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Summary record of the 548th meeting

Topic:
Consular intercourse and immunities

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of the diplomatic articles. That was quite true; but the situation was quite different, since it had been recognized for centuries that diplomatic staff enjoyed inviolability there had been no need to emphasize the rule in the diplomatic draft, whereas consular staff did not enjoy such inviolability and therefore needed a special provision enjoining respect and protection for them. He entirely agreed with the Secretary that the situations contemplated in article 32 and in article 51 were quite different.

80. Mr. Verdross had rightly raised the special case of a member of the consular staff who had been dismissed in the country of residence. He had been quite correct in maintaining that such a person no longer enjoyed consular privileges and immunities, since he no longer was a member of the consulate, nor could those immunities be revived. It might not, however, be necessary to draft a special paragraph to cover that situation; it might be referred to in the commentary.

81. The point raised by Mr. Bartoš about consular property left behind in storage might also be dealt with in the commentary.

82. Mr. AMADO strongly disagreed with Mr. Yokota. Service staff of consulates had left their native country with full faith in the guarantee that they should enjoy respect and protection; that must be secured for them.

83. The CHAIRMAN suggested that draft article 51 might be referred to the Drafting Committee.

84. Mr. BARTOŠ observed that Mr. Yokota was still in disagreement with several other members of the Commission on the point in question; the Drafting Committee could hardly reconcile two radically conflicting views. The question was whether the receiving State was bound to recognize the right of members of the service staff of a consulate to leave its territory upon the termination of the consular functions.

85. Mr. YOKOTA replied that he did not object to the clause affording such persons the right to leave the territory of the receiving State, but simply felt that it was going too far to prescribe that private servants of consular officials must be treated with special respect.

86. Mr. ERIM suggested that further discussion of draft article 51 be deferred until the next meeting.

It was so agreed.

The meeting rose at 1.20 p.m.

548th MEETING

Friday, 27 May 1960, at 9.40 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/L86) *(continued)*

ARTICLE 51 *(Right to leave the territory of the receiving State and facilitation of departure) (continued)*

1. The CHAIRMAN asked the Commission to continue its consideration of the revised text of article 51 proposed by the Special Rapporteur (547th meeting, paragraph 59).

2. Mr. SANDSTRÖM said that he agreed with Mr. François that the phrase " save as otherwise provided in the present articles" should be redrafted. The phrase " at the earliest possible moment ", from article 42 of the diplomatic draft should be added in the first sentence of draft article 51, paragraph 2.

3. It was not entirely clear whom the phrase " provided that they are not nationals of the receiving State " in paragraph 1 qualified. It should not exclude wives of members of consular staffs who were nationals of the receiving State or any of their children who were nationals of that State. The principle applicable to the facilitation of their departure was implicit in article 42 of the diplomatic draft read in conjunction with article 37 of that draft *(Diplomatic agents who are nationals of the receiving State)*.

4. After hearing the Special Rapporteur's reply (*ibid.*, paragraph 77) to the question raised by Mr. Yokota (paragraphs 66-68) with regard to the second sentence in paragraph 2, he had concluded that the Special Rapporteur had been right to include it. The situation might perhaps be made clearer by adding the phrase : " even if they do not enjoy the privileges set forth in article 32 " at the end of the paragraph.

5. Sir Gerald FITZMAURICE agreed with the principle stated in article 51, but also with the drafting points made by Mr. Sandström.

6. The case, mentioned by Mr. Verdross, in which a consular official had been discharged locally by the sending State might easily be included by careful drafting.

7. Mr. Sandström had been perfectly right in arguing that the wives and children who were nationals of the State of residence should not be excluded from the application of the article. The provisions should be as broad as possible and should cover both those who enjoyed privileges and immunities and those who did not.

8. The second sentence of paragraph 2 should be retained, for it was in a sense the raison d'être of the entire article. The explanation for the difference between article 51 of the consular draft and article 42 of the diplomatic draft was that the very nature of diplomatic privileges and immunities necessarily gave diplomatic personnel the right to leave the territory, whereas it was by no means so clear that some of the consular staff had an absolute right to leave the territory of the receiving State at the termination of the consular mission, and in practice such persons had on occasion not been treated with due respect.

9. He was not sure that the reciprocity rule should be excluded by an express provision. While he fully appreciated Mr. François' reasons for suggesting it, he doubted whether the addition of such a provision would in fact improve the position. It might rather create a situation of which any State that might be tempted to fail to fulfil the obligation laid down in article 51 at the outbreak of armed conflict would have the advantage. The only sanction available to the sending State if the receiving State failed to facilitate the prompt departure of the former's consular officials was to retaliate in kind. If the sanction were removed and if even the possibility of relying on the principle of reciprocity was denied, the article might operate in favour of a State which was willing to disregard its obligations under article 51.

