Document:-
A/CN.4/SR.539

Summary record of the 539th meeting

Topic:
Consular intercourse and immunities

Extract from the Yearbook of the International Law Commission:-
1960 ,vol. I

Downloaded from the web site of the International Law Commission (http://www.un.org/law/ilc/index.htm)

Copyright © United Nations

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.

539th MEETING

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

Chairman: Mr. Luis PADILLA NERVO

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

[Agenda item 2]

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

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

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

2. Mr. EDMONDS said that he agreed with the general principles expressed in the Special Rapporteur's draft articles 33 and 34, but had some doubts about the arrangement and wording. The principle was that members of the consular staff were not amenable to the jurisdiction of the judicial or administrative authorities of the receiving State except in certain instances. Logically, the general rule should be stated before the exceptions, as had been done in paragraph 1 of Mr. Sandström's text. The Special Rapporteur seemed to be using the terms " consular officials " in article 33 and " members of the consular staff " in article 34 interchangeably. If any distinction were intended, it should be stated *expressis verbis*. If no such distinction were intended, the same term should be used throughout. He agreed with Mr. Amado that legal rules should be formulated in precise terms. 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.

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

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

5. Sir Gerald FITZMAURICE thought that the Drafting Committee might well consider placing the Special Rapporteur's draft article 33 after draft article 34 — the more logical order, especially as the question of immunity from jurisdiction might arise in connexion with article 33, paragraph 1. It was not clear whether the exception stated in that paragraph would apply even to cases where the act was committed in the course of the exercise of consular functions. Such cases were unlikely, of course, but not inconceivable; for example, a consul proceeding in his car on official business might by negligent driving kill or seriously injure some person. That would normally be classed as an offence, and in such a case the question would arise whether the principle of the consul's personal inviolability would apply. The effect of the exception stated in paragraph 2 of the Special Rapporteur's draft and in paragraph 3 of Mr. Sandström's draft (despite the difference with regard to the length of the term of imprisonment) would be that a consul convicted of the class of offence so defined would not have to serve a sentence. That would be tantamount to giving consuls complete immunity from the consequences of all except the most serious criminal offences and, virtually the same kind of immunity as diplomatic agents. There might be no great objection of principle to that, but it went a great deal further than most consular conventions. Most consular conventions granted no immunity if a consular officer was convicted of a criminal offence and provided immunity only from arrest and detention pending trial. Many consular conventions provided for no exemption from serving a sentence imposed by a final judgement. Theoretically, a consul would be liable to serve a sentence, even if it was only for a term of six months. Undoubtedly that rarely happened, since, at any rate where a career consul was involved, some means would be found to enable him to be recalled. The Special Rapporteur and Mr. Sandström now proposed to qualify that practice fairly drastically and to go considerably beyond the existing practice. Paragraph 3 of the Special Rapporteur's draft also went beyond the existing practice. There might be some inconsistency between the provision stipulating that a consular official could in no event be compelled to appear before the court and that in paragraph 1, under which in certain cases a consular official might actually be placed under arrest. It would be a curious situation if a person under arrest could not be compelled to appear in court. He supported the principle set out in paragraph 4 of the Special Rapporteur's draft, but doubted if the diplomatic representative of the sending State would have to be notified in all cases. He would naturally have to be notified if the case involved the head of consular post, but where some other member of the staff of the consulate was involved, the obvious person to notify would be the head of consular post. That slight inconsistency might easily be remedied by redrafting.

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

also vague. It was not clear whether it meant the punishment prescribed in the penal code or that imposed by the court. If it meant the former, there might be aggravating or mitigating circumstances which might influence the court's judgement. The formula used in articles 14 and 16 of the Havana Convention of 20 February 1928 regarding consular agents [1] was preferable, for it established the two principles that if a consul committed an act classed as a crime by local legislation, he was liable to prosecution, and that consuls were not subject to local jurisdiction for acts done in their official character and within the scope of their authority. If the Special Rapporteur's draft were adopted as it stood, it would render the procedure of the courts of the State of residence unworkable.

