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Summary record of the 545th meeting

Topic:
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their juridical value in the codification of international law, was a draft supplementary protocol to the Convention on Territorial Asylum of 1954, a draft convention on extradition, and, above all, a complete draft convention on human rights, consisting of eighty-eight articles, that was being sent to the Council of the Organization of American States for submission to the Eleventh Inter-American Conference (*ibid.*, paragraphs 23 and 24).

53. The Inter-American Council of Jurists was also discussed the question of collaboration with the International Law Commission and had affirmed the necessity of continuing such collaboration (*ibid.*, paragraph 159).

54. The attendance at meetings of the Commission of Mr. Gómez Robledo, a member of the Inter-American Juridical Committee, some days previously had been a welcome token of such continuous collaboration in the interests of the codification and progressive development of international law.

55. Sir Gerald FITZMAURICE thanked the Secretary for his informative report. He did not wish to comment on its substance but he thought the Inter-American Council of Jurists was to be congratulated on some very interesting work.

56. The CHAIRMAN said that the Commission would certainly welcome the reaffirmation of the Council's desire for continued collaboration and would have studied the report, and especially the draft resolutions, with the greatest interest. He proposed that the Commission should take note with satisfaction of the Secretary's report on the proceedings of the Fourth Meeting of the Inter-American Council of Jurists (A/CN.4/124).

It was so agreed.

The meeting rose at 12.30 p.m.

545th MEETING

Monday, 23 May 1960, at 3 p.m.

Chairman : Mr. Luis PADILLA NERVO

Welcome to new member

1. The CHAIRMAN, on behalf of the Commission, welcomed Mr. Mustafa Kamil Yasseen, who had been elected to fill a casual vacancy.

2. Mr. YASSEEN thanked the Chairman for his welcome. He said that the cause of peace was best served by respect for international and municipal law, but the law must be well grounded. To collaborate in making international law, as the International Law Commission was doing, was a discreet but effective contribution to the cause of peace. He appreciated the honour conferred on him by his election to membership of the Commission, but appreciated no less the difficulties and complexities of the task. He hoped to merit the Commission's confidence.

3. Mr. MATINE-DAFTARY said that he was glad to associate himself with the Chairman in welcoming Mr. Yasseen, particularly as Mr. Yasseen came from a country neighbouring on Iran.

Expression of sympathy on the occasion of the natural disaster in Chile

4. Mr. MATINE-DAFTARY said that he wished to express, especially to all the Latin American members of the Commission, his sympathy with them on the occasion of the recent natural disaster in Chile.

5. The CHAIRMAN expressed his appreciation on behalf of the Latin American members of the Commission for that expression of sympathy.

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 25 (*Inviolability of consular premises*) (*continued*) *

6. Mr. BARTOŠ observed that some of his remarks at the 530th meeting (paragraph 7) had been recorded in an unduly condensed form, which might give rise to misinterpretation. At that meeting, he had advocated the principle that inviolability should be accorded to consular premises only if no activities other than consular activities were carried on on such premises, and the Commission had decided to include a clause to that effect in the draft articles. In that connexion he had cited on the one hand the practice followed by the USSR and other countries which in some instances carried on activities of a non-consular nature — such as the operations of the headquarters of a trade mission — in premises which were normally those of a consulate, and on the other hand the similar practice followed by Western countries, which installed information offices, travel agencies, libraries, reading rooms, permanent displays, etc. in their consulates. He had not intended in any way to criticize the use of those premises for such purposes, especially since it had not been due to any fault of the USSR but, in the case of his country, had in most instances been caused by the lack of available separate accommodation. All that he had asked was that the rule of inviolability should not apply to premises so used. The USSR had, in fact, asked for separate premises for its trade mission in Yugoslavia. He had certainly not meant to imply that the USSR's practices were in any way

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* Resumed from the 530th meeting.

contrary to international law. Mr. Tunkin had pointed out to him that there was no consular convention between Yugoslavia and the USSR regulating that particular matter; actually, a convention had been concluded in 1940 on the status of trade missions, under which the consular premises received immunity, while the premises of the trade mission were recognized as falling under Yugoslav jurisdiction.