10. Mr. HSU observed that Sir Gerald Fitzmaurice had placed the Commission in a dilemma. If its draft admitted the principle of reciprocity, the departure of members of consular staffs would undoubtedly be liable to delay; but if it omitted the principle, the receiving State might grasp the pretext to disregard its obligation. Since a choice had to be made, the Commission should omit all reference to the principle of reciprocity. The principle of reciprocity had been one of the means of the development of international law, but once the present stage had been reached, it was possible to pass over the principle in silence and let the absolute rule stand. If the receiving State ignored the rule, there would be many means of enforcing it, including refusal to allow members of the consular staff to depart.

11. Mr. FRANÇOIS said that Sir Gerald Fitzmaurice's point was well taken, but Mr. Hsu was right. The question of reciprocity was pertinent to almost all the provisions in the consular draft, and the whole draft would be adversely affected if the provisions were not executed by the receiving State until the sending State had done likewise. There had been instances where members of consular staffs had received all technical facilities for departure, but had been held up at the last moment because the receiving State had not been sure that the sending State had also fulfilled its obligation. The object of a provision expressly excluding the principle of reciprocity would be to ensure that the obligation was fulfilled promptly, if it was technically possible to do so.

12. Mr. ŽOUREK, Special Rapporteur, said that the case mentioned by Mr. Sandström of women nationals of the receiving State who, though married to foreign consular officials, retained their nationality was rather marginal and exceptional. It would be difficult to provide for that case in the body of an article which was to form part of a multilateral convention.

13. The Drafting Committee should bear in mind the various drafting points raised, especially the possibility of inserting the phrase "at the earliest possible moment" as suggested by Mr. Sandström. Those words would, of course, become important mainly in cases of armed conflict; in other cases, on the contrary, the departing staff would undoubtedly prefer to have the necessary time and facilities for preparing their departure (paragraph 2).

14. With regard to the principle of reciprocity, he said that he had included references to it in certain draft articles on the assumption that many States would wish it to appear, since it was to be found even in bilateral consular conventions. Even though the Commission had decided in most cases to eliminate the reference, he still felt that many governments would wish to see it restored. In the particular case in question in article 51, however, experience indicated — and the Commission should realize — the fact that States would in any case apply the principle of reciprocity in case of armed conflict.

15. Mr. MATINE - DAFTARY observed that diplomatic and consular relations were in principle based on reciprocity, but it would be dangerous to say so expressly in article 51 in so far as it related to freedom of movement. Article 51 did not deal with the severance of consular relations, but with the termination of the functions of the consular mission. It would rarely happen that both States concerned would wish to terminate their consular missions at the same time.

16. Mr. SANDSTRÖM pointed out to the Special Rapporteur that the question of members of a consular official's family who were nationals of the State of residence was not simply marginal; it was humanitarian in essence and should therefore be expressly provided for.

17. Sir Gerald FITZMAURICE agreed with Mr. Sandström. He could not see why the Special Rapporteur thought that no provision covering the point could be placed in the body of the article. The Drafting Committee would certainly find no great difficulty in drafting a suitable provision.

18. Mr. AGO shared Mr. François' concern about the principle of reciprocity and agreed that the rule in article 51 should be made absolute. For that purpose, however, it would not, he thought, be necessary to insert a special clause excluding the principle of reciprocity. Such a clause might, in fact, be dangerous, since a State might by interpretation hold that all the other articles not containing a like clause were subject to the principle of reciprocity — an interpretation which

the Commission would surely reject. In any case, the obligation provided for in article 51 stood as an absolute one, whether a clause such as that suggested by Mr. François was inserted or not. A State might, of course, as a sanction against another State's breach of international law, refuse to fulfil the obligation, but that refusal would not affect the reality and the absolute character of the obligation.

19. The Commission, by amending the original draft of the Special Rapporteur, had decided that in article 49 the breaking-off of consular relations would not be mentioned as one of the causes of the termination of consular functions. The draft of article 51, however, provided for the special obligation already mentioned, only with regard to the case of a termination of consular functions. The question might arise whether the obligation subsisted in case of a breaking-off of consular relations. The Drafting Committee which had been given considerable latitude with regard to article 49, might well ponder that point in order to find a drafting of article 51 avoiding an interpretation which would not be admissible.

20. Mr. FRANÇOIS agreed with Mr. Ago. He had been shocked by the Special Rapporteur's statement that States would be certain to apply the principle of reciprocity. All members of the Commission agreed that reciprocity should be excluded from article 51, since it dealt, not with an exchange of consular officers, but with an obligation binding on every State to allow consular officers to leave its territory. It was to be hoped that the expression of that obligation would not be weakened by such statements as that made by the Special Rapporteur.

