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Summary record of the 541st meeting

Topic:
Consular intercourse and immunities

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however slight. His sole object was to confine arrest and detention pending trial to particularly serious cases and to ensure that a consul was not compelled to serve a prison sentence when the offence involved was a minor one. If and when a consul was sentenced under a final judgment, he would have to serve his sentence like any other person, provided that the offence was one punishable by a term of imprisonment of a length which had still to be determined.

50. The CHAIRMAN suggested that paragraphs 1 and 2 of article 33 be referred to the Drafting Committee with the following general indications: the majority of the members had expressed the opinion that the notion of the gravity of the crime should be one of the main criteria; on the other hand, the explanations furnished by Mr. Amado and Mr. Scelle with regard to the expression *in flagrante delicto* and detention pending trial made it possible to consider both notions in the wording of article 33; it had been agreed that the decision to be taken with regard to the gravity of the criminal offence must be made by the judicial authority. The Drafting Committee's text would, of course, be by no means final, since the Commission would examine it and would subsequently receive comments from governments. The suggestion made by Mr. Matine-Daftary might perhaps be discussed separately.

51. Mr. YOKOTA objected that the Drafting Committee would simply have to go over the same arguments as the Commission unless the latter decided whether the expression " caught *in flagrante delicto* " was to be retained or not.

52. The CHAIRMAN replied that the explanations given by some members seemed to weigh in favour of its retention. Whatever the Commission's text might provide, the practice of arresting overt offenders would undoubtedly continue in real life, since the police was responsible for protecting public order. He proposed that article 33 be referred to the Drafting Committee with the indications he had outlined.

It was so agreed.

The meeting rose at 6.20 p.m.

541st MEETING

Tuesday, 17 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]

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

ARTICLE 40 *(Attendance as witnesses in courts of law and before the administrative authorities)*

1. Mr. ŽOUREK, Special Rapporteur, introducing article 40, said that paragraph 1 expressed an accepted principle of international law. The fact that members of the consular staff were obliged to attend as witnesses, either in civil or in criminal proceedings, was stated in virtually all consular conventions. In his view, the same rule applied to attendance before administrative authorities.

2. The next two paragraphs of the article dealt with the application of the principle stated in paragraph 1. The provisions of those paragraphs were based on those of a number of consular conventions and proceeded from the general idea that the evidence of the consular official or employee concerned should be taken in a manner consistent with the respect due to him and so as not to hinder the exercise of his official duties.

3. The rules governing the point in the conventions could be classified into four broad groups. In the first were the rules similar to article 7 of the 1928 Consular Convention between Belgium and Poland of 12 June 1928: [1] a consular official or employee was treated practically in the same manner as any other witness, except that the judicial authority requesting him to appear was not allowed to threaten him with penalties in the event of non-appearance. Provision was usually made for the possibility of postponing the consular officer's deposition on grounds of health or urgent official duties, but that provision was no more than the application of a general rule to the specific case of consuls.

4. The second group consisted of rules giving the consular officer the choice between appearing in person and having his evidence taken at the consulate or at his residence. His proposal for article 40 followed those precedents.

5. In the third or intermediate group of rules, the consular officer, if unable to appear, was allowed to make a deposition in writing. Some consular conventions added that a written deposition could be made in those cases only where it was permissible under the laws of the receiving State. A variant of that rule provided that the court would take all necessary steps to avoid interference with the performance of the official duties of the consular officer and, in the case of a head of consular post, would arrange for the taking of his testimony at the consulate.

6. A fourth or mixed rule, which was that of article 15 of the Havana Convention of 1928 [2] drew a distinction between civil and criminal cases. Personal attendance by a consular officer as a witness was compulsory in criminal cases, and the only requirement was that he should be treated " with all possible consideration to consular dignity and to the duties of the consular office ". In civil cases, on the other hand, provision was made for the taking of evidence at the residence or office of the consular officer concerned.

7. He thought that the Commission could adopt any of those solutions, except the first, which

[1] League of Nations *Treaty Series*, vol. CXXIII (1931-1932), No. 2803, p. 31.

[2] *Ibid.*, vol. CLV (1934-1935), No. 3582, p. 299.

gave no genuine advantage of any kind to consular officers, and the fourth; the distinction drawn in the latter was due to the special features which characterized judicial procedure in the American countries.

