheless, he agreed with Mr. Tunkin that the resulting instrument would have a unifying influence, in that future bilateral conventions would be based on the essential rules of that instrument. Moreover, parties to bilateral conventions might compare the advantages of those conventions and those of the multilateral instrument and, if they considered that the bilateral conventions were exceeded by the multilateral instrument, they could terminate the former of their own free will and allow their consular relations to be governed by the provisions of the latter. But the unifying influence of the new convention should operate without prejudice to the freedom of the will of the States, if it were declared that all the provisions of bilateral conventions which were inconsistent with those of the multilateral instrument would be abrogated, many States would hesitate to sign the instrument. Article 59 had been included in the draft precisely for the purpose of facilitating the acceptance of the proposed convention.

18. Mr. BARTOŠ regarded the question as both doctrinal and practical. Bilateral consular conventions laid down contractual provisions concerning the operation of consulates, whereas the Commission's draft was intended to unify and universalize the rules governing consular relations. The Commission had been aware from the outset that it could not provide for every contingency and had agreed to leave certain questions to be settled by bilateral or regional agreements. Nevertheless, the rules that it had adopted constituted the minimum necessary for the maintenance of the status and operation of consulates.

19. In his opinion, any provisions of bilateral conventions which did not go so far as that minimum should be regarded as abrogated upon signature of the proposed multilateral instrument. Otherwise, States which were not parties to bilateral conventions but which signed the multilateral instrument would be governed by the system of the latter, but signatory States which

were parties to bilateral conventions conferring the lesser privileges and immunities could apply the rules of the multilateral instrument to a limited extent only. That situation would be absurd chronologically, for at the time when the bilateral conventions had been entered into the general rules embodied in the multilateral instrument had not existed, and yet the States concerned would be deprived of the benefit of those rules.

20. So far from furthering the progressive development of international law, article 59 constituted an invitation to take a retrograde step, and that under the auspices of the United Nations. It was obvious that if a bilateral convention conferred greater privileges and immunities than the draft, that convention should remain in force; but the possibility, open under article 59, paragraph 2, of according less extensive facilities could not be countenanced. The continuance in force of contractual provisions antedating the multilateral instrument was not an argument in favour of the proposition that a State would be free to accede to that instrument and at the same time to ignore it in its future relations with certain countries. Nor was it a sound argument to say that States should be allowed to become accustomed to the provisions of the multilateral instrument; draft article 59 in effect left the door wide open to any signatory which wished to disregard the provisions of that instrument.

21. Mr. JIMÉNEZ DE ARÉCHAGA supported article 59 as drafted by the Special Rapporteur. In reply to Mr. Pal's remarks, he pointed out that States bound by existing bilateral conventions were free to diminish the privileges and immunities conferred by a later multilateral agreement, if they so desired. The only way of avoiding that effect would be to insert a provision along the lines of Article 103 of the United Nations Charter, which stated that, in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter would prevail. If such a clause were added, the proposed instrument would become an overriding law; such a course, in addition to defeating the whole purpose of the instrument through the understandable reluctance of States to sign it, was not justified by the subject matter of the draft.

22. Mr. HSU agreed with members who had spoken against the article and believed that, if it were retained, paragraph 2 should be considerably amended. The purpose of the instrument was to bring about harmony in consular practice, and that purpose would be defeated if paragraph 2 were retained in its present form. Moreover, if the whole subject were left open to settlement by bilateral convention, there was no need for a multilateral instrument or for a plenipotentiary conference.

23. Mr. AGO admitted the validity of the prac-

tical argument that it would be easier for States to accede to the proposed instrument if they could be sure of being able to maintain the existing network of bilateral conventions if they so desired. From the theoretical point of view, also, it might be questioned whether the Commission had been simply codifying rules of international law and particularly whether it had confined itself to stating generally accepted rules. In fact, much of its draft would be based on the example of certain consular conventions and consist of provisions selected, as representing sound law, from those conventions. Yet, inasmuch as it was concerned not only with codification but also with the progressive development of international law, the simple rule that the particular prevailed over the general and that therefore existing bilateral conventions ought to prevail over the general law as set forth in the present multilateral convention did not hold good.

24. While it might be easier for States to accede to the multilateral instrument if it contained such a clause, in practice the instrument would to some extent be nullified by article 59 as now drafted. The new instrument would merely serve to fill gaps in the network of bilateral conventions and, while attracting a large number of ratifications might be regarded as a laudable aim, the final result would be that the rules laid down in the instrument would be applied even less widely than they would if the article were omitted. The real advantage of codification was to unify and rationalize rules of international law; if all bilateral conventions were to remain in force, that advantage would be largely nullified.

25. The Commission was faced with a dilemma. To contend that the proposed convention would extinguish all existing bilateral conventions and would rule out the possibility of keeping them in force, would be going too far; on the other hand, the system proposed in article 59, namely to maintain all existing conventions in force, was also too far-reaching, since it would have the effect of limiting too greatly the effect of the multilateral convention. A compromise solution might be to provide that it would be open to States, notwithstanding their accession to the new instrument, to agree to maintain existing bilateral conventions in force, not merely by tacit understanding but by positive action. Such a provision would promote the authority of the multilateral instrument, but would not be too extreme, as it would respect the will of States.

26. Mr. VERDROSS said that he favoured the idea expressed by Mr. Bartoš. According to the ancient maxim *lex posterior derogat priori*, the provisions of the multilateral instrument would supersede those of bilateral treaties with respect to States which signed and ratified that instrument, in so far as they were in conflict with the multilateral instrument.

27. If for practical reasons and in order to facilitate the draft's acceptance by governments, the Commission considered that the draft should

contain a provision on the relationship between it and pre-existing conventions, a short article along the lines suggested by Mr. Ago would perhaps be sufficient.

28. Mr. MATINE-DAFTARY explained that it had not been his intention that the Commission should accept a rule contrary to that embodied in draft article 59. He had simply suggested that the Commission should refrain from including an article along those lines. It was an accepted rule that new general law did not affect pre-existing special law. It was, however, undesirable to draw the attention of governments at that stage to the possibilities offered by that rule. It was better to leave it to governments to raise that question during the plenipotentiary conference or at the time of signing the proposed multilateral instrument. It could well be that only some of them would be interested in maintaining pre-existing bilateral agreements.

29. Mr. LIANG, Secretary to the Commission, said that the question which had been raised was one of the most difficult ones encountered by the Commission in its study of the draft on consular intercourse.

30. There were some precedents in multilateral conventions for the provisions of article 59, paragraph 1. The 1958 Convention on the Territorial Sea and the Contiguous Zone stated in its article 25 :

“The provisions of this Convention shall not affect conventions or other international agreements already in force, as between States Parties to them.”¹

31. Article 30 of the 1958 Convention on the High Seas was identical. But it was significant that the preamble to that Convention stated that its articles were adopted by the United Nations Conference on the Law of the Sea “as generally declaratory of established principles of international law”.² Few treaties existed which regulated the subject of the high seas and those few dealt only with certain special topics; the purpose of the 1958 Convention was primarily to state the already existing rules of general international law in the matter.

32. So far as the draft on consular intercourse and immunities was concerned the position was different. The draft contained certain important innovations. For example, article 41 concerning the nationality of children of consular officers expressed what was no doubt a sound principle but one which was largely at variance with existing State practice : it departed from the rules in force under the nationality legislation of the United Kingdom and the United States of America, for

example. With regard to honorary consuls, the Commission had likewise adopted a number of innovations. Therefore, in view of the element of progressive development in the draft, it would seem that a State which accepted its provisions and ratified them would be under a legal duty to bring its practice into line with them.

33. As to paragraph 2 of article 59, he said there existed no precedent for such a provision in a multilateral convention. If it were adopted, it would largely nullify the usefulness of the whole draft and reduce it to a set of model rules, similar to the set of articles on the subject of arbitral procedure which the Commission had prepared. He felt that the Commission should consider the matter very thoroughly before taking a decision on that paragraph.

34. Mr. SCELLE considered that article 59 should be deleted because its provisions would impair the scope of the proposed multilateral instrument.

35. The proposed provisions appeared to state two obvious facts. Paragraph 1 indicated in its first sentence that two States were free to maintain in force a bilateral convention existing between them; that was the meaning of the words “and still in force between them”. However, he doubted the wisdom of drawing attention to that fact in the actual text of the draft.

36. Paragraph 2 also stated the obvious, so long as it was understood that the parties to a future bilateral convention which departed from the terms of the multilateral instrument previously signed by them would have to denounce the multilateral instrument before entering into the bilateral convention. There again, he saw no useful purpose in drawing attention to that obvious fact.

37. So far as the second sentence of paragraph 1 was concerned, he said he could not see its connexion with the idea contained in the first sentence of the paragraph.

38. For his part, he felt that the Commission should either adopt a provision which enhanced the role of the proposed multilateral instrument or else drop article 59 altogether.

39. Mr. ERIM pointed out that many States had signed bilateral conventions which regulated a large variety of questions and which covered much more ground than the Commission's draft. Some of the bilateral conventions gave greater prominence to questions of shipping and navigation, others to the position of aliens — matters which were not dealt with in the draft. Thus, States would always need to have recourse to bilateral conventions. Unless a provision along the lines of article 59 were included in the draft, those States would be placed in the awkward position of having to adjust the provisions of the pre-existing bilateral treaties, so as to bring them into line with the provisions of the multilateral instrument, before they could subscribe to the

¹ United Nations Conference on the Law of the Sea, *Official Records*, vol. II, *Plenary Meetings* (United Nations publication, Sales No. 58.V.4, vol. II), p. 135.

² *Ibid.*

later instrument. Problems of consular intercourse were not dealt with solely in bilateral consular conventions; they were also determined, for example, in trade or establishment agreements. A clause enabling States to maintain existing bilateral conventions was therefore essential.

40. Nor was there any valid ground for preventing States from entering in the future into bilateral treaties which departed from the provisions of the draft articles, whether the bilateral treaties granted greater privileges or less. There were some rules of international law, such as those contained in the Charter of the United Nations, which were of an imperative character. Other rules, however, could be varied by agreement between the States concerned, a number of those concerned with consular intercourse and immunities often belonged to that category.

41. He considered that most of the draft articles would always serve for the guidance of States. For example, some of the Conventions signed at The Hague in 1899 and 1907 had remained unratified but still provided jurists with inspiration for practice and served as models for the drafting of international instruments.

42. For those reasons, he thought that a provision on the subject-matter of article 59 was essential and he was inclined to favour a formula such as that suggested by Mr. Ago.

43. Sir Gerald FITZMAURICE said that the Commission was, from a practical point of view, faced with something of a dilemma. If a provision along the lines of article 59 were to be retained, it might perhaps deter States from ratifying the draft articles because they might regard themselves as licensed to continue to rely on existing bilateral conventions. If, however, a provision along those lines were not included in the draft, States might be deterred from signing an instrument which did not expressly stipulate that it would not prejudice existing bilateral conventions or prevent the conclusion of any in the future.

44. In matters such as the law of the sea and diplomatic intercourse, there existed a great deal of basic international law, which the Commission had been called upon to codify. In the matter of consular intercourse, on the other hand, the position was different: the draft articles as approved by the Commission would to a great extent represent a synthesis of the provisions of existing bilateral conventions. The reason was that, unlike the law of the sea, for example, in which only a few specific points were governed by bilateral treaties, the subject of consular relations was covered in its entirety by a large number of bilateral conventions.

45. In one sense, in that it inevitably covered much less ground, the Commission's draft fell short of many existing bilateral consular conventions. It was clear that States parties to such conventions would wish those subjects which fell outside the scope of the draft articles to conti-

nue to be governed by the provisions of bilateral conventions.

46. In other respects, the draft articles went beyond existing conventions. In some ways, the draft assimilated consular officials to diplomatic officers. He felt that the innovations adopted by the Commission probably represented a step forward, but it could not be denied that those innovations represented to some extent departures from the existing practice of States. Unless the States concerned were allowed so to speak to contract out of those innovating provisions of the draft so far as their bilateral relations went, they might be unwilling to accept it.

47. A provision along the lines of article 59 would be unnecessary if the draft were intended as a set of model rules or simply as a codification of a new branch of the law to be recommended for approval by the General Assembly under sub-paragraph (a) or sub-paragraph (b) of article 23, paragraph 1, of the Commission's Statute.

48. The position was altogether different if the draft was looked upon as a potential multilateral convention. Countries whose consular relations had been working satisfactorily under existing bilateral consular conventions would not wish to put the provisions of those conventions back into the melting pot. Moreover, those existing bilateral conventions went into much greater detail than the draft articles, so that the latter would have to be greatly expanded if there was any intention that they should supplant existing bilateral provisions.

49. For his part, he hoped that the draft articles would be embodied in a multilateral convention at an international conference. A provision on the subject dealt with in article 59 would then be necessary and should perhaps take the form suggested by Mr. Ago.

50. Mr. AMADO said that he could not agree with Sir Gerald Fitzmaurice. Referring to the remarks made by the Secretary, he said that it would be deplorable if the Commission were to elaborate model rules rather than a multilateral convention.

51. All members were familiar with the problem of reservations to treaties. He regarded article 59 as a somewhat novel method of enabling signatories to make a far-reaching reservation. Mr. Ago's suggestion would introduce the system of reservations used extensively in treaties concluded between Latin American countries.

52. He regretted that Sir Gerald Fitzmaurice should have made no attempt to discuss the arguments put forward by Mr. Bartoš and Mr. Scelle and had instead discussed the question raised by article 59 from the purely practical viewpoint. The Commission could not disregard the general treatment of reservations in international instruments concluded under United Nations auspices. In the present draft the Commission had sought to contribute to the progressive development of international law and had had to look into bilateral

conventions for evidence of as yet non-existent general rules. It was unthinkable that the outcome of that arduous effort should be treated as a set of model rules.

53. He agreed with Mr. Scelle that article 59 added nothing useful to the draft and that it provided a most undesirable method of making prior reservations.

54. Mr. SANDSTRÖM agreed with Mr. Pal that the maintenance of article 59 would greatly weaken the draft as a whole : indeed, such a provision would certainly not promote the progressive development of international law.

55. Mr. FRANÇOIS agreed with Mr. Ago, Sir Gerald Fitzmaurice and Mr. Erim. Article 59 should be retained, though it did require modification. It was often difficult to reconcile the principle that a particular law prevailed over a general one with the principle that a later law overruled an earlier one. If the Commission failed to indicate whether the present draft affected or did not affect existing bilateral conventions, grave uncertainty would result.

56. In his opinion it could not be claimed that any existing bilateral convention which did not accord with the draft was thereby abrogated. Time must be allowed for the requisite adjustments to be made, particularly as the draft by no means covered all the matters regulated by existing consular conventions or by national regulations. Indeed, it would not always be easy to decide which specific issues had been covered. The whole question whether two States or a group of States could conclude a convention derogating from a multilateral convention was extremely controversial and had been the point at issue in the *Oscar Chinn* case.³ The generally accepted view was that a new convention that was not wholly consistent with a previous treaty did not invalidate the earlier instrument if the latter's purpose was not materially impaired by the new one. Since the purpose of the present draft was not to secure complete uniformity of all rules concerning consular intercourse and immunities, it would be open to any two States or to a group of States to conclude an agreement that was not entirely consistent with the draft. In the sphere of consular relations uniformity was not as necessary as, for example, in the case of the regime of the high seas.

57. The problems raised by article 59 were not comparable to the general problem of reservations. With bilateral conventions remaining in force, the present draft, if it ultimately became a multilateral convention, would undoubtedly in time influence the practice of States and would even be accepted by those which decided to retain for the

time being somewhat different rules already established in bilateral conventions.

58. Clearly the Commission should express an opinion on the technical question of the relationship between the draft and existing conventions, and he therefore favoured a provision of the kind embodied in article 59. If the matter were left for final settlement by a diplomatic conference, considerable weight would probably be given to the Commission's opinion, as had been the case at the two United Nations Conferences on the Law of the Sea.

59. Mr. YOKOTA said if it were assumed that the draft would eventually become a multilateral convention, article 59 could not be dispensed with altogether. In international law there was no well established hierarchy of rules as existed in municipal law and therefore even a general multilateral convention did not necessarily possess overriding force to abrogate existing bilateral treaties. Hence, from the theoretical point of view, article 59 was necessary and it was also necessary for practical reasons, because without such a provision States might hesitate to sign.

60. On the other hand, he recognized that there were weighty objections to article 59 on the ground that it was not conducive to the progressive development of international law.

61. Perhaps the problem might be resolved by inserting in the preamble of the draft a statement on the lines of that included in the preamble of the Convention on the High Seas, 1958, to the effect that the provisions of the draft were generally declaratory of established principles of international law : such a statement would serve as a reminder to States that they should abide by the rules contained in the draft.

62. Turning to the wording of article 59, he suggested that it should be less categorical and that the words "shall not automatically" should be substituted for the words "shall in no way" in paragraph 1. The second sentence of that paragraph was self-evident and gave the undesirable impression that the scope of the draft was limited ; accordingly, he suggested that the sentence be omitted.

63. Lastly, he suggested that, in deference to comments made during the discussion, a statement should be inserted in the commentary to the effect that the present articles should be taken into account in the application of bilateral conventions. In that manner the essential elements of article 59 could be retained.

64. Mr. GARCÍA AMADOR observed that in making a procedural suggestion at the outset of the discussion on article 59 (see paragraph 9 above) he had foreseen that it might be difficult to reach agreement on the article. His expectation had proved correct and there was no sign of any consensus of opinion emerging. Without making any formal proposal, he would therefore reiterate the view that it might be wiser to defer

³ Publications of the Permanent Court of International Justice, *Judgments, Orders and Advisory Opinions*, series A/B, No. 63.

a decision on the article. He had been prompted to make his suggestion by the experience of the Inter-American Council of Jurists which, in 1959, after discussing an analogous provision in a draft convention on extradition, had referred it to the Inter-American Juridical Committee with a request that that body prepare alternative texts for submission to the diplomatic conference that was to be convened to consider the draft.

65. As had been pointed out, the Commission usually discussed whether to recommend that the General Assembly itself should examine a particular draft or whether it should be submitted to a diplomatic conference. Perhaps a diplomatic conference would be the proper forum for considering a provision of the kind embodied in article 59.

66. Mr. LIANG, Secretary to the Commission, referring to certain comments made concerning his earlier remarks, explained that he had not intended to suggest that the present draft should be submitted to the General Assembly as a set of model rules. He had only sought to emphasize that if article 59, paragraph 2, were retained the utility of the draft would be greatly impaired. A flood-gate would be opened, and States would avoid the obligations assumed after becoming parties to the convention. He had in no way wished to advocate that the draft should be a set of model rules; indeed, he hoped that the draft would become a multilateral instrument.

67. The second draft convention on extradition prepared for the Inter-American Council of Jurists by the Inter-American Juridical Committee in 1957 contained a provision (article 21) stipulating that it did not abrogate existing bilateral extradition treaties, but that if such treaties lapsed the provisions of the convention would come into effect immediately.⁴ If article 59, paragraph 2, were modified so as to stipulate that in cases where States accepted the present draft then future bilateral conventions should apply only to questions not governed by the draft, it would be less open to criticism.

68. Referring to Mr. Yokota's suggestion that the preamble should contain a statement on the lines of that contained in the preamble to the Convention on the High Seas, 1958, he pointed out that he could not share his view since, whereas the Convention to a great extent codified customary law, much of the Commission's draft on consular intercourse and immunities would be regarded as a piece of international legislation and as creating new law.

The meeting rose at 6 p.m.

561st MEETING

Tuesday, 14 June 1960, at 9.30 a.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 59 (*Relationship between the present articles and previous conventions*) (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of article 59. He drew attention to the following text proposed by Mr. Ago to replace the Special Rapporteur's draft article 59 :

"Acceptance of the present articles shall be no impediment to the maintenance in force by the parties, in their mutual relations, of existing bilateral conventions concerning consular intercourse and immunities, or to the conclusion of such conventions in the future."

2. Mr. ŽOUREK, Special Rapporteur, said that he wished to put forward certain considerations which might help the Commission to reach a conclusion on article 59 without too much delay. In drawing up the text of that article he had been guided by the assumption that the draft would eventually take the form of a multilateral convention. The Commission had endorsed that assumption. The General Assembly's decision to refer the Commission's draft on diplomatic intercourse and immunities to a conference of plenipotentiaries (resolution 1450 (XIV)) seemed to have justified that assumption.

3. The argument that the inclusion of article 59 would greatly impair the value of the whole draft and would not promote the progressive development of international law was based on an oversight. After all, only a small number of States had concluded consular conventions and those were mainly concerned with matters of special importance to the signatories. He therefore maintained the contrary view that the draft's chances of acceptance would be greatly enhanced by the inclusion of article 59. Since under the terms of the article the draft would also apply to States bound by existing bilateral conventions in respect of matters not regulated in those conventions, the effect of article 59 would actually be to enlarge the scope of the draft.

4. If the draft was treated as a set of essential rules it would ultimately have a unifying effect though in its present form it did not seek to impose unification in the matter of consular relations. Mr. Bartoš had contended that it would be paradoxical if a multilateral convention did

⁴ Inter-American Juridical Committee, *Second Draft Convention on Extradition* (Washington, D.C., Pan American Union), p. 23.

not apply in cases where two States were bound by provisions of a bilateral treaty that were defective; but surely one could trust States to have the good sense to denounce a bilateral treaty which was less satisfactory than a general convention.

5. The contention that article 59 was unnecessary because it embodied a self evident principle was over-simplified. Besides, some members of the Commission had questioned whether that principle was commonly accepted. As Mr. François had pointed out (560th meeting, paragraph 55), neither the maxim that a particular rule always prevailed over a general rule nor the maxim that later law superseded earlier law could be regarded as absolute. If the former were accepted as absolute, the inference would be that it was open to any two States to conclude a particular agreement violating a general rule of international law. And if the latter maxim were pushed to its extreme, it would mean that any general international instrument abrogated all previous bilateral agreements on the same subject, which was patently untrue; not even the United Nations Charter, which had established certain overriding rules of law, made any such claim. What course then should the Commission adopt?

6. At first he had been tempted by Mr. García Amador's suggestion that the decision on article 59 should be deferred (*ibid.*, paragraph 64); but on reflection he found it difficult to accept because, as Mr. François had said (*ibid.*, paragraph 58), the Commission was expected to express an opinion on a technical matter which profoundly affected substance. Clearly, the attitude of governments to the draft as a whole would be greatly influenced by whether or not its acceptance affected previous conventions. In his opinion, the only correct course was to maintain article 59, for without such a provision a multilateral convention would hardly be acceptable to governments. Examples of analogous provisions occurred in the Havana Convention of 1928 (article 24), the 1958 Convention on the Territorial Sea and the Contiguous Zone (article 25),¹ the 1958 Convention on the High Seas (article 30)² and the second draft on extradition prepared by the Inter-American Council of Jurists (article 21).³ Manifestly, without such a provision States would feel that they were taking a leap in the dark by accepting a general convention of the kind now under consideration.

7. Mr. Ago had suggested another solution viz., that it should be left to the parties to specify which of their existing bilateral conventions would remain unaffected by the multilateral

instrument (*ibid.*, paragraph 25). Presumably, that would mean that signatory States would have to itemize in a separate declaration the bilateral conventions remaining in force. That method was not commonly used and, he believed, was less acceptable than the system of article 59. If the method proposed by Mr. Ago was followed, the States would, before ratifying or acceding to the multilateral convention, have to negotiate with all the other States with which they had concluded conventions relating to consular questions, and as a consequence the entry into force of the instrument being prepared by the Commission would be delayed.

8. Referring to article 59, paragraph 2, he said that one could not exclude the possibility that States parties to the multilateral instrument might in future wish to conclude more detailed bilateral conventions or even conventions departing in some respects from the multilateral instrument. Not to make allowance for that possibility would be to deny the possibility of development of international law. A provision of the kind contained in that paragraph was therefore essential.

9. Accordingly, in the light of all those considerations, he agreed with Sir Gerald Fitzmaurice that article 59 was indispensable; the wording of course could be left to the Drafting Committee.

10. Mr. BARTOŠ said that the issue raised by article 59 was of the greatest importance and could not be glossed over, particularly as there was considerable divergence of opinion among members. The Commission should view the matter by reference to its own task, which was to assist the General Assembly in fulfilling the aims of Article 13 of the United Nations Charter by encouraging Member States to codify and develop international law without preventing them from regulating matters of detail through bilateral agreements.

11. Unlike some members, he believed that there was a hierarchy of rules of international law so far as they were embodied in contractual instruments. All multilateral conventions contained certain obligatory clauses but left a considerable margin to signatory States to fill any gaps by means of bilateral agreements.

12. By accepting a general convention a State assumed certain legal obligations. Accordingly, a draft of the type under consideration made a positive contribution to the development of international law, but at the same time the proposed text contained a destructive element in that States could still regulate certain matters bilaterally, even in a manner at variance with the multilateral instrument. That difficulty had been well illustrated when the agreement on frontier health regulations concluded between Greece, Yugoslavia and Bulgaria, which went considerably beyond the International Sanitary Regulations, had been severely criticized in the World Health Assembly because it might create problems for other States. An analogous problem arose when preferential treatment was granted to certain

¹ United Nations Conference on the Law of the Sea, *Official Records, Plenary Meetings*, (United Nations publication, Sales No. 58.V.4, vol. II), document A/CONF.13/L.52, p. 135.

² *Ibid.*, document A/CONF.13/L.53, p. 138.

³ Inter-American Juridical Committee, *Second Draft Convention on Extradition*, Pan American Union (Washington, D.C.), p. 24.

categories of consuls in bilateral conventions, since that might be regarded as discriminatory vis-à-vis third States.

13. The Commission, being anxious to ensure the proper conditions for the exercise of consular functions, had decided to prepare a convention and to restrict its draft in a way that would fulfil that purpose; but if States were to be left free to ignore certain principles laid down in the draft or to contract out of them, the Commission would have succeeded neither in codifying nor in promoting the progressive development of international law. That consideration was not a technical one but one of substance. Of course, the Commission was free to frame model rules as it had done in the case of arbitral procedure, but in the present case it was not concerned with the drafting of model rules for such rules seldom found practical application.

14. Turning to the question of the relationship between general and bilateral conventions, he expressed the view that the former could never exclude the conclusion of the latter, subject to the proviso, however, that a bilateral convention must not conflict with the principles and purposes of a general convention on the same subject. Mr. François had been very cautious in his exposition of that doctrine (*ibid.*, paragraph 56). The Commission could clearly not regulate all the matters pertaining to consular intercourse and immunities; yet it could also not admit the idea that States were free to conclude bilateral conventions that would reverse or compromise the whole system laid down in the draft. It was already a considerable concession to accept transitional provisions that would give States time to decide which bilateral conventions would remain in force. In the meantime it must be absolutely clear that States which solemnly undertook to respect the principles of a general convention could not subsequently conclude bilateral conventions that were based on principles at variance with it.

15. Mr. TUNKIN said it was generally agreed that the Commission's duty was to formulate rules of international law that would be acceptable to States, and the divergence of opinion as to the means of making them acceptable should not be exaggerated. The Special Rapporteur had rebutted the argument that a provision of the kind contained in article 59 would greatly impair the value of the draft as a whole. State practice in the matter of consular relations was exceedingly diverse, and any attempt to impose absolute uniformity by means of a multilateral convention that abrogated existing bilateral conventions would only delay ratification of the present draft. On the other hand, if the draft could be rendered acceptable to all or at least a large majority of States, its unifying influence was likely to make itself felt soon, and once the convention gained in authority bilateral conventions might begin to lapse.

16. The principle, stated in Mr. Ago's proposal, that States would be entitled to maintain exist-

ing bilateral conventions after the entry into force of a multilateral convention was self-evident; but the suggestion, made by Mr. Ago at the previous meeting, that an express declaration to that effect was necessary if the bilateral conventions were not to be regarded as abrogated would impair the draft's chances of being ratified, for governments would hardly be willing to itemize in a special declaration all the bilateral conventions which they intended to remain unaffected by the multilateral instrument.

17. By reason of those practical considerations he thought that article 59 in the form submitted by the Special Rapporteur should be approved.

18. Mr. SCELLE said that Mr. Bartoš in his admirable exposition of the problem had quite rightly emphasized that everything depended on the Commission's intention. Mr. Bartoš had clearly stated the legal doctrine concerning the relationship of the present draft to previous conventions if it were to be regarded as a general multilateral instrument. He (Mr. Scelle) greatly hoped that the Commission would not approve article 59 in its present form since it was at variance with that indisputable doctrine.

19. The question to be settled was how to obviate conflicts between two successive conventions. Parties to a general convention could not conclude a limited convention that was at variance with the former unless they denounced it. The purpose of the Commission should be to ensure that existing bilateral conventions would remain in force and that future ones could be concluded that amplified the present draft, provided that they did not conflict with its provisions. Thus article 59 should be modified in that sense so as to lay down what was in effect a self-evident principle, and he accordingly submitted the following alternative text:

"1. The signatories to the present multilateral convention agree that the bilateral consular conventions entered into between them before, or to be entered into between them after, the present instrument shall retain or shall acquire complete and entire validity to the full extent to which the said conventions confirm, supplement, extend or amplify the provisions hereof.

"2. In the event of a dispute concerning any of these points, they agree to institute conciliation or arbitration proceedings."

20. He would have been able to support Mr. Ago's proposal had it contained the essential proviso that existing or future bilateral conventions must not conflict with the principles laid down in the multilateral instrument.

21. Clearly, some provision must be made for the settlement of disputes concerning the reconcilability of the provisions of two conventions. The fate of the Commission's own draft on arbitral procedure proved the reluctance of governments to resort to arbitration. He had accordingly in paragraph 2 of his proposed text provided, in addition to arbitration, for the conciliation procedure referred to in Article 33 of the United

Nations Charter. The advantage of that procedure was that once it had been initiated the bilateral convention in question would remain in suspense. It should also be conducive to the progressive development of international law.

22. Mr. VERDROSS said that the Special Rapporteur had raised two questions in his most recent statement. The first concerned the relationship between the proposed multilateral instrument and pre-existing bilateral conventions; the second concerned its relationship to future bilateral conventions. For practical reasons, the majority of the Commission seemed prepared to accept the substance of paragraph 1 of the Special Rapporteur's draft article 59, concerning bilateral conventions antedating the multilateral instrument. With regard to the second question, the Special Rapporteur had said that States would be free to enlarge upon the provisions of the multilateral instrument and to develop international law through bilateral agreement. The vital question that remained was whether a State, having ratified the multilateral instrument, could conclude a bilateral convention restricting the rules of that instrument. The point was so important that he thought it warranted a vote in the Commission. Put in another way, the question was whether the rules laid down in the multilateral instrument could become applicable to a ratifying State only in the absence of bilateral conventions. In his opinion, the Special Rapporteur's verbal assurance conflicted with the wording of article 59. Perhaps the Special Rapporteur could eliminate the contradiction by accepting the addition of the words "which supplement and extend the rules laid down in these articles" at the end of paragraph 2 of article 59.

23. Mr. AGO said that the Special Rapporteur's and the Secretary's references to the codification of the law of the sea as examples of relations between multilateral and bilateral agreements were not entirely pertinent to the case now before the Commission. In dealing with consular intercourse and immunities, the Commission was faced, not with a few isolated bilateral conventions relating to certain specific points (as in the case of the law of the sea) but with a vast network of such conventions covering frequently all aspects of consular relations. The Commission's task was to unify those provisions. He was therefore surprised by the Special Rapporteur's claim that his system would simplify the achievement of the Commission's purpose. On the contrary, the Commission's work of codification would be largely nullified if all existing bilateral consular conventions were to remain in force automatically. The only purpose of the new instrument would be to fill the gaps which were not covered by bilateral conventions.

24. While he agreed that the proposed instrument should not be merely a set of model rules, he could not go to the opposite extreme, as did certain members. If it were assumed that the proposed instrument could entirely supplant the

variety of rules laid down in bilateral consular conventions, its acceptance would necessarily carry with it the termination of all those bilateral conventions, with no possibility for the parties to maintain them in force even by positive action. That would be very difficult for some States to accept, particularly since certain bilateral conventions were extremely detailed and progressive; indeed, some had provided material for the Commission's draft. There would be no reason for the States concerned not to maintain such bilateral conventions in force, but article 59 should be so phrased as to convey that that would be the exception rather than the rule, and that States should expressly agree between them that certain specific bilateral conventions would remain in force. A similar reservation should be added concerning future bilateral conventions that might go further than the provisions of the multilateral instrument; while in practice it might be less important to provide for the possibility of concluding new bilateral conventions, it should be borne in mind that States could not be prevented from doing so.

25. He could not entirely agree with Mr. Scelle that the new instrument would represent *jus cogens* and that no existing or future bilateral consular convention could depart from the principles laid down in that instrument, although the bilateral convention might confirm, supplement, extend or amplify the provisions of the multilateral instrument. In such a matter as consular intercourse and immunities, it was clearly unnecessary to lay down too many imperative rules. Moreover, two States could agree to give their respective consular officers wider privileges than those provided for in the Commission's articles. For example, the Commission had decided not to extend certain privileges and immunities to honorary consuls; but a bilateral convention might make those facilities applicable to such officials. Furthermore, certain States might agree to grant consular officers certain exemptions in excess of those provided for in the draft. Hence the Commission's draft could hardly stipulate that no bilateral convention should derogate from the provisions of the multilateral instrument. Nor did he think that the absence of such a stipulation would matter greatly; for surely a State which was prepared to ratify the new multilateral instrument would not, in a bilateral convention, derogate from its fundamental principles.

26. To sum up, he could not agree with the system proposed by the Special Rapporteur; rather he considered that the most the Commission could do would be to draft article 59 in terms which would allow States to maintain certain bilateral conventions in force, without however stating that all such agreements would automatically remain in force. The Commission should beware of laying down too categorical a rule in the matter.

27. Mr. HSU said he was disappointed by the texts proposed as replacements for the Special

Rapporteur's article 59. Mr. Ago's proposal was an improvement so far as form was concerned, and the first proposition in that text was more acceptable than the Special Rapporteur's paragraph 1. In the second proposition, however, Mr. Ago seemed to have accepted the Special Rapporteur's system. In his (Mr. Hsu's) opinion, there was no need for any such provision, which would merely serve to nullify the Commission's work.

28. If a proposal along the lines of the Special Rapporteur's article 59 or of Mr. Ago's text were introduced at the plenipotentiary conference on consular intercourse and immunities, he might find himself in a position where he would be obliged to vote for it for the sake of agreement. But the Commission's duty was to try to lay down rules of international law acceptable to the community of nations; the special interests of individual States must be left aside, and the purely political considerations involved should be left to diplomats. Accordingly, he believed that article 59 should be omitted, unless the objections that had been raised could be disposed of satisfactorily.

29. Mr. EDMONDS said that the Commission should approve an article on the subject of the relationship between the consular draft and bilateral conventions, but he was not in favour of the Special Rapporteur's wording of article 59. In his opinion, there was no question of codification; the article was concerned with the extent to which the provisions of the draft would affect existing or future bilateral agreements. Governments contemplating signature of the new multilateral instrument would be concerned primarily with its effect on existing bilateral conventions and on their freedom to conclude other such agreements. The majority of bilateral conventions now in force went much further and into greater detail than did the Commission's articles; it was therefore unreasonable to suppose that any governments which approved the Commission's draft would wish to abandon bilateral conventions concluded after much negotiation and dealing with particular problems arising in the consular relations between the Parties thereto.

30. His main criticism of the Special Rapporteur's draft related to the second sentence of paragraph 1. It was extremely difficult to determine what questions would not be governed by the previous conventions. It might even be said that most of the Commission's articles applied in some degree to the provisions of all existing bilateral consular conventions. In order to remove any doubts on that score, he suggested that the article might be drafted in the following terms:

"The provisions of these articles shall not affect any existing bilateral convention concerning consular intercourse and immunities. Any party accepting these articles is free to enter into any bilateral convention concerning consular intercourse and immunities. Such convention shall

solely govern their relations except to the extent that the parties specifically adopt the provisions of these articles in whole or in part."

31. The first sentence of that proposal expressly preserved the validity of existing consular bilateral conventions. If parties believed that the new multilateral instrument improved upon the provisions of those conventions, they would be free, but under no obligation, to renounce them, and the validity of any provisions they had accepted in order to meet special problems would not be affected. Under the remainder of the proposal, States would be free to conclude bilateral conventions in the future, on the understanding that their acceptance of the Commission's articles did not preclude their acceptance of bilateral conventions particularly suited to their needs. In that way, the progressive provisions of existing bilateral conventions would not be automatically abrogated by acceptance of the multilateral instrument and, if States regarded any of the provisions of the multilateral instrument as an improvement over those of bilateral conventions, they might benefit by them. He could not agree with the contention that all existing bilateral conventions should be extinguished by the Commission's draft or that that draft should prevent the conclusion of more detailed and more progressive bilateral conventions in the future.

32. Mr. FRANÇOIS agreed with Mr. Scelle that it would be inadmissible if the Commission approved a text under which, in contravention of the established principles of international law, a State could subscribe to a multilateral instrument and would be free at the same time to enter into bilateral conventions stipulating provisions at variance with the multilateral instrument. Nevertheless, he could not regard Mr. Scelle's remarks as very pertinent to the Commission's draft; they were more pertinent to such topics as State responsibility, human rights and the law of the sea. During the past weeks, the Commission had been primarily concerned with working out compromise provisions on the rights, privileges and immunities to be granted to consuls, and it was therefore hard to say what the principles of international law in the matter really were. In his opinion, a State which failed to grant consuls exemption from stamp duty or which refused them the right to fly the flag of the sending State on all means of transport would hardly be committing a violation of the rules of international law.

33. Codification carried with it the danger of creating unduly rigid law and of disregarding divergent opinions. The proposed multilateral instrument should take into account the practice of States as reflected in bilateral conventions, which governed only their relations *inter se*. If parties to such conventions wished to go further than did the Commission's draft, or not so far, they would hesitate before signing an instrument containing a clause which precluded them from

doing so. He was therefore in favour of retaining the Special Rapporteur's text, perhaps with some drafting improvements; he could not support Mr. Scelle's proposal. Commenting on that proposal, he said it would be extremely difficult to determine the extent to which bilateral consular conventions confirmed, supplemented, extended or amplified the provisions of the multilateral instrument; secondly, while he was usually in favour of arbitration, as a mode of settling disputes, he did not think that the procedure was appropriate in the circumstances referred to in Mr. Scelle's proposal. In his opinion, States should be given latitude to depart from the provisions of the multilateral convention in existing and future bilateral conventions, since the provisions that the Commission had adopted related to practice rather than to principle.

34. Mr. AMADO did not think that the Commission should be unduly concerned with the reaction of governments to the draft instrument it was preparing; those reactions would become evident at the plenipotentiary conference and, besides, governments would have an opportunity of commenting on the text in the near future. The Commission's task was to codify international law and promote its progressive development; he had been surprised to hear Mr. François express the view which amounted to a denial of that task.

35. Nor could he agree with Mr. Tunkin's view that the Special Rapporteur's draft article 59 should stand on the ground that its adoption would hasten the unification of international law on consular relations. The Commission's duty was to state the principles for such unification in the form which it considered most desirable, and to submit that instrument to the conference. The existence of the instrument would serve as a rallying point for States, which would gradually see their way towards ratifying it. But if the instrument were opened for signature with an escape clause, giving all signatories the latitude not to comply with its provisions, the unification of international law on consular intercourse and immunities would in practice be retarded. He therefore believed that article 59 should be omitted, and that the draft should be forward to governments for their comments without any such provision.

36. Mr. PAL said that some provision along the lines of article 59 would have to be retained. He did not agree that, even in the absence of such a provision, the normal rules of interpretation would always produce the results set forth in the Special Rapporteur's draft. The rules referred to by the several speakers might apply only if the two sets of norms were on the same juridical plane. Norms purported to be of law could not be subject to modification by mere consensual rules of some of the parties unless the set of legal norms itself subjected them to such modification.

37. If the intention of the Commission was to raise the provisions of the draft to the level of

law, one could legitimately expect future bilateral conventions to be brought into conformity with those provisions. If there were any gaps in the provisions of the draft, it would be legitimate to allow those gaps to be filled by bilateral agreement. For example, the Consular Convention of 1952 between the United Kingdom and Sweden contained detailed provisions on shipping questions which were not covered at all by the Commission's draft. In his opinion, if the United Kingdom and Sweden accepted a general instrument such as that which the Commission was preparing, the provisions concerning shipping in their bilateral treaty would remain in force between them. He also believed that States would remain free to enter into bilateral conventions in the future also for the purpose of filling such gaps in the Commission's draft articles.

38. It had been suggested that a provision along the lines of article 59 would nullify the effects of the whole draft. He could not agree with that extreme view. That again depended on what the Commission purported to do in making the rules. If the intention was to leave the field to the agreements of the parties, the rules now framed operating only in the absence of such agreements, there would be nothing wrong in the present provision. The whole draft might be declared operative only in the absence of an agreement between the parties. It was quite common for municipal law, particularly in some fields like partnership, to state that certain provisions applied in the absence of agreement between the parties. Provisions of that nature were intended to fill any gaps left by the parties to an agreement. Accordingly, there would have been nothing objectionable in adopting a similar approach when codifying certain provisions of international law, if the purpose was the same. He, however, understood the purpose of the Commission to be quite different. The Special Rapporteur himself claimed unifying effect for the rules; others claimed them as giving norms of law, though not existing, yet meeting the demands of progressive development in the field. With that object in view such a wide provision would be wholly inapt.

39. The problem for the Commission was how far it wished to go in imposing uniform provisions, particularly for the purpose of avoiding discriminatory practices. His impression was that the Commission intended to state the minimum rules on the subject of consular intercourse and immunities. On that basis, the Commission might make provision for leaving pre-existing bilateral conventions unaffected so far as they did not fall short of that minimum and insisting that future bilateral agreements must not depart from the minimum rules, on a principle analogous to that underlying the most-favoured-nation clause in the commercial field. He could not, however, go so far as Mr. Scelle who wanted in fact to make all the articles of the draft imperative. Further, consular relations having themselves been declared in the draft as based on consent,

there would be nothing wrong in allowing the principle of the maxim *volenti non fit injuria* to operate in that context.

40. In conclusion, he considered that the formula suggested by Mr. Ago would be of assistance in the drafting of a provision for the purpose.

Organization of the Commission's work

41. Mr. LIANG, Secretary to the Commission, suggested that the Commission, following its practice at previous sessions, should devote two meetings, possibly on 20 and 21 June 1960, to the discussion of the topic of State responsibility (agenda item 3). It was desirable that the Commission's discussion of the topic should take place while the observer for the Inter-American Juridical Committee was present at Geneva. He recalled that the topic was on the agenda both of the International Law Commission and of the Inter-American Council of Jurists. The observer for the Inter-American Juridical Committee, which carried on the preparatory work for the Inter-American Council of Jurists, would wish to hear the Commission's discussion on the subject of State responsibility and he was not in a position to remain until the end of the Commission's present session.

42. He said that Professor Sohn of Harvard Law School was present at Geneva. It was desirable, in view of the study on state responsibility which was being pursued by the Harvard Law School, that Professor Sohn should also be able to attend the Commission's discussion on that subject.

43. He thought the adoption of his suggestion would not interfere with the Commission's schedule of work because, while the Drafting Committee was preparing the final draft articles on consular intercourse and immunities, the Commission would have to consider other items on its agenda. Subject therefore, to the views of the special rapporteurs on the topics of consular intercourse and State responsibility, he ventured to suggest that the Commission should devote two meetings early in the following week to a discussion of the subject of state responsibility.

44. Mr. SANDSTRÖM said that he could not approve the suggestion made by the Secretary to the Commission. The Commission should give priority to the topic of *ad hoc* diplomacy (agenda item 5). It was very important that the Commission should discuss that topic before the Vienna conference on the subject of diplomatic intercourse and immunities. It was unfortunate that the Commission could only prepare a preliminary draft on the subject of *ad hoc* diplomacy and would have no time to obtain government comments on that draft in accordance with the normal procedure. But the Commission should at least prepare a preliminary draft for the benefit of the Vienna conference.

45. Mr. SCALLE supported Mr. Sandström; the

Commission had barely the time necessary to complete its discussion of the draft on consular intercourse and immunities and it was essential that it should also discuss *ad hoc* diplomacy. Besides, he did not think that any useful purpose was served by short general discussions on subjects to which the Commission could devote no more than one or two meetings during a session.

46. Mr. YOKOTA shared the misgivings expressed by the previous speakers with regard to the time available to the Commission. Speaking as Chairman of the Drafting Committee, he added that, if requested by the Commission, the Committee could submit some of the articles of the draft on consular intercourse before the others in order to speed up the work of the Commission.

47. Mr. LIANG, Secretary to the Commission, pointed out that he had not suggested that the subject of State responsibility should receive priority, but simply that the Commission should adhere to its custom of devoting some attention to that subject at each of its sessions. He had merely suggested that two meetings might be devoted to the discussion of the subject of state responsibility. He considered that if the Commission were not to discuss that subject on Monday 20 June, it would still have to do so on some later date, when the observer for the Inter-American Juridical Committee and Professor Sohn would no longer be present.

48. Mr. GARCÍA AMADOR said he was surprised by the strong resistance to the Secretary's suggestion. He recalled that he had agreed that priority should be given to the question of *ad hoc* diplomacy, in view of the proposed Vienna conference (527th meeting, paragraph 13). He pointed out, however, that, by virtue of an express decision of the General Assembly, the Commission was asked to give priority to the subject of state responsibility.

49. For his part, he had no great interest in a very short discussion limited to one or two days, but he felt that such a discussion would serve at least to acknowledge the interest which the Inter-American Juridical Committee and the Harvard Law School took in the work of the Commission on the subject of state responsibility.

50. Mr. HSU said that to allow two meetings for a discussion of state responsibility seemed unjustifiable in view of the lack of time. He thought, however, that the Commission might like to set aside one meeting or even half a meeting for the Special Rapporteur and Professor Sohn to report on their study of the subject.

51. Mr. AGO thought that a special meeting should be scheduled at which the Commission would hear the Special Rapporteur on the topic of state responsibility, Professor Sohn of Harvard Law School and the observer for the Inter-American Juridical Committee. He did not feel, however, that a very short discussion, limited to

some two meetings, would do justice to the topic of state responsibility. It was desirable that the Commission should concentrate on the topic at one of its future sessions.

52. Mr. GARCÍA AMADOR said that his views on the subject of state responsibility were set forth in the various reports which he had prepared as special rapporteur (A/CN.4/96, 106, 111, 119 and 125). Accordingly, he felt no special urgency to address the Commission on the subject. He was, however, greatly interested in hearing the views of members. Even the brief discussions which had taken place at previous sessions had provided him with valuable material for the preparation of his reports. It was not unlikely that the observer for the Inter-American Juridical Committee and Professor Sohn were very much in the same position and were much more interested in hearing the views of the members than in addressing the Commission.

53. Mr. EDMONDS suggested that the discussion should be limited to certain specific aspects of the question of state responsibility.

54. Sir Gerald FITZMAURICE said that, for his part, he was prepared to attend one or two additional meetings for the purpose of discussing the subject of state responsibility, if the Commission felt that its ordinary meetings were going to be fully taken up by the subjects of consular intercourse and *ad hoc* diplomacy.

55. He noted that at its previous session the Commission had briefly discussed a draft on state responsibility prepared by the Harvard Law School. Since then the Harvard Law School had prepared a new draft which took into account observations made by members of the Commission at the time. He suggested that Professor Sohn should be invited to explain the difference between the latest draft and its predecessor. The members of the Commission would thus have an opportunity to comment on any points which attracted their attention as a result of that explanation. He suggested that the Commission should devote the meeting on 20 June 1960, to hearing Professor Sohn and discussing his statement. The Commission would then be in a position to decide whether a second meeting should be devoted to the subject.

56. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to devote its meeting on Monday, 20 June 1960, to the subject of state responsibility and to hear Professor Sohn of Harvard Law School at that meeting. In addition the Commission might hear the observer for the Inter-American Juridical Committee if he should wish to speak on the subject.

It was so agreed.

The meeting rose at 1 p.m.

562nd MEETING

Wednesday, 15 June 1960, at 9.30 a.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 59 (*Relationship between the present articles and previous conventions*) (continued) *

1. Mr. YASSEEN thought that the difference of opinion on the subject of article 59 reflected, firstly, the desire to secure acceptance of the draft convention by a large member of States and, secondly, the desire to safeguard the authority of the draft when once it had been adopted. Some members had argued that the convention should not prevail over pre-existing bilateral agreements and should not prevent the parties thereto from making bilateral agreements departing from its provisions. Others, however, had taken the view that the multilateral instrument when once adopted, prevailed and that the latter, which had the object of unifying the international law concerning consular relations, should prevail over pre-existing bilateral agreements and debar the parties from departing from its provisions by international agreements. Those members thought it undesirable to allow States which had accepted the draft to regard that acceptance as a mere formality and to consider themselves completely free to depart from its provisions.

2. That reasoning, though correct in principle, did not apply with equal force to all the provisions of the draft. Some of those provisions were fundamental — for example, those of article 27 (*Inviolability of the archives and documents*) and article 29 (*Freedom of communication*) — whereas others constituted what French jurists termed “*règles supplétives*” or “*règles dispositives*”. The fundamental principles should prevail, but the same could not be said of the “*règles dispositives*” or “*supplétives*”. In the circumstances, the Commission might specify which of the draft articles should be regarded as mandatory, or in other words as provisions which signatories could not contract out of by bilateral agreement.

3. It might be asked whether it was possible to lay down mandatory rules by means of multilateral conventions. In that connexion, he drew attention to Article 103 of the Charter, an instrument which, despite its very special character, was technically nothing other than a multilateral convention.

* Resumed from the 561st meeting.

4. In his opinion, a multilateral convention should have greater force than a bilateral treaty. It was one of the cases in which form could have an effect on substance. For those reasons, he considered that the Commission could well indicate those rules which it regarded as mandatory.

5. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Ago's remarks (see 561st meeting, paragraph 23), said that the retention of article 59 as it stood would not diminish the importance of the draft articles. Existing bilateral conventions governed only a small part of consular relations throughout the world. The proposed multilateral instrument would serve to regulate consular relations between pairs of States which were at present not bound by any bilateral treaty, in other words, the greater part of inter-State relations. For evidence in support of his view he would mention only the fact that there were now over ninety States in the world and that before long there would be more than 100. Any one State had bilateral consular conventions with only a small fraction of the total number of States. Moreover, the multilateral convention was to apply even in cases where States were bound by a pre-existing bilateral convention, but in such a case it would govern only those questions which were not settled by the bilateral convention.

6. With reference to Mr. Yasseen's remarks, he said that articles 27 and 29 expressed universally accepted rules of customary national law. Even States which did not adopt the draft would have to observe those rules in the same manner as before.

7. He thought that it would be undesirable to lay down any rigid rule to prevent States from departing from the provisions of the draft articles. States should be free to grant not only greater, but also less extensive privileges than those stipulated in the draft articles, so long as their agreement affected only the relations between them. For example, two States might wish, by agreement, to grant to their respective consuls a lesser measure of customs exemption than that laid down in the draft articles. It was extremely unlikely, however, that two States would wish to depart in any way, in their reciprocal relations, from such rules as that of the inviolability of consular archives.

8. Mr. AGO said that the Special Rapporteur had assumed that all the bilateral provisions on consular intercourse were contained in consular conventions. In fact, provisions of that type were contained in a vast number of treaties, some of them very old, dealing with other subjects; treaties of establishment, treaties of friendship, commercial treaties and navigation treaties often contained provisions on consular intercourse and immunities.

9. Under the Special Rapporteur's draft article 59, all pre-existing provisions on consular relations would continue to stand, unless of course the parties agreed otherwise. For his part, he thought that that system would not favour the

progressive modernization of the subject. It was by reason of that consideration that he had suggested (560th meeting, paragraph 25) that bilateral provisions should only remain in force between States both of which had accepted the draft if they so agreed. Under that system, the presumption would be in favour of the draft articles rather than in favour of the pre-existing provisions, as suggested by the Special Rapporteur.

10. With regard to Mr. Yasseen's question, he said that in his opinion the reply was that it was very hard to find, in an international multilateral convention, rules of a mandatory character incapable of being varied by bilateral treaty.

11. In fact, even if some of the rules laid down in the draft articles were to be specifically regarded as constituting *jus cogens*, it would be very difficult to prevent two States from adopting different rules in their reciprocal relations. He considered, however, that the fears expressed in that respect were baseless in so far as the fundamental rules of consular law were concerned. It was unthinkable, for example, that two States would by agreement decide that their respective consular archives would not be inviolable.

12. In conclusion, he suggested that the Commission should be asked to decide on the principle of including a provision which recognized the possibility for States of maintaining by mutual agreement pre-existing conventions and concluding new ones. When the Commission had taken a decision on that question of principle, the Drafting Committee could prepare an appropriate text.

13. Mr. YOKOTA supported the principle embodied in Mr. Ago's proposal (561st meeting, paragraph 1), which laid down the minimum requirement in the matter. States had an incontrovertible right to maintain in force, in their mutual relations, existing bilateral conventions concerning consular intercourse and immunities. Nor could their right to conclude such conventions in the future be questioned. Many points of detail which were dealt with in bilateral conventions, or which could be dealt with in the future in such conventions, were not covered by the draft.

14. With regard to the problem of the possible conflict of the provisions of the draft with those of bilateral treaties, he felt that the text proposed by Mr. Scelle (561st meeting, paragraph 19) went too far; it would impose upon States obligations which they would not readily accept. On the other hand, it would undermine the whole purpose of the draft if States were left completely free to depart from its provisions in all respects. The wisest course would be to refrain from including in the draft any explicit provision on the question and to leave such conflicts to be settled by the normal rules of interpretation.

15. Sir Gerald FITZMAURICE said that it seemed somewhat ungrateful to suggest that all existing provisions touching on consular matters should disappear upon the adoption of the Commission's draft articles. The Commission had largely drawn its inspiration from existing bilateral

consular conventions and from provisions in treaties of commerce and establishment. Surely, there would be no great harm if, so long as the parties so wished, existing provisions were maintained in force.

16. If the Commission had intended the proposed multilateral instrument to supersede all existing bilateral consular conventions, then, in strict logic, it should have covered the whole subject of consular intercourse and immunities in its draft. The States parties to existing bilateral conventions could not be expected to terminate them in favour of a multilateral instrument, unless that instrument covered all the details dealt with in the bilateral conventions.

17. Actually, the Commission had not intended to formulate a complete substitute for existing consular conventions. Its aim had been to state the fundamental law on the subject of consular intercourse. Two countries which were not bound by any bilateral convention could save themselves the trouble of preparing such a convention by simply applying the Commission's draft articles; but they might find it necessary to supplement the draft in some respects.

18. In that connexion, he pointed out that not all countries had the same degree of interest in all the matters covered by consular law. Where there was a large resident foreign population in a country, bilateral consular conventions between that country and foreign States could be expected to contain detailed provisions on such question as the administration of the estates of deceased nationals of foreign countries. On the other hand, a country having large shipping interests would include, in the consular conventions which it signed with other countries, mainly provisions on shipping matters.

19. The Commission's text, for its part, contained an assembly of basic or necessary clauses, but did not cover all the details of such subjects as the administration of estates and shipping. It was therefore essential to make it clear that the Commission did not intend its text to affect the continued operation of existing conventions — if the parties wished to maintain them in force — or to prejudice the conclusion of future conventions.

20. Referring to the question whether States would be free to depart, by bilateral agreement, from the rules laid down in the draft articles, he said that in his opinion none of the provisions of the draft represented *jus cogens*. The departure from one of those provisions would only affect the relations between the two countries concerned, and he could not see any basis for excluding such a possibility.

21. It was true that there were certain rules, such as that concerning freedom of communication, which constituted fundamental principles of consular law and it was almost inconceivable that any two countries would deliberately provide in a bilateral treaty for the exclusion of such rules in the relations between them. But even if such an extraordinary situation were to arise — for example, if two very friendly countries

were to agree on some mitigation of certain essential privileges — possibly as a concession to uninformed public opinion — there was no reason why those two countries should not be allowed to do so as between themselves. Their agreement in that respect would not alter in any way their obligations towards other countries under the multilateral instrument.

22. He agreed with the thought behind Mr. Ago's proposal, which proceeded from the desire not to encourage countries to maintain pre-existing bilateral provisions. In practice, however, the method suggested by Mr. Ago — viz., itemizing in a special declaration the bilateral conventions which were to remain unaffected by the multilateral instrument — would give rise to difficulties. Before signing the multilateral instrument, a government would have to examine all its bilateral treaties, and not merely the consular conventions, to determine which provisions dealing with consular law it wished to maintain in force. Moreover, the government would have to communicate with that of the other party with a view to concerting policy in the particular matter. Otherwise, a situation might arise in which one party made a declaration that it wished to maintain a particular bilateral treaty but the other party to that treaty failed to take similar action.

23. For all those reasons, the Commission should decide the question of principle whether its draft should contain a provision regarding the maintenance in force of existing bilateral conventions and the conclusion of such conventions in the future. If the Commission decided that such a provision was necessary, as he thought it was, a suitable formula could be drafted.

24. Mr. VERDROSS drew attention to article 33 of the Harvard Draft, which contained the same idea as the Special Rapporteur's text for article 59.

25. The arguments put forward by Mr. Ago (561st meeting, paragraph 24) and Mr. François (*ibid.*, paragraph 33) had convinced him that uniformity was not essential in the matter of consular law. It was therefore necessary to leave States free not only to expand, but also to curtail, by bilateral convention, the privileges set forth in the draft articles. Perhaps a passage should be included in the commentary stating that the freedom of States to conclude such bilateral conventions was limited by the general rules of international law.

26. That approach would not reduce the draft to the status of a mere model set of rules. The draft articles would apply in all cases where two States had not stipulated otherwise by bilateral convention. The fact that a rule did not constitute *jus cogens* did not mean that it was not binding. The rule would apply in the absence of any different treaty provisions.

27. The Commission should take a decision on three questions: (1) Whether, after acceptance of the multilateral instrument, pre-existing bilateral conventions concerning consular intercourse and immunities would remain in force; (2) whether

States would be able to conclude new bilateral conventions on the subject in the future; and (3) whether the freedom of the parties in the matter was subject to the observance of the general principles of consular law, as suggested by Mr. Scelle.

28. Mr. MATINE-DAFTARY said that, in principle, he agreed with the views expressed by Mr. Scelle (561st meeting, paragraph 18 *et seq.*) and Mr. Bartoš (*ibid.*, paragraphs 10 *et seq.*), but thought that both the text proposed by Mr. Scelle and that proposed by the Special Rapporteur for article 59 entailed some danger.

29. If Mr. Scelle's proposed text was adopted, States at present bound by bilateral conventions would oppose the draft. And it was desirable to make the draft articles acceptable precisely to those States which maintained widespread consular relations, and for that reason, had in the past concluded a large number of treaties on the subject.

30. The text proposed by the Special Rapporteur was equally fraught with danger. If, as that text implied, the adoption of the draft did not change the existing situation materially, the draft articles would attract little attention from States.

31. Lastly, he could not accept the proposal of Mr. Edmonds (*ibid.*, paragraph 30) for it would encourage particularist tendencies. The Commission could not adopt such a proposal without renouncing its very role as the organ entrusted by the General Assembly, under Article 13 of the Charter, with the important mission of encouraging the progressive development of international law and its codification.

32. In conclusion, he agreed with Mr. Garcia Amador (560th meeting, paragraph 64) that the question dealt with in article 59 had been raised prematurely. It would be better to submit the articles to governments first. If governments wished to raise the question of the relationship of the draft to pre-existing treaties, they could do so in their comments. Indeed, they could raise it at the much later stage of an international conference. He pointed out in that connexion that article 25 of the 1958 Convention on the Territorial Sea and the Contiguous Zone, which stated that the provisions of that Convention did not affect agreements already in force, as between States Parties to them, had not been drafted by the Commission but had been introduced into the Convention during the Conference on the Law of the Sea. Similarly, article 30 of the 1958 Convention on the High Seas had been introduced at the Conference. In his view, the introduction of those provisions had diminished the value of the two conventions and explained to some extent why they had attracted only few ratifications.

