Summary record of the 537th meeting

Topic:
Consular intercourse and immunities

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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. BARTOS 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. Bartos' 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.
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 district, 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. Žourek'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 categoric 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, para-
graph 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 ques-
tion 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 para-
graphs 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 para-
graph 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 send-
ing State. Paragraph 1 was, therefore, too sweep-
ing, 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. ZOUREK, 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 rele-
vant 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 receiv-
ing 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 incontro-
vertible right of consuls to charge fees payable
under the national laws of the sending State, since
they might otherwise be prosecuted for perform-
ing 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 "a l'occa-
sion" 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 sug-
gested that the Drafting Committee should draw
upon the language of the French text of article 26
of the draft on diplomatic intercourse.

30. Mr. BARTOS pointed out that the Special
Rapporteur had not included in the draft the funda-
mental 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 para-
graph 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 receiv-
ing State from making the validity of that docu-
ment within its own territory subject to the pay-
ment of the fees normally levied by it for such
services. It might perhaps be useful if the Draft-
ing 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, 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. 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 article. 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 omissions.

54. Mr. BARTOŠ said that he was in general

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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 of the article in 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. Zourek 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 Committee 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