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Summary record of the 552nd meeting

Topic:
Consular intercourse and immunities

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552nd MEETING

Thursday, 2 June 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 56 (*Legal status of honorary consuls*)
(continued)

1. Mr. VERDROSS introduced his amendment to replace paragraph 2 of the Special Rapporteur's draft article 56 (551st meeting, paragraph 18) by the following text:

"2. In the matter of privileges and immunities, honorary consuls shall enjoy the same benefits as career consuls in so far as they are necessary for the exercise of their function. As regards the other privileges and immunities they shall enjoy those conferred upon them by treaties or the law of the receiving State."

2. He did not insist on the actual wording of the amendment, but urged that the idea contained in it should be accepted. The purpose of the amendment was to draw a distinction between the privileges without which an honorary consul could not perform his duties as a consul and those which were granted to the person of the consul and which were not essential to an honorary consul. For example, acts performed by an honorary consul in the name of the sending State could not be made subject to the jurisdiction of the courts of the receiving State. The exemption from taxation and customs duties, on the other hand, was a privilege attaching to the person of the consul and was not indispensable for the performance of their duties. However, under the second sentence of his amendment, even the more extensive privileges and immunities could be conferred upon an honorary consul if the receiving State was prepared to do so.

3. Mr. ŽOUREK, Special Rapporteur, said that he was prepared to accept the amendment proposed by Mr. Verdross, subject to drafting adjustments, particularly in the last phrase of the first sentence. The acceptance of that amendment would have the great advantage of speeding up the work of the Commission on article 56.

4. Sir Gerald FITZMAURICE said that he could not support the amendment proposed by Mr. Verdross because it would tend to restrict the privileges of honorary consuls far more than did the Special Rapporteur's text. Paragraph 2 as proposed by the Special Rapporteur at least specified some of the privileges to which honorary

consuls were entitled, but under Mr. Verdross's amendment, it might be argued that the only privilege necessary for the exercise of the consular function was the immunity from court jurisdiction in respect of acts carried out by the honorary consul in the exercise of that function.

5. For his part, he saw no reason for limiting the privileges of honorary consuls as such. There could be limitations due to a consul's having the nationality of the receiving State, or to the fact that he was engaged in a gainful occupation in that State, but where those conditions were not present, there was no valid reason for treating an honorary consul in any way differently from a career consul. The question whether he received a regular salary or not, and the question whether he belonged to a career service or not, were matters entirely between him and the government of the sending State.

6. He insisted that the only correct basis on which the provision could be drafted was not to enumerate the privileges to which an honorary consul was entitled but to state that he enjoyed all the privileges laid down in the draft articles and to stipulate, by way of exception, those privileges to which an honorary consul was not entitled.

7. Mr. FRANÇOIS shared the misgivings expressed by Sir Gerald Fitzmaurice. The adoption of the text proposed by Mr. Verdross would certainly speed up the work of the Commission but it would destroy the whole value of the articles as far as honorary consuls were concerned. Such a text could lead to much misunderstanding. It was likely to be interpreted very restrictively by some States, but it could also be interpreted very broadly by others: it was arguable that all the privileges and immunities set forth in the draft articles were necessary for the exercise of the consular function, on the grounds that otherwise the Commission would not have included them in the draft articles.

8. The second sentence of Mr. Verdross's amendment showed, however, that the author's intention was rather to place a very strict limitation on the privileges and immunities of honorary consuls. That sentence provided that, so far as other privileges and immunities were concerned (meaning other than those necessary for the exercise of their function), honorary consuls would enjoy those conferred upon them by bilateral treaties or by the law of the receiving State. No reference was made to international custom, although there existed a body of customary law on the subject of honorary consuls. It would accordingly be necessary, if the text proposed by Mr. Verdross were adopted, to conclude hundreds of bilateral treaties to cover benefits which were at present recognized by international customary law and State practice.

9. Mr. YOKOTA said that he could not accept the formula proposed by Mr. Verdross because it was far too vague and general. For example, it was not clear whether, under that formula, honorary consuls would be entitled to the privileges

set forth in articles 24 and 25, provisions which, under the Special Rapporteur's draft article 56, would not apply to honorary consuls. Certain other privileges, such as those specified in articles 37 and 38, could be said to be necessary to the exercise of consular functions. The text proposed would give rise to disputes between receiving States and sending States concerning the eligibility of an honorary consul to a specific benefit.