33. For all those reasons, he suggested that the question of including an article along the lines of article 59 should not be dealt with by the Commission at that stage.

34. Mr. SCELLE said that Mr. Yasseen and

Mr. Verdross had admirably drawn attention to the central issue raised by article 59: did international law admit the juxtaposition of permissive and mandatory rules? To take an analogy from private law, an example of the former were rules pertaining to a marriage settlement. If, as Mr. Bartoš considered was the case, the Commission was engaged in preparing a draft multilateral convention, it would be a contradiction in terms to envisage a convention lacking in obligatory rules. Naturally, it could also contain rules of *jus dispositivum* which would serve as a guide to the parties but which they were not bound to follow.

35. It had never been suggested that the present draft should supersede all existing bilateral conventions; his own text, in which he had no particular pride of authorship, emphasized that previous bilateral conventions would remain in force and that others could be concluded after the ratification of the multilateral convention.

36. He did not suppose that Mr. Ago's remarks could have been interpreted to mean that in bilateral conventions States were free to derogate from principles of customary international law; such principles were obligatory. True, it was difficult sometimes to determine whether a particular convention initiated a new rule that would become customary law or whether it conflicted with an existing rule of customary law. In case of inconsistency, the older rule would prevail. In the present draft, however, the Commission had included a number of customary rules which were clearly mandatory.

37. Since in a multilateral convention there must be some rules of *jus cogens* from which the signatories could not derogate by means of special conventions, he had sought in his proposal to indicate in general terms all those cases in which signatories could conclude special bilateral conventions. He had been surprised by Mr. François' criticism (561st meeting, paragraph 33) of the wording he had used but was prepared to replace it by a more general formula of the kind which he understood Mr. Sandström intended to propose. All he was concerned to ensure was that no future bilateral convention concluded between signatories to the multilateral instrument could be regarded as valid if it departed from the obligatory provisions of the latter. Mr. Yasseen had mentioned examples of provisions which were *jus cogens*.

38. Though Mr. Ago's text was certainly preferable to that of the Special Rapporteur it failed to provide for the settlement of disputes concerning the reconcilability of the provisions of a particular convention with the obligatory provisions of a multilateral convention. The Special Rapporteur had not yet indicated whether he intended to include a general provision on the settlement of disputes in the draft. He (Mr. Scelle) had sought to make good that omission in paragraph 2 of his own text and, since it was questionable whether States would be willing to resort to arbitration, he had also envisaged conciliation which, not

being obligatory, might prove more acceptable. At the same time, he hoped that those few States which were willing to submit to the rules of international law rather than to use them for their own purpose would resort to arbitration for the settlement of disputes.

39. Mr. ERIM thought that after Mr. Scelle's remarks it could be said that a common view was beginning to emerge. Mr. Scelle now accepted a distinction between mandatory and permissive provisions. Whereas at the previous meeting (561st meeting, paragraph 19) he had categorically affirmed that bilateral agreements could not derogate from a multilateral convention, he had just said (see paragraph 37 above) that it was only the mandatory provisions of the latter from which bilateral agreements concluded after ratification of a multilateral convention could not depart. In the abstract that was true. But even on that assumption parties to the multilateral convention could by express provision accept the right to derogate from all its articles. Accordingly, the question was: Were there any provisions in the draft which could properly be described as "mandatory"? He was unable to agree that even such provisions as those contained in articles 27 and 32 of the draft should be regarded as *jus cogens*, for it was conceivable — hypothetically — that two States might agree that there was no need to guarantee the inviolability of consular archives or to accord any special protection to consuls beyond that accorded to aliens generally. An agreement of that sort would in no way affect the interests of a third State and would, therefore, be perfectly acceptable. The only provision of the present draft which could, perhaps, be regarded as one from which derogation by means of a bilateral treaty should not be allowed was article 6 (*classes of heads of consular posts*), since such a derogation might affect third States. Secondly, the comparison between the present draft and civil law should not be pushed too far. The draft was not a code and by no means covered all matters relating to consular intercourse and immunities. The subject was not exhausted. That was why there would be no danger whatever in allowing States to conclude bilateral agreements either wider in scope than the draft or restricting its application. Such a possibility would contribute to the development of international law. The draft did not represent the definitive treatment of the subject; it was only a compromise.

40. Mr. SANDSTRÖM said that earlier in the discussion he had been inclined to favour Mr. Scelle's proposed text but the views since expressed by Mr. François and Mr. Yasseen had convinced him that that text went too far. Accordingly, he considered that the words "conform, supplement, extend or amplify the provisions hereof" in Mr. Scelle's text should be replaced by the words "do not depart from the fundamental principles of the present convention". That was a more flexible formula which, though somewhat imprecise, would better safeguard the fundamental

principles of the present draft. A proviso of that sort was particularly important to protect smaller States from being forced by more powerful States to accept unduly onerous conditions.

41. He proposed to vote for Mr. Scelle's proposal if his amendment was not accepted, and otherwise would support Mr. Ago's text.

42. He was opposed to Mr. García Amador's suggestion because it was important to obtain the views of governments on article 59.

43. Mr. AGO considered that the discussion had usefully narrowed the area of disagreement. The practical difficulties which some members, including Sir Gerald Fitzmaurice, thought his proposal would entail were more apparent than real. According to the system he had proposed, if one only of the signatories to a bilateral convention ratified the multilateral instrument the former would automatically remain in force as between the two States. On the other hand, if both signed the multilateral instrument then, as soon as the second State had ratified it, that instrument would automatically supersede the original bilateral convention unless the two parties to it agreed that, notwithstanding their acceptance of the multilateral instrument, the bilateral convention should remain in force. The practical effect would be that, if the multilateral instrument entered into force, the provisions concerning consular relations in old bilateral treaties of any kind would probably lapse but those detailed provisions of more recent consular conventions which States found necessary and convenient would by common accord between the parties probably remain in force. If the Commission maintained the system proposed by the Special Rapporteur in article 59, States would have to make an express agreement to revoke earlier conventions, and failure to do so might bring about uncertainty and difficulties in controversial cases.

44. He did not oppose Mr. Scelle's idea that multilateral conventions could contain some obligatory provisions, but considered in the present instance that most if not all of the rules contained in the draft could be regarded as *jus dispositivum*. After all, any two States were not even obliged to establish consular relations with each other, and he agreed with Mr. Erim that there was no *a priori* reason why two neighbouring and friendly States should be prevented from agreeing, for instance, that their respective consuls required no special protection over and above that granted to any alien.

45. In reply to Mr. Scelle's criticism that his (Mr. Ago's) text contained no reference to the procedure for the settlement of disputes, he said that whereas he favoured some provision for the settlement of disputes by conciliation or arbitration he would have thought that a general clause on that subject was needed in the draft rather than one solely applicable to disputes concerning

the relationship between the present draft and previous conventions.

46. Mr. EDMONDS said it seemed to be the general view that ratification of a multilateral convention by any two States would not, *ipso facto*, annul any previous bilateral convention between them and that it would not debar them from concluding further bilateral conventions dealing with matters of special interest in greater detail than had been done in the multilateral instrument.

47. He had no great objection to Mr. Ago's proposal except that it did not indicate clearly what would be the position if parties to the multilateral instrument wished subsequently to enter into a separate bilateral convention.

48. Referring to article 33 of the Harvard Draft, he said he knew from personal experience that it was not always an easy matter to decide whether the provisions of one agreement were or were not consistent with the provisions of another; that difficulty would be overcome by a statement in the draft to the effect that none of the provisions of the multilateral convention would affect subsequent bilateral conventions unless the former had been specifically accepted by the parties.

49. He said he would not press his own proposal and would be quite satisfied if the wording were left to the Drafting Committee. However, he insisted that the Commission must reach a decision concerning the effect of the present draft on existing conventions and concerning the conditions on which parties to it could subsequently conclude bilateral conventions.

50. Mr. TUNKIN, commenting on some of the proposals relating to article 59, expressed the view that Mr. Scelle's text was impracticable, unnecessarily complicated the whole matter, and might, if adopted, make the whole draft unacceptable to a number of States.

51. Mr. Ago's text and that of the Special Rapporteur for article 59 had the same general purpose of leaving signatories of the multilateral instrument free to maintain in force existing bilateral conventions or to conclude new ones if they wished. Nevertheless, Mr. Ago's text would also complicate the situation. In the first place, if Mr. Ago's proposal was adopted, States wishing to sign the multilateral instrument would be obliged to do so in complete ignorance of the fate of existing bilateral conventions, inasmuch as the other parties to such conventions might hold different views on their maintenance or abrogation. Secondly, Mr. Ago's proposal would have the effect of compelling a State which intended to ratify the multilateral instrument to review all the earlier bilateral consular conventions to which it was a party and to enter into fresh negotiations with all the other parties concerned; it was quite possible that a large number of bilateral conventions would have to be negotiated and ratified for the purpose of expressly preserving the validity of existing conventions.

52. In his opinion, the Commission's best course would be to refer the Special Rapporteur's text and Mr. Ago's proposal to the Drafting Committee for amalgamation. The new article should state, in particular, that bilateral consular conventions would not be automatically abrogated by accession to the multilateral instrument and that States would be left free to conclude new bilateral agreements.

53. Mr. HSU proposed that the words "in so far as they are not in conflict with the general principles of the present articles" should be added at the end of Mr. Ago's proposal. Although that phrase might seem self-evident, he believed that it touched on a basic principle. While the first point made in Mr. Ago's proposal was acceptable and necessary, and its omission would lead to the misconception that accession to the multilateral instrument automatically entailed abrogation of all bilateral consular conventions, he thought that the second point gave States excessive latitude for concluding new agreements. The purpose of preparing a multilateral instrument was to put an end to the regulation of consular practice by bilateral convention only, and it therefore seemed inadvisable to encourage States to conclude new bilateral conventions unless they were called for by exceptional circumstances.

54. Mr. ŽOUREK, Special Rapporteur, replying to remarks made during the debate, said it was not strictly accurate to say that few States had concluded bilateral consular conventions. In fact there were many such conventions; what could be said was that, by comparison with the large number of sovereign States in the world, the area covered by those conventions was relatively small. For example, although theoretically consular conventions could be concluded with over ninety States, his own country has concluded only half a dozen. Accordingly, although certain States had concluded large numbers of bilateral conventions, it could not be contended on those grounds that such States would not sign the multilateral instrument if article 59 were included, because from the geographical point of view a large area of inter-State consular relations remained to be covered by such conventions.

55. He did not think it possible to follow Mr. Matine-Daftary's suggestion that the problem with which article 59 was concerned should not be solved at the current session. Governments should be offered a precise clause concerning the relationship between the draft and existing conventions, in order that they could make up their minds with respect to the draft.

56. In reply to Mr. Scelle's question whether he (the Special Rapporteur) intended to include any reference to the settlement of international disputes in the article, he observed that such a reference was unnecessary, since the whole problem of settlement of disputes was a separate problem that was regulated by numerous international agreements. Moreover, such a provision would be all the more unnecessary in an instrument relating to

consular intercourse and immunities as in the matter of consular intercourse and immunities States were always anxious to settle any disputes through negotiation; and in any case it was evident from the collection of judicial decisions in Stowell's *Consular Cases*¹ that, whereas questions affecting the legal status of consular officials had quite often been adjudicated by national courts, there were virtually no decisions by international judicial bodies on the subject. That proved that disputes concerning the prerogatives of consuls were generally settled through the diplomatic channel. If any exceptionally serious disputes arose, States had a wide choice of procedures, such as negotiation, conciliation, paritary commissions, commissions of investigation, arbitration, and, finally, appeal to the International Court of Justice.

57. The majority of the Commission seemed agreed that the draft should contain a clause providing for the maintenance in force of existing bilateral conventions and for the possibility of concluding such conventions in the future. Opinions seemed to be divided only on the question whether the freedom of States in the matter should be limited and, if so, what the extent of the limitation should be. His own view was that it would be inadvisable to restrict that freedom unduly, but Mr. Scelle and Mr. Ago were in favour of more or less considerable limitations. Mr. Ago's proposal, though not fundamentally different from his own, was open to criticism from the practical point of view in that it would mean that parties to bilateral agreements would, before ratifying the multilateral convention, virtually have to revise their whole system of bilateral consular conventions and to enter into fresh negotiations with all the States with which they had concluded consular conventions. While in principle that procedure was desirable, in practice many States would hesitate to shoulder such a heavy burden. It would be more practicable to allow the existing network of bilateral consular conventions to remain intact, lest the entry into force of the multilateral instrument be delayed.

58. While it was of course open to the Commission to refer article 59 and all the relevant proposals and amendments to the Drafting Committee, his personal opinion remained that the system which he had proposed in article 59 was the only practicable one. His view was supported by the only existing multilateral instrument on the subject, the Havana Convention of 1928 regarding Consular Agents, which provided in its article 24 that the Convention did not affect obligations previously undertaken by the contracting parties through international agreements; and article 26 of the Havana Convention regarding Diplomatic Officers contained the same provision.²

¹ Ellery C. Stowell, *Consular Cases and Opinions*, Washington, D.C., John Byrne, 1909.

² Text cited in *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, pp. 419 to 422.

59. Mr. AGO said that, while Mr. Hsu's proposal did not give rise to any major objections, he did not think that the addition was altogether appropriate. In the first place, it was not likely that many future bilateral consular conventions would conflict to any great extent with the general principles of the multilateral instrument. Secondly, the addition would open the door to a discussion of what the general principles of the Commission's articles really were. Widely, of these general principles did not constitute *jus cogens*, he could not see why it was necessary to stipulate that States must not depart from those principles.

60. The CHAIRMAN declared the debate on articles really were. Thirdly, if those general principles did not constitute *jus cogens*, he could on the subject of the relationship between the draft and previous conventions should be included.

61. Mr. GARCÍA AMADOR asked whether the decision would apply to both the provisional and the final drafts.

62. The CHAIRMAN said that no decision could be taken in respect of the final draft until the observations of governments had been received.

63. He called for a vote on the question whether an article on the relationship between the Commission's draft and previous conventions should be included.

It was decided by 13 votes to 5, with 1 abstention, that such an article should be included in the draft.

64. The CHAIRMAN observed that it would be difficult for the Commission at that stage to examine in detail each proposal and amendment relating to article 59. It might simplify the procedure if the Commission voted on the general question whether the ratification of the multilateral instrument would *ipso facto* affect the maintenance in force of existing bilateral consular conventions.

65. Mr. AGO thought that the proposition on which the Chairman wished to take a vote was not quite clear. For instance, if the proposition was to be understood in the sense that existing bilateral conventions would cease automatically upon the ratification by both their parties of the multilateral instrument unless the parties agreed otherwise, his vote would be favourable. His vote would be different, however, if the intention was to suggest that existing bilateral agreements would be maintained in force unless they were expressly abrogated upon ratification of the multilateral instrument.

66. Mr. YOKOTA thought that the four main proposals before the Commission could be divided into two groups. The Special Rapporteur's text of article 59 and Mr. Ago's proposal, which did not differ really from each other, might form one group, and Mr. Scelle's and Mr. Edmonds' proposals might form the other group. The Commission should decide which principle of the two groups should be adopted, and then refer it to the Drafting Committee.

67. Mr. AMADO could not agree that there was little difference between the Special Rapporteur's text and Mr. Ago's proposal. He had been in favour of omitting article 59 altogether, but in view of the Commission's decision to include an article, he thought that the wording should be as clear as possible. All the proposals and amendments should therefore be referred to the Drafting Committee.

68. Mr. EDMONDS said that the Drafting Committee should be given explicit directives. The Commission should vote on the two questions: 1. Would acceptance of the multilateral instrument, *ipso facto*, bring to an end existing bilateral consular conventions? 2. Were States ratifying the multilateral instrument free to conclude bilateral conventions in the future?

69. Mr. ŽOUREK, Special Rapporteur, thought that the only question to be decided by vote should be whether rectification of the multilateral instrument *ipso facto* abrogated existing bilateral consular conventions: that was the only fundamental point of law involved.

70. Mr. JIMÉNEZ DE ARÉCHAGA considered that the best course would be to refer all the proposals and amendments to the Drafting Committee. Nevertheless, if the Commission wished to take a general decision, it should first vote on the principle, common to the Special Rapporteur's text and Mr. Ago's proposal, that acceptance of the draft would be no impediment to the maintenance in force of existing bilateral consular conventions. If the Commission approved that principle, it could then take a vote on the *modus operandi*, in which it would have a choice between the Special Rapporteur's and Mr. Ago's solutions.

71. Mr. SANDSTRÖM, supported by Mr. Scelle, considered that certain nuances of the opinions of individual members would be lost in a vote on a general question of principle. The difference between those opinions was not as great as might seem at first sight, and it would therefore be best to refer the article, the proposals and the amendments to the Drafting Committee.

72. The CHAIRMAN said that he had made his original suggestion for a vote because some members wanted to give the Drafting Committee some guidance in preparing the article. He been unable to state the proposition as clearly as Mr. Ago might have wished, because the Commission would then have had to vote on the substance of the question. The position would now be clarified by a vote on whether all the proposals should be sent to the Drafting Committee, together with the records of the members' views. If that suggestion were defeated, any vote might be taken on the guidance to be given to the Drafting Committee.

73. Mr. MATINE-DAFTARY thought it would be inadvisable to refer all the proposals to the Drafting Committee. The two distinct views which had emerged during the debate were, first, that all existing bilateral consular conventions

should simply remain in force and, secondly, that such conventions should remain in force, but with certain reservations. The decision could not be left to the Drafting Committee, and a vote should be taken on that point.

74. Mr. GARCÍA AMADOR thought that either the Commission or the Drafting Committee should also consider his concrete proposal, made early in the debate, that the attention of governments should be drawn to the subject of article 59, either in the Commission's report or in the commentary, in order to enable them to indicate their views on the relationship between the draft and existing bilateral conventions. The question was political, rather than technical, and hence the views of governments should be sought. The Commission could not presume to decide such a matter for governments.

75. Mr. ŽOUREK, Special Rapporteur, thought that, if the Commission wished to give guidance to the Drafting Committee, it might follow the voting procedure suggested by Mr. Jiménez de Aréchaga.

76. The CHAIRMAN did not think that that would be the most efficient way of solving the problem. He called for a vote on whether the Special Rapporteur's draft article 59 and the proposals and amendments relating thereto should be referred to the Drafting Committee.

It was decided by 9 votes to 6, with 2 abstentions, that the article and the relevant proposals and amendments should be referred to the Drafting Committee.

77. Mr. BARTOŠ and Mr. EDMONDS said that they had cast a negative vote because they considered that the Drafting Committee was not competent to settle such wide divergencies on a question of principle.

The meeting rose at 1.10 p.m.

563rd MEETING

Thursday, 16 June 1960, at 9.30 a.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 60 (Complete or partial acceptance)

1. Mr. ŽOUREK, Special Rapporteur, introducing article 60, said that it offered States which did not send or accept honorary consuls the possibility of excluding chapter II (which grouped together the provisions relating to honorary

consuls) from their ratification of the instrument. The draft aimed at universality, being conceived as a general convention codifying general rules of international law. Nevertheless, States which did not send or accept honorary consuls could not be expected to ratify or accede to the whole instrument, including chapter II, or to accept as rules of general international law those relating to honorary consuls. The procedure of admitting partial acceptance would have the great advantage of ensuring the universality of the instrument without prejudicing the existing practice of States. In his opinion, his text of article 60 providing for partial acceptance was a happy technical solution, which would avoid the need for large numbers of reservations. For if the draft did not contain such an article, States which did not use the institution of honorary consuls would have no choice but to formulate reservations concerning the provisions relating to honorary consuls when accepting the convention. Reservations, although sometimes essential, were in general undesirable, for they tended to weaken the scope of a particular instrument; one party's reservation might impair irremediably the value of the whole instrument as between the State making the reservation and States which did not accept the reservation. A further advantage of the procedure of partial ratification or accession was that a State exercising the option might subsequently extend its ratification or accession to the whole instrument, if it were to change its views or if practical circumstances made it necessary for it to send or accept honorary consuls.

2. The procedure was not a new one, having been used in the case of the General Act concerning the Pacific Settlement of International Disputes of 1928. Furthermore, the Commission should not attach undue importance to the article in its first draft, which would be sent to governments for comments. It should therefore be possible to dispose of the matter rapidly. The wording would, of course, be modified when the Drafting Committee and the Commission had finally approved the structure of the draft, but the principle seemed clear enough for the Commission to come to a decision without difficulty.

3. Mr. YOKOTA observed that the question had already been referred to at length in connexion with other articles. So many members had opposed the article that he was surprised at the Special Rapporteur's insistence on including it. It seemed unnecessary to press for further discussion of the question in the Commission; the Drafting Committee, which had been entrusted not only with the wording of the articles, but with the consideration of the whole structure of the draft, could take article 60 into account in that context. It would therefore be wiser to defer further discussion until the Drafting Committee had finished its work.

4. He could not accept the reasons which the Special Rapporteur had given for partial ratification of the draft. He (the Special Rapporteur) seemed to have based the article on the assump-

tion that a number of States opposed the institution of honorary consuls as such; but the debates in the Commission had shown that, on the contrary, the great majority of States appointed and received honorary consuls, and even if some States did oppose the institution, there was no reason for making the provisions concerning honorary consuls subject to separate ratification. A State which opposed the institution was free to refrain from appointing honorary consuls or to refuse to receive them. The fact that the convention contained provisions relating to honorary consuls should not serve as an impediment to ratification, since that instrument did not oblige States to receive or appoint honorary consuls. An analogy could be drawn with the case of consular agents, who were not appointed or received under the municipal law of some countries, including his own; nevertheless, that fact did not prevent such countries from acceding to conventions containing provisions relating to consular agents. Accordingly, he did not believe that the Special Rapporteur's argument that the omission of article 60 would prevent many States from acceding to the instrument as a whole was valid.

5. Mr. ERIM considered that the article was unnecessary and, since so much freedom of action had already been recognized for States, that it would nullify the Commission's work of codification. In agreeing to the inclusion of a provision on the lines of article 59, the Commission had agreed in principle that States which wished to regulate their consular affairs otherwise than as provided for in the multilateral instrument would be free to do so; by adopting that principle, the Commission had in effect turned the instrument into a set of rules to be followed by States which did not wish to conclude bilateral consular conventions. Accordingly, States were not prevented from derogating from the rules of the multilateral convention, and the adoption of article 60 would render the instrument practically ineffective in that particular respect.

6. Furthermore, the manner in which the article was worded seemed to give States an opportunity to ratify certain chapters *en bloc*, but did not give them the right to make exceptions in respect of specific provisions. The real question was: Did the Special Rapporteur not accept the State's right to formulate reservations to particular articles? Besides, the partial freedom, if considered in relation to article 59, represented yet another breach in the structure of the instrument. The Commission should submit to governments an integral convention, as a model for general lines of conduct in the matter of consular intercourse and immunities. States which did not wish to follow some of the rules laid down could, under article 59, maintain in force their existing bilateral conventions or conclude other bilateral consular conventions suitable to their needs. He therefore proposed that the discussion and the vote on article 60 should be postponed, pending the final decision on article 59.

7. Mr. BARTOŠ considered that the question raised by article 60 was substantive rather than technical. He could understand the point of view of those who believed that the institution of honorary consuls was undesirable, although he personally did not share that opinion. The question whether all countries used the institution or not was immaterial; States were not obliged by the proposed instrument to appoint or accept honorary consuls and were therefore free to exercise their own judgment in the matter, irrespective of the inclusion of article 60. Nevertheless, he would submit that the effect of the Special Rapporteur's solution was to attach different values to the various chapters of the draft: chapter I would be regarded as compulsory, and chapter II as optional. It would be preferable by far to leave States free to refuse to recognize the institution of honorary consuls. Besides, even a State which did not ratify chapter II would not be debarred from receiving or even sending honorary consuls, if the other parties concerned agreed.

8. Mr. EDMONDS said that the article was quite unnecessary and should be deleted. A State which did not appoint or receive honorary consuls would not have in its territory any consular officials to which chapter II would apply. If at any later date it changed its mind about the appointment or acceptance of honorary consuls, it would be free to take advantage of the provisions of the chapter. There was no need to defer action on the article pending a decision on other clauses.

9. Mr. GARCÍA AMADOR drew attention to his statement at the beginning of the discussion of chapter III (*General provisions*) (560th meeting, paragraph 9), when he had suggested that the Commission should discuss first whether general provisions having the character of final clauses should be included in the first draft. He had made that suggestion in order to avoid a debate on substance, and his apprehensions had unfortunately been confirmed. The Commission had conducted a long and inconclusive discussion on article 59 and was now running the risk of embarking on a long debate on the question of reservations. The practice of discussing final clauses was contrary to the Commission's usual procedure. To avoid further substantive discussion, he suggested that a vote should be taken on the question whether articles 59 and 60 should be included in the draft.

10. Mr. MATINE-DAFTARY said that, since he had no sympathy for the institution of honorary consuls, he welcomed the Special Rapporteur's initiative in providing an opportunity for States not to ratify chapter II. Nevertheless, it might be wiser to follow a somewhat different procedure and to attach chapter II to the draft as an optional annex, as had been done in the case of the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes

adopted at the first United Nations Conference on the Law of the Sea, 1958.

11. The reason for that suggestion was that under the procedure proposed by the Special Rapporteur, States might be obliged to accede to whole chapters and, as Mr. Erim had pointed out, might be debarred from making reservations to individual provisions. If the effect of article 60 was to remove the right to make reservations, he thought that the best way of making the provisions on honorary consuls optional would be to embody them in a separate optional annex. He was of the opinion that, in the present state of international law, States regarding themselves as sovereign were free to make reservations to any instrument that they signed.

12. Mr. ŽOUREK, Special Rapporteur, pointed out to Mr. Matine-Daftary that the partial acceptance proposed in article 60 only affected the chapter on honorary consuls. He also assured him that the provision in no way excluded the possibility of making reservations, which would be dealt with in chapter IV (*Final clauses*). The inalienable right of sovereign States to make reservations was not affected by article 60, which had been included in the draft with a view to ensuring the universality of the proposed instrument.

13. In reply to Mr. Yokota, he said that the number of States which did not accept the institution of honorary consuls was immaterial. The essential point was that a sovereign State could not be obliged to accept an institution to which it objected. He had as yet heard no convincing argument against the procedure proposed in article 60; the option of partial acceptance was in no way intended as questioning the value of the institution of honorary consuls. On the contrary, knowing that they rendered valuable services to many States, he had devoted a special chapter of his draft to honorary consuls.

14. He thought that Mr. Erim's fears that the draft would be rendered ineffective by article 60 were exaggerated. The article in no way affected the existing international practice; it simply made it possible for States which neither appointed nor recognized honorary consuls not to commit themselves to provisions concerning such consuls. But the recommended procedure would in no way prejudice the position of States favouring the institution. He could not agree with Mr. Yokota that the case of consular agents was analogous, since consular agents were one of the classes of consuls, whereas honorary consuls formed a separate category of consuls. Furthermore, a State which had acceded to the multilateral instrument as a whole but which did not recognize the institution of honorary consuls, would be placed in an embarrassing position if it wished to refuse the exequatur to an honorary consul. The procedure set forth in article 60 would eliminate all ambiguity and all germs of dispute in the matter and, as he had pointed out, could not harm any State.

15. Mr. MATINE-DAFTARY said he was satisfied by the Special Rapporteur's explanations.

16. Sir Gerald FITZMAURICE said that he could not share the Special Rapporteur's view that a State which had ratified the whole instrument would be in an embarrassing position if asked to accept an honorary consul. The main fallacy of the Special Rapporteur's argument lay in that point. The fact that some States — in his opinion, a small minority — did not recognize the institution of honorary consuls was no argument for including article 60. Nothing in the draft obliged States to receive or to appoint honorary consuls, and it could not be contended that by ratification a State was estopped from refusing the exequatur to such officials.

17. The Special Rapporteur's assertion that the inclusion of the clause would obviate the necessity for many reservations was based on the same fallacy. No country would be obliged to make reservations because its total freedom in the matter of sending or receiving honorary consuls was in any way affected by ratification or accession to the instrument as a whole. The faculty of States to propose reservations in respect of individual articles was quite a different thing from an option of partial acceptance. Accordingly, the provision was unnecessary even for the Special Rapporteur's purpose of preserving the freedom of action and the *status quo ante* of countries which did not recognize the institution of honorary consuls. The only cogent reason for such a provision would have been the presence in the draft of a provision compelling States to appoint and receive honorary consuls; but no such provision existed.

18. Mr. AGO considered that the article was not only unnecessary, but inappropriate. It was most undesirable to expose a work of codification not only to the normal risk of possible reservations, but to the more serious danger of an option to accept or reject certain rules. The Commission recognized the existence of the institution of honorary consuls; at the same time it recognized that each State was free to decide whether to appoint or admit such officials. When once a State had decided to send or receive honorary consuls, the Commission recognized that the rules set forth in chapter II would apply. Governments did not necessarily adhere to the same policy; any government might decide for practical reasons to admit or appoint honorary consuls or not to do so, and the decision might also be changed in time. Moreover, since under article 11, a government was entitled to refuse the exequatur to any consul, the Special Rapporteur's contention that embarrassment might be caused by having to refuse honorary consuls was not tenable. And under article 20 the receiving State might inform the sending State that a member of the consular staff was not acceptable. Accordingly, there was no reason to adopt a provision which might create the impression that some of the rules of international law laid down in the draft were optional and others compulsory. The 1958 Convention

on the Territorial Sea and the Contiguous Zone had been ratified by States having no sea coast; that action denoted recognition by the States concerned that the rules laid down in the Convention governed the situation of maritime States. The same principle should surely apply to the institution of honorary consuls: States not having such an institution might very well recognize that the rules laid down in the draft governed the position of honorary consuls with respect to States which did have the said institution.

19. Furthermore, the effect of article 60 might be dangerous. Certain States might resort to partial acceptance because they disapproved of the institution of honorary consuls, but others who used the institution might take the course of partial ratification because they wished to apply rules other than those contained in the instrument. He appealed to the Special Rapporteur not to insist on article 60; if governments reacted strongly to the absence of such a provision, it would still be open to the Commission to include it in the final draft, but it seemed unnecessary to provide such a clause at that stage.

20. Mr. FRANÇOIS thought the debate had shown the close connexion between article 60 and the whole question of reservations. If reservations to the instrument were admitted, a State which wished to do so could make a reservation to chapter II as a whole. He had been surprised to hear certain members express the view that the right to make reservations was inherent in sovereignty; in his opinion, the right depended solely on the nature of the instrument concerned and he was inclined to think that the draft instrument before the Commission was one to which few if any reservations should be admissible.

21. Members who had spoken against article 60 had contended that States which did not wish to appoint or admit honorary consuls conserved full freedom of action. He could not wholly agree with that argument, since certain difficulties might arise in practice. For example, in connexion with article 45 (*Duties of third States*) countries acceding to the convention as a whole would be obliged to recognize the application of the article to honorary consuls also. It might be preferable to allow the provision to apply to honorary consuls if the State concerned recognized the institution, but to admit reservations in the case of States which did not recognize it. While that might be regarded as a matter of detail, it constituted an exception to the absolute freedom of deciding whether or not honorary consuls should be appointed or received.

22. Mr. TUNKIN saw much value in the suggestion of Mr. García Amador. The provisions of article 60 probably fell into the category of final clauses and it was not the general custom of the Commission to include final clauses in its drafts. As a rule, the Commission only prepared substantive articles on the topics which it discussed.

23. He was concerned at the view expressed by

certain members, who from the beginning had been in favour of assimilating honorary consuls to career consuls, that there should not be any separate chapter on the subject of honorary consuls; he felt that if the Drafting Committee were to submit a draft in which no such separate chapter was included, the Commission would reopen its lengthy discussion on the subject of honorary consuls.

24. The discussion of the legal status of honorary consuls had shown that in many respects it differed from that of career consuls, and the Commission should have arrived at the conclusion that honorary consuls constituted a distinct institution. He therefore suggested, for the consideration of the Drafting Committee, that, if it decided to include provisions on honorary consuls in the same articles which dealt with career consuls, it should submit to the Commission a second draft in which honorary consuls were dealt with in a separate chapter.

25. Mr. LIANG, Secretary to the Commission, said that Mr. García Amador had raised a very important point which affected the whole technique of the Commission's work. The Commission had always regarded itself as an expert body whose views were based on independent research and free discussion. The conclusions of the Commission had therefore been generally embodied in drafts dealing with substantive matters only.

26. It was true that, on occasion, the Commission had included in some of its drafts certain provisions falling into the category of final clauses, generally in cases in which the Commission had dealt with a subject on which no customary rules of international law existed and the making of new law was involved. For example, the Commission itself had drafted final clauses for its draft conventions on the subject of statelessness, which was a subject for progressive development and in regard to which there were no rules of customary law. The government representatives attending the conference of plenipotentiaries on that subject in 1959 had, however, drafted fresh final clauses.

27. As a general rule, however, the Commission had not tried to anticipate the extent to which States might wish to undertake obligations concerning a whole draft or part of it. The Commission had limited its work to substantive provisions, leaving such question as entry into force, reservations and denunciation to be decided by the representatives of governments participating in a conference. The extent to which States would wish to be bound by convention was in reality a political decision which governments themselves would take after examining minutely the provisions of a draft. The International Law Commission was not in a position to predict what the attitude of eighty or ninety governments might be in that regard. He recalled in that connexion the reply he had ventured to give to the Israel representative in the Sixth Committee, when that representative had asked why no final clauses had

been appended to the Commission's draft on diplomatic intercourse and immunities.¹

28. When the Commission had dealt with the topic of the law of the sea it had not included final clauses in all its drafts. It had done so only in the texts on fishing and conservation of the living resources of the high seas because those clauses were, in that case, an integral part of the substance of the draft; without the creation of the proposed machinery, the principle embodied in the draft could not operate. It had therefore been appropriate in that case for the substantive provisions to be reinforced by final clauses.

29. For those reasons, he agreed with the view of Mr. García Amador and Mr. Tunkin that the Commission should not endeavour to deal with the question of complete or partial acceptance raised by the proposed article 60. Indeed, the same remark applied to article 59 on the relationship between the draft articles and bilateral conventions, but the Commission had already discussed that question at length. He felt that the Commission could save considerable time if it decided not to deal with the subject matter of article 60. The draft on consular intercourse and immunities contained both a restatement of existing international law and rules aimed at the progressive development of international law, and it was quite impossible for the Commission to anticipate to what extent States would wish to accept the proposed new rules.

30. He recalled that the 1958 Conference on the Law of the Sea had adopted the provisions of the Convention on the High Seas "as generally declaratory of established principles of international law". That language had not been used in the Convention on the Territorial Sea and the Contiguous Zone or in the Convention on the Continental Shelf, a circumstance which indicated that the Conference had not regarded all the provisions of those conventions as declaratory of existing international law in the same manner. He felt that where, as in the case of consular intercourse and immunities, a substantial part of the provisions of a draft was concerned with the creation of new international law, it was all the more important that it should be left to the States represented at an international conference to decide on the extent to which they would wish to be bound by the proposed new rules.

31. Mr. JIMÉNEZ DE ARÉCHAGA supported the suggestion of Mr. García Amador that the Commission should not deal with article 60 at that stage. For the reasons given by Mr. Edmonds and other speakers, he saw no need to include the provisions of that article. If such an article were included, many States might think, notwithstanding anything that might be said in the commentary, that article 60 was the only provision on the subject of reservations and that therefore the

¹ See *Official Records of the General Assembly, Thirteenth Session, Sixth Committee, Official Record of the 572nd meeting, paras. 13 to 15, pp. 104 and 105.*

only reservations permissible would be those mentioned in that article.

32. Mr. ERIM said that the explanations given by the Special Rapporteur had confirmed him in his opinion that article 60 did not serve any useful purpose. Since States were not obliged either to send or to accept honorary consuls, a provision of the type of article 60 was quite unnecessary. Article 59 already gave enough freedom of action to States.

33. With regard to the question of reservations, he said that it was not uncommon to limit the right of the signatories to a multilateral treaty to formulate reservations. Article 19 of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas and article 12 of the 1958 Convention on the Continental Shelf provided examples of such a limitation.

34. Mr. ŽOUREK, Special Rapporteur, said that the right to formulate reservations, which was inherent in the sovereignty of the State, could not be curtailed without the consent of the State.

35. He did not believe that the provisions of article 59 would accomplish the purpose which article 60 was intended to achieve. A State which did not admit honorary consuls would certainly find it difficult to enter into a bilateral convention providing for the exclusion of such consuls with a State which on the contrary wished to make the maximum use of the institution of honorary consuls.

36. Nor could he agree with Mr. García Amador that it would be wrong to include article 59 in the draft. It was essential to indicate to governments whether and how far existing bilateral conventions would be affected by the draft articles.

37. Article 60, admittedly, was in a different position and could be regarded as one of the final clauses. But it was vital, for from it the States would gather that they were not bound to accept the draft *in toto*. It was for that reason that the article had already at that stage been included in the draft. He did not agree with the Secretary that the Commission should not discuss final clauses; the Commission had done so in the past in connexion with other drafts and could usefully do so in the future. However, in view of the lack of time, he was prepared to withdraw article 60, as far as the current session of the Commission was concerned, on the understanding that the Commission would reconsider the question in the light of governments' comments.

38. Mr. AGO thanked the Special Rapporteur for withdrawing article 60 and said that he agreed with him that the Commission could do useful work in connexion with final clauses by making suggestions also regarding such clauses.

39. As to the point covered by article 60, he agreed with Mr. Tunkin that it was desirable to have a separate chapter on honorary consuls and suggested that the purpose of article 60 would be much better served by including in that chapter an article stating that States remained completely

free both not to make use of honorary consuls and not to receive such consuls. A provision of that kind would give those States which either did not send, or did not receive, honorary consuls the necessary safeguards without the difficulties involved in the system of article 60 or, in general, in the system of reservations.

40. Mr. YOKOTA said that the question whether the draft should or should not contain a separate chapter on the subject of honorary consuls had not yet been decided. The general structure of the draft and the placing of certain articles had been referred to the Drafting Committee. It was only if the Drafting Committee decided that there should be a separate chapter on honorary consuls that the issue of including an article along the lines of article 60 would arise. On that understanding he would agree to the Commission's deferring consideration of article 60.

41. Mr. BARTOŠ supported the suggestion made by Mr. Ago for a special article which would have the effect of fully safeguarding the position of States which either did not wish to send honorary consuls or did not wish to receive them. The formula suggested by Mr. Ago would fully serve the purpose intended in article 60 without any departure from the general rules laid down in the draft articles.

42. He added that the question was an important one which should be decided by the Commission. Therefore, subject to drafting, he supported the suggestion made by Mr. Ago, which would have the effect of incorporating in the draft a tacit reservation clause.

43. The CHAIRMAN said that the withdrawal of article 60 at that stage by the Special Rapporteur brought to an end the discussion on the subject. He therefore took it that the Commission agreed that no further decision was necessary and that all other points raised in connexion with the discussion of article 60 would be noted for the consideration of the Drafting Committee.

It was so agreed.

44. Mr. MATINE-DAFTARY pointed out to Mr. François that he had not discussed the question of reservations but had merely observed in passing that sovereign States considered themselves entitled to exercise the right to make reservations. The topic of reservations to multilateral conventions had been referred to the Commission by General Assembly resolution 478 (V) and would be studied thoroughly later.

45. He had been the first to suggest that the provisions relating to honorary consuls should be grouped together in a separate chapter of the draft, and hoped that that suggestion would be given some thought by the Drafting Committee.

ADDITIONAL ARTICLE (*Representation of nationals before the authorities of the receiving State*)

46. The CHAIRMAN invited the Commission to consider the additional article proposed by the Special Rapporteur in the following terms :

“The consul shall have the right to appear, without producing a power of attorney, before the courts and other authorities of the receiving State for the purpose of representing nationals and bodies corporate of the sending State that owing to their absence or for any other reason are unable to defend their rights and interests in due time. This right shall continue to be exercisable by the consul until the persons or bodies in question have appointed an attorney or have themselves assumed the defence of their rights and interests.

47. Mr. ŽOUREK, Special Rapporteur, explained that he was proposing the additional article because it was most desirable that a multilateral convention should confirm the consul's right *ex officio* to represent the nationals of the sending State who were unable to defend their rights and interests in person before the judicial and administrative authorities of the receiving State. That prerogative was indispensable to the exercise of consular functions, one of which was the function of protecting and defending the rights and interests of the nationals of the sending State, including those of bodies corporate having the nationality of that State. It was hard to visualize how the consul could discharge that function if he were not entitled to address inquiries to the courts and administrative authorities concerning cases affecting his nationals, to communicate information and proposals tending to safeguard the rights of nationals of the sending State and, if necessary, to arrange for the representation of those nationals in court. It would be useful to receive the comments of governments on the provision, which might perhaps be inserted immediately after article 4 (*Consular functions*).

48. Mr. BARTOŠ said it was certainly a rule of customary law that consuls had the right to represent nationals of the sending State; express provisions to that effect occurred in a number of consular conventions notably those concluded by the United States with other countries.

49. The existence of the right was recognized even in the absence of any specific treaty provision, and he therefore supported the inclusion of the article proposed by the Special Rapporteur.

50. Mr. VERDROSS considered that the new article would represent a great step forward though he doubted whether there was such a general rule of law already in existence. Certainly it was important for the Commission to express a view on the matter.

51. However, he had some criticism to offer of the way in which the article was drafted. First, he did not believe that the French expression “*pleins pouvoirs*” was appropriate in the context. Secondly he considered that the second sentence should be omitted, for it might be interpreted to imply that once the persons or bodies in question had assumed the defence of their rights and interests the consul was no longer entitled to give assistance: that was manifestly not so.

52. Mr. SANDSTRÖM said that a provision of

the kind proposed might have some value but it could also have undesirable results. If it was included certain safeguards would have to be introduced, for example to protect persons from having their rights and interests defended by a consul who was not qualified to act in that capacity.

53. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Sandström, said that a consul would in most instances entrust the actual conduct of a case to a lawyer. It was undoubtedly better to ensure that the rights and interests of absent persons were protected — even if there was the element of risk which Mr. Sandström had mentioned — than that nothing at all should be done.

54. Referring to Mr. Verdross's remarks he said that the expression “*pleins pouvoirs*” appeared in certain consular conventions; still, he was willing to consider alternative wording. So far as Mr. Verdross's second suggestion was concerned, he said he would be unwilling to omit the second sentence, for it indicated when the right exercised by virtue of the provision contained in the first sentence came to an end. The right to protect interests of nationals of the sending State conferred by the article was a strictly limited one.

55. Mr. BARTOŠ pointed out that the matters which were apparently causing Mr. Sandström concern were regulated by domestic law. For example, according to the consular regulations of Yugoslavia, if the consul or vice-consul at any post was not a qualified lawyer, a lawyer of the receiving State was consulted in any particular case.

56. Sir Gerald FITZMAURICE endorsed the principle embodied in the additional article but considered that the text would have to be modified. If the text were amended the kind of objection raised by Mr. Sandström could be easily overcome. For example it could be made clear that representation in court was usually entrusted to a lawyer. It was the consul *ex officio* who represented nationals and bodies corporate of the sending State as an agent.

57. Mr. MATINE-DAFTARY expressed doubts about the practical utility of the article in its present form which was too elliptical and left many questions unanswered. It did not specify the nature of representation by a consul, nor whether a person would be bound by the action taken by the consul vis-à-vis the authorities of the receiving State on his behalf in the same way as he would be bound by the action of a person holding a power of attorney. It did not explain whether a person represented by a consul would lose the rights usually accorded to absent parties by most codes of procedure. Lastly, it failed to take account of the fact that in some countries only a member of the bar could appear before the courts. In view of those serious omissions he considered that the article should either be deleted or be drafted in far greater detail.

58. Mr. ERIM shared Mr. Sandström's doubts about the additional article. Moreover, it happened

that persons living abroad were not on particularly good terms with the authorities of their own country. In the Commission of Human Rights of the Council of Europe he had had occasion to examine complaints from persons who considered that their interests had not been adequately defended by agents of their own State.

59. He did not find the Special Rapporteur's wording particularly satisfactory. The French word "représenter" was so broad that it might cover every aspect of legal proceedings and could result in consuls exceeding their competence. The expression "pleins pouvoirs" was also too broad. Finally, the expression "bodies corporate" needed careful definition. Did the Special Rapporteur mean it to refer only to companies in which the government of the sending State was the majority shareholder?

60. He added that some allowance should be made for the possibility that some persons or bodies corporate did not wish their interests to be defended by a consul.

61. Mr. JIMÉNEZ DE ARÉCHAGA said that the principle stated in the additional article would be totally unacceptable to many countries, particularly in Latin America. In countries where there was a large foreign population that enjoyed complete equality in civil law with the nationals of the receiving State, such a provision would be discriminatory in effect. In cases where the civil code was modelled on the Code Napoléon and where, consequently, the rights and interests of absentees were safeguarded, such a provision would confer special advantages on foreigners. The words "or for any other reason" in the first sentence of the additional article greatly extended the scope of the right of representation by consuls and might even lead to something in the nature of a system of capitulations.

62. Such a controversial function did not form part of the whole scheme envisaged in article 4, and he thought that the purpose which supporters of the additional article had in mind was already covered in paragraph 1 of that article.

63. Mr. SANDSTRÖM said that the kind of safeguard which should necessarily accompany a rule of the kind envisaged in the additional article was that a consul could represent a national or body corporate of the sending State if, for example, that national or body could not appear before the court of the receiving State within the time limit specified. In his opinion, the consul was not entitled to exercise the broad powers which the additional article, as drafted, purported to confer.

64. With the proper safeguards a provision of that kind might fulfil a useful purpose.

65. Mr. VERDROSS agreed with the Special Rapporteur that the right of representation differed from the right of consuls to protect nationals of the sending State, but it was necessary to indicate in the second sentence that after the person or corporate bodies in question had assumed the defence of their own rights and interests the

consul's right to protect his nationals should not lapse.

66. Mr. FRANÇOIS questioned the utility of the additional article and agreed with Mr. Erim that it might have grave disadvantages. For example there was a great deal of uncertainty about the nationality of bodies corporate, and he doubted whether mere drafting changes could make the article acceptable. He was therefore inclined to oppose the article.

The meeting rose at 1 p.m.

564th MEETING

Thursday, 16 June 1960, at 3.30 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)

ADDITIONAL ARTICLE (*Representation of nationals before the authorities of the receiving State*) (continued)

1. Mr. ŽOUREK, Special Rapporteur, said he wished to reply to some of the criticisms concerning his proposed additional article (for the text of the draft article, see 563rd meeting, paragraph 46). It had been said (*ibid.*, paragraph 58) that the article should make allowance for the case where nationals resident abroad were on bad terms with the government of the sending State. In his opinion such special cases could hardly be provided for in the article itself, though they might be mentioned in the commentary. In any event, the persons referred to might eventually, as was contemplated in the second sentence of the article, themselves assume the defence of their rights and interests, since the consul's action in the matter was provisional.

2. With regard to Mr. Erim's objection to the use of the word *représenter* (*ibid.*, paragraph 59), he pointed out that the consul's power of representation would be limited to urgent measures indispensable for the protection of the rights and interests of absent nationals. In practice, the consul would only obtain information concerning the court case and appoint a lawyer until the persons or bodies in question had themselves assumed the defence of their rights and interests. The consul would not of course personally undertake the defence of the person concerned in court, for only rarely was a consul also a lawyer acquainted with the law of the receiving State.

3. He did not think that Mr. François's objec-

tion (*ibid.*, paragraph 66) that the nationality of bodies corporate was often uncertain affected the validity of the principle embodied in the additional article. The Commission had already decided that one of the functions of a consul was to protect bodies corporate of the sending State. The question of nationality was certainly not more difficult in the case of companies than in the case he had mentioned. On the contrary, in practice the question was much less important in the case of bodies corporate. In the first place, the court on its own initiative might rule upon the nationality of the body corporate concerned, and, secondly, it should be borne in mind that the other party in the case would be particularly anxious to ensure that the foreign consul undertook the protection of bodies corporate of the sending State only.

4. To those who argued that the provision related to a specific case and that its subject-matter was covered by article 4 (*Consular functions*), he pointed out that the Commission had decided to include special articles on matters covered by that article when the importance of the subject matter seemed to warrant such a procedure. He agreed with Mr. Bartoš that there was nothing revolutionary in such a clause and thought that the fears expressed by Mr. Jiménez de Aréchaga (*ibid.*, paragraph 61) were exaggerated. The law of all countries provided for the representation in court of absent parties; the article stated simply that an absent party could be represented, for the purpose of the defence of that party's rights and interests, by someone appointed by the consul. Of course, many special cases were conceivable, but he thought that the article should merely state the general principle. He would be prepared to amend the text with the help of the Drafting Committee and to add a full explanation in the commentary.

5. In reply to Mr. Verdross's objections (*ibid.*, paragraph 51), he said that the second sentence might be so drafted as to provide that the consul's provisional powers would terminate when the persons or bodies concerned had appointed an attorney or had themselves assumed the defence of their rights and interests. Such a provision should not of course be held to mean that a consul would thereupon lose his powers of protection under article 4; but that point could easily be dealt with in the commentary.

6. It was self-evident that the consul could exercise his powers under the additional article in those cases only which came to his knowledge. The manner whereby that information reached him would obviously vary: the national concerned might communicate with him, or the court might approach him in matters relating to an inheritance, for example; or to the appointment of a guardian for a minor.

7. In his opinion, the basic principle could not be contested; if the Commission did not uphold the principle, it would in effect be destroying the possibility of consular protection in many important cases. The Commission had specially

laid down that the receiving State had a duty to notify the consul of certain events affecting matters of succession, guardianship and trusteeship and shipwreck. There might be other such cases where emergency intervention by the consul might be necessary, and if only for that reason a clause recognizing the consul's right to represent absent nationals was indispensable.

8. Mr. GARCÍA AMADOR said that, on first reading the additional article, he had formed a somewhat unfavourable opinion and had thought that the provision was not altogether appropriate in the draft. The debate had shown him, however, that the dangers he had in mind were exaggerated and that the article was not redundant, as some members seemed to think. He would have no objection to the insertion of such a clause, provided that its form was suitably modified by the Drafting Committee.

9. Mr. EDMONDS said he understood the Special Rapporteur's purpose in proposing the additional article; but the provision as it stood would give rise to many difficulties. Courts in the United States usually allowed consuls to appear on behalf of an absent party to litigation, but confined that permission to the narrow field where the rights of the person concerned would otherwise be extinguished by lapse of time. The article, however, referred to authorities other than courts; and in his country there were hundreds of administrative bodies having judicial power to which individuals and bodies corporate were amenable. The article therefore conferred on the consul what amounted to the rights of an attorney, and the national concerned might, owing to the ignorance or the lack of direction of the consul, be placed in a much worse position than he would be in without such representation.

10. If the article were redrafted so as to limit the consul's powers of representation to ensuring that the national concerned was not deprived of his status or other right by the lapse of time, the article might be acceptable. The essential point, however, was to ensure that the rights of the consul or of the person appointed by him should not be unduly extensive.

11. Mr. AMADO said he had been struck by the disproportion between the relatively modest purpose of the additional article and the broad powers which it sought to confer upon consuls for achieving that purpose. The key phrase of the article seemed to him to be the words "in due time". And yet for that comparatively insignificant emergency action, a consul was to be given by a multilateral instrument what amounted to a statutory proxy (*mandat légal*).

12. He could not accept such an extension of the framework of article 4 for a simple emergency measure. While he had every confidence in the Drafting Committee and in the probity of the Special Rapporteur, he had considerable doubts concerning the provision in its present form.

13. Mr. AGO said that, while he shared some

of the preoccupations that had been voiced by members; he did not oppose the article in principle and thought that a radical revision by the Drafting Committee would probably allay the fears expressed. For example, the case of persons who did not wish to be represented by the consul could be covered by a clause providing that the article would apply only in the absence of objection by the national concerned.

14. Some misunderstanding seemed to prevail concerning the exact position of the consul in the matter. The consul's function would be that of representation under civil law, and not of representation under procedural law, since a consul could not have the position of an attorney in such cases. In that connexion, he thought that the second sentence should be amended, since the right should continue to be exercisable by the consul for so long only as the persons or bodies in question wished it to continue; such continuance could not be made contingent on the appointment of an attorney by the persons or bodies concerned.

15. Finally, he agreed with Mr. Edmonds that the power of representation should not be unlimited. That point might be covered by providing that the right should be subject to the limitations of municipal law.

16. The CHAIRMAN, speaking as a member of the Commission, considered that the many amendments that had been suggested to the original draft touched on matters of substance. He could not express his views on a hypothetical text, and would confine his remarks to the additional article as proposed by the Special Rapporteur.

17. He agreed with members who had pointed out that the effect of the article would be to confer on the consul a right — distinct from the general right to protect nationals of the sending State — which would be substituted for the will of the national concerned. He thought that such a course was inadmissible, and even if the Commission approved the article, the question would arise whether the person or body corporate concerned would have a remedy against action taken *ex officio* by the consul on the basis of the article. He would point out to the Special Rapporteur that an absent person who was aware that his rights and interests required protection might agree that the consul should act on his behalf; in that event the consul would not be acting under the article, but under the powers given to him by that person.

18. He also doubted whether the consul could take action *ex officio* in all cases without distinction. As Mr. Jiménez de Aréchaga had pointed out, the municipal law on representation *in absentia* varied from country to country. Moreover, the absence might be voluntary and even deliberate in some cases. Mr. Erim had raised the extremely pertinent case of political refugees or asylees, who might find themselves in the position to which the article referred, but would not wish the consul of their country to act

on their behalf. It was obviously difficult to provide for all the specific cases that might arise. 19. Further doubts were raised by the use of the phrase "shall have the right". Was a consul obliged to take the appropriate action whenever a case came to his knowledge, or could he use his discretion in performing his functions under the article?

20. The great variety of bodies corporate would also give rise to many difficulties. Some were wholly or partly State owned, others were entirely private.

21. He agreed with Mr. Edmonds that the words "and other authorities" made the provision unduly far-reaching. It would be necessary to explain exactly what other authorities were meant and what their jurisdiction covered; it might well be that the authorities concerned would deal with cases quite other than those in which lapse of time was material. Moreover, the words "or for any other reason" opened an unduly wide field for the consul's discretion.

22. To meet all the objections and doubts of members, the Drafting Committee and the Special Rapporteur would have to amend the text considerably and probably to attach a lengthy commentary to it. If all the points he had mentioned were covered, he would find the article acceptable, but he would not be able to make up his mind until he had seen a redraft.

23. Mr. HSU shared the many doubts that had been expressed concerning the desirability of including the additional article in its present form. If limited to cases of inheritance the article would be useful. As it stood, however, the provision, although intended to benefit the nationals of the sending States, might be turned against their interests.

24. Mr. BARTOŠ said he was in favour of the additional article, but thought that the exercise of the right in question should be subject to certain conditions and limitations. In that connexion, he thought the practice evolved by this country in its consular relations with a number of American States might be of interest to the Commission and the Drafting Committee. One of those limitations concerned cases where the local law required a special power of attorney for the performance of certain acts. In those cases, the presumption of agency rested in the consul operated *ipso jure (ex contractu)*, by virtue of the international treaty, so far as "mesures conservatoires" were concerned. On the other hand, in the case of so-called special acts (e.g., acceptance of a succession to an estate), if the interested party was an individual, he would sign a special declaration empowering the consul to act on his behalf, while a body corporate would execute a power of attorney in favour of the consul. Another limitation was that the nationals concerned, whether individuals or bodies corporate, might at any time appoint a person other than the consul to represent them, or themselves assume the defence of their rights

and interests. Thirdly, they were free at any time to revoke a consul's power to act on their behalf, whether that power had been conferred by treaty or by the principals themselves. Fourthly, provision was made for suitable guarantees to cover the liability of the sending State for acts performed by its consul in the exercise of the right of representation. Lastly, the government of the sending State gave a letter of guarantee to cover its liability in respect of sums entrusted to Yugoslav consuls in the United States on behalf of the estate of emigrés. In that way, if the beneficiaries in Yugoslavia did not receive full payment at the most favourable rate of exchange, those arrangements enabled the payor to obtain the reimbursement in dollars. That arrangement provided a satisfactory method of protecting the interests of Yugoslav emigrés in the United States and their successors.

25. The conditions and limitations he had mentioned were in his opinion fundamental and might be used by the Drafting Committee as a basis for the article. In any case, the clause should not be too brief or simple, and should refer to "mesures conservatoires".

26. Mr. SANDSTRÖM said that a provision on the right of a consul to represent his nationals without producing a power of attorney was not unknown in bilateral conventions. Provision for such representation was made in some consular conventions in matters of inheritance. It was in connexion with those matters that the representation was particularly useful because the heirs in the sending State would often be unaware of their rights under the laws of the country where the deceased had left property.

27. He could not support Mr. Ago's suggestion for the deletion of the second sentence of the article. It was necessary to make provision for the cessation of the consul's powers of representation when his national subsequently became legally represented in the receiving State. Such provision was made, for example, in the second sentence of article 22, paragraph 1, of the 1952 Consular Convention between the United Kingdom and Sweden.

28. For those reasons, he considered that the proposed article could serve a useful purpose but that some safeguards had to be provided in so far as it applied to matters other than inheritance.

29. Mr. ERIM said that the object of the additional article was sound but that the discussion had shown that its provisions gave rise to insurmountable difficulties. The discussion had also shown that no generally accepted principle had emerged from the practice of the different States in the matter.

30. For those reasons, he proposed that the article be dropped from the draft and that the Commission should in that way leave States free to deal with its subject-matter by bilateral agreement.

31. Mr. ŽOUREK, Special Rapporteur, said that under article 4, paragraph 1 (a), of the draft

it was part of the functions of a consul to protect the interests of the nationals of the sending State. In order to protect those interests, and of course the rights of such nationals, it was essential that the consul should have the right to represent them and to take all necessary steps to safeguard their interests without awaiting the receipt of a formal power of attorney. Otherwise, the consul would not be able to protect the interests of one of his nationals until that national was in a position to defend them himself.

32. The debate had been unnecessarily complicated by references to exceptional situations. It would be dangerous to derive a general rule from exceptional cases and, with specific reference to the question of asylees, he said that it was extremely improbable that a consulate would take action to protect the interests of a person who had broken all ties with his country of origin. Such examples unnecessarily complicated the discussion of the particular issue.

33. In reply to the question concerning the expression "other authorities of the receiving State", he said the expression would cover, for example, a patents registration office and notaries public, who in some countries dealt with inheritance questions.

34. With regard to the suggestions for the amendment or even the deletion of the second sentence, he said that the sentence was indispensable, though its actual wording might, if necessary, be revised by the Drafting Committee. It was essential to specify when the right of representation of the consul would cease.

35. Mr. AGO said that after reflection he had come to the conclusion that the subject-matter of the additional article was exceedingly complicated. A sending State might not wish its consul to act in representation of its nationals, and particularly of bodies corporate, because a mistake made by a consul in regard to what might be very substantial interests could involve the State's liability towards the parties whose interests had been injured by ill-advised steps on the part of the consul.

36. The law of many countries made a special form of recourse (opposition) available to a person against whom a decision had been obtained in his absence, so as to enable that person to secure a retrial of the case. The extremely delicate question would then arise whether action taken by a consul without any power of attorney, but purporting to be taken on behalf of the absent defendant concerned, would prevent that defendant from exercising his right to secure a retrial of the case.

37. He accordingly suggested that the Commission should not take any decision on the additional article at that stage and that the Drafting Committee should prepare a new draft.

38. Mr. YOKOTA said that, in view of the many doubts which had been expressed, it was preferable that the Commission should first decide whether its draft should contain an article con-

cerning the representation of nationals before the authorities of the receiving State. For his part, he considered that the draft should not contain such an article.

39. Mr. TUNKIN suggested that the Commission should refrain from taking any decision on the additional article, but should ask governments for their opinions without making any recommendation whatsoever.

40. He said there were a number of questions, of which the one under discussion was an example, on which it would be desirable to ask governments for information and comments without actually putting any proposal to them. The Commission might append to the draft articles a list of specific questions on which it desired information and comments from governments. The question of honorary consuls, on which the Commission possessed little information, could well be one of them. It would be of great assistance to the Commission, when preparing the final draft, to have more factual information on the subject.