8. Paragraph 4 of his draft article 40 expressed a principle which was contained in various forms in most consular conventions. Some of those conventions also stated that a consul was entitled to refuse to give expert evidence as to the law of the sending State.

9. With regard to the persons entitled to the benefit of paragraph 4, he said that he had considered it inadvisable to exclude consular employees, on the grounds that all members of the consular staff should be exempted from any obligation to give evidence concerning circumstances connected with the exercise of their functions.

10. In the commentary to article 40, he proposed to cite the conventions which embodied the principles expressed in its various paragraphs.

11. He suggested that the Commission should take a decision on three main points. First, the obligation of the head of the post and members of the consular staff to attend as witnesses in the courts and before the administrative authorities. Second, the question of giving those persons a special treatment when they gave evidence. Third, the right to decline to give evidence and to produce correspondence in the cases set forth in article 40, paragraph 4.

12. Mr. EDMONDS said that the provisions of article 40 were much too broad. The article should only cover consular officials; consular employees should not have the right to decline to give evidence.

13. A much more serious matter was the failure of the article to distinguish between civil and criminal cases. Provisions of that kind had led to considerable embarrassment in the United States of America, for under American law the defendant was always entitled to be confronted with the witnesses against him. For that reason, the United States of America had made it a practice not to enter into any convention which exempted a person from the duty to attend as a witness at the trial of a criminal case.

14. He preferred the terms of article 22 of the Harvard Draft,[3] which exempted a consul from attendance as a witness in civil cases only. He did not, of course, insist that the exact language of that provision be used, but he urged that the principle which it expressed should be adopted.

15. Mr. SANDSTRÖM said that there was general agreement on the principle contained in paragraph 4 of the Special Rapporteur's draft article 40, which was also laid down in the first sentence of paragraph 2 of his own proposal (537th meeting, paragraph 41).

16. As was clear from his (Mr. Sandström's) proposal, he did not approve of the Special Rapporteur's rules regarding the duty of members of the consular staff to give evidence as witnesses. It was sufficient to state that the authorities concerned should refrain from taking any coercive measures against the consular officer and that any difficulties which arose should be settled through the diplomatic channel. He drew attention in that connexion to the Commission's decision not to exempt consular officers from attendance in court if they were prosecuted for acts performed outside their functions, and he suggested that they should be under a like duty to attend if summoned as witnesses.

17. Mr. AGO said that, on the understanding that the words " administrative authorities " meant administrative tribunals (as other administrative authorities could not summon witnesses), he was in agreement with the principle of article 40.

18. After reflexion, he agreed that the provisions of paragraphs 2 and 3 should apply also to consular employees. In the circumstances contemplated by those paragraphs those employees were treated by most consular conventions in the same manner as consular officials. The provisions of the two paragraphs in question were, however, too detailed and too rigid and he thought that a more flexible formula, in more general terms, would be preferable. The receiving State should have some latitude, so long as the object of those provisions was achieved.

19. Commenting on paragraph 4, he suggested that the first sentence should be amended to read : " Members of the consular staff are entitled to decline to give evidence . . . " *(ont le droit de se refuser à déposer)*. The second sentence appeared to him completely unnecessary. Most consular conventions were content to state the right of members of the consular staff to decline to give evidence in the cases envisaged; it was quite obvious that the authorities of the receiving State could not take any coercive measures against a member of the consular staff who exercised that right. Nor was it necessary to specify that all difficulties must be settled solely through the diplomatic channel.

20. Sir Gerald FITZMAURICE said that he was inclined to agree with Mr. Ago's remarks concerning paragraph 4. He had no positive objection to the second sentence, but, while the first part of that sentence might be useful, the second part dealing with settlement of difficulties through the diplomatic channel was quite unnecessary.

21. He wished, however, to suggest that in the first sentence of paragraph 4 the words " on the grounds of professional or State secrecy " should be deleted. It was not necessary to specify the grounds on which a member of the consular staff could decline to give evidence. Besides, professional or State secrecy might not be the only grounds for

[3] Harvard Law School, *Research in International Law. (II) The Legal Position and Functions of Consuls* (Cambridge, Mass., Harvard Law School, 1932), p. 341.

such refusal; very often the inviolability of the consular archives or correspondence would be the reason for the refusal.