10. Mr. AMADO recalled that he had already pointed out (550th meeting, paragraph 50) that honorary consuls were much more important to countries such as the Netherlands than to countries like Brazil, which relied almost exclusively on career consuls. Small countries such as the Netherlands, which had widespread commercial and maritime interests, found it essential, on grounds of economy, to make considerable use of honorary consuls. He urged that the Commission should recognize the needs of those States; the adoption of a text such as that proposed by Mr. Verdross might have the effect of obliging those States to maintain career consuls at a large number of places.

11. Honorary consuls should be eligible not only for the benefits inherent in the consular function but also for those inherent in the consul's position. The formula proposed by Mr. Verdross was too vague; it was extremely difficult to tell when an act was performed in the exercise of the consular function. An honorary consul might be asked by the diplomatic representative of the sending State to convey a written communication to an important citizen who was passing through the consular district. It was not clear whether such an assignment would be covered by the proposed formula.

12. For those reasons, he could not accept the proposed formula, although its adoption might have shortened the discussion.

13. Mr. JIMÉNEZ DE ARÉCHAGA shared the view of those who held that honorary consuls should be treated, in principle, in the same manner as career consuls and should enjoy, as a rule, consular privileges and immunities. The only difference between an honorary consul and a career consul was that an honorary consul could, if he so wished, engage in a gainful occupation apart from his consular duties. That fact justified his exclusion from some of the benefits laid down in the draft articles. He accordingly suggested that paragraph 2 should be redrafted along the following lines: "In the matter of privileges and immunities, honorary consuls shall not enjoy the benefits provided for in articles 24, 25, 26, 27, 32, 37, 38 (b) and 38 (c)."

14. He thought that such a text would set forth much more clearly the legal status of honorary consuls and might help to reconcile the divergent views which had been expressed.

15. Mr. MATINE-DAFTARY asked the opponents of the amendment proposed by Mr. Verdross to identify the specific benefits, among those

granted to honorary consuls under the Special Rapporteur's draft, which they considered would be excluded by the application of the amendment. He recalled, in that connexion, that the function had been adopted by the Commission as a criterion in the diplomatic draft.

16. Mr. SCELLE said that the amendment proposed by Mr. Verdross, although criticised by some as too vague, had at least the merit of laying down the principle that, in the performance of their official duties, honorary consuls were on the same footing as career consuls. He was glad to note that the new member of the Commission, Mr. Jiménez de Aréchaga, held views similar to those which he (Mr. Scelle) had expressed at an earlier meeting (550th meeting, paragraphs 11-13) regarding the equality, in principle, of the status of honorary consuls and that of career consuls.

17. In his view, the only significant difference between honorary and career consuls was that the former might not be entrusted with all consular functions, but only with certain special functions. To meet that case, he had suggested at the previous meeting (551st meeting, paragraph 54) a provision to the effect that where honorary consuls were invested with such a limited competence, they enjoyed, in the performance of their official duties, the same prerogatives as career consuls, subject to the limitations specified in certain articles of the draft. If such a provision were approved, it would, of course, become necessary to specify in the text of the various articles concerned, the benefits from which honorary consuls exercising limited functions would be excluded.

18. Mr. VERDROSS, replying to Mr. François, said he would agree to the addition of the word "custom" after the words "bilateral treaties" in the second sentence of his amendment.

19. In reply to Mr. Amado, he stressed that, under the second sentence of his amendment, the receiving State would be free to grant even the full measure of privileges and immunities to an honorary consul, if it so desired.

20. He recognized that his formula was somewhat vague but, as he had said before, he was quite prepared to accept drafting changes. For example, for the sake of greater precision, the particular articles which laid down benefits necessary for the exercise of the consular function might be specified in brackets.

21. The purpose of his amendment was to reconcile differences in the provisions of municipal law. The form in which his idea was expressed was relatively immaterial; he was prepared to express it in a negative form if that should be more acceptable to the Commission. It was essential however, to specify that honorary consuls enjoyed the same benefits as career consuls in so far as those benefits were necessary for the exercise of the consular function and that, with regard to the other privileges and immunities, honorary consuls would enjoy those benefits conferred upon them by

agreement between the two States concerned or by the municipal law of the receiving State.