41. Mr. JIMÉNEZ DE ARÉCHAGA said that the proposed additional article represented a complete innovation. There was no precedent for it even in bilateral conventions. Article 22, paragraph 1, of the Consular Convention between the United Kingdom and Sweden limited the benefit of its provisions to nationals of the sending State who were not resident in the territory of the receiving State. He could not, therefore, approve of the proposed additional article, even if its operation were limited to "mesures conservatoires".

42. Under the legislation of most countries, the provisions of the Civil Code on limitation of actions by lapse of time usually contained a clause safeguarding the rights of absent persons, on the principle that time did not run against those who were unable to act in defence of their interests. The provisions of the proposed additional article might then operate to the detriment of the very persons whom it was meant to protect, because it might be held that time ran against them, since their consul was in a position to act for them.

43. For those reasons, he agreed with Mr. Erim's proposal that the proposed additional article be dropped. The subject-matter could be dealt with either by bilateral convention or by tacit agreement between the receiving State and the sending State, as a result of the operation of the principle embodied in article 4, paragraph 1. He also supported Mr. Tunkin's proposal that the Commission should request information from governments.

44. Mr. GARCÍA AMADOR urged the Commission to adopt Mr. Tunkin's proposal and to refrain from including an article on the subject in its draft; instead, it should ask governments for information.

45. Mr. ŽOUREK, Special Rapporteur, withdrew his proposal for an additional article, on

the understanding that its subject matter would be brought to the notice of governments in the commentary. On the basis of the observations of governments, the Commission would be in a position to take a decision.

46. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to the course proposed by the Special Rapporteur.

It was so agreed.

ARTICLE 55 (*Powers of honorary consuls*) (*resumed from the 551st meeting*)

47. The CHAIRMAN recalled that the Special Rapporteur's original proposal for article 55 (A/CN.4/L.86) had been discussed at some length at the 550th meeting (paragraphs 55 to 77) and at the 551st meeting (paragraphs 1 to 16). In the course of that discussion, some members had suggested that the draft should not include a provision on the powers of honorary consuls, but the Commission had decided to defer further discussion of article 55 until the Special Rapporteur had prepared a new draft.

48. Mr. ŽOUREK, Special Rapporteur, introduced his new draft article 55, in the following terms:

"1. The powers of honorary consuls shall be determined by the sending State within the limits of article 4 of this draft. In the absence of such delimitation honorary consuls shall be assumed to possess all the powers specified in the said article.

"2. In communicating the commissions of its honorary consuls or sending notice of their appointment to the State in whose territory they are to exercise their functions (article 10, paragraphs 2 and 3), the sending State shall inform the receiving State of the extent of the powers conferred upon the consuls in question."

49. The first sentence of paragraph 1 indicated that, as a general rule, the powers of honorary consuls were more limited than those of career consuls. It was necessary to give an indication of that kind, for otherwise the draft might give the erroneous impression that the powers of honorary consuls were the same as those of career consuls.

50. The vast majority of States gave only limited powers to honorary consuls. He did not know of any State, for example, which empowered its honorary consuls to issue passports. He quoted in that connexion article 9 of instruction No. 9 of 1954 of the Ministry of Foreign Affairs of Japan regulating the functions of honorary consuls-general and honorary consuls: that article stated that honorary consuls were not empowered to issue passports or grant visas and enumerated six other categories of matters, among them all those connected with shipping, in respect of which Japanese honorary consuls did not exercise consular functions.

51. The second sentence of paragraph 1 provided that, in the absence of any delimitation by the sending State, honorary consuls would be presumed to possess all the powers specified in article 4 of the draft. He had introduced that presumption in order to meet the desires of certain members of the Commission and to stress in the article itself that the sending State, if it so wished, could invest an honorary consul with full consular powers.

52. Paragraph 2 laid down the duty of the sending State to communicate particulars of the extent of the powers conferred upon its honorary consuls appointed to serve in the receiving State. The objection had been made that it had not been the practice in the past to communicate those particulars. He did not believe that the argument was a good one: the existence of an unsatisfactory state of affairs was not a valid reason for perpetuating it. It was certainly not a satisfactory state of affairs if the government of the receiving State did not know what were the powers of the honorary consuls present in its territory and was, consequently, unable to inform the authorities and nationals concerned what those powers were. The receiving State could not be expected to grant every facility to an honorary consul and at the same time be left in ignorance of the exact extent of his powers. It was in the obvious interest of both the receiving and the sending State that the powers should be specified, and particulars communicated to the receiving State, at the time of appointment.

53. It had also been said that the obligations specified in paragraph 2 would impose an undue burden on the sending State. He did not agree. The sending State would in any case have to prepare the consular commission, and it would not be too much to ask it to add some indication of the powers vested in the honorary consul.

54. For those reasons, he urged that, subject to drafting changes, a provision on the lines of paragraph 2 be retained in the draft so as to give governments an opportunity of commenting upon it. If the paragraph attracted criticism from governments, it could be dropped from the Commission's final draft.

55. Mr. FRANÇOIS, recalling that he had opposed the original text of article 55, regretted that he did not find the new version any more satisfactory. The Special Rapporteur seemed to exaggerate the extent to which the functions of honorary consuls were restricted. He had, for example, claimed that the issue of passports was a function which honorary consuls were not allowed to perform; but that argument did not materially substantiate his case, for even some career consuls were not empowered to issue passports.

56. If it was as necessary as the Special Rapporteur contended for the receiving State to know what powers were being conferred on a particular consular official, that requirement must surely also apply to career consuls.

57. Criticizing the new draft in detail, he said that

the principle stated in the first sentence was self-evident and the assumption made in the second sentence of paragraph 1 had no legal validity, since it could surely not be argued that if the powers of an honorary consul were not delimited he could exercise all the functions enumerated in article 4. In addition, that sentence conflicted with the terms of paragraph 2 under which the sending State was to communicate to the receiving State particulars of the extent of the powers conferred. If the Commission insisted on retaining paragraph 2, at least it should be limited in scope by the insertion of the words "at its request" after the words "receiving State".

58. If the article were not omitted altogether — and he would prefer it to be omitted — the first sentence in paragraph 1 might be retained as being harmless, though unnecessary, and paragraph 2 should be amended in the sense he had suggested.

59. Mr. YASSEEN asked whether the sending State would be under a duty to inform the receiving State if certain functions previously accorded were withdrawn from the competence of an honorary consul. It was conceivable, for example, that at a time of crisis, an honorary consul might be directed not to issue visas.

60. Mr. ŽOUREK, Special Rapporteur, said in reply to Mr. Yasseen that in order not to impose too heavy an obligation on the sending State, he had proposed that it should only inform the receiving State of the extent of the powers conferred at the time of communicating the consular commission or of sending notice of appointment.

61. In reply to Mr. François, he said he did not agree that the second sentence in paragraph 1 conflicted with paragraph 2. It was, after all, possible that the sending State might fail to comply with the requirement laid down in paragraph 2, in which event the receiving State had no means of obliging it to do so. He believed that there were cases where only a bare notification was given of the appointment of honorary consular officers.

62. He did not think Mr. François had been correct in stating that in some instances career consuls were not empowered to issue passports; presumably, career consuls could exercise all the functions listed in article 4. If the receiving State organized the division of work in the consulate in such a way that some particular consular official did not perform some particular consular function, the reason was quite different from that which caused States not to entrust certain functions to honorary consuls.

63. He was prepared to delete the second sentence in paragraph 1 and to accept Mr. François' amendment to paragraph 2. In any event the draft article was provisional and would be reconsidered in the light of observations of governments.

64. Sir Gerald FITZMAURICE said that he had been among those members who had opposed the original text of article 55, and he agreed with

Mr. François that the new version was still unacceptable. It was true that with some drafting changes paragraph 1 would be relatively innocuous; even so, it would not serve any useful purpose, for it was obvious that the powers of either career or honorary consuls were determined by the sending State. The only concern of the receiving State was that those powers should conform to international law. A stronger objection to paragraph 1 was that it wrongly implied that in the matter of the delimitation of powers honorary consuls were in a special position. But the functions of career consuls might also on occasions be subject to limitation.

65. Paragraph 2, even if amended in the sense suggested by Mr. François, would cause unnecessary inconvenience. The sending State might easily find that the functions of a particular consular post had to be modified to meet practical needs and there was no precedent whatever to justify imposing an obligation on the sending State to inform the receiving State of any such changes. He also thought that there was an inconsistency between the second sentence in paragraph 1 and paragraph 2.

66. Mr. SANDSTRÖM suggested that the objections raised by Mr. François, which he shared, might be overcome by re-drafting article 55. The new text might state the requirement contained in paragraph 2 and then stipulate that if no such communication was received the honorary consul should be regarded as possessing the same powers as a career consul.

67. Mr. AGO endorsed the views expressed by Mr. François and Sir Gerald Fitzmaurice and considered, in the light of those views, that it would probably be better to reject article 55. Article 4 already enumerated, though not exhaustively, the functions exercised by consuls, and it was commonly accepted that the sending State determined the competence of any particular consul, whether career or honorary. Accordingly, the statement in paragraph 1 was as true of career as of honorary consuls. The second sentence of paragraph 1 was open to the serious objection that if the powers of an honorary consul were not expressly delimited he might be assumed to have wider competence than a particular career consul whose powers were delimited.

68. He saw no reason for the requirement contained in paragraph 2.

69. Mr. ŽOUREK, Special Rapporteur, pointed out that the practice of States in regard to honorary consuls varied greatly and the position of such persons was not wholly covered by other articles in the draft. In some cases, honorary consuls had really purely honorary functions. There was some utility therefore in requiring the sending State to inform the receiving State of the functions of honorary consuls, though they might be few in number.

70. He could not agree that the question of the delimitation of powers was solely a matter for the

sending State, for those powers were exercised in the receiving State and there was therefore a two-sided relationship. There might be administrative reasons why the receiving State should know what the powers were so that it could address itself to the appropriate consulate in some particular matter. With the amendment suggested by Mr. François such a requirement would not be onerous, and in any case the provision could always be modified after the observations of governments had been received. It was true that the requirement could be regarded as a development of international law; if it met with strong criticism from governments it could be abandoned.

71. Mr. BARTOŠ considered that the requirement in paragraph 2 was not customary and might detract from the dignity of an honorary consul. If a particular consul was not competent, for example, to deal with applications for passports or visas the applications were usually passed on to the appropriate consulate: that was a purely internal matter regulated by the sending State. The receiving State could only intervene if an honorary consul exceeded the functions attributable to him under international law or violated the municipal law.

72. The CHAIRMAN invited the Commission to vote on Mr. François's suggestion that article 55 should be omitted.

The suggestion was adopted by 10 votes to 2, with 5 abstentions.

73. The CHAIRMAN announced that the Commission had now concluded its first reading of the draft on consular intercourse and immunities.

The meeting rose at 6.30 p.m.

565th MEETING

Friday, 17 June 1960, at 9.30 a.m.

Chairman: Mr. Luis PADILLA NERVO

Ad hoc diplomacy

(A/CN.4/129, A/CN.4/87, A/CN.4/L.88)

[Agenda item 5]

1. The CHAIRMAN invited the Commission to begin its discussion of item 5 of the agenda and asked Mr. Sandström, the Special Rapporteur on the subject, to introduce his report (A/CN.4/129).

2. Mr. SANDSTRÖM, Special Rapporteur, said that, in formulating rules on *ad hoc* diplomacy, the Commission would obviously have to refer constantly to the draft articles on diplomatic intercourse and immunities prepared at its tenth session¹ (the "1958 draft"). Accordingly, the

¹ *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9 (A/3859, chapter III).*

best method to follow was to determine the analogies and dissimilarities between special diplomatic missions and permanent diplomatic missions. The Commission could consider from that point of view which of the articles of the 1958 draft were applicable to *ad hoc* diplomacy. In general, the difference between the two lay in the fact that diplomatic missions properly so called were permanently established, whereas the topic of *ad hoc* diplomacy was concerned with more transitory institutions. The similarity, on the other hand, lay in the functions of the two types of mission, which were all diplomatic. He would suggest that the Commission should consider the 1958 draft article by article to see which provisions applied to *ad hoc* diplomacy.

3. Mr. PAL observed that the provisions on *ad hoc* diplomacy proposed by Mr. Jiménez de Aréchaga for insertion in the 1958 draft (A/CN.4/L.87) and his explanatory memorandum on that proposal (A/CN.4/L.88) amounted to an amendment of the Special Rapporteur's text. The main difference between those proposals and the Special Rapporteur's report lay in the fact that Mr. Jiménez de Aréchaga regarded all the articles of the 1958 draft as applicable to *ad hoc* diplomacy, while the Special Rapporteur made a number of exceptions. Before deciding on the method to be followed, therefore, the Commission might wish to hear an explanation of those proposed amendments.

4. Mr. JIMÉNEZ DE ARÉCHAGA explained that his proposals were not in fact amendments to the Special Rapporteur's text, but largely coincided with the latter's intentions. In submitting the proposals, he had been motivated by the need for rapid action, in order that the Commission might adopt a text in time for consideration by the General Assembly and subsequently by the plenipotentiary conference scheduled at Vienna for the spring of 1961.

5. He observed that the Special Rapporteur's proposals covered three forms of *ad hoc* diplomacy—namely, delegates to congresses and conferences, itinerant envoys and special missions. The Special Rapporteur himself suggested in his report (A/CN.4/129, paragraph 40) that the category of delegates to congresses and conferences should not be dealt with for the time being, and he (the speaker) agreed wholly with that view, as the Commission did not have the necessary time. Furthermore, he agreed with the Special Rapporteur (paragraph 28) that itinerant envoys might be regarded as persons carrying out a series of special missions for whom no special rules apart from those applicable to a special mission were needed. Accordingly, the Commission would only be concerned with the question of special missions.

6. The Special Rapporteur considered that all except twenty-five of the articles of the 1958 draft should be applicable to special missions; in his (the speaker's) own memorandum (A/CN.4/L.88), however, he had analysed the reasons why

those twenty-five articles should be applicable to such missions. The Special Rapporteur's reason for not making the articles in question applicable to special missions was not that they were incapable of being applied but that they were irrelevant to a special mission. He (the speaker) believed, however, that it might be undesirable to exclude special missions from the application of those provisions, for to do so might invite the inference that, in accordance with the principle *inclusio unius est exclusio alterius*, special missions might, for example under articles 10 (*Size of staff*) and 11 (*Offices away from the seat of the mission*), claim to have an unlimited staff or to open offices in any part of the territory of the receiving State (A/CN.4/L.88, paragraph 10). Moreover, in certain cases where the Special Rapporteur considered that some articles of the 1958 draft had no bearing on special missions, the articles might relate to such missions in a few specific cases, which it would be unwise to exclude.

7. In his opinion, all the articles of the 1958 draft were applicable to special missions and the Commission only needed to insert in that draft the three provisions he had set forth in his proposal (A/CN.4/L.87). The object of the first was to include a definition of "special mission" in article 1; the second would provide in article 41 for the special method of termination of the special mission; and under the third, the provisions of the 1958 draft would be made fully applicable to special missions. He had based his proposals, and the method of carrying them into effect, on the Havana Convention regarding Diplomatic Officers which made provision for special missions in articles 2, 9 and 25. Those were the minimum provisions on *ad hoc* diplomacy that should be included in the 1958 draft, which would be incomplete without them.

8. Mr. TUNKIN said, that though he had no objections to the Special Rapporteur's text, Mr. Jiménez de Aréchaga's proposals might greatly simplify the Commission's work. He could accept the proposition that the whole 1958 draft was in principle applicable to *ad hoc* diplomacy, since from the point of view of functions and representative character special missions were comparable to permanent missions, but believed that the Commission might consider whether any of those articles did not apply to *ad hoc* diplomacy.

9. He also agreed with the Special Rapporteur and Mr. Jiménez de Aréchaga that it was unnecessary to distinguish between itinerant envoys and special missions, because an itinerant envoy was merely conducting special missions in several countries. Furthermore, the term "itinerant envoy" was not generally accepted by all countries. The Commission could save much time if it confined its attention to special missions.

10. Finally, he agreed that the Commission should not in its draft deal with the position of delegates to congresses and conferences. So broad a topic deserved special study and, possibly, a special convention. Moreover, many conventions, on the

subject were already in force, and if the Commission produced a new text the earlier conventions might have to be reconsidered, possibly by the General Assembly, since many such instruments had been concluded under the auspices of the United Nations. He considered that the Commission should decide forthwith the question whether or not it would deal with delegates to conferences at the present stage: for his part, he did not believe that it would be wise to discuss the subject of conferences and congresses.

11. Mr. AGO agreed with previous speakers that it would be undesirable for the Commission to deal with the question of delegates to congresses and conferences under the heading of *ad hoc* diplomacy. The subject was largely covered by existing multilateral conventions, and particularly by the Convention of 1946 on the Privileges and Immunities of the United Nations² and the Convention of 1947 on the Privileges and Immunities of the Specialized Agencies.³ European international organizations had adopted similar conventions. Accordingly, the field which remained to be covered concerning the position of such delegates was very small and the question was by no means urgent.

12. Mr. LIANG, Secretary to the Commission, supported Mr. Jiménez de Aréchaga's proposals, to the effect that the Commission's work on *ad hoc* diplomacy should be confined to special missions, in order that the subject might be submitted to the General Assembly in time for forwarding the draft to the Vienna conference.

13. He also agreed with Mr. Ago that the subject of the privileges and immunities of delegates to congresses and conferences was already covered by a wide network of agreements. Special agreements were entered into with the governments of countries where conferences were regularly held; thus, there was an agreement between United Nations and the Swiss Government on conferences held at Geneva. In 1947, the United Nations had entered into an agreement with the United States of America in respect of headquarters,⁴ although the United States had not yet acceded to the Convention on Privileges and Immunities adopted by the General Assembly in February 1946. When United Nations conferences were held away from Headquarters, special agreements, such as those concluded with the French Government in 1948 and 1951,⁵ were entered into with the governments concerned. Full information on the matter would be given in a volume concerning the relations of international organizations with States to be published in 1960 in the *Legislative Series* in two parts, one referring to the United Nations and the other to specialized agencies. The Commission would undoubtedly take up the question when it considered the topic of relations between States

and inter-governmental organizations under General Assembly resolution 1289 (XIII); meanwhile, there was no need to consider the position of delegates to congresses and conferences in connexion with *ad hoc* diplomacy.

14. Mr. HSU considered that the Commission and the General Assembly owed a great debt to the Special Rapporteur for his thorough examination of *ad hoc* diplomacy. As was pointed out in paragraph 1 of the Special Rapporteur's report (A/CN.4./129), the situation had been by no means clear when the Special Rapporteur had undertaken the work; with the addition of Mr. Jiménez de Aréchaga's proposals, however, all that the Commission would have to do would be to include some references to special missions in the 1958 draft, on the understanding that itinerant envoys were covered by the expression "special mission". Members might simply refer to any of the articles of the 1958 draft which might seem to them not to be applicable to special missions.

15. Sir Gerald FITZMAURICE congratulated the Special Rapporteur on his report, which provided a useful analysis of the subject and guided the discussion into the right channels. Mr. Jiménez de Aréchaga's proposals did not differ from the Special Rapporteur's in substance, but merely provided for a different method, which, if adopted, would have two great advantages. In the first place, it would enable the Commission to proceed much more rapidly and to complete the draft during the current session; secondly, it would enable the 1961 conference to deal with the subject of special missions virtually as a part of the 1958 draft.

16. He would, however, suggest a slight drafting amendment to the third of Mr. Jiménez de Aréchaga's proposals (A/CN.4./L.87), in order to render the proposed article 43*a* somewhat more flexible. The last phrase might be altered to read "the provisions of this convention shall apply, *mutatis mutandis*, to such mission, in so far as they may be applicable to the given case". That phrase would indicate that the provisions of the convention would not apply literally to all special missions; a large number of the articles would be fully applicable to special missions, but it would be wise to insert the additional phrase to give some flexibility. Of course, the Commission might find that a few articles would in no case apply to special missions; in that case, it might modify the proposed article 43*a* to read "... the provisions of this convention (with the exception of articles . . .) shall apply . . .".

17. He quite agreed that the Commission should not at that stage discuss the question of delegates to international congresses and conferences and similar bodies. Mr. Ago had rightly pointed out that the great majority of conferences were covered by agreements in privileges and immunities concluded under the auspices of international organizations. The essential element of such agreements was, in his opinion, immunity from personal arrest and detention, which was more important

² United Nations Treaty Series, vol. 1, p. 15.

³ *Ibid.*, vol. 33, p. 261.

⁴ *Ibid.*, vol. 11, p. 11.

⁵ *Ibid.*, vol. 122, p. 191.

than immunity from jurisdiction, because its purpose was to prevent a delegate from being hindered in the performance of his functions during the conference. Of course, a few important conferences were not held under the auspices of any international organization, and a certain area still remained to be covered by general rules, but the matter was not so urgent as to require immediate consideration.

18. Mr. GARCÍA AMADOR thought that the Commission was in a position to decide forthwith not to discuss the position of delegates to congresses and conferences. It would thus be able to avoid discussion on any matter other than the privileges and immunities of special missions.

19. Mr. YOKOTA agreed that the question of delegates to congresses and conferences should not be considered at the current session and also that there was no substantial difference between itinerant envoys and special missions. Furthermore, because in his opinion most of the provisions of the 1958 draft were applicable to special missions, he could accept Mr. Jiménez de Aréchaga's proposals. The only point that he wished to raise concerned the functions of special missions. If all the articles of the 1958 draft were regarded as applicable to special missions, presumably article 3, which enumerated the functions of the diplomatic mission, would be treated as so applicable. The implication would be that a special mission would have the function, under paragraph (b), of protecting in the receiving State the interests of the sending State and of its nationals, and under paragraph (e), that of promoting friendly relations between the sending State and the receiving State and developing their economic, cultural and scientific relations. In order to make it absolutely clear that the activities of a special mission should be limited to the scope of its assignment, it might be wise to add a provision reading "the functions of the special mission shall be confined to the assignment for which it has been sent".

20. Mr. SANDSTRÖM, Special Rapporteur, said that he himself had doubted the advisability of dealing with the privileges and immunities of delegates to congresses and conferences at the current session, and had expressed those doubts in his report. He would therefore have no objection to following the course on which the Commission seemed to be agreed. He had also in his report assimilated itinerant envoys to special missions and would not object if the idea of studying that category of envoys separately were dropped. Nevertheless, itinerant envoys were referred to in his terms of reference, and it might therefore be advisable to define those envoys in the article on definitions and to state explicitly that they should be placed on a par with special mission.

21. He agreed that the procedure proposed by Mr. Jiménez de Aréchaga would greatly simplify the Commission's work, and he hoped that Sir Gerald Fitzmaurice's amendment would be acceptable. The Commission could then proceed to

consider which of the articles of the diplomatic draft were applicable to special missions; he was sure that that task would not take up much time.

22. Mr. PAL hoped that Mr. Jiménez de Aréchaga would accept Sir Gerald Fitzmaurice's amendment, since the Special Rapporteur obviously considered that twenty-five of the articles of the 1958 draft did not apply to *ad hoc* diplomacy. The Commission's best course would be to scrutinize and decide whether any of the twenty-five articles concerned were applicable to special missions; it could thus avoid going through the whole of the 1958 draft. He then mentioned the articles to be examined in that way.

23. Mr. FRANÇOIS paid a tribute to the Special Rapporteur for his valuable work and agreed that the question of the privileges and immunities of delegates to congress and conferences should be left aside, since the majority of such conferences were regulated by existing conventions.

24. He could not, however, support Sir Gerald Fitzmaurice's amendment to Mr. Jiménez de Aréchaga's third provision. In his opinion, it would be extremely dangerous to insert the phrase "in so far as they may be applicable to the given case", since the article would then lose all its value. He hoped that Sir Gerald would reconsider his amendment.

25. The CHAIRMAN suggested that the Commission should decide not to consider the privileges and immunities of delegates to congresses and conferences at the current session.

It was so agreed.

26. The CHAIRMAN suggested that the Commission should decide not to distinguish between itinerant envoys and special missions, but should follow the Special Rapporteur's suggestion and add a passage concerning itinerant envoys in the article on definitions, specifying that they were assimilated to special missions.

It was so agreed.

27. The CHAIRMAN drew attention to the suggestion made by the Special Rapporteur and Mr. Pal that the twenty-five articles of the 1958 draft which in the Special Rapporteur's opinion were not applicable to *ad hoc* diplomacy should be considered *seriatim* from the point of view of their applicability to special missions. The Commission's consideration of the articles might be followed by a discussion on the wording of Mr. Jiménez de Aréchaga's proposed article 43 *a*, and Sir Gerald Fitzmaurice's amendment might then be examined in the light of the remarks of Mr. François.

28. Mr. GARCÍA AMADOR thought that the Commission could gain time by following Mr. Hsu's suggestion that members should refer only to the articles of the 1958 draft which in their opinion did not apply to special missions.

29. Mr. YOKOTA thought that it would not be advisable simply to decide whether certain articles of the 1958 draft were applicable to special mis-

sions, since some of them might be applicable with certain modifications. The method outlined by the Chairman, would however, be acceptable to him on that understanding.

30. The CHAIRMAN pointed out to Mr. García Amador that there was no contradiction between the proposed method and Mr. Hsu's suggestion, since the Special Rapporteur had raised doubts concerning the applicability of twenty-five articles to special missions.

31. He suggested that the Commission should decide to follow the procedure he had outlined.

It was so agreed.

32. Mr. SANDSTRÖM, Special Rapporteur, said that article 1 (*Definitions*) of the diplomatic draft could apply to special missions provided, of course, that a definition of those missions was added. He had proposed such a definition in sub-paragraph (b) of alternative II of his article 1 (A/CN.4/129, p. 20). That definition would, of course, have to be amended so as to cover itinerant envoys.

33. Mr. JIMÉNEZ DE ARÉCHAGA introduced his proposal for a new sub-paragraph (*e bis*) (A/CN.4/L.87) to be inserted in article 1. In substance, his definition coincided with that proposed by the Special Rapporteur.

34. Accordingly, he proposed that both texts should be referred to the Drafting Committee with instructions to prepare an acceptable definition of special missions.

35. Mr. TUNKIN stressed that it was desirable to deal with special missions in a distinct set of provisions, commencing with a definition of the special mission and including those embodied in article 43 *a* as proposed by Mr. Jiménez de Aréchaga.

36. In that manner, article 1 would be left unamended and would deal only with permanent missions.

37. Mr. PAL said that, although article 1 might have to be supplemented with a definition of special missions, it could be said to apply to those missions for the simple reason that the articles admittedly applicable would be controlled by those definitions. For his part, he thought that article 1 should remain unamended and that the definition of special missions should be embodied in a separate provision. It would be dangerous now to amend any of the articles of the 1958 draft so as to make them suitable for the present purpose. If occasion arose, it would be better to make separate provision for *ad hoc* purposes.

38. Mr. YOKOTA supported the method of dealing with special missions in a separate part of the draft. The difference between special missions and permanent missions was far greater than that between honorary consuls and career consuls. Separate treatment was therefore even more justified in the case of special missions than in that of honorary consuls.

39. The CHAIRMAN said that, if there were no

objection, he would take it that the Commission considered that article 1 of the 1958 draft was applicable to special missions and agreed to refer the two proposed definitions to the Drafting Committee, with instructions to prepare a definition which would cover itinerant envoys.

It was so agreed.

40. Mr. SANDSTRÖM, Special Rapporteur, said that he had proposed in his report (A/CN.4/129, p. 20) a text of article 2 for special missions. Article 2 (*Establishment of diplomatic relations and missions*) of the 1958 draft dealt explicitly with permanent missions and could not be applied to special missions.

41. Mr. JIMÉNEZ DE ARÉCHAGA said he saw no harm in leaving article 2 applicable to special missions. From the point of view of legal drafting, it was not necessary to state that the article did not apply to special missions.

42. Sir Gerald FITZMAURICE drew a distinction between form and substance. In the form in which it was drafted, article 2 of the 1958 draft clearly did not apply to special missions but to permanent missions. The substance, however, was applicable, because there was an element of mutual consent in the sending and receiving of special missions, as in the establishment of permanent missions. If a separate article was included to deal with the sending and receiving of special missions, a reference could be made therein to that mutual consent.

43. Mr. AMADO said that the word "establishment" in article 2 of the 1958 draft clearly indicated that its provisions concerned permanent missions and not special missions and still less itinerant envoys.

44. The only idea expressed in article 2 that extended to special missions was the idea of mutual consent, and that idea was contained in article 43 *a* as proposed by Mr. Jiménez de Aréchaga (A/CN.4/L.87). The Commission could therefore decide without disadvantage that article 2 did not apply to special missions.

45. Mr. TUNKIN, agreeing with Mr. Amado, said that article 2 of the 1958 draft clearly applied to the exchange of permanent missions and not to the sending of a special mission, which was usually sent in one direction only.

46. Mr. YOKOTA drew attention to the fact that certain writers, including Oppenheim, maintained that if a State had a question to discuss with another, the latter could not refuse to negotiate with a special mission sent for the purpose. For his part, he did not necessarily endorse that view. However, since it was held by some authorities on international law, it was necessary to state that a special mission, like a permanent mission, could not be sent to a country without the latter's consent.

47. Mr. LIANG, Secretary to the Commission, said that the terms of article 2 of the 1958 draft

were clearly not applicable to special missions. The words "establishment", "diplomatic relations" and "permanent diplomatic missions" all clearly referred to permanent missions. The only expression in article 2 which could apply to special missions was "mutual consent".

48. Mr. SANDSTRÖM, Special Rapporteur, urged that the Commission should direct its attention to the question whether the substance of each article applied to special missions. The form could be dealt with at a later stage.

49. Mr. JIMÉNEZ DE ARÉCHAGA said that there was general agreement on substance. A special mission could only be sent by the mutual consent of the States concerned. The form in which that idea would be expressed could be left to the Drafting Committee.

50. Mr. PAL said that no distinction could be drawn in that respect between substance and form. The Commission had to investigate whether the various articles, as they stood, were applicable to special missions. If one of those articles was not applicable, the Commission should say so, even if it had to adopt a substitute provision relating to special missions.

51. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed that article 2 of the 1958 draft, as it stood, was not applicable to special missions; that decision did not imply that the mutual consent of the States concerned was not necessary for the sending of a special mission.

It was so agreed.

52. Mr. SANDSTRÖM, Special Rapporteur, said that article 3 of the 1958 draft was not suited to special missions because it consisted of an enumeration of the functions of permanent diplomatic missions. Special missions were entrusted with a special assignment and not with the general functions set forth in article 3.

53. Mr. YOKOTA supported the Special Rapporteur and said that, for example, the function specified in sub-paragraph (b) of article 3 was clearly not vested in special missions sent for ceremonial functions, such as weddings or funerals. While setting aside the application of article 3, the Commission might adopt a provision to the effect that special missions must confine themselves to the assignment for which they were sent. He did not, however, believe that a special provision along those lines was absolutely necessary, because the idea was contained already in the actual definition of special missions.

54. Mr. JIMÉNEZ DE ARÉCHAGA drew attention to paragraph 18 of his memorandum (A/CN.4/L.88). From the point of view of legal drafting, it would be a very serious matter to declare article 3 expressly not applicable to special missions. Such a declaration might well be interpreted as signifying that a special mission could not, for example, represent the sending State, or

negotiate with the government of the receiving State.

55. He urged that it was necessary to find some way of saying that, within the scope of the specific task assigned to the special mission, article 3 would apply to such a mission.

56. Mr. GARCÍA AMADOR said he failed to see how any of the sub-paragraphs of article 3 of the 1958 draft could be regarded as not applicable to special missions.

57. With regard to the function of representing the sending State in the receiving State, set forth in sub-paragraph (a), he said that there were two forms of representation: permanent representation and the sporadic form of representation afforded by special missions. The representative character of a special mission could not possibly be denied.

58. Another example was provided by sub-paragraph (c). The very purpose of most special missions was to negotiate with the government of the receiving State — the function referred to in sub-paragraph (c).

59. With regard to the method adopted by the Commission, he said that the discussion of the applicability of each individual article of the 1958 draft to special missions would lead to a prolonged discussion for which the Commission had not sufficient time. It was imperative that the Commission should prepare at the current session a draft, or at least some basis of discussion, for use at the Vienna conference. The only manner in which that practical result could be achieved was to adopt the formula proposed by Mr. Jiménez de Aréchaga in his article 43 a, as amended by Sir Gerald Fitzmaurice, the observations of Mr. François being taken into account.

60. Mr. TUNKIN expressed misgivings regarding the proposal that article 3 should not apply to special missions. He would not, however, oppose the proposal, provided that the question of substance would be considered anew when the Commission came to deal with the article 43 a proposed by Mr. Jiménez de Aréchaga. A reference to article 3 would have to be included in that article, since any of the provisions of that article could apply to special missions, but taken together they constituted a description characteristic of the status of permanent missions.

61. Mr. ERIM expressed strong support for Mr. García Amador's suggestion. The Commission should reconsider the procedure, for it had no time to engage on a discussion of all the articles of the 1958 draft. Many of those articles might, in appropriate circumstances, be applicable *mutatis mutandis* to diplomats sent on *ad hoc* missions. Therefore, the only practical course open to the Commission was to adopt an article stating in general terms that all the provisions of the 1958 draft would apply, as appropriate, to special missions.

62. With specific reference to article 3, he said that, on reflection, he thought all the sub-para-

graphs of that article were applicable to special missions. Shortly after the end of the Second World War, there had been special missions which had performed for a time even the function of protecting in the receiving State the interests of the nationals of the sending State. It was now an international practice to send "roving ambassadors" who could negotiate, act in a representative capacity and, if necessary, even protect nationals. That being so, it could not be said that any one of the provisions of the article was inapplicable to special missions.

63. The CHAIRMAN said that no matter what procedure the Commission followed, if there was a difference of opinion among members regarding the applicability of a particular article to special missions, the question of the applicability of that article would have to be discussed.

64. With regard to article 3 of the 1958 draft, he said that a decision by the Commission that it did not apply as it stood to special missions did not, of course, mean that such a mission could not be sent, for example, to negotiate and conclude a treaty with the government of the receiving State or even to examine the situation of the nationals of the sending State in the receiving State. However, the functions to be performed by a special mission were those conferred upon it by the sending State and agreed to by the receiving State.

65. On the other hand, if the Commission decided that article 3 applied to special missions, it was clear that the decision would have to be qualified in such a manner that the provisions of article 3 would apply only within the scope of the specific task assigned to the special mission.

66. Lastly, with regard to the question of method, he said that few articles would give rise to the same difficulties as article 3. In most cases, it would be easy for the Commission to decide whether the provisions of a particular article of the 1958 draft applied to special missions or not.

67. Mr. LIANG, Secretary to the Commission, said that the task on which the Commission had embarked was much more difficult than that of trying to determine which provisions of the consular draft were applicable to honorary consuls. In the matter of special missions, the Commission was trying to reconcile two opposites. The diplomatic missions envisaged in the 1958 draft were permanent missions, and special missions constituted the opposite of permanent missions.

68. If it were asked whether article 3 of the 1958 draft was applicable to special missions, the answer could be either in the affirmative or in the negative, depending on the point of view from which it was considered.

69. The actual position was that article 3 was not applicable in its entirety to special missions. A special mission represented the sending State for a limited purpose and therefore sub-paragraph (a) was to that extent applicable to such missions. The theoretical formulation contained in sub-

paragraph (b) was similarly applicable to special missions. As to sub-paragraphs (c), (d) and (e), he said it was clear that the functions mentioned therein could be given to a special mission. At the same time, however, it was apparent that the whole philosophy of article 3 was not applicable to special missions.

70. For those reasons, he felt that resort to some general formulation offered the only practical solution. An examination of the individual articles could be useful, but would be time-consuming. Accordingly, he was inclined to favour the suggested formula; "the provisions of this convention shall apply *mutatis mutandis*, to special missions."

71. Mr. YASSEEN said he did not think that article 3 could be considered as being applicable to special missions, since such missions could not discharge all the functions enumerated in it. By definition, special missions were appointed to accomplish a specific task. It would therefore be necessary to draw up a separate article stating that their functions were limited and were defined by mutual agreement between the two States.

72. Mr. PAL considered that the remarks of Mr. García Amador, Mr. Erim and the Secretary had confused the problem of method. The Commission had already decided to follow the procedure of examining the articles which the Special Rapporteur held to be inapplicable to special missions; indeed it was difficult to see what other method the Commission could have adopted since there was clearly no avoiding an individual examination of the articles concerned. Obviously, there would be no need to discuss those provisions which it was generally agreed were applicable.

73. With reference to the argument that special missions must be held to represent the sending State in the receiving State and that therefore at least article 3, paragraph (a), was applicable to them, he pointed out that they represented the sending State for a limited purpose only. In any case, article 3 as it stood did not apply to *ad hoc* missions, and that was all the Commission was concerned with at the moment.

74. Mr. VERDROSS said that, as the Commission had settled its procedure, he would address his remarks solely to the substantive question at issue. In his opinion article 3 could not apply to special missions whose functions were strictly limited: a permanent diplomatic mission represented the sending State in respect of all matters that might arise in the day-to-day relations between the two States. The cases mentioned in article 3 were only examples of that activity. Accordingly, the article was not applicable to special missions.

75. Mr. SANDSTRÖM, Special Rapporteur, said that, if his definition of special missions were adopted, there would be no need for any further provision concerning their functions.

76. Mr. YOKOTA pointed out that if special

missions were sometimes appointed to carry out purely ceremonial functions, as indicated by the Special Rapporteur in paragraph 4 of his report, article 3 in its present form could certainly not apply to them.

77. Mr. SCELLE agreed with Mr. García Amador that the Commission had embarked upon a hazardous venture since it would take a great deal of time to decide which elements in each article of the 1958 draft were applicable to special missions. Such missions had a precise purpose and were appointed by mutual consent between States; since their functions could be extended by agreement, the definition of "special mission" had to be extremely flexible. He favoured the formula suggested by Sir Gerald Fitzmaurice which would obviate the need for a detailed examination of each of the articles.

78. Sir Gerald FITZMAURICE explained that his suggestion had been designed to further the purpose of Mr. Jiménez de Aréchaga's memorandum, which was to save the Commission from having to carry out a detailed analysis for which it had not time. The *mutatis mutandis* formula would have covered those instances where an article of the 1958 draft was applicable in principle but could not in its actual language be applied literally to special missions.

79. He had suggested that the Commission examine which articles of the 1958 draft were inapplicable to special missions in the belief that it could carry out the examination rapidly.

80. After a procedural discussion, the CHAIRMAN put to the vote the proposal that the Commission should modify its earlier decision concerning the method to be followed and that it should cease to examine *seriatim* the articles of the 1958 draft which in the Special Rapporteur's opinion were not applicable to special missions.

The proposal was rejected by 13 votes to 6, with 1 abstention.

The meeting rose at 1.5 p.m.

566th MEETING

Monday, 20 June 1960, at 3 p.m.

Chairman: Mr. Luis PADILLA NERVO.

State responsibility (A/CN.4/96, A/CN.4/106, A/CN.4/111, A/CN.4/119, A/CN.4/125)

[Agenda item 3]

1. The CHAIRMAN invited the observer for the Inter-American Juridical Committee to address the Commission.

2. Mr. GÓMEZ ROBLEDÓ, observer for the Inter-American Juridical Committee, thanked the Commission for giving him the opportunity of

addressing it. He wished it to be understood that he did not claim to act as spokesman on the present occasion for all his colleagues on the Inter-American Juridical Committee.

3. It was significant that, until the Tenth Inter-American Conference held at Caracas in 1954, the Inter-American Juridical Committee had not been entrusted with the codification of the principles of international law governing State responsibility, nor had any of its members suggested that it should undertake that task. That reluctance to deal with the subject was certainly not due to any lack of material nor to any lack of interest in codification as such; it was due purely and simply to the difficulties inherent in the topic itself.

4. There was an obvious connexion between General Assembly resolution 799 (VIII) of 7 December 1953, which requested the International Law Commission to undertake the codification of the principles of international law governing State responsibility, and resolution CIV of the Tenth Inter-American Conference of 1954, which recommended to the Inter-American Council of Jurists, and hence to its permanent committee, the Inter-American Juridical Committee of Rio de Janeiro, "the preparation of a study or report on the contribution the American continent has made to the development and to the codification of the principles of international law that govern the responsibility of the State" (cited in A/CN.4/124, paragraph 101). The purpose of that resolution, as rightly indicated in the secretariat memorandum on co-operation with other bodies (*ibid.*, paragraph 102) was to transmit to the International Law Commission, for its use, material describing the contribution made by the American continent to that field of international law.

5. It had soon become apparent to the Inter-American Juridical Committee that the resolution in question narrowed down its terms of reference and at the same time entrusted it with a task of immense scope and difficulty.

6. The Committee's terms of reference under resolution CIV were limited to the study of the contribution that the American continent had made in the past to the development and codification of the principles governing state responsibility. Those terms of reference did not enable the Committee to make a constructive or creative contribution of its own.

7. At the same time, the Committee considered that the study in question, which was to be limited to the past, should take into account all the existing material on the subject in the American continent, and that material was particularly vast in regard to the law of claims.

8. Faced with those difficulties, the Committee had hoped that either the International Law Commission or the competent inter-American organs would limit its task, possibly to the law of claims, the field in which the contribution of the American continent had been particularly original. If so, the question arose whether the

Committee should confine its work to treaties and decisions of the numerous Mixed Claims Commission or should also examine the abundant literature on the subject. With regard to decisions of claims commissions, however, there would be little purpose in the Committee reproducing, for the benefit of the International Law Commission, material which already existed in the well-known works of Borchard and Feller, for example.

9. Moreover, the Inter-American Juridical Committee was particularly concerned that its work should not overlap with that of the International Law Commission. The jurists of America were devoted to their regional tradition but held that the principles of American international law should apply to those questions only which were capable of a truly regional solution. In all other matters, they felt bound by the general principles of the law of nations, and the Inter-American Juridical Committee had always acted in that spirit. For example, in connexion with certain matters of maritime law which had been submitted to it, the Committee had simply recommended the governments of the American States to accede to the Brussels Convention on the subject, no action being called for at the regional level.

10. In the absence of any delimitation of the subject by the bodies concerned, the Inter-American Juridical Committee had decided in effect to limit the scope of its work to the law of claims, not only because of the abundance of the material available on the subject but also because of its unique regional features. The Committee felt that more universal questions, such as the circumstances which gave rise to state responsibility, and the problem of imputability, were not appropriate subjects for regional organs of codification. The same was true of certain other important problems, such as that of the responsibility which might result from nuclear tests. In all those matters, the International Law Commission had a greater and broader competence.

11. There was, however, a further difficulty. It was an unfortunate but undeniable fact that the contribution of the American continent to the development of the law of claims was by no means uniform. There was a distinct cleavage between the views held on the subject of the law of claims in the United States of America, on the one hand, and in the Latin American republics on the other, in regard to three important matters: the position of aliens, the international validity of the waiver of diplomatic protection (Calvo clause) and the problem of the denial of justice.

12. So far as the position of aliens was concerned, the doctrine of an international minimum standard of justice had been uniformly opposed in the Latin American countries, which observed the principle of the equality of nationals and aliens. Under that principle, aliens could claim at most (as a maximum, not as a minimum), equality of treatment with nationals. The doctrine of an international minimum standard, whatever its merits in the abstract, was regarded

as out of place in the historical, social and political context of America. The republics of America had reached a high level of civilization and their moral unity, proclaimed at the Lima Conference in 1938, presupposed a high degree of mutual confidence. In the circumstances, the principle of the equality of treatment was the principle best suited to a community bound by such close ties as that of the American peoples.

13. That cleavage between the views held in all good faith by two schools of thought was related to the different approach taken towards the same problems in highly industrialized and capital-exporting countries on the one hand, on the other, in countries which were still struggling with the problems of industrialization and the raising of standards of living. The latter countries naturally did not wish to be hampered in the application of those economic measures which they were obliged to take in the interests of their development, but which in more prosperous countries would have seemed unduly drastic or even unjustified.

14. Similar considerations explained the introduction into the legislation of certain Latin American countries (in the case of Mexico into the Constitution itself) of provisions under which aliens were deemed to accept a waiver of the diplomatic protection of their governments in regard to certain specific claims. The waiver of diplomatic protection, known as the Calvo clause, did not of course apply to claims in respect of acts against the life or freedom of aliens; it applied specifically to claims arising out of the alien's ownership of immovable property, and more especially to rights under a state concession for the exploration or exploitation of mineral resources or petroleum products.

15. The action taken in the matter in the countries in question was nothing more than the exercise of the right of eminent domain over the resources of the subsoil. Those resources had for a time in the past been regarded as vested in the owner of the land, under the influence of an unwarranted extension of the individualist concept of property. In the case of Mexico, that mistake had been put right by the provisions of the Mexican Constitution of 1917.

16. There was no doubt in the minds of most Latin American jurists regarding the validity of the Calvo clause not only in municipal law but also in international law. In their view, the waiver of diplomatic protection debarred *ab initio* the claim by the government of the alien concerned to protect its national. The contrary view, however, was held by those jurists elsewhere who adhered to the opinion that the individual was merely an object, and was never a subject, of international law and that his actions, however freely agreed to, were irrelevant to the admissibility of diplomatic protection — an opinion which appeared to be based on a complete disregard of the human factor.

17. The cleavage was equally marked in regard to denial of justice. In that connexion, the ques-

tion arose whether the expression "denial of justice" applied only to court decisions or could be held to apply also to decisions of other bodies. A further question arose whether denial of justice should be interpreted in its literal sense as the denial to an alien of access to the ordinary processes of law or whether it should be held to include those cases usually described as malicious discrimination and manifest injustice of a judicial decision.

18. In the opinion of most Spanish-American jurists, it was essential to limit the concept of denial of justice to those obvious cases which were covered by the strict meaning of the expression, without introducing any subjective elements. That restrictive definition of denial of justice, which was accepted by certain European writers such as De Vischer,¹ had been embodied in article VII of the American Treaty on Pacific Settlement (Pact of Bogotá, 1948),² by virtue of which the Contracting Parties bound themselves not to make diplomatic representations in order to protect their nationals when those nationals had had available the means to place their case before the competent domestic courts. However, he drew attention to the fact that the provision in question had been the subject of a reservation by the United States of America.

19. The different viewpoints of United States jurists on the one hand and Spanish-American jurists on the other did not, however, account for the whole American contribution to the subject. Brazil occupied a distinct position which had led to that country, with its great diplomatic and legal tradition, being described as a third America. The views held by Brazilian jurists were perhaps closer to those held in other countries of Latin America than those held in the United States but represented nonetheless a completely separate approach to the same problems. That fact had been made clear, for example, by the attitude of Brazil towards the Drago doctrine at the second Hague Peace Conference in 1907, and by the writings of Brazilian jurists who denied the existence of an American international law, as propounded by such writers as the Chilean Alvarez.

20. Faced with the divergence on views in the matter, the Inter-American Juridical Committee had undertaken to enumerate a number of principles which in its view formed part of Latin American international law as well as, in certain aspects, of American international law. Those principles were reproduced in the Secretariat memorandum on the subject of co-operation with other bodies (A/CN.4/124, para. 108). Of the six principles enumerated, the United States jurist who was a member of the Committee had accepted principles I, II and IV.

21. Principle I referred to non-intervention,

which had been accepted as a fundamental principle by all American States in the 1936 protocol signed at Buenos Aires³ and had been incorporated in article 15 of the Charter of American States. Principle II proclaimed in its first sentence the well-known Drago doctrine, while the second sentence virtually repudiated the so-called Porter amendment to that doctrine. It was interesting to note that the United States member of the Committee had accepted principle II without reservations. As to the following three principles, the United States member had accepted principle IV but had given only a qualified acceptance to principles III and V (*ibid.*, paragraph 112). The main difference of opinion arose, however, in regard to principle VI, which referred to denial of justice (*loc. cit.*, *in fine*).

22. In view of the existing differences of opinion, it might well be asked whether it would not be preferable that the inter-American bodies should not attempt to codify the law of claims for the time being. The patient work of diplomacy might in the course of time bring closer together the opposing views in the matter better than the polemics of international discussion. An invaluable contribution could also be made by the work of learned bodies. In that connexion, he had been interested to note that the most recent Harvard Draft on the subject of state responsibilities (draft No. 11) contained, in paragraph 5 (a) of its article 22, what seemed to him a recognition of the validity of the Calvo clause.

23. Lastly, he stressed that the law of claims belonged to a period of transition. International law was irresistibly advancing towards the international protection of human rights and the recognition of the individual as a subject of the law of nations. The attainment of those objectives, by means of the adoption by all States of covenants on human rights, would bring to an end present controversies on the law of claims. An international minimum standard of justice would be laid down for human beings in general; in case of violation of the standard thus laid down, the person concerned, whether alien or national, could appeal to the competent international body. When that process was completed, diplomatic protection would cease to exist as a distinct legal institution.

24. He hoped that his remarks would be of assistance to members of the Commission and that the co-operation between the Commission and the Inter-American Juridical Committee would continue to develop fruitfully.

25. The CHAIRMAN invited Professor Sohn, of the Harvard Law School, to address the Commission.

26. Professor SOHN said that he was grateful to have an opportunity of explaining the main

¹ "La responsabilité des Etats", in *Bibliotheca Visseriana*, vol. II, 1924, pp. 99 *et seq.*

² United Nations *Treaty Series*, vol. 30, p. 87.

³ League of Nations *Treaty Series*, vol. CLXXXVIII, p. 32.

changes in the new (1960) draft prepared by the Harvard Law School of the convention on the subject of international responsibility of States for injuries to aliens.

27. In response to a suggestion made by Mr. Alfaro, the first sentence in article 1 had been revised in order to make it clear that the Draft related only to the responsibility of States under international law and not to their possible responsibility under municipal law; in addition, the article now specified that the standard "under international law" was applicable to all elements of State responsibility not only to the determination of the wrongfulness of an act but also to the question whether the act was attributable to the State and had caused an injury. Those amendments rendered the definition clearer and more consistent with the general theory of State responsibility.

28. Other important changes had been introduced in the light of the Commission's discussion at its previous session.⁴ For example, several members had criticized the phrase "standards of justice recognized by civilized States". That criticism had been accepted in spite of the fact that a similar phrase was used in article 38 of the statute of the International Court; instead, the new draft used the words "principles generally recognized by municipal legal systems", which would perhaps be more acceptable, particularly in view of the recent emergence of many new States that were jealous of the standing of their domestic law. That modification had meant certain changes in the definitions of wrongful acts, for instance in articles 6 and 8. Three important categories of situations were envisaged: First, a clear and discriminatory violation of local law, in which case the standard of national treatment was applied. Secondly, an unreasonable departure from the principles of justice generally recognized by municipal legal systems, resulting in the application of the so-called "minimum treatment standard", as laid down for instance in more explicit form in article 6 (b). Thirdly, a clear breach of a particular obligation under international law or of a special obligation under a treaty voluntarily concluded. In addition, the authors of the draft had sought to define more explicitly certain other wrongful acts, in which task they had been assisted by recent definitions of human rights and developments of international law, as well as conventions on the treatment of military forces stationed abroad, concluded by both western countries and people's democracies.

29. In attempting to define as precisely as possible wrongful acts relating to the arrest of an alien or judicial decisions, they had not used the expression "denial of justice" — which had been mentioned by Mr. Gómez Robledo — because it was so controversial. Some members of the Inter-

American Juridical Committee had attached a very narrow meaning to that expression. Other international lawyers, on the other hand, believed that it comprised all violations of human rights.

30. First place had been given in the Draft to acts committed against the person of individuals or improper procedure by tribunals or administrative authorities. The provisions relating to the destruction of property, the taking of property and the violation of contracts had caused the greatest difficulty and had been attacked both for going too far and for not going far enough, so perhaps the authors had succeeded in finding a middle way.

31. In the light of some of the comments received, certain changes had been made in article 10. In paragraph 1, the taking of property not for a public purpose clearly recognized as such by a law of general application in effect at the time of the taking had been defined as wrongful since it would be clearly discriminatory under domestic law. In paragraph 3, the authors of the draft had followed the suggestion made by Sir Gerald Fitzmaurice, who had said that there were other methods of taking property as dangerous as outright taking. They had also defined the meaning of the word "property" more explicitly, closely following the provisions of the treaty of peace with Italy.⁵

32. As a concession to those who believed that acquired rights needed special protection, a new provision had been added in article 12, paragraph 1 (a), but no general provision concerning the protection of acquired rights had been inserted because the concept was too broad and eluded precise definition. The authors had therefore preferred the alternative method of enumerating the rights that should be protected from ordinary interference. However, the Commission would note that article 3 was drafted in very general terms, the effect of which was that the State would be responsible not only for the acts or omissions defined in articles 5 to 12 but also if without sufficient justification it caused injury to aliens by intentional acts or by lack of due care that created unreasonable risks of injury. In other words, in addition to the acts explicitly enumerated as wrongful, the draft also covered those arising from intent or negligence.

33. Article 26 concerning claims barred by lapse of time embodied what might perhaps be regarded as a novel concept in international law, but one now regarded as justified. It would of course apply in limited cases only, and though open to criticism on grounds of vagueness he doubted whether it could be improved.

34. Article 32 on damages for taking and deprivation of use or enjoyment of property had been simplified, as had article 35 which now provided for damages of a single kind.

35. Article 25 had aroused very critical comment, on the ground that a provision allowing

⁴ *Yearbook of the International Law Commission, 1959*, vol. I (United Nations publication, Sales No. 59.V.1, vol. I), 512th and 513th meetings, pp. 147 to 154.

⁵ United Nations *Treaty Series*, vol. 49, p. 4.

States to waive claims of individuals was inconsistent with the fundamental principles underlying the draft. However, its authors had not felt justified in departing from the traditional concept established by a long history of diplomatic relations and also recognized in numerous settlements recently concluded.

36. Nor did the authors feel able to meet the view expressed by some that provision should be made either in the draft or in an additional protocol allowing individuals direct access to the International Court of Justice or to some other special tribunal competent to receive international claims. In their opinion, the matter would best be left to a diplomatic conference if one were ultimately convened to consider the question of state responsibility.

37. Another complaint made against the draft was that it failed to make clear which elements were *de lege lata* and which *de lege ferenda*. The authors had not been convinced by the injunction that they should set down existing law without seeking to reconcile conflicting judicial decisions and practice or remove inconsistencies in the law itself, and as the practice of any individual State did not necessarily have to be consistent and might develop independently of that of other States, they had as codifiers sought to present a draft that was self-consistent. They intended to explain in detail in a commentary how and where they had departed from existing law, and hoped to circulate that detailed commentary in 1961.

38. In conclusion he thanked the Commission's Secretary and its Special Rapporteur on state responsibility for their help.

39. Mr. GARCÍA AMADOR, Special Rapporteur, hoped that the Commission would maintain and intensify its collaboration with the Inter-American Council of Jurists and that it would establish similar co-operation with other regional bodies such as the Asian-African Legal Consultative Committee which had included the topic of state responsibility in its agenda.

40. At the risk of repeating some of the points made by the observer for the Inter-American Juridical Committee he wished to remind the Commission of certain elements in the doctrine of State responsibility which had originated in the Latin American continent. First, there was the Drago doctrine and other expressions of the principle of non-intervention in the exercise of diplomatic protection, which had been embodied in a number of international instruments, both regional and general in scope.

41. Secondly, there was the Calvo clause, whereby in certain specific cases the alien, under the terms of a contract entered into with the State of residence, waived diplomatic protection. The clause had been used extensively and its validity had been recognized by some international claims commissions.

42. Thirdly, there was the principle of equality between nationals and aliens which, as opposed to the notion of the "international standard of

justice", formed the cornerstone of Latin American doctrine concerning state responsibility. Since introducing his first report (A/CN.4/L.96) he had strongly advocated a reconsideration of those two principles in the light of the fact that they had in a sense now been surpassed by the international recognition (in the Charter of the United Nations and in international declarations) of the fundamental rights of man.⁶

43. Turning to the new draft prepared by the Harvard Law School, he said that it differed fundamentally on certain points from the Harvard Draft of 1929⁷ and reflected certain new developments and trends in the theory of state responsibility. He had emphasized in his reports the shortcomings of the traditional view of state responsibility, particularly concerning the subject or owner of the interest injured for the purpose of reparation. He had indicated the way in which the traditional doctrine had been inconsistent with reality and even with itself. There was no reason why the Commission should feel bound by that traditional doctrine, even though it had been upheld by the Permanent Court of International Justice and by the new Court at The Hague as well as by arbitral tribunals.

44. Again, he had insisted in his reports on the capacity of the individual to bring an international claim for injuries that by no means necessarily affected the interests of the State of nationality, and had advocated that a practice initiated by the Central American Court of Justice in 1907 should receive every encouragement.

45. The recognition by the new Harvard Draft of the capacity of individuals to bring claims was in the nature of progressive development of international law. The 1929 draft had contained no references at all to the future possibility of extending such a right to aliens; the only provision it contained concerning disputes was article 18, which provided that disputes (between States) which were not settled by negotiation and not referred to arbitration under a general or special arbitration treaty should be referred to the Permanent Court of International Justice. In article 1, paragraph 2 (a), of the new draft, however, the right of an alien to present an international claim was unequivocally stated, and section F (Presentation of claims by aliens) devoted three lengthy articles to the procedure to be followed in such cases. In 1929, the capacity of individuals to bring claims before international instances would have seemed inconceivable, but since then a number of international instruments had been concluded in which the idea of individual recourse had gradually gained recognition. Since the Second World War, for example, many important international concessions agreements concluded by Asian and African countries provided for arbitration and had established the capacity of a foreign individual

⁶ *Yearbook of the International Law Commission*, 1956, vol. I (United Nations publication, Sales No. 1956.V.3, vol. I), 370th meeting, esp. paras. 29 *et seq.*

⁷ *Ibid.*, vol. II, document A/CN.4/96, p. 229.

or company to submit disputes concerning the interpretation of those agreements to arbitration.

46. The trend he had referred to could not be ignored and illustrated the extent to which reality, rather than abstract notions, could serve as a basis for changing rules in the codification of international law. Needless to say, the recognition of the capacity of aliens to present international claims was subject to the rule concerning the exhaustion of local remedies. The new trend, however, had the important advantage of not excluding diplomatic protection, but of avoiding the abuses of such protection as far as possible and of avoiding a stumbling block which had given rise to many disputes in the past.

47. Another respect in which the new Harvard Draft was a great improvement over the 1929 draft was that, whereas the earlier text had contained no mention whatsoever of the generally recognized doctrine and practice in the matter of circumstances extenuating responsibility, and had not exempted States from responsibility in cases where the act or omission had taken place in such circumstances, the idea was firmly established in the new draft. Thus, article 3 provided that certain acts by the State should not be considered wrongful under certain conditions, and article 4 (*Sufficiency of justification*) enumerated the main causes or circumstances exonerating a State from responsibility.

48. Yet another respect in which the new Harvard Draft departed from the traditional system set forth in the 1929 text concerned the principle of the exhaustion of local remedies. Under article 6 of the 1929 draft, a State was not "ordinarily" responsible (under a duty to make reparation to another State) until the local remedies available to the injured alien had been exhausted. In article 1, paragraph 2, of the new draft, however, the exhaustion of local remedies was made a condition *sine qua non* of the admissibility of an international claim; that provision gave the principle its full scope under international law.

49. He believed that many other points could be mentioned to prove that the new Draft was a considerable step forward in relation to the 1929 text. While so far as certain provisions were concerned it might not be thought entirely compatible with recent political, economic and social developments, those points might be considered during the Commission's next session, when the subject would be studied in greater detail. In conclusion, he expressed his gratitude to the Harvard Law School for the invaluable co-operation it had extended to him in his work in his capacity as Special Rapporteur on the topic.

50. Sir Gerald FITZMAURICE expressed his great appreciation of the interesting statements that had been made and of the work done by the Harvard Law School. Any criticism that he might feel obliged to make should not be construed as lack of awareness of the magnitude and difficulty of the task.

51. With regard to the changes in the law of

state responsibility that had been referred to by all the speakers, he quite agreed that the Commission must be progressive and that there were certain trends towards advancement. He would not go so far as to say, however, that any part of the traditional law on the matter had become obsolete or been overtaken by the modern trends.

