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**A/CN.4/SR.538**

# Summary record of the 538th meeting

Topic:
**Consular intercourse and immunities**

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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 in the article of the second sentence of Mr. Sandström's draft article 32.

*It was so agreed.*

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

*It was so agreed.*

The meeting rose at 1.10 p.m.

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## 538th MEETING

*Thursday, 12 May 1960, at 10 a.m.*

*Chairman:* Mr. Luis PADILLA NERVO

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### 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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

29. It would be most regrettable if the Commission's draft on consular intercourse and immunities omitted a provision expressing the duty of the receiving State to accord special protection to foreign consuls. The broad terms in which the Special Rapporteur's proposal was couched should not deter the Commission from adopting it; indeed, rules of international law often had to be expressed in general terms. There was neither the time, nor the possibility, nor in some cases even the desire, to enter into detail. A term like " special protection " was valuable precisely because it could express a great deal more than a number of detailed provisions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

" *Special protection and respect due to consuls*

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

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

ARTICLE 33 *(Personal inviolability)*

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

49. A provision laying down the personal immunity of the consul had first appeared in the Pardo Convention of 13 March 1769 (Convention between the Courts of Spain and France for the better regulation of the functions of the Consuls and Vice-Consuls of the Spanish and French Crowns in their respective ports and territories), which had stipulated that the consul could not be arrested or imprisoned except for " atrocious crimes ". That provision had been followed by others such as that of the Consular Convention of 1853 between the United States of America and France. The so-called personal immunity clause had subsequently given rise to differing interpretations.

50. Although he had attempted in his second report to trace the ways in which consular conventions and custom had gradually defined consular privileges and immunities, it was perhaps more important, in establishing the present theory and practice to examine the provisions of recent consular conventions. Article 14 of the Havana Convention of 1928 provided that consuls " shall neither be arrested not prosecuted except in the cases when they are accused of committing an act classed as a crime by local legislation ",[4] but article 17, which read " consuls are subject, in civil as well as in criminal matters, to the jurisdiction of the State where they exercise their functions " [5] seemed to weaken the provision of the earlier article. Consular inviolability was in fact subject to exceptions which were defined differently in different conventions.

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

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

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

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

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

[5] *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

70. With regard to depositions, he said that all members of the consular staff as well as the consul himself should have a right to refuse to give evidence on circumstances connected with the exercise of their official functions. Certain concessions might be made to consuls if they agreed to make depositions. To state, however, that the consul was not a compellable witness in matters not connected with the exercise of their functions would be very difficult, since it would involve depriving the courts of their powers to institute hearings and counsel for the defence of the right to cross-examine a consul. Such a provision would be all the more unjust as the conrul himself was in certain cases amenable to jurisdiction. If he could be prosecuted for a serious offence, there seemed to be no reason why he should not make a deposition in the regular way. According to Yugoslav jurists, more extensive privileges should be given to career consuls than were afforded them in the Special Rapporteur's draft and the procedure with regard to personal inviolability should be more elastic.

The meeting rose at 1 p.m.

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## 539th MEETING

*Friday, 13 May 1960, at 10 a.m.*

*Chairman:* Mr. Luis PADILLA NERVO

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

[Agenda item 2]

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

ARTICLE 33 *(Personal inviolability) (continued)* and ARTICLE 34 *(Immunity from jurisdiction)*

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

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