22. Mr. YASSEEN recalled that, at the previous meeting (551st meeting, paragraph 29) he had stressed the difference between the facilities accorded by reason of the consular function as such — which should be accorded regardless of whether that function was exercised by an honorary consul or by a career consul — and the privileges and immunities accorded to the person of the consul. The formula proposed by Mr. Verdross proceeded from that distinction and recognized the principle, also expressed in Mr. Scelle's proposal, that like functions should imply like facilities.

23. Whereas that principle was generally accepted, there was no such consensus about the privileges attaching to the person of the consul. There existed no generally recognized rule of international law to the effect that honorary consuls enjoyed the same personal privileges as career consuls. State practice was not uniform in that respect, and the position in municipal law varied greatly from one country to another. Some States accorded no privileges whatsoever to honorary consuls, while others gave them extensive privileges. In the circumstances, the wisest course was that proposed by Mr. Verdross, whose amendment would leave the question of the extent of the personal privileges and communities of honorary consuls to be settled by bilateral treaties or by the municipal law of the receiving State.

24. The formula proposed by Mr. Verdross would have the added advantage of securing for the draft articles a wider acceptance by States. It would also favour the institution of honorary consuls for, if those consuls were to be recognized as possessing the same personal privileges and immunities as career consuls, many States would be unwilling to receive them.

25. For those reasons, he strongly supported the amendment submitted by Mr. Verdross, subject to drafting adjustments.

26. Mr. SANDSTRÖM said that Mr. Verdross's amendment did not solve the problem of honorary consuls; it provided no ready criterion for the purpose of determining the benefits to be enjoyed by those consuls. The explanation given by Mr. Yasseen had not made the matter any clearer. The personal privileges granted to consuls were extended to them precisely because of their consular function and it was therefore difficult to separate the benefits which were necessary for the exercise of those functions from those which constituted purely personal privileges.

27. It had been estimated that honorary consuls were in charge of half of the existing consulates throughout the world. If therefore the Commission were to adopt the formula proposed by Mr. Verdross, it would in effect be failing to deal with one-half of the subject-matter of its draft.

28. In conclusion, he agreed with those members who felt that the Commission should adopt a formula along the lines proposed by Mr. Jiménez

de Aréchaga, and specify in article 56, paragraph 2, that honorary consuls enjoyed the same benefits as career consuls, with the exception of those laid down in certain specified articles.

29. Mr. PAL said that there seemed to have been some misunderstanding about the scope of the proposal made by Mr. Verdross. It had not been the intention of Mr. Verdross, as he had explained when introducing the proposal, to formulate a rule but rather to provide a satisfactory test — as indeed he had — for the purpose of determining for which privileges and immunities honorary consuls should be eligible and which of the actual rules should be applied to honorary consuls. The difficulty was, however, that the Commission had not specified anywhere in the draft that privileges and immunities were granted on the basis of the general principle set forth in Mr. Verdross's formula. The Commission had merely enumerated in each article the circumstances in which the privilege mentioned in the article existed; no general criterion had been laid down in that regard. Mr. Verdross's formula would not therefore reduce the Commission's labour, since each relevant article would, even so, have to be scrutinized.

30. For his part, he would prefer a provision along the lines of that suggested by Sir Gerald Fitzmaurice and elaborated by Mr. Jiménez de Aréchaga. For the purpose of determining which articles should be mentioned as not applicable to honorary consuls, the Commission should go through the various articles of its draft, one by one, and see whether any of them were in fact not applicable to honorary consuls.

31. Lastly, he suggested that the formula put forward by Mr. Jiménez de Aréchaga be supplemented by a provision, similar in purpose to the second sentence of Mr. Verdross's text, along the following lines :

“As regards the privileges and immunities mentioned in the aforesaid articles [i.e., the articles declared by the immediately preceding sentence as not applicable to honorary consuls], they shall enjoy those conferred upon them by bilateral treaties, custom or the law of the receiving State.”