7. Mr. FRANÇOIS also expressed his appreciation of the research carried out by the Special Rapporteur, but was not wholly in agreement with the result. The principle of immunity from jurisdiction in respect of acts performed in the exercise of consular functions was generally accepted. With regard to the placing of article 33 in subsection C (entitled " *Personal privileges and immunities* "), he was even more dubious than Sir Gerald Fitzmaurice. What was at issue was not really personal immunity. The Special Rapporteur himself in his commentary on article 27 in the first draft had remarked that the immunity from jurisdiction enjoyed by consular officers with regard to acts performed by them in the discharge of their functions was based on the respect due the sovereignty of the foreign State whose organs they were; [2] it was therefore not a personal immunity but an immunity attaching to every act of a sovereign State. Had the Special Rapporteur changed his view ? Or had he come to the conclusion that his earlier view was open to too many objections and had he sacrificed logic in order to meet those objections ? To accept the idea of personal immunity for acts performed in the exercise of consular functions would give rise to difficulties. In article 37, paragraph 1, of the diplomatic draft the expression " official acts " had been used; that was an apt way of qualifying the concept " acts performed in the exercise of their functions ", which was too sweeping. Thus, a traffic offence committed in the course of official functions would not itself be an official act. Mr. Bartoš had said that in many recent consular conventions the trend was towards a more liberal treatment of consuls and their assimilation to diplomatic agents. Mr. Matine-Daftary had stated that he would even prefer to give consular agents diplomatic status rather than accept the Special Rapporteur's draft. He agreed with Mr. Bartoš that a trend existed towards broadening the prerogatives of consuls, but Mr. Bartoš himself would have to admit that a reverse trend also existed. National authorities were coming increasingly to object to the number of persons claiming to enjoy diplomatic privilege especially in consequence of the growth of international organizations. The principle of immunity from jurisdiction was perhaps applicable to the head of a consular post, but the Special Rapporteur's draft seemed to extend it to all " members of the consular staff ". The Special Rapporteur had explained that the expression did not include consular employees but even consular staffs tended to be very numerous in large cities and ports. To extend the scope of immunity would add to the difficulties of the administrative authorities of the State of residence. The Special Rapporteur had rightly not asserted absolute immunity, but had postulated only relative immunity in cases where consular officials could be arrested or detained. The principle that consular officials could be prosecuted and even fined should be upheld. In practice they rarely committed very serious criminal offences, but members of consular staffs not infrequently committed traffic offences. No concession should be made in such cases. He must therefore object to the Special Rapporteur's provision that consular officials could not be compelled to appear in court in person. There was really no reason why they should not appear. At the most, they might waste a morning or an afternoon, and the exercise of consular functions would not suffer more than if they happened to be ill. Judges would find it extremely inconvenient to go to a consulate to take a deposition. The situation was quite different in the case of diplomatic agents, owing to the principle of extraterritoriality. A diplomatic agent could not be required to attend a court hearing. The dignity of the high diplomatic function could not be jeopardized. Those two principles applied with far less force to consular officials. Furthermore, proceedings in writing were not accepted in the criminal procedure of many countries. Those countries could hardly be expected to amend their code of criminal procedure simply to save a consular officer from having to spend a morning in court. For the same reason, he could not concur with Mr. Yokota's amendment requiring the judicial authority to arrange for taking depositions in writing at the consul's residence or office. Like other speakers he could not accept the Special Rapporteur's proposal in draft article 33, paragraph 1, that consular officials were not liable to arrest except *in flagrante delicto* and if the act committed constituted a criminal offence against life or personal freedom. The Special Rapporteur had selected the provision from certain consular conventions, but his choice had not, perhaps, been a happy one. It was not clear why the exception for a criminal offence against life should apply only if the consular official was caught *in flagrante delicto* and not if the act was proved subsequently. The criminal offences listed in paragraph 1 were not the only serious offences that a consular official might commit. Mr. Sandström's wording was preferable. He agreed with Sir Gerald Fitzmaurice's criticism of the Special Rapporteur's provision

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

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

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

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

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

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

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

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

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

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

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

[3] *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

35. Mr. ŽOUREK, Special Rapporteur, said that he had included the provision in question because it appeared in a number of consular conventions and because it served an eminently practical purpose.

36. A provision of that kind was particularly useful in the draft on consular intercourse because immunity from jurisdiction depended on whether the act involved was performed in the exercise of consular functions. The difficulties which might arise in connexion with that immunity were much more complex than those involved in the application of diplomatic immunity. With regard to diplomatic agents, immunity from jurisdiction applied to all acts, whether performed in the exercise of official functions or not, and therefore the only question which could arise was the much simpler one of determining whether the person concerned was entitled to diplomatic immunity or not.

37. Mr. SANDSTRÖM explained that he had not included in his amendment a provision corresponding to paragraph 2 of the Special Rapporteur's draft article 34 because he shared Sir Gerald Fitzmaurice's misgivings. The court should naturally consult the Ministry of Foreign Affairs, but it was for the court to decide whether or not the charge arose from an act committed in the course of the consul's official duties.