52. The capacity of the individual to present an international claim was a major stumbling block. In practice, whatever rights might be extended to individuals, it was difficult to make the right effective except through the action of States. The only rare exceptions to that rule occurred where special provisions had been made by international convention. For example, under the European Convention for the Protection of Human Rights,⁸ 1950, individuals who considered that they had been mistreated by their own government could put their case to the Commission or Court of Human Rights through the machinery provided for in the Convention. It should be borne in mind, however, that the right had been rendered effective by the signature of a specific convention binding on the parties. In the absence of such treaty provisions, an individual would find it difficult to obtain redress by means of an international claim without governmental assistance, unless there was a considerable development in international law. Accordingly, traditional law in the matter was by no means obsolete.

53. He had considerable misgivings concerning the wording of article 24 (*Waiver, compromise, or settlement of claims of claimants and imposition of nationality*) of the new Harvard Draft. A State could not be precluded from continuing a claim if it so wished, for it might be interested in the question of principle involved. Whereas an individual could renounce his own interest in the claim, he was not competent to impose that waiver on his government. If the authors of the Draft had not intended to affect the position of the government in that connexion, they should have said so explicitly, since article 24 read together with article 1 did not give that impression.

54. He further observed that references were made throughout the Draft to "international law or a treaty". He appreciated the reason of the authors for inserting that phrase so often; presumably their intention was to ensure that the clauses concerned were not confined to the specific points mentioned. Nevertheless, one of the main purposes of a code on state responsibility was to specify the acts affecting aliens which constituted a breach of international law and involved the responsibility of States. The reference to treaties, moreover, raised an even more fundamental point, since where a breach of a treaty was involved, the real wrong from the international point of view was the breach of the treaty, and not the mistreatment of an alien. For example, if the parties to a commercial treaty agreed to grant each other certain trade and tariff concessions, and one party

⁸ United Nations Treaty Series, vol. 213, p. 221.

failed to grant the rights concerned, an individual might be affected or injured, but the real cause of action would be the breach of treaty, not international responsibility for injuries to aliens. If a treaty between two States was violated by one State, the rights of the other State and, hence, those of its subjects and citizens, were impaired, and in such a case the injury to the alien was an indirect consideration.

55. He believed that the new texts of articles 6 (*Denial of access to a tribunal or an administrative authority*) and 8 (*Adverse decisions and judgements*) constituted an improvement over the corresponding articles of the Harvard Draft of 1959 in that the words "and discriminatory" had been introduced ("if it [i.e., the denial of access or the adverse decision] is a clear and discriminatory violation of the law of the State"); that wording, in his opinion, came close to attaching international responsibility to a State for a decision which was merely incorrect. National courts were not infallible, and the nationals of the State concerned might also fall victim to wrong decisions; the key point was that there should be no animus against the alien as such and the important word in the provision as now drafted was "discriminatory". To take the point further, there seemed to be no reason why discrimination should not be made the test; there seemed to be no reason to refer to violation of the law of the State concerned, since a denial of justice would exist in the event of discrimination.

56. Apart from the introduction of the notion of discrimination, he did not think that the new articles 6 and 8 were in fact an improvement over the corresponding articles of the 1959 Harvard Draft. The earlier articles had gone into greater detail, but the present article 8 was open to criticism on the grounds that paragraph (a) should be essentially confined to the notion of discrimination, that paragraph (c) contained the reference to international law and treaties and that paragraph (b) was incomplete. A number of other causes could result in denial of justice and involve the State's responsibility. The cause of corruption, for instance, mentioned in the 1959 draft, had been omitted from the present article 8; but discrimination and corruption could not be regarded as the same concept. Furthermore, the earlier Draft had referred to judgements clearly departing from the standards of justice generally recognized by civilized States; while that somewhat variable concept might be said to be covered by the phrase "principles of justice generally recognized by municipal legal systems", he thought that the earlier wording was preferable. The phrase used in the 1959 text "if it [the judgement] clearly departs from the standards of justice generally recognized by civilized States" had been criticized mainly on the grounds that the word "civilized" was equivocal; he personally preferred the words "generally recognized standards of justice". When the matter had been discussed at the previous session, Mr. Žourek had suggested the phrase "rules common to the principal legal systems of

the world",⁹ and that phrase seemed to be preferable to the reference to "municipal legal systems".

57. In conclusion, he reiterated that those and other criticisms of the new draft should not be ascribed to any lack of appreciation of the improvements that had been made over the 1929 draft.

The meeting rose at 6.10 p.m.

⁹ *Yearbook of the International Law Commission, 1959, vol. I, 513th meeting, para. 6.*

567th MEETING

Tuesday, 21 June 1960, at 9.30 a.m.

Chairman: Mr. Luis PADILLA NERVO

Ad hoc diplomacy (A/CN.4/129, A/CN.4/L.87, A/CN.4/L.88, A/CN.4/L.89) (resumed from the 565th meeting)

[Agenda item 5]

1. The CHAIRMAN invited the Commission to resume its discussion on the question whether article 3 (*Functions of a diplomatic mission*) of the 1958 draft on diplomatic intercourse and immunities¹ was applicable to special missions and recalled that the Special Rapporteur had proposed the exclusion of that article from the provisions applicable to special missions.

2. Mr. JIMÉNEZ DE ARÉCHAGA said that the provisions of article 3 applied to special missions, although only within the scope of the specific tasks assigned to such missions.

3. Mr. MATINE-DAFTARY said that he agreed with the idea put forward by Mr. Jiménez de Aréchaga but considered that it should be incorporated in a special article, since article 3 could not be amended. The Commission should agree on a provision to the effect that the functions of a special mission were determined in each case by agreement between the two States concerned.

4. Mr. ERIM said that it was essential to find some formula which would make it possible to apply the various provisions of the 1958 draft to special missions. In his opinion, any of the functions described in the sub-paragraphs of article 3 could be entrusted to a special mission. Those sub-paragraphs gave a description of diplomatic duties in general, and provided the cornerstone of the whole diplomatic function, whether *ad hoc* or permanent.

5. Mr. TUNKIN suggested that it should be left to the two States concerned to determine the

¹ *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9 (A/3859, chapter III).*

extent of the functions of the special mission. Article 3 described the characteristic features of a permanent mission and could not be applied as it stood to special missions.

6. Mr. YASSEEN pointed out that article 3 stated that the functions of a diplomatic mission "consist *inter alia*" of those enumerated in sub-paragraphs (a) to (e). So far as special missions were concerned the position was totally different: a special mission might have the one or other of the functions enumerated in sub-paragraphs (a) to (e), or even one not mentioned therein. That fact was an additional argument for not making article 3 applicable to special missions.

7. Mr. PAL said that even with the limitations suggested by Mr. Jiménez de Aréchaga article 3 as it stood would not apply to *ad hoc* missions. At the most, sub-paragraphs (a) and (c) might be moulded into a form making them applicable to such missions. That would also involve the redrafting of those sub-paragraphs. The other provisions of article 3, however, did not express appropriately the functions of a special mission even with the qualification proposed by Mr. Jiménez de Aréchaga. As it stood, article 3 was certainly not applicable to special missions, and that was all the Commission was concerned with for its present purpose.

8. Mr. BARTOŠ said that it was essential to include in the draft articles on *ad hoc* diplomacy a provision specifying that the functions of a special mission would be those stated by the sending State and agreed to by the receiving State.

9. Furthermore, a reference should be made in the commentary to the question of the relationship between the powers of a special mission and those of the permanent diplomatic mission. It might happen, for example, that a special mission was sent to negotiate on a particular question and that the permanent ambassador of the sending State concerned settled the question at a time when the special mission was present in the receiving State.

10. Mr. SANDSTRÖM, Special Rapporteur, said that a special mission was entrusted with a specific task and not with the various functions set forth in article 3, although of course some of those functions might be relevant to its special task.

11. For his part, he felt that it was unnecessary to do more than refer, in the definition of the special mission, to the agreement between the two States concerned on the functions to be performed by the special mission.

12. The CHAIRMAN, speaking as a member of the Commission, said that article 3 made it clear that the functions of a diplomatic mission consisted at all times of those set forth in sub-paragraphs (a) to (e), as well as of other functions, as indicated by the term "*inter alia*". The same was

obviously not true of special missions, and therefore article 3, as it stood, did not apply to such missions. The exclusion of article 3 from the provisions applicable to special missions would not, of course, imply that a special mission could not be entrusted with any or all of the functions in question; the two States concerned, in their agreement concerning the sending and the receiving of the mission would specify the mission's tasks.

13. Speaking as Chairman, he said that if there were no objection, he would take it that the Commission agreed that article 3 of the 1958 draft did not, as it stood, apply to special missions. The reservations expressed by certain members would be referred to the Drafting Committee.

It was so agreed.

14. Mr. SANDSTRÖM, Special Rapporteur, said that article 4 (*Appointment of the head of the mission: agrément*) of the 1958 draft did not apply to special missions. It laid down strict rules concerning the agrément of the head of a permanent mission. The composition of a special mission might be the subject of some informal discussion in the correspondence preceding the sending of the mission, but there did not appear to be anything resembling a formal agrément.

15. Mr. JIMÉNEZ DE ARÉCHAGA said that, though it might be true in some cases that the acceptance of a special mission would constitute acceptance of its composition, that might not always be the case. Where the composition of a mission was not agreed upon at the time when consent was given to its being sent, the agrément would be necessary subsequently.

16. If the Commission stated that article 4 was not applicable to special missions, it would be inferred that in no case was the agrément necessary in respect of the composition of a special mission.

17. The CHAIRMAN, speaking as a member of the Commission, said that that was not his interpretation. The Commission's decision that article 4 was not applicable to special missions would simply mean that the procedure for the acceptance of the composition of a special mission was not necessarily the same as that of obtaining the agrément to the appointment of the head of a permanent mission.

18. In practice, the formal procedure of agrément was not followed in the case of all special missions. The receiving State was informed, of course, of the composition of the special mission by the sending State — and the receiving State might object to the composition — but the actual procedure of agrément was not followed.

19. Mr. TUNKIN said that the practice of States was to ask for a visa for the members of a special mission, but never for a special agrément. A decision to declare article 4 applicable to special missions would create unnecessary complications and would be unacceptable to most States.

20. He urged the Commission to declare article 4 not applicable to special missions. That decision would confirm the existing practice in the matter.
21. Mr. SANDSTRÖM, Special Rapporteur, explained that he had sought to draft article 3 in alternative I of his draft (A/CN.4/129) in such a way as to avoid making a formal agrément obligatory for an itinerant envoy or members of a special mission: the wording should not therefore give rise to the practical objections mentioned by certain members.
22. The Commission's slow progress had prompted him to submit a new alternative proposal (A/CN.4/L.89). Members would note that under article 2 of that new proposal the provisions in the 1958 draft relating to diplomatic privileges and immunities (sections II, III and IV) would be declared applicable to special missions; the applicability of the provisions of section I would be dealt with in sub-paragraph (a) of the comment to the new article 2. If, as he did not believe was the case, it could be inferred from the new article 2 that the provisions of section I of the 1958 draft did not apply to special missions, an alternative method might be to insert an additional article stipulating that the provisions of that section were, *mutatis mutandis*, applicable to special missions in like circumstances.
23. Mr. TUNKIN, referring to the Special Rapporteur's new alternative proposal, said that although the provisions of sections II, III and IV of the 1958 draft might be considered as applicable without need for indicating exceptions, he doubted whether a general statement about the applicability of the provisions in section I of the kind outlined by the Special Rapporteur would serve the purpose.
24. Mr. BARTOŠ said that he was inclined to share Mr. Tunkin's view. The *mutatis mutandis* formula was by no means entirely satisfactory.
25. For example, it might be preferable to state that the provisions of article 4 of the 1958 draft would similarly apply to itinerant envoys and special missions: that would take into account the fact that the agrément was usually tacit. In the new text, the *mutatis mutandis* formula would mean that a formal agrément would be indispensable. Again, there was no need in the case of special missions for a formal ceremonial presentation of credentials.
26. He would be averse to an "umbrella" provision of the kind suggested by the Special Rapporteur, since it would give no precise indication of the manner in which the provisions of section I would apply to special missions. Of course, the Commission should codify the rules concerning *ad hoc* diplomacy in the light of those regulating ordinary diplomatic relations, but the distinction between the two should be clearly maintained and he feared that the *mutatis mutandis* formula would only help to provoke disputes about interpretation. He could not therefore support article 2 in the Special Rapporteur's new alternative proposal, and warned the Commission against confusing form with substance.
27. Mr. JIMÉNEZ DE ARÉCHAGA agreed that the procedure of accreditation was less formal for special than for permanent missions, but emphasized that on no account should there be any suggestion that for special missions the consent of the receiving State was not required. An explanation stressing that point in the commentary would not suffice because experience had shown that governments often ignored commentaries to drafts prepared by the Commission.
28. Mr. ERIM said that the wording of article 2 in the Special Rapporteur's new alternative proposal might create uncertainty because it did not stipulate that the sending State must inform the receiving State of the name or names of the itinerant envoy or members of a special mission.
29. The CHAIRMAN noted that with regard to the applicability of article 4 of the 1958 draft to special missions there seemed to be general agreement in the Commission that the procedure of acceptance by the receiving State of an itinerant envoy or members of a special mission was not always the same as the regular procedure for obtaining an agrément, but that the consent of the receiving State was always necessary and that it could be withheld.
30. He then invited the Commission to consider whether article 5 (*Appointment to more than one State*) of the 1958 draft was applicable to special missions.
31. Mr. SANDSTRÖM, Special Rapporteur, pointed out that he had not considered that article 5 was directly applicable to heads of special missions, though a receiving State might be entitled to object if informed by a sending State that an itinerant envoy or special mission might also be sent to another country.
32. The CHAIRMAN, speaking as a member of the Commission, said that in so far as article 5 applied to the head of a permanent diplomatic mission it was a sound provision, for some States were reluctant to receive as head of a permanent mission a person who was also accredited to another State. But surely a receiving State could not object to an itinerant envoy or head of a special mission being sent to other States as well.
33. Mr. JIMÉNEZ DE ARÉCHAGA said that it would be wrong if article 5, as applied to special missions, could be interpreted to mean that the head of a special mission could not be accredited to more than one State, for the practice of accrediting heads of special missions to several States was quite a general one.
34. The CHAIRMAN, speaking as a member of the Commission, said that he had not, of course, wished to suggest that a sending State could not accredit a head of a special mission to more

than one State, but only to point out that the proviso contained in article 5 could not apply to special missions because a receiving State had no right to object to that mission's being accredited to other States as well, and indeed might not be informed of the fact.

35. Mr. BARTOŠ pointed out that in practice there had been cases, recognized as justified, in which a receiving State had refused to accept a special mission that was to be accredited to other States as well, for example where the same special mission was to have been accredited both to Israel and to Arab States. Again, certain Latin American States were only ready to receive good will missions on condition that they could stipulate the sequence in which such missions would visit the various countries to which they were accredited. Such political situations should be taken into account as they were not exceptional. The circumstances of accrediting special missions were not identical with those governing the accreditation of permanent diplomatic missions.

36. Mr. SCELLE urged the Commission not to embark upon a detailed consideration of practice, the variations of which were infinite. He would have thought that by the simple insertion of the word "special" before the word "mission" in article 5, it could be regarded as applicable to special mission. The same held true of nearly all the other articles in the draft.

37. Mr. TUNKIN said that, although there might not be a rule of international law allowing a receiving State to object to a special mission's being accredited to other States as well (because by definition the assignment of that special mission was limited to the territory of the receiving State), in practice the Commission might make a concession to political realities and by way of a new development allow for such objections to be raised by the receiving State: that provision could then be submitted to the diplomatic conference for consideration.

38. Mr. BARTOŠ said that, with all due respect to the authority of Mr. Scelle, he maintained that from the legal point of view the issue arising out of article 5 was not the same for permanent and special missions.

39. Mr. MATINE-DAFTARY said that if article 5 in its present form were made applicable to special missions, the very institution of *ad hoc* diplomacy would become meaningless, for that provision would enable one receiving State to frustrate the plans of a sending State to appoint a special mission to explore, for example, the prospects of trade with different countries. The Commission could not derive a rule from exceptional cases such as those which had arisen owing to the state of war between Israel and Arab countries.

40. The CHAIRMAN observed that the Commission seemed to be agreed that the question of the acceptance of a special mission would be settled at the time of the negotiations between

the two States concerning the sending of such a mission. Nevertheless, Mr. Tunkin had said that it might be advisable to make explicit provision for cases where a State sent the same special mission to several countries.

41. Mr. TUNKIN said that, whether or not an express provision to that effect was added to article 5, any government had the right at any time to decline to receive a special mission.

42. Mr. SANDSTRÖM, Special Rapporteur, thought there was no need to render the article applicable to special missions in order to regulate the situations to which Mr. Tunkin had referred; as Mr. Tunkin himself had pointed out, governments would be entitled to refuse to receive a special mission at any given time.

43. The CHAIRMAN considered that, with that interpretation of the situation with regard to article 5, the Commission could proceed to consider the applicability of article 6 (*Appointment of the staff of the mission*) of the 1958 draft to *ad hoc* diplomacy.

44. Mr. SANDSTRÖM, Special Rapporteur, commenting in the first place on the first sentence of article 6, recalled that the phrase "may freely appoint members of the staff of a mission" had been inserted in view of the existence of an article on the appointment of the head of the mission, which was not applicable to members of the mission staff. He therefore did not think that the first sentence was applicable to special missions, since it was self-evident that the members of the staff of a special mission would be freely appointed by the sending State.

45. Mr. ERIM considered that a question of principle was involved. Some members of the Commission had pointed out in connexion with article 5 that the prospective receiving State was entitled to refuse to receive a special mission, sent to more than one country. Likewise, if a person who had been declared *persona non grata* as a member of a permanent mission were proposed as a member of a special mission, the receiving State should be in a position to refuse him. That was one example. There might be many other reasons why a receiving State might refuse to receive a particular member of the special mission. The question was one of relations between States, which were based on mutual consent. If the Commission decided that article 6 was not applicable to special missions, its decision might be construed to mean that so far as the appointment of the staff of such a mission was concerned the receiving State's consent was not necessary.

46. Mr. SANDSTRÖM, Special Rapporteur, observed that the point raised by Mr. Erim was fully covered by article 3 of his draft (A/CN.4/129, alternative I), under which a State had the right to declare a head or member of a special mission *persona non grata* or not acceptable even if it had given its formal agrément for such a person.

47. The Chairman, speaking as a member of

the Commission, agreed that Mr. Erim's point was covered by the Special Rapporteur's article 3. Moreover, the Commission had agreed that the sending State must make certain that the agreement of the receiving State had been given for the proposed head of a special mission. *A fortiori*, the receiving State could decline to receive a particular member of a special mission.

48. Mr. SANDSTRÖM, Special Rapporteur, referring to the second sentence of article 6 of the 1958 draft, said that sentence was not, in his opinion, applicable to special missions, because military, naval or air attachés were not usually assigned to special missions.

49. Mr. TUNKIN thought that Mr. Erim's objections were met by article 8 (*Persons declared persona non grata*) which the Special Rapporteur regarded as applicable to *ad hoc* diplomacy.

50. Mr. ERIM could not agree with Mr. Tunkin, since article 8 related to cases where persons might be declared *persona non grata* after the mission had been appointed, and not at the time of its appointment. In his opinion, the receiving State must have the right during the negotiations preceding the sending of the special mission, to declare certain persons undesirable as members of that mission. The same objection applied to the Special Rapporteur's article 3, which would enter into operation after the event. The real issue was whether the composition of the special mission was to be governed by mutual consent.

51. Mr. SANDSTRÖM, Special Rapporteur, said it was obvious that the sending State would communicate to the receiving State the names of the persons intended to be appointed to the special mission, and at that stage the receiving State could raise objections.

52. Mr. PAL thought that the Commission was deviating from its purpose. In adopting article 6 of the 1958 draft it had provided, rightly or wrongly, that no prior agreement was needed for the appointment of the members of the staff of a diplomatic mission; it had been considered that article 8 would constitute a sufficient safeguard in that respect in relation to the appointment of such members. The question now before the Commission was not whether those articles adequately provided for all the possible cases but whether, as they stood, they were applicable to *ad hoc* missions. Members who doubted the wisdom of the provisions of article 6 presumably regarded the article as unacceptable in the case of special missions also. Personally, however, he agreed with Mr. Tunkin that article 8 sufficed and that the question to which Mr. Erim had referred did not arise, since the words "not acceptable" were comprehensive enough to relate also to refusal before the person concerned had been appointed. Furthermore, it should be borne in mind that both the Special Rapporteur and Mr. Jiménez de Aréchaga regarded article 8 as applicable to *ad hoc* diplomacy and none objected to its appli-

cability. The question was not, therefore, before the Commission at the moment.

53. Mr. ERIM said that his intention had not been to discuss the substance of article 6 of the 1958 draft, but merely to eliminate certain difficulties which arose in connexion with special missions. The Commission's task was to fill in gaps in the draft on *ad hoc* diplomacy, and there was no article in that draft corresponding to article 6. The Special Rapporteur had given a verbal assurance that the receiving State was entitled to object to the composition of a special mission. That assurance should be included in the commentary or in a special article.

54. With regard to the Special Rapporteur's statement concerning the second sentence of article 6, he thought that, although members of a special mission who were concerned with military, naval or air matters might not be attachés properly so-called, certain special missions, such as those concerned with defence matters, might be composed mainly of military personnel. It would therefore be advisable to refer to such persons in the draft.

55. Mr. JIMÉNEZ DE ARÉCHAGA said that article 6 of the 1958 draft contained two main provisions, first, that the sending State might freely appoint members of the staff of the mission and, secondly, that the names of military, naval or air attachés should be submitted beforehand for the approval of the receiving State. If the Commission declared the article not applicable to special missions, the implications of such a decision might be that a sending State could not freely appoint members of the staff of a special mission and that the receiving State was not entitled to require the names of the military staff of such mission to be submitted beforehand; and yet the Commission's debates showed that such an interpretation was contrary to the opinion of all members. Furthermore, he pointed out that the special missions of many American States were accompanied by military, naval or air attachés properly so-called.

56. Mr. BARTOŠ agreed with Mr. Erim that, although special missions might not normally comprise military, naval or air attachés, military, naval or air experts might be attached to some special missions, such as those dealing with questions of frontier delimitation and various naval matters. For practical reasons, it was advisable to give the receiving State the right to require the names of such experts to be submitted beforehand for its approval. For example, some of the Balkan States made a practice of declaring military personnel unacceptable on special missions for tracing the whereabouts of the war dead. The reasons for that practice were not only strategic; for example, at a time when Yugoslavia had maintained diplomatic relations with the Federal Republic of Germany, it had accepted such a mission, but had refused to accept as its members persons who had participated in the fighting on the battlegrounds which were to be searched. The

Yugoslav Government had suggested that on those missions doctors and other specialists should be substituted for military personnel. That action had been mainly prompted by consideration for the feelings of the local population.

57. His country had also had a dispute with Turkey with regard to the composition of a mission concerned with negotiations about the property of Turkish nationals in Yugoslavia. The Turkish Government had appointed former Yugoslav citizens to that mission as experts; the Yugoslav Government had agreed to accept those persons, but only on the condition that no direct negotiations would be conducted with them.

58. In his opinion, the provisions of article 8, under which any member of a mission could be declared not acceptable, sufficed to cover the situations referred to by Mr. Erim.

59. Mr. SANDSTRÖM, Special Rapporteur, likewise considered that the question of the acceptability of persons who were to form part of special missions was fully covered by article 8, and hence that article 6 should not be declared applicable to such missions.

60. The CHAIRMAN, summing up the debate, thought that the Commission was generally agreed that article 6 of the 1958 draft was not applicable to special missions. The anxiety expressed by some members seemed to have been met by the Special Rapporteur's statement that the names of the prospective members of the special mission were communicated in advance to the receiving State and that the latter was entitled to object and to declare any member of a special mission not acceptable. In any case, article 8, which the Special Rapporteur regarded as applicable to *ad hoc* diplomacy, covered both non-acceptance of a member of the mission and the declaration, after acceptance, that such a person was *persona non grata*.

61. He invited the Commission to consider the applicability of article 7 (*Appointment of nationals of the receiving State*) of the 1958 draft to special missions.

62. Mr. SANDSTRÖM, Special Rapporteur, considered that there was no need to make article 7 applicable to special missions, because the number of cases where a member of a special mission was a national of the receiving State was negligible.

63. The CHAIRMAN, speaking as a member of the Commission, pointed out that the acceptance of a special mission depended on the consent of the receiving State and that the provision of article 7 of the 1958 draft would be covered by the general acceptance of the special mission.

64. Mr. ERIM considered that article 7 should be made applicable to special missions, since the receiving State was entitled not to accept one of its own nationals as a member of such a mission. There could be no inherent difference be-

tween the two types of mission so far as consent was concerned.

65. Mr. YASSEEN pointed out that there was an inherent difference between the position of a permanent and that of a special mission. Because special missions were sent to the receiving State for a limited period, it was unnecessary to make them subject to an administrative restriction of the kind laid down in article 7.

66. The CHAIRMAN observed that the majority of the Commission did not seem to regard article 7 of the 1958 draft as applicable to special missions, since the situation of the latter was covered by articles 8 and 4.

67. Mr. JIMÉNEZ DE ARÉCHAGA suggested that the Commission should consider the applicability of article 8 of the 1958 draft to *ad hoc* diplomacy, since the Special Rapporteur had not mentioned section I of that draft in article 2 of his new alternative proposal (A/CN.4/L.89).

68. Mr. SANDSTRÖM, Special Rapporteur, drew attention to his statement that he might draft a special additional article providing for the applicability of section 1 of the diplomatic draft to special missions, *mutatis mutandis*. Alternatively, it might be stated in the commentary that article 8 and article 9 (*Notification of arrival and departure*) of the 1958 draft were applicable to special missions.

69. The CHAIRMAN considered that, whatever final text might be adopted, the opinion of the Commission on the question would be known to the Drafting Committee. At the present stage, articles 8 and 9 should be regarded as applicable to special missions as contemplated in the Special Rapporteur's report (A/CN.4/129, paragraph 14). The Commission should therefore proceed to consider the applicability of article 10 of the 1958 draft to *ad hoc* diplomacy.

70. Mr. SANDSTRÖM, Special Rapporteur, observed that article 10 (*Size of staff*) had been formulated expressly for permanent missions and was scarcely applicable to special missions. Moreover, in that case also the faculty of the receiving State to impose its will was wide enough to safeguard its interests and it was unnecessary to make special provision for the size of special missions. Furthermore, it would be extremely difficult to decide upon "a size exceeding what is reasonable and normal" in the case of special missions.

71. Mr. JIMÉNEZ DE ARÉCHAGA said that article 10 introduced an important restriction on the powers of the sending State. Although he agreed with the Special Rapporteur that the provision would in most cases be irrelevant to special missions, it might be undesirable to rule out its applicability to such missions altogether, for such a decision might be interpreted to mean

that special missions could have an unlimited number of staff.

72. Mr. ERIM, agreeing with Mr. Jiménez de Aréchaga, said that a formula should be found which would preclude that interpretation.

73. Mr. TUNKIN thought it was impossible, unnecessary and even dangerous to try to formulate a legal rule to cover every case. The acceptance of a special mission was the result of consent between the sending and receiving States, and the question of the size of the staff would be settled by the States concerned, if it was raised at all. The provisions of article 10 were appropriate in the case of permanent missions, but the implication of specific consent concerning the size of the staff would unnecessarily complicate arrangements for special missions.

74. Mr. ŽOUREK, supporting the Special Rapporteur's view, pointed out that paragraph 5 of the commentary to article 10 specifically stated that in the opinion of some members that clause did not express a recognized rule of international law. The Commission had included the article as a practical measure for permanent missions; but neither from the technical nor the practical point of view should the provision be regarded as applicable to a special mission sent to the receiving State for a limited period.

75. Mr. BARTOŠ, while agreeing that no special rule concerning the size of staff of special missions was needed, observed that in practice States were sometimes obliged to agree that special missions should not exceed a certain number. Countries which received many delegations might be faced with practical difficulties in such matters as hotel accommodation, particularly at certain seasons; nevertheless, since the matter was governed by mutual consent, there was no need to make specific provisions on the subject.

76. Mr. YASSEEN thought that a decision to render the article applicable to special missions might upset the differentiation between permanent and special missions. In connexion with article 10, the difference lay in the fact that a special mission would usually comprise a large number of experts, because it would be unable to keep in touch with the home government throughout the period of its assignment, whereas a permanent mission could avail itself of the services of local experts or send for experts from the sending State.

77. The CHAIRMAN noted that the majority of the Commission considered that article 10 of the 1958 draft was not applicable to *ad hoc* diplomacy and that the principle of consent underlying the acceptance of the special mission would cover all practical considerations relating to its size.

The meeting rose at 1.10 p.m.

568th MEETING

Tuesday, 21 June 1960, at 3.30 p.m.

Chairman: Mr. Luis PADILLA NERVO

State responsibility (A/CN.4/96, A/CN.4/106, A/CN.4/111, A/CN.4/119, A/CN.4/125) (resumed from the 566th meeting)

[Agenda item 3]

1. Mr. VERDROSS commended the work done on the subject of state responsibility by the Inter-American Juridical Committee and the Harvard Law School. The new revised Harvard Draft would be of great assistance to the Commission when it came to consider the Special Rapporteur's draft, article by article.

2. At the present stage, he would confine himself to a few general remarks, elaborating upon his brief comments on the subject at the eleventh session.¹

3. In the first place, as had been stressed by Sir Gerald Fitzmaurice (566th meeting, paragraph 52), the old-established principle that international responsibility operated as between States and not as between a State and an individual was not based on an obsolete doctrine; it formed part of the general international law as recognized by the highest judicial authority in the world, the International Court of Justice. The new tendency to admit that individuals could have rights at the international level was merely an exception to that rule, an exception based on certain conventions such as the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950.²

4. A State which presented a claim in respect of an injury sustained by one of its nationals was not acting "on behalf of a person who is its national", as was stated in paragraph 2(b) of article 20 of the new Harvard Draft. The State making the claim asserted its own right. As had been stated on several occasions both by the former Permanent Court and by its successor, the International Court of Justice, it was the rights of that State under international law which had been violated in the person of one of its nationals.

5. The formula thus accepted by the International Court was not of purely academic interest; it produced certain important practical consequences. In the first place, a State was not obliged to present a claim at the request of its injured national. For example, the Swiss Foreign Office (Political Department) had repeatedly stressed that Switzerland was under no obligation to submit a claim at the request of one of its injured

¹ Yearbook of the International Law Commission, 1959, vol. I, 512th meeting, paragraph 32.

² United Nations Treaty Series, vol. 213, p. 221.

nationals and that it could take into consideration the public interest before deciding whether to put forward a claim.

6. Another practical consequence of the formula adopted by the International Court was that a State could only make a claim if the injured person had been its national at the time of sustaining the injury. The statement to the contrary in paragraph 6 of article 23 of the Harvard Draft did not therefore reflect the existing position in international law.

7. No doubt, existing international law could be changed and the Special Rapporteur had suggested that changes should be introduced so as to divorce international claims from political considerations. Changes in that direction might represent useful progress, but was the international community prepared to accept such changes in existing international law? Furthermore, by what means could those changes be brought about?

8. Speaking only on the second of those questions, he said that apparently Professor Sohn believed that it would suffice to adopt a provision in an international convention to the effect that individuals were entitled to present international claims. In fact, however, the mere statement of that right in an international convention would not be sufficient to make the individual a subject of international law. It would be necessary in addition to place at the disposal of the individual international procedure machinery to assert his rights. So long as such an international procedure was not made available to individuals, their so-called international "rights" could not be said to be positive rights in general international law.

9. It might be objected that States themselves could only submit a claim to an arbitral tribunal or to an international court if they had agreed to submit to arbitration or to judicial settlement. Even where no such agreement existed, however, the States had had always available an international procedure to assert their rights: they could resort to diplomatic negotiations, appeal to a United Nations organ or even have recourse to economic reprisals. Such remedies were not available to individuals. Accordingly, if it was really desired to give individuals the right to present international claims, it was essential to make available to them international processes for submitting such claims. Otherwise, individuals would be given expectations but not true rights at international law.

10. Lastly, he considered the task before the Commission. He hoped that it would be possible to devote the next session to a thorough study of the Special Rapporteur's reports on state responsibility. He felt, however, that it would be preferable to consider in the first place international responsibility as such; it would then be possible to apply the rules of international responsibility to the law concerning the treatment of aliens. Both the Harvard Draft and the draft submitted by the Special Rapporteur endeavoured to deal at the same time with two branches of international law: the international responsibility of States

and the law governing the treatment of aliens. It was obvious, however, that international responsibility could arise not only in relation to the treatment of aliens but in the whole wide field of international law. Accordingly, it was essential that the Commission, before dealing with the applicabilities of the rules governing international responsibility to the treatment of aliens, should first formulate and codify the rules governing the international responsibility of States as such.

11. Mr. AGO thanked the observer for the Inter-American Juridical Committee and Professor Sohn for their valuable statements and for the work accomplished by that committee and the Harvard Law School in the study of state responsibility, which was one of the most important and difficult subjects of international law.

12. He recalled the misgivings he had expressed when it had been suggested that the Commission should devote some attention at the present session to the topic of state responsibility. He had said that a short discussion would do less than justice to that important topic and that the Commission should devote to it most of its time at one of its future sessions (561st meeting, paragraph 51).

13. In the brief time available, it would be impossible for him to deal with the many important points raised by the observer for the Inter-American Juridical Committee and by Professor Sohn, and he would have to concentrate on a few points chosen almost at random. In doing so, he would naturally comment more on the points on which he differed than those on which he agreed.

14. He wished to say first, however, that he had been very favourably impressed by the tendency of the Inter-American Juridical Committee to interpret the expression "denial of justice" strictly. For his part, he was convinced that a claim for violation of international law by reason of denial of justice to an alien could be brought only if the alien concerned had been denied access to fair judicial process; it would be extremely dangerous to endeavour to apply the concept of denial of justice to cases in which free access to the courts and guarantees of fair process had not been denied but the actual decision rendered was criticized as contrary to the law, or manifestly unjust. The attempt to appraise the merits of a decision adverse to an alien would inevitably transform international justice into a process of appeal from decisions of national courts. In addition, the door would be opened to all manner of controversies which should be avoided. Any decision was open to criticism, and lawyers were familiar with the critical analysis of decisions of municipal courts. It was unthinkable that the mere fact that a decision could be criticized should open the door to an international claim just because an alien was involved. Justice was rendered by human beings and was therefore subject to human error. All that international law required was that a decision should be rendered with the normal standard safeguards, in cases concerning aliens.

15. With regard to the Harvard Draft, he said that the conclusion of the law of state responsibility and the law concerning the treatment of aliens was still to be found in its revised text. The comments which he had made on the draft submitted at the previous session³ therefore also applied to the new draft.

16. It was true that, in practice, the subject of state responsibility had developed to a considerable extent in connexion with the treatment of aliens. The fact, however, remained that the question of the responsibility of the State for injuries to aliens was only one chapter of the general topic of state responsibility.

17. He could not therefore accept the definition given in article 1, paragraph 1, of the new Harvard Draft ("A State is internationally responsible for an act or omission which, under international law, is wrongful, is attributable to that State, and causes an injury to an alien"). He was certain that the authors of the draft had not intended to say that the international responsibility of States only arose in connexion with the treatment of aliens, but the definition lent itself to that construction.

18. His main criticism, however, related to the confusion he had already mentioned. The various provisions of the draft described as wrongful a number of acts affecting the position of aliens. That approach was the consequence of the fact that the treatment of aliens, instead of being considered positively, was considered from the angle of state responsibility, an approach which had the defect of presenting the rules of international law concerning the treatment of aliens in a negative form, in other words of describing many acts as wrongful, whereas it would be much more logical to express in a positive form what were the State's obligations in the matter of the treatment of aliens. The responsibility of the State was but the consequence of the violation of any of these obligations.

19. With regard to the section concerning the presentation of claims by aliens, he pointed out that an injury sustained by an alien at the level of municipal law did not necessarily justify an international claim. An international claim did not lie unless the particular act or omission, regardless of whether it violated or did not violate municipal law, constituted a breach of an international obligation under a convention or under customary international law towards the alien's State of nationality. Where no such breach of international law existed, a claim could not be brought under international law.

20. It was particularly dangerous to focus attention on the injury sustained by the individual. A tendency might result to ignore the fact that the alien's State of nationality must itself have sustained an injury at international law. The Permanent Court of International Justice had

repeatedly ruled that the State presenting an international claim asserted its own rights and not those of its national: the State concerned asserted its right to ensure respect for the rules of international law in the person of its nationals.⁴ That doctrine represented existing international law, and to ignore it would constitute not progressive development of international law, but a retrograde step.

21. As to the question of enabling an alien individual to submit an international claim directly, he felt considerable misgivings. The example of the European Court of Human Rights was not altogether valid. That court was a joint court of certain European countries, access to which was open to individuals who wished to make claims, as a rule against the very State of which they were nationals. It did not deal with international claims by States arising out of violations of international law.

22. He advised caution with regard to the question of the exhaustion of local remedies, dealt with in article 19 of the new Harvard Draft. He was somewhat disturbed by the statement in paragraph 1 of that article that local remedies would be deemed to have been exhausted if the claimant had employed all remedies made available to him by the respondent State "without obtaining the full redress to which he is entitled under this convention". An alien was entitled to access to judicial process; he was also entitled to be treated without discrimination, but he was not entitled to obtain a favourable decision in any case. A State had an international duty to ensure that a fair judicial process was open to aliens, but no duty to ensure that the process necessarily resulted in the recognition of every claim of aliens as well-founded.

23. Lastly, he was grateful to Professor Sohn for his promise that the Harvard Law School would give a precise indication of what it considered to be the existing law in the matter. It was recognized that the Harvard Draft proposed, in many of its provisions, changes in the existing law; the Commission would be greatly assisted in its work if a clear differentiation were made between those provisions of the draft which, on the one hand, constituted a restatement of existing international law and those which, on the other hand, constituted proposed changes in the law.

24. Mr. ERIM said he would confine remarks to a problem he had raised at the previous session—namely, the right of individuals (aliens and nationals) to apply to an international court for redress against a State.⁵ He had raised the problem then because of the new development introduced by the adoption of the European Convention for the Protection of Human Rights

⁴ Cf. citation in *Yearbook of the International Law Commission*, 1956, vol II, document A/CN.4/96, paragraph 98.

⁵ *Yearbook of the International Law Commission*, 1959, vol. I, 512th meeting, paragraph 26.

³ *Yearbook of the International Law Commission*, 1959, vol. I, 512th meeting, paragraphs 33 to 38.

and Fundamental Freedoms of 1950 and by the more general consideration that most civilized States were anxious to close any gaps in the law, so that it afforded the fullest possible protection for the individual, and were tending more and more to become States governed by the rule of law.

25. He welcomed the advance, albeit modest, in the new Harvard Draft, article 22, paragraph 2 of which gave a claimant the right to present his claim directly to a competent international tribunal if the State alleged to be responsible had conferred on that tribunal jurisdiction over such a claim. Though the provision still adhered to the traditional doctrine that a State could not be made a party to proceedings before an international tribunal unless it had previously consented to accept that tribunal's jurisdiction, a provision of that kind if incorporated in an international convention would at least be binding on the signatory States and therefore would mark some progress.

26. It was not yet a general practice. But academic legal bodies could be in advance of practice and promote the progressive development of law. In view of the fact that fifteen European States had already accepted the jurisdiction of the European Commission and also of the European Court of Human Rights, at least a permissive clause allowing for direct access by individuals to international tribunals should be included in any draft on state responsibility drawn up by the Commission.

27. Mr. LIANG, Secretary to the Commission, said it was very gratifying that the Commission should have found it possible to devote at least some time to the topic of state responsibility in pursuance of the decision taken at the previous session.⁶ He wished to present a few observations on the new Harvard Draft, and the scholarly statement made by Mr. Gómez Robledo.

28. The Commission would have noted from the introduction that Professors Baxter and Sohn had been entirely responsible for the new Harvard Draft but that they had had the advice of a learned advisory committee as well as that of Professor Milton Katz. He (Mr. Liang) had also put forward certain views.

29. With regard to the Draft itself he only wished on the present occasion to point out the disadvantage of departing from well-established terminology. For instance, the phrase "denial of justice" had now been replaced by certain articles that might be criticized either for saying too much or too little and which could not be interpreted by reference to the vast corpus of case-law on the denial of justice. He could not see the force of the objection to the retention of the expression. Nor could he understand why the authors of the draft should have done away with the expression "standard of treatment", whether "national standard" or "international law standard" or

"human rights standard". A standard was not the same as a principle or a rule and could be measured by the judicial process. Moreover, the Universal Declaration of Human Rights used the expression "standard of conduct".

30. Though he was somewhat sceptical about the possibility of providing an exposition of existing law he welcomed the promise made in the Draft. The authors had at their disposal all the resources of the Harvard Law School. With regard to the Harvard drafts of earlier years, he said that many students of international law thought the commentaries drawn up to support the conclusions more valuable than the black-lettered texts themselves. He did not think that an exposition of existing law substantiated by judicial decision and by practice, together with reasons for changing the existing law, could be comprised in "explanatory notes", and he hoped that what the authors of the Harvard Draft had in mind was something very much more detailed and comprehensive.

31. He agreed with Mr. Ago that the new Harvard Draft incorporated changes in the existing international law; that fact should be made clear so that there was no misunderstanding about its nature. In a sense it might be compared to certain principles of international law which had been formulated as a result of a series of discussions initiated by Judge Manley O. Hudson before the end of the last war, and those principles, entitled "International Law of the Future"⁷ had exerted some influence on the formulation of the Charter of the United Nations. He thought that the present draft should be clearly designated as part of the international law of the future.

32. He thought it encouraging that state responsibility was being considered by a number of scientific bodies including the Institute of International Law which had on its present agenda the following topics: local remedies, diplomatic protection and nationalization. There was no ground whatever for eschewing such an important subject because it had political implications.

33. Commenting on some of Mr. Gómez Robledo's very illuminating remarks, he said they had been particularly valuable because in section II of his (Mr. Liang's) own report (A/CN.4/124) he had of necessity been concise and had not attempted to state in detail the various views expounded in the Inter-American Council of Jurists. One of the most important points brought out by Mr. Gómez Robledo was the need to consider state responsibility not only from the legal, but also from the political, economic and sociological points of view. The whole subject should not be left to exposition and research by agents or counsel of governments alone, who were somewhat limited in their approach, but should be studied from every angle, as had been done by F. S. Dunn in his

⁶ *Ibid.*, 515th meeting, paragraph 45.

⁷ *The International Law of the Future: Postulates, Principles and Proposals*, Washington, D.C., Carnegie Endowment for International Peace, 1944.

well-known book⁸ and by Professor Shea in his book on the Calvo clause.⁹ It was to be hoped that further authoritative works of that type would be published in the future.

34. Without discussing in detail the substantive issues touched upon by Mr. Gómez Robledo, who had been so informative about the cleavage of views in the Inter-American Juridical Committee, he pointed out that the various doctrines concerning state responsibility held by Latin American jurists were not necessarily confined to that continent. He recalled a speech which he had heard at The Hague Codification Conference of 1930 in defence of a single standard, that of the equality of treatment for nationals and aliens. The speaker had argued that both from the legal and from the logical points of view it was impossible to see how a State could object to such a standard since persons going to live in a foreign country went there of their own free will and in full knowledge of the economic and social conditions. That being so, there was no reason whatever why the State of residence should be held to bear a heavier responsibility for the protection of aliens than it had for the protection of its own nationals. That speech had not been delivered by a representative of a Latin American country, but by the Chinese delegate. Nevertheless, it must be recognized that Latin American jurists had made a great contribution to the theory of state responsibility. Such authorities as Drago and Calvo were mentioned in the most elementary treatises of international law in use in China for the past fifty years. More recently there had been the studies of Guerrero, Podestá Costa and Accioly, as well as the noteworthy contributions of Mr. García Amador and Mr. Jiménez de Aréchaga. He still vividly remembered the statement made at the Codification Conference of 1930 by Mr. Guerrero, when the latter had emphasized that the first problem to be solved in connexion with state responsibility was how to define the concept of an international obligation.

35. He believed that state responsibility as a subject lent itself to being studied from the sociological angle advocated by certain contemporary proponents of the philosophy of law such as former Dean Roscoe Pound of the Harvard Law School, who had elaborated the theory of "social engineering" that sought to reconcile interests by weighing the claims of the interested parties in the light of sociological considerations.

36. It was a pity that through lack of time the Inter-American Council of Jurists, both at its session at Mexico City and at its session at Santiago de Chile, had been unable to undertake a thorough study of state responsibility. The same had been true of the International Law Commission which he

hoped at future sessions would be able to examine that important topic in greater detail.

37. Mr. PAL associated himself with the tributes paid to the authors of the Harvard Draft and thanked Mr. Gómez Robledo for pointing out some of the difficulties of the subject. Indeed, any proper evaluation of the proposed measures would necessarily present features of social reality which could be observed only in given historical situations. He thought that the Commission should devote a whole session to discussing the topic of state responsibility which, for lack of time, it had not as yet been able to do despite the importance of the subject. There were certain obvious disadvantages in discussing it in a piecemeal way during two or three meetings at each session, the main one being that such cursory comments were likely to assume a somewhat political and emotional tinge.

38. As he had not had the opportunity to study the new Harvard Draft carefully, it would be presumptuous on his part to attempt a detailed comment on it. Cursory comments on the other hand might unwittingly do injustice to the authors. By way of example one could refer to the comment made — and apparently rightly made — by Sir Gerald Fitzmaurice in the course of his observations regarding the frequent use by the authors of the expression "international law or treaty". Sir Gerald had observed that the reference to treaties in the relevant provisions raised a fundamental point, for in such a case the real wrong was the breach of the treaty and not the maltreatment of the alien. Professor Sohn, however, already at the previous session had indicated that his draft was restricted to responsibility for injuries to aliens and that violations of treaties as such did not fall within its scope. So it was quite within the competence of the present draft to deal even with what would be only a secondary wrong, if that was caused as a secondary consequence to an alien. Similarly, departures from the 1929 draft had also been pointed out by Professor Sohn himself at the previous session.

39. He agreed with Mr. Ago and Mr. Verdross that great caution was needed in accepting the view that the desired progress in the field was in the direction of allowing individuals to become subjects of international law. There were, indeed, many new historical factors not yet adequately assimilated in the requisite legal thinking in that respect. He drew attention particularly to the recent trend of change in the economic structure throughout the world and in the place of individual initiative in it, and pointed out its important bearing on the question. He welcomed Professor Sohn's promise that each article would be supported by an explanatory note and would be accompanied by a statement of the existing law. He suggested that the explanatory note should contain an explanation of the growth with a brief survey of the conditions responsible for the change, if any. That would help to point out the inner necessity of the law and would make it operate not as an obstacle but as the necessary channel through

⁸ Frederick S. Dunn, *The Protection of Nationals: A Study in the Application of International Law*, Baltimore, The Johns Hopkins Press, 1932.

⁹ Donald R. Shea, *The Calvo Clause, a Problem of Inter-American and International Law and Diplomacy*, Minneapolis, University of Minnesota Press, 1955.

which the co-ordinated energies were to flow. In the sphere of international law, law-making aimed at producing a consciousness of the ends would be more helpful to progress than the mere assertive provision of means.

40. Mr. TUNKIN associated himself with earlier speakers in congratulating the authors of the Harvard Draft on their elaborate project and Mr. Gómez Robledo on his extremely interesting statement on the trends of opinion among Latin American jurists on the topic of state responsibility. The Commission unfortunately had no time to discuss the Draft in detail, so that his observations would of necessity be very general.

41. As he had pointed out at the previous session,¹⁰ the Harvard Draft represented a specific point of view, but its practical value for the Commission's work in the matter was questionable. In approaching the codification and progressive development of international law, the primary consideration must be the laws of the development of human society, which conditioned the main lines of the development of international law. From that point of view, he wished to make two main observations on the Harvard Draft.

42. In the first place, the provisions of the Draft relating to property were formulated in disregard of the fact that two fundamentally different economic systems now existed in the world and also in disregard of the disintegration of the colonial system. For example, paragraph 2, article 10 (*Taking and deprivation of use or enjoyment of property*), which laid down certain standards for compensation, in effect reproduced the corresponding provisions of the Code Napoléon of 1804 in its concern for the sanctity of private property. While such provisions might still exist in the municipal law of some countries, it was absolutely inadmissible, in view of the co-existence of two economic systems, to postulate the principle as a rule of international law. Secondly, the concept of the individual as a subject of international law was also unacceptable.

43. His remarks should not be held to mean that he did not regard the Harvard Draft as a valuable exploratory work, representing a definite point of view; but it was to him an increasing source of anxiety that if the Commission continued to work on the same lines it would be difficult to expect practical results in the codification of the international law on the subject.

44. The scope and nature of the draft that the Commission would ultimately present to the General Assembly were by no means clear. The reason for that, in his opinion, was that two distinct subjects — state responsibility proper and the treatment of aliens — had been mixed together.

45. The structure of the Draft also seemed to be open to criticism. The Special Rapporteur had

used as a point of departure the question of fundamental human rights, and his earlier reports in fact amounted to statements of those rights. But it was obvious that fundamental human rights as set forth in the draft international covenants on human rights had not yet become an institution of international law. Moreover, though starting from that basis, the Special Rapporteur had in some cases departed from it and tended to perpetuate the obsolete concept of the privileged status of aliens.

46. In conclusion, he hoped that the Commission at its next session would find time to examine the main points of the subject.

47. Mr. ŽOUREK recalled that, when state responsibility had been discussed at the previous session, he had observed that the then Harvard Draft departed in some essential respects from the well-established rules of international law.¹¹ Many members of the Commission had made constructive criticisms on some points of the 1959 draft, and the representatives of the Harvard Law School had said that they would take the observations into account in their final draft. While he had not had time to study the new draft exhaustively, he had compared it with the 1959 draft, and had been somewhat disappointed by the absence of change in the methods used and in the basic principles contained therein.

48. It was doubtful, to say the least, whether a satisfactory codification of the rules of one of the most difficult branches of international law could be based on the Harvard Draft, since several of its provisions contained totally unacceptable theses. For example, paragraph 2, article 3 (*Categories of wrongful acts and omissions*) stated that the wrongfulness of a certain act or omission might be the result of the fact that the law of the State concerned did not conform to international standards; but the notion of "international standards" did not exist in international law, nor, for that matter, was it defined in the Draft. In several passages, also, the expression "the principles of justice generally recognized by municipal legal systems" was used; in view, however, of the wide difference between the principal economic and juridical systems of the world in that respect, it would be very difficult to agree on generally recognized principles of justice. Furthermore, the Draft seemed to be based on the idea that aliens had a privileged position in economic matters; while it stated that the position of aliens should not be less favourable than that granted to the nationals of the State concerned, at some points the vague concept of generally recognized principles of justice was mentioned, as though it were a definable entity. Finally, under paragraph 6 of article 23 (*Espousal of claims and continuing nationality*) a State could present a claim on behalf of a person who had become a national of that State subsequent to the injury. Those were some of the most outstanding examples of the departures made by the authors of the draft from

¹⁰ *Yearbook of the International Law Commission*, 1959, vol. I, 512th meeting, paragraph 24.

¹¹ *Ibid.*, 513th meeting, paragraph 4.

the terra firma of existing rules of international law.

49. The rules in the Harvard Draft were based on one economic and legal system, and no attempt had been made by the authors to work out provisions capable of being applied at the international level to all States, whatever their economic and social structure. The unilateral nature of the Draft therefore made it impossible for the Commission to use it as a basis. Viewed as a work of research and as simply an indication of the line of thought prevailing in the United States of America, it might prove of some use for codification purposes, but it could not be used as a guide by the Commission. If the Commission used it as a guide, its debates on the topic would be bound to end in disagreement. He had been glad to hear, however, that the Harvard Law School was thinking of preparing a commentary to the Draft, in which it would distinguish between existing law and purely theoretical proposition. The only practical course was to return to the rules and fundamental principles of international law in the matter, and to distinguish between cases where an injury to an alien did not constitute a breach of international law, and cases where the State of residence was internationally responsible for injuries sustained by an alien.

50. Mr. GARCÍA AMADOR, Special Rapporteur, replying to Mr. Tunkin's comments on his study and on the methods he had used, observed that his reports contained detailed explanations of the difference between the two subjects of state responsibility properly so called and the legal status of aliens. The clear distinction between the two had never been questioned in a public or private codification, and he was therefore surprised that the matter should have been raised by a member of the International Law Commission. The two subjects could indeed be regarded as aspects of the same question: the legal status of aliens was the substantive aspect, while the other aspect consisted in the conditions and circumstances in which States must assume responsibility. The Commission's clearly defined task was to codify the conditions and circumstances in which a wrongful act causing injury to an alien was imputable to a State. A careful study of his reports would show that their scope was fundamentally confined to such codification and that the subject of the legal status of aliens was touched upon only in connexion with the explanation of the difference between the two questions.

51. Nor could he agree with Mr. Tunkin that human rights and fundamental freedoms were not generally recognized at the international level. As early as 1956, before Mr. Tunkin had become a member of the Commission, the majority of the Commission had seemed to be in favour of basing a general approach to the question of state responsibility for injuries caused to the person or property of aliens on the concept of human rights.

52. In commenting on the new Harvard Draft, Mr. Tunkin had stressed the need to find a new concept in keeping with the "principle of peaceful co-existence" of the two economic systems of private and socialist property. That need was undeniable, and he would submit that the difference of opinion between Mr. Tunkin and himself on the matter was perhaps not so great. In his fourth report, for example (A/CN.4/119), he had studied the questions of expropriation and compensation in the light of new developments in the social function of private property. The importance attached to the social function of property rights was not, however, an exclusive attribute of socialist States; it was evident in most States as at present organized. Again, he was surprised that Mr. Tunkin laid such stress on the alleged disregard of one legal system of property and yet showed such reluctance to admit the concept of internationally recognized human rights, which was a universal concept and an integral part of the principles of the United Nations.

53. Mr. BARTOŠ agreed with the views expressed by earlier speakers that the new Harvard Draft laid down desiderata for guaranteeing the interests of aliens without taking into account the fundamental developments that had taken place in social institutions throughout the world and the new legal concepts expressed in many United Nations documents. For example, the Universal Declaration of Human Rights and the draft international covenants on human rights contained a number of limitations which were disregarded in the Harvard Draft. Article 17, paragraph 2, of the Universal Declaration merely stated that no one should be arbitrarily deprived of his property, and article 29, paragraph 2, stated that, in the exercise of his rights and freedoms, everyone should be subject only to such limitations as were determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. The Harvard Draft, however, did not take into account the "limitations determined by law". Furthermore, he agreed with Mr. Žourek that in some of its provisions the Draft disregarded established rules of international law—for example, in the provision enabling a State to present a claim on behalf of a person who had become its national after the injury.

54. The Harvard Draft could therefore be regarded only as a codification of United States case-law, which in effect extended the right of intervention but failed to take into account the interests of other States. With all due respect for the concept of state responsibility, he considered that certain limitations must be provided to allow for developments that had taken place in the municipal law of many States: since the Code Napoléon, for instance, the French law relating to property rights had been changed very greatly.

relating to property rights had been changed very greatly.

55. The Commission's thanks were due to the authors of the Harvard Draft and also to the Inter-American Juridical Committee, whose observer had given an illuminating description of the views held by various American jurists. Nevertheless, for a really profound study of the foundations of state responsibility the Commission could not use the Harvard Draft as a guide. The consequences of the existence of several economic and legal systems must be taken into account, and he welcomed the Special Rapporteur's assurance that he would study new developments closely for his future texts.

56. The CHAIRMAN expressed the Commission's thanks to Professor Sohn and to Mr. Gómez Robledo for their valuable contributions to the Commission's work. The all-too-brief exchange of views prompted by their statements would undoubtedly be most useful in future discussions. It was to be hoped that when the Commission came to study the subject of state responsibility in detail, those exchanges of views would be borne in mind and also that the mutually beneficial collaboration between the Commission and the Harvard Law School and the Inter-American Juridical Committee would continue.

The meeting rose at 6.5 p.m.

569th MEETING

Wednesday, 22 June 1960, at 9.30 a.m.

Chairman: Mr. Luis PADILLA NERVO

Ad hoc diplomacy (A/CN.4/129, A/CN.4/L.87, A/CN.4/L.88, A/CN.4/L.89) (resumed from the 567th meeting)

[Agenda item 5]

1. The CHAIRMAN invited the Commission to consider whether article 11 (*Offices away from the seat of the mission*) of the 1958 draft was applicable to special missions.

2. Mr. SANDSTRÖM, Special Rapporteur, said that he had proposed (A/CN.4/129, paragraph 15) that article 11 should be excluded from the list of provisions applicable to special missions because the article dealt with a question affecting specifically permanent missions.

3. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed that article 11 did not apply to special missions.

It was so agreed.

4. Mr. SANDSTRÖM, Special Rapporteur, said that article 12 (*Commencement of the functions of the head of the mission*) of the 1958 draft did not,

as it stood, apply to special missions. The effective date of the commencement of the functions of the head of a permanent mission affected such matters as precedence; in the case of special missions, the date of commencement, though less important, might occasionally be of consequence.

5. He therefore proposed that, in the draft on special missions, article 12 should be mentioned as one of the provisions which could on occasion serve for special missions.

6. The CHAIRMAN said that, if there were no objection, he would take it that the Commission accepted the Special Rapporteur's proposal concerning article 12, with his explanation.

It was so agreed.

7. Mr. SANDTRÖM, Special Rapporteur, said that article 13 (*Classes of heads of mission*) of the 1958 draft was not relevant to special missions, except those sent on ceremonial occasions. He proposed that article 13 and article 14 should be dealt with in the same manner as article 12.

8. Mr. MATINE-DAFTARY pointed out that article 13 was of interest for itinerant envoys.

9. Mr. JIMÉNEZ DE ARÉCHAGA drew attention to articles 2, 3 and 4 of the Regulation of Vienna.¹ The provisions of those articles, taken together, made it clear that diplomatic officials on extraordinary missions, who were the subject of article 3, must belong to one of the three classes of heads of mission. The provisions of article 13 had therefore applied to special envoys at least since 1815.

10. Mr. SANDSTRÖM, Special Rapporteur, agreed with Mr. Jiménez de Aréchaga on that point.

11. With regard to article 14, he said that its provisions clearly concerned permanent missions, for it dealt with the question of reciprocity in the exchange of heads of mission. Special missions were of an occasional character and were not reciprocal. For those reasons, he proposed that article 14 should be dealt with in the manner which he had indicated.

12. Mr. TUNKIN said that, in practice, the two States concerned never entered into an express agreement regarding the class to which the head of a special mission was to belong. Accordingly, article 14 was not applicable to special missions; there was no reason to oblige States to enter into an agreement in advance on the class of the head of a special mission.

13. Of course, when the receiving State consented to receive the special mission, the agreement would in fact, explicitly or implicitly, include an agreement on the duration and purpose of the mission and also on its head. Article 14, however, referred to the special procedure applicable to

¹ Official Records of the General Assembly Thirteenth Session, Supplement No. 9 (A/3859), footnote 29.

heads of permanent missions. The agreement concerning the sending and the receiving of a special mission referred to a single mission, and it would be introducing an unnecessary complication, inconsistent with existing practice, to include article 14 among the provisions applicable to special missions.

14. Mr. MATINE-DAFTARY agreed with Mr. Tunkin. The class to which the head of a special mission belonged was not a matter of concern to the receiving State. The sending State could choose a suitable person to head a special mission, and there was no need to specify that an agreement between the two States was required on the class of the head of the mission.

15. Quite frequently, a special mission was led by a senator or some other person who was not a diplomatic agent. It would be most inconvenient to require the sending State to give the person concerned the rank of ambassador; under the law of certain countries, that rank could not be conferred upon persons who did not belong to the diplomatic service.

16. Mr. SCELLE saw no reason why article 14 should not apply to special missions. The receiving State was entitled, when consenting to receive the special mission, to insist that it should be headed by a person of a particular rank. If no objection were made by the receiving State, there would be a tacit agreement between the two States concerned regarding the class to which the head of the mission belonged.