32. Mr. EDMONDS said that he could not accept the text proposed by Mr. Verdross. That text was somewhat confusing; in particular he could not accept the idea, implicit in the second sentence, that there existed consular privileges and immunities which were not necessary for the exercise of the consular function. He thought that all the privileges specified in the draft articles had been granted to consular officers precisely because they were necessary for the exercise of the consular function.

33. For those reasons, he could not accept the amendment proposed by Mr. Verdross and he urged the Commission to adopt the course, suggested by Sir Gerald Fitzmaurice and other speakers, of examining the various articles for the purpose of determining which ones should not apply to honorary consuls.

34. Mr. HSU expressed support for the amendment proposed by Mr. Verdross. He thought that the Commission could not adopt any broader provision than that which it contained. That formula would also have the advantage of making the draft more acceptable to those States which were not willing to extend to honorary consuls all the facilities desired by Mr. François.

35. In most cases, an honorary consul was also a merchant, and many States found it difficult to grant to such consuls the same treatment as to career consuls. In all justice, the position of those countries should be recognized. He considered that the text proposed by Mr. Verdross met the situation and the wisest course of action for the Commission was to adopt that text.

36. Mr. YOKOTA explained that his main reason for not accepting the amendment proposed by Mr. Verdross was that he could not see what specific privileges were covered, and which ones were excluded by that formula. The Special Rapporteur, for his part, only appeared to regard as necessary for the exercise of the consular function the benefits provided for in the articles enumerated in paragraph 2 of his draft. In fact, many members, including himself (Mr. Yokota), held that many other articles should apply to honorary consuls. It was therefore apparent that there existed a considerable difference of opinion among the members of the Commission as to what privileges were really necessary and if the members, who were well versed in international law, differed so widely on the subject, the position would be even more unsatisfactory when the formula came to be applied by less informed persons.

37. The suggestion made by Mr. Verdross that his amendment could serve as an introduction, to be followed by an enumeration of the articles which would apply to honorary consuls, would not be of great assistance to the Commission. The Commission would still have to examine the various articles to determine which of them applied and which did not apply to honorary consuls.

38. Mr. AGO said that he agreed on the desirability of finding a formula which would take into account all the various systems in existence. He could not, however, accept that proposed by Mr. Verdross, mainly because it made the very grave implication that there existed consular privileges and immunities, the justification for which did not lie in the need for facilitating the exercise of the consular function. In fact, the only justification for granting to consuls the various privileges and immunities specified in the draft articles was precisely that they were necessary for the exercise of the consular function. Of course, some of those privileges were more directly related than others to the consular function, but the Commission had already recognized that all of them were to some degree necessary for the exercise of that function by mentioning them in the draft articles.

39. He recalled that the much greater personal

privileges of diplomatic agents were based on the principle of *ne impediatur legatio*. In like manner, the less extensive privileges of consuls were granted not out of mere courtesy but in order to facilitate the exercise of the consular function.

40. Accordingly, he would prefer a provision to the effect that honorary consuls enjoyed the same benefits as career consuls, with the exception of those mentioned in certain specified articles. For the purpose of such a formulation, it would be necessary for the Commission, as suggested at the previous meeting by Mr. Yokota (551st meeting, paragraph 32), to examine the various articles one by one in order to determine whether they contained any provisions which did not apply to honorary consuls as such. He emphasized that the provisions to be excepted should be those which did not apply to honorary consuls, regardless of their nationality and occupation. Where a consul was denied a particular benefit because he was a national of the receiving State, or because he was engaged in a gainful occupation, that fact was already stated in the relevant article, and applied to all consuls, whether career consuls or honorary consuls.

41. If the examination of the various articles revealed that there were very few provisions which did not apply to honorary consuls as such, it might not be necessary to have a separate article dealing with honorary consuls in general terms. It would be quite sufficient to specify the exception in the relevant articles.

42. Mr. LIANG, Secretary to the Commission, said that the amendment proposed by Mr. Verdross would be unobjectionable if it was assumed that honorary consuls were always nationals of the receiving State. A corresponding provision appeared in article 37 of the diplomatic draft which stipulated that "a diplomatic agent who is a national of the receiving State shall enjoy inviolability and also immunity from jurisdiction in respect of official acts performed in the exercise of his functions". The word "official" had been singled out for special comment earlier in the discussion. However, honorary consuls were not necessarily nationals of the receiving State, and the effect of Mr. Verdross's amendment would be restrictive.