22. With regard to paragraph 2 and 3, he said he shared to a large extent the views of Mr. Edmonds. The provisions of those paragraphs were much too complex and were not altogether consistent with the principle laid down in paragraph 1 (liability of the consular staff to attend as witnesses), a principle which in itself was quite satisfactory. For example, paragraph 2 appeared to give a consular official or employee the choice between having his evidence taken at the consulate or at his residence, and appearing in person before the court. Paragraph 3 did not state whether the court could request the consular officer concerned to attend in court if the circumstances of the case justified his attendance. Under many systems of law the personal attendance of a witness before the court was considered essential.

23. For his part, he did not think that any distinction should be made between civil and criminal cases in the matter of the attendance of consuls as witnesses. In defamation cases, for example, which were civil cases, it was just as important as in any criminal case that the court should see the witness, so that his demeanour could be studied and so that he could be examined and cross-examined by counsel.

24. Accordingly, he suggested that the Commission should draw upon the language used in a large number of consular conventions and redraft the provisions of paragraphs 1, 2 and 3 to the effect that members of the consular staff were liable to attend as witnesses in the courts; but every possible consideration would be shown to them by the courts and, so far as possible, evidence would be taken at their residence or office.

25. Mr. PAL said that he fully agreed with the principle underlying article 40 and was prepared to accept paragraph 1 of that article, subject to the understanding mentioned by Mr. Ago — *viz.*, that the expression " administrative authorities " meant administrative tribunals or administrative authorities expressly empowered to function as a court for the purpose of taking evidence.

26. With regard to paragraph 4, he agreed with the views expressed by Mr. Ago and Sir Gerald Fitzmaurice concerning the second sentence. As to the first sentence, he preferred a draft along the lines of article 12, paragraph 5, of the 1952 Consular Convention between the United Kingdom and Sweden.[4]

27. He agreed that paragraphs 2 and 3 were too detailed. The means employed by a court to avoid interfering with consular functions should be left for the court to decide. For example, a court might well decide to issue a commission to take evidence at the consulate, just as it did in the case of a witness who was ill or was exempted from attending court because he was a high dignitary.

28. Accordingly, he thought that paragraphs 2 and 3 might be replaced by a provision along the lines of article 13, paragraph 3, of the Consular Convention between the United Kingdom and Sweden.

29. Mr. YOKOTA agreed with previous speakers that the last sentence of paragraph 4, or at least the final phrase of that sentence, should be omitted. The provision was similar to that of the Special Rapporteur's article 34, paragraph 2, which the Commission had decided to omit; accordingly, the consensus seemed to be that that kind of provision should not be included in the draft. Turning to paragraphs 2 and 3, he proposed that they should be replaced by the following provision :

" 2. In the case of a consular official or employee who is not a national of the receiving State, the judicial or administrative authority requiring his testimony 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 testimony, orally or in writing, at his residence or office."

30. The detailed procedure should be arranged between the parties concerned; his amendment had, he thought, the merit of being simpler and more general than the Special Rapporteur's paragraphs 2 and 3. The amendment was based on similar provisions in several international instruments, such as the Consular Convention between the United States of America and Costa Rica (article II, 3), the Consular Convention between the United Kingdom and Sweden (article 13, 3) and the draft Consular Convention between Japan and the United States of America.

31. Mr. MATINE-DAFTARY agreed with Mr. Ago that consular officials were liable to attend as witnesses in the courts, not before the administrative authorities. Secondly, he considered that, for the purpose of the consul's liability to attend as witness, civil and criminal cases could not be treated on a par. In criminal cases, evidence should be given in the actual presence of the jury. Thirdly, he agreed with Mr. Pal and Mr. Yokota that paragraphs 2 and 3 should be combined, though he considered that there should be some provision concerning observance by the consular official or employee of the time-limit prescribed by the authority concerned. In any case, the decision whether the consul was to be heard in court or elsewhere must lie with the judicial authorities.

32. His main criticism, however, related to paragraph 4. Not all the functions of a consular official or employee were in fact governmental. While he might act as a State representative in commercial activities, his functions as a registrar of births, marriages and deaths and as a notary public did not involve State secrets. Accordingly, a distinction should be drawn between a consular official's right to decline to give evidence in any case that might involve disclosure of State secrets and that official's position in cases where his evidence was

[4] United Nations *Treaty Series*, vol. 202 (1954-1955), No. 2731, p. 172.

required in matters dealt with by him as registrar or notary public.