21. Mr. ŽOUREK, Special Rapporteur, replied that his remark had not in any way related to the theory, on which he entirely agreed with Mr. François and Mr. Ago. He had simply meant that he was doubtful whether the practice would change as a result of the acceptance of article 51, since if an aggressor State had violated the most important rules of international law, it would be unlikely to have many scruples about violating the principle stated in article 51 as well. In such cases, the only way in which the victim of the agression could ensure compliance with the rule would be to apply the principle of reciprocity. Article 51 was, however, concerned in the first place with the termination of consular functions, and he quite agreed that in that case the obligation could not be made subject to reciprocity.

22. Mr. YOKOTA wished to explain a remark he had made at the previous meeting (547th meeting, paragraph 68), He had not meant to say that the receiving State was not under a duty to treat consular officials with respect, but merely that the point in time up to which they were entitled to such treatment was specified in an earlier provision (article 43, paragraph 2) and hence did not have to be specified again in article 51. He had no objection to the principle; it was merely a matter of drafting with which he was concerned.

23. The CHAIRMAN proposed that draft article 51 be referred to the Drafting Committee. No objection had been raised to Mr. Sandström's suggestion that the article should cover all members of the families of consular officers, even if they were nationals of the State of residence. The objection raised at the 547th meeting by Mr. Yokota might now be regarded as having been disposed of. The Commission seemed to be agreed that it was undesirable to embody in the text of the article a provision excluding the principle of reciprocity, and that the absence of such a provision in no way weakened the absolute character of the obligation laid down in the article.

It was so agreed.

ARTICLE 52 *(Protection of premises, archives and interests)*

24. Mr. ŽOUREK, Special Rapporteur, explained that he had thought it essential to include in the consular draft an article concerning protection of premises, archives and interests in the circumstances described in the article, since a similar article (article 43) existed in the diplomatic draft.

25. The closing of a consulate by the sending State might be an act quite distinct from the severance of consular relations. The protection of premises, archives and interests was a rule established in international law and, as in the case of diplomatic missions, it subsisted even in the case of armed conflict. The inclusion of a reference to armed conflict had been discussed at length in connexion with the diplomatic draft; the Commission had concluded that the inclusion of such a reference would be of great practical value and that the draft convention's efficacy would be greatly impaired by its absence. The principle need not be debated again.

26. Three changes had been made in article 52 as compared with the text of diplomatic article 43; first, in the case of consulates the sending State might entrust custody to the consulates or diplomatic mission of another State; secondly, if a third State was entrusted with the protection of the interests of the sending State, such protection might be exercised either by consulates or by the diplomatic mission; thirdly, he had used the expression " d'un Etat tiers accepté par " (" of a third State accepted by ") instead of the expression " d'un Etat tiers acceptable pour " (" of a third State acceptable to ") in the French text, since a study of the practice of States which had represented the interests of foreign States after the severance of diplomatic and consular relations showed that in the vast majority of cases those States secured the consent of the State in whose territory they were asked to protect foreign interests (cf. A/CN.4/131, part III, article XII, commentary). That had been notably

so in the case of Switzerland, which had protected the interests of thirty-four States during the Second World War. The consent might be express or tacit. From a practical point of view it would not make much difference whichever wording was adopted. The phrase " acceptable pour " seemed to put the onus on the protector State, since a subjective factor was involved. If the receiving State took the view that the protector State was not acceptable, it could refuse to recognize it in that capacity.

27. Mr. YOKOTA observed that there appeared to be a mistake in the English version of article 52, which used the words " acceptable to ".

28. The merits of the phrases " accepted by " and " acceptable to " had been discussed at considerable length in connexion with diplomatic article 43, and the Commission had concluded that the sending State was not obliged to approach the receiving State to ascertain whether the third State was acceptable or not. There was no good reason to treat the question of consulates differently from that of diplomatic missions in that respect.

29. Mr. FRANÇOIS concurred in Mr. Yokota's view. The ordinary practice was not to ask the opinion of the State of residence in advance. The practice of inquiring whether the protecting State would be acceptable might result in a great deal of delay which should be avoided.

30. It should be clear that sub-paragraph (*a*) did not preclude the receiving State from using the consular premises for other purposes during an armed conflict, provided that the archives remained inviolable. That question had been discussed during the drafting of diplomatic article 43. In the case of embassies or legations, the dignity of the State might be said to be at issue, but the same was not true of consular premises, especially as there was only one embassy or legation in a receiving State, but there might be many consulates (often in rented premises which the receiving State might not be able to leave empty and unused). The Special Rapporteur might add an observation in the commentary to the effect that it would not be a violation of the rule of international law if during the suspension of consular relations consular premises were used for other purposes, provided that the archives remained inviolable.

31. Mr. AGO drew attention, in the first place, to the need for a drafting change in sub-paragraph (*b*), so as to make the provision apply to " the said consulate ", namely that referred to in sub-paragraph (*a*). Normally, the custody of all the consulates of the sending State would be entrusted to the consulates or diplomatic mission of the same protecting State.