38. Mr. AGO also doubted the wisdom of inserting such a provision in the draft. Even under the provisions of the diplomatic draft, there were persons to whom immunity was granted only in respect of those acts performed in the course of their duties (article 36); and no provision similar to the Special Rapporteur's text of article 34, paragraph 2, had been inserted in that draft. In his view, such a provision would provoke a storm of criticism. Its practical effect would be that it would always be open to the person concerned to invoke immunity, and the matter would nearly always lead to a dispute at the diplomatic level. If the Commission were to adopt such an innovation in international law, the disadvantages would far exceed any advantages that might be gained.

39. The CHAIRMAN proposed that the first paragraph of article 34 of the Special Rapporteur's draft should be referred to the Drafting Committee.

It was so agreed.

40. Mr. FRANÇOIS agreed with Mr. Ago that paragraph 2 of the Special Rapporteur's draft article 34 constituted an undesirable innovation, and thought that it should be deleted.

41. Mr. YOKOTA thought that the position was correctly stated in paragraph 2 of article 36 of the diplomatic draft. In a well-known case which had occurred in Japan about twenty years earlier, involving a Chinese minister, the courts had decided in favour of respecting the minister's immunity; that should also be the case where a consul was concerned.

42. Mr. BARTOŠ said he would go even further than Mr. Ago. In any case in which the consul pleaded immunity the Attorney-General (procureur-général) should consult the Ministry of Foreign Affairs or the organ of the receiving State which dealt with matters of protocol; that was the practice in most countries, including Yugoslavia. When acquainted with the results of that enquiry, the courts must nevertheless have freedom to define their competence, subject of course to the terms of a duly ratified international convention between the two States. He cited the Castiglioni case which, after judicial proceedings, had finally been settled by negotiation. It showed that, even though the question whether or not an act performed by a consul as part of his official functions was one covered by immunity might be determined by the courts of the receiving State, and even though their decision might be in the negative yet, in the last resort, it was possible to settle the matter by negotiations between the two governments. In general he did not think that the interpretation of consular immunities and privileges should form the subject of diplomatic negotiation unless such negotiation finally became unavoidable. Compulsory arbitration was of course a possible method, but it was not the generally accepted practice, and in any case reference to arbitration or to the International Court of Justice was costly and cumbersome, and he did not believe that the Commission in drafting a multilateral convention would wish to recommend that procedure to States as a way of settling everyday matters involving the privileges and immunities of consuls.

43. Mr. ERIM said that attention had been drawn to article 21 of the Harvard Draft on the legal position and functions of consuls. Under that article, for the purpose of determining whether a consul was exempt from the local jurisdiction in respect of any particular act, the authorities of the receiving State decided whether the act in question had been performed in the course of official duty. Such a provision was particularly relevant to countries in which the separation of powers (executive and judicial) was strictly observed. The courts were jealous of their prerogatives, and in his country, for instance, the judiciary would not accept a provision such as that embodied in paragraph 2 of article 34 of the Special Rapporteur's draft. The interpretation of consular immunities and privileges should be left to the courts of the receiving State; there could always be an appeal and finally, if necessary, a recourse to diplomatic negotiations. He thought the Drafting Committee should be asked to devise a form of words on the lines of article 21 of the Harvard Draft.

44. Mr. AMADO said that article 21 of the Harvard Draft only referred to a consul who was no longer in office. He drew attention to the Swiss practice under which consular officials, though not eligible to immunity from jurisdiction as of right, were not brought into court until after the authorities responsible for protocol had had an opportunity of expressing their opinion.

45. Mr. BARTOŠ remarked that the position in the United States of America was similar.

46. Mr. ŽOUREK, Special Rapporteur, explained that he had included paragraph 2 in his draft article 34 because he had thought that it would provide a practical way of cutting short any dispute which might arise about immunity from jurisdiction. Possibly the provision did not actually reflect the prevailing general practice, but it was nevertheless to be found in a number of consular conventions. He agreed with Mr. Amado that before proceedings were instituted against a consul the court should first consult the Ministry of Foreign Affairs or the authority in the receiving State responsible for protocol and the interpretation of international conventions. His object in drafting paragraph 2 of article 34 had been to find some way of forestalling disputes over consular privileges and immunities.

47. The CHAIRMAN asked the Commission to decide by a vote whether paragraph 2 of article 34 of the Special Rapporteur's draft should be retained and referred to the Drafting Committee.

By 11 votes to 2, with 3 abstentions, it was decided not to retain paragraph 2.