33. Mr. ŽOUREK, Special Rapporteur, referring to the question concerning the expression " administrative authorities " raised by Mr. Ago, said that a member of the consular staff might be asked to testify not only in court but also in matters governed by administrative law. Administrative matters were undoubtedly within the jurisdiction of the receiving State. He suggested that the meaning of the expression might be interpreted in the commentary.

34. Mr. BARTOŠ thought that the reference to administrative authorities should be retained in paragraph 1. In support of that view, he cited the useful administrative procedure introduced in Austria after the First World War and subsequently adopted by several other countries, including Yugoslavia, for the purpose of protecting the rights of the individual vis-à-vis the administration. Under that system, the administrative tribunals, although not vested with full judicial competence, had been given power to deal with acts committed by public servants, who were under an obligation to observe a procedure which provided safeguards for the rights of the individual. Disputes at law, however, remained within the competence of the ordinary courts.

35. With regard to paragraph 2, he agreed with Sir Gerald Fitzmaurice and Mr. Ago that a more flexible formula should be found. Furthermore, the convenience of the consular official was not the only factor to be taken into consideration; the nature of the evidence mattered too. According to the circulmstances, it was for the judge or the jury to decide whether the consular official should appear in person or not; nor should the interests of the other party in the proceedings be ignored. Nearly all modern consular conventions did not give the consular official full freedom to decide whether he should make his deposition at the consulate or his residence or in the court. The courts of the receiving State usually extended all due courtesy to the consular official; in most cases he was merely asked to give a deposition in writing. It therefore seemed inadvisable to lay undue stress on the consular official's option to appear in person.

36. While the principle contained in paragraph 4 was correct, it was perhaps inaccurate to say that difficulties of that kind must be settled solely through the diplomatic channel. In practice, such difficulties could often be resolved at a lower level, so long as no disclosure of professional or state secrets was involved in the giving of evidence. Furthermore, so far as some of their functions were concerned (even those not involving access to state secrets) consular officials were in much the same position as other public officials, whose disclosure of anything that came to their knowledge in the course of official business was governed by certain rules. The procedure then was for the court to inquire from the government concerned, through the channels of judicial assistance or failing that through the diplomatic channel, whether the official in question was exempt from the duty of testifying.

37. Mr. FRANÇOIS considered that paragraph 2 of the Special Rapporteur's draft article 40 went much too far, for in effect it left it to the consular official himself to decide whether his evidence was to be taken at the consulate or at his residence or whether to appear in person. As Mr. Edmonds had pointed out, oral evidence taken outside the court was inadmissible under the law of some countries. The Special Rapporteur might cite many consular conventions in support of the provision, but those precedents merely meant that States whose law allowed evidence to be taken outside the court could embody such a provision in bilateral conventions; the Commission could not expect all States to accept the provision, and if it were included in the draft some States would be obliged either to abstain from signing the resulting convention or to change their whole system. Mr. Yokota's proposal (see paragraph 29 above) represented the furthest point to which the Commission could go. It was essential to provide that the final decision concerning the giving of evidence rested with the judicial authority, not with the consular official himself.

38. Mr. TUNKIN thought that the Commission was agreed on the principle that should be embodied in paragraph 1. The best course would be to use the broadest possible language, covering evidence both before administrative authorities and in court. The principle of liability to attend as a witness once stated, the question arose whether coercive measures could be used to compel members of the consular staff to attend as witnesses. The principle that with respect to consular officials no such coercive measures were admissible, which was laid down in many recent consular conventions, should also be stated in paragraph 1. If the official did not wish to attend as a witness, the matter could be dealt with through the diplomatic channel.

39. Paragraphs 2, 3 and 4 provided for exceptions to the rule laid down in paragraph 1. He believed that the right of members of the consular staff to decline to give evidence concerning circumstances connected with the exercise of their official functions was entirely acceptable. On the other hand, the exceptions stated in paragraphs 2 and 3 seemed to be unduly technical. In that connexion, he agreed in principle with Sir Gerald Fitzmaurice, Mr. Bartoš and Mr. François. The two paragraphs might be combined, and Mr. Yokota's text could be used, with an addition to the effect that testimony might be taken at the consulate or at the residence of the consular official, if the taking of evidence in that way was permissible under the municipal law of the receiving State. Finally, if the principle that the consul was not a compellable witness was accepted, it would apply to the article as a whole, and the second sentence of paragraph 4 would become redundant.