ARTICLE 47 *(Jurisdiction of the receiving State)*

7. Mr. ŽOUREK, Special Rapporteur, said that, as the Commission had emphasized on several occasions, one of the main distinctions between diplomatic and consular agents was that, with certain exceptions diplomatic agents enjoyed complete immunity from the jurisdiction of the receiving State, whereas consular officers were amenable to its jurisdiction, except for acts performed in the exercise of consular functions. He had thought that the rule should be enunciated in the draft on consular intercourse and immunities, since it was a rule of customary law, appeared in several consular conventions and was set forth in article 17 of the Havana Convention, amongst others. Even consular conventions which did not state the rule *expressis verbis* often contained provisions under which consular officials were exempted from jurisdiction for acts performed in the exercise of consular functions; it followed that they did not enjoy exemption in respect of any other acts. The principle was expressly stated in the consular conventions between the USSR and Albania of 1957 (article 7) and the USSR and Austria of 1959 (article 7), and in several other consular conventions. The recent series of consular conventions concluded by the United Kingdom contained provisions on similar lines, exempting the consul from the local jurisdiction in respect of acts performed in the exercise of consular functions. The consular draft would be incomplete if the basic rule stated in article 47 were omitted.

8. It should be noted that the phrase " members of the consular staff " was intended to mean all members of the consulate, including the head of post and his subordinate officials, and that a more appropriate expression would be used when the Commission had completed the definitions in draft article 1.

9. Mr. AGO agreed with the Special Rapporteur that consular officials were not exempt from the jurisdiction of the State of residence, except for acts performed in the exercise of consular functions. That had been stated extremely clearly in article 34, which was based on consular conventions defining the cases where immunity from jurisdiction was granted. Thus, it was self-evident that all other acts performed by consuls were not exempt from jurisdiction. Accordingly, article 47 was, superfluous and the best solution therefore would be to delete it.

10. In any case there was a considerable difference between stating that consular officers were " not exempt " from jurisdiction and that they were " amenable " (soumis) to jurisdiction. For instance, a consular officer who committed a criminal offence in his own country would, like any other private person, normally be amenable to the criminal jurisdiction of his own country, not to that of the State of residence. Similarly, there were many cases in which a consular officer, although not enjoying any special immunity, would, in the same way as any one else, not be amenable to the civil jurisdiction of the country of residence. At all events the expression used in article 47 should amended.

11. Sir Gerald FITZMAURICE agreed with Mr. Ago. If article 34 had not been included, article 47 would have been required; but to include both of them was unnecessary. The Special Rapporteur had incorrectly cited the recent United Kingdom Consular Conventions in support of his argument for the inclusion of article 47. They were based on the system used in article 34, not that used in article 47. The position was absolutely clear. All aliens in a country were automatically subject to the local law unless they possessed some title to exemption, as diplomatic agents did and, within limits, consular officers. It followed, therefore, that except in so far as they were specifically exempt, they would be automatically subject to the jurisdiction of the State of residence. To include article 47 might indeed be dangerous, for it might suggest that some positive statement was necessary to cause aliens to be subject to the local jurisdiction. Mr. Ago had rightly suggested that the article be deleted.

12. Mr. LIANG, Secretary to the Commission, thought that articles 47 and 48 should not, perhaps, have been placed in section III *(Conduct of the consulate and of the consular staff towards the receiving State)* of the Draft.

13. The article as drafted seemed to indicate that if a consul committed a criminal offence, the receiving State had a duty to see that he was prosecuted in the courts of that State. In practice, however, that was not always true, since consuls who committed such offences were frequently returned to the sending State on the assurance that under the law of the sending State the act charged was a punishable offence. That had often been done by mutual arrangement between the States concerned, in order to avoid publicity and strained relations. The wording of draft article 47 was perhaps too categorical and should be toned down.

14. Mr. SCELLE supported the views expressep by Mr. Ago and Sir Gerald Fitzmaurice. Draft article 47 duplicated article 34, and its wording was unacceptable. As career consuls, at any rate, were rarely nationals of the receiving State the word " amenable " (soumis) was far too strong; " passibles " would be a better term.

15. Mr. AMADO said that the previous speakers

had expressed precisely what he himself had had in mind. He doubted whether the word *assujettis* in the French version of article 17 of the Havana Convention, or even the English word " subject ", correctly rendered the original intention.

16. Mr. ŽOUREK, Special Rapporteur, observed that the arguments advanced in support of the deletion of article 47 in fact spoke strongly for its retention. It was not enough to say in article 34 that members of the consular staff should not be amenable to jurisdiction in respect of acts performed in the exercise of their functions; that article was silent on the subject of other acts performed by them. Article 47 dealt positively with that subject, which had been discussed at length in the literature.

17. Although it was true, as Sir Gerald Fitzmaurice had said, that ordinary aliens were subject to local jurisdiction, unless expressly exempted, a consul was not an ordinary alien, but the representative of a State. If the Commission's definition of the legal status of consular officers was to be complete, article 47 would be required. The Havana Convention covered both aspects in separate articles, articles 16 and 17. If article 47 were deleted, there would be a gap in the consular draft.

18. He did not agree with the Secretary that the wording of article 47 might be construed as an obligation on the State of residence to see that a consul was prosecuted for a criminal offence committed in that State, for the judicial authorities had great latitude and frequently preferred to refrain from prosecution if diplomatic or international officials were concerned. The article could be interpreted only in the light of the acknowledged rules of international criminal law, which, save in exceptional cases, did not accept the idea that a crime committed in one country might be prosecuted in another.

19. Mr. MATINE-DAFTARY thought that, so long as article 34 stood as drafted, article 47 should likewise stand. If, however, the Drafting Committee revised article 34 so as to provide that consuls were not amenable to the local jurisdiction, subject to an exception concerning acts not performed in the exercise of their functions, then article 47 could be dispensed with.

20. Referring to a point raised by Mr. Ago, he said that the case of a criminal offence committed by the consul in the sending State was hardly relevant in the context. So far as civil proceedings were concerned, however, he said that the consul was not immune to suit brought by a fellow-national in the receiving State.

21. Mr. AGO thought that it was necessary to avoid confusing the idea that a consul might be subject to local law with the idea that he might be subject to local jurisdiction. The Commission had already agreed in connexion with article 46 that a consular officer when not exercising consular functions was on the same footing as an ordinary alien in the country of residence and hence was subject to the local law. He was not, however, in all cases amenable to the local criminal or civil jurisdiction. As he (Mr. Ago) had already stated, if an alien committed a crime in his home country, he was normally amenable to his own country's jurisdiction, but not to that of a foreign country. Similarly, if proceedings were instituted with respect to some immovable property he held in his own country, the case would be amenable to the jurisdiction of that country. To state that members of the consular staff should be amenable to the jurisdiction of the State in which they exercised their function would open the way to very dangerous interpretations. The correct phrase should be " are not exempt from the jurisdiction ". There was, however, no need at all to retain article 47. If necessary, the idea which it contained could perhaps be introduced as an addition to article 34.

22. Mr. VERDROSS agreed with Mr. Ago. Either article 47 should be deleted and the point that consuls did not enjoy exemption from jurisdiction for their private acts should perhaps be made in the commentary, or, if it were retained, the article might be supplemented by some such phrase as: " if jurisdiction in respect of such acts normally vests in that State under the rules governing conflicts of jurisdiction."

23. Sir Gerald FITZMAURICE observed that the Special Rapporteur had argued that the draft would be incomplete without article 47. If that argument were valid, it would be necessary to insert a great many more articles, because every time an exemption was stated, an article would have to be inserted providing that the exemption did not apply to acts which were not performed in the exercise of consular functions. That, however, was not the method which the Commission had adopted. For example, in article 33, which provided for immunity from arrest and detention, the Commission had not gone on to state that a consular official would not be immune from arrest or detention in all cases other than those specified; that followed automatically.

24. The Special Rapporteur had explained that ordinary aliens were always amenable to the local jurisdiction, but had claimed that consuls were not amenable to the jurisdictions because they were representatives of States. That argument seemed to postulate that in general representatives of States enjoyed some basic immunity; actually, only diplomatic agents had such immunity. Heads of trade missions, who might well be senior officials or even ministers in their own country, enjoyed no immunity unless special exemption was arranged by mutual agreement between the States concerned. Consular officials might be representatives of governments, but they enjoyed no basic general immunity except by virtue of the general rules of international law or under treaty. If they enjoyed exemption from jurisdiction in certain specified cases, it followed that they did not enjoy it in any other cases, but were in those

other cases in exactly the same position as any other alien. To retain article 47 would be dangerous, because it might suggest that aliens in a special position enjoyed some special form of immunity.