43. In connexion with the question which articles were applicable to honorary consuls he observed that the enumeration in the Special Rapporteur's draft article 56, paragraph 2, did not mention article 41. Was it to be inferred, then, that a child born in the receiving State to an honorary consul who was a national of the sending State would acquire the nationality of the receiving State? Under Canadian law, for example, which was based mainly on *jus soli*, a child born in Canada of foreign diplomatic or consular officers — an expression which would include honorary consuls — did not by that fact acquire Canadian citizenship.

44. Mr. MATINE-DAFTARY, expressing support for Mr. Verdross's amendment, said he had

not been convinced by its critics that the amendment was narrower in scope than the Special Rapporteur's text. There seemed to be no force in the contention that Mr. Verdross's amendment did not ensure for honorary consuls the enjoyment of privileges and immunities necessary for the performance of their duties. He considered that the provisions concerning the inviolability of consular premises and archives (articles 25 and 27) should be applicable to honorary consuls.

45. Owing to the tendency to give preferential treatment to honorary consuls who were nationals of the sending State it was important to define clearly the legal status of honorary consuls who were not nationals of that State.

46. Mr. VERDROSS said in reply to Mr. Ago that not all consular privileges and immunities were founded on international law. Some, such as those connected with customs exemptions, had originated as a matter of international courtesy and had later been included in some bilateral conventions, but they normally applied only to career consuls.

47. Mr. ŽOUREK, Special Rapporteur, observed that the Commission would have to decide whether article 56 was to be *de lege lata* or *de lege ferenda*. He agreed with Mr. Yasseen that there was no rule of international law according to which honorary consuls enjoyed the same privileges and immunities as career consuls, nor, as far as he knew, had any authority on international law maintained such a proposition. On the contrary it was generally accepted that the privileges and immunities extended to honorary consuls were much more limited. The question was an extremely thorny one and the Commission was unlikely to find an answer in customary law. It was, therefore, bound to approach the task as one of the progressive development of law; but if it were not to work in a vacuum it must select those elements of general practice that would be acceptable to the majority of States, and proceed cautiously. The relevant provisions of municipal law and of consular conventions were so diverse that he was sure the members of the Commission would express very varied opinions concerning the distinguishing characteristics of honorary consuls. Criteria such as nationality or carrying on gainful activities were important, but were not sufficient *per se* to distinguish honorary from career consuls. He would have thought that for receiving States the fact that honorary consuls were not subject to disciplinary action by the sending State, did not form part of their national administrative services, and could at any time embark on private activities of a gainful nature was of far greater importance and was the reason why receiving States refused to extend the same privileges to honorary as to career consuls. The Commission should bear in mind State practice in that particular matter and should refrain from purely theoretical conjecture.

48. The CHAIRMAN suggested that, as the different views of members had now been expounded

at length, the Commission should consider its procedure.

49. Sir Gerald FITZMAURICE said that if the Commission decided that article 56 would have to be examined in the light of the earlier articles concerning privileges and immunities, that review article by article might be entrusted to the Drafting Committee.

50. It might eventually be found that all views could be reconciled by a provision stipulating, first that honorary consuls not nationals of the receiving State and not engaged in commerce or in some other gainful occupation should enjoy the same privileges as career consuls; secondly, that honorary consuls who were nationals of the receiving State should only enjoy certain specific privileges; and, thirdly, that honorary consuls, whatever their nationality, who engaged in commerce or in some other gainful occupation should enjoy only certain privileges.

51. Mr. SCELLE maintained the view that a consular service was made up of career and honorary consuls and that the sending State enjoyed the same prerogatives in respect of both categories. If a receiving State issued an exequatur to either a career or honorary consul that State was bound by the exequatur.

52. He favoured the procedure suggested by Sir Gerald Fitzmaurice and withdrew his own tentative proposal (551st meeting, paragraph 54).

53. Mr. TUNKIN said that the Commission would never escape from the vicious circle in which it found itself if it persisted in the attempt to frame a general definition of "honorary consul". It should follow the method advocