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Summary record of the 534th meeting

Topic:
Consular intercourse and immunities

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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. SCELLE 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 Sweden[1] 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 he 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 frustate 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 priviliged 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.