25. Mr. TUNKIN agreed in principle with Mr. Ago that article 47 should be deleted, but thought that the danger inherent in its retention had been exaggerated. Under international law aliens were amenable to the jurisdiction of the State of residence. There could be no danger in stating so. The addition suggested by Mr. Verdross was implicit in the text as drafted by the Special Rapporteur and was similar to the provision in article 17 of the Havana Convention. The omission of article 47 would not leave a gap. A similar provision appeared in certain conventions concluded by the U.S.S.R., but was absent in others. The absence of an article of that kind in a consular convention simply meant that, apart from the specified cases in which consular officials were declared exempt from jurisdiction, they did not enjoy it in any other. It was immaterial, therefore, whether article 47 was retained or deleted.

26. Mr. PAL did not agree with the Special Rapporteur that the omission of article 47 would leave a gap. Unless the exemption of consuls from the local jurisdiction in certain particular cases meant that there was no exemption in all other cases, the exemption would be meaningless. The very fact that provision for exemption had been made implied that in other respects the persons exempted were subject to the jurisdiction. It would be preferable, however to state the exemption negatively: that members of the consular staff should be amenable to the jurisdiction of the receiving State except in respect of acts performed in the exercise of their functions. Mr. Verdross's suggestion was not acceptable; it would lead to many difficulties and conflicts of law, especially in civil cases.

27. Mr. HSU agreed that the article was unnecessary, although the principle which it expressed was correct. The whole consular draft was an expression of the existing trend to regard the difference between diplomatic agents and consuls as merely one of degree. Accordingly, since the diplomatic draft contained no provision along the lines of article 47, the article should be dropped.

28. Mr. ŽOUREK, Special Rapporteur, said it was obvious that in cases in which a conflict of jurisdiction arose members of the consular staff were subject to the jurisdiction of the receiving State only to the extent that the courts of that State had jurisdiction under the rules of international law governing conflict. Obviously, article 47 did not mean that a consular officer would be subject to the jurisdiction of the receiving State for an offence in respect of which the courts of that State had no jurisdiction, nor could it mean that a civil suit was entertainable against him in the courts of the receiving State in respect of matters within the jurisdiction of that State's courts under the rules of private international law.

29. In view of the importance of the principle involved, he considered it was essential to state, at some place in the draft, that members of the consular staff were amenable to the jurisdiction of the receiving State, or that they were not exempt from that jurisdiction, if the latter formula were preferred. For his part, he had no objection to the suggestion of Mr. Matine-Daftary that the principle should be expressed in an amended version of article 34 instead of in a separate article.

30. Mr. BARTOŠ said that the principle set forth in article 47 was part of positive international law but in the Special Rapporteur's draft it was expressed in far too absolute terms. Any alien could, under the rules of private international law, object in certain cases to local jurisdiction. He felt that the provision should be retained, but should be expressed by the Drafting Committee in a manner more consistent with the real position; one solution might be to redraft the article on the following lines: "Except as otherwise provided in these articles, in the relevant international agreements and by the rules of international law, the members of the consular staff shall not, by reason solely of their consular status, be exempted from the jurisdiction of the receiving State."

31. With reference to the example mentioned earlier, of a criminal offence committed by the consul in his home country, he said that the strict territoriality of criminal law, which was a feature of Anglo-Saxon law, was not so absolute elsewhere. The criminal law of a great many countries, including some very modern codes, vested jurisdiction in the national courts over criminal offences committed abroad in two types of cases: firstly, where the State concerned had a special interest in the punishment of the offence committed; and, secondly, in respect of certain crimes which were of concern to the international community. It was, therefore, not altogether accurate to suggest that national courts would never have jurisdiction to try a criminal offence committed abroad.

32. In conclusion, he suggested that article 47 should be referred to the Drafting Committee with instructions to redraft in less categorical terms and to bring those terms into line with the provisions of article 34.

33. Mr. SANDSTRÖM said that the deletion of article 47 would not leave any gap. Article 34, like many other articles of the draft, set forth an exemption, in other words an exception, for the benefit of consular officers, to a general rule. It was obvious that, outside the terms of the exemption laid down in article 34, the ordinary rules governing amenability to jurisdiction would apply.