40. Mr. SCELLE thought the consensus of the Commission was that the article should be considerably simplified and that it was not satisfactory in its present form. He could not agree with Mr. Tunkin that nothing could be done if a consular official declined to give evidence, and believed that such an official must testify in person, particularly in criminal cases. A consular official's duty was not only to protect the nationals of the sending State but, as a liaison official, to collaborate with the receiving State; he was not necessarily an individual acting as defending counsel, especially in criminal cases.

41. He could not agree with Mr. Bartoš that administrative and judicial proceedings were comparable. At an earlier stage in French law, administrative jurisdiction had been vested in ministers acting in a judicial capacity; but the changes that had since taken place in French law were, in his opinion, progressive. He would prefer the reference to administrative authorities to be deleted from paragraph 1, since in some countries there was a danger that undue stress on administrative authority might lead to something resembling police jurisdiction. He considered, furthermore, that the reference to State secrecy should be omitted, for it was an anachronistic concept; whereas the staff of diplomatic missions might conceivably have access to State secrets that could not be divulged, he took the view that consular officials could not decline to give evidence unless their testimony would disclose some private secrets of persons under their protection.

42. He believed that the corresponding provision (article 22) of the Harvard Draft, which was in much more general terms, should be taken as a model and that the Drafting Committee now had enough data to formulate a satisfactory text of the article under discussion.

43. Mr. VERDROSS did not think that a reference either to the courts alone or to the administrative authorities alone would suffice in paragraph 1. Under the Austrian system, the courts and the administrative authorities were on a comparable footing in that both had the duty to apply the law; both, too, had similar rules of procedure. The only difference between them was that the judiciary was independent whereas the administrative authorities were answerable to ministries; but an administrative decision was challengeable in the final instance in an administrative tribunal.

44. He therefore suggested that both courts and administrative authorities should be mentioned, but should not be confused, in order to allay the fear that consular officials might be obliged to give evidence before a political organ. The phrase might read along the following lines : " administrative authorities whose procedures are similar to judicial procedures ".

45. Mr. AGO agreed that it was possible to find an acceptable formula for paragraph 1 which would cover all possibilities. The important point, however, was not so much to cover all the possible proceedings in which the consul might be obliged to attend as witness as to safeguard his position. The danger lay in making a general reference to administrative authorities, since that might lead to a situation incompatible with the dignity of the consular official and with the performance of consular functions.

46. Mr. EDMONDS said that there were many administrative tribunals and bodies in the United States which had the right to hear and determine controversies by decisions having the force of judgement. Thus, a multitude of persons or bodies might be included under the expression " administrative authorities ". In the interests of precision, the Committee might follow Mr. Verdross's suggestion and limit the expression to bodies entitled to hear and determine controversies. The difficulty had been avoided in article 22 of the Harvard Draft by differentiating clearly the consular official's liability to attend in civil cases from his liability to attend in criminal cases. In his opinion, paragraph 1 as drafted by the Special Rapporteur meant that members of the consular staff should provide evidence in the trial of any case. However, that wording left open the exact status of the persons to be exempted. He did not believe that the provision should be extended to all the persons employed in the consulate : if the Commission held the same view, that should be stated *expressis verbis* in the draft.

47. Mr. ŽOUREK, Special Rapporteur, said that the Drafting Committee might well consider Mr. Verdross's suggestion that a fuller explanation be given of the phrase " administrative authorities ". It might also consider Mr. Tunkin's suggestion that it should be stated that no coercion could be used to compel members of the consular staff to give testimony; that was a rule of customary law. He had inserted a provision to that effect in his first draft of the consular articles,[5] but had made it implicit in the second draft since it was more detailed. In any case, if the Commission accepted the deletion of the final phrase in paragraph 4 or the proposed amalgamation of paragraphs 2 and 3 and drafted those two paragraphs in more general terms, that rule, which was found in many consular conventions and in general practice, would have to be stated *expressis verbis*.