32. As to the language used in sub-paragraphs (*b*) and (*c*), he recalled that the Commission had at its tenth session (465th meeting, paragraphs 30-55), discussed at considerable length the question of replacing the words " acceptable to " (acceptable pour) by " accepted by " (accepté par), in the then article 36 of the diplomatic draft. The Commission had finally agreed to keep the words " acceptable to ", chiefly with the aim of excluding the possibility of the provision being interpreted as meaning that the receiving State's prior consent, and possibly even its express consent, was necessary for the designation of the protecting State. In that particular respect, there appeared to be no difference between the position of consulates and that of diplomatic missions and the words " acceptable to " should therefore be used in the consular draft, as in the diplomatic draft.

33. With regard to the question of the custody of the premises, he pointed out the difference which usually existed between consulates and diplomatic missions. A diplomatic mission was normally housed in a single detached building which was often the property of the sending State and the provisions of article 43 (*b*) of the diplomatic draft were easy to apply to such premises. So far as consulates were concerned the position was altogether different : the sending State might have a large number of consulates, often housed in rented premises and sometimes situated in small localities. It would be difficult to require the receiving State to leave the premises in question unoccupied during the possibly long period of the cessation of consular relations, especially if there was a housing shortage. He suggested that the Drafting Committee should consider the formulation of a text which placed the emphasis on the protection of the archives.

34. Mr. ERIM said that the provisions of sub-paragraphs (*a*), (*b*) and (*c*) contemplated the situation arising from a complete breaking-off of consular relations. However, the introductory paragraph of article 52 referred also to the case where " a consulate is closed temporarily or permanently ", in other words to a case in which consular relations as such were not necessarily broken off. Such a situation arose when, for example, a consulate was abolished on grounds of economy. The usual practice in those cases was to enlarge the consular district of the remaining consulate or consulates.

35. With regard to the duty of the receiving State under sub-paragraph (*a*) " to respect and protect the premises of the consulate, together with its property and archives ", he said those provisions should be brought into line with the terms of article 25 on the inviolability of consular premises. Clearly, the inviolability enjoyed by consular premises and archives after the severance of consular relations could not be broader in scope than that set forth in article 25.

36. Lastly, he shared the preference expressed by several members for the use of the words " acceptable to " in sub-paragraphs (*b*) and (*c*). The choice of a protecting Power when relations were broken off was often a matter of extreme urgency. The sending State frequently did not have the time to consult the receiving State on

that point. The best solution was therefore for the sending State to choose the State to which it wished to entrust the protection of its interests and the custody of its consulates; if the receiving State subsequently rejected that choice another protecting Power would of course have to be sought.

37. Mr. SCELLE recalled that in the discussion at the tenth session he had stated (*ibid.*, paragraph 45) that he regarded the word "acceptable" in French as not at all suitable. The use of that term would make the provision meaningless in French: in the correct sense of the word, all States which were neutral in the dispute between the two States concerned were "acceptable", but the real issue was whether the State chosen by the sending State as protecting Power was going to be accepted by the receiving State. It was only after the receiving State's acceptance that protection became effective, and that State was sole judge of the acceptability of the proposed protecting Power. If it refused to accept the one chosen by the sending State, that choice would have no effect. Moreover, the receiving State was not required to give any reasons for its refusal to accept the choice in question.

38. That being so, the full meaning in French would only be conveyed by an expression such as "acceptable et accepté".

39. Mr. MATINE-DAFTARY, while recognizing the force of Mr. Scelle's arguments, said that every effort should be made to keep the language of article 52 as close as possible to that of the corresponding provision of the diplomatic draft, so as to avoid any possible misconstruction.

40. Sub-paragraphs (*b*) and (*c*) referred to the question of acceptability in identical terms in the context of two different situations. The acceptance of the receiving State did not appear to be so necessary for the purpose of entrusting, as provided in sub-paragraph (*b*), the custody of the premises and archives of a consulate to a third State. The choice of a State to be entrusted with the actual protection of the sending State's interests, under sub-paragraph (*c*) was quite a different matter; here, the need for the consent of the receiving State was understandable.

41. Mr. PAL recalled that, during the lengthy discussion at the Commission's tenth session on the proposal that the words "acceptable to" should be replaced by "accepted by", Mr. Ago (*ibid.*, paragraph 51) had suggested a third solution, involving the use of some such phrase as "unless the receiving State refuses". In the end, however, the Commission had adopted the relevant article of the diplomatic draft, with the words "acceptable to" in its sub-paragraphs (*b*) and (*c*), by fifteen votes to none with one abstention (*ibid.*, paragraph 58).

42. He considered that, although the words "acceptable to" might be stylistically inelegant, particularly in the French text, the Commission should not reopen the question and should maintain in article 52 the language it had adopted for the corresponding provision of the diplomatic draft.