34. Mr. ERIM said that article 47 merely stated the general principle that the laws of a country applied to aliens within its territory. However, the article, as drafted, was out of place. Nowhere else in the draft was a statement made regarding

the rights and duties of the consul as an ordinary alien. If that approach were to be adopted, the draft would have to commence with a statement of the general rights and duties of aliens and then proceed to state the exceptional rules applicable to consuls.

35. In conclusion, he thought that article 47 could not be accepted in the form proposed but he agreed that article 34 should be amended in the manner suggested by Mr. Matine-Daftary.

36. Mr. AMADO said that he could not accept the suggestion made by Mr. Matine-Daftary. The provisions of article 34, paragraph 1, were perfectly clear and therefore needed no interpretation. The statement that members of the consular staff were not amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of their functions implied, *a contrario sensu*, that, in respect of all other acts, they were amenable to that jurisdiction. There was no justification whats oever for adding a provision to state that obvious fact. Accordingly, he urged that article 47 should be purely and simply deleted.

37. Mr. YOKOTA said that he was in full agreement with the proposal to delete article 47. It had been suggested that, since an exception to the jurisdiction of the receiving State was stipulated in article 34, the general principle of such jurisdiction outside that exception should also be stated. In that connexion, he pointed out that in articles 37 and 38, certain exemptions from taxation and customs duties were laid down. Nevertheless, the Commission had not considered it necessary to state anywhere the general principle that, apart from those exceptions, consular officers were subject to taxes and customs duties normally levied by the receiving State.

38. Mr. SCELLE said that there appeared to be no disagreement among members of the Commission with regard to article 47, which could therefore be referred to the Drafting Committee. The task of that Committee was to prepare a text which did not contain conflicting provisions. As drafted, however, article 47 conflicted with article 34. The reason was, as Mr. Bartoš had said, that it laid down the jurisdiction of the receiving State in far too absolute terms. There were cases in which the receiving State would not have jurisdiction over a member of the consular staff in respect of one of his private acts.

39. Furthermore, he thought the Drafting Committee should consider the placing of articles 46, 47 and 48, and also the wording of the title of the whole section. Section III was entitled " Conduct of the Consulate and of the Consular Staff towards the Receiving State "; naturally, however, article 48 dealt with obligations of the receiving State towards the consulate and was therefore outside the scope of the title.

40. He had no objection to the principles contained in articles 46, 47 and 48 but objected to the drafting of the first two of those articles. Like article 47, article 46 was expressed in far too absolute terms. Consular officers were not always and in all circumstances obliged to respect the laws and regulations of the receiving State. If, for example, those laws and regulations conflicted with international law, it was the duty of the consular officer to take the necessary steps to raise the issue at the diplomatic level by advising his government or diplomatic representative.

41. Mr. ŽOUREK, Special Rapporteur, said that he had felt it necessary to state in explicit terms the principle contained in article 47 because that principle had on occasion been disputed in the past. He added that the Commission had at times thought it wise to state explicitly a principle which was virtually undisputed : for example, article 29, paragraph 4, of the diplomatic draft stated that the immunity of a diplomatic agent from the jurisdiction of the receiving State did not exempt him from the jurisdiction of the sending State, which was self-evident.

42. He agreed with Mr. Scelle that the subject matter of article 48 was not wholly covered by the title of the section ; but that was a drafting point and the title would have to be altered by the Drafting Committee.

43. In conclusion, he agreed that article 47 should be referred to the Drafting Committee with instructions to reconcile its terms with those of article 34, and also to consider the possibility of including its provisions in article 34.

44. The CHAIRMAN said that the question of the title of section III and of the placing of the articles could be decided at a later stage. As to article 47, he believed that all members of the Commission agreed to both the principle embodied in that article and that embodied in article 34. Most members believed that the idea contained in article 47 was also contained in article 34, but some had said that much depended on the final wording of article 34. He thought that the debate provided enough guidance to the Drafting Committee. If there were no objections, he would accordingly consider that the Commission agreed that article 47, with the comments thereon, be referred to the Drafting Committee.

It was so agreed.

ARTICLE 48 *(Obligations of the receiving State in certain special cases)*

45. Mr. ŽOUREK, Special Rapporteur, introducing article 48, said that the article laid down the obligation of the receiving State to co-operate in a positive manner with the consulate in certain cases which involved matters of great importance to the exercise of consular functions.