48. Mr. BARTOŠ proposed that the commentary on article 34 should mention the proposal which the Special Rapporteur had made in paragraph 2.

49. The CHAIRMAN felt sure it would be agreed that the proposal should be mentioned in the commentary.

50. Mr. ERIM said that the deletion of paragraph 2 of article 34 of the Special Rapporteur's draft left a vacuum. Who was to settle the question whether an act which was the subject of a court case fell within the consul's official functions ?

51. Sir Gerald FITZMAURICE said that in his view disputes concerning the interpretation of the scope of consular immunity to jurisdiction would be settled in much the same way as other disputes concerning consular functions (e.g., visits to nationals in prison). The diplomatic draft envisaged arbitration or a recourse to the International

Court of Justice. In the last resort, disputes concerning consular immunities would probably be settled in like manner.

52. Mr. PAL did not feel that the Commission's rejection of paragraph 2 of article 34 would cause any difficulty. The courts of the receiving State must in the first instance decide their own competence; for that purpose they would also be competent to reach their own decision as to the basic facts.

53. Mr. SCELLE agreed with Sir Gerald Fitzmaurice and Mr. Pal, but thought that a special article might be drafted to cover any difficulty that might arise.

54. The CHAIRMAN asked the Commission to discuss any further points arising out of paragraph 4 of the Special Rapporteur's draft article 33. He personally felt that if a consular official was arrested the receiving State should inform the head of the consular mission rather than the diplomatic mission.

55. Mr. ŽOUREK, Special Rapporteur, agreed with the Chairman, and thought that the draft of the article could be referred to the Drafting Committee.

56. Mr. SANDSTRÖM reiterated his objections to paragraph 3 of the Special Rapporteur's draft article 33.

57. Sir Gerald FITZMAURICE thought there were a number of matters of substance on which the Drafting Committee would need guidance. For instance, he still felt considerable doubt whether the provision contained in the last sentence of paragraph 3, which required the judicial authority to visit the consul in his residence for the purpose of taking a deposition, was practical.

58. Mr. YOKOTA, speaking as Chairman of the Drafting Committee, said the Committee certainly needed some guidance. At its last meeting it had had to refer back to the Commission a question which seemed to be one of principle.

59. The CHAIRMAN drew attention to the fact that there were two alternative amendments to paragraph 3 of article 33, namely those of Mr. Yokota and Mr. Sandström.

60. Mr. ŽOUREK, Special Rapporteur, said that it had been asked for what reason the consul should enjoy special privileges if he were called upon to appear in court. A consul was, after all, the representative of a foreign country; newspaper publicity, for instance, might damage his reputation before the case was heard, and the incident might easily become a matter affecting international relations. He was prepared to follow Mr. Tunkin's suggestion and to insert a provision in the article to the effect that a consul must be answerable to the courts, but he was convinced of the need for laying down some special procedure.

61. Mr. BARTOŠ said that all members of the consular staff who were the subject of judicial proceedings should be treated in the same way as the head of a consular post: the privileges which they enjoyed were not granted to them in a personal capacity but as a result of the office they held.

62. Sir Gerald FITZMAURICE doubted whether the Special Rapporteur could cite a single example in a consular convention of a provision of the kind he had proposed in paragraph 3 of article 33.

63. In many countries a consul, like any other person accused on a criminal charge, must be brought into court and, if he gave evidence, could be cross-examined. In England, where criminal trial was usually by jury, it would scarcely be practical to transport the whole jury to the consul's residence. The real choice seemed to be between complete immunity from arrest, or compliance with the normal procedure of the local courts.

64. Mr. AGO emphasized the fact that, while it might be possible to conceive of consular immunity from the obligation to appear before the court in a case where the consul enjoyed immunity from detention, it was certainly not possible to do so in a case where he had already been arrested. Even where the consul was at liberty during criminal proceedings which had been instituted against him, it was inadvisable to treat him as if he were a witness in a case in which he was not the accused but had merely been requested to give evidence. When criminal proceedings had been brought against a consul, it was going too far to ask the local authorities to go to his residence to take down a statement. He thought the matter could be solved by a more flexible formula, which might give expression to the principle that special care should be taken to avoid interference with a consul's work or with the exercise of his functions.

65. Mr. AMADO suggested that, to cover the case of the consul as witness in civil proceedings, the Commission's draft might follow article 22 of the Harvard Draft.

66. Mr. BARTOŠ reiterated his view that, whatever the wording used, all consular staff, irrespective of rank, should be treated as being on the same footing by the courts of the receiving State.