43. With regard to Mr. Erim's remarks concerning the relationship between article 52 and article 25 of the consular draft, he pointed out that the terms of article 25, paragraph 3, stood in the same relation to article 52 as did article 20 of the diplomatic draft to the terms of article 43 (*a*) of that draft. Since the Commission was agreed on the substance of article 52 (*a*), he suggested that it should be left to the Drafting Committee to compare the language of that provision with the terms of article 25, paragraph 3, and of articles 43 (*a*) and 20 of the diplomatic draft and arrive at a satisfactory formulation.

44. Lastly, he suggested that the Commission should consider the advisability of including in the draft a provision stating the right of the consular officers of the sending State, in the event of the closure of all or any of its consulates, to take with them their archives and official papers. He drew attention to the reference to that right contained in the First Protocol to the 1952 Consular Convention between the United Kingdom and Sweden. That reference was not a mere bilateral clause but the expression of what the two contracting Parties regarded as "principle . . . applicable to consulates and consular officers under the general law of nations in the event of war or of the rupture of diplomatic relations".[1]

45. Mr. ERIM reiterated the need to take into account the situation of extreme urgency which often arose when relations were broken. There had been cases during the Second World War when only a few hours had been available in which to find a consulate to which the keys of their premises could be entrusted by the consular officers of the sending State who were abruptly called upon to cease their functions. He therefore insisted on the need to formulate the provisions of article 52 in such a manner as not to make it necessary to obtain the consent of the receiving State for the purpose of entrusting the consular premises and archives to a third State in case of urgency. If the receiving State found the choice objectionable, it could later negotiate for a change in the protecting Power.

46. The CHAIRMAN, speaking as a member of the Commission, agreed with Mr. Scelle that the word "acceptable" was unsuitable. He thought that many of the difficulties to which article 52 had given rise were due to the fact that, like article 51, the article covered three different situations — *viz.*, armed conflict; severance of consular relations, whether or not in consequence of the severance of diplomatic relations; and temporary or permanent closure of a consulate in the absence of any conflict or rupture of consular relations.

47. Where a consulate was closed temporarily

[1] United Nations *Treaty Series*, vol. 202 (1954-1955), No. 2731, p. 204.

or permanently, the choice of a protecting Power would normally form the subject of negotiations at the time when the sending State notified the receiving State of its intention to close its consulate. That practice would not change, even if there was no express provision on the subject in the draft.

48. In the event of the breaking-off of consular relations, the practice was for the sending State to entrust the custody of its consulate to a third State of its choice; when that State notified the receiving State of its designation, the receiving State had an opportunity to object.

49. For those reasons, he thought that the whole article might be made clearer if the three cases to which he had referred were kept separate.

50. Mr. ŽOUREK, Special Rapporteur, referring to Mr. Pal's remarks, said that where a consulate was closed, the sending State had obviously the right to remove the archives and official papers of the consulate. Sometimes, however, it was difficult for the sending State to do so and occasionally, as in the case of a temporary closure, such a removal was unnecessary. It was therefore much more practical to entrust the archives to the consulate of a third State.

51. With regard to the question raised by Mr. François and Mr. Ago on the subject of the utilization of the consular premises after the closure of the consulate, he said that where the premises in question were the property of the sending State he saw no reason why those premises should not be protected by the receiving State in the same manner as those of a diplomatic mission in the case of severance of diplomatic relations. If the consulate concerned, on the other hand, occupied rented premises, the protecting Power would have the choice between continuing to pay the rent (in which case the premises would receive the same treatment as those of the consulate of the protecting Power) and giving up the lease and storing the property and archives of the sending State in a safe place.

52. In reply to Mr. Matine-Daftary he said that the receiving State might well, for political reasons, object to the choice of a particular State either as the Power entrusted with the protection of the sending State's interests or as the custodian of the premises of the consulate. Accordingly, the language of sub-paragraph (*b*) could hardly be very different from that of sub-paragraph (*c*).

53. With reference to Mr. Erim's earlier comments (see paragraph 35 above) he said that draft article 52 was certainly not meant to give the premises of a closed consulate an inviolability greater than that conferred by article 25 on a consulate which was functioning. He thought that the Drafting Committee would take the relationship between the two articles into account; an explanation would be given in the commentary.

54. Lastly, with regard to the question raised by Mr. Pal, he said that under article 59 of the consular draft, the provisions of article 52, or of any other article of the draft, were not intended to affect existing conventions.

55. Mr. PAL said that the passage he had quoted from the First Protocol of the 1952 Consular Convention between the United Kingdom and Sweden had been intended by the parties not as a clause in a bilateral treaty but as an expression of their opinion regarding the principles applicable to consulates under the general law of nations. He therefore urged the Special Rapporteur to mention in the draft the right of the sending State to remove the archives of a consulate which had been closed.

56. Mr. SCELLE said that nothing in the draft articles prevented the sending State from removing the archives in such a case. He suggested that the matter might be dealt with by inserting a comment to the effect that, wherever possible, the sending State could remove the archives if it so desired.