46. The duty expressed in article 48 (*a*) to advise the consulate of the death of one of its nationals was stated in numerous consular conventions. It was part of the consular function to represent, in all cases connected with succession, the rights and interests of the nationals of the sending State and it was therefore very important that the

consul should be notified of the death of one of its nationals. Indeed, it could be added that the authorities of the receiving State had an obligation to inform the consul not only of the death of one of its nationals, but also of the extent of the property known to have been left by him, any available information concerning the existence of a will and the names of any known heirs and legatees.

47. Article 48 (*b*) and (*c*) specified the obligations of the receiving State in two other cases, which were also frequently mentioned in consular conventions.

48. The three cases mentioned in article 48 were the more important ones, but he would not object to the addition of references of other cases in which the receiving State had an obligation to facilitate the exercise of consular functions. It was particularly important that a multilateral convention should express the duty of the receiving State to notify the consulate in good time of events which affected the exercise of consular functions, and in that way to facilitate the co-operation between the consulate and the authorities of the receiving State.

49. Mr. EDMONDS said that, in his opinion, article 48, like article 47, was not suitably placed in the draft. So far as the substance of the article was concerned, he believed that the usual practice in consular conventions was to make the provision concerning the death of a national of the sending State applicable only when there was a property interest, as was done in article 14 of the Harvard Draft. Paragraph (*a*) might be brought closer into line with that provision; otherwise, the burden placed on the authorities of the receiving State would be too heavy.

50. Mr. MATINE-DAFTARY said that, while not opposed to article 48 in principle, be throught that article 28, which provided that the receiving State should accord full facilities for the purpose of the consular functions, fully covered the three cases mentioned. If, however, the Commission wished to particularize, then article 48 might be redrafted somewhat differently. It was sometimes impossible for the receiving State to fulfil the obligations in question, for owing to imperfections in the registration system, its authorities might not be aware of the death of a national of the sending State. Similarly, by reason of organizational inadequacies, it might not be possible for the receiving State to discharge the duty laid down in paragraph (*b*); for that matter, he was not convinced that that provision had any practical use.

51. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Matine-Daftary, did not consider that article 28 covered the three cases referred to in article 48, for the scope of article 28 extended only to the consular official's request to the authorities of the receiving State for assistance.

52. In reply to Mr. Edmonds, he pointed out that the sending State should be told of the death of any of its nationals in the receiving State, not only because the death might affect the disposition of property, but also because it might affect the personal status of other nationals of the sending State. Nor did he think that the burden of the obligation imposed on the receiving State by article 48 should be exaggerated, for every death necessitated certain investigations on the part of the authorities for the purpose of determining whether the deceased had left any property, whether he had made a will and whether there were any heirs. Accordingly, with the exception of the rare case of a death occurringwithout anybody's knowledge, the authorities of the receiving State would have no difficulty in notifying deaths to the competent consulates.

53. With regard to Mr. Matine-Daftary's question concerning paragraph (*b*), he pointed out that the personal status of the national of the sending State was involved. The second variant of article 4, paragraph 6, relating to consular functions, provided that one of the consular functions was to appoint guardians or trustees, to submit nominations to courts for the office of guardian or trustee and to supervise guardianship and trusteeship. The obligation laid down in paragraph (*b*) was not so excessive and, besides, the courts of the receiving State were in any case obliged to deal with the appointment of guardians or trustees for minors or other persons lacking full capacity. The personal status of such persons who were nationals of the sending State was governed by the law of that State and, in the absence of a bilateral agreement, the consular official was in any case obliged under article 4 to supervise guardianship and trusteeship. Accordingly, the burden imposed on the receiving State by article 48 was not as heavy as it might seem.

54. Mr. VERDROSS proposed that the opening passage of article 48 should be amended to read " shall have the following obligations, among others : ". The object of the amendment was to make it clear that the enumeration in paragraphs (*a*), (*b*) and (*c*) did not exhaust the cases where the exercise of consular functions might be facilitated by the receiving State. Secondly, Mr. Matine-Daftary's point might be met by adding after the word " shall " in the opening passage the phrase " if circumstances permit ".