67. The CHAIRMAN, summing up the discussion, said that it seemed to him there were three points on which the Commission should take a decision. Firstly there was the question, on which Mr. Tunkin and the Special Rapporteur were now agreed, whether consuls should be obliged to appear in court. Secondly there was the question how and where they were to give their evidence. Finally, there was the proposal that when a consul was asked to appear in court interference with his official functions should be avoided.

68. Mr. ŽOUREK, Special Rapporteur, said that he would prepare a more general form of words for article 33, paragraph 3.

69. The CHAIRMAN welcomed the Special Rapporteur's offer, and hoped that he would take

into account the problem which Sir Gerald Fitzmaurice thought would arise if the local authorities were obliged to go to the consul's residence to take his statement of evidence.

The meeting rose at 1 p.m.

540th MEETING

Monday, 16 May 1960, at 3.55 p.m.

Chairman: Mr. Luis PADILLA NERVO

Filling of casual vacancy in the Commission (article 11 of the Statutes) [*continued*] *

[Agenda item 1]

1. The CHAIRMAN announced that the members of the Commission, meeting in private, had elected two persons to fill the vacancies caused by the appointment of Mr. Ricardo J. Alfaro to the International Court of Justice and by the resignation of Mr. Thanat Khoman. The new members were Mr. Eduardo Jiménez de Aréchaga of Uruguay and Mr. Mustafa Kamil Yasseen of Iraq. The Secretariat would communicate the results of the elections to the persons concerned.

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

[Agenda item 2]

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

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

2. The CHAIRMAN, inviting the Commission to resume its consideration of article 33, paragraph 3, of the Special Rapporteur's draft (A/CN.4/L.86), referred to three points that had been raised in connexion with the evidence of consular officials against whom criminal proceeding were instituted. Mr. Tunkin had suggested (539th meeting, paragraph 16) that the obligation to appear before a court should be expressly stated. Some members had opposed the provision that the judicial authority requiring a consular official's deposition should take such deposition at the latter's residence or office. Lastly, Mr. Yokota had proposed an amendment (538th meeting, paragraph 64) stressing the desirability of avoiding interference with the performance of the consular official's duties.

3. Mr. ŽOUREK, Special Rapporteur, suggested tentatively that the paragraph should be replaced by the following text, which might be submitted to the Drafting Committee :

" In the event of criminal proceedings being instituted against a consular official of the sending State, that official shall appear before the court or before the administrative authorities. Nevertheless, the proceedings shall be conducted, except in the cases referred to in paragraph 1 of this article, with the respect due to the sending State and in a manner which will not hamper the exercise of consular functions."

4. Mr. SANDSTRÖM said that the " except " clause in the Special Rapporteur's tentative text was not satisfactory. Surely, the respect due to the sending State should be observed in all circumstances.

5. Mr. ŽOUREK, Special Rapporteur, said that he could not quite see how it would be possible to establish a distinction where detention was concerned. Ste thought the Drafting Committee would be able to draft a text acceptable to Mr. Sandström.

6. Mr. VERDROSS said that cases might occur where the sending State dismissed one of its consular officials owing to the nature of the offence he had committed.

7. Mr. AGO observed that in such cases the official concerned would be treated as an ordinary individual.

8. Mr. BARTOŠ agreed with Mr. Ago and thought that the draft fully covered the case referred to by Mr. Verdross.

9. The CHAIRMAN said that the tentative draft suggested by the Special Rapporteur and the opinions on paragraph 3 expressed in the Commission would be forwarded to the Drafting Committee.

10. Turning to paragraph 1, he recalled that Mr. Sandström had submitted a proposal (537th meeting, paragraph 41). Moreover, at the previous meeting (539th meeting, paragraph 5), Sir Gerald Fitzmaurice had questioned whether the provision also applied in cases where an offence was committed by the consular official while engaged on official business. Also at the previous meeting (*ibid.*, paragraph 6), Mr. Matine-Daftary had criticized the passage " the act committed constitutes a criminal offence against life or personal freedom ", on the ground that consular officials might be liable to arrest or detention in the case of other criminal offences as well.

11. He invited members to comment on the principle raised in paragraph 1.

12. Mr. FRANÇOIS said he objected to the whole system set forth in the paragraph. In the first place, the provision seemed to imply that a consular official could be arrested in any case where he was taken *in flagrante delicto*, which had clearly not been the Special Rapporteur's intention. Naturally, an arrest should not be possible for minor offences. Secondly, the provision should not be limited to cases where a consular official was taken *in flagrante delicto,* for it was conceivable that conclusive evidence might be found, some time later, that the consular official had com-

* Resumed from the 527th meeting.