57. Mr. ERIM said the draft should cover the case where a consulate was closed by a sending State which continued to maintain a diplomatic mission, and possibly also other consulates, in the receiving State. It was not appropriate to use in article 52 the same terms as in article 43 of the diplomatic draft. If a diplomatic mission was recalled, even temporarily, diplomatic relations were severed or at least suspended. If a consulate was closed and diplomatic relations (possibly also consular relations) subsisted between the two States concerned, the sending State did not need to entrust the protection of its interests to a third State. Its own diplomatic mission and other consulates would remain to protect those interests.

58. Mr. BARTOŠ supported Mr. Pal's proposal for the inclusion of a provision concerning the right to remove the archives and said that the proposed provision should also refer to the restitution of archives. Many States, including Yugoslavia, had requested the return of archives which had been seized as enemy property during the Second World War and had met with a refusal. He suggested that the provision in question should contain a reference to the duty of the receiving State to hand over the archives, as far as possible, to the State concerned.

59. The point raised by Mr. Erim was also of considerable practical importance. He recalled that when the Netherlands had closed its consulates in Bulgaria, the consular archives had been transferred to the Netherlands diplomatic mission at Sofia. More recently, when a number of United Kingdom consulates had been closed for reasons of economy, nowhere had the right been disputed to transfer the consular archives to other United Kingdom consulates or to remove them to the United Kingdom.

60. He felt certain that, with regard to substance, the Special Rapporteur was in agreement with him and that only the drafting of suitable provisions remained to be settled.

61. Mr. MATINE-DAFTARY said that he was not fully satisfied by the Special Rapporteur's reply to his remark and could not agree that sub-

paragraph (*c*) could be supported by the same arguments as sub-paragraph (*b*). When diplomatic relations were broken off as the result of an armed conflict, urgent measures for the emergency protection of property and archives would often be required, while the protection of the interests of the sending State by the consulates or diplomatic mission of a third State was a more continuous operation. He hoped that the Special Rapporteur and the Drafting Committee would take those considerations into account.

62. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Erim, said that he had intended to refer in the commentary to cases where a sending State, after closing a consulate, still had a diplomatic mission or another consulate in the receiving State. In view of Mr. Erim's observations, however, he thought that a suitable phrase might be added to sub-paragraph (*b*) or (*c*) in the body of the article. It might be even better for the sake of clarity to separate the two cases of the severance of consular relations and the temporary or permanent closure of a consulate.

63. The CHAIRMAN thought that the Drafting Committee might take into account the remarks made in the course of debate concerning consulates which occupied rented premises and concerning the removal of archives. The Committee should also take into consideration the view of some members that article 52 should be brought more closely into line with article 43 of the diplomatic draft and that the provisions of article 52 should not confer a greater inviolability than article 25. Finally, the suggestion made by the Special Rapporteur to meet Mr. Erim's point should be taken into account. He suggested that article 52, with those comments, should be forwarded to the Drafting Committee.

It was so agreed.

ARTICLE 53 *(Non-discrimination)*

64. Mr. ŽOUREK, Special Rapporteur, introduced the following revised text for article 53 :

" 1. In the application of the present rules, the receiving State shall not discriminate as between States.

" 2. However, discrimination shall not be regarded as taking place :

" (*a*) Where the receiving State applies one of the present rules restrictively because of a restrictive application of that rule to its consulate in the sending State;

" (*b*) Where the action of the receiving State consists in the grant, on the basis of reciprocity, of greater privileges and immunities than are required by the present rules."

65. His main reason for preparing the revised text was that references to the principle of reciprocity had been deleted from previous articles of the draft. He had therefore decided to adhere more closely to article 44 of the diplomatic draft, in accordance with the Commission's wish that the consular draft should follow that text as far as possible. Nevertheless, he had some doubts about the wording. Paragraph 1 of course called for no comment, since it stated a universally-recognized rule of international law, but in paragraph 2, the principle of reciprocity was, so to speak, reintroduced through the back door. While it was obvious that a State granting greater privileges and immunities than those expressly provided for was entitled to require reciprocity, as was stated in paragraph 2 (*b*), the case described in paragraph 2 (*a*) might give rise to practical difficulties, since the reference to restrictive application restored in a different form the principle of reciprocity that had been deliberately eliminated from all the other articles of the draft. He suggested that the best course might be to delete paragraph 2 (*a*).

66. Mr. ERIM supported the Special Rapporteur's suggestion. The rules of the draft (when it became a multilateral convention) could not be applied restrictively; a State which did not apply the rules as laid down would be violating its obligations under the convention and the State which was the victim of such a violation might have recourse to reprisal or retortion. Paragraph 1 was useful and necessary, since it stated a general rule of international law. Paragraph 2 (*b*) also stated the general rule that a signatory State, while accepting certain rules which constituted a necessary minimum as between all the Parties, would be free to enter into bilateral agreements providing for more generous treatment as between the two Parties, so long as there was no discrimination vis-à-vis other signatories of the multilateral convention.

