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Summary record of the 536th meeting

Topic:
Consular intercourse and immunities

Extract from the Yearbook of the International Law Commission:-
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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 1553. 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 traval 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 supranational 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 refust 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 requests ", 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 Contigous 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. SCELLE 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 aftert he 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 incomunicado 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