48. Sir Gerald FITZMAURICE's objection that paragraphs 2 and 3 contradicted the principle stated in paragraph 1 was not well founded, since paragraphs 2 and 3 simply laid down the procedure for taking depositions from members of the consular staff when they were unable to attend as witnesses in the courts. A provision whereby members of the consular staff could give evidence without being obliged to appear in person before the court could not be held to interfere with the course of justice. In nearly all countries the codes of procedure provided for cases in which the per-

[5] *Yearbook of the International Law Commission, 1957*, vol. II (United Nations publication, Sales No. 1957.V.5, vol. II), p. 101.

sonal appearance of witnesses was not essential; instances were to be found in such procedures as commissions rogatoires and the despatch of juges délégués.

49. With regard to paragraph 4, he said the Commission had agreed that members of the consular staff could decline to give evidence on circumstances connected with the exercise of their functions. He would have no objection to deleting the stated reasons : " on the grounds of professional or state secrecy "; but he doubted the wisdom of deleting the last sentence, as cases might arise where a judicial authority insisted that a member of the consular staff give evidence which in that person's opinion would amount to evidence concerning circumstances connected with the exercise of his functions. The sentence could be deleted only if the rule that there must be no coercion was expressly stated; otherwise the member of the consular staff might become liable to a fine or other penalty for declining to give evidence.

50. The Drafting Committee might well consider Mr. Yokota's proposal for a shorter form of words to replace paragraphs 2 and 3.

51. With regard to Mr. Edmonds's point about what persons should enjoy the privilege in question, he could only repeat what he had said when introducing the article, namely, that they would include the chief of post, the consular officials and the employees of the consulate, since there was no reason to make an exception for any of them. All the modern consular conventions covered all the members of the consular staff in that respect, notably that between the Soviet Union and Hungary of 1957 and that between the United Kingdom and Sweden of 1952.

52. Since most members of the Commission had now expressed their opinion and a consensus had been reached on the main principles, he thought article 40 might be sent to the Drafting Committee.

53. Replying to Mr. Matine-Daftary, he explained that to draw the requisite distinction between declining to give evidence on the grounds of State secrecy and consenting to do so when the consular official was acting as registrar would hardly be possible in the body of the article itself, which should be a concise statement of the rule of law and left no room for the statement of such exceptions. In both instances the member of the consular staff would be acting in his official capacity. Nevertheless it was hardly likely that he would refuse to give evidence in matters arising out of the registration of births, marriages and deaths. Mr. Matine-Daftary's point might, however, be referred to in the commentary.

54. Mr. AMADO said that he was sure that the draft article was now ripe for reference to the Drafting Committee.

55. The CHAIRMAN observed that the three points on which the Special Rapporteur had requested the Commission's views had been completely settled. It had been established that members of the consular staff were liable to attend as witnesses. It had been established that in certain cases consular officials and employees had the right to decline to make certain depositions, as stated in the first half of paragraph 4. It had been established that consular officials ought to enjoy certain courtesies in keeping with their status and position. The Drafting Committee should consider the possibilities, already accepted by the Special Rapporteur, of amalgamating paragraphs 2 and 3 in a single provision drafted in more general terms. It should also consider how the phrase " administrative authorities " in paragraph 1 should be interpreted. Attention should also be paid to the point raised by Mr. Edmonds as to what members of the consulate were liable to attend as witnesses before the administrative authorities. In that connexion he would cite article 22 of the Harvard Draft. The Drafting Committee should likewise consider the desirability of including a provision stating that no coercive measures could be taken against consular officials who declined to make depositions, since it had been argued that such a provision might be unnecessary, as it was a logical consequence of the right of members of the consular staff to decline to give evidence on circumstances connected with the exercise of their functions; that principle might perhaps be stated in connexion with the general principle set forth in paragraph 1. The members of the Commission seemed to be agreed that the phrase " on the grounds of professional or State secrecy " in paragraph 4 should be omitted. The Drafting Committee should also bear in mind that the Special Rapporteur would embody in the commentary the point made by Mr. Matine-Daftary about the distinction between acts performed by the consul as a registrar and his acts performed in the name of the sending State. Lastly, the Drafting Committee might examine the placing of draft article 40 in relation to draft articles 33 and 34. With those indications, he proposed that article 40 should now be referred to the Drafting Committee.

It was so agreed.

ARTICLE 35 *(Exemption from obligations in the matter of registration of aliens and residence permits)*

56. Mr. ŽOUREK, Special Rapporteur, introducing article 35, said that the laws and regulations of almost all countries required both nationals and foreigners to register with the authorities and many countries required residence permits. Many countries exempted members of the consular staff who were aliens from those obligations, but required that their names be notified to the Ministry of Foreign Affairs, which issued a special identity card to such persons. Provisions similar to article 35 appeared in many consular conventions, such as the 1924 Convention between Italy and Yugoslavia and the 1929 Convention between Hungary and Italy. There were similar provisions in national laws and regulations, such as Argentine Decree No. 4660 of 18 March 1953 and Peruvian Decree No. 69 of 18 February 1954, which provided for consular identity booklets for career officers and their wives and identity cards for

other members of their families, honorary staff and their wives and for administrative employees and members of their immediate families. Since the Commission had already accepted the principle in article 21 *(Notification of arrival and departure)*, it would be only logical to exempt the persons mentioned in that article from registration and residence permits.

57. The phrase " subject to reciprocity " was used in many bilateral consular conventions. It would be useful psychologically, but it also had a legal significance inasmuch as it implied that the State of residence might refuse the privilege to nationals of States which did not grant it without thereby violating the convention which the Commission was engaged in drafting. The result would be that the article would come to exist on its own. If a reciprocity clause were not included in the Commission's draft of article 35, the implication might be that it intended the receiving State to be obliged to accord exemption from registration in all cases while the other State would not be under a corresponding obligation and would be free not to accord the exemption. If, however, the Commission decided that the clause was undesirable, he would be willing to delete it, but as it might be required in other articles, such as those on exemption from taxation (article 37) and exemption from customs duties (article 38), it might well be retained, at least provisionally. The objection that no provision similar to article 35 appeared in the diplomatic articles was irrelevant, since diplomatic agents were completely immune from the jurisdiction of the State of residence, whereas consuls were subject to that jurisdiction in so far as they were not released from it by virtue of a provision in an international convention.

58. Mr. AGO supported the principle stated in draft article 35, even though it was rather more liberal than that to be found in certain consular conventions. He also agreed with the Special Rapporteur that the absence of a similar article in the diplomatic draft articles was no reason why article 35 should not appear in the consular draft. The reciprocity clause should, however, be deleted. Its effect would be to destroy the article's mandatory character and to leave each State free to do as it pleased. If the Commission really agreed that consular staff should enjoy the benefit of the prerogative intended to be conferred by article 35 and that the duty to register as aliens and to obtain residence permits was incompatible with the consular status, it should lay down a firm rule to that effect.

59. Mr. YOKOTA said that he could support article 35 in principle, but doubted whether the phrase " provided that their names have been notified to the Ministry of Foreign Affairs of the receiving State or to the office designated by that Ministry " was really appropriate. Naturally the names of members of the consular staff, members of their families and their private staff would have to be notified to the receiving State so that it would know that they were exempted from registration, but they should not be deprived of that prerogative, perhaps by an oversight or accident on the part of the consular employee whose duty it was to make the notification in question. What really mattered was whether the person concerned was in fact a member of the consular staff; if so, the prerogative should be accorded automatically. The same point had been discussed in connexion with a similar article proposed for the diplomatic draft, particularly whether the notification of the names of the members of the diplomatic mission was the *sine qua non* of their right to diplomatic privileges and immunities, and in connexion with the question of the diplomatic list. The Commission had then decided that both notification and the diplomatic list were desirable, but that neither should be regarded as a *sine qua non*, as had been clearly stated in the commentaries to diplomatic article 9 and article 36, paragraph 13. Either, therefore, the proviso should be deleted or else the article should be split into two sentences, the first sentence ending with the words " residence permits " and the next beginning with " Their names should be notified . . . "

60. Mr. FRANÇOIS agreed with Mr. Ago's remarks concerning the reciprocity clause, which should be deleted as unnecessary; if it was retained in article 35, it would have to be inserted in several other articles. He also agreed with Mr. Yokota that the draft article might be divided into two separate sentences, as two separate obligations were involved. The statement of the second obligation was, however, superfluous in article 35 because it had already been adopted in article 21. He asked why the Special Rapporteur had included the qualification " if they are not nationals of the receiving State " in article 35 and in certain other articles, since the general principle was stated in article 42 *(Members of the consular staff who are nationals of the receiving State)*.

61. Mr. ERIM agreed that, from the legal point of view, reciprocity would be ensured by the very acceptance of the convention. The reciprocity clause was therefore unnecessary, and, in fact, if retained, would annul the mandatory force of the article.

62. Mr. BARTOŠ agreed with previous speakers that the reciprocity clause was unnecessary, since the Commission was drafting a convention on the status of consuls and it was therefore self-evident that that status would be respected by all signatories. Nor did he think it was necessary to retain the phrase " if they are not nationals of the receiving State " for the position of consular staff who were nationals of that State would be dealt with in another article.

63. In almost all consular conventions the State of residence was obliged to issue to members of the consular staff who were not nationals of the receiving State special identity cards certifying that they were members of the consular corps. The private staff could not, however, be exempted from complying with all the regulations of the

receiving State of residence. A reference should therefore be included in the commentary to the fact that receiving States were bound to issue the identity cards, but that the cards themselves conferred no special privileges other than that of being exempted from the requirement to obtain residence permits and that all privileges and immunities enjoyed by consular staff derived from the notification that they were members of the consular corps. In several countries, and especially in France, the authorities declined to issue such an identity card to a person whom they considered *non grata*. That was something of an innovation, which the Drafting Committee might well consider, although no clause covering it need necessarily be included in the article itself.

64. Mr. AMADO observed that the reciprocity clause might be essential in bilateral conventions, but made no sense in a multilateral convention. In his opinion, the draft article was ready for reference to the Drafting Committee.

65. Mr. TUNKIN was generally in agreement with the previous speakers. He asked the Special Rapporteur why he had omitted the words " who formed part of their households ", which appeared in similar provisions of the diplomatic draft, such as article 31, and he thought the phrase " their private staff " was too comprehensive.

66. Mr. ŽOUREK, Special Rapporteur, explained that he by no means insisted on the retention of the reciprocity clause, but did not agree that it was unnecessary, for it would enable parties to the convention to avoid going as far as the draft article without violating the terms of the convention. It would thus have some psychological value.

67. Mr. Yokota's criticism of the final phrase, based on the parallel with the diplomatic list, was not pertinent. The privileges and immunities of diplomatic missions were *ipso facto* recognized and could not, therefore, depend on notification, whereas in the case of consular officials, the Commission was establishing a rule on that particular point which might not yet have been accepted by all States. The authorities of the receiving State had to know who were the members of the consular staff, and only if their names had been notified to the Ministry of Foreign Affairs would the latter be exempt from registration. He would, however, have no objection to placing the proviso in the commentary.

68. Mr. FRANÇOIS had correctly pointed out that the position of members of the consular staff who were nationals of the receiving State was dealt with in draft article 42, but it was not yet known whether that draft article would be accepted. Such points might be cleared up later when all the articles were before the Commission.

69. In reply to Mr. Tunkin he said he had not used the phrase " who formed part of their households " in article 35 because he had believed that a broader term might be preferable. Not inconceivably, even a relation of one of the members of the consular staff paying a private visit to him for several weeks (and hence not forming part of the official's permanent household) might be eligible for the benefit of the clause. With regard to the expression " private staff ", he said the expression meant only the private staff brought in from abroad. It would hardly be practical to exempt members of the consular staff and members of their families from registration and residence permits, but to require such private staff — who would probably be domestic servants — to obtain them. In any case, that was a point which might be reviewed by the Drafting Committee.

70. The CHAIRMAN proposed that article 35 be referred to the Drafting Committee, on the understanding that, whatever the final wording, it would state the principle that members of the consular staff, members of their families and their private staff would be exempt from all obligations under local legislation in the matter of registration of aliens and residence permits. The Drafting Committee might consider adding a second clause, to the effect that the names of such staff should be notified to the Ministry of Foreign Affairs of the receiving State, though the Committee should, for that purpose, take into account the terms of article 21. The general consensus was that the phrase " if they are not nationals of the receiving State " should be deleted, since the draft convention would include a general article covering the position of consular staff who were nationals of the receiving State. By general agreement, and without objection on the part of the Special Rapporteur, the reciprocity clause would be dropped, though the commentary might possibly refer to the question of reciprocity.

It was so agreed.

The meeting rose at 1.15 p.m.

542nd MEETING

Wednesday, 18 May 1960, at 9.15 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 36 *(Exemption from social security legislation)*

1. Mr. ŽOUREK, Special Rapporteur, introducing article 36, explained that it followed very closely article 31 of the draft articles on diplomatic intercourse and immunities and had been included in another form as article 31 in his first