67. Mr. AGO agreed with Mr. Erim. Paragraph 2 (*a*) added nothing to the article and was dangerous in so far as it referred to " restrictive application " : in many cases that might be a wrongful application. If, however, the Commission wished to retain the provision for the sake of conformity with the diplomatic draft, he would recommend the Special Rapporteur to provide a very clear explanation of the provision in the commentary. The only situation in which the possibility of restrictive application could be entertained was that where the signatory States had some latitude to choose between a liberal and a restrictive interpretation; but it was obvious that the Commission could not allow any restrictive application constituting a violation of the convention which it was drafting.

68. Mr. SANDSTRÖM agreed with Mr. Ago in principle, but pointed out that some of the provisions allowed the States applying the convention some latitude. For example, in the matter of exemption from customs duties paragraph 2 (*a*) might be applied.

69. Mr. VERDROSS considered that paragraph 2 (*b*) was already covered by the provision in article 59, paragraph 2, that acceptance of the articles of the convention should be no impedi-

ment to the conclusion in the future of bilateral conventions concerning consular intercourse and immunities. It seemed unnecessary to state that idea twice in the same draft.

70. Mr. TUNKIN agreed with Mr. Erim and Mr. Ago that paragraph 2 (*a*) was dangerous and out of place in a general multilateral convention. In reply to Mr. Sandström, he observed that in so far as a rule of the draft itself allowed some latitude, a State would be applying the rule correctly if it availed itself of that latitude; the question of a restrictive or liberal application did not arise in that case. On the other hand, if a particular rule were applied restrictively, the rule itself was changed. Inasmuch as it was the Commission's task to formulate definitive rules of international law, and as paragraph 2 (*a*) did not answer that description, he thought that provision should be omitted.

71. Mr. YOKOTA said he understood the preoccupations of previous speakers with paragraph 2 (*a*). Nevertheless, he agreed with Mr. Ago that it would be wise to retain in the consular draft a provision which had been adopted in the diplomatic draft, provided that it was stated with the utmost clarity in the commentary that the rule itself must be applied. Moreover, an adequate explanation of that point was already included in paragraph 3 of the commentary to article 44 of the diplomatic draft.

72. Sir Gerald FITZMAURICE said that, although he shared some of the doubts that had been expressed with regard to the article, and particularly with regard to paragraph 2 (*a*), he thought that omission of the provision might create some confusion, since a similar provision had been adopted in the diplomatic draft. The wisest course might be to postpone a decision on the article until after the conference on diplomatic intercourse and immunities, to be held in the spring of 1961, and then, if article 44 of the diplomatic draft was modified or even omitted by that conference, to take corresponding action with regard to article 53 of the consular draft.

73. Previous speakers had mentioned the relationship between the draft and bilateral agreements. He observed that, while there were virtually no bilateral agreements affecting diplomatic intercourse, the many existing consular conventions would continue in force after the draft under discussion had become a multilateral convention. Accordingly, because all bilateral treaties were based on reciprocity, there would be many concrete cases falling under paragraph 2 (*b*). It might be wise to add a paragraph 2 (*c*), stating that discrimination would not be regarded as taking place where greater privileges and immunities were given in consequence of a bilateral treaty. The Drafting Committee might decide, however, that such a provision should be included in the commentary, or that a reference to article 59, paragraph 2, should be inserted in the article.

74. Mr. LIANG, Secretary to the Commission, observed that the question that Mr. Erim and Mr. Ago had raised in connexion with paragraph 2 (*a*) had been thoroughly discussed at the tenth session in connexion with article 44 of the diplomatic draft. He had pointed out at the time (467th meeting, paragraph 19) that it was quite logical to argue that the question was not so much one of liberal or restrictive application of rules as of according liberal or strict treatment within the framework of the rules. If the matter were strictly one of application, no objections could be raised, for a State would have done everything within its power under the rules; on the other hand, if treatment within the framework of the rules was liberal or strict and differed among various sending States, there might be cause for objection and reprisal. Since the meaning of the provision seemed to be clear, he thought it would be invidious to use a different approach in the consular draft from that used in article 44 of the diplomatic draft. Accordingly, paragraph 2 (*a*) should be retained, but the attention of governments should be drawn to it and article 53 might be brought into line with article 44 of the diplomatic draft after the conference on diplomatic intercourse and immunities.

75. Mr. YASSEEN associated himself with the doubts expressed concerning paragraph 2 (*a*). The expression " restrictive application " was inappropriate, since each rule of law had its definite field of application. Nevertheless, the State applying a particular rule had a certain margin of discretion for liberal or strict application; if the Special Rapporteur had that margin in mind, the Drafting Committee should clarify the matter.

76. The principle in paragraph 2 (*b*) was perfectly admissible, since the draft would provide an irreducible minimum of privileges and immunities, which might be exceeded by virtue of bilateral agreements.