17. Mr. ERIM, agreeing with Mr. Scelle, said that for the sake of prestige a government might insist on the head of a special mission having the rank of ambassador, for example. If the Commission decided that article 14 should not apply to special missions, the result would be that the sending State would be considered free to give any title it wished to the head of the mission. Such a system would be contrary to existing practice.

18. Mr. BARTOŠ said that in principle he agreed with Mr. Scelle. In practice, it often occurred that where a State was invited to send a special mission, the inviting State asked that it should be headed by an ambassador extraordinary or by a member of the government of the sending State. If the sending State accepted the invitation, made subject to that condition, it thereby gave its consent to the proposed class of the head of the mission. Often, too, the receiving State asked that a special mission should not be headed by the permanent ambassador of the sending State, so as to mark the fact that the mission would not deal with current business but with a special assignment.

19. The CHAIRMAN, speaking as a member of the Commission, said that the exclusion of article 14 as unsuitable for special missions would not imply that the consent of the receiving State was unnecessary in the matter of the class of the head of the mission. All that it meant was that

there was no special obligation for the States concerned to enter into a separate and prior agreement concerning the class of the head of the mission. Of course, the receiving State could, when consenting to receive the mission, raise the question of the class of envoy who was to head the mission and even make its consent conditional on the head belonging to a particular class.

20. Mr. LIANG, Secretary to the Commission, agreed with Mr. Matine-Daftary and cited the concrete instances of Colonel House, of the United States, who had been sent on a special mission during the First World War; Mr. Summer Welles, when Under-Secretary of State of the United States of America, who had gone early in the Second World War on a special mission to Europe; and, towards the end of the war, Mr. Harry Hopkins, who had gone on a special mission to Moscow. From those examples, it was clear that the question of assigning a diplomatic rank to the head of a special mission did not arise.

21. Mr. JIMÉNEZ DE ARÉCHAGA pointed out that Mr. Matine-Daftary and the Secretary had spoken on the applicability of article 13, not of article 14, to special missions. He recalled that the Special Rapporteur had agreed that the terms of article 13, by virtue of the Vienna Regulation, in fact applied to special missions.

22. Under article 3 of the Vienna Regulation, it was clear that all heads of special missions, described in that article as "diplomatic officials on extraordinary missions", held diplomatic rank. If they were not accredited as ambassadors, they would be deemed to be envoys.

23. The CHAIRMAN drew attention to the opening words of the Regulation of Vienna: "In order to avoid the difficulties which have often arisen and which might occur again by reason of claims to precedence between various diplomatic agents . . ." It was clear that questions of precedence would arise only in the case of the simultaneous reception of a number of special missions from foreign countries on such ceremonial occasions as the installation in office of a new chief of State. In those cases, the sending State would decide the rank of the head of its special mission, and precedence would depend on that rank and, as between heads of mission of the same rank, on the date on which the invitation to send a special mission had been accepted.

24. Mr. YASSEEN said that article 14 was a corollary of article 13 and that the two should be discussed together. As far as the Arab and Middle Eastern countries were concerned at any rate, it was not the existing practice to classify heads of special missions as set forth in article 13. A special mission was often headed by a cabinet minister or by a general who did not receive any special title for the purpose of his mission.

25. Mr. SANDSTRÖM, Special Rapporteur, said that he had himself once been sent on a special mission and had not been given any diplomatic class.

26. Mr. LIANG, Secretary to the Commission, said that the Regulation of Vienna did not apply in the manner suggested by Mr. Jiménez de Aréchaga. Article 3 of the Regulation made it clear that, if a special envoy was given diplomatic rank, the rules laid down in the Regulation would apply to him and that the mere fact of being sent on an extraordinary mission did not entitle a diplomatic official to any superiority of rank. The Regulation did not say that all envoys must have diplomatic rank. It was quite common for a high official of the sending State to head a special mission, and he could not see how an Under-Secretary of State, for example, could be reduced to the rank of an envoy (i.e., the second class under the Vienna Regulation) merely because he had not been formally styled an ambassador.
27. Lastly, he agreed that articles 13 and 14 could not be discussed separately.
28. Mr. SCALLE said that undue emphasis had been placed on the term "class" which was relatively unimportant in article 14. As far as the substance of the article was concerned, the important words were "shall be agreed".
29. It would be dangerous to declare article 14 inapplicable to special mission, for such a decision could be construed as meaning that the essential condition of agreement did not have to be fulfilled in the case of such missions and that, therefore, the sending State could send any person it desired as head of the special mission. In fact, the consent, albeit tacit, of the receiving State was necessary.
30. Mr. TUNKIN suggested that article 14 should be considered not applicable to special missions, and that the reservations expressed by certain members should be taken into account in the drafting of the clauses relating to special missions.
31. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to Mr. Tunkin's suggestion.
- It was so agreed.*
32. Mr. SANDSTRÖM, Special Rapporteur, said that article 15 (*Precedence*) of the 1958 draft was clearly not applicable to special missions. Its provisions might, of course, serve some purpose in the case of special missions, as, for example, when a number of special missions were sent simultaneously by several countries on a ceremonial occasion. He proposed that article 15 should be dealt with in the same manner as articles 12, 13 and 14.
33. Mr. ERIM agreed that article 15, as it stood, did not apply to special missions but to permanent missions. The question of precedence for special missions, however, needed to be solved. The protocol divisions of the Ministries of Foreign Affairs in many countries had experienced difficulties in the matter of the precedence of special missions, and it might perhaps be desirable to suggest some rule on the subject in the draft on *ad hoc* diplomacy.
34. Mr. SANDSTRÖM, Special Rapporteur, said that it was impossible to lay down a uniform rule for all special missions. It was better to leave the question of the precedence of special missions to be settled by the protocol divisions concerned, which would draw upon the substance of article 13 wherever possible.
35. The CHAIRMAN said that questions of precedence arose only where a large number of special missions were sent at the same time to a single State. In the rare cases where doubts arose, they were removed by conversations between the interested parties and settled in accordance with the prevailing practice in the receiving State.
36. If there were no objection, he would take it that the Commission agreed to the Special Rapporteur's proposal concerning article 15.
- It was so agreed.*
37. The CHAIRMAN invited the Commission to consider whether article 16 (*Mode of reception*) of the 1958 draft should be applicable to special missions.
38. Mr. SANDSTRÖM, Special Rapporteur, said that the same considerations applied to article 16 as to article 15.
39. Mr. BARTOŠ pointed out the difficulty of establishing a uniform rule with regard to the mode of reception for special missions which varied so greatly in character. Those which were of great political importance might call for more formality. Perhaps the matter should be left to the protocol section of the Ministry of Foreign Affairs of the receiving State.
40. The CHAIRMAN, speaking as a member of the Commission, agreed that, for the reasons given by Mr. Bartoš, it was impossible to lay down a uniform rule concerning the reception of heads of special missions.
41. Mr. MATINE-DAFTARY agreed with Mr. Bartoš that the mode of reception must depend on a whole set of variable circumstances such as the state of relations between the two countries.
42. Mr. JIMÉNEZ DE ARÉCHAGA pointed out that the provision contained in article 16 in fact embodied the principle of article 5 of the Regulation of Vienna and clearly was applicable to both permanent and special missions, as could be seen from a perusal of the previous articles of that Regulation. The rule was thus well established and if the Commission decided that article 16 should not be applicable to special missions, its decision might be interpreted to mean that discrimination in the mode of reception of heads of special missions was permissible.
43. The CHAIRMAN, speaking as a member of the Commission, pointed out that article 16 dealt with the presentation of credentials, a procedure not normally observed in the case of heads of special missions. He therefore continued to think that the mode of reception of special missions should be settled by the States concerned.

44. Mr. BARTOŠ observed that article 16 did involve certain issues of substance which also arose under section II. The important point was that there must be no discrimination.

45. Mr. SANDSTRÖM, Special Rapporteur, suggested that the intention of article 16 should be taken into account in the general formula to be embodied in the clauses concerning special missions.

It was so agreed.

46. The CHAIRMAN invited the Commission to consider whether article 17 (*Chargés d'affaires ad interim*) of the 1958 draft was applicable to special missions.

47. Mr. SANDSTRÖM, Special Rapporteur, explained that although article 17 might not be considered as directly applicable as it stood, the principle on which it was based was applicable to special missions but the manner of its application would depend greatly on circumstances.

48. The CHAIRMAN, speaking as a member of the Commission, said that in practice the head of a special mission would rarely vacate his post or be unable to perform his functions. In any event, he doubted whether it would be appropriate to stipulate that the head of a special mission should be replaced by a *chargé d'affaires ad interim* in such a contingency, and it would not be necessary to require the sending State to notify the receiving State when a member of a special mission already empowered to carry on the negotiations and accepted by the receiving State acted as head of the mission.

49. Mr. LIANG, Secretary to the Commission, confirmed that the terminology used in article 17 applied solely to permanent missions, though circumstances similar to those provided for in the article might arise in the case of special missions.

50. Mr. JIMÉNEZ DE ARÉCHAGA observed that article 17 as drafted could not be applicable to special missions for it would oblige the sending State to appoint a *chargé d'affaires ad interim* if the head of the mission was unable to perform his functions. He considered, however, that drafted in permissive terms the article could and should be made applicable to special missions in order to allow the replacement of a principal negotiator.

51. Mr. TUNKIN considered that the legal position of special missions was entirely different. If the head of a permanent mission either absented himself or was unable to perform his functions, the affairs of the mission would be conducted by a *chargé d'affaires ad interim*, no new *agrément* being necessary for the purpose, though of course the receiving State was entitled to raise objections to a particular person acting in that capacity. If, on the other hand, the head of a special mission was to be replaced, the consent of the receiving State to the replacement would be required.

52. Mr. SANDSTRÖM, Special Rapporteur, said that if the Commission could devise a formula indicating which principles rather than which

specific articles of the 1958 draft were applicable to special missions — since the wording was not always appropriate — there would be no difficulty in reaching a decision on article 17.

53. Mr. MATINE-DAFTARY emphasized the difference, both in law and in practice, between permanent and special missions. The functioning of a permanent mission must not be interrupted for a moment, either by sickness, absence or any other reason. A special mission, however, could suspend and then resume its work and there might not be any need to replace a head who for a time could not perform his functions. It was quite impossible to establish a rigid uniform rule for special missions since everything depended on the circumstances.

54. Mr. BARTOŠ also stressed the difference between the position of permanent missions and that of special missions. Often, the personal standing of the head of mission was the preponderant consideration in the case of a special mission and representation by the person concerned was a condition *sine qua non*. For example, if an interstate conference of ministers was convened, and a minister heading the mission was unable to perform his functions, it was very difficult indeed for some other official to take his place among the cabinet ministers of other States. Furthermore, in practice the members of a special mission did not have the same powers as the head of the mission. It was usual in the full powers of a special mission to enumerate the members of the mission authorized to negotiate and, after empowering the head of mission to sign any acts emerging from the conference, to designate his alternate by name. By contrast, if the head of a permanent mission was unable to perform his functions, the transfer of the conduct of the mission's affairs to a *chargé d'affaires ad interim* was automatic.

55. He considered that article 17 should not be applicable to special missions. It might, however, be stated in the commentary that in the eventuality contemplated the alternate of the head of a special mission should act on behalf of the head of mission in so far as the nature of the conference permitted, if the other participants in the conference agreed and within the limits of the alternate's authority.

56. The CHAIRMAN noted that the consensus of the Commission was that article 17 of the 1958 draft imposed no obligations concerning the manner of replacing the head of a special mission and that the official ranking immediately below the head of mission could not — if he did not have full powers — be automatically presumed to take over the conduct of the affairs of the mission. He suggested that the article should be regarded as inapplicable to special missions.

It was so agreed.

57. Mr. SANDSTRÖM, Special Rapporteur, said that, in his opinion, article 18 (*Use of flag and emblem*) of the 1958 draft should apply to special

missions. The main point of the article was obviously the use of the flag and emblem of the sending State on the means of transport of the head of the mission; there seemed to be no reason to deny that facility to the heads of at least some special missions, particularly those which were primarily ceremonial.

58. The CHAIRMAN suggested that article 18 of the 1958 draft should be applicable to special missions.

It was so agreed.

59. Mr. SANDSTRÖM, Special Rapporteur, recalling his original proposal that four of the articles in section II of the 1958 draft should be held not to be applicable to special missions (A/CN.4/129, paragraphs 23 and 24), said that he had reconsidered his earlier position in the light of comments made in the Commission and now recommended that the whole of sections II, III and IV of that draft should be applicable to special missions (A/CN.4/L.89, draft new article 2). Since privileges and immunities were granted by reason of the functions performed, and since the functions of both permanent and special diplomatic missions were analogous, the provisions in question should be applicable to both. The only question that might give rise to some doubt was that of including among the persons eligible for the benefit of diplomatic privileges and immunities the families of members of special missions; he thought, however, that the extension of those privileges and immunities to those persons was justified by the functions performed by the officials concerned, and in that opinion he was supported by the Havana Convention of 1928 regarding Diplomatic Officers, which extended the privileges and immunities to the families of members of special missions.

60. Mr. TUNKIN said that his acceptance of the principle that the provisions of sections II, III and IV were applicable to special missions should not be held to mean that he had no criticisms to make concerning specific articles of those sections.

61. Mr. JIMÉNEZ DE ARÉCHAGA asked whether, in the light of certain views expressed in his (the speaker's) memorandum (A/CN.4/L.88, paragraph 19), the Special Rapporteur would consider including a specific provision concerning the termination of special missions in article 41 (*Modes of termination*) of the 1958 draft. Alternatively, the point might be raised at a later stage.

62. Mr. SANDSTRÖM, Special Rapporteur, said that for the purpose of its application to special missions, he had contemplated replacing article 41 (a) by a provision to the effect that a special mission would be terminated when it had carried out the task assigned to it. On further consideration, however, he had decided that it would be enough merely to render article 41 applicable to special missions, since the enumeration in that

article was not exhaustive and covered the self-evident fact that a special mission came to an end when its task was accomplished.

63. The CHAIRMAN observed that the Commission seemed to agree that sections II, III and IV of the 1958 draft were applicable to special missions.

64. Mr. ERIM said that, in the light of the Commission's discussions, some of the articles of the 1958 draft which were regarded as applicable to special missions would have to be changed considerably for the purpose of being so applicable. Accordingly, the Special Rapporteur might consider altering the wording of his new article 2 by inserting after the phrase "the provisions of sections II, III and IV" the words "except as otherwise expressly provided in this convention".

65. Mr. PAL thought that the point raised by Mr. Erim was one of drafting rather than of substance.

66. Mr. JIMÉNEZ DE ARÉCHAGA suggested that some provision might be included in the text concerning the termination of a special mission by reason of the termination of its functions (*cf.* A/CN.4/L.87, proposed sub-paragraph (d) for article 41). The only precedent in the matter was the Havana Convention of 1928 regarding Diplomatic Officers, article 25 of which contained a specific provision to that effect. He did not think that article 41 (a) of the 1958 draft quite covered the point.

67. Mr. PAL drew attention to the danger of altering one article when the Special Rapporteur had already agreed that sections II, III and IV were applicable to special missions. Moreover, Mr. Jiménez de Aréchaga's point was adequately covered by the words "*inter alia*" in the introductory part of article 41.

68. Mr. JIMÉNEZ DE ARÉCHAGA replied that he had not suggested an amendment of article 41, but merely that the point should be covered in the special chapter on *ad hoc* diplomacy.

69. Mr. PAL considered that that procedure would still carry the danger of including in the chapter on *ad hoc* diplomacy an extension of one article which was contained in a section already recognized as applicable to special missions.

70. Mr. TUNKIN supported Mr. Pal's views. The article did not deserve special mention in the section on *ad hoc* diplomacy, and the question of the termination of special missions was a simple matter which raised no controversy in practice. Furthermore, article 41 in its present form was broad enough to cover the question.

71. Mr. SANDSTRÖM, Special Rapporteur, said that, if the Commission referred the sections concerned to the Drafting Committee, he would raise the question in the Committee, giving the argument for and against.

72. The CHAIRMAN suggested that the Com-

mission should forward sections II, III and IV of the 1958 draft to the Drafting Committee for the purpose of settling the text applicable to *ad hoc* diplomacy.

It was so agreed.

73. Mr. TUNKIN said that he had thought at one time that section V of the 1958 draft might also be rendered applicable to special missions. On reflection, however, he had decided that the question of the applicability of section V to special missions probably did not arise. He therefore withdrew his suggestion.

74. Mr. SANDSTRÖM, Special Rapporteur, observed that, since the clauses on *ad hoc* diplomacy were to be contained in the same document as the draft on diplomatic intercourse and immunities, sections V and VI would constitute general clauses referring to all parts of the convention, and would thus apply to special and permanent missions alike. Thus, the draft would consist of a chapter on permanent missions, a chapter on special missions and a final chapter consisting of sections V and VI.

The meeting rose at 12.5 p.m.

570th MEETING

Thursday, 23 June 1960, at 9.30 a.m.

Chairman: Mr. Luis PADILLA NERVO

Consular intercourse and immunities
(A/CN.4/131) (*resumed from the 564th meeting*)

[Agenda item 2]

PROVISIONAL DRAFT ARTICLES (A/CN.4/L.90)

Consular intercourse and immunities (item 2 of the agenda) (A/CN.4/131, A/CN.4/L.86, A/CN.4/L.90) (*resumed from the 564th meeting*)

PROVISIONAL DRAFT ARTICLES

1. The CHAIRMAN asked the Chairman of the Drafting Committee to introduce the provisional draft articles relating to consular intercourse and immunities (A/CN.4/L.90) which had been prepared by the Drafting Committee.

2. Mr. YOKOTA, Chairman of the Drafting Committee, said that the document contained all the provisional draft articles relating to career consuls; the draft provisions concerning honorary consuls would be submitted later.

3. Only one point deserved special mention. During the debate on article 20, some members had been in favour of amalgamating (529th meeting, paras. 9 and 11) that article with article 18 as adopted at the previous session (A/CN.4/L.86), in

which the unacceptability of a member of the consular staff was rendered conditional on conduct giving serious grounds for complaint. The Special Rapporteur had been against such amalgamation and the question of the possibility of such amalgamation had therefore been referred to the Drafting Committee (*ibid.*, para. 26). Opinion had been divided in the Committee on the criterion of conduct giving serious grounds for complaint, and it had therefore been decided to refer the question back to the Commission.

4. The CHAIRMAN thought that the Commission might begin its consideration of the provisional draft articles with article 20, on which the Drafting Committee's opinion had been divided.

5. Mr. ŽOUREK, Special Rapporteur, felt that the Commission would be wasting a lot of time if it discussed the substance of article 20 and might be obliged to alter the entire structure of the draft. There was no need to settle the problem at the current session, and it would be better to await the comments of governments on the matter.

6. Mr. TUNKIN and Mr. YOKOTA thought that the provisional draft articles should be discussed one by one.

7. Mr. EDMONDS said that the Commission should decide what kind of report it was going to submit. It had already departed from its normal practice of first commenting on and submitting amendments to the Special Rapporteur's texts, voting on the amendments and articles and then forwarding the texts to the Drafting Committee for improvement of the wording, but not for decision on matters of substance. In the present case, it had voted on only one or two articles, and many of them had been referred to the Drafting Committee when there had been considerable differences of opinion. In those circumstances, the text before the Commission was the Special Rapporteur's draft with changes made by the Drafting Committee; it was not a text reflecting the considered opinion of members of the Commission. Accordingly, unless the Commission now voted on every article, the report should clearly state that the articles had not been adopted by the majority, but were the Special Rapporteur's text as altered by the Drafting Committee in the light of the views expressed by some, but not a majority, of the members. In several cases, the differences of opinion expressed in the debate were so great that the Drafting Committee could not possibly reconcile them.

8. The CHAIRMAN considered that, even when no vote had been taken, the Drafting Committee had in most cases been given guidance reflecting the opinion of the majority. Naturally, if there were disagreement on the text of any particular provision, that provision would be put to the vote. He appealed to members who objected to some of the clauses either to submit specific amendments or to confine themselves to explaining

their votes, so as not to repeat the earlier lengthy discussions on the principles involved.

9. Mr. ŽOUREK, Special Rapporteur, thought it would be wise to take a vote on each article, but not to reopen the debate on basic principles.

10. He pointed out to Mr. Edmonds that the text of the provisional draft articles before the Commission was not a document prepared by the Special Rapporteur, but a text prepared by the Drafting Committee.

11. The CHAIRMAN invited the Commission to consider the provisional draft articles *seriatim* (A/CN.4/L.90).

ARTICLE 1 (*Definitions*)

12. Mr. ŽOUREK, Special Rapporteur, said that, as compared with the text in his own draft (A/CN.4/L.86), the only changes in article 1 related to subsections (f), (h) and (k). A new definition had been added in subsection (h). On the other hand, the definitions included at the previous session in subsection (f) had been deleted. The remaining sentence merely stated that a consul might be a career consul or an honorary consul. The new expression "members of the consulate" in subsection (h) covered the persons defined in subsections (i) and (j) and thus meant all the consular officials, including the head of post, and all the employees of the consulate; the expression "members of the consular staff" defined in subsection (k) now covered consular officials (other than the head of post) and the employees of the consulate.

13. Mr. TUNKIN, referring to subsection (f), asked why an exception was made for article 6 and why articles 11 and 12 were mentioned.

14. Mr. YOKOTA observed that the whole text of subsection (f), with the exception of the last sentence, had been adopted by the Commission at its previous session. Accordingly, the last sentence was the only one before the Commission.

15. Mr. ŽOUREK, Special Rapporteur, explained that the term "consul" was used generically throughout the draft, except in article 6, where it was used in the technical sense, as the second class of heads of consular posts. Articles 11 and 12 set forth the necessary authorization conferring consular status upon the consul.

16. Mr. GARCÍA AMADOR, referring to subsection (k), said that the phrase "(other than the head of post)" was neither necessary nor advisable, since technically the head of post was a member of the consular staff.

17. Mr. SANDSTRÖM said that the wording of the subsection had the advantage of corresponding to the definition in the draft on diplomatic intercourse and immunities.

18. Mr. SCALLE agreed with Mr. García Amador that the head of post was a member of the consular staff.

19. Mr. LIANG, Secretary to the Commission, said that the question had been discussed at the beginning of the session. He pointed out that, for example, the Secretary-General of the United Nations was not regarded as a member of the staff of the United Nations.

20. Mr. YOKOTA considered that the brackets might well be omitted.

21. Mr. ŽOUREK, Special Rapporteur, supported the views expressed by Mr. Sandström and the Secretary. The definition was essential if it was to be made clear that certain provisions related to consular officials and employees of the consulate excluding the head of post. In the case of provisions relating to all consular officials including the head of post and all employees of the consulate, the new expression "members of the consulate" was used.

22. Mr. PAL thought the difficulty lay in applying the modified definitions to articles which the Commission had already adopted. He hoped that the Drafting Committee had gone through those articles, with a view to ensuring that the new definitions were properly aligned with them.

23. Sir Gerald FITZMAURICE agreed with the Special Rapporteur that it was absolutely necessary to retain the phrase "(other than the head of post)". If it were omitted, there would be no difference between the definitions in subsection (h) and subsection (k), and no way of providing for members of the consulate other than the head of post.

24. The CHAIRMAN agreed with Mr. Pal that the discrepancy between the new and the earlier definitions should be corrected in the articles already adopted.

25. Mr. ŽOUREK, Special Rapporteur, said that, if the Commission adopted the new wording for the article on definitions, the earlier articles would have to be adapted to the new terminology. It was purely a question of drafting.

26. Mr. BARTOŠ said that the Commission might proceed to adopt the article, but during its final examination of the draft should bear in mind the application of the new definitions to the articles adopted at its previous session, in order to ascertain whether any points of substance were involved by such adaptation.

27. Mr. GARCÍA AMADOR still thought that the phrase "(other than the head of post)" was redundant, especially in view of the terms of subsections (h) and (i). Nor could he agree with Mr. Sandström that the similarity of subsection (k) to a corresponding provision of the draft on diplomatic intercourse was a reason for retaining that phrase, which might lead to misinterpretation. He would not, however, insist on a vote on the question.

28. The CHAIRMAN said that, if there were

no objection, article 1 as revised by the Drafting Committee would be regarded as adopted.

There being no objections, article 1 was adopted.

ARTICLE 19 (*Appointment of the consular staff*)

29. Mr. SANDSTRÖM thought it doubtful whether articles 19*a* and 20 could really be regarded as qualifying the rule set forth in article 19. The question dealt with in those articles was rather that of the effectiveness of the appointment. Nevertheless, he had no objection to the wording of article 19.

30. Mr. SCELLE agreed with Mr. Sandström, and also thought that the term "freely" (*à son gré*) should be omitted, since it cancelled out the proviso concerning articles 19*a* and 20.

31. Mr. ŽOUREK, Special Rapporteur, recalled the Commission's decision to follow the draft on diplomatic intercourse in the matter and to insert the reference to articles 19*a* and 20 to correspond with article 6 of that draft. The French expression used in that text was "*à son choix*", but the Drafting Committee had thought that "*à son gré*" might be preferable.

32. Mr. SCELLE still maintained his view concerning the expression; it had almost the same meaning as "arbitrarily".

33. Mr. PAL considered that the article was acceptable and pointed out that the adverb "freely" was governed by the phrase "subject to the provisions of articles 9, 19*a* and 20".

34. Mr. MATINE-DAFTARY supported Mr. Scelle's view.

35. Sir Gerald FITZMAURICE agreed with Mr. Pal. The faculty freely to appoint the members of the consular staff, however strongly worded, was governed by the phrase "subject to the provisions of articles 9, 19*a* and 20", and the word "freely" could not cancel out that limitation.

36. Mr. YASSEEN suggested that the word "librement" might be more acceptable to Mr. Scelle.

37. Mr. LIANG, Secretary to the Commission, said that the point had been discussed extensively in connexion with article 6 of the draft on diplomatic intercourse. In his opinion, it was axiomatic that the sending State could freely appoint the members of the consular staff; the important point was the limitation imposed by the first phrase. The word "freely" seemed to have no great significance; since it had been included in the draft on diplomatic intercourse and could do no great harm, the Commission might decide to retain it.

38. Mr. YOKOTA, Chairman of the Drafting Committee, observed that the Committee had been instructed to draft article 19 more or less on the pattern of the corresponding provision of the draft on diplomatic intercourse.

39. Mr. EDMONDS thought that the word "freely" was redundant and could well be omitted.

40. Mr. ŽOUREK, Special Rapporteur, observed that the omission would lead to a discrepancy between the draft on diplomatic intercourse and the present draft. If the Commission did not like the term "freely", it might be best to follow the former draft and to use the term "*à son choix*", for otherwise governments might question the discrepancy. In any case, the question did not seem important enough to warrant a lengthy debate.

41. The CHAIRMAN agreed that governments might question the discrepancy. It would be unwise to invite inferences not intended by the Commission.

42. Mr. MATINE-DAFTARY thought that the use of the term "*à son choix*" was happy solution, and would be in conformity with the Commission's decision to use the same general wording as in the draft on diplomatic intercourse, wherever possible.

43. Mr. SCELLE said he could see no reason for slavishly copying the draft on diplomatic intercourse without regard for the best possible wording. In any case, it would be for the plenipotentiary conference to decide the final wording.

44. Sir Gerald FITZMAURICE pointed out that the adverb "freely" was not entirely useless, as some members seemed to think. It had been deliberately included in the draft on diplomatic intercourse in order to emphasize that, with the exception of the head of post, whose appointment was governed by the *agrément*, the choice of members of the staff lay entirely in the hands of the sending State; it was only later that the receiving State could declare such persons *persona non grata*. The Commission's best course would be to await the decision of the conference on diplomatic intercourse and immunities and to conform with that decision in respect of article 19.

Article 19 was adopted by 11 votes to 2, with 4 abstentions.

ARTICLE 19*a* (*Size of staff*)

45. Mr. TUNKIN said that he had doubts regarding the advisability of including article 19*a* but would not formally propose its deletion, since other members considered it necessary.

46. He asked whether there was any special significance in the omission of the adjective "specific" to qualify the agreement as to the size of staff. That adjective was used in article 10, paragraph 1, of the draft on diplomatic intercourse, on which article 19*a* was based.

47. Mr. YOKOTA explained that in the course of the discussion in the Drafting Committee, some members had pointed out the discrepancy between the English expression "specific agreement" and the French "*accord explicite*" used in article 10, paragraph 1, of the draft on diplomatic

intercourse. The Committee had thereupon decided to delete the adjective.

48. Mr. TUNKIN proposed that the adjective "specific" be reintroduced. It was useful to retain the idea of an express agreement on the size of the consular staff, distinct from the agreement on the establishment of a consulate.

Mr. Tunkin's proposal was adopted by 13 votes to 1, with 3 abstentions.

Article 19 a as a whole, as amended, was adopted by 15 votes to none, with 2 abstentions.

49. Mr. MATINE-DAFTARY said that he had voted for the insertion of the English term "specific" but must make reservations regarding the French translation of that term.

ARTICLE 20 (*Persons deemed unacceptable*)

50. Mr. ŽOUREK, Special Rapporteur, in reply to a question by Mr. TUNKIN, said that article 20, unlike article 8 of the draft on diplomatic intercourse, dealt only with subordinate officers and employees of the consulate because the question of the recall and withdrawal of the *exequatur* of the head of post was already dealt with in article 18.

51. Mr. YOKOTA suggested that the Commission should deal at that stage with the proposal for the amalgamation of articles 18 and 20, which had been favoured during the earlier discussion by the majority of the Commission (529th meeting, paragraphs 9 to 26), but on which the Drafting Committee had not been able to agree.

52. Mr. ŽOUREK, Special Rapporteur, opposed the amalgamation of articles 18 and 20. It was desirable to draw a clear distinction between the head of a consular post and his subordinate staff. With regard to the head of post, it was appropriate to specify, as was done in article 18, paragraph 1, that his recall could be requested only if his conduct gave "serious grounds for complaint". That condition was not stipulated in the case of the head of a diplomatic mission in article 8 of the draft on diplomatic intercourse, but there were good grounds for drawing a distinction between a consul and a diplomatic representative. In the first place, the consul was often the only consular officer in a consular district and his presence was indispensable to the continuance of consular relations. In the second place, a consul, because of the specialized knowledge often required, could not always be replaced readily. Those considerations also applied to members of the consular staff and that was why he had originally proposed the inclusion even in that article of a provision that that right could only be exercised if the conduct of the member of the consular staff gave serious grounds for complaint.

53. However, the difference between article 18 and article 20 could be explained by making it clear that the reasons given did not apply to the same extent to the subordinate staff, who were the subject of article 20.

54. Accordingly, he suggested that, for the reasons he had mentioned, the two articles should be left as they stood. That course would have the additional practical advantage of giving governments an opportunity of commenting on the two provisions in question, and on the differences between them, particularly in the question whether the same limitation should be added to article 20 as to article 18.

55. Sir Gerald FITZMAURICE recalled that he had been one of those members who had favoured the amalgamation of the two articles and the elimination of the proviso "where the conduct of a consul gives serious grounds for complaint". The arguments put forward by the Special Rapporteur had convinced him, however, that there were solid grounds for drawing a distinction between the head of a consular post and the head of a diplomatic mission and also between the head of a consular post and his subordinate staff. He was therefore satisfied to leave articles 18 and 20 as they stood.

56. Mr. BARTOŚ expressed misgivings with regard to the method adopted by the Commission. Governments were reluctant to contradict the decisions of the Commission and it was therefore desirable that it should take a vote on any question on which it was divided, rather than leave the issue to be decided in the light of government comments.

57. In the present instance, he urged that the commentary should explain the division of opinion in the Commission.

58. The CHAIRMAN drew attention to the fact that at its previous session the Commission had already adopted article 18 with the proviso in question. It would be therefore sufficient for the Commission to vote on article 20 and leave the question of the amalgamation of articles 18 and 20 to be dealt with at its next session. The commentary would set forth the reasons given by those members who, during the discussion, had criticized the proviso in question. If there were no objection, he would take it that the Commission adopted article 20 on that understanding.

It was so agreed.

ARTICLE 21 (*Notification of the arrival of members of the consulate and of the termination of their functions*)

59. Mr. SANDSTRÖM asked why article 21, unlike article 9 of the draft on diplomatic intercourse, made no reference to the departure of the officials concerned.

60. Sir Gerald FITZMAURICE explained that consular officials were not necessarily always recalled. Sometimes they were discharged locally because they were local residents. The essential point was therefore the termination of their functions and not their departure, for a consular official did not always actually leave the country on the termination of his functions.

61. Mr. TUNKIN said that the departure of one of the persons concerned, as distinct from the termination of functions, should be notified to the competent authorities of the receiving State. He therefore proposed the insertion of the words "their departure or" before "the termination of their functions".

62. Mr. YOKOTA supported Mr. Tunkin's proposal.

63. Mr. SANDSTRÖM agreed that it was desirable to introduce a reference to the departure of the persons concerned.

Mr. Tunkin's amendment was adopted.

64. Mr. MATINE-DAFTARY proposed the introduction of the words "or departure" in the second sentence of paragraph 1, immediately after the words "The same shall apply in the case of the arrival". The authorities of the receiving State had an interest in being notified of the departure of a member of the family of a consular official.

Mr. Matine-Daftary's amendment was adopted.

65. Mr. ŽOUREK, Special Rapporteur, explained that the departure of a member of the consulate meant his final departure on the termination of his functions. The authorities of the receiving State were not interested in being notified of a consular official's casual absence on holiday, for example. In the case of a member of the household of a member of the consulate, the receiving State was primarily interested in being notified when the person concerned ceased to be a member of that household.

66. Sir Gerald FITZMAURICE agreed with the Special Rapporteur that the term "departure" meant final departure, and said that an explanation could be given in the commentary.

67. Mr. SCELLE pointed out that the French term "ménage" meant the husband, wife and children but did not include private staff. Accordingly, the last phrase of the second sentence of paragraph 1 would have to be re-drafted. He suggested the use of some such expression as "cesseraient leur emploi".

68. Sir Gerald FITZMAURICE said that the English term "household" included all the persons under the same roof and therefore covered servants or private staff.

69. The phrase referred to by Mr. Scelle applied not only to private staff but also to members of the families of consular officials. He suggested that the provision would be clearer if the words "the latter" were replaced by the word "these".

70. Mr. ŽOUREK, Special Rapporteur, said that, while the wording could be improved, the substance of the provision was necessary. The authorities of the receiving State were interested in knowing when a member of the private staff ceased to be in the service of a consular official, just as they were interested in knowing when a member of a consular official's family ceased to

live under his roof. Such events affected the admittedly very limited privileges enjoyed by those persons. He therefore proposed that the Drafting Committee should be asked to prepare a satisfactory formula.

71. Mr. SANDSTRÖM said that even with the change suggested by Sir Gerald Fitzmaurice, the phrase in question could still be construed as referring only to the private staff, and the same was true of the French text.

72. Mr. BARTOŠ said that the intention of the provision could be clarified in the commentary. He supported the Special Rapporteur's proposal that the Drafting Committee should prepare a text which would make it clear that a notification was necessary if a member of the family or of the private staff of a consular official ceased to form part of his household, in other words ceased to live under the same roof. As had been pointed out during the discussion on the draft on diplomatic intercourse, the decisive test was not the existence of family relationship but life under the same roof (*communauté de vie*).

73. Mr. SANDSTRÖM said that it was essential to include a reference to the case where a member of the family or private staff ceased to form part of the household of the consular officer.

74. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed on the substance of article 21, subject to rewording of the final phrase of paragraph 1 and on the understanding that the commentary would explain the intention of the provision.

It was so agreed.

ARTICLE 22 (*Use of the national flag and of the state coat-of-arms*)

75. Mr. EDMONDS said that he had not had an opportunity to refresh his memory of the discussion on articles 22 and 23 of the Special Rapporteur's draft from the summary record (*ibid.*, paras. 41 to 72) but to the best of his recollection the Commission had decided that it should go no further than to declare that the receiving State should place no restriction on the right of the consulate to fly the national flag and display the state coat-of-arms. The wording of article 22 as prepared by the Drafting Committee might well be construed as stating a rule which would override the right of the owner of a building leased for consular purposes to attach conditions to the flying of the national flag or the display of the coat-of-arms on the building.

76. The CHAIRMAN said that as far as he could remember it had been agreed (*ibid.*, paras. 71 and 72) that the problem referred to by Mr. Edmonds seldom arose and could be left for settlement between the owner of the premises and the lessee.

77. Mr. ŽOUREK, Special Rapporteur, explained

that the right of a consulate to fly the national flag and to display the state coat-of-arms was recognized in all consular conventions and could not be left unmentioned in the present draft; the Drafting Committee's text of article 22 was modelled on article 18 in the draft on diplomatic intercourse. The Commission had not wished to enter into the complex issues of the relationship between municipal and international law but had recognized that a signatory to the multilateral instrument which the Commission was drafting would have to enact the necessary legislation to give effect to the international obligations assumed in the instrument.

78. Mr. TUNKIN said that the right laid down in article 22 was well-established and was unlikely to cause practical difficulties of the kind mentioned by Mr. Edmonds.

79. Sir Gerald FITZMAURICE also thought that Mr. Edmonds' concern was unfounded, since the lessor of consular premises could hardly be unaware of the invariable practice of consulates to fly a national flag and display the state coat-of-arms on the premises. If the landlord had any objection he could propose a special clause for insertion in the lease and it would then be for the sending State to decide whether or not such a clause was acceptable. If it were not, presumably the sending State would look for other premises. He considered that article 22, which was very similar to article 18 in the draft on diplomatic intercourse, was acceptable.

80. Mr. ERIM said he was not sure that article 22 could be interpreted in the way Sir Gerald had interpreted it. Under the constitution of certain States, a convention once ratified became part of municipal law. The Drafting Committee did not appear to have been guided by the Commission's decision that articles 22 and 23 of the Special Rapporteur's draft be referred to the Drafting Committee on the understanding that the purpose of those articles was to lay down that the receiving State, so far as it was concerned, should permit (or not prevent) the use of the coat-of-arms and national flag of the sending State.

81. Mr. BARTOŠ, observing that he had been responsible for drawing attention to the practical difficulties which such a provision might cause, said the Drafting Committee's version was acceptable, provided the commentary explained that the exercise of the right in question might raise an issue of private law as between the landlord and the consul as lessee.

82. Mr. AGO said that, although under the law of some States an international instrument on being ratified became, *ipso facto*, part of municipal law, the provision contained in article 22 should not cause any difficulty, since the landlord was free to impose special conditions in the lease or simply not to let the premises for consular purposes.

83. Mr. ARIM maintained his objection, in particular to the phrase "shall have the right", and

emphasized that if the article were approved in its present form, and later incorporated in a general international instrument, once that instrument came into force article 22 would immediately apply even to those premises for which leases had already been signed.

84. Mr. AGO pointed out to Mr. Erim that article 22 simply stated a customary rule of law and was not an innovation.

85. Mr. YOKOTA, Chairman of the Drafting Committee, suggested that the concern expressed by Mr. Edmonds and Mr. Erim might be met by the inclusion in the commentary of a statement to the effect that there was no intention of interfering in the private relations between a consulate and a landlord; that would be entirely consonant with the decision taken by the Commission at its 529th meeting.

86. Mr. SCALLE considered that the discussion was entirely idle. Landlords and consuls belonging to two signatory States of an international instrument were not free to reach an agreement that would frustrate a provision of that instrument.

87. Mr. ŽOUREK, Special Rapporteur, suggested that as article 22 enunciated a rule of international law, the Commission should be able to reach a decision without more ado. Those who were opposed to the article could register their opinion by a negative vote.

88. Sir Gerald FITZMAURICE said that as Mr. Erim might be taken as almost suggesting that the Drafting Committee had ignored the Commission's directives, some explanation should be given of the Drafting Committee's action. It had decided not to use some such wording as "the receiving State shall place no restriction on the right of the consulate to fly the national flag and to display the state coat-of-arms" because such language might have provoked doubts about what was an invariable practice and might even have encouraged objections to that practice. No one could compel the owner of premises to let them for consular purposes at all and therefore the prospective landlord was automatically protected, especially as he would normally know in advance of the existence of the practice.

89. If the Drafting Committee had gone any further, then Mr. Erim's preoccupation might have been justified.

90. Mr. JIMÉNEZ DE ARÉCHAGA said that although he had not been present during the discussion of articles 22 and 23 of the Special Rapporteur's draft he gathered from the summary record that the Commission had decided that the obligation lay on the receiving State to ensure that the exercise of the right specified in article 22 would not be impeded.

91. Mr. MATINE-DAFTARY said that some provision was necessary in article 22 whereby the receiving State would be obliged to ensure that the right in question could be exercised. Such a provision should obviate long-drawn-out disputes.

92. Mr. ERIM, thanking Sir Gerald Fitzmaurice for his explanation, observed that there was no real disagreement between them. His only concern was that the Commission should not adopt a clause enabling the consul to force the landlord to agree to the flying of the national flag or to the display of the coat-of-arms on the leased premises. He noted that the analogous provision in article 10 of the Consular Convention between the United Kingdom and Sweden was permissive.

93. Mr. EDMONDS said that he had not been reassured by Sir Gerald Fitzmaurice's argument that article 22 would not give rise to practical difficulties. He pointed out that in many urban areas in the United States, many, perhaps even most, large office buildings had rules prohibiting the display of signs or flags by tenants.

94. The CHAIRMAN, observing that there was a real divergence of opinion, asked the Commission to decide by a vote whether the opening words of article 22, paragraph 1, should be amended to read, as suggested by Mr. Edmonds, "The receiving State shall place no restriction on the right of the consulate to fly the national flag . . ."

The amendment was rejected by 11 votes to 7, with 1 abstention.

95. The CHAIRMAN put to the vote the Drafting Committee's text for article 22.

Article 22 was adopted by 14 votes to 3, with 2 abstentions.

The meeting rose at 1 p.m.

571st MEETING

Friday, 24 June 1960, at 9.30 a.m.

Chairman: Mr. Luis PADILLA NERVO

Planning of future work of the Commission

[Agenda item 10]

1. The CHAIRMAN invited discussion on item 10 of the agenda.

2. Mr. ŽOUREK said that although in the past the Commission had decided to allow two years to elapse between the first and second reading of a draft so as to allow Governments more time to comment, since it had undertaken to complete its work on consular intercourse and immunities by 1961 it must of necessity make an exception to that rule and resume consideration of the draft articles on consular intercourse and immunities at its next session. If the work was well organized four or five weeks at the beginning of the next session would be sufficient for the purpose.

3. Mr. GARCÍA AMADOR agreed with Mr. Žourek that the first topic on the next session's agenda should be consular intercourse and immu-

nities, but considered that, as a great deal of time had been taken up with it at the previous and current sessions, no more than four weeks should be assigned to it. In order to make progress with its general programme of work the Commission should then devote the following five weeks to state responsibility.

4. After further discussion, the CHAIRMAN suggested that, at its thirteenth session, the Commission should decide to complete its work on consular intercourse and immunities and then take up state responsibility.

It was so agreed.

Date and place of the thirteenth session

[Agenda item 9]

5. The CHAIRMAN invited discussion on item 9 of the agenda.

6. Mr. LIANG, Secretary to the Commission, said that the Commission's thirteenth session was scheduled to last for ten weeks, from 24 April to 30 June 1961.

7. The plenipotentiary conference on diplomatic intercourse and immunities was scheduled to meet at Vienna from 2 March to 14 April 1961, so that there would be an interval of ten days before the opening of the Commission's session. It had not proved feasible, as hoped, to allow for a longer interval.

8. Mr. GARCÍA AMADOR asked whether the opening date of the thirteenth session could be postponed for one week so as to allow a longer interval between the end of the Vienna conference and the opening of the Commission's own session, even though in that event the last week of the Commission's session would overlap with the first week of the Economic and Social Council's summer session at Geneva.

9. Mr. LIANG, Secretary to the Commission, drew attention to the terms of General Assembly resolution 694 (VIII), paragraph 1 (c), under which the Commission's sessions at Geneva should not overlap with the summer session of the Economic and Social Council. If Mr. García Amador's request were accepted, the Commission would lose one week of its session. The thirty-second session of the Economic and Social Council was scheduled to begin at Geneva on Tuesday, 4 July 1961.

10. Sir Gerald FITZMAURICE observed that the stipulation quoted by the Secretary from General Assembly resolution 694 (VII) had repeatedly given rise to difficulties. He did not object to the principle but only to the rigid manner in which it had been applied. The overlap in 1961 would only be four working days, which he would not have thought could cause serious inconvenience, whereas it would make a great deal of difference to members of the Commission if its session could start one week later.

That fact should be conveyed by the Secretary to the appropriate authorities.

11. The CHAIRMAN, speaking as a member of the Commission, said that on previous occasions the Commission had always conveyed its wishes concerning the dates of future sessions to the Secretary-General through its secretary. In the present instance, if members thought that some modification in the application of General Assembly resolution 694 (VII), paragraph 1 (c) was required, perhaps the better procedure would be to raise the matter in the Sixth Committee.

12. Mr. LIANG, Secretary to the Commission, said that in the past the Commission had conveyed its wishes to the General Assembly in its reports. For example, in its report on the ninth session (A/3623, paragraph 34) it had again referred to the difficulties already mentioned in the report on its fifth session (A/2456, paragraph 175), created by the requirements contained in resolution 694 (VII). The general Assembly had originally approved a programme of conferences for the years 1954 to 1957 and when that programme had been reviewed in 1957 the matter had not been raised in the General Assembly. The present pattern of conferences as approved by General Assembly resolution 1202 (XII) covered the five-year period 1958 to 1962, and any modification of the pattern would have to be approved by the Assembly.

13. Sir Gerald FITZMAURICE said the point he had raised was a different one. He had not suggested that the Commission should try to get the General Assembly's decision reversed, but that the requirements enunciated in resolution 694 (VII), paragraph 1 (c) should not be applied so strictly that the Commission was not permitted to sit concurrently with the Economic and Social Council even for a few days.

14. Mr. TUNKIN said that another consideration in favour of postponing the opening of the Commission's session for one week was that, judging from the experience of the two Conferences on the Law of the Sea, the Vienna conference on diplomatic intercourse and immunities might last longer than foreseen. In that event, there would be practically no time at all between the end of that conference and the opening of the Commission's own session. It was far more important that there should be no overlap at that time than that the Commission should not overlap with the Council, for about half of the Commission's members would probably be attending the conference, in which case there might be no quorum at the beginning of the Commission's session. Perhaps the Chairman of the Commission could take up the question with the Secretary-General.

15. Mr. LIANG, Secretary to the Commission, said that the considerations mentioned by Mr. Tunkin had already been brought to the attention of the appropriate authorities at Headquarters. He (the Secretary) would immediately bring them to their notice again, indicating that the Com-

mission was anxious that an interval of at least two weeks should elapse between the end of the Vienna conference and the beginning of its own session, and inform the Commission later of their reply.

16. Much as he would like to be able to interpret more liberally the rule in General Assembly resolution 694 (VII), as suggested by Sir Gerald Fitzmaurice, unfortunately, in the opinion of the headquarters authorities responsible for the planning of conferences, financial and technical problems made that impossible.

17. Mr. ŽOUREK suggested that, since circumstances would be exceptional in 1961, the Commission might ask that the opening of the Economic and Social Council's thirty-second session be postponed for one week and that the Chairman explain the Commission's predicament to the General Assembly.

18. Mr. LIANG, Secretary to the Commission, with regard to Mr. Žourek's suggestion, said that in previous years efforts had been made in that direction but it had been found impossible because, under rule 2 of the Council's rules of procedure, its summer session had to end at least six weeks before the regular session of the General Assembly so that the Council must open by a certain date in July.

19. The CHAIRMAN, speaking as a member of the Commission, said that, if any results were to be obtained, it was most important that the Commission's wishes should be conveyed through the proper channel. The Secretary-General should certainly be consulted as to whether it lay within his power and resources to meet the exceptional situation in 1961.

20. Mr. TUNKIN proposed that the Chairman be requested to raise the matter with the Secretary-General on the understanding that the Commission was not seeking to modify the decision taken by the General Assembly but only to meet the exceptional circumstances that were likely to arise in 1961.

21. Mr. YOKOTA supported Mr. Tunkin's proposal but considered that the Commission should clearly indicate that it was not unaware of the difficulties involved in postponing the opening of its thirteenth session.

22. The CHAIRMAN suggested that the Commission should adopt Mr. Tunkin's proposal as qualified by Mr. Yokota's remarks.

It was so agreed.

23. Mr. GARCÍA AMADOR asked whether that decision meant that the Commission was completely abandoning the idea, which had been strongly supported, that its sessions should start a month later than was its current practice.

24. Mr. LIANG, Secretary to the Commission, explained that the present pattern of conferences covered the years 1958 to 1962. He doubted

whether repetition of the request that the Commission's sessions be held later in the summer would meet with much success.

25. Mr. GARCÍA AMADOR said it would be regrettable if the Commission renounced the possibility of its sessions being held later in the summer. He suggested that in due course the Commission might request an amendment of the provisions of its Statute concerning the dates of its sessions.

26. The CHAIRMAN said he did not consider that any action was required at that stage on the point raised by Mr. García Amador, which would have to be dealt with by representatives to the General Assembly at some future time.

**Representation of the Commission
at the Fifteenth Session of the General Assembly**

27. Mr. LIANG, Secretary to the Commission, observed that it was customary for the Chairman of the Commission to be available for consultation at the General Assembly, particularly when the Sixth Committee discussed the Commission's report.

28. The CHAIRMAN suggested that that procedure should be followed at the fifteenth session of the General Assembly.

It was so decided.

**Co-operation with other bodies
(resumed from the 559th meeting)**

[Agenda item 8]

29. Mr. LIANG, Secretary to the Commission, pointed out that the Commission had not as yet taken a decision on the question of sending an observer to the fourth session of the Asian-African Legal Consultative Committee, to be held at Tokyo in March 1961. The letter of invitation from the Secretary of the Committee had been read out at the 559th meeting. It should be borne in mind that the Commission had on two occasions been unable to send an observer to the Committee's sessions, mainly because they had conflicted with the dates of the General Assembly's sessions. The Secretariat would ascertain the agenda of the session and the financial implications of sending an observer. That latter information would have to be included in the Commission's report, as the budget estimates for 1961 had already been prepared for submission to the Assembly, and a supplementary appropriation would be needed if the Commission decided to send an observer.

30. In principle, he would advise acceptance of the invitation, especially since the Commission had been unable to send observers to previous sessions of the Committee and since some of the topics to be discussed at the session, such as diplomatic protection of nationals abroad and

state responsibility, were of particular interest to the Commission.

31. Mr. GARCÍA AMADOR recalled that, during the debate on state responsibility, he had had occasion to comment on the value of close collaboration between the Commission and the Inter-American Council of Jurists and the Inter-American Juridical Committee, and also to express the hope that similar collaboration would be established with other regional bodies, including the Asian-African Legal Consultative Committee. Furthermore, since the fourth session of that committee would be discussing the topic of state responsibility, to which the Commission would be devoting a considerable part of its thirteenth session, it would be desirable for practical reasons, apart from considerations of courtesy, to send an observer to Tokyo. The opinions of the many newly independent countries of Asia and Africa on state responsibility would be of great interest to the Commission.

32. Mr. MATINE-DAFTARY endorsed those views.

33. Mr. TUNKIN thought that, while it might be desirable to send an observer to Tokyo, he was not sure that it was indispensable from the practical point of view. Considerable expense would be involved and, to judge by previous experience, the value of such representation to the Commission as a whole was doubtful. Perhaps the Commission might ask the Asian-African Legal Consultative Committee to send an observer to the Commission's thirteenth session to explain the Committee's views; the value of that procedure had been proved by the contribution made by the observer for the Inter-American Juridical Committee to the debate on state responsibility at the current session.

34. The CHAIRMAN thought that Mr. Tunkin's suggestion was sound. The only function that the Commission's observer could perform at the session of the Asian-African Legal Consultative Committee would be to express the Commission's interest in the matters discussed, since the Commission had not as yet studied most of the topics on the Committee's agenda.

35. Mr. MATINE-DAFTARY did not think that Mr. Tunkin's and Mr. García Amador's suggestions were mutually exclusive. The Commission might decide to send an observer to Tokyo and also to invite the Asian-African Legal Consultative Committee to send its representative to the Commission's thirteenth session.

36. Mr. YASSEEN thought that a question of principle was involved. The Commission had sent observers to meetings of some intergovernmental bodies, and if it failed to do so in the case of the Asian-African Legal Consultative Committee it might lay itself open to a charge of discrimination, particularly since the Committee intended to discuss topics with which the United Nations would ultimately be concerned.

37. Mr. EDMONDS pointed out that an observer would be able to make only a limited contribution to the work of the Asian-African Legal Consultative Committee, since the Commission had not yet dealt with the subject of state responsibility in detail.
38. Mr. ERIM said he could not understand why there was any hesitation in sending an observer to the fourth session of the Asian-African Legal Consultative Committee, in view of the precedent established in the case of the Inter-American Council of Jurists. Moreover, the Committee had on its agenda the topic with which the Commission would be dealing at its thirteenth session.
39. Mr. BARTOŠ endorsed the views expressed by Mr. Yasseen and Mr. Erim. He had supported the recommendation to enter into co-operation with the League of Arab States and the Inter-American Council of Jurists, and did not believe there should be any discrimination with respect to the Asian-African Legal Consultative Committee. The Commission should recommend the General Assembly to approve the sending of an observer to Tokyo. No other course was open, not only for reasons of courtesy, but also because the Commission should take into account legal opinions throughout the world.
40. The CHAIRMAN said it appeared that the consensus of opinion in the Commission was in favour of sending an observer to the fourth session of the Asian-African Legal Consultative Committee.
41. Mr. TUNKIN agreed that an observer should be sent, but wished to raise a further point with regard to co-operation. Appropriate steps should be taken to ensure that the organization with which the Commission was in consultative relationship supplied their documentation to all the members of the Commission.
42. Mr. LIANG, Secretary to the Commission, pointed out that the secretary of the Asian-African Legal Consultative Committee had already stated in his letter of invitation that the summary report of the proceedings of the third session (January 1960) of the Committee, which was expected to be ready by July, would be forwarded to the Commission (559th meeting, paragraph 96).
43. Mr. ŽOUREK agreed that it was important for the Commission to send observers to meetings of regional intergovernmental bodies, which discussed subjects germane to those treated by the Commission. Nevertheless, he agreed with Mr. Tunkin that what was more important was that organizations should supply their documents, including draft codes, relevant to the subjects in question. The documents supplied by the Inter-American Council of Jurists had been extremely useful to the Commission in its work on the law of the sea, but since then little if any material had been received. He considered the regular exchange of documents with regional intergovernmental organizations concerned with international law even more important than sending observers, provided, of course, that these documents were distributed to the members of the Commission.
44. Mr. BARTOŠ agreed with Mr. Žourek. He had found it difficult to obtain regional organizations' documents on codification, and had in fact applied to the Asian-African Legal Consultative Committee, which had replied that the summary report of its third session would be forwarded to the Commission. That would be of little practical use, however, if the documents concerned were kept in the archives at United Nations Headquarters; it was the members of the Commission who should receive the material.
45. The CHAIRMAN thought the Commission would agree to ask the Secretariat to express the Commission's wish to receive the documents of intergovernmental organizations. A number of copies of such documents were supplied to members through the Secretariat, but the Secretariat might be requested to prepare extra copies for distribution, where that was possible.
46. Mr. GARCÍA AMADOR said that documentation presented no problem so far as the Inter-American Council of Jurists was concerned, all of whose documents were available in Spanish, English, French and Portuguese. The Secretariat should apply to the legal department of the Pan-American Union for copies in the appropriate languages and then forward them to members at their private addresses.
47. The CHAIRMAN invited the Commission to appoint an observer to attend the fourth session of the Asian-African Legal Consultative Committee.
48. Mr. ERIM proposed Mr. García Amador as the logical choice, in view of his position as Special Rapporteur on the topic of state responsibility.
49. Mr. JIMÉNEZ DE ARÉCHAGA, Mr. SCALLE, Mr. PAL, Mr. BARTOŠ, Mr. TUNKIN and Mr. EDMONDS supported the proposal.
- It was unanimously decided to appoint Mr. García Amador as the Commission's observer at the fourth session of the Asian-African Legal Consultative Committee.*
50. The CHAIRMAN, speaking on behalf of the Commission, congratulated Mr. García Amador on his appointment and expressed the conviction that his attendance of the session would be most valuable. He asked Mr. García Amador to convey an invitation to the Asian-African Legal Consultative Committee to send an observer to the Commission's thirteenth session and also to request the Committee to supply its documents to the Commission at regular intervals.
51. Mr. GARCÍA AMADOR thanked the Commission for the confidence it had placed in him.

It was understood that, in representing the Commission at Tokyo, he would not speak on behalf of the Commission on matters of substance, but would limit himself to communicating the two requests mentioned by the Chairman. He would report to the Commission at its thirteenth session on the deliberations of the Asian-African Legal Consultative Committee.

Consular intercourse and immunities
(A/CN.4/L.86, A/CN.4/L.90)

[Agenda item 2]

**PROVISIONAL DRAFT ARTICLES
ON CONSULAR INTERCOURSE
AND IMMUNITIES (A/CN.4/L.90)**
(*resumed from the previous meeting*)

52. The CHAIRMAN invited the Commission to resume its debate on the draft articles on consular intercourse and immunities prepared by the Drafting Committee (A/CN.4/L.90).

ARTICLE 25 (*Inviolability of consular premises*)

53. Mr. ŽOUREK, Special Rapporteur, said that the wording of article 25 had been brought into line with that of article 20 of the Commission's 1958 draft on diplomatic intercourse, in accordance with the view expressed by several members. Consular premises, like the premises of a diplomatic mission, housed official correspondence, documents and archives and the reasons for their inviolability were the same in both cases.

54. Mr. ERIM thought article 25 was too absolute in its terms; it went much further than the corresponding provisions of both the Harvard Draft and the Havana Convention of 1928. In the course of the discussion of article 25, attention had been drawn to the case of consular premises which also housed such services as information offices and travel agencies (530th meeting, paras. 7, 26, 31, 43 and 51). It was essential to limit inviolability to premises used exclusively for the exercise of the consular function. He accordingly proposed that the words "used exclusively for the exercise of consular functions" should be inserted in paragraph 1, immediately after the words "The consular premises".

55. He further proposed the addition of a new paragraph 4, based on article 19 of the Havana Convention, to read as follows:

"Consuls are obliged to deliver, upon the request of the local authorities, accused or convicted persons who may have sought refuge in the consulate."

56. With those two amendments, the provisions of article 25 would reflect existing international law and reflect contemporary state practice. He realized that the new version of article 46 (*Duty to respect the laws and regulations of the receiving State*) covered, in paragraphs 2 and 3,

some of the points he had raised, but he still thought that the principle of inviolability should not be stated in unduly categorical terms in article 25.

57. Sir Gerald FITZMAURICE said that paragraphs 2 and 3 of article 46 completely covered the points raised by Mr. Erim, although they did not go into great detail. He drew particular attention to the last sentence of paragraph 3, by virtue of which non-consular offices would not benefit from the inviolability laid down in article 25.

58. As in the draft on diplomatic intercourse, the principle of inviolability should be stated quite categorically and the duties of the sending State in the matter of the use of the consular premises should be laid down in a separate provision.

59. Mr. PAL agreed with Sir Gerald Fitzmaurice and drew attention to the definition of consular premises in article 1 (b) of the Special Rapporteur's draft, "any building or part of a building used for the purposes of a consulate". That definition covered the points raised by Mr. Erim; the provision of article 46 afforded an additional safeguard. At that stage, therefore, it was unnecessary for the Commission to go further into those questions.

60. Mr. SCALLE said that although in his opinion consular premises should be as inviolable as diplomatic premises, it seemed to him that the terms of article 25 were too absolute and categorical. He accordingly proposed that the first sentence of paragraph 1 should open with the qualifying proviso "Subject to the provisions of article 46".

61. Mr. ŽOUREK, Special Rapporteur, said that inviolability of the premises, freedom of communication and inviolability of the official archives and correspondence constituted the three fundamental principles of international law concerning consular intercourse and immunities. He could not support Mr. Erim's amendments for they would weaken the entire draft. With regard to Mr. Scelle's amendment, the relationship between the provisions of article 46 and those of article 25 could be explained in the commentary.

62. It would be advisable to leave untouched the text of article 25 as worded by the Drafting Committee and await the comments of governments. If those comments suggested that the article was too absolute in its terms, it could then be amended.

63. Mr. ERIM said that the explanations given by Sir Gerald Fitzmaurice and the Special Rapporteur had not fully convinced him. Article 46, paragraph 3, did not provide any remedy in cases where the non-consular office was not kept separate from the premises used for consular purposes. He therefore maintained his first amendment, which implied the sanction of loss of inviolability in such cases.

64. As regards his second amendment, he asked whether article 46, paragraph 2, covered the case of a fugitive criminal taking refuge in a consulate.
65. Mr. BARTOŠ said that article 25 would be unacceptable to him without some qualification along the lines either of Mr. Erim's or of Mr. Scelle's amendment. If neither of those amendments was accepted, the article 46, paragraph 3, could be construed as expressing a purely internal requirement and as not affecting the absolute rule laid down in article 25.
66. Speaking on a more general point, he said he must reject the Special Rapporteur's conception of the Commission's duty and competence. It was not the Commission's duty to submit questionnaires to governments and then to draft texts in the light of their replies. It was the Commission's duty to submit to governments solutions of problems of international law.
67. Mr. EDMONDS agreed with Mr. Bartoš. It was the duty of the Commission to define the rules of existing international law and to make suggestions for the progressive development of that law. That duty would clearly not be satisfactorily performed by merely asking governments for their opinions and framing a text on the basis of their answers. The Commission should not shrink from formulating its draft articles in the form which it determined, by a majority vote, was correct.
68. Mr. SANDSTRÖM proposed that, in paragraph 1, after the words "The consular premises", the following words should be inserted: "as defined and limited in articles 1 (b) and 46, paragraph 3". That amendment should, he thought, satisfy Mr. Erim without in any way weakening the provisions of the article.
69. Mr. SCELLE supported Mr. Sandström's amendment and withdrew his own.
70. Mr. MATINE-DAFTARY said that the terms of article 25 were much too categorical; in the case of the premises of a diplomatic mission such sweeping language was justifiable, but there was a great difference between diplomatic premises and consular premises. He agreed with the purpose of the first amendment proposed by Mr. Erim: it was essential to provide some sanction for the enforcement of article 46, paragraph 3. He accordingly favoured the amendment proposed by Mr. Scelle, which would make the inviolability of consular premises subject to the provisions of article 64.
71. Lastly, referring to the immunity from search provided for in article 25, he suggested that an exception should be made in the case of a search ordered by a court. He did not think that a consul, on being duly notified of a search order issued by a court, should resist such an order.
72. Mr. YOKOTA said that, in his view, paragraphs 2 and 3 of article 46 provided a sufficient guarantee against any abuse of inviolability.
- However, to satisfy certain members, he suggested that in the definition of consular premises in article 1 (b), the word "exclusively" should be inserted before the words "used for the purpose of a consulate".
73. That amendment would bring the definition into line with the provisions of article 46, paragraph 3, and would also render unnecessary any inelegant addition to the provisions of article 25.
74. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Erim on the subject of fugitive criminals, said that under article 46, paragraph 2, the sending State was under a clear duty to deliver to the local authorities any accused or convicted person who sought refuge in the consulate.
75. With regard to Mr. Erim's suggestion that a sanction was necessary to enforce the provisions of article 46, paragraph 3, such sanction could never be permitted to extend to violation of consular premises. The question of sanctions arose also in connexion with the rules relating to the inviolability of diplomatic premises. The Commission had taken the view that the authorities of the receiving State could never enter the premises of a diplomatic mission forcibly even if those rules had been violated by the sending State or its officers; it should state the same rule in the case of consular premises. If a consular official disregarded, for example, the provisions of article 46, the receiving State's remedy was either to request his recall or, in extreme cases, to declare him unacceptable.
76. Lastly, he could not accept Mr. Matine-Daftary's suggestion that the immunity of consular premises from search should be subject to an exceptions in the case of a search ordered by the court. He drew attention in that connexion to comment 6 to article 20 of the draft on diplomatic intercourse and said that the exception suggested by Mr. Matine-Daftary would defeat the whole purpose of inviolability. It would reduce consular premises to the same level as any private dwelling, for in many States, even private houses could not, as a general rule, be entered by the authorities except under a court order.
77. Mr. ERIM said that the purpose of his first amendment was to state expressly that under the draft inviolability attached only to those premises which were used exclusively for the exercise of consular functions. Accordingly, any of the amendments proposed by Mr. Scelle, Mr. Sandström and Yokota would be acceptable to him.
78. He asked what would be the position if non-consular activities were carried on in the same room as the consular function, instead of being kept separate.
79. Sir Gerald FITZMAURICE replied that in the case mentioned by Mr. Erim, there would clearly be a violation of the provisions of the draft articles.

The meeting rose at 1.5 p.m.

572nd MEETING

Monday, 27 June 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.90) (continued)

ARTICLE 25 (*Inviolability of the consular premises*)
(continued)

1. The CHAIRMAN invited the Commission to vote on Mr. Erim's first amendment for the insertion in paragraph 1, after the words "The consular premises", of the words "used exclusively for the exercise of consular functions".

Mr. Erim's first amendment was rejected by 8 votes 6, to with 1 abstention.

2. Mr. ERIM said that, his own amendment having been rejected, he would support Mr. Sandström's amendment for the insertion in paragraph 1, after the words "The consular premises", of the words "as defined and limited in articles 1 (b) and 46, paragraph 3" which, combined with Mr. Yokota's amendment for the insertion in article 1 (b) of the word "exclusively" before the words "used for the purposes of a consulates", would achieve the same purpose.

3. Mr. PAL said that it was desirable to vote on Mr. Yokota's amendment before voting on Mr. Sandström's amendment. Until the definition of consular premises in article 1 (b) was settled, it would be difficult for him (Mr. Pal) to vote on Mr. Sandström's amendment.

4. Mr. ŽOUREK, Special Rapporteur, said that Mr. Yokota's amendment expressed the same idea as Mr. Erim's amendment which the Commission had rejected. He asked Mr. Yokota whether he maintained his amendment.

5. Mr. YOKOTA explained that he had put forward his amendment to article 1 (b) in order to allay the concern of certain members over article 25. If, however, article 25 were accepted by the Commission as it stood, he would withdraw his amendment.

6. The CHAIRMAN said that in that case Mr. Yokota's amendment to article 1 (b) would only be considered if article 25 was not adopted by the Commission in its present wording.

7. Mr. AGO requested an explanation with regard to the wording of Mr. Sandström's amendment. The reference to the definition of consular premises in article 1 (b) was clear; but he thought that the only passage in article 46, paragraph 3, which could be said to limit in any way the consular

premises was the last sentence, specifying that non-consular offices installed in the consular premises should not be deemed to form part of those premises.

8. Mr. SANDSTRÖM, to meet Mr. Ago's point, said he wished to make two changes in his amendment: to insert, after the word "limited", the word "respectively", and, after the words "paragraph 3", the words in parentheses, "(last sentence)".

9. Mr. YOKOTA pointed out that article 26 provided for exemption of the consular premises from taxation. If Mr. Sandström's amendment were adopted it would be necessary to include the same form of words after the words "consular premises" in article 26, and in several other articles too. In his opinion, such an addition would be inelegant.

10. Mr. ŽOUREK, Special Rapporteur, agreed with Mr. Yokota.

11. In fact, Mr. Sandström's amendment added nothing of substance. It was obvious that the term "consular premises" meant those premises as defined in article 1 (b). It was equally obvious that the provisions of article 25 had to be interpreted in conjunction with those of article 46, paragraph 3. If, however, those facts were stated in explicit terms in article 25, it would become necessary to do the same in all the other articles of the draft which referred to the consular premises. Otherwise, it might well be asked whether the omission of the qualifying phrase was intentional and what was the significance of its omission.

12. Mr. ERIM disagreed with the Special Rapporteur's interpretation. Article 25 dealt with the inviolability of the consulate and it was necessary to specify that inviolability attached only to the premises used exclusively for consular purposes. The same problem did not arise in connexion with article 26; exemption from taxation might well be granted to a consulate regardless of the fact that other institutions or agencies were installed in the consular premises.

13. Mr. TUNKIN said that the reference to the definition in article 1 (b) and to the restrictions specified in article 46, paragraph 3 did not affect inviolability as such.

14. The CHAIRMAN put to the vote Mr. Sandström's amendment with the two changes made by its author.

There were 7 votes for and 7 votes against the amendment, with 1 abstention. The amendment was not adopted.

15. The CHAIRMAN said that the Commission had now disposed of the amendments to paragraph 1. No amendments had been proposed to paragraphs 2 and 3, but there was still Mr. Erim's amendment for an additional paragraph 4 (571st meeting, paragraph 55).

16. Mr. MATINE-DAFTARY urged Mr. Erim to withdraw his amendment. If it were put to the

vote, the Commission would be placed in a difficult position, since its rejection might be construed as implying that the Commission believed that a right of asylum in consulates existed.

17. Sir Gerald FITZMAURICE said he could not accept that interpretation. He would vote against the proposed additional paragraph, not because he believed that there was a right of asylum in consulates, but because there already existed in article 46, paragraph 2, a provision which fully covered the points raised by Mr. Erim. Under that provision the consul had a general duty to refrain from a large number of acts. If any one act were singled out for special mention in article 25, the result would be to impair the general character of article 46, paragraph 2.

18. Mr. ERIM said that if the Commission agreed to include Sir Gerald Fitzmaurice's explanation in the commentary to article 46, he was prepared to withdraw his proposal for an additional paragraph 4 to article 25.

19. Mr. ŽOUREK, Special Rapporteur, said that a negative vote did not necessarily mean that the Commission did not accept the substance of a proposal. It might also mean that the Commission considered the proposed provision as superfluous, or that its introduction was undesirable in a particular draft.

20. At the previous meeting he had stated (*ibid.*, paragraph 74), in reply to Mr. Erim, that the point raised by him was covered by article 46, paragraph 2. He was quite prepared to explain, in the commentary to article 46, the idea contained in Mr. Erim's proposal for an additional paragraph to article 25.

21. Mr. TUNKIN said that, in view of the Special Rapporteur's undertaking, Mr. Erim's proposal might now be withdrawn.

22. Mr. SCELLE pointed out that article 46, paragraph 2, did not specify that there was no right of asylum in consulates. It was desirable to state in explicit terms that no such right existed and, for his part, he was prepared to accept a statement in the commentary, provided it gave a full explanation of the position.

23. Mr. BARTOŠ said that, in order to prevent any misunderstanding resulting from the vote, he wished to make it clear that he favoured the substance of Mr. Erim's proposal and was firmly of the view that there was no right of asylum in consulates.

24. Mr. AGO supported the inclusion in the commentary of a purely negative statement to the effect that no right of asylum in consulates existed. He could not, however, support a statement in the commentary along the lines of Mr. Erim's proposed paragraph. That suggested that the consul had an actual positive duty to hand over a person seeking refuge in the consulate.

25. Mr. ERIM said he had based the wording of

his paragraph on article 19 of the Havana Convention.

26. He was prepared to withdraw his amendment on the understanding that the commentary to article 46 would explain that there was no right of asylum in consulates.

27. The CHAIRMAN said it was agreed that the commentary to article 46 should contain that explanation. On that understanding, he put to the vote article 25 as prepared by the Drafting Committee.

Article 25 was adopted by 13 votes to none, with 2 abstentions.

ARTICLE 26 (*Exemption in respect of the consular premises from taxation*)

28. The CHAIRMAN said that no amendments had been proposed to article 26.

29. Mr. EDMONDS said that the terms of article 26 as prepared by the Drafting Committee were virtually identical with those originally proposed by the Special Rapporteur. As he (Mr. Edmonds) had explained in the earlier debate on article 26 (531st meeting, paragraph 5), its terms did not express adequately the intention of the Commission, which was to exempt the consular premises from taxation. The provision now presented exempted the consul personally and the sending State as the owner of property. However, under the municipal law of a number of States of the United States of America, the primary liability for taxation attached to the property and not to the owner. Exemption of the owner from personal liability did not necessarily mean that the property itself was exempt from taxation.

30. Sir Gerald FITZMAURICE said that whatever might be the liability attaching to the property, ultimately the liability for tax would normally be discharged by a person. As he saw it, the exemption from taxation of the sending State in respect of the consular premises was sufficient to protect those premises. In addition, the property itself was inviolable and could therefore not be sold in satisfaction of fiscal liabilities.

31. The CHAIRMAN put to the vote article 26 as prepared by the Drafting Committee.

Article 26 was adopted by 11 votes to 1.

32. Mr. ŽOUREK, Special Rapporteur, said that he had voted for article 26 in the belief that its terms conferred a "real" immunity (*immunité réelle*) on the consular premises as such.

ARTICLE 27 (*Inviolability of the official correspondence, archives and documents*)

33. The CHAIRMAN drew attention to the amendment proposed by Mr. Bartoš, Mr. Scelle and Mr. Verdross to add the following sentence to article 27: "The archives and documents of the consulate shall be kept and remain kept carefully

separated from the personal documents and papers of the consuls."

34. Mr. SCELLE explained that the amendment was mainly designed to give satisfaction to Mr. Tunkin who had rightly argued (554th meeting, paragraph 42) that the inviolability of official correspondence, archives and documents was only effective if the authorities of the receiving State were debarred from scrutinizing them for the purpose of determining whether any personal papers had been placed among official papers. The amendment would impose an obligation on the sending State to instruct its consuls to keep official papers quite separate. If the Special Rapporteur regarded such a provision as unnecessary, perhaps he would give his reasons.

35. Mr. ŽOUREK, Special Rapporteur, said that he had repeatedly recognized the utility of such a provision so far as honorary consuls were concerned but it was wholly unnecessary in the case of career consuls who were engaged exclusively in consular functions and did not carry on any other activities. The requirement laid down in the amendment might weaken the principle of the inviolability of the premises of career consuls since it could be interpreted to mean that the authorities of the receiving State were entitled to examine the consulate's papers with a view to satisfying themselves that they were in fact official consular papers.

36. Mr. SCELLE repeated the argument (*ibid.*, paragraph 52) he had advanced during the earlier discussion that it was invidious to suppose that only honorary consuls might engage in nefarious activities and, by relying on the inviolability of the premises, seek to hide compromising documents among official papers. The possibility of career consuls abusing their immunities in that way would be reduced if the amendment were adopted, though he agreed that it was more necessary in the case of honorary consuls.

37. Mr. AGO considered the amendment inadvisable; it had, incidentally, been drafted before the Commission's decision to separate the provisions relating to honorary consuls. It was quite exceptional for career consuls to be allowed by the sending State to engage in private activities, and for them the amendment was wholly unnecessary. Moreover, it could be positively detrimental inasmuch as it might be difficult to judge whether certain papers, which the consul had good reason to keep among his official papers, could be regarded as strictly personal ones. If the requirement laid down in the amendment was intended as a condition of the inviolability of official correspondence, it might be extremely dangerous since it might be held to allow the authorities of the receiving State to examine the papers.

38. Mr. TUNKIN agreed with Mr. Ago's interpretation of the possible consequences of the amendment. In his earlier observations on article 27 he had never intended to suggest that it should be modified in such a manner.

39. The CHAIRMAN, speaking as a member of the Commission, said that the amendment was modelled on article 30 of the Harvard Draft, but that article was concerned exclusively with the duties of the sending State. He opposed the amendment because it might be regarded as qualifying the principle of the inviolability of official correspondence.

40. Mr. SCELLE said that in the form proposed by the Drafting Committee, article 27 meant that all papers in a consulate, whether official or not, were inviolable. If that was the intention of the Commission, an express statement to that effect should be made in the commentary.

41. The CHAIRMAN put the amendment to the vote.

The amendment was rejected by 9 votes to 6, with 1 abstention.

42. The CHAIRMAN put to the vote article 27 as proposed by the Drafting Committee.

Article 27 was adopted unanimously.

43. Mr. SCELLE said that he had voted in favour of article 27 as it stood on the understanding that the Commission's intention as he had interpreted it would be explained in the commentary.

ARTICLE 28 (*Facilities*)

44. The CHAIRMAN put to the vote article 28 as prepared by the Drafting Committee.

Article 28 was adopted unanimously.

ARTICLE 28 a (*Free movement*)

45. Mr. TUNKIN said that article 28 a as drafted by the Drafting Committee imposed an excessive obligation on the receiving State. In his opinion, only in the consular district should consular officials enjoy full freedom of movement.

46. Sir Gerald FITZMAURICE explained that the article was modelled on article 24 of the draft on diplomatic intercourse and the Drafting Committee had seen no reason why in the case of consuls the obligation to accord freedom of movement should be narrower, for although consular officials would normally travel only within their consular district they might have to visit other districts or their own embassies. Perhaps Mr. Tunkin's doubts about the present wording related more to the phrase "shall ensure" and might have been removed if the phrase "shall not restrict" had been used. If at the 1961 conference on diplomatic privileges and immunities such an amendment were made to article 24 of the draft on diplomatic intercourse then a parallel change could be made to article 28 of the present draft.

47. Mr. TUNKIN said his doubts had not been removed by Sir Gerald Fitzmaurice's explanation; he moved that article 28 a be reworded so as to indicate that the receiving State was bound to

ensure freedom of movement in the consular district but not in the whole of its territory.

48. The CHAIRMAN put Mr. Tunkin's amendment to the vote.

Mr. Tunkin's amendment was rejected by 11 votes to 2, with 2 abstentions.

Article 28a as prepared by the Drafting Committee was adopted by 14 votes to 1 with 1 abstention.

ARTICLE 29 (*Freedom of communication*)

49. Mr. TUNKIN asked what was meant by the expression "special couriers", which was not to be found in the draft on diplomatic intercourse.

50. Mr. YOKOTA, Chairman of the Drafting Committee, explained that during the earlier discussion on article 29 (531st meeting, paragraphs 37 and 38, and 532nd meeting, paragraph 29) some members had said that consular documents were often entrusted to couriers who were not diplomatic couriers in the strict sense.

51. Mr. TUNKIN said that the institution of diplomatic couriers was well established; he considered that it would be inadvisable to introduce a new category of couriers.

52. Sir Gerald FITZMAURICE explained that the term "other special couriers" had been inserted by the Drafting Committee to cover the various possibilities which had been mentioned during the earlier discussion in the Commission. For example, an official of a consulate or a consular servant might be sent to collect consular correspondence received at the embassy in the normal diplomatic bag or he might be sent to an airport to collect consular correspondence which had been entrusted to the captain of an aircraft.

53. Mr. PAL suggested that paragraph 1 should end at the words "all appropriate means". The clause would then be comprehensive and it would be unnecessary to introduce terms not used in the diplomatic draft.

54. Mr. AGO considered that although theoretically Mr. Pal's suggestion was acceptable there were practical reasons for mentioning the kind of means that might be employed for the purpose of communication; otherwise endless disputes could arise as to whether a particular means was "appropriate". The enumeration at the end of paragraph 1 served a useful purpose.

55. Mr. ŽOUREK, Special Rapporteur, said that the category of special couriers had been included by the Drafting Committee to cover special cases. For example, the sending State might not have a diplomatic mission in a particular country and the communications of consulates would then have to be entrusted to messengers other than diplomatic couriers. The same would apply in cases where the consular bag had to be carried from a consulate to the diplomatic mission of the sending State.

56. Mr. GARCÍA AMADOR asked whether the obligations in article 28 *a* and 29 were different in nature. If they were not, he failed to see why the words "shall ensure" were used in article 28 *a* and the words "shall permit and protect" in article 29.

57. Mr. TUNKIN considered that at the present late stage the Commission should not depart from the wording of the draft on diplomatic intercourse which had been so carefully considered.

58. Mr. SANDSTRÖM observed that since article 28 *a* dealt with freedom of movement, it would be inappropriate to speak of protection in that article.

59. Mr. AGO said that the expression "shall ensure" could certainly not be used in article 29 since it might convey the impression that the receiving State had itself to effect the communications of the consulate, which was absurd.

60. Mr. GARCÍA AMADOR said it was now clear that there was a difference in nature between the obligation laid down in article 28 *a* and that laid down in article 29.

61. Mr. MATINE-DAFTARY felt that the Drafting Committee had failed to carry out the Commission's instructions to follow the wording of the draft on diplomatic intercourse. He was opposed to the introduction of an entirely unknown category of special couriers.

62. Mr. AGO said that consulates might not always be able to avail themselves of the diplomatic couriers or of the diplomatic bags used by the embassies of their respective countries; allowance should be made for such circumstances in the text.

63. Mr. MATINE-DAFTARY said he was willing to accept the Drafting Committee's text if an explanation on the lines of that given by Mr. Ago were inserted in the commentary.

64. The CHAIRMAN suggested that an explanation on the lines of that contained in paragraph 3 of the commentary on article 25 in the draft on diplomatic intercourse be inserted in the commentary.

It was so agreed.

Article 29 as prepared by the Drafting Committee was adopted unanimously.

ARTICLE 30 (*Communication with the authorities of the receiving State*)

65. Mr. TUNKIN observed that the consular district was not mentioned in the Drafting Committee's text for article 30, paragraph 1, whereas article 4, paragraph 2 (Consular functions) provided that a consul might deal only with the local authorities. Under paragraph 1 as proposed by the Drafting Committee, however, consuls might address any authority, including central authorities other than the Ministry of Foreign

Affairs of the receiving State. He asked for an explanation of that wording.

66. Sir Gerald FITZMAURICE pointed out that the consul might address only the authorities which were competent under the law of the receiving State. The purpose of the provision was to allow for the many cases where services were centralized and where there were no competent authorities in the consular district; for example, in the United Kingdom all matters relating to copyrights, patents and trade names were dealt with by a central department in London, and not in any consular district. The provision was supplemented by paragraph 3 of the article, which referred to the relevant international agreement and the laws and usages of the receiving State.

67. Mr. BARTOŠ observed that the consul might be obliged to address, not the central authorities, but the competent local authorities outside the consular district concerned. In Yugoslavia, for example, recruitment, with which consuls might be concerned, was dealt with in command regions which did not correspond to the districts of the civil administration; the same applied to customs districts. All consular districts, on the other hand, corresponded to the boundaries of the civil administration. Accordingly, the consul might be obliged to address himself to authorities outside his consular district. He would vote in favour of the article.

68. Mr. TUNKIN still did not consider the wording of paragraph 1 satisfactory. Although he would vote for the article, he thought that the meaning of paragraph 1 should be clarified in the commentary.

Article 30 as prepared by the Drafting Committee was adopted unanimously.

ARTICLE 30 *a* (Communication and contact with nationals of the sending State)

69. Sir Gerald FITZMAURICE, in reply to a question by Mr. Erim, said that article 30 *a*, like article 28 *a*, did not confer on the consul the right to visit a national in a prohibited area. That could easily be explained in the commentary.

70. Mr. TUNKIN said he would abstain from voting on article 30 *a* because the wording was unnecessarily complicated. He did not wish to submit an amendment at that late stage.

71. Mr. EDMONDS said that, during the discussion on the original article, he had said (536th meeting, paragraph 36) that provision should be made for private communications between the consul and the national of the sending State. Nevertheless, that provision might be implicit in the article, and he would vote for it.

Article 30 a as prepared by the Drafting Committee was adopted by 12 votes to none, with 2 abstentions.

ARTICLE 31 (Levy of consular fees and charges and exemption of such fees and charges from taxes and dues)

Article 31 as prepared by the Drafting Committee was adopted unanimously.

ARTICLE 32 (Special protection and respect due to consuls)

Article 32 as prepared by the Drafting Committee was adopted by 14 votes to none, with 1 abstention.

ARTICLE 33 (Personal inviolability)

Paragraph 1

72. Mr. MATINE-DAFTARY said he would vote against the article for reasons that he had explained during the Commission's earlier debates (539th meeting, paragraphs 6 and 21 to 24, and 540th meeting, paragraphs 40 to 45).

73. Mr. TUNKIN asked that the vote be taken paragraph by paragraph.

74. With regard to paragraph 1, he doubted whether the criterion of an offence punishable by a maximum sentence of not less than five years' imprisonment would be generally acceptable to all States. While similar provisions occurred in some bilateral conventions, the law varied so greatly from country to country that it was impossible to lay down any specific term of imprisonment as a general rule. It would be better to adopt a more general formula, imposing an obligation on States, but leaving the details to be settled under municipal law.

75. Mr. EDMONDS agreed that paragraph 1 was unacceptable, but for a different reason from that mentioned by Mr. Tunkin. It was impossible to know with any certainty, at the time an offence was committed, whether it was punishable by a maximum sentence of five years' imprisonment. Arrests were often made on an open charge and the penalty for the offence upon conviction might not become known until the prosecutor filed a complaint or indictment.

76. Sir Gerald FITZMAURICE could not agree that the provision was unworkable; its inclusion in many bilateral agreements had raised no difficulty. The Drafting Committee had been of the opinion that the phrase "arrest or detention pending trial" would not rule out purely temporary arrest or detention, but would prevent the consul from being held throughout the period between the ascertainment of the offence and his trial. It would be recalled that in the Special Rapporteur's draft (A/CN.4/L.86) a decisive condition governing a consul's liability to arrest had been the flagrancy of the offence; but that provision had been criticized on the grounds that it would render the consul liable to arrest even for a petty offence. The criterion of a grave offence had also been suggested, but had been rejected because of its vagueness. The criterion of an offence

punishable by a maximum sentence of five years' imprisonment seemed to be objective and would ensure that a consul would not be arrested unless the offence was indeed grave. He was fully aware of the difficulty of finding an appropriate wording.

77. Mr. SANDSTRÖM thought that the best course might be to adapt the provision to the criminal law of the countries concerned. For example, as defined in the Consular Convention between the United Kingdom and Sweden of 1952, the expression "grave offence" meant in the United Kingdom an offence punishable by imprisonment for five years or more, and in Sweden an offence punishable by imprisonment for four years or more (article 2 (9) of the Convention).

78. Mr. EDMONDS said that the provision would be clearer if it stated simply that a consul was not liable to detention pending trial unless charged with an offence punishable by a maximum of five years' imprisonment. He proposed the deletion of the words "arrest or".

79. Mr. YASSEEN agreed with Mr. Edmonds that the provision might be difficult to apply and controversial in practice, for no one could know in advance what sentence would be imposed in respect of a particular offence. Furthermore, he did not see why the Drafting Committee had chosen a maximum of five years' imprisonment; in most of the countries which recognized a tripartite division of criminal acts into "crimes" "délits" and "contraventions", a crime was punishable by a sentence of not less than three years' imprisonment. While it was understandable that consuls should not be arrested for a "contravention", or offence, they should surely be liable to arrest for a crime.

80. Mr. AGO pointed out to Mr. Yasseen that, in some bilateral conventions, the maximum penalty specified in analogous provisions marking the point at which a consul's immunity to arrest ceased was five years' imprisonment. Five years was not a really high maximum, for the minimum might be as little as only a few months. In any case, any specific figure was bound to be arbitrary; for countries which observed the theoretical distinction between "crimes et délits" (felonies and misdemeanours), the simple clause "except in the case of a felony" might suffice, but the clause would probably not be applicable for countries following a different legal system.

81. Mr. SANDSTRÖM agreed that the tripartite classification mentioned by Mr. Yasseen was unknown to the law of a number of countries, including his own.

82. Mr. ŽOUREK, Spécial Rapporteur, said that it was extremely difficult to draft a generally acceptable provision on the question, although the Commission was obviously agreed on the principle that some personal inviolability should be extended to consuls. As Mr. Sandström had pointed out, the law varied widely from country to country. In particular, some countries did not recognize the

classification of punishable offences into "crimes", "délits" and "contraventions", so that Mr. Ago's suggestion would not meet the case.

83. The Commission was faced with a choice between two procedures: it could either name a hypothetical term of imprisonment as a criterion or insert a general clause; that would have the disadvantage of vagueness, but it might be acceptable to all States. In his original draft, he had combined those two conditions, but had limited the cases in which a consul could be arrested as far as possible. A consul being subject to the jurisdiction of the State of residence, justice must take its course, and he could not be absolved from responsibility in the case of a serious crime. What was important was to limit the number of cases where a consul could be imprisoned pending trial. That was why he had put forward the criterion of *flagrante delicto* if the act constituted a criminal offence against life or personal freedom. The Drafting Committee, however, had thought that such a provision might limit unduly the powers of the receiving State, and the outcome of its lengthy deliberations was the present paragraph 1.

84. Sir Gerald FITZMAURICE thought the effect of Mr. Edmonds' amendment would be to give the receiving State complete freedom to arrest a consul on the most trifling pretext. Such a solution was unacceptable and, moreover, was not in accordance with general practice.

85. Mr. LIANG, Secretary to the Commission, drew attention to the phrase "do not carry on any gainful private activity". The accumulation of adjectives seemed to be unnecessary since public activity could hardly be regarded as gainful. He did not believe that it was to be found in many bilateral agreements.

86. Mr. ŽOUREK, Spécial Rapporteur, said that the phrase occurred in a number of bilateral consular conventions, and was usually preceded by the words "commerce or other"; the Drafting Committee had thought that the reference to commerce was superfluous. He could not agree with the Secretary that private activity was always gainful, for it might be carried on for humanitarian or social purposes.

87. Mr. EDMONDS said that in view of Sir Gerald Fitzmaurice's comments he withdrew his amendment, but proposed instead the deletion of the provision, "except in the case of an offence punishable by a maximum sentence of not less than five years' imprisonment". The purpose of detention pending trial was to ensure the defendant's presence in court; such a provision was hardly necessary in the case of a consul.

88. Mr. AGO thought that Mr. Edmonds' new proposal simplified the situation, but would make the article difficult for States to accept. If it rendered the consul immune from detention pending trial even in very serious cases, the draft would be going much farther than any existing bilateral consular convention.

89. Since it was obvious that the Commission could not agree on a satisfactory text, he would suggest that the provision should be adopted as prepared by the Drafting Committee but that the attention of governments should be drawn to the problem in the commentary.

90. Mr. TUNKIN thought that the deadlock could be broken by offering alternative texts to governments. One might be the text prepared by the Drafting Committee and the other the same text but with the proviso amended to read simply "except in the case of a serious offence".

91. The CHAIRMAN pointed out that Mr. Tunkin's second alternative was similar to article 20 of the Harvard Draft.

92. Mr. YASSEEN said that, if that formula were approved, each State would decide for itself what was the maximum penalty justifying the arrest of a consul.

93. Mr. EDMONDS said that the Commission was discussing an academic point. Very few consuls were arrested or detained for grave offences. His objection to Mr. Tunkin's formula was that it would impose on every policeman the duty to determine whether a particular offence was or was not "serious". The purpose of both his proposals was to provide an element of certainty in the application of the rule laid down. The practical result of the adoption of his latest amendment would be to extend to the consul the necessary immunity from arrest or detention, in view of the fact that in practice a person having consular status because of his position was unable to evade appearance in court and would not disobey an order requiring him to be present at a certain time and place.

94. Mr. AGO supported Mr. Tunkin's proposal that the Commission should submit alternative texts to governments, but only on the understanding that the criterion was truly objective and that both the receiving and the sending States should have a say in deciding whether a particular offence with which a consul was charged was serious.

95. The CHAIRMAN put Mr. Edmonds' amendment for the deletion of the final clause to the vote.

Mr. Edmonds' amendment was rejected by 11 votes to 1, with 4 abstentions.

96. The CHAIRMAN put to the vote Mr. Tunkin's proposal that alternative texts for paragraph 1 should be offered to governments, one to be the Drafting Committee's text and the other the wording proposed by Mr. Tunkin himself, on the understanding that the expression "serious offence" would not be interpreted unilaterally by the receiving State.

Mr. Tunkin's proposal was adopted by 10 votes to 2, with 4 abstentions.

97. Mr. EDMONDS said he had voted against Mr. Tunkin's proposal because he did not believe

that the Commission should submit alternatives to governments and also on the ground that the rule should be stated unequivocally.

98. Mr. SANDSTRÖM said that he had voted against the proposal because the paragraph as worded by the Drafting Committee would have elicited clearer replies from governments.

99. Mr. SCALLE said that in voting for the proposal he had made the mental reservation that the paragraph would be valuable only if it were subject to a general clause providing for arbitration in cases of dispute.

100. The CHAIRMAN put paragraph 1 to the vote.

Paragraph 1 was adopted by 14 votes to 2.

Paragraph 2

101. Mr. TUNKIN said he had considerable doubts concerning the words "of at least two years' imprisonment". They made the paragraph self-contradictory in two ways. First, if a consul was regarded as subject to the jurisdiction of a court, it was illogical to provide for any exception whatsoever based on the severity of the sentence imposed. Secondly, from the practical point of view, the words might conceivably influence the judgement of the court to pronounce a heavier sentence than the normal, because otherwise a consul would be immune from all punishment. He therefore proposed that the words be deleted.

102. Sir Gerald FITZMAURICE observed that the effect of Mr. Tunkin's amendment would be to nullify the whole paragraph. No one, whether a consul or not, could be committed to prison except in pursuance of a final sentence. The purpose of the paragraph was to give a consul partial immunity from the consequences of criminal process; to some extent the provision thus placed consuls on the same footing as diplomats, although the latter had complete immunity while the immunity of consuls was limited. Furthermore, he did not believe that courts would be influenced by the provision in the manner suggested by Mr. Tunkin; surely sentences were related to the gravity of the offence.

103. Mr. TUNKIN could not agree that the deletion of the last phrase would render the provision meaningless. Similar clauses occurred in many bilateral conventions; their purpose was to cover the situation where a court of first instance has considered a case and had decided on a penalty, which was subject to appeal. Nevertheless, he would not press his proposal.

104. Mr. LIANG, Secretary to the Commission, agreed with Mr. Tunkin that the deletion of the phrase would not render paragraph 2 meaningless. While it could be argued that such a provision was self-evident, the Commission had adopted a number of other clauses which were equally obvious.

105. The CHAIRMAN put paragraph 2 to the vote.

Paragraph 2 was adopted by 14 votes to 1, with 1 abstention.

Paragraphs 3 and 4

Paragraphs 3 and 4 were adopted by 15 votes to 1.

Article 33 as a whole was adopted by 14 votes to 2.

**Date and place of the thirteenth session
(resumed from the previous meeting)**

[Agenda item 9]

106. Mr. LIANG, Secretary to the Commission, said it had been suggested at the previous meeting that an interval of two weeks should be allowed between the end of the 1961 Conference on Diplomatic Intercourse and Immunities and the beginning of the Commission's thirteenth session. He had consulted the Secretary-General of the United Nations, who has agreed that the thirteenth session of the International Law Commission should begin on 1 May 1961 and end on 7 July. That information would be included in the Commission's report.

The meeting rose at 6.25 p.m.

573rd MEETING

Tuesday, 28 June 1960, at 9.30 a.m.

Chairman: Mr. Luis PADILLA NERVO

**Consular intercourse and immunities
(A/CN.4/L.86, A/CN.4/L.90) [continued]**

[Agenda item 2]

**PROVISIONAL DRAFT ARTICLES
(A/CN.4/L.90) (continued)**

1. The CHAIRMAN invited the Commission to continue its consideration of the provisional draft articles prepared by the Drafting Committee.

ARTICLE 34 (Immunity from jurisdiction)

2. The CHAIRMAN drew attention to the amendment proposed by Mr. Verdross substituting the words "in respect of the acts within the scope of their functions" for the words "in respect of acts performed in the exercise of their functions".

3. As Mr. Verdross had had to leave he had asked, in the event of his amendment being rejected, that his views be recorded that consuls enjoyed immunity from jurisdiction in respect of official acts only—namely, those attributable to the sending State. Consequently, he considered

that the Drafting Committee's formula was too broad since it also covered offences committed by consuls in their private capacity during the exercise of their functions.

4. Mr. ŽOUREK, Special Rapporteur, said the amendment was unacceptable because it tended to weaken the position of consuls and might hamper the free and independent exercise of consular functions. It was by no means always easy to determine whether a specific act definitely formed part of the consular functions. Some learned authors had even advanced the theory of "functional offences". The formula proposed by the Drafting Committee was correct and corresponded to analogous provisions in a large number of consular conventions: it in no way prejudiced the rights of nationals of the receiving State.

5. Mr. FRANÇOIS said the Drafting Committee's text for article 34 was not very satisfactory; at least the word "acts" should be qualified by the adjective "official" to remove the discrepancy in the wording of article 34 and article 40, paragraph 2. The question of the immunity of consuls from jurisdiction raised a whole series of difficulties, even at the national level. In view of the shortage of time perhaps it might be advisable provisionally to accept the Drafting Committee's text pending the discussion at the 1961 conference on diplomatic intercourse and immunities of article 29 of the draft on diplomatic intercourse and the receipt of the observations of governments on the present draft.

6. The CHAIRMAN put Mr. Verdross' amendment to the vote.

The amendment was rejected by 8 votes to 4, with 2 abstentions.

Article 34 was adopted by 10 votes to 2, with 2 abstentions.

ARTICLE 35 (Exemption from obligations in the matter of registration of aliens and residence and work permits)

7. Mr. ŽOUREK, Special Rapporteur, in reply to a question by Mr. YASSEEN concerning the expression "work permits", explained that the intention was to exempt consuls and members of the consular staff from the duty to obtain for members of their private staff the usual work permits required for aliens by the receiving State. An explanation to that effect would appear in the commentary.

8. Mr. MATINE-DAFTARY said he could accept article 35 on condition that the exemption from the duty to obtain work permits applied solely to employment in the consulate itself; without such a safeguard the article would be far too liberal and might be held to apply to any kind of employment undertaken in the receiving State.

9. Mr. YASSEEN agreed on the previous speaker's interpretation of the scope of the exemption,

which should be expressly indicated in the commentary.

10. Mr. AGO said that the exemption in question was applicable to domestic staff rather than to persons employed in the consulate as such.

11. Mr. YOKOTA said that it would be a simple matter to explain that the exemption related to work performed in the domestic service of the consul or of members of his staff. He would have thought the interests of the receiving State were fully safeguarded by the provisions of article 21.

12. Mr. YASSEEN argued that exemption should certainly not be capable of being extended to a gainful private occupation carried on outside the consulate.

13. Mr. LIANG, Secretary to the Commission, did not think the Commission had intended to extend the application of the provision in the sense suggested by Mr. Yasseen. Certainly the meaning of article 35 as it stood was obscure, and if the Commission wished to make it applicable to persons other than the private staff of members of a consulate it would have to explain its reasons. It seemed to him inconceivable that a career member of a consular staff would want to engage in gainful private activities and, if so, should venture to seek exemption from the local legislation regarding work permits. He shared Mr. Ago's views about the scope of the exemption.

14. M. BARTOŠ considered that the exemption concerning work permits applied only to work performed in the consulate or to work carried out by members of the private staff of members of the consulate. That intention had not been clearly expressed by the Drafting Committee, and he agreed that some amendment was required together with an explanation in the commentary.

15. Mr. AGO believed that in most countries work permits were only required for unskilled labour and not for activities of a professional type; that fact should be brought out in the commentary.

16. Mr. MATINE-DAFTARY said that in most countries an alien was not allowed to accept any employment without a work permit. That fact should be clearly reflected in the text of the article itself, since it would be quite insufficient merely to mention it in the commentary, which tended to be ignored. If the Commission was unwilling to modify the article he must ask for a separate vote on the words "and work permits".

17. The CHAIRMAN put to the vote the text of article 35 up to the words "residence permits".

That text was adopted by 14 votes to none, with 1 abstention.

18. The CHAIRMAN put to the vote the words "and work permits".

Those words were adopted by 10 votes to 2, with 3 abstentions.

Article 35 as a whole was adopted by 14 votes to 1, with 1 abstention.

19. Mr. YASSEEN explained that he had voted against the inclusion of the words "and work permits" not because he disagreed with the interpretation given by the Special Rapporteur, but because in its present form article 35 was too general and might give rise to conflicting interpretations.

20. Mr. BARTOŠ said that he had abstained from voting on that phrase because he believed that the receiving State should not be entitled to require a work permit for work carried out in the consulate. At the same time, he had felt unable to vote against the inclusion of those words, since no individual could be deprived of the right to look for work. Under the legislation of his country that right was assured even for nationals of a country which did not grant reciprocal advantages to Yugoslav nationals.

ARTICLE 36 (*Social security exemption*)

21. Mr. TUNKIN asked why the proviso "if they are not nationals of the receiving State" contained in article 31 of the draft on diplomatic intercourse had not been inserted in article 36 of the present draft.

22. Mr. ŽOUREK, Special Rapporteur, replied that the commentary would explain that the enjoyment by nationals of the receiving State of the privileges and immunities conferred by the draft was subject in all cases to the general limitation laid down in article 42.

23. Mr. TUNKIN stated that the Special Rapporteur's reply had not fully satisfied him: article 42 of the draft did not refer to members of the families of consular staff. Article 36 as it stood did not correspond to article 31 in the draft on diplomatic intercourse, which did cover members of families forming part of the household of members of the mission.

24. Mr. ŽOUREK, Special Rapporteur, acknowledging the justice of Mr. Tunkin's criticism, suggested that article 42 be amplified to apply also to members of the families of consular staff.

25. Mr. TUNKIN said that that change would meet his point.

26. Mr. BARTOŠ asked for a separate vote on paragraph 4 of article 36, which he could not support because he considered that voluntary participation in the social security scheme of the receiving State should not be made conditional on the good will of that State. All persons should have the benefit of the local medical services, for example.

27. Mr. SANDSTRÖM thought that the drafting of article 36 was superior to that of the corresponding article in the draft on diplomatic intercourse, which had been formulated towards the end of the discussion, perhaps somewhat hastily.

28. Mr. EDMONDS said that in his opinion paragraph 2 (b) was unnecessary. Why should the receiving State be interested in knowing whether members of the private staff were covered by the social security system of the sending State or of a third State? And why should the receiving State require a foreigner to subject himself to its social security system if the foreigner and his employer were willing to exempt him from social security in the sending State?

29. Mr. ŽOUREK, Special Rapporteur, said that it would be contrary to the fundamental purpose of social security systems and not in the interests of the person concerned if he could not benefit from the social security system of the receiving State in the event of his not being covered by the social security system of the sending State or of a third State.

30. Mr. EDMONDS said he would vote against that provision, which was out of place in the draft.

31. The CHAIRMAN put to the vote paragraphs 1, 2 and 3 of article 36.

Those paragraphs were adopted by 15 votes to 1.

Paragraph 4 was adopted by 14 votes to 2.

Article 36 as a whole was adopted by 14 votes to 1, with 1 abstention.

ARTICLE 37 (*Exemption from taxation*)

Article 37 was adopted unanimously.

ARTICLE 38 (*Exemption from customs duties*)

Article 38 was adopted by 15 votes to none, with 1 abstention.

ARTICLE 39 (*Exemption from personal services and contributions*)

32. Mr. TUNKIN asked whether in the draft on diplomatic intercourse exemption from personal services and contributions had been extended to members of the private staff.

33. Mr. ŽOUREK, Special Rapporteur, replied that article 36, paragraph 3, of the draft on diplomatic intercourse might be interpreted as implying that private servants of the head or of members of the mission were exempted from personal services or at any rate that the receiving State should not require them to perform services in a manner which would interfere unduly with the performance of their duties. The exemption extended in article 39 of the present draft to private staff of members of a consulate who were not nationals of the receiving State was a more definite one.

34. Mr. TUNKIN, stating that he had no objection to article 39, explained that he had only wished to ascertain whether the departure from the draft on diplomatic intercourse had been deliberate.

Article 39 was adopted by 15 votes to none, with 1 abstention.

35. Mr. BARTOŠ suggested that the Secretary should draw the attention of the 1961 conference on diplomatic intercourse and immunities to the fact that in article 39 of the present draft the Commission was proposing a wider exemption for members of the private staff of consular officials than that accorded to the staff of diplomatic agents under article 36 of the draft on diplomatic intercourse.

ARTICLE 40 (*Liability to give evidence*)

36. Mr. MATINE-DAFTARY regretted that the Drafting Committee had ignored his contention (541st meeting, paragraph 32) that members of the consulate could not refuse to comply with a request by the courts of the receiving State for the production of official documents such as certificates of marriage or death. If the Commission was unwilling to meet his objection to paragraph 3 he would have to ask for a separate vote on that paragraph.

37. Mr. ŽOUREK, Special Rapporteur, said that he intended to explain the scope of paragraph 3 in the commentary, and hoped that would satisfy Mr. Matine-Defatory.

38. Mr. EDMONDS said that he agreed with Mr. Matine-Defatory. Some documents were of a purely public character and should certainly be produced on a proper order by a court. It would be no solution of the question to put an explanation to that effect in the commentary, as the explanation would not be consistent with the terms of paragraph 3 as it now stood.

39. The CHAIRMAN put to the vote paragraphs 1 and 2 of article 40.

Those paragraphs were adopted unanimously.

Paragraphs 3 was adopted by 10 votes to 3, with 2 abstentions.

Article 40, as a whole, was adopted by 13 votes to 2.

ARTICLE 41 (*Acquisition of nationality*)

40. Mr. SCALLE, pointing out that the French term "ménage" could only comprise husband, wife and, at most, their children, and was therefore considerably narrower than the English term "household", suggested that the word be replaced by *foyer*.

It was so agreed.

Article 41 was adopted unanimously, subject to the change in the French text.

ARTICLE 42 (*Members of the consulate and of the private staff who are nationals of the receiving State*)

41. The CHAIRMAN informed the Commission that Mr. Verdross had wished to propose an amendment replacing the words "in respect of official acts performed in the exercise of their functions" in paragraph 1 of article 42 by the

words "in respect of acts within the scope of their functions".

42. Mr. MATINE-DAFTARY supported the amendment.

Mr. Verdross' amendment was rejected by 9 votes to 3, with 4 abstentions.

Paragraph 1 of article 42 was adopted by 15 votes to none, with 1 abstention.

43. Mr. YOKOTA, Chairman of the Drafting Committee, suggested that paragraph 2 be referred to the Drafting Committee for modification in the light of Mr. Tunkin's observations concerning article 36 and of the Special Rapporteur's reply thereto; article 42, paragraph 2, should stipulate clearly that it applied also to members of the families of the consular staff and of the private staff. He suggested that the Commission should endorse such an amendment in principle and leave the precise wording to the Drafting Committee.

The amendment to paragraph 2 was approved in principle by 14 votes to none.

Paragraph 2, as amended, was adopted by 15 votes to none, with 1 abstention.

Article 42, as a whole, as amended, was adopted by 15 votes to none, with 1 abstention.

44. Mr. ŽOUREK, Special Rapporteur, suggested that a suitable wording for the beginning of article 42, paragraph 2, might be "Other members of the consulate and members of the private staff, as well as members of the families of members of the consulate and of private staff who are nationals . . ."

ARTICLE 43 (*Duration of consular privileges and immunities*)

45. Mr. ŽOUREK, Special Rapporteur, observed that in keeping with an earlier decision the French term "ménage" would have to be replaced by "foyer".

46. Mr. MATINE-DAFTARY said that he objected to the expression "in respect of acts performed by members of a consulate in the exercise of their functions" in paragraph 3. He asked for a separate vote on paragraph 3 and said that he would abstain from the vote on that paragraph.

Paragraphs 1 and 2 were adopted unanimously.

Paragraph 3 was adopted by 13 votes to 1, with 2 abstentions.

Article 43 as a whole was adopted by 15 votes to none, with 1 abstention.

ARTICLE 44 (*Estate of a member of the consulate or of a member of his family*)

Article 44 was adopted unanimously.

ARTICLE 45 (*Obligations of third States*)

47. Mr. TUNKIN asked the Special Rapporteur whether, under the text proposed, the obligations of a third State would not in some respects be greater than those of the receiving State.

48. Mr. ŽOUREK, Special Rapporteur, said that they would not. While the provisional draft article originally submitted by him had intentionally, in the interest of members of the consulate, been meant to confer on third States obligations greater than those owed by the receiving State, it had been decided in the Drafting Committee that the obligations of third States could in no case be greater than those of the receiving State.

49. Mr. BARTOŠ observed that his earlier objection to paragraph 1 was no longer applicable in view of the insertion of the reference to article 33.

Article 45 was adopted unanimously, subject to the omission of the words "sur ce territoire" as redundant (change affecting the French text only).

ARTICLE 46 (*Respect for the laws and regulations of the receiving State*)

50. Mr. TUNKIN asked why the terms of paragraph 1 departed from those of the corresponding provision in article 40 of the draft on diplomatic intercourse and immunities, in particular why the words "the exercise of the consular functions or" had been inserted.

51. Mr. BARTOŠ also asked for an explanation.

52. Sir Gerald FITZMAURICE said that it was clear, from the very nature of the diplomatic function, what was a diplomatic agent's relationship to the laws and regulations of the receiving State. Consuls, on the other hand, had to treat with local authorities on a great variety of questions and there was a greater danger that they might be hampered in carrying out their consular functions. It had therefore been felt that the additional phrase should be included in article 46.

53. Mr. YOKOTA recalled that at an earlier meeting (543rd meeting, paragraph 95) the Drafting Committee had been asked to include a provision to the effect "that the duty [to respect local law] should be without prejudice to the carrying out of normal consular functions connected with matters of internal administration."

54. Mr. MATINE-DAFTARY asked whether article 46 could be construed to mean that in the exercise of their functions consuls did not have to respect the laws and regulations of the receiving State.

55. Mr. BARTOŠ observed that consuls were subject to the jurisdiction of the receiving State and were required to respect the law of that State unless that law conflicted with the rules of international law governing the status of consuls or with a treaty. If consuls were granted privileges and immunities by treaty, it was precisely in order to permit them to exercise their consular functions.

56. Mr. ŽOUREK, Special Rapporteur, agreed with Sir Gerald's explanation. For example, a consul might have to communicate with the local authorities regarding a decision affecting a national

of the sending State which violated a treaty. In such a case it was conceivable that the consul might be accused of interfering in the internal affairs of the receiving State.

57. In reply to Mr. MATINE-DAFTARY, he said that a consul had the duty to respect all the laws of the receiving State, with the exception of any legislative provisions that imposed a duty from which he was exempted by virtue of the articles being prepared by the Commission or by virtue of an unchallenged rule of general international law or, lastly, by virtue of a provision in a consular convention.

58. Mr. LIANG, Secretary to the Commission, pointed out that while there was a theoretical justification for including the phrase "without prejudice to the exercise of the consular function", it was actually out of place since the idea expressed was understood as basic throughout the draft and to mention it in article 46 might lead to confusion. It was very difficult to draw a fine line of distinction between consular and diplomatic functions so far as the question under discussion was concerned, and since it did not appear in the corresponding article of the draft on diplomatic intercourse and immunities, it would be better to omit the phrase in article 46.

59. Mr. TUNKIN said that since the privileges and immunities of consuls were recognized by the receiving State for the purpose of permitting the exercise of consular functions, it seemed to him that the phrase under discussion could be omitted. To include it would be very dangerous because it might be construed as meaning that a consul could ignore any law whenever he was exercising his consular functions.

60. Mr. AGO said that the phrase under discussion was included for a certain purpose in compliance with an instruction by the Commission, but he agreed with Mr. Tunkin that it was open to misinterpretation and that it would be dangerous to retain it.

61. Mr. MATINE-DAFTARY observed that the Special Rapporteur's reply related to "privileges and immunities" but not to the phrase under discussion. He would support its omission.

62. Mr. BARTOŠ said that he would not oppose the deletion of the phrase in question since privileges and immunities were granted for the purpose of permitting consuls to exercise their functions.

63. Mr. YOKOTA said that in the light of the discussion he agreed that the phrase might be misconstrued and should therefore be deleted.

It was unanimously agreed to omit the words "the exercise of the consular functions or".

Article 46 as amended was adopted unanimously.

ARTICLE 48 (*Obligations of the receiving State in certain special cases*)

64. Mr. EDMONDS recalled his earlier observation that the duty specified in paragraph (a) was

too broad (545th meeting, paragraph 49). It would be impossible in practice, at least so far as the United States of America was concerned, to impose the obligation to report the death of every foreign national.

65. Mr. ŽOUREK, Special Rapporteur, said that the Drafting Committee had considered Mr. Edmonds' observations. The limitation of the obligation to the case of deceased nationals who had owned property in the receiving State would make the provision inapplicable to the case of a national who had owned property in the sending State, where a copy of the death certificate would be important for the purpose of succession to the estate. Also, a sending State might be interested in the certificate for other reasons — for example, for the purpose of vital statistics. As to the possibility of amending part of the paragraph to read "of a person known to be a national of the sending State", he said it was obvious that the obligation of the receiving State could only arise if its authorities learned that the deceased had been a national of the sending State. That point would be made clear in the commentary.

66. Mr. SANDSTRÖM suggested, but not as a formal proposal, that article 48 might be inserted after article 28, instead of after article 4.

Article 48 was adopted by 11 votes to 1, with 1 abstention.

ARTICLE 49 (*Termination of a consul's functions*)

67. Mr. MATINE-DAFTARY said that the words "the functions of the head of post shall be terminated" were misleading. The actual functions would, in the events described, be exercised by someone else and would therefore continue. He had suggested before that the word "functions" should be replaced by the word "mission" (546th meeting, paragraph 10).

68. Mr. ŽOUREK, Special Rapporteur, said that the Drafting Committee had considered the suggestion. In the context the term "functions" meant those of the particular consular official and not consular functions in general.

69. The CHAIRMAN recalled that the Commission had decided to refer not to "consular functions" but to "the functions of a consular official", and also to follow article 41 of the draft on diplomatic intercourse as closely as possible (*ibid.*, paragraph 24).

70. Mr. LIANG, Secretary to the Commission, suggested that the words at the end of paragraph 2 "that it considers the said functions to be terminated" should be replaced by words similar to those used at the end of paragraph 2 of article 20 — for example, "that it refuses to recognize them as members of the consular staff". He made that suggestion because paragraph 1 of article 20 had no connexion with paragraph 2 of article 49.

71. Mr. AGO pointed out that section IV did

not deal with the end of consular relations, as the proposed title implied, but with the termination of consular functions.

72. Sir Gerald FITZMAURICE said that the words "and immunities" in the title of section VI could be omitted, since there was no mention of the termination of immunities in the section.

73. Mr. TUNKIN drew attention to the wording of the title of section IV and of article 41 in the draft on diplomatic intercourse, and proposed that the substance of article 49 and its title should be formulated along similar lines.

74. Mr. AGO observed that in that case the word "grounds" should not be used in the text of article 49.

Mr. Tunkin's proposal was agreed to.

Article 49 was adopted by 15 votes to none, with 1 abstention, subject to the effects of Mr. Tunkin's proposal.

ARTICLE 50 (*Maintenance of consular relations in the event of the severance of diplomatic relations*)

75. Mr. AGO pointed out that it was understood that article 50 could have no meaning unless combined with that of article 2, paragraph 2, if adopted.

Article 50 was adopted unanimously.

ARTICLE 51 (*Right to leave the territory of the receiving State and facilitation of departure*)

76. Mr. TUNKIN asked why the words "for their departure as soon as they are ready to leave" in paragraph 2 had been included in place of "in order to enable persons . . . to leave at the earliest possible moment", the words which appeared in the corresponding article (article 42) of the draft on diplomatic intercourse.

77. Sir Gerald FITZMAURICE explained that while it could be assumed that a diplomatic official would wish to leave as soon as possible, a consular official might require a little time to wind up his affairs in view of the great variety of consular functions.

78. Mr. TUNKIN said that he saw no reason for departing from article 42 of the draft on diplomatic intercourse, but in view of the late stage in the session's work he would not press for a change.

Article 51 was adopted by 13 votes to none.

ARTICLE 52 (*Protection of consular premises and archives and of the interests of the sending State*)

79. Mr. BARTOŠ asked for a separate vote on paragraph 3. He would vote against it because it failed to provide for the restoration of archives by the receiving State.

Paragraphs 1 and 2 were adopted by 13 votes to none, with 1 abstention.

Paragraph 3 was adopted by 13 votes to 1.

Article 52 as a whole was adopted by 13 votes to none, with 1 abstention.

80. Mr. MATINE-DAFTARY explained that he had abstained from the vote because he considered that paragraph 1 (b) might be applied to situations where the procedure described would be inadvisable.

ARTICLE 53 (*Non-discrimination*)

81. Mr. YOKOTA, Chairman of the Drafting Committee, said the Committee proposed that article 53 together with the article concerning the relationship between the draft and bilateral consular conventions should be included in a separate "chapter IV" entitled "General provisions".

The proposal of the Drafting Committee was agreed to.

Article 53 was adopted by 13 votes to none, with 1 abstention.

The meeting rose at 1 p.m.

574th MEETING

Tuesday, 28 June 1960, at 3.30 p.m.

Chairman: Mr. Luis PADILLA NERVO

Consular intercourse and immunities
(A/CN.4/L.86, A/CN.4/L.90 and Add.1) [continued]

[Agenda item 2]

PROVISIONAL DRAFT ARTICLES
(A/CN.4/L.90/Add.1) (continued)

1. The CHAIRMAN drew attention to the provisional draft articles of chapter III (Honorary consuls) prepared by the Drafting Committee (A/CN.4/L.90/Add.1).

ARTICLE 56 (*Legal status of honorary consuls*)

2. Mr. YOKOTA, Chairman of the Drafting Committee, commenting on the text prepared by the Committee, said that, in conformity with the Commission's decision (551st meeting, paragraph 81, and 559th meeting, paragraphs 50 and 51) article 56, paragraph 1, stated that chapter I, sections I and IV of the draft relating to consular intercourse and immunities (A/CN.4/L.90) were applicable to honorary consuls. Paragraph 2 enumerated the articles of that draft which were applicable to honorary consuls without any modification. It would be recalled that the Commission had decided that certain articles might be rendered applicable to honorary consuls with a few changes, and the Drafting Committee had thought that if those articles were simply omitted, the implication would be that they did

not apply to honorary consuls at all. Some members of the Drafting Committee had thought, however, that article 56, paragraph 3, in which those articles were enumerated, was unnecessary because those articles were replaced by articles 56 *a* to 57. Finally, as was explained in the note to article 56, the Commission had referred a decision on the applicability of certain articles to honorary consuls until the articles in question had been prepared by the Drafting Committee.

3. Mr. ŽOUREK, Special Rapporteur, said that, in his opinion, paragraph 3 was superfluous. In the first place, it did not lay down a rule of law but was in fact an explanatory note, stating that so far as their applicability to honorary consuls was concerned the articles in question were replaced by articles 56 *a* to 57. Such a note was unnecessary, inasmuch as the commentary to each article would contain the necessary cross-references. Secondly, the commentary to article 56 would make the position sufficiently clear; if any members of the Commission insisted, an explanatory note could be inserted before the commentary. Thirdly, in so far as paragraph 3 might be read to mean that the articles cited were simply replaced by articles 56 *a* to 57 it was misleading, for in reality the Commission had decided to draft those new clauses precisely because it considered that articles 27, 32, 35, 37, 39, 40 and 46 were only partially applicable to honorary consuls.

4. Mr. AGO could not agree with the Special Rapporteur that paragraph 3 was superfluous. Article 56 as a whole represented a kind of introduction to the subject of honorary consuls; the Commission had adopted a set of rules, with titles, relating to career consuls, and paragraphs 1 and 2 of the article stated that sections I and IV and certain articles of sections II and III of those rules applied equally to honorary consuls. If the article were to end there and the draft convention continued with a repetition of titles which already appeared in earlier sections, the reader would undoubtedly be confused, particularly since the articles regarded as partially applicable were also contained in sections II and III. Paragraph 3 was therefore essential for completing the framework of the article.

5. BARTOŠ agreed with Mr. Ago that paragraph 3 was necessary for an accurate interpretation of the article. It was essential to state in the clause itself that certain articles of the draft were wholly applicable to honorary consuls, while others were so applicable with modifications. It was sound legal draftsmanship to make such references in the text itself; that method was used to avoid ambiguity in texts containing a general regulation of certain matters and excepting others.

6. Mr. TUNKIN considered that the question was one of drafting rather than of substance, and from the point of view of drafting it would be more advisable to insert an explanatory note in the commentary, instead of the text of the convention. The instrument should state certain rules; the

statements in paragraphs 1 and 2 that certain articles were applicable to honorary consuls constituted such rules, but paragraph 3 differed essentially from those positive statements.

7. Mr. SANDSTRÖM thought that either of the proposed methods could be employed, but that there was some advantage in explaining the situation in the article itself, which would thus constitute an integral whole. Otherwise, the reader would be obliged to read through all the articles not mentioned in paragraph 2.

8. Mr. ŽOUREK, Special Rapporteur, thought that an explanatory note attached to the commentary would also offer the advantage to which Mr. Sandström had referred.

9. Mr. AGO reiterated his opinion that it would be illogical to leave the reader without any explanation concerning the partial applicability of the articles enumerated in paragraph 3 to honorary consuls. A note inserted in the commentary would not be enough.

10. Mr. TUNKIN said that if the articles which were partially applicable to honorary consuls were cited in the body of article 56, the new articles 56 *a* to 57 would be liable to be interpreted in the light of the partially applicable articles, which would be dangerous.

11. Mr. ERIM said he did not understand the reason for the differences in wording between paragraphs 2 and 3 of article 56; the former stated that certain articles in sections II and III should likewise be applicable to honorary consuls, while the latter stated that articles 56 *a* to 57 should apply to honorary consuls "as regards the matters dealt with in [the partially applicable] articles." The reason for the procedure used was not explained clearly enough. He proposed that paragraph 3 should state clearly that, for the propose of the matters dealt with in articles 27, 32, 35, 37, 39, 40 and 46, the provisions of articles 56 *a* to 57 would apply to honorary consuls. If that change were made, he would be able to vote for the inclusion of paragraph 3.

12. Mr. AGO said that Mr. Erim's amendment was acceptable to the Drafting Committee.

13. The CHAIRMAN called for a vote on paragraph 3 of article 56.

It was decided by 9 votes to 2 that paragraph 3, amended as proposed by Mr. Erim, should form part of article 56.

14. Mr. YOKOTA suggested that paragraph 3 should become the second sentence of paragraph 2. Otherwise, a reference to sections II and III of chapter I should be included in paragraph 3.

15. Mr. ŽOUREK, Special Rapporteur, drew attention to the basic legal difference between the two provisions, which, in his opinion, made their amalgamation impossible.

16. Mr. ERIM agreed that paragraph 3 should be kept separate from paragraph 2.

17. The CHAIRMAN put article 56 to the vote.

Article 56, as amended, was adopted by 11 votes to none, with 1 abstention.

18. The CHAIRMAN drew attention to the note to article 56, which stated that the Commission had deferred its decision on the applicability of certain articles of the draft to honorary consuls. He invited the Commission to consider the applicability of article 28 *a* (*Free movement*) to honorary consuls.

19. Mr. ERIM considered that the question of the applicability of the article to honorary consuls scarcely arose, since the right of free movement was a natural one for all citizens, and not only for consular officials, subject to an exception in the case of prohibited areas access to which was governed by special regulations.

It was decided by 8 votes to none, with 4 abstentions, that article 28 a should be applicable to honorary consuls.

20. Mr. ŽOUREK said he had abstained from voting because he had considered from the outset that article 28 *a* was unnecessary and might even be prejudicial to consuls.

21. The CHAIRMAN invited the Commission to consider the applicability of article 29 (*Freedom of communication*) to honorary consuls.

22. Mr. ŽOUREK, Special Rapporteur, observed that the Commission had gone as far as possible, and, indeed, much farther than existing practice, in extending rights and prerogatives to honorary consuls. He did not consider that article 29 should be applicable to such consuls, particularly in its present form. He doubted if in any State honorary consuls were free to use all the means of communication enumerated in the second sentence of paragraph 1; while some freedom of communication should be granted to enable the honorary consul to carry out his functions, he could not be given the full freedom conferred by article 29, for the simple reason that honorary consuls were not subject to disciplinary control in the same way as career consuls were. The Commission might consider at a later stage adding a new article concerning the freedom of communication of honorary consuls.

23. Sir Gerald FITZMAURICE said that what mattered was not the personality of the head of post, but the exercise of consular functions and the representation of the sending State. It was immaterial, for the purposes of freedom of communication, whether the head of post was an honorary or a career consul. No consular official could be expected to discharge consular functions without freedom of communication; such freedom, moreover, could have no value unless all the conditions set forth in article 29 were present. Furthermore, if a career consul were replaced by an honorary consul, as sometimes happened in practice, the functions performed did not change; but if article 29 were not rendered applicable to honorary consuls, such an official might find himself seriously

hampered in his work as representative of the sending State. A distinction could be made between the two categories in respect of certain personal privileges and immunities, but freedom of communication was essential to all consuls in carrying out their duties. He had never heard of any cases where differentiation in the matter of communications was made on the grounds of the honorary status of the head of post.

24. Mr. YOKOTA agreed that article 29 should apply to honorary consuls. It was made absolutely clear in the first sentence of paragraph 1 that it was only for official purposes that freedom of communication should be granted. And paragraph 2 expressly conferred inviolability on the consular correspondence only; no differentiation should be made between honorary and career consuls so far as official correspondence of the sending State was concerned.

25. Mr. TUNKIN said that the crucial question was: should abstract ideas or international practice be taken as a basis? If the latter approach, which he regarded as correct, were adopted, some differentiation must be made between an honorary consul and a career consul; in considering all the articles of the draft from the point of view of their applicability to honorary consuls, the Commission had undeniably proved that there were considerable distinctions between the two categories. It could begin now to proceed on the assumption that the consular system was in practice a single and indivisible institution. Sir Gerald Fitzmaurice had said that he had never heard of such a distinction in practice: he should refer to article 12 (3) of the Consular Convention of 1952 between the United Kingdom and Sweden, which clearly differentiated between career and honorary consuls in the matter of freedom of communication.

26. Mr. YASSEEN said that, although it was the practice of States to distinguish between honorary and career consuls in the matter of freedom of communication, he could find no logical basis for such a distinction. In conformity with the view that he had often defended in connexion with the status of honorary consuls, he thought that article 29 should be applicable to consulates headed by honorary consuls. The question was one of facilities granted to consulates, and not of privileges granted to consuls. Even if the applicability of article 29 to honorary consuls was not borne out by general practice, it could in any case be regarded as progressive development of international law to declare the article applicable to such consuls.

27. Mr. ŽOUREK, Special Rapporteur, observed that Sir Gerald Fitzmaurice had restated a thesis based entirely on British case-law. That thesis had originated at a time when, in the absence of relevant conventions, English case-law had not recognized consuls as entitled to any privileges or immunities. On that basis it had been easy to affirm that there was no difference between career consuls and honorary consuls, for neither had enjoyed any privileges. In his own opinion,

the great majority of honorary consuls did not head career consulates properly so-called, but used their personal staff to carry out their consular duties; the case when a career consul might be replaced by an honorary consul was so exceptional as to be academic. Career consuls were usually replaced as heads of post by other members of the career service. If it should happen that they were replaced by honorary consuls (though no concrete example had been cited to illustrate such a hypothetical event), a rule of general international law could not be based on so exceptional a case.

28. Several speakers had expressed the opinion that the facilities concerned were granted to the sending State, and not to the consul himself. It should be borne in mind, however, that all privileges and immunities were granted to the sending State for the performance of consular functions. It might be argued on that basis that all the privileges and immunities of career consuls should be extended to honorary consuls, but the Commission itself had not gone so far, and had refrained from granting many privileges and immunities to honorary consuls.

29. He agreed with Mr. Tunkin that the only approach to the question which was open to the Commission was to base itself on international practice in the matter. Even if the Commission should wish to propose a provision *de lege ferenda*, it should first inquire carefully how far governments were prepared to go in accepting such a development. While he had not been able to obtain all the available information on the matter, his researches led him to believe that no State would agree to allow an honorary consul to use diplomatic or other special couriers, the consular bag or messages in cipher. In his opinion, article 29 as it stood could not apply to honorary consuls, but a new text applicable to that category might be drafted.

30. Mr. BARTOŠ said that his approach to the matter was based entirely upon the consulate and the competence of consuls. Furthermore, he was of the opinion that, in general, honorary consuls had the same competence as career consuls. He could not agree with Mr. Tunkin and the Special Rapporteur that the assimilation of the two categories was academic; in practice, there were many cases where consulates consisted of both honorary and career officers, and the honorary consul in such cases was usually the head of post. The principal consideration was that of the operation of the consulate: if consular functions were to be protected, the consul's freedom of communication must not be hampered in any way.

31. While it was true that in the past honorary consuls had occasionally abused the facilities granted to them, it should be borne in mind that similar abuses had been practised even by ambassadors extraordinary and plenipotentiary. So long as a consulate was recognized as such, all the officers serving in it should enjoy freedom of communication. Official circles in his own country

recognized the principle that, if the institution of honorary consuls was accepted, all honorary officers, even if they were nationals of the receiving State, must be granted protection commensurate with the dignity of the sending State.

32. Mr. ERIM said there was no reason why the official communications of a consulate headed by an honorary consul should be denied protection. It would be impossible for a head of post to carry out the consular functions properly without such protection. The consequence of not rendering article 29 applicable to honorary consuls would be that the communications of an honorary consul with the government, the diplomatic missions and the other consulates of the sending State would not be confidential, free or protected; that would be manifestly absurd.

33. He had some doubts concerning the wording of article 29, although he had no concrete suggestions for an alternative. He was not quite sure, for example, whether an honorary consul should be allowed to use special couriers, the consular bag and messages in cipher; nevertheless, he was fairly convinced that the first sentence of paragraph 1 must be applicable to honorary consuls, in order to ensure the efficient performance of consular functions.

34. The CHAIRMAN, speaking as a member of the Commission, said that he would vote in favour of the applicability of article 29 to honorary consuls. It was a fact that a large number of consulates were in the charge of honorary consuls. Those consuls had to communicate with their governments, and any decision by the Commission to the effect that article 29 should not apply to honorary consuls would interfere with the discharge of their duties. It was for the sending State to decide whether an honorary consul might use a consular bag, for example, but, if the bag was used by such a consul, the mere fact that its sender or recipient was an honorary consular officer could not constitute grounds for interfering with the bag.

35. Mr. ŽOUREK asked for a separate vote on the applicability of the first sentence of article 29, paragraph 1, to honorary consuls. For his part, he was prepared to accept that provision as applicable to honorary consuls and suggested that the details which formed the subject matter of the remainder of the article be left to the States concerned. It would be going too far to apply those provisions as they stood to honorary consuls.

36. Mr. AGO said that freedom of communication, so far from being a personal privilege of the consul, affected the functions of the consulate as such: article 29 should therefore be declared applicable to honorary consuls. In the light of government comments, the Commission could decide at its next session whether the detailed provisions of article 29 required any adjustment to suit the requirements of honorary consuls. At the present stage, however, it was essential to mark the Commission's adherence to the principle of the freedom of communication of consul-

ates, regardless of whether they were in the charge of honorary or of career consuls.

37. Mr. SANDSTRÖM said that the question of messages in cipher was in reality a matter for the sending State. It was for the sending State to decide whether it wished to confide its cipher to honorary consuls or not.

38. Mr. BARTOŠ drew attention to the fact that a State usually had several ciphers and could well authorize its honorary consuls to use one of them:

39. Mr. ERIM suggested that the Commission might agree to render applicable to honorary consuls the first sentence of article 29, as had been proposed by the Special Rapporteur, while adding a provision along the following lines, to replace the remainder of the article as far as honorary consuls were concerned:

“For the purposes of such communication, the honorary consul shall also have the right to employ all means made available to him by his government.”

40. Sir Gerald FITZMAURICE doubted whether the text suggested by Mr. Erim would achieve the desired purpose. That text seemed to mean that an honorary consul could make use of any means of communication. It would place his sending State in a better position than if it had sent a career consul, since career consuls were limited to the means specified in article 29.

41. As to the substance of the matter, he urged the Commission to declare article 29 applicable to honorary consuls. Freedom of communication, as set forth in that article, was essential to the discharge of the consular function.

42. Mr. ŽOUREK, Special Rapporteur, said that Mr. Erim's suggested text would go much further than the second sentence of article 29, paragraph 1. It could be understood to mean that an honorary consul could communicate with his sending State by means of a radio transmitter, for example.

43. Mr. ERIM withdrew his suggestion, since it had not achieved the desired compromise.

44. The CHAIRMAN, in accordance with Mr. Žourek's request, put to the vote the applicability of the first sentence of paragraph 1 of article 29 to honorary consuls.

It was decided unanimously that the sentence should be applicable to honorary consuls.

45. The CHAIRMAN invited the Commission to vote on the question of the applicability of the remainder of article 29 to honorary consuls.

It was decided, by 11 votes to 1, with 1 abstention, that the remainder of article 29 should be applicable to honorary consuls.

It was decided, by 11 votes to 1, with 1 abstention, that article 29 as a whole should be applicable to honorary consuls.

46. Mr. ŽOUREK said that he had voted against the applicability of the remainder of the article, and of the article as a whole, to honorary consuls for the reasons explained during the discussion.

47. The CHAIRMAN invited the Commission to vote on the applicability to honorary consuls of article 30 (*Communication with the authorities of the receiving State*).

It was decided, by 9 votes to none, with 2 abstentions, that article 30 should be applicable to honorary consuls.

48. Mr. SANDSTRÖM said that article 30 a (*Communication and contact with nationals of the sending State*) was not mentioned at all in article 56 as prepared by the Drafting Committee (A/CN.4/L.90/Add.1). He proposed that article 30 a should be included among those declared applicable to honorary consuls in article 56, paragraph 2.

49. Mr. YOKOTA supported that proposal. The Drafting Committee had not mentioned article 30 a because that article had not yet been adopted by the Commission at the time when the Drafting Committee had drafted article 56.

50. Sir Gerald FITZMAURICE said that article 30 a clearly must be applicable to honorary consuls. Otherwise, nationals of the sending State who happened to be in a consular district in the charge of an honorary consul would be placed at a disadvantage as compared to those residing in districts in the charge of career consuls.

Mr. Sandstrom's proposal was adopted by 10 votes to none, with 2 abstentions.

51. Mr. ŽOUREK, Special Rapporteur, drawing attention to the note to article 56, said that the next question to be decided was the applicability to honorary consuls of paragraph 2 of article 40 (*Liability to give evidence*). That paragraph corresponded to the former paragraphs 2 and 3 of his original draft for article 40 (A/CN.4/L.86). The reference in the note in document A/CN.4/L.90/Add.1 to paragraphs 2 and 3 of article 40 should therefore be construed as referring to the present paragraph 2 only.

52. Mr. BARTOŠ asked for a separate vote on the first part of the paragraph (“the authority . . . his official duties”). He was prepared to accept the statement that the authority requiring the evidence of an honorary consul should take all reasonable steps to avoid interference with the performance of his official duties, but he felt that it would be going too far to suggest that arrangements should be made whenever possible for the taking of such testimony at the honorary consul's residence or office.

53. Mr. YASSEEN shared the view of Mr. Bartoš.

54. Mr. AGO agreed with Mr. Bartoš on the substance of the matter and suggested that, if only the first part of paragraph 2 were adopted, the Commission might consider incorporating its text into article 56 f (*Liability of honorary consuls to given evidence*).

55. Mr. EDMONDS said that he saw no reason to draw any distinction between honorary consuls and career consuls in the matter of liability to testify. The provision under discussion was intended to ensure the smooth conduct of the consular function, regardless of the person who exercised it.

56. The CHAIRMAN called for a vote on the question of the applicability to honorary consuls of the passage: "The authority requiring the evidence of a consular official shall take all reasonable steps to avoid interference with the performance of his official duties."

It was decided, by 10 votes to none, with 2 abstentions, that the passage should be applicable to honorary consuls.

57. The CHAIRMAN called for a vote on the applicability to honorary consuls of the remaining words of paragraph 2: "and shall, where possible and permissible, arrange for the taking of such testimony at his residence or office".

It was decided, by 5 votes to 3, with 4 abstentions, that the remainder of paragraph 2 should be applicable to honorary consuls.

58. Mr. BARTOŠ said that he had cast an adverse vote for the reasons he had stated during the discussion.

It was decided, by 8 votes to none, with 4 abstentions, that article 40, paragraph 2, should be applicable to honorary consuls.

59. Mr. ŽOUREK, Special Rapporteur, said that the Commission should next decide on the applicability of article 45 (*Obligations of third States*) to honorary consuls. Paragraph 4 of that article, which dealt with the consul's official correspondence in transit, was clearly applicable to honorary consuls. The first three paragraphs, however, were inapplicable to honorary consuls, who were usually chosen from among persons permanently resident in the receiving State.

60. Mr. EDMONDS said that he knew of cases where honorary consuls were not residents of the receiving State. Paragraphs 1, 2 and 3 should therefore apply to such consuls.

61. Mr. YOKOTA said that, subject to suitable drafting changes, paragraph 3 applied to honorary consuls. Third States should not hinder the transit through their territories of honorary consuls and members of their families. As to paragraphs 1 and 2, he did not believe that they applied to honorary consuls.

62. Mr. FRANÇOIS said that the question of the applicability of article 45 to honorary consuls could give rise to some difficulty. States which did not admit honorary consuls might, under that article, be obliged to give certain facilities to honorary consuls in transit to other countries which did accept them.

63. As to the substance, he agreed with Mr. Edmonds and felt that article 45 should apply to honorary consuls.

64. Mr. SANDSTRÖM said that even a State which did not accept honorary consuls would have to recognize the need for transit facilities for the benefit of honorary consuls accepted by other countries.

65. Mr. BARTOŠ thought that all the provisions of article 45 should be applicable to honorary consuls. Apart from the reason already stated — *viz.*, that an honorary consul might well not be a resident of the receiving State — he cited the practice of his country of inviting its honorary consuls to travel to Yugoslavia in order to become familiar with certain important developments. For example, a seminar of Yugoslav honorary consuls abroad had been organized in order to acquaint them with new rules of civil procedure which had been recently introduced. Recently, a seminar had also been arranged for honorary consuls on the question of tourist travel in Yugoslavia.

66. For those reasons, he considered that it was essential to give the sending State the possibility of arranging for the travel of its honorary consuls, even if nationals of the receiving State, for the purpose of consulting with the government for which they acted and of obtaining information and instructions. Transit facilities for such travel were necessary to the performance of the consular function itself.

67. The CHAIRMAN, speaking as a member of the Commission, said that if the Commission were to hold that articles 45 did not apply to honorary consuls in its entirety, it would be acting on the assumption that an honorary consul could never be a national of the sending State or of a third State, and also that if the honorary consul was a national of the receiving State, he was somehow debarred from travelling abroad. That assumption was patently wrong.

68. Accordingly, he considered that all the provisions of article 45 should apply to honorary consuls.

69. Mr. AGO said that he had at first had some doubts regarding the applicability of paragraphs 1 and 2, but that the reasons stated by the Chairman had convinced him that the whole of article 45 should apply to honorary consuls.

70. Mr. YOKOTA asked for a separate vote on paragraphs 1 and 2.

It was decided, by 9 votes to 1, with 1 abstention, that paragraphs 1 and 2 of article 45 should be applicable to honorary consuls.

It was decided, by 10 votes to none, with 1 abstention, that paragraph 3 and 4 of article 45 should be applicable to honorary consuls.

It was decided, by 9 votes to none, with 2 abstentions, that article 45 as a whole should be applicable to honorary consuls.

The meeting rose at 6.5 p.m.

575th MEETING

Wednesday, 29 June 1960, at 9.30 a.m.

Chairman: Mr. Luis PADILLA NERVO

Consular intercourse and immunities
(A/CN.4/L.86, A/CN.4/L.90 and Add.1) [continued]

[Agenda item 2]

PROVISIONAL DRAFT ARTICLES
(A/CN.4/L.90/Add.1) (continued)

1. The CHAIRMAN invited the Commission to continue its discussion of the draft articles prepared by the Drafting Committee concerning honorary consuls (A/CN.4/L.90/Add.1).

ARTICLE 56 a (*Inviolability of the official correspondence, archives and documents of the consulate*)

Article 56 a was adopted by 12 vote to none, with 1 abstention.

ARTICLE 56 b (*Special protection*)

2. Mr. MATINE-DAFTARY suggested that the title of article 56 b should be amended. The position of an honorary consul was different from that of a career consul and the title of the corresponding article relating to career consuls (article 32) should not be automatically reproduced.

3. Mr. YOKOTA observed that the title of article 32 was "Special protection and respect due to consuls". In the case of article 56 b that title had not been reproduced since the article contained no reference to the respect due to honorary consuls.

Article 56 b was adopted by 10 votes to none, with 2 abstentions.

ARTICLE 56 c (*Exemption from obligations in the matter of registration of aliens and residence and work permits*)

4. Mr. YASSEEN reiterated the objections he had expressed, in connexion with article 35, to the inclusion of any reference to work permits. From the point of view of logic, there was an additional objection in the case of article 56 c. In effect, the article said that honorary consuls who did not engage in gainful private activity did not need a work permit.

5. It seemed to him that the outside activities in which honorary consuls engaged were so diverse that unless the words "work permit" were carefully qualified, it would be better to omit them entirely, and he made a formal proposal to that effect.

6. Mr. ERIM supported Mr. Yasseen's amendment. Whereas article 35 was concerned with the

exemption of the consular official's private staff from the duty to obtain work permits, article 56 c spoke of a like exemption for the honorary consul and the members of his family.

7. Sir Gerald FITZMAURICE said that the words "work permits" should be retained in order to guard against the possibility that an honorary consul who was not engaged in a gainful private activity might have to obtain a work permit in order to discharge his consular functions.

8. Mr. YASSEEN did not think that the words "work permits" could be construed as meaning permission to act as an honorary consul.

9. Mr. ERIM pointed out that if Sir Gerald's understanding of the words "work permits" was correct, article 56 c would permit the receiving State to require nationals who wished to act as honorary consuls to obtain an authorization to do so.

10. Mr. ŽOUREK, Special Rapporteur, thought it was clear both in article 35 and article 56 c that the words "work permits" referred to private staff hired by consular officials. Article 56 c said in effect that an honorary consul who was a national of the receiving State could not employ anyone without a work permit, if such permits were generally required.

11. Mr. ERIM noted that there was no mention in article 56 c of private staff, in contrast to article 35, which specifically referred to private staff. If the same type of work permit was intended, that intention should be made plain.

12. Mr. SANDSTRÖM said that while it might be possible to omit the words "work permits", he would prefer them to stand for reasons of consistency with article 35, especially as the exceptions relating to nationals of the receiving State or persons carrying on a gainful private activity were plainly stated.

The Chairman put Mr. Yasseen's amendment to the vote.

The result was 5 votes in favour and 5 against, with 3 abstentions.

Mr. Yasseen's amendment was not adopted.

Article 56 c was adopted by 8 votes to 1, with 4 abstentions.

ARTICLE 56 d (*Exemption from taxation*)

13. Mr. YOKOTA, Chairman of the Drafting Committee, pointed out that the text of the article contained two conditional phrases between square brackets. The brackets had been included in error and should be ignored.

14. Mr. BARTOŠ said that not only should the brackets be ignored but that the text in the brackets should be omitted, for it implied that an honorary consul who was a national of the receiving State should not be exempted from taxes on emoluments received from the sending

State. He was against such an implication. He proposed the omission of the passage in question.

15. Mr. TUNKIN agreed that the words "and if not engaged in any gainful private activity" should be omitted. There was no need to stipulate that condition since the article provided only for exemption from taxes on emoluments received by the person concerned in his capacity as honorary consul. By contrast, the words "if not a national of the receiving State" should stand, for without those words the article would exempt all honorary consuls, irrespective of nationality, from taxation on their emoluments. In his view, if an honorary consul was a national of the receiving State there was no reason to exempt any of his earnings from income tax, which, where it existed, was applicable equally to all citizens.

16. Mr. SANDSTRÖM pointed out in support of Mr. Tunkin's position that article 37 of the draft articles on diplomatic intercourse and immunities left it to the receiving State to decide whether to tax the emoluments received from the sending State by a diplomatic agent who was a national of the receiving State.

17. Mr. ERIM agreed with Mr. Tunkin that the conditional phrase relating to gainful private activity was unnecessary.

18. Sir Gerald FITZMAURICE observed that it was generally agreed that States should not tax each other. Whatever form the taxation of the emoluments of an honorary consul might take, it would ultimately be the sending State which would be taxed. Any tax levied on the honorary consul's earnings accruing from his consular capacity would in effect have to be compensated for by the sending State.

19. He agreed with Mr. Tunkin that the conditional phrase relating to gainful private activity was unnecessary and should be omitted.

20. Mr. FRANÇOIS supported Mr. Tunkin's position. The exemption of any nationals from taxation always raised a serious problem. The case of international civil servants was not parallel to that of honorary consuls: the emoluments of international civil servants were paid out of contributions from all the members of the international organization concerned and, what was more, it was necessary to avoid inequality among international civil servants. While he sympathized with Sir Gerald's view, which was theoretically sound, for practical reasons he supported Mr. Tunkin's position.

21. Mr. ŽOUREK, Special Rapporteur, pointed out that as the text stood the two conditional phrases were cumulative. Perhaps it should be made clear that each constituted a separate condition.

22. Mr. SCELLE expressed his support of the position of Mr. Bartoš and Sir Gerald.

23. Mr. TUNKIN observed that the question whether the taxation of the earnings of a national

paid by a foreign State was taxation of a national or taxation of a foreign State, was a theoretical question that had been discussed by the Commission more than once. However, apart from that aspect of the matter, the Commission had already decided, as Mr. Sandström had pointed out, that a diplomatic agent in a similar situation would enjoy exemption from taxation only if the exemption was granted to him by the receiving State.

24. What was more, by virtue of article 42 of the present draft, career consuls who were nationals of the receiving State could be taxed by that State on their emoluments as consuls. It would be incongruous to accord to honorary consuls who were nationals of the receiving State a fiscal exemption more extensive than that accorded to career consuls who were nationals of that State.

25. Mr. BARTOŠ cited a case which had occurred in his own country. An effort had been made to collect taxes on the emoluments received by a Yugoslav national who acted as the honorary consul of a foreign State. The consul in question had protested, citing the terms of his contract. Although it had been decided in principle that he should be taxed, a difficulty had arisen because the tax could not be assessed without examining the consular books. Eventually, it had been decided that it would be better to exempt him from taxation on his earnings as honorary consul.

26. Mr. YOKOTA said that while it was true as a general principle of international law that a State could not tax another State, it was a principle that was difficult to apply in practice. For example, the Japanese Government had not yet signed the convention on the privileges and immunities of employees of specialized agencies because of the problem of Japanese nationals working in Japan for the specialized agencies. The problem would be even greater in the case of honorary consuls who were nationals of the receiving State, and he was therefore inclined to support Mr. Tunkin.

27. Mr. ŽOUREK, Special Rapporteur, pointed out that the text of article 56 *d*, as it stood, went beyond the existing practice in the matter.

28. The CHAIRMAN, speaking as a member of the Commission, supported the proposal of Mr. Bartoš. It would avoid the danger of double taxation since in most cases the emoluments paid by the sending State would have already been taxed by the sending State.

29. Mr. PAL said that if it did not wish to be inconsistent the Commission was compelled to accept Mr. Tunkin's view. If honorary consuls who were nationals of the receiving State were exempted from taxation on their earnings as consuls, the same privilege should be extended to career consuls who were nationals of the receiving State, and article 43 would have to be changed accordingly.

30. Mr. LIANG, Secretary to the Commission, doubted whether the test of the source of the

income was necessarily sound. For example, in the United States there were many lawyers who received substantial emoluments from foreign governments for work performed for them. The more easily applicable criterion was that of nationality. In the case of the Anglo-Swedish convention, the exemption was limited to the emoluments of honorary consuls who were nationals of the sending State.

31. As to double taxation, he said the question might not be very relevant in cases where honorary consuls functioned on a part-time basis and were remunerated according to the services actually rendered.

32. Mr. AGO pointed out that under article 56, honorary consuls who were nationals of the receiving State were excluded from the benefit of the exemption by virtue of the terms of article 42, paragraph 1. The proposal of Mr. Bartoš could therefore be adopted without thereby exempting such honorary consuls from taxation.

33. Mr. TUNKIN said that he failed to see the relevance of the example cited by Mr. Bartoš. The honorary consul in question had simply been accorded an additional immunity by the receiving State, as provided for in article 42, paragraph 1.

34. If, as Mr. Ago had said, nationals of the receiving State were automatically excluded from the exemption provided for in article 56 *d*, there was no harm in so indicating in the text of the article. To omit the words between brackets would leave a text which on its face was applicable to all honorary consuls and which might lead to confusion, although the confusion might be mitigated by a rearrangement of the articles.

35. Mr. PAL observed that if article 42 applied to honorary consuls who were nationals of the receiving State it would still be inconsistent to have in article 56 *d* an unqualified text applicable to all honorary consuls.

36. Mr. YOKOTA agreed with Mr. Ago that nothing would be changed by omitting the words between brackets. The case of honorary consuls who were nationals of the receiving State was covered by article 42.

37. Mr. AGO said that it would be bad drafting to specify in each article relating to honorary consuls that it did not apply to the nationals of the receiving State. Inasmuch as the general provision of article 42 would be applicable to honorary consuls, article 56 *d* would not be applicable to such nationals unless it read "An honorary consul, even if a national of the receiving State," etc.

38. Mr. BARTOŠ observed that the retention of the words "if not a national of the receiving State" would tend to deny to honorary consuls who were nationals of the receiving State an immunity that could otherwise be granted by the receiving State under article 42. The receiving State would be tempted to say that the case of its nationals had been settled by article 56 *d*

and that they were not eligible for the benefit of the exemption.

39. Mr. TUNKIN said that the point at issue was not merely a question of drafting; it was a question of principle, since some members had taken the views that all honorary consuls, including those who were nationals of the receiving State, should be exempt from taxation. It might be that the text between brackets was unnecessary, but the Commission should decide whether or not the mandatory exemption applied only to honorary consuls who were not nationals of the receiving State. One that principle had been decided, the actual form of words could be left to the Drafting Committee.

40. Mr. ERIM said that in that case the Drafting Committee would also have to reconsider article 56 *c* as just adopted, which also specifically, and presumably unnecessarily, excluded honorary consuls who were nationals of the receiving State from the benefits conferred by that article.

41. Mr. EDMONDS pointed out that there were formal proposals for the omission of certain words. It seemed to him that the correct procedure was to vote on those proposals rather than on a general principle.

42. The CHAIRMAN did not see any need for a vote on the principle. Whatever might be the views of individual members, the words in article 42 had a plain meaning.

43. Speaking in his personal capacity, he said that the Commission should not do anything that might cause a State to deny to nationals who were honorary consuls privileges and immunities which it might otherwise have granted. In his view the words between brackets should be omitted.

44. Mr. BARTOŠ observed that there was really no substantive difference of opinion and no question of principle to decide. The matter had been settled by article 42, under which the question of the position of nationals of the receiving State was left to be decided by that State.

45. Sir Gerald FITZMAURICE explained that in expressing his views earlier in the discussion he had not thought of the terms of article 42. Obviously the Commission's draft could not give to honorary consuls more extensive advantages than it gave to career consuls, and the case of honorary consuls who were nationals of the receiving State would have to be governed by article 42.

46. Mr. AGO observed that there was no longer any need to vote on the principle involved, since all members were agreed that article 56 *d* had to be read in conjunction with article 42.

47. Mr. TUNKIN took it that it was agreed that article 56 *d* would apply only to honorary consuls who were not nationals of the receiving State.

The proposal of Mr. Bartoš for the deletion of the words between brackets in article 50 d was adopted by 10 votes to 2, with 4 abstentions.

Article 56 d as amended was adopted by 12 votes to 1, with 3 abstentions.

48. Mr. SANDSTRÖM explained that he had voted for the deletion of the words in brackets on the assumption that a new text would be prepared containing a specific reference to article 42.

49. Mr. ERIM said that the Commission's decision on article 56 *d* called for a retrospective modification in article 56 *c*. The arguments in favour of omitting the words "if not a national of the receiving State" in the former applied all the more forcibly to the words "who are nationals of the receiving State or" in the latter.

50. Mr. AGO agreed that those words should be omitted from article 56 *c* since the exemption concerning the registration of aliens and residence permits clearly had no relevance to nationals of the receiving State.

It was agreed to omit the words "who are nationals of the receiving State or" in article 56 c.

ARTICLE 56 e (Exemption from personal services and contributions)

Article 56 e was adopted by 10 votes to none, with 2 abstentions.

ARTICLE 56 f (Liability to give evidence)

51. Mr. EDMONDS said that he would be obliged to vote against article 56 *f* as it stood because it did not precisely convey the Commission's intention. Honorary consuls were certainly bound to produce official documents such as birth and marriage certificates or testimonies in the form of a deposition if they properly fell within the scope of a judicial inquiry.

52. Mr. TUNKIN said that the wording of article 56 *f* seemed to confer a greater privilege on honorary consuls than was conferred on career consuls by the corresponding provision in article 40, paragraph 3. As that was presumably not the intention, the Drafting Committee should bring the two texts into line.

53. Mr. ŽOUREK, Special Rapporteur, said that perhaps the phrase in the English text "to attend as witness" was not an exact rendering of the French text.

54. Mr. AGO observed that article 56 *f* would have to be amplified now that the Commission had decided (574th meeting, paragraphs 56 and 57), that article 40, paragraph 2, should be applicable to honorary consuls.

55. Mr. ERIM suggested that it would suffice to add in article 56 *f* a cross-reference to article 40, paragraph 2, without repeating the substance of that paragraph.

56. Mr. MATINE-DAFTARY said he was unable to see why article 40, paragraph 1, should not also apply to honorary consuls. In the matter of liability to give evidence he was inclined to think

that honorary consuls should be assimilated to career consuls. He therefore proposed that article 56 *f* be deleted and that article 40 be added to the enumeration contained in article 56, paragraph 2.

57. Sir Gerald FITZMAURICE agreed with Mr. Matine-Daftary that the whole of article 40 applied to honorary consuls and that article 56 *f* should be deleted.

58. Mr. ŽOUREK, Special Rapporteur, pointed out that the provision contained in the second sentence of article 40, paragraph 1, represented a very considerable concession: the Commission should therefore exercise the greatest caution in extending the privilege in that form to honorary consuls. He would have thought that article 56 *f* correctly stated the position.

59. Mr. TUNKIN urged Mr. Matine-Daftary not to press his proposal in view of the serious nature of the privilege provided for in the first sentence of article 40, paragraph 1.

60. The CHAIRMAN suggested that the Commission should approve article 56 *f*, subject to drafting changes.

Article 56 f was adopted by 13 votes to none, with 1 abstention, subject to drafting changes.

ARTICLE 56 g (Respect for the laws and regulations of the receiving State)

61. Mr. LIANG, Secretary to the Commission, considered that for the sake of precision the words "in receiving State" should be inserted after the words "official position".

62. Mr. ŽOUREK, Special Rapporteur, disagreed. Such a phrase might be understood to mean that an honorary consul could use his official position for political purposes or to secure personal advantage in a third State.

63. Mr. AGO believed that such an amendment was unnecessary. It was self-evident that the requirement laid down in article 56 *g* applied to activities in the receiving State.

64. Mr. YOKOTA formally proposed the amendment suggested by the Secretary which was consistent with the corresponding provision in article 46, paragraph 1.

65. Mr. SCELLE proposed the omission of article 56 *g*, which was wholly unnecessary and out of place in a legal draft, being concerned with a matter of civilized behaviour and integrity.

66. Mr. ERIM and Mr. SANDSTRÖM agreed with Mr. Scelle.

67. Mr. ŽOUREK, Special Rapporteur, pointed out to Mr. Scelle that the Commission had already adopted a similar article (article 46) in respect of career consuls and had agreed that certain elements in that article were applicable to honorary consuls. Article 56 *g* certainly had some utility.

68. Mr. YASSEEN said that since an honorary consul might both be a national of the receiving State and engage in a gainful private activity, there was no need for article 56 *g*, which concerned ethical conduct.

69. Mr. ŽOUREK, Special Rapporteur, emphasizing the very explicit terms of article 46, pointed out that the obligation laid down in the first sentence of article 46, paragraph 1, was self-evident as far as nationals of the receiving State were concerned, but it was equally applicable to honorary consuls who were nationals of the sending State or of a third State.

70. The obligation laid down in article 56 *g* was a legal and not a moral one.

71. Mr. SCELLE maintained his view that there was no connexion between article 46, which was concerned with respect for the laws of the receiving State, and article 56 *g* which purported to lay down rules of conduct.

72. Sir Gerald FITZMAURICE observed that the Commission had decided (574th meeting, paragraph 13) that, since honorary consuls were in most cases nationals of the receiving State, the wording of the obligation laid down in the second sentence of article 46, paragraph 1 was inappropriate to such consuls, and had to be framed differently for purposes of the present article, which as it now stood should be acceptable.

73. The CHAIRMAN said that in the absence of any objection, he presumed that Mr. Yokota's amendment adding the words "in the receiving State" after the words "official position" was acceptable.

It was so agreed.

Article 56 g, as amended, was approved by 13 votes to 1, with 2 abstentions.

ARTICLE 57 (*Precedence*)

74. Mr. TUNKIN asked the Special Rapporteur whether in practice honorary consuls ranked in each class after career consuls. In other words, would an honorary consul-general have precedence over a career consul?

75. Mr. ŽOUREK, Special Rapporteur, confirmed that that was the practice of a number of States.

76. The CHAIRMAN said that although the text of article 57 had been approved earlier he would put it to the vote to comply with the wishes of Mr. Edmonds.

Article 57 was adopted by 14 votes to none, with 2 abstentions.

ARTICLE 57 bis (*Optional character of the use and admission of honorary consuls*)

77. Mr. SCELLE considered that article 57 bis was too absolute and arbitrary since it might imply that a State could refuse to accept all

honorary consuls, whereas in fact it could only refuse the appointments of its own nationals as honorary consuls by the sending State. That hypothetical case was perhaps far-fetched but it was not inconceivable, and such a refusal would certainly be contrary to international law and to the interests of the international community, for which consular relations were indispensable.

78. Mr. ERIM, emphasizing that the rule set forth in the article had been discussed at considerable length, said that its adoption had enabled certain members to support other articles. If article 57 bis were now to be modified, the discussion on other articles might have to be reopened.

79. Mr. LIANG, Secretary to the Commission, criticized the wording both of the title and of the text of the article. The words "use" and "admission" were quite inappropriate.

80. After some discussion, the CHAIRMAN suggested that the article might be amended to read:

"Each State is free to decide whether it will appoint or receive honorary consuls."

That text was adopted by 14 votes to none, with 2 abstentions.

The meeting rose at 1.10 p.m.

576th MEETING

Wednesday, 29 June 1960, at 3.30 p.m.

Chairman: Mr. Luis PADILLA NERVO

Consular intercourse and immunities (A/CN.4/L.86, A/CN.4/L.90 and Add.1) [*concluded*]

[Agenda item 2]

PROVISIONAL DRAFT ARTICLES (A/CN.4/L.90 and Add. 1) (*concluded*)

1. The CHAIRMAN invited the Commission to continue its debate on the draft concerning consular intercourse and immunities prepared by the Drafting Committee (A/CN.4/L.90/Add.1).

ARTICLE 59 (*Relationship between these articles and bilateral conventions*)

2. Mr. YOKOTA, Chairman of the Drafting Committee, said that the Committee had found it impossible to reconcile the two different points of view which had been expressed during the Commission's discussion of article 59 (560th meeting, paragraphs 8 to 69, and 561st meeting, paragraphs 1 to 40). It had, therefore, put forward alternative texts for the article (A/CN.4/L.90/Add.1), and wished to propose that both should be submitted to governments for their comments.

3. Mr. EDMONDS said that he favoured the second alternative because its provisions would be self-executing. The provisions of the first alternative would require some action by the States concerned in order to maintain in force existing conventions.

4. Mr. AGO recalled that the first alternative embodied a proposal which he had made during the protracted discussion of article 59 in the Commission (561st meeting, paragraph 1). The second alternative was a simplified version of the Special Rapporteur's proposal for article 59 (A/CN.4/L.86).

5. In view of the absence of several members and the lack of time, he thought it would not be appropriate for the Commission to make a choice between those two texts and he supported the proposal of the Drafting Committee that both should be submitted to governments.

6. Mr. TUNKIN said that he preferred the second alternative, but would support the proposal that both should be submitted to governments.

7. Mr. YASSEEN pointed out that a third view had been expressed during the discussion of article 59 (560th meeting, paragraphs 18, 19, 20, 26 and 36 and 561st meeting, paragraphs 14, 18 and 19) — *viz.*, that the proposed multilateral convention contained a number of fundamental principles and that bilateral agreements, whether concluded previously or subsequently, should not infringe those principles. He requested that the commentary to article 59 should mention that third point of view, so as to reflect faithfully the discussions of the Commission.

8. The CHAIRMAN said that, if there was no objection, he would take it that the Commission accepted the proposal of the Drafting Committee that both alternatives for article 59 should be submitted to governments; the commentary to article 59 would mention the point of view put forward by Mr. Yasseen.

It was so agreed.

ARTICLE 2, PARAGRAPH 2 (*Establishment of consular relations*) (A/CN.4/L.86)

9. The CHAIRMAN recalled that the Commission had, at its previous session,¹ reserved its decision on article 2, paragraph 2 (A/CN.4/L.86). At the present session, the Commission had adopted article 50 (A/CN.4/L.90), which might be combined with the provision of article 2, paragraph 2, if the Commission approved the latter.

10. Mr. AGO said that the prolonged discussion on article 2, paragraph 2, at the previous session had shown that those who favoured a provision

to the effect that the establishment of diplomatic relations included that of consular relations were thinking in terms of a very limited form of consular relations. Indeed, those members considered that only where a diplomatic mission was established that mission could also exercise certain consular functions. Limited in that manner, the provision could perhaps be accepted by other members as well, on the condition that an explanation to that effect should be included in the commentary.

11. Unfortunately, the inclusion of article 50 involved an additional difficulty. If two countries established diplomatic relations, but only limited consular relations in the charge of the diplomatic mission itself, a serious problem would arise in the event of the severance of diplomatic relations. Under the provisions of article 50, consular relations were not *ipso facto* broken off because of the severance of diplomatic relations between the two countries. However, the closure of the diplomatic mission would, in the circumstances alluded to, in fact mean that the existing limited consular relations would also be broken off. He for one could not accept the idea that the consular section of the diplomatic mission could remain open if diplomatic relations were severed.

12. Mr. TUNKIN said that, inasmuch as diplomatic relations were the more important or broader form of relations between States, they should be held to include the lesser; namely, consular relations. He drew attention, in that connexion, to the USSR practice: when diplomatic relations had been established with a number of countries, no special mention had been made of the establishment of consular relations, but consular sections and consulates had nevertheless been set up subsequently to the establishment of diplomatic relations.

13. With reference to article 50, he said it was in the general interests of peaceful relations between States that, unless the States concerned decided otherwise, the severance of diplomatic relations should not necessarily involve that of consular relations.

14. Mr. LIANG, Secretary to the Commission, drew attention to commentary 3 to article 2 in the Commission's report on its eleventh session.² According to that paragraph, the Commission was called upon to take a decision on the provision in question.

15. Mr. Tunkin's statement that the establishment of diplomatic relations included that of consular relations by virtue of the principle that the larger included the smaller was not perhaps absolutely true. The establishment of diplomatic relations between two States was usually effected by a very simple procedure which often took the form of an exchange of messages between the two States concerned. The establishment of consu-

¹ *Yearbook of the International Law Commission*, 1959, vol. I, 498th meeting, paragraph 13 (the provision then numbered article 1, paragraph 2).

² *Official Records of the General Assembly, Fourteenth Session, Supplement No. 9 (A/4169)*, chapter III.

lar relations, on the other hand, could either be a simple or an extensive matter. The two States concerned might wish to enter into a long and thorough examination of the consular functions, more or less on the pattern of the Consular Convention of 1952 between the United Kingdom and Sweden : in that event, there would necessarily be a period during which the establishment of diplomatic relations was not simultaneous with that of consular relations.

16. The statement that the establishment of diplomatic relations included that of consular relations contained an element of ambiguity and might be open to more than one interpretation. It could be held to mean (as suggested by the use in the French text of the word "comporte") that the establishment of diplomatic relations carried with it the duty to establish consular relations as well. On the other hand, it could also be held to mean that the establishment of diplomatic relations automatically produced a situation in which consular relations were presumed to exist.

17. Article 2, paragraph 2, in the form in which it had been drafted, could represent the reflection of a state of affairs — *viz.*, that the establishment of diplomatic relations was sooner or later usually followed by the establishment of consular relations. If, however, it were meant as a statement of the law on the subject, it would be necessary to consider the substance of the question and to draft a provision in more precise terms.

18. As to the provision contained in article 50, he doubted the wisdom of combining it with the provision in article 2, paragraph 2. Perhaps governments could make suggestions regarding the placing of the provision of article 50.

19. Mr. YOKOTA said that, during the discussion at the previous session, the majority of the Commission had been of the opinion that diplomatic relations did not necessarily include consular relations.³ He for one could not accept the theory that consular relations were automatically established as a result of the establishment of diplomatic relations. It was true that certain functions of protection and supervision of nationals could be performed by diplomatic agents, but if they were, the functions in question would be diplomatic functions and not consular functions. He drew attention in that connexion to the provisions of article 3 of the draft on diplomatic intercourse and immunities. When a diplomatic officer performed the function of protecting the nationals of the sending State he was discharging his own diplomatic function and acting in his own capacity as a diplomatic agent. The exercise of that function could therefore not be held to represent the establishment of consular relations as such.

20. It was, of course, possible for two States which established diplomatic relations to establish consular relations at the same time. But it was equally possible for two States to establish only diplomatic relations, at least for a time. It would, therefore, be going too far to say that the establishment of diplomatic relations always included that of consular relations.

21. For those reasons, he thought it would be preferable if the Commission did not adopt article 2, paragraph 2, as a text but merely stated in a commentary that where diplomatic relations were established, diplomatic agents could perform some of the functions normally performed by consular officials.

22. Sir Gerald FITZMAURICE, referring to the remarks of the Secretary, said that the establishment of consular relations was independent of the conclusion of consular conventions. Even if negotiations were in course with a view to the conclusion of a consular convention, that fact did not mean that consular relations were not already in existence between the negotiating parties. In the case of the United Kingdom, numerous consular conventions had been signed with countries with which consular relations had been maintained for a long time previously.

23. He for his part had grave doubts regarding the provisions of article 2, paragraph 2. Although there was a considerable affinity between diplomatic relations and consular relations, the former could not properly be said to be the greater of the two or, hence, be said to include the latter. There was in fact no reason why one type of relations should imply the other.

24. Two countries which established diplomatic relations needed to make a separate arrangement, even if it were usually a simultaneous one, for the establishment of consular relations. He had known of several cases, some of them quite recent, in which diplomatic relations having been broken off and subsequently re-established, consular relations — which had also been broken off — had not been re-established at the same time. Consequently, it was a fact that consular relations were not *ipso facto* re-established because of the re-establishment of diplomatic relations. The proposed provision was therefore not an expression of the existing practice. It could of course be adopted as a rule for the future, but he doubted whether that course was advisable.

25. In any event, if the Commission should decide that in general terms the establishment of diplomatic relations entailed that of consular relations, it would be necessary to state, either in the article itself or in the commentary to it, what that statement actually implied. The establishment of consular relations could not in itself necessarily mean that, as a matter of course, diplomatic missions could perform all consular functions. The missions could take such action as the renewal of passports or the issuance of visas, which did not involve any relations with the local authorities, but any action which in-

³ Yearbook of the International Law Commission, 1959, vol. I, 496th and 497th meetings, *passim*.

volved such relations would require an exequatur. It was therefore necessary to state that the consular section of a diplomatic mission could only exercise those consular functions for which no exequatur was required and which did not necessitate relations with the local authorities.

26. As to the difficulty mentioned by Mr. Ago, he (Sir Gerald) considered that, where no separate consulate existed, consular relations depended on the existence of diplomatic relations and the severance of the one would necessarily entail the severance of the other. If it were admitted that, in that case, the consular section of the embassy could remain open, a situation of inequality might result if the other State kept its consulates separate from its diplomatic missions: the latter State would not be able to maintain open any part of its embassy, while the former would be able to do so.

27. In conclusion, he said he would prefer a draft which stated that, in all cases, the establishment of consular relations was an act separate from that of diplomatic relations.

28. Mr. ŽOUREK, Special Rapporteur, said that by the end of the discussion on article 2, paragraph 2, at the previous session, the opposing views had moved much closer together. General agreement appeared to have been reached on the proposition that a diplomatic mission could, in principle, exercise all consular functions, but, wherever those functions required it to deal with a local authority, it was required (except as otherwise agreed) to deal with them through the Ministry of Foreign Affairs.

29. There was no support in state practice for the view that the establishment of consular relations, when once diplomatic relations had been established, necessitated separate action. State practice was based on the premise that the establishment of diplomatic relations included that of consular relations. In that connexion, he cited the example of Czechoslovakia, which had very few consulates separate from its diplomatic missions. In practically all countries of Europe, America and Asia, Czechoslovak diplomatic missions performed consular functions without any special agreement to that effect and without any exequatur being required for the head of mission.

30. As to the provisions of article 50, he said it was generally admitted that where two States broke off diplomatic relations, consular relations subsisted if separate consulates existed. Difficulties arose only if one or both of the two States did not have consulates separate from the diplomatic missions; in that event, he did not see any reason why the consular section of the diplomatic mission or missions concerned should not remain open. In that regard, he cited Article 41 of the Charter of the United Nations, which mentioned the severance of diplomatic relations as one of the non-military sanctions. For this part, he could not accept the idea that the severance of diplomatic relations under that provision of the Charter

should necessarily involve the severance of consular relations as well.

31. He could not agree with Mr. Yokota's statement that certain functions, if performed by diplomatic agents, ceased to be consular functions and became diplomatic functions. If an embassy issued a passport, that fact did not mean that the issuance of passports became a diplomatic function.

32. With reference to Sir Gerald Fitzmaurice's remarks, he agreed that diplomatic agents could not, in the absence of an exequatur, exercise consular functions which involved relations with the local authorities.

33. Mr. BARTOŠ said that opinion on the question raised by article 2, paragraph 2, was undergoing a transformation; accordingly, there was much to be said in favour of both Sir Gerald Fitzmaurice's and Mr. Tunkin's arguments. Recently, several States had collectively required the exequatur for members of the consular sections of the Yugoslav embassies, and the Yugoslav authorities had had occasion to investigate international practice in the matter. They had discerned two distinct trends, one towards recognizing officials of the consular sections of diplomatic missions as consuls, quite freely and without any exequatur, with the consequence that such persons exercised both diplomatic and consular functions; and the other towards regarding consular sections as auxiliary offices of the embassy, the officials concerned not being recognized as consuls, with the consequence that the exequatur was needed for them. The practices could not be regarded as contradictory, but in fact they were totally different.

34. He could not agree with the Special Rapporteur that the consular sections of diplomatic missions were obliged to conduct their dealings with the local authorities of the receiving State through the Ministry of Foreign Affairs of that State. In many cases, a ministry receiving such an application simply referred the consular section to the competent local authorities, and in such cases it might be said that the establishment of diplomatic relations entailed the establishment of consular relations.

35. There were arguments in favour both of the exercise of consular functions by diplomatic agents and of the traditional rules of the separation of those functions. The Commission might favour the more liberal system, but it could not be certain that in so doing it would be following the practice of certain States. The theoretical distinction between the establishment of consular relations and the exercise of consular functions was bound to be reflected in the practice.

36. In that connexion, he mentioned that, whereas diplomatic relations between Yugoslavia and the Federal Republic of Germany had been broken off, consular relations were actively maintained, and, indeed, certain functions usually vested in diplomatic missions were performed by the consulates concerned.

37. The traditional and the liberal systems were

so fundamentally divided that the Commission must choose between them in formulating article 2, paragraph 2. The facile expedient of merely stating that both systems were acceptable would not serve the common cause.

38. Mr. LIANG, Secretary to the Commission, referring to the statement of Sir Gerald Fitzmaurice in connexion with one of the points which he (Mr. Liang) had made, said he had not meant to contend that consular conventions must be concluded before consular relations could be established. He had merely pointed out that, in certain circumstances, a State might wish to conclude a convention before establishing consular relations. For example, China had established diplomatic relations with certain newly independent States, but might decide to conclude conventions before entering into consular relations with them, in order to settle the protection and facilities which would be offered to its consular officers. Similarly, after the First World War, China had re-established diplomatic relations with some former enemy States. But it had taken time to conclude consular conventions with these States, by virtue of which "consular jurisdiction" had been abolished. Until such conventions had been concluded, consular relations had not been resumed.

39. He also believed that article 2, paragraph 2, as worded by the Special Rapporteur, conveyed the idea of an automatic relationship between the establishment of diplomatic relations and the establishment of consular relations, and could not be regarded as a true description of international practice.

40. Mr. TUNKIN, speaking on a point of order, observed that the Commission did not have enough time to discuss the question before it thoroughly. He therefore moved that the Commission should defer its decision on article 2, paragraph 2, and should forward the text to governments for comment, without any recommendation. That procedure had been followed in the case of article 59 (see paragraph 8, above).

41. Mr. YOKOTA could not agree with Mr. Tunkin's proposal. The question involved was a purely legal one: it could be settled only by jurists, and not by governments. Article 59 involved a question of policy and practice, and it had therefore been quite correct to refer it to governments; but if the Commission were to follow that procedure in the case of article 2, paragraph 2, it would in effect be shirking its obvious duty.

42. The CHAIRMAN pointed out that paragraph 2 of article 2 had been reserved at the previous session pending a final decision on article 4 (*Consular functions*).

43. Mr. TUNKIN thought that the procedure he had proposed should be followed if the Commission were to complete its work in time. Furthermore, in the absence of many members of the Commission

a decision on such an important point could not properly be taken. In reply to Mr. Yokota, he observed that the eighty-two States Members of the United Nations also had eminent jurists at their disposal.

44. The CHAIRMAN called for a vote on Mr. Tunkin's motion that a decision on article 2, paragraph 2, should be deferred until the next session.

The motion was carried by 7 votes to 5.

45. Mr. YOKOTA observed that the draft text of paragraph 2 of article 2 should not appear in the Commission's report.

46. Mr. ŽOUREK, Special Rapporteur, said he could see no reason why the paragraph should not be included in the report, with a note stating that it had been reserved.

47. Sir Gerald FITZMAURICE suggested to the Special Rapporteur that he should bear in mind that the paragraph as now drafted was too categorical, but that it might be acceptable if it were qualified in some way. The paragraph might state that the establishment of diplomatic relations included the establishment of consular relations, provided that the receiving State made no objection.

48. Mr. AGO thought that the whole of article 2 should be reserved, including the provision (article 50) concerning the maintenance of consular relations in the event of the severance of diplomatic relations, which was to be included in that article.

49. Mr. ŽOUREK, Special Rapporteur, observed that no decision had yet been taken on the insertion of that provision in article 2. Pending the receipt of the observations of governments on the matter, the clause should remain in section IV of chapter I.

50. The CHAIRMAN drew attention to the draft articles on special diplomatic missions (A/CN.4/L.92/Add.1). He invited the Special Rapporteur to introduce the draft.

Ad hoc diplomacy (A/CN.4/L.92/Add.1)
(resumed from the 569th meeting)

[Agenda item 5]

51. Mr. SANDSTRÖM, Special Rapporteur, explained that he had considerably altered the form of his report on *ad hoc* diplomacy. He had originally (cf. A/CN.4/129) regarded only two of the articles in section I of the 1958 draft on diplomatic intercourse and immunities as applicable to special missions. The debate had shown, however, that the Commission considered that a number of other articles in the section were also applicable to special missions, if only partially. It had also emerged from the debate that there was no need for some special articles that he had envisaged, and that small drafting changes would suffice to

make certain articles of a 1958 draft applicable to special missions.

52. He had been prompted to make that radical change in his report by the lack of time that the Commission had at its disposal and also by Mr. Jiménez de Aréchaga's proposals (A/CN.4/L.87 and L.88) for simplifying the matter by including the provisions on *ad hoc* diplomacy in the 1958 draft, for the convenience of the 1961 conference on diplomatic intercourse and immunities.

53. Mr. TUNKIN observed that the wording of article 2 of the new draft on special missions did not correspond with the Commission's decision that section I of the 1958 draft, with the exception of fourteen articles, should be regarded as applicable to special missions. The language of article 2 was much too vague, particularly the reference to the "principles underlying the provisions of section I".

54. Mr. YOKOTA, Chairman of the Drafting Committee, explained that the members of the Drafting Committee had not been present at the meetings at which the question had been discussed. The Committee had worked on the basis of two papers corresponding to the Special Rapporteur's second alternative proposal (A/CN.4/L.89) and on the basis of Mr. Jiménez de Aréchaga's text (A/CN.4/L.87). The absence of those members during the discussion might explain why the new draft articles were not quite in line with the Commission's views.

55. Mr. SANDSTRÖM, Special Rapporteur, said he was not sure that the Commission had in fact taken a decision on the applicability of every article of the 1958 draft to special missions, although argument for and against the applicability of the provisions in question had been presented.

56. Mr. PAL said that, although the Commission had been working without the members of the Drafting Committee, it had examined twenty-five articles of the 1958 draft and had reached decisions concerning their applicability to special missions. It had also, on a suggestion by Sir Gerald Fitzmaurice, agreed to state in its draft that all the articles of section I, with the exception of those regarded as inapplicable, should be applicable to special missions. Accordingly, article 2 should be revised in accordance with those decisions.

57. The CHAIRMAN suggested that the Special Rapporteur should draft a new article 2 along the lines proposed by Mr. Tunkin and Mr. Pal.

58. He invited the Committee to consider article 1 (*Definitions*) of the draft concerning special missions.

59. Mr. AGO suggested that the word "diplomatic" in the first sentence of paragraph 1 should be replaced by "official" and that the word "diplomatic" should be omitted from the second sentence of that paragraph.

60. Mr. SANDSTRÖM, Special Rapporteur, said that, while he had no strong objection to Mr. Ago's suggestion, he had included the word "diplomatic" because the whole topic was entitled "*ad hoc* diplomacy".

61. Mr. LIANG, Secretary to the Commission, said that, in his opinion, paragraph 2 of article 1 was not really a definition. It could more accurately be called a reference, and could be placed either in the commentary or in the body of the report.

62. Sir Gerald FITZMAURICE did not agree with the Secretary that paragraph 2 should be omitted from the article. It represented a perfectly adequate definition of the expression "1958 draft".

63. Mr. YOKOTA, referring to Mr. Ago's suggestion, thought that the omission of the word "diplomatic" from the second sentence would mean that any commercial or cultural envoy would be regarded as a diplomat.

64. Mr. SANDSTRÖM, Special Rapporteur, agreed that the effect of Mr. Ago's amendment would be that the articles would cover a number of missions having nothing to do with diplomacy as such.

65. Mr. AGO thought that the whole purpose of the definition was to cover all the missions which were sent by States to conclude agreements on a wide variety of subjects.

66. Mr. SANDSTRÖM, Special Rapporteur, said that he had used the adjective "diplomatic" in order to convey the idea that the negotiations to be conducted by the special mission would be at a high level.

67. Mr. AGO did not think that the word "diplomatic" was used quite accurately in the article; even the head of a special mission was usually not a diplomatic agent.

68. Mr. TUNKIN thought that Mr. Ago's suggestion for replacing the word "diplomatic" in the first sentence by "official" was sound, because a mission sent to conclude a convention was a delegation, but not a diplomatic mission. An official mission implied representation of the State at the governmental level.

69. Mr. SANDSTRÖM, Special Rapporteur, thought that the words "sent by one State to another" also conveyed the idea that the mission represented the government.

70. Mr. ERIM did not think that the situation was clear enough. The meaning of the articles would be considerably affected according to whether the word "diplomacy" was taken in its broad sense or whether the intention was to cover only missions consisting of career diplomats. He thought the Commission should specify what type of mission the draft was intended to cover. He

personally had no particular preference for the one or other interpretation.

71. Mr. YASSEEN did not think it necessary to use the word "official", for any mission sent by a State was official.

72. The CHAIRMAN, speaking as a member of the Commission, shared Mr. Erim's doubts concerning the scope of the word "diplomatic". The privileges and immunities granted to special missions would certainly depend upon the interpretation of that word.