55. Mr. SANDSTRÖM said that he was not unduly worried about the mandatory form of the provision, for after all a State could hardly be obliged to provide assistance which overtaxed its capabilities. He would not, however, object to the additions suggested by Mr. Matine-Daftary and Mr. Verdross. The most important point seemed to be the place of the article in the draft, and he thought that it might most appropriately be inserted as a clarification of article 28. Finally, he suggested that the new provision proposed by Sir Gerald Fitzmaurice, concerning visits by consular officials to arrested nationals of the sending State, should be added to that set of provisions.

56. Mr. MATINE-DAFTARY supported Mr. Verdross's amendments. It should be remembered that not all the States acceding to a multilateral convention had reached the same degree of development. His own country would have no difficulty in undertaking the obligations in question.

57. He added that cases might occur where the nationality of a minor was in dispute between the sending State and the receiving State; in such a case a notification under paragraph (*b*) would be tantamount to recognition of nationality. That difficulty would be obviated by the adoption of Mr. Verdross's formula.

58. Mr. ERIM did not think that Mr. Verdross's second amendment adequately covered the difficulties that had been indicated. A wiser course would be to follow the example of article 14 of the Harvard Draft and article 22 (7) of the Consular Convention of 1952 between the United Kingdom and Sweden, which provided that the person whose death was to be notified to the consular official should be known to be a national of the sending State.

59. Sir Gerald FITZMAURICE said he did not believe that in practice the provisions of article 48 were likely to give rise to the difficulties anticipated by Mr. Matine-Daftary. Furthermore, Mr. Verdross's second amendment might weaken the article. Mr. Erim's point seemed to be valid; the authorities of the receiving State might have no knowledge of the death of a particular person and, if they did, they might not know that he was a national of the sending State. Under international law, no absolute obligation could be imposed on the receiving State's authorities in those circumstances. Accordingly, any qualifying phrase in article 48 should refer to the knowledge available to the authorities of the receiving State.

60. Mr. Matine-Daftary had raised the question of persons having the nationality of the sending State and also that of the receiving State. In that case, no obligation would arise, because the principle of master nationality ensured that in the case of a person having dual nationality, living in one of the countries concerned, the nationality of that country prevailed for the time being.

61. Mr. SCELLE considered that the best place for the provision of article 48 might be in article 4 *(Consular functions)*, after the enumeration contained in both variants. The provisions might be introduced by some wording based on article 28.

62. Mr. YOKOTA considered that the article should be more flexible. For example, in the case contemplated by paragraph (*b*), the question whether a person was a minor or was lacking full capacity had to be decided in accordance with the domestic law of that person's country. The provisions of municipal law concerning minority varied from country to country, and, moreover, the question of full capacity was extremely complicated. The local authorities of the receiving State could not be expected to know the domestic law of every country whose nationals might be in its territory, particularly in big cities where many aliens lived; they could therefore hardly be expected to notify the competent consulate immediately of the appointment of guardians or trustees for such persons.

63. Mr. MATINE-DAFTARY pointed out to Sir Gerald Fitzmaurice that he had not raised the question of dual nationality, but that of cases where the nationality of a person was in dispute between the sending State and the receiving State.

64. He endorsed Mr. Scelle's views concerning the placing of the article.

65. Mr. ŽOUREK, Special Rapporteur, said he could accept Mr. Verdross's first amendment. With regard to Mr. Verdross's second amendment, however, he shared the doubts expressed by Sir Gerald Fitzmaurice. The introduction of too many escape clauses would emasculate the text. Moreover, the maxim *ultra posse nemo tenetur* obviously applied: authorities which had no knowledge of the death of a national of the sending State or which did not know that a particular person was a national of that State could not be obliged to notify the competent consulate. Mr. Erim's suggestion that the obligation should be contingent on knowledge of the facts was a better way of allaying fears that an unduly great burden would be laid upon the authorities of the receiving State.

66. He could not share Mr. Yokota's misgivings concerning paragraph (*b*). In practice, authorities concerned with guardianship and trusteeship could apply to their Ministry of Justice for information concerning the domestic legislation of foreign States on the matter. The draft would not add to existing obligations in that respect. There was still less difficulty in determining whether a person lacked full capacity, and the task of the authorities of the receiving State would merely be to appoint a provisional trustee for the person concerned. If the question arose whether or not an alien could be kept in a mental institution to which he had been committed, it was surely in the interests of the receiving State itself to notify the competent consulate as soon as possible, in order to avoid bearing the maintenance costs for any length of time.

67. Mr. AMADO thought that, while Mr. Verdross's second amendment was acceptable from the point of view of the comity of nations, the provision would be sounder in law if Mr. Erim's suggestion were followed. The wording of article 22 (7) of the Anglo-Swedish Consular Convention of 1952 made it quite clear that a consular official should be notified only in cases where he had an opportunity to take action. In a country in which many aliens resided, it was impossible for the competent consular officials to keep themselves informed of the movements of all their nationals, and the receiving State should co-operate with consulates in such matters; on the other hand,

the article as drafted by the Special Rapporteur was difficult to accept owing to the fact that the obligation to provide information was made automatic.

68. The CHAIRMAN, summing up the debate, noted that Mr. Verdross's first amendment had been accepted by the Special Rapporteur. The consensus seemed to be that Mr. Verdross's second amendment tended to weaken the article and that Mr. Erim's suggestion would be preferable in that respect. Mr. Amado's reference to the Consular Convention between the United Kingdom and Sweden might find a place in the commentary, as a further explanation of the meaning of the article. The Drafting Committee might be asked to take into account the suggestions that had been made concerning the proper place of the article. He suggested that the article should be referred to the Committee with those comments.

It was so agreed.

ARTICLE 49 *(Termination of consular functions)*

69. Mr. ŽOUREK, Special Rapporteur, introducing article 49, drew attention to the fact that the termination of consular functions was treated separately from the severance of consular relations (which was the subject of article 50), for the termination of a consul's functions would not *per se* affect the consular relations between the countries concerned. The main reasons for the termination of a consul's functions were itemized in many consular conventions; for example, article 23 of the 1928 Havana Convention referred to the suspension of functions because of illness or leave of absence and to the termination of office by death, by retirement, resignation or dismissal and by the cancellation of the exequatur, and article 10 of the Harvard Draft added the rare cause of the extinction of the sending or the receiving State. The Commission might consider adding to article 49 a paragraph explaining that the causes of termination of functions mentioned, with the exception of item 4, applied to members of the consular staff as well as to consuls; alternatively, it might prefer to explain that point in the commentary.

70. Mr. VERDROSS observed that, if the article covered all the members of the consular staff, item 1 should begin with the words " Suspension or ". While the functions of the head of post were normally terminated by recall, other members of the staff might be suspended or dismissed in certain circumstances, such as their conviction of a criminal offence.

The meeting rose at 6 p.m.

546th MEETING

Tuesday, 24 May 1960, at 9.30 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 49 *(Termination of consular functions) (continued)*

1. Mr. EDMONDS said that the wording and the title of the article were not sufficiently precise. In practice, it was not so much the consul's function as his status that might be terminated for the causes mentioned in article 49. Furthermore, item 1 should be clarified by specifying that the consul's status would be terminated on the date of recall. The same applied to item 2, since many national legislations provided that a consul's resignation did not become effective until accepted by the sending State. The difficulty had been avoided in the Harvard Draft, article 10 of which provided that a person ceased to be a consul under three distinct circumstances. That provision seemed much more explicit than article 49 and far more in keeping with reality. With regard to item 4, he said that in many cases a formal exequatur was not issued; it would be more appropriate to redraft the item to read: " withdrawal of consent by the receiving State to the person's acting as consul ". The purpose of his suggested amendments was to state more exactly when a consul's duties terminated; the utmost precision was necessary in view of the commercial activities in which consuls were engaged, and the difficulties which might arise if the date on which a consul had certified a document were to be called in question.

2. Mr. YOKOTA observed that in article 1 a consul was defined as the head of post. Accordingly, article 49 dealt only with the termination of the functions of a head of post; by contrast, the article dealing with the termination of diplomatic functions in the draft concerning diplomatic intercourse (article 41) spoke of " diplomatic agents ", an expression defined as meaning not only the head of mission but also the members of the diplomatic staff. He thought that article 49 of the consular draft should be brought into line with the provision in the diplomatic draft and that it should cover other members of the consular staff, or at least consular officials.

3. Moreover, there seemed to be a serious gap in the article. Under article 20, the receiving State could request the sending State to recall a member of the consular staff who was unacceptable or to terminate his functions, and if the