77. Mr. HSU considered that paragraph 2 (*a*) should be omitted. The provision could not well be defended and it was unfortunate that a similar clause had been adopted in the diplomatic draft. To admit its mistake, so far from doing the Commission's repute any harm, would add to its prestige, for the world would realize that the views of an international body, like those of an individual, could evolve.

78. Mr. MATINE-DAFTARY said that he had originally been in favour of deleting paragraph 2 (*a*), but that the debate had convinced him that the difficulty lay in the wording of the paragraph. The wording must be changed radically if the provision were to be retained. He suggested that paragraph 2 (*a*) should be amended to read : " In the case of the rules which allow a certain latitude to the receiving State, the scope of their application shall be based upon the principle of reciprocity."

79. With regard to paragraph 2 (*b*), he said that in some ways he preferred the Special Rappor-

teur's original text (A/CN.4/L.86) to the revised text. The original paragraph, in referring to " other relevant international agreements ", had taken reciprocity into account and had at the same time ensured that other States concerned could not obtain the advantage of most-favoured-nation treatment. He suggested that the Special Rapporteur might consider restoring the reference to " other relevant international agreements".

80. Mr. TUNKIN thought that the Commission was agreed on the substance of the article. Clearly, the words " one of the present rules " in paragraph 2 (*a*) could only mean a rule that allowed a certain latitude; the Special Rapporteur's text might be improved to bring out that meaning. He thought that Mr. Matine-Daftary's suggestion concerning paragraph 2 (*a*) was sound, and that the Drafting Committee might be asked to prepare a final text and to explain in the commentary why the article differed from the corresponding provision of the diplomatic draft.

81. He still had some doubts, however, concerning paragraph 2 (*b*). In the first place, the reference to reciprocity might be unnecessary, for it was questionable whether the voluntary granting of greater privileges and immunities than those expressly required by the multilateral convention should be regarded as discriminatory. Secondly, he wondered whether the paragraph should be regarded as eliminating the application of the most-favoured-nation clause in the case of existing treaties containing such clauses. If State A granted State B greater privileges than did the convention and had a treaty containing a most-favoured-nation clause with State C, was State B to regard that situation as discriminatory ?

82. Mr. ERIM could not agree with the course suggested by Sir Gerald Fitzmaurice and endorsed by the Secretary. The best way of drawing attention to the possible shortcomings of article 44 of the diplomatic draft was to improve the wording of article 53 of the consular draft and to explain in the commentary why the two texts differed. Since the consensus of the Commission seemed to be that the wording of paragraph 2 (*a*) was undesirable, it would be dangerous to leave it unamended. He also doubted whether the word "latitude", suggested by Mr. Matine-Daftary, was acceptable, since even if some latitude of application was recognized, governments were not free to use that margin for discriminatory purposes. If a State enacted a general law on customs duties which applied to all States equally, that was tantamount to imposing a restriction, and the question of discrimination arose only if that State interpreted its margin of discretion liberally vis-à-vis some States and restrictively vis-à-vis others. In any case, all members seemed to agree that paragraph 2 (*a*) must not give States the opportunity to restrict any rule *per se*. Accordingly, the article could be forwarded to the Drafting Committee, with the proviso that paragraph 2 (*a*) should be clarified if it were retained.

83. Mr. AMADO observed that the complex question of the interpretation of the text of a treaty was once again before the Commission. Paragraph 2 (*a*) as now drafted amounted to a least-favoured-nation clause; since it was notoriously difficult to insert a most-favoured-nation clause in a multilateral treaty, it was obviously even more difficult to formulate such a treaty on the basis of a least-favoured-nation clause.

The meeting rose at 1.5 p.m.

549th MEETING

Monday, 30 May 1960, at 3 p.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 53 *(Non discrimination) (continued)*

1. The CHAIRMAN invited the Commission to continue its discussion of article 53.

2. Mr. SANDSTRÖM drew attention to the explanation given in commentary 3 to article 44 of the diplomatic draft.

3. Since some of the articles in the consular draft allowed for a measure of discretion in their application by the receiving State, the provisions of article 53, paragraph 2, would be useful in that draft.

4. Mr. PAL said that he had reached the conclusion that the whole of paragraph 2 should be dropped. The paragraph had been suggested by the most favoured nation clause, which was resorted to in international relations in order to extend to other States the applicability of the terms of treaties. The use of such a clause helped to promote the stability and uniformity of commercial treaty law, and made it possible for a typical commercial treaty to play its part in establishing general legal certainty in the particular sphere with which it dealt. On the present occasion, however, the Commission was engaged in formulating rules of law which were intended to provide that very certainty where the subject under discussion was concerned. In so doing, it had not left much scope for the discretion of the receiving State. Some of the rules laid down in the draft were dependent on the consent of the receiving State; some others depended on the provisions of the municipal law of the receiving State; lastly, some of them were enabling provisions and merely stated that a certain course of action was open to the receiving State. As far as he could see, in none of