73. Mr. YOKOTA said that, for example, a group of business men sent by the government to investigate the trade situation in another country might be regarded as an official mission, but not as one enjoying diplomatic privileges and immunities.

74. Mr. AGO observed that business men were not usually sent by governments, although governmental consent might be required for such delegations. The vital point was that, in order to qualify for the benefit of diplomatic prerogatives, a special mission had to represent the State; direct relations between administrative branches of governments were constantly expanding, and official missions could consist of a great variety of persons. The article might be amended to make it clear that the mission must consist of representatives of States.

75. Mr. ERIM asked whether, for example, the director-general of sports of a particular country would, when discussing official business with the corresponding authority in another country, enjoy the privileges and immunities conferred by the draft.

76. Mr. YASSEEN and Mr. AGO considered that the director of sports would in that case be acting as a representative of the State. The representative character of special missions should be stressed in the article.

77. Sir Gerald FITZMAURICE suggested that the phrase might read "an official mission consisting of state representatives".

78. Mr. YASSEEN thought that the suggested phrase could be interpreted to mean that all the members of the mission should be state representatives, whereas that might not be the case.

79. Sir Gerald FITZMAURICE pointed out that all the members of a delegation were representatives of the State for the purposes of the mission. For example, the United Kingdom delegation to the Conferences on the Law of the Sea had comprised experts and members of the fishing industry, who had represented the United Kingdom for the purposes of the Conferences.

80. The CHAIRMAN suggested that Mr. Ago's amendments to article 1 should be approved.

It was so agreed.

The meeting rose at 6 p.m.

577th MEETING

Thursday, 30 June 1960, at 9.30 a.m.

Chairman: Mr. Luis PADILLA NERVO

Ad hoc diplomacy (A/CN.4/L.92/Add.1) [continued]

[Agenda item 5]

1. The CHAIRMAN, inviting the Commission to continue the debate on the draft on *ad hoc* diplomacy (A/CN.4/L.92/Add.1), drew attention to the revised version of article 2 proposed by the Special Rapporteur in the following terms:

"1. Of the provisions of section I of the 1958 draft, articles 8, 9 and 18 shall apply also to special missions.

"2. Articles 12 and 13 shall apply where appropriate in the circumstances."

2. Mr. AGO proposed the omission of paragraph 2 of draft article 2. Article 13 of the 1958 draft dealt with the classes of heads of permanent missions and was wholly inapplicable to special missions. As to article 12, who would decide whether its application was appropriate?

3. Mr. BARTOŠ said that he would abstain from the vote on paragraph 2. He adhered to the view he had expressed at an earlier meeting that a mere reference to certain articles of the 1958 draft was inadequate, although he fully realized that the time spent by the Commission on the topic of consular intercourse and immunities during the current session had made it impossible to prepare a more elaborate text on the subject of *ad hoc* diplomacy.

4. In the case of special missions, the credentials might take the form of full powers if the mission was headed by an ambassador, a procurator embodied in an exchange of letters, or simply a letter of introduction.

5. Mr. TUNKIN agreed with Mr. Ago and Mr. Bartoš that the Commission should not try to squeeze the great variety of special missions into the framework of the provisions regarding credentials and classes of heads of permanent missions. In practice, there were sometimes no written credentials at all, the "credentials" taking the form of a telephone call from the embassy or legation concerned.

6. Mr. SANDSTRÖM, Special Rapporteur, and Mr. PAL pointed out that paragraph 2 had been prepared in conformity with directives of the Commission (569th meeting, paragraphs 5, 6, 7, 30 and 31).

7. The CHAIRMAN, speaking in his personal capacity, observed that articles 12 and 13 of the 1958 draft might in certain cases serve as a useful guide in the matter of precedence and etiquette, especially when a number of special missions

arrived simultaneously. The words "where appropriate in the circumstances" obviously meant that the articles would apply only where they could apply.

8. Mr. AGO said that there were all kinds of special missions, including frequent missions by cabinet ministers. The words cited by the Chairman would not be interpreted uniformly and could lead to different treatment in analogous circumstances.

9. Mr. YASSEEN said he failed to see how article 13, which dealt with a specific matter relating to permanent missions, could ever apply to special missions.

Mr. Ago's proposal that paragraph 2 should be omitted was adopted by 6 votes to 1, with 5 abstentions.

Article 2, as amended, was adopted, subject to drafting changes.

10. The CHAIRMAN invited debate on article 3 as contained in document A/CN.4/L.92/Add.1.

11. Mr. SANDSTRÖM, Special Rapporteur, explained that the Drafting Committee had been of the opinion that account should be taken of the proposal made by Mr. Jiménez de Aréchaga (A/CN.4/L.87) concerning the mode of termination of a special mission; that proposal was reflected in the terms of article 3, paragraph 2.

Article 3 was adopted by 12 votes to none, with 1 abstention.

12. The CHAIRMAN invited the Commission to consider the introduction to the draft on *ad hoc* diplomacy.

13. Mr. BARTOŠ said that he would refrain from taking part in the present discussion because he considered that the Commission had failed in its task of preparing draft articles on *ad hoc* diplomacy. It had not had time to examine the whole subject in detail, which was what was necessary for practical purposes since the general principles were not at issue. He accordingly reserved his position on the whole of the draft and the commentaries.

14. Mr. TUNKIN considered that Mr. Bartoš' criticism of the Commission's method of work was fully justified: he, too, was dissatisfied with the present draft on *ad hoc* diplomacy, which was by no means a simple subject. However, he believed that the Commission should try and do the best it could in the circumstances.

15. Mr. SANDSTRÖM, Special Rapporteur, suggested that in paragraph 3 of the introduction Mr. Jiménez de Aréchaga's memorandum (A/CN.4/L.88) should be mentioned.

It was so agreed.

16. Mr. TUNKIN, referring to paragraph 4, said he did not think the Commission had in fact decided to study separately at a later date the subject of "relations between States and international organizations". If his supposition was

correct, the latter part of the second sentence in paragraph 4 should be omitted.

17. Mr. LIANG, Secretary to the Commission, recalled that at the previous session the Commission had noted General Assembly resolution 1289 (XIII) and had resolved in due course to consider the matter of the relations between States and international organizations.¹ It had not explicitly decided to study the substance of the subject in the near future, and he would therefore have thought it preferable to omit the final words of paragraph 4.

18. The remainder of the second sentence in paragraph 4 could stand, but in the interests of accuracy the words "at present" should be inserted after the word "relations". During the discussion in the Sixth Committee of the General Assembly in 1958 he had had occasion, as Secretary of the Committee, to point out that, in so far as the privileges and immunities of international organizations were concerned, the relations between States and such organizations were governed by a number of multilateral instruments.² Any codification of the principles of international law in that field would have to take account of those instruments. He also had doubted whether it was opportune to codify the subject.

It was agreed to delete the words "and will form the subject of a separate study later" and to insert the words "at present" after the word "relations" in the second sentence of paragraph 4.

19. Mr. TUNKIN, referring to paragraph 5, said that it was not quite accurate: the Commission had not discussed the relationship between the two subjects mentioned in the first sentence. It would be preferable to say nothing about its future intentions regarding them.

20. Mr. SANDSTRÖM, Special Rapporteur, said that he was prepared to re-draft paragraph 5 so as to indicate simply that the Commission had decided not to deal with the question of diplomatic conferences and had confined itself to the question of special missions.

21. Sir Gerald FITZMAURICE, Rapporteur, said it would be wrong of the Commission not to give reasons for adopting a certain course of action. If the question of diplomatic conferences was bound up with the question of relations between States and international organizations, some explanation should be given of the Commission's decision.

22. Mr. TUNKIN, agreeing with Sir Gerald, suggested that the Commission might indicate that it had chosen to deal with special missions,

¹ *Official Records of the General Assembly, Fourteenth Session, Supplement No. 9 (A/4169), chapter IV, paragraph 48.*

² *Official Records of the General Assembly, Thirteenth Session, Sixth Committee, 571st meeting, paragraphs 13 and 14.*

whereas diplomatic conferences and relations between States and international organizations were somewhat different subjects.

It was decided to request the Special Rapporteur, in consultation with the Rapporteur, to prepare a new text for paragraph 5, explaining that at the present session the Commission had decided to confine itself to the question of special missions, no mention being made of the other two topics.

23. Mr. SANDSTRÖM, Special Rapporteur, said that in view of the amended text of article 1 as adopted (576th meeting, paragraphs 59 and 80), the word "diplomatic" should be replaced by the word "official" in paragraph 6 of the introduction.

24. Sir Gerald FITZMAURICE suggested that paragraph 6 should indicate that the essential characteristic of a special mission was that it represented the sending State: the commentary would then be more consistent with the text of article 1 itself.

25. Mr. SANDSTRÖM, Special Rapporteur, said that the suggestion was acceptable to him.

Sir Gerald's suggestion was adopted.

26. Mr. SANDSTRÖM, Special Rapporteur, said that, in keeping with the amended wording of article 1, the word "diplomatic" should be deleted from paragraph 7.

27. Mr. YASSEEN criticized paragraph 7 because it did not stress that an itinerant envoy might be sent to several States to carry out the same task. That was the main difference between an itinerant envoy and a special mission.

28. Sir Gerald FITZMAURICE pointed out that an itinerant envoy might have to carry out different tasks in different countries. It should not always be assumed that the task would always be the same.

29. Mr. ERIM said that paragraph 7 was not specific enough and failed to indicate that an itinerant envoy represented the sending State and was usually a prominent man. For example, in recent years, the United States had followed the practice of appointing personal representatives of the President; generals, senators and even business men had acted as such personal representatives. There was no reason why itinerant envoys should not be assimilated to heads of special missions for the purpose of eligibility for privileges and immunities.

30. Mr. LIANG, Secretary to the Commission, observing that the expression "itinerant envoys" was not in his view a technical one, said that perhaps the Commission had not had an opportunity to discuss the expression fully when it had used it in the introduction to the 1958 draft.

31. Mr. SANDSTRÖM, Special Rapporteur, said that, as the Commission could not now abandon the term, it would be best to assimilate itinerant envoys to special missions, but he was prepared

to delete the reference to a definition in paragraph 7.

32. Mr. YOKOTA suggested that, in view of the lack of time, the Special Rapporteur and the Rapporteur might be asked to re-draft paragraph 7 in such a way that it would reproduce the definition of an itinerant envoy agreed upon for inclusion in article 1.

It was so agreed.

33. Mr. LIANG, Secretary to the Commission, referring to paragraph 8, considered that the co-ordination of a State's diplomatic activities in various countries was far from being the usual object of special missions; indeed, unless they received a special mandate to carry out such a task, he imagined that it would give rise to a strong reaction in permanent missions. He would, therefore, suggest that the phrase "the necessity for some degree of co-ordination of the diplomatic activities undertaken in the different countries" should be omitted.

34. Mr. SANDSTRÖM, Special Rapporteur, said he had no objection to that amendment.

The Secretary's suggestion was adopted.

Paragraph 9 was approved with some drafting changes.

35. Mr. LIANG, Secretary to the Commission, referring to paragraph 10, suggested that the passage "the provisions of articles 21 and 22 of the Commission's statute notwithstanding" should be deleted in order not to provoke any discussion in the Sixth Committee of the General Assembly as to whether or not the Commission was rigidly adhering to the terms of its statute. The reasons for not doing so in the present instance (the limited scope of the draft and lack of time) were, in any case, explained.

36. Mr. SANDSTRÖM, Special Rapporteur, said he had no objection to the deletion of the passage, which he had inserted merely in order to indicate that the Commission had not overlooked the provisions of articles 21 and 22 of its statute.

37. Mr. BARTOŠ emphasized that the draft could be submitted to the 1961 conference on diplomatic intercourse and immunities for information only; in its present form it could serve no other purpose whatever.

Paragraph 10 was adopted, subject to the deletion of the passage "the provisions . . . notwithstanding".

The introduction to the draft on ad hoc diplomacy was adopted as amended.

38. The CHAIRMAN invited discussion on the Special Rapporteur's commentary on article 2.

39. Mr. SANDSTRÖM, Special Rapporteur, said that in the second sentence of paragraph 1 the words "generally — but not invariably —" should be replaced by the word "sometimes".

40. Mr. AGO observed that that change reduced the importance of the second sentence and that it would be better to omit it.

41. Mr. LIANG, Secretary to the Commission, expressed doubts about the first sentence of paragraph 1. Very often the task of a special mission was not normally within the competence of the permanent mission. He suggested that the first sentence too should be omitted, since its subject-matter was dealt with in article 1.

42. Mr. SANDSTRÖM, Special Rapporteur, said that he had no objection to the suggestions for the deletion of paragraph 1.

It was agreed that paragraph 1 of the commentary on article 2 should be omitted.

Paragraph 2 of the commentary on article 2 was adopted with changes consequential on the omission of paragraph 1, subject to drafting changes.

43. Mr. SANDSTRÖM, Special Rapporteur, said that the end of paragraph 3 should be changed to read :

“... it is no less true that in some respects, by virtue of the similarity referred to, the rules which, under section I of the 1958 draft, relate to permanent missions should apply also to special missions.”

The Special Rapporteur's re-draft of paragraph 3 was adopted, subject to drafting changes.

Paragraph 4 of the commentary on article 2 was adopted.

44. The CHAIRMAN pointed out that the Special Rapporteur had withdrawn paragraphs 5 and 6 of the commentary as reproduced in document A/CN.4/L.92/Add.1 and wished to replace them by the following text :

“5. After analysis of the various articles contained in section I of the 1958 draft the conclusion was reached that articles 8, 9 and 18 are generally applicable to special missions as well as to permanent missions.

“6. It should not be inferred from the proposed provisions that apart from the cases covered by the rules mentioned, cases in which the principles laid down in the provisions of section I of the 1958 draft might occasionally be applicable are inconceivable; but because special missions vary so greatly the Commission did not think that excessively rigid rules should be provided in respect of such missions. States will have no difficulty, when discussing the sending of a special mission or when the question arises, in establishing the appropriate rules, possibly on the basis of the rules relating to permanent missions.”

The Special Rapporteur's new paragraphs 5 and 6 of the commentary on article 2 were adopted.

45. The CHAIRMAN drew attention to the following new paragraph 7 prepared by the Special Rapporteur.

“7. So far as questions of precedence and etiquette are concerned, the protocol services should have no difficulty in settling such questions, possibly on the basis of the relevant rules relating to permanent missions”.

The Special Rapporteur's new paragraph 7 was adopted, subject to drafting changes.

46. The CHAIRMAN invited the Commission to consider the commentary to article 3.

47. Mr. BARTOŠ observed that as he was opposed to article 3, paragraph 1, he was likewise unable to agree to paragraph 1 of the commentary.

48. Mr. SANDSTRÖM, Special Rapporteur, said that he was beginning to have doubts about the reference, in both the article and the commentary, to article 41 of the 1958 draft since the present article dealt with a different matter.

49. Mr. AGO considered that although article 41, sub-paragraphs (b) and (c) of the 1958 draft did not apply to special missions, sub-paragraph (a) did apply to them and should be mentioned since it described another way in which the functions of a special mission might come to an end.

50. Mr. YOKOTA pointed out that the enumeration contained in article 41 of the 1958 draft was not exhaustive, being introduced by the “*inter alia*”. There could be other causes for the termination of a special mission, such as death or resignation. It was accordingly preferable to mention article 41 in article 3.

51. The CHAIRMAN observed that the commentary on article 41 clearly explained how it should be interpreted.

52. Mr. SANDSTRÖM, Special Rapporteur, pointed out to Mr. Ago that sub-paragraphs (b) and (c) of article 41 were applicable to special missions now that article 8 of the 1958 draft had been declared applicable to them. He had been convinced by the remarks of Mr. Yokota and the Chairman that the reference to article 41 should stand.

The commentary to article 3 was adopted.

Consideration of the Commission's draft report covering the work of its twelfth session (A/CN.4/L.92 and Add.1 and 3)

CHAPTER I (Organisation of the session)

Chapter I of the draft report (A/CN.4/L.92) was adopted.

CHAPTER III (Ad hoc diplomacy)

53. The CHAIRMAN suggested that the text contained in document A/CN.4/L.92/Add.1, with the draft articles and commentaries as amended in the course of discussion, should constitute chapter III of the report.

It was so agreed.

54. Sir Gerald FITZMAURICE, Rapporteur, suggested that it might be advisable to include a paragraph in the report explaining that the Commission had had to deal with the question of *ad hoc* diplomacy rather hurriedly and adding a sentence along the following lines :

“However, the Commission thinks that this scheme is one that may be useful for the work

of the Vienna conference and puts it forward in that spirit."

It was so agreed.

CHAPTER IV (*Other decisions of the Commission*)
(A/CN.4/L.92/Add.3)

Section I (*Codification of the principles and rules of international law relating to the right of asylum*)

Section I was adopted.

Section II (*Study of the juridical régime of historic waters, including historic bays*)

Section II was adopted.

Section III (*Planning of future work of the Commission*)

55. Mr. LIANG, Secretary to the Commission, suggested that it should be made clear in the text that the subject of state responsibility would be taken up at the thirteenth session.

It was so agreed.

56. Mr. BARTOŠ asked what would happen if the Vienna conference in 1961 made a recommendation regarding the Commission's future work.

57. The CHAIRMAN replied that section III simply reported the Commission's decision, based on what was known at the present session.

58. Mr. GARCÍA AMADOR observed that a recommendation from the Vienna conference would have to be addressed to the General Assembly. Naturally, the Commission would have to take into account any new instructions by the General Assembly.

Section III was adopted subject to the Secretary's suggestion.

Section IV (*Co-operation with other bodies*)

59. Mr. YOKOTA considered that section IV should report the general approval of Mr. Tunkin's observation (571st meeting, paragraphs 33 and 41) that it was of more importance that the Commission should receive the papers, summary records and other documents of conferences of international organizations interested in the development of international law than that it should send observers to such conferences for a few days.

60. Mr. TUNKIN said that the report should indicate that it was the feeling (*ibid.*, paragraphs 45 and 50), and perhaps even the decision, of the Commission that the Secretariat should arrange for the transmission to members of the documents Mr. Yokota had mentioned.

61. Mr. LIANG, Secretary to the Commission, said that he hesitated to predict the extent of the interchange envisaged. For example, if fifty

members of the Asian-African Legal Consultative Committee should request all the documents of the Commission, a serious problem would arise. Under United Nations rules, fifty sets of the Commission's *Yearbook* could not be distributed free of charge. Some quantitative parity in the exchange would have to be aimed at, and he hoped the Secretariat would be given a certain latitude in the matter.

62. The CHAIRMAN did not think that the Commission had contemplated an exchange of documents. The Secretariat was to request the bodies in question to provide the documents desired by the Commission. If counter-requests for Commission documents were received, they would have to be treated in accordance with United Nations rules.

63. The summary records would show what the Commission had intended. He suggested that a paragraph should be added to section IV, indicating the kind of help the Commission hoped to receive.

It was so agreed.

Section IV, as amended, was adopted.

Section V (*Date and place of the next session*)

Section V was adopted.

Section VI (*Representation at the fifteenth session of the General Assembly*)

Section VI was adopted.

The meeting rose at 1 p.m.

578th MEETING

Thursday, 30 June 1960, at 3.30 p.m.

Chairman: Mr. Luis PADILLA NERVO

Consideration of the Commission's draft report covering the work of its twelfth session (A/CN.4/L.92/Add.2) [continued]

CHAPTER II (*Consular intercourse and immunities*)

1. The CHAIRMAN recalled that there now remained to be considered chapter II (Consular intercourse and immunities) of the draft report (A/CN.4/L.92/Add.2). He invited debate on the commentaries to the articles.

Commentary to article 19 (Appointment of the consular staff)

2. Sir Gerald FITZMAURICE doubted whether paragraph 6 was really necessary, since in the context it might give the inaccurate impression that, although the article purported to give total freedom of choice of the consular staff to

the sending State, that freedom had little reality because the receiving State was at any time able to refuse a visa. Cases of such refusal were extremely unusual and it would be wiser to omit the paragraph altogether.

3. Mr. ŽOUREK, Special Rapporteur, said he had inserted the paragraph not only because it was a statement of fact, but also because an analogous provision was contained in the commentary to the corresponding article of the draft on diplomatic intercourse. If the paragraph were omitted, governments might query the discrepancy between the two commentaries.

4. Sir Gerald FITZMAURICE said he would not insist on his suggestion.

The commentary to article 19 was adopted.

Commentary to article 19 a (Size of staff)

5. Mr. YOKOTA thought that the first two paragraphs might well be omitted, since it was not the Commission's practice to state the circumstances of the adoption of an article in the commentary. Moreover, whereas the Special Rapporteur had given substantive reasons in paragraph 1 for his omission of such an article in his original draft (A/CN.4/L.86), paragraph 2 gave only a formal reason for the Commission's majority decision to include the provision. The reader might receive the impression that the Special Rapporteur had had good reasons for not including the provision, while the Commission had taken its decision without any foundation. Such an impression should not be conveyed in a commentary which purported to be the work of the Commission.

6. Mr. ŽOUREK, Special Rapporteur, said that he would be prepared to amplify paragraph 2, and to include the arguments advanced in support of the article. He believed, however, that the reader should be made aware that there had been a difference of opinion on the inclusion of article 19 a.

7. The CHAIRMAN, speaking as a member of the Commission, thought that it would be difficult and take time to draft a commentary setting out the arguments put forward by members.

8. Mr. PAL observed that it was not the usual practice of the Commission to include arguments for and against an article in the commentary, which should be confined to observations on the article as finally adopted.

9. Mr. TUNKIN could not agree with Mr. Pal that that was the usual practice. Nevertheless, he agreed with Mr. Yokota that there was some imbalance between paragraphs 1 and 2, and proposed that the last sentence of paragraph 1 might be deleted.

10. The CHAIRMAN suggested that Mr. Tunkin's proposal should be followed.

It was so agreed.

11. Mr. LIANG, Secretary to the Commission, observed that the phrase "might also be of

practical use to consulates" in paragraph 2 was inaccurate. It might be better to say "of practical use in respect of consulates".

12. The CHAIRMAN suggested that the exact wording should be left to the Special Rapporteur and the Rapporteur of the Commission.

It was so agreed.

The commentary to article 19 a, as amended, was adopted.

Commentary to article 20 (Persons deemed unacceptable)

13. Mr. ŽOUREK, Special Rapporteur, accepted minor drafting amendments to paragraphs 1, 2 and 6 suggested by Sir Gerald Fitzmaurice, Mr. Matine-Daftary, Mr. Ago and Mr. Scelle.

14. Mr. YOKOTA said that his criticism of paragraphs 1 and 2 of the commentary to article 19 a applied equally to paragraphs 7 and 8 of the commentary to article 20. The motivation of the Special Rapporteur's original text was described at length in paragraph 7, while the arguments submitted by members during the debate were treated much more summarily in paragraph 8. That paragraph should be amplified in order to restore the balance.

15. Mr. ŽOUREK, Special Rapporteur, said he would be prepared to include all the arguments, but observed that the main consideration had been the wish to follow the draft on diplomatic intercourse.

16. Mr. AGO, referring to the second sentence of paragraph 8, said he did not recall any decision by the Commission to draw the attention of governments to that particular point.

17. Mr. ŽOUREK, Special Rapporteur, pointed out that the particular question would be settled much more effectively if government opinions on it were obtained.

18. Mr. AGO said that in the absence of an express decision by the Commission, the procedure of asking governments for their opinions was not acceptable.

19. The CHAIRMAN said that governments would comment on the draft as a whole, and their attention would be drawn to special cases where the Commission had been unable to reach a decision. In any case, the Commission should first decide on the wording of paragraph 7.

20. Sir Gerald FITZMAURICE suggested that the last two sentences of paragraph 7 might be deleted.

It was so agreed.

21. Sir Gerald FITZMAURICE suggested that the last two sentences of paragraph 8 should be omitted and the first sentence altered to read "Since, however, many members of the Com-

mission, relying mainly on article 8 of the draft articles on diplomatic intercourse, objected to the insertion of this condition as going too far in the case of the consular staff, the Special Rapporteur withdrew it."

22. The CHAIRMAN thought that the Special Rapporteur and the Rapporteur of the Commission might be authorized to settle the final text of the commentary in the light of the amendments suggested.

It was so agreed.

The commentary to article 20 was adopted, subject to the amendments mentioned.

Commentary to article 21 (Notification of the arrival of members of the consulate and of the termination of their functions)

23. Mr. ŽOUREK, Special Rapporteur, accepted drafting amendment to paragraphs 1 (a), 3 and 5 proposed by Mr. Edmonds, Mr. Scelle and Mr. Ago.

The commentary to article 21, as amended, was adopted.

Commentary to article 22 (Use of the national flag and of the state coat-of-arms)

24. Sir Gerald FITZMAURICE thought that paragraph 7 should be omitted, since it was practically inconceivable that anyone should regard the display of the coat-of-arms or flag of the sending State as conferring the right of asylum.

25. Mr. ŽOUREK, Special Rapporteur, said that an express provision on the matter appeared in a large number of consular conventions. He would not, however, insist on the inclusion of paragraph 7.

26. He accepted drafting amendments to paragraphs 4 and 8 suggested by Mr. Ago.

27. Mr. LIANG, Secretary to the Commission, said he had some doubts concerning the last sentence of paragraph 8. It was incorrect to say that "this problem", which might be held to mean the relatively secondary question of the use of a coat-of-arms and the national flag of the sending State, would be considered in connexion with the law of treaties. It might be better to say that the general problem of the primacy of international law over municipal law would be considered in that connexion.

28. The CHAIRMAN suggested that the passage in question should be amended in conformity with the Secretary's remarks.

It was so agreed.

The commentary to article 22, as amended, was adopted.

Commentary to article 25 (Inviolability of consular premises)

The commentary to article 25 was adopted.

Commentary to article 26 (Exemption in respect of the consular premises from taxation)

The commentary to article 26 was adopted.

Commentary to article 27 (Inviolability of official correspondence, archives and documents)

The commentary to article 27 was adopted.

Commentary to article 28 (Facilities)

The commentary to article 28 was adopted.

Commentary to article 28 a (Free movement)

29. Mr. YOKOTA said that his earlier criticism of the commentaries on certain other articles also applied to the commentary on article 28 a. The Special Rapporteur had given his reasons for not including the article in his original draft (A/CN.4/L.6), but had not given the arguments that had led the majority of the Commission to include the article. The last sentence of the commentary was particularly inappropriate, since article 28 a had not been adopted provisionally, but on the same footing as all the other articles.

30. Mr. ŽOUREK, Special Rapporteur, pointed out that all the articles adopted by the Commission were provisional and would have to be reviewed in the light of the comments of governments. He did not remember hearing any substantive arguments in favour of the inclusion of the article, but he would be prepared to look through the summary records again and to amplify the commentary accordingly.

31. Mr. YOKOTA agreed with the Special Rapporteur that all the articles were provisional. Nevertheless, he thought it indvidious and misleading to single out article 28 a by specifically describing it as provisional when the other articles were not expressly so described.

32. Mr. AGO, supported by Mr. SCELLE, pointed out that certain members had urged that a consul's movements should not be limited to the consular district (531st meeting, paragraphs 35 and 40), especially in cases where the consul was exercising his function of protecting the nationals of the sending State. Restriction of the movement to the consular district would tend to hamper the consul in the exercise of his functions.

33. Mr. ŽOUREK, Special Rapporteur, observed that the arguments referred to by Mr. Ago had been put forward after it had been agreed to include the article in the draft. The commentary was concerned with the prior question whether such an article should be included at all in the draft. He had not included such a provision in his original draft because he had found no analogous provision in any of the bilateral conventions that he had studied. Nevertheless, he would be prepared to amplify the second part of the commentary.

34. Mr. YOKOTA suggested that the last part of the third sentence of the commentary should be omitted, so as not to leave the erroneous impression that article 28 *a* was the only clause that had been adopted provisionally.

It was so agreed.

The commentary to article 28 a, as amended, was adopted.

Commentary to article 29 (Freedom of communication)

The commentary to article 29 was adopted.

Commentary to article 30 (Communication with the authorities of the receiving State)

35. Mr. AGO proposed two amendments. Firstly, in paragraph 4 of the commentary, third sentence, the comma and all the words after "the Ministry of Foreign Affairs of the receiving State" should be deleted and replaced by "in the particular case where the sending State has no diplomatic mission in the receiving State". Secondly, in paragraph 6, the last sentence, which referred to article 59 in its original form, should be deleted. The Commission had not adopted article 59 in that form but had decided to submit alternative texts to governments.

36. Sir Gerald FITZMAURICE pointed out that all the consular conventions cited in paragraph 6 constituted examples of conventions which did not allow consuls to address the central authorities direct. There were some conventions which permitted consuls to have access to the central authorities and he proposed that one or two examples of such conventions should also be mentioned.

37. Mr. ŽOUREK, Special Rapporteur, accepted the amendments proposed by Mr. Ago and Sir Gerald Fitzmaurice.

With those amendments, the commentary to article 30 was adopted.

Commentary to article 30 a (Communication with nationals of the sending State)

38. Mr. YOKOTA proposed the deletion of the second sentence of paragraph 6 of the commentary. If the authorities of the receiving State refused to allow the consul to visit a prisoner, a mere statement of reasons could not be deemed sufficient to make that refusal consistent with the freedom of communication. Unless the reasons given were valid reasons under the applicable laws and regulations, the refusal would in fact frustrate the freedom in question. He therefore urged the deletion of the sentence in question, which did not contain any safeguard against abuse.

39. Sir Gerald FITZMAURICE supported Mr. Yokota's proposal and suggested that paragraph 7, and the passages in paragraph 5 concerning

persons held *incomunicado*, could also be omitted. As they stood, paragraphs 5, 6 and 7 placed undue emphasis on that form of detention, thus throwing the whole commentary out of balance.

40. Mr. EDMONDS, supporting Mr. Yokota's proposal, said that the second sentence of paragraph 6, and some other passages of the commentary to article 30 *a*, were in direct contradiction with the actual provisions of that article. He recalled that the discussion in the Commission on the article had largely centred on the question of the time when the consul would be allowed to visit his national: if he could not do so until the trial was about to begin, the real purpose of article 30 *a* — which was to enable him to make arrangements for his national's defence — would be completely nullified.

41. Mr. AGO also supported Mr. Yokota's proposal and proposed the deletion, in paragraph 5 of the commentary, of the fifth and sixth sentences (passage commencing with the words: "Under the laws of some countries . . ." and ending with the words: ". . . the person is held *incomunicado*.").

42. Mr. TUNKIN said that the second sentence of paragraph 6 was perhaps unduly vague; he therefore favoured its deletion, but suggested that the first sentence should also be deleted, since it merely repeated one of the provisions of article 30 *a*.

43. As to paragraph 7, he said its text reflected accurately the understanding on which the Commission had approved article 30 *a*.

44. Mr. BARTOŠ said that it was essential to amend the wording of the commentary so that it would reflect not only the views of the Special Rapporteur and of a minority of the members, but also that of the majority, who had supported the provisions of article 30 *a*. The commentary, as it stood, placed too much emphasis on the State's interests and all too little on human rights, which had been foremost in the minds of the majority of the members, who wished to safeguard the right of the consul to communicate with his national before the trial in order to arrange for his defence.

45. Sir Gerald FITZMAURICE said that if Mr. Yokota's and Mr. Ago's amendments were accepted, he would be prepared to agree to the retention of paragraph 7 as it stood.

46. Mr. TUNKIN said that the criticism voiced by Mr. Bartoš was unfounded. The Special Rapporteur had merely taken into account in the commentary those cases in which it was impossible, in the interests of the investigation of a case, to allow the consul to see the arrested person.

47. Mr. ŽOUREK, Special Rapporteur, accepted Mr. Ago's proposal for the deletion of the fifth and sixth sentences of paragraph 5.

48. He could not, however, accept Mr. Yokota's

amendment to delete the second sentence of paragraph 6. That sentence merely stated an obvious fact.

Mr. Ago's amendment to paragraph 5 was adopted unanimously.

Mr. Yokota's amendment to paragraph 6 was adopted by 10 votes to 2, with 6 abstentions.

49. Mr. MATINE-DAFTARY said that he could not accept the first sentence of paragraph 6 without the second. He therefore proposed the deletion of that first sentence.

The proposal was rejected by 9 votes to 3, with 1 abstention.

50. Mr. EDMONDS proposed the deletion of paragraph 7.

51. Sir Gerald FITZMAURICE said that he would vote against that proposal because, after the deletion of the fifth and sixth sentences of paragraph 5 and the second sentence of paragraph 6, he could accept paragraph 7 as it stood.

52. Mr. ŽOUREK, Special Rapporteur, said that he would vote against the proposal because he had accepted Mr. Ago's amendment to paragraph 5 only on the understanding that paragraph 7 would be retained as it stood.

Mr. Edmonds' proposal was rejected by 8 votes to 3, with 3 abstentions.

The commentary to article 31 a, as amended, was adopted.

Commentary to article 31 (Levying of consular fees and charges and exemption of such fees and charges from taxes and dues)

The commentary to article 31 was adopted.

Commentary to article 32 (Special protection and respect due to consuls)

The commentary to article 32 was adopted.

The meeting rose at 6 p.m.

579th MEETING

Friday, 1 July 1960, at 9 a.m.

Chairman: Mr. Luis PADILLA NERVO

Consideration of the Commission's draft report covering the work of its twelfth session (A/CN.4/L.90 and Add.1, A/CN.4/L.92/Add.1, 2 and 3) [concluded]

CHAPTER II (*Consular intercourse and immunities*)
(concluded)

1. The CHAIRMAN invited the Commission to continue its consideration of the commentary on the draft articles concerning consular intercourse and immunities (A/CN.4/L.92/Add.2).

Commentary to article 33 (Personal inviolability)

2. Mr. MATINE-DAFTARY noted that the commentary did not mention his dissenting opinion (539th meeting, paragraph 6, and 540th meeting, paragraphs 40 to 45).

3. Mr. ŽOUREK, Special Rapporteur, did not consider it possible to state the view of a single member of the Commission in the commentary. However, if Mr. Matine-Daftary so wished, his dissent could be recorded in a footnote.

4. Mr. MATINE-DAFTARY pointed out that he had not been alone in opposing the anomalous system put forward in article 33 which appeared to confer on consuls immunity from prosecution for offences punishable by a sentence of a specified number of years. He could have agreed that consular officials should not be liable to arrest or detention pending trial except in the event of criminal proceedings. He regretted that his constructive proposal had been disregarded.

5. Mr. ŽOUREK, Special Rapporteur, said he would be prepared to insert a sentence in the commentary to the effect that some members had held that consuls should not be eligible for immunity from imprisonment in cases where imprisonment was ordered by a judicial decision.

6. The CHAIRMAN, observing that in the past the Commission had even omitted to mention in its commentary a minority view held by several members, suggested that Mr. Matine-Daftary's objection might be recorded in a footnote.

It was so agreed.

7. Mr. TUNKIN asked whether the statement made in the last sentence of paragraph 12 was accurate. He had assumed that the exceptions to the benefit of article 33 related to gainful private activity carried on in the receiving State only.

8. Mr. ŽOUREK, Special Rapporteur, said that if a consul carried on a gainful private activity in any country there was a *prima facie* presumption against his eligibility for the privileges specified in article 33. Admittedly, if the activity was carried on in the sending State or in a third State, there was less reason for withholding the privileges in the receiving State. In his opinion, the Commission should reach a decision on the point.

9. The CHAIRMAN observed that the Commission had not discussed the point, and if the last sentence in paragraph 12 was accepted as it stood, article 33, paragraph 1, which seemed to refer only to gainful private activity in the receiving State, would have to be reconsidered.

10. Mr. ŽOUREK, Special Rapporteur, said he would agree to the deletion of the last sentence in paragraph 12 and hoped that the point would be considered at the next session.

It was agreed that the sentence in question would be omitted.

11. Mr. AGO suggested that paragraph 13 should be revised in the light of the Commission's decision to offer alternative texts for article 33, paragraph 1 (572nd meeting, paragraph 96).

12. Mr. ŽOUREK, Special Rapporteur, undertook to revise paragraph 13 in the light of the Commission's decision on article 33, paragraph 1.

The commentary to article 33, as amended, was adopted.

Commentary to article 34 (Immunity from jurisdiction)

13. Mr. AGO suggested that the word "jurisdiction" should be substituted for the word "authority" in the second sentence of paragraph 1. Secondly, in paragraph 2 it should be made clear that members of the consulate were not amenable to the jurisdiction of the receiving State in respect of acts attributable to the sending State. The reference to "official" acts was, therefore, inappropriate in the light of the decisions taken on article 34.

14. Mr. ŽOUREK, Special Rapporteur, accepted Mr. Ago's suggestions.

The commentary to article 34, as amended, was adopted.

Commentary to article 35 (Exemption from obligations in the matter of registration of aliens and residence and work permits)

The commentary to article 36 was adopted.

Commentary to article 36 (Social security exemption)

The commentary to article 36 was adopted.

Commentary to article 37 (Exemption from taxation)

15. Mr. YOKOTA said there seemed to be a discrepancy between the statement in the second sentence of paragraph 1 that, in the absence of treaty provisions, the consul's exemption from taxation was governed by the law of the receiving State and was always conditional on reciprocity, and the statement in the first sentence of paragraph 3 that bilateral conventions usually granted the exemption, subject to reciprocity. He believed the second statement was the more correct.

16. Mr. ŽOUREK, Special Rapporteur, explained that to the best of his knowledge exemption from taxation was never accorded to foreign consuls by the municipal law of any State unless reciprocal treatment was accorded by the sending State.

The commentary to article 37 was adopted.

Commentary to article 38 (Exemption from customs duties)

17. Mr. AGO said that the enumeration of objects exempt from customs duties (paragraph 1) was too restricted and suggested that it should be expanded.

It was so agreed.

The commentary to article 38 was adopted, subject to that revision.

Commentary to article 39 (Exemption from personal services and contributions)

The commentary to article 39 was adopted.

Commentary to article 40 (Liability to give evidence)

18. Mr. AGO suggested that some explanation of the purpose of paragraph 2 of article 40 should be added to the commentary.

19. Mr. ŽOUREK, Special Rapporteur, agreed.

20. Sir Gerald FITZMAURICE considered that the language of the last sentence in paragraph 2 of the commentary was too categorical in view of the fact that according to the terms of article 40, paragraph 3, members of a consulate could decline to give evidence concerning matters connected with their official functions or to produce official correspondence and documents relating thereto. Admittedly they should not decline to produce documents of the kind mentioned in the last sentence of paragraph 2 of the commentary, but the sentence should be brought into line with the wording of the article. He suggested that the words "should not" should be substituted for the word "cannot" before the word "decline".

It was so agreed.

The commentary to article 40, as amended, was adopted.

Commentary to article 41 (Acquisition of nationality)

21. Mr. BARTOŠ said that cases other than those mentioned in the commentary could occur. In certain countries of South America, nationality could be acquired by virtue simply of prolonged residence.

22. Mr. ŽOUREK, Special Rapporteur, doubted whether prolonged residence was enough to confer nationality without some formal expression of will on the part of the person concerned. He was prepared to indicate that the cases described in the commentary were not exhaustive by inserting the words "more particularly" in the first sentence.

That amendment was approved.

23. Mr. AGO expressed doubts about paragraph 1 (a), which appeared to ignore the case where one parent was a national of the receiving State.

24. Mr. ŽOUREK, Special Rapporteur, explained that he had understood the Commission's intention to be that the article should prevent the automatic acquisition of the nationality of the receiving State in cases where neither of the parents was a national of that State.

25. Mr. AGO observed that it would be surprising if the article were interpreted to mean that the

son of a foreign consul and of a woman having the nationality of the receiving State would automatically acquire the mother's nationality.

26. Mr. TUNKIN said that the Commission would be ill-advised at that stage to attempt to resolve the very complicated problems connected with the acquisition of nationality. The law varied greatly from country to country, and the text of the article refrained from stating a general rule.

27. Mr. AGO agreed with Mr. Tunkin, but pointed out that paragraph 1 of the commentary seemed to place an unacceptable interpretation on article 41.

28. Mr. YASSEEN considered that the meaning of article 41 was perfectly clear: it stipulated that a member of the consulate or a member of his family belonging to his household could not acquire the nationality of the receiving State even if the municipal law of that State provided otherwise.

29. Mr. AGO observed that Mr. Yasseen's interpretation was certainly not borne out by the commentary.

30. Mr. LIANG, Secretary to the Commission, said that he had pointed out during the earlier discussion that article 41 was at variance with The Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, 1930, and with the law of certain *jus soli* countries such as the United States and, he believed, the United Kingdom (543rd meeting, paragraph 18). He regretted that the Special Rapporteur had not followed his suggestion to emphasize in the commentary the progressive character of the article. Unless that fact were brought out, the article would cause considerable surprise.

31. Mr. ŽOUREK, Special Rapporteur, said that he had not been very much in favour of the parallel article in the draft on diplomatic intercourse (article 35) and had sought to press for a different formulation, but after lengthy discussion the Drafting Committee had decided to follow the said article 35.

32. He could not agree with Mr. Ago that there was a contradiction between the terms of the article itself and the commentary. The case mentioned in paragraph 2 of the commentary was excluded from the scope of the article. As Mr. Tunkin had indicated, the Commission offered an incomplete rule stipulating that if neither of the parents was a national of the receiving State their child would not acquire the nationality of that State, even though the latter's nationality law was based on *jus soli*. The case where one parent only was a national of the receiving State and the other was a national of the sending State or of a third State was different. He considered that the commentary as it stood correctly explained the position.

33. Mr. BARTOŠ proposed that paragraph 3 of

the commentary be deleted because it conflicted with the Convention on the Nationality of Married Women concluded under the auspices of the United Nations in 1957.¹

34. Mr. AGO said that he could not accept the Special Rapporteur's interpretation of article 41 which was so much at variance with that given by several members of the Commission. He could, however, agree with Mr. Tunkin that the Commission should not commit itself. He would, therefore, suggest that sub-paragraphs (a) and (b) be deleted, and that it should be simply indicated in paragraph 1 that the purpose was to prevent the automatic acquisition of the nationality of the receiving State by reason of birth, marriage, prolonged residence, etc.

35. Mr. ŽOUREK, Special Rapporteur, did not consider that such a change would be particularly illuminating. As Special Rapporteur he had simply sought to explain the Commission's intention.

36. In answer to Mr. Bartoš' criticism, he pointed out that paragraph 3 could not conflict with the Convention on the Nationality of Married Women, for in all cases where that convention applied as between the sending State and the receiving State the marriage of a woman member of a consulate would not automatically produce a change of nationality, and consequently such cases did not come within the scope of article 41.

37. Mr. BARTOŠ emphasized that the latter part of the commentary to article 35 in the draft on diplomatic intercourse conflicted with the Convention on the Nationality of Married Women. The Secretary should be requested to bring that fact to the attention of the 1961 conference on diplomatic intercourse and immunities.

38. He proposed that paragraph 3 of the commentary to article 41 of the consular draft should be deleted.

39. Mr. TUNKIN said he could see no conflict between paragraph 3, which dealt with the acquisition of nationality by members of the family forming part of the household of a member of the consulate, and the Convention cited by Mr. Bartoš, which dealt with an entirely different question.

40. Mr. ŽOUREK, Special Rapporteur, said that, in order to meet Mr. Ago's objection, he was prepared to withdraw paragraph 2. He added that he would prepare a detailed commentary on article 41.

41. Mr. AGO stated that he would be satisfied with the omission of paragraph 2.

42. Mr. ŽOUREK, Special Rapporteur, said that, in order to give satisfaction to Mr. Bartoš, he would amend paragraph 3 to state that in the case mentioned in that paragraph article 41 had lost a good deal of its force in view of the terms of

¹ United Nations *Treaty Series*, vol. 309, p. 65.

the Convention on the Nationality of Married Women, 1957.

The commentary to article 41, as amended by the Special Rapporteur, was adopted.

Commentary to article 42 (Members of the consulate, members of their families and members of the private staff who are nationals of the receiving State)

43. Mr. TUNKIN proposed that the words "in conformity with the practice of States" should be omitted from the first sentence of paragraph 1, lest the passage should be misinterpreted as meaning that the general state practice was to appoint employees of the consulate without the consent of the receiving State.

It was so agreed.

The commentary to article 42, as amended, was adopted.

Commentary to article 43 (Duration of consular privileges)

The commentary to article 43 was adopted.

Commentary to article 44 (Estate of a member of the consulate or of a member of his family)

The commentary to article 44 was adopted.

Commentary to article 45 (Obligations of third States)

The commentary to article 45 was adopted.

Commentary to article 46 (Respect for the laws and regulations of the receiving State)

44. Sir Gerald FITZMAURICE considered that the last sentence in paragraph 3 should be omitted. There was no need to single out the rare case of consular premises being used for asylum; other ways of misusing consular premises were far more frequent.

45. Mr. ŽOUREK, Special Rapporteur, said that he had included that sentence because Mr. Erim's amendment to article 25 had been withdrawn on the express understanding that the matter would be mentioned in the commentary to article 46 (572nd meeting, paragraph 18). Besides, many consular conventions stipulated that consular premises must not be used as asylum.

The commentary to article 46 was adopted.

Commentary to article 48 (Obligations of the receiving State in certain special cases)

The commentary to article 49 was adopted.

Commentary to article 49 (Termination of a consul's functions)

46. Mr. LIANG, Secretary to the Commission, recalled that the Commission had decided (546th

meeting, paragraph 24) that article 49 would deal with the modes of termination of a consul's functions. He suggested that the first sentence of paragraph 1 of the commentary, which spoke of "the causes which terminate the functions" should be amended to bring it into line with that decision.

47. Mr. TUNKIN said that the title of the article itself should likewise be amended.

48. Mr. ŽOUREK, Special Rapporteur, said that he would make the necessary alterations to take into account the remarks of Mr. Tunkin and the Secretary.

49. Mr. EDMONDS proposed the deletion of paragraph 3. He saw no reason for making the statement that article 49 should be regarded as codifying the existing international law. That statement was true not only of article 49 but of all the articles of the draft.

50. Mr. ŽOUREK, Special Rapporteur, agreed to the deletion of paragraph 3.

With those amendments, the commentary to article 49 was adopted.

Commentary to article 50 (Maintenance of consular relations in the event of the severance of diplomatic relations)

51. Mr. LIANG, Secretary to the Commission, suggested that the term "universally" be replaced by "generally".

52. Mr. YOKOTA said that the note which referred to article 2, paragraph 2, would have to be amended in view of the Commission's decision not to include that provision in the draft articles but to refer to the matter in the commentary.

53. Mr. ŽOUREK, Special Rapporteur, accepted both suggestions and said that, in an amended form, the note would become the second sentence of the commentary to article 50.

With those amendments the commentary to article 50 was adopted.

Commentary to article 51 (Right to leave the territory of the receiving State and facilitation of departure)

54. Mr. LIANG, Secretary to the Commission, said that it was not clear whether the second sentence of paragraph 1 referred to the last phrase of the first sentence, or to the whole of that sentence.

55. Mr. ŽOUREK, Special Rapporteur, said that the second sentence referred only to the case of armed conflict. He would insert in that sentence the words "in the case of armed conflict" in order to avoid any ambiguity.

With that amendment, the commentary to article 51 was adopted.

Commentary to article 52 (Protection of consular premises and archives and of the interests of the sending State)

The commentary to article 52 was adopted.

Commentary to article 53 (Non-discrimination)

56. Sir Gerald FITZMAURICE proposed that the last part of paragraph 3 should be expanded so as to state more explicitly the Commission's reason for not including in article 53 a provision along the lines of paragraph 2 (a) of article 44 of the draft on diplomatic intercourse. The reason was that the Commission, after discussion (548th and 549th meeting), had doubted whether the provision should have been included in the diplomatic draft itself, but was no longer in a position to alter that draft.

57. Mr. ŽOUREK, Special Rapporteur, accepted Sir Gerald Fitzmaurice's proposal.

With that amendment, the commentary to article 53 was adopted.

Introduction to the chapter relatively to honorary consuls

58. Sir Gerald FITZMAURICE criticized the last phrase of paragraph 3 of the introduction. The Commission had not, to the best of his recollection, decided "to leave States free to choose" criteria for defining honorary consuls. He suggested that the last phrase of the paragraph should be replaced by the words "but to insert in article 1 a provision to the effect that the term 'consul' covered both career and honorary consuls".

59. If a reference were to be made to the choice of criteria for defining honorary consuls, it would have to be specified that it was for the sending State to choose the criteria in question. Otherwise, if the sending State and the receiving State did not adopt the same criteria, the result might be that the same consul might be considered an honorary consul by the one and a career consul by the other — a result which was clearly impossible.

60. Mr. TUNKIN said that the appointment of an honorary consul rested with the sending State, but the definition of the institution of honorary consuls could not be left to that State. The description of the institution was an objective matter.

61. He suggested that the last phrase of paragraph 3 should be deleted.

62. Mr. BARTOŠ supported that suggestion.

63. For his part, he could not accept the idea that the choice of criteria lay with the sending State. Since the honorary consul was appointed by the sending State but had to be accepted by the receiving State, both States were called upon to pronounce themselves on the criteria in question. The fact was that the criteria applied

by both the States concerned would have to be taken into consideration cumulatively.

64. Mr. ŽOUREK, Special Rapporteur, agreed to the deletion proposed by Mr. Tunkin.

With that amendment, the introduction to the chapter relating to honorary consuls was adopted.

Commentary to article 56 (Legal status of honorary consuls)

65. Sir Gerald FITZMAURICE said that in view of the strong statement in paragraph 4 regarding the opinion of certain members of the Commission that the privileges and immunities granted to honorary consuls under the draft far exceeded those granted to them in state practice, a short sentence should be added to say that the majority of the Commission thought otherwise.

66. Mr. EDMONDS suggested the deletion, in paragraph 5, of the words "until governments had expressed their views on the matter". The Commission should not suggest that it would be bound by the views which might be expressed in the replies of governments.

67. Mr. SCELLE said that he was also dissatisfied with the expression criticized by Mr. Edmonds.

68. Mr. LIANG, Secretary to the Commission, suggested that the words cited by Mr. Edmonds be replaced by "until governments had furnished their observations". Those observations would include not only government views but also information on state practice.

69. Such an amendment would largely meet Mr. Edmonds' objection.

70. Mr. ŽOUREK, Special Rapporteur, accepted the amendments to paragraphs 4 and 5 suggested by Sir Gerald Fitzmaurice and the Secretary respectively.

With those amendments, the commentary to article 56 was adopted.

Commentary to article 56 a (Inviolability of the official correspondence, archives and documents of the consulate)

71. Mr. SCELLE proposed the deletion of the word "only" in the first sentence.

72. Sir Gerald FITZMAURICE proposed that in the second sentence the word "most" should be replaced by "many", and that the word "gainful" be inserted before the words "private activity". The intention was to facilitate the examination of documents for the purposes of tax inspection and therefore the condition referred to did not apply to private activities which were not of a gainful character.

73. Mr. ŽOUREK, Special Rapporteur, accepted the amendments proposed by Mr. Scelle and Sir Gerald Fitzmaurice.

With those amendments, the commentary to article 56 a was adopted.

Commentary to article 56 b (Special protection)

The commentary to article 56 b was adopted.

Commentary to article 56 c (Exemption from obligations in the matter of registration of aliens and residence and work permits)

The commentary to article 56 c was adopted.

Commentary to article 56 d (Exemption from taxation)

74. Mr. AGO proposed the insertion of the word "Nevertheless" at the beginning of the last sentence of the commentary.

75. Mr. ŽOUREK, Special Rapporteur, accepted that amendment.

With that amendment, the commentary to article 56 d was adopted.

Commentary to article 56 e (Exemption from personal services and contributions)

The commentary to article 56 e was adopted.

Commentary to article 56 f (Liability to give evidence)

76. Mr. TUNKIN proposed that the words "He may decline to attend as a witness" in the second sentence be replaced by: "He may decline to give evidence".

77. Mr. MATINE-DAFTARY said that the commentary should specify, like the commentary to article 40, that the consul should not decline to give evidence or to produce documents concerning evidence which came to his notice in his capacity as registrar of birth, marriages and deaths.

78. Mr. ŽOUREK, Special Rapporteur, accepted the amendments proposed by Mr. Tunkin and Mr. Matine-Daftary.

With those amendments, the commentary to article 56 f was adopted.

Commentary to article 56 g (Respect for the laws and regulations of the receiving State)

The commentary to article 56 g was adopted.

Commentary to article 57 (Precedence)

The commentary to article 57 was adopted.

Commentary to article 57 bis (Optional character of the institution of honorary consuls)

79. Mr. AGO proposed that the commentary should be amended to read:

"This article, taking into consideration the practice of States which do not appoint, or do not accept to receive, honorary consuls. . . ."

80. Sir Gerald FITZMAURICE supported the

amendment, with the addition of the word "those" before the word "States".

81. Mr. ŽOUREK, Special Rapporteur, accepted those amendments.

With those amendments the commentary to article 57 bis was adopted.

Commentary to article 59 (Relationship between these articles and bilateral conventions)

82. Mr. YOKOTA did not think that paragraph 3 reflected the opinions expressed in the Commission. Some members had held that the draft articles laid down fundamental principles of international law in the matter (576th meeting, para. 7); that should be made clear in the commentary.

83. Mr. YASSEEN suggested that paragraph 3 should be amended to read:

"During the discussion of this matter in the Commission, some members held that article 59 should state that the convention set forth fundamental principles of consular law, which should prevail over pre-existing bilateral agreements and from which subsequent bilateral agreements should not derogate."

84. Mr. ŽOUREK, Special Rapporteur, agreed to Mr. Yasseen's amendment to paragraph 3.

85. Mr. AGO thought it would be more logical to follow the order of the alternative texts for the article in the commentary. Accordingly, the order of paragraphs 1 and 2 should be reversed.

86. Mr. LIANG, Secretary to the Commission, thought that the allusion to amendments accepted by the Drafting Committee should be deleted from paragraph 1, since that was the only reference to the Drafting Committee in the whole commentary. With regard to paragraph 2, he did not think that the adjective "opposite" was quite accurate and suggested that it should be omitted.

87. Mr. ŽOUREK, Special Rapporteur, agreed with Mr. Ago's suggestion to reverse the order of the first two paragraphs: that would involve some consequential drafting changes.

88. He could not, however, agree with the Secretary that the ideas contained in the alternative were not opposite. Under one alternative, all earlier bilateral agreements would be maintained automatically, without any action on the part of the State, while under the other the assumption was that earlier conventions were automatically abrogated unless the parties decided to maintain them in force. Those two views were absolutely contrary to each other, both in theory and in practice. He had proposed his original text in the belief that, while it would be very desirable for States to review their whole system of consular conventions, they were hardly likely to shoulder such a heavy burden.

89. Mr. AGO observed that the Secretary's objection would in any case be covered by the

consequential changes entailed by the reversal of the order of the two paragraphs.

The commentary to article 59, as amended, was adopted.

90. Mr. AGO hoped that the Special Rapporteur would review the whole text of the commentaries carefully, since there were some passages in the commentaries to articles 35 and 36 which might need re-drafting. Moreover, the draft should be scrutinized with a view to ensuring that the non-applicability of certain articles to consular officials who were nationals of the receiving State was observed.

Appendix to be inserted in the commentary to article 4 (Consular functions)

91. Mr. ŽOUREK, Special Rapporteur, said he had drafted the appendix in pursuance of the Commission's decision (564th meeting, paras. 44 and 45) to make no recommendation at that stage on his proposed additional article. He had placed the provision in the commentary to article 4 because it related to forms of the exercise of consular functions.

92. Mr. AGO thought that the Commission's views on the powers to be granted to a consul under the additional article should be explained clearly in the commentary. Otherwise, governments might be struck by the fact that consuls were entrusted with powers very similar to those of attorneys.

93. Mr. ŽOUREK, Special Rapporteur, said that he would make it clear that the powers in question were provisional, to be exercised in the absence of the national of the sending State.

The appendix to the commentary to article 4 was adopted, on the understanding that the Special Rapporteur would amend it in the manner indicated.

94. The CHAIRMAN observed that the Commission had as yet taken no decision on paragraphs 1 to 21 of chapter II of its draft report (A/CN.4/L.92/Add.2).

Paragraphs 1 to 21 of chapter II of the draft report were adopted.

95. The CHAIRMAN, recalling that the Commission had adopted the actual text of the draft articles on consular intercourse and immunities at earlier meetings, asked the Commission to vote on chapter II of its draft report as a whole.

Chapter II of the Commission's draft report, as a whole, as amended, was adopted, subject to drafting changes.

96. The CHAIRMAN invited the Commission to vote on the report as a whole, as amended in debate.

97. Sir Gerald FITZMAURICE asked that a reservation, worded in the following terms, should be incorporated as a footnote to the report:

"Sir Gerald Fitzmaurice said that in voting in favour of the report, he must reserve his position in regard to paragraph 7 of the commentary to

article 29, since in his view the provisions of the various telecommunications conventions have no relation to the use of what is known as the diplomatic wireless."

98. The CHAIRMAN said that the reservation would be recorded.

99. Mr. ŽOUREK, Special Rapporteur, said that his vote in favour of the report should not be interpreted as a change of opinion with regard to certain matters relating to honorary consuls.

100. Mr. BARTOŠ said that his vote in favour of the report should not be held to mean that the views he had expressed in connexion with the Commission's treatment of *ad hoc* diplomacy had in any way changed.

101. Mr. TUNKIN said that, although he would vote in favour of the report, that did not mean that he abandoned his views concerning various parts of the draft that had been adopted.

The Commission's report covering the work of its twelfth session, as a whole, as amended, was adopted unanimously, subject to drafting changes.

Closure of the session

102. The CHAIRMAN thanked the Commission for the honour it had done him in electing him. The obligation to follow arguments most attentively had given him a greater opportunity than ever before to appreciate and learn from the opinions of his distinguished colleagues. The Commission had done extremely useful work in completing its drafts on consular intercourse and immunities and on *ad hoc* diplomacy. It was always encouraging at sessions of the Commission to see what fruitful and harmonious deliberations could be held, despite differences of opinion, background and nationality. It was to be hoped that the influence of that harmonious atmosphere would in time pervade other endeavours at the international level.

103. Sir Gerald FITZMAURICE observed that the Commission's successful conclusion of one of its most arduous sessions, in which it had completed over forty articles of the draft on consular intercourse and immunities, was due largely to the qualities of authority and firmness, combined with tact and courtesy, that the Chairman had shown in his leadership. The session might be described as an historic one, since the topic of consular law had been codified and developed for the first time in a broadly international body. The Commission, the United Nations and the whole world would owe the Chairman and the Special Rapporteur a great debt of gratitude.

104. Mr. GARCÍA AMADOR, Mr. MATINE-DAFTARY, Mr. SCELLE, Mr. YOKOTA, Mr. TUNKIN, Mr. PAL, Mr. YASSEEN, Mr. EDMONDS, Mr. AGO, Mr. BARTOŠ and

Mr. SANDSTRÖM associated themselves with Sir Gerald Fitzmaurice's remarks.

105. Mr. ŽOUREK said he likewise wished to thank the Chairman for the impartiality and patience with which he had guided the Commission's proceedings. He was grateful to all speakers who had expressed themselves in such kind terms concerning his contribution to the codification of the international law relating to consular intercourse and immunities. He wished to explain that, as the consideration of the articles proposed by the Drafting Committee had finished only three days before the close of the session, his time had been almost fully taken up with work in the Commission and in the Drafting Committee; as a consequence, he had been able to prepare only provisional commentaries, which he hoped to supplement at the next session. Lastly, he wished to thank the officers of the Commission and the secretariat for their assistance.

106. The CHAIRMAN thanked the members of the Commission for their kind words and expressed his gratitude to the officers of the Commission, the special rapporteurs and the secretariat.

107. Mr. BARTOŠ proposed that the Commission should send a telegram to Mr. Faris el-Khoury, one of the original members of the Commission, who had unfortunately been prevented by illness from attending the twelfth session. Mr. el-Khoury should be told that the Commission had greatly missed his wise counsel during the session and hoped that his health would soon improve.

It was so decided.

108. The CHAIRMAN declared the twelfth session of the International Law Commission closed.

The meeting rose at 12.25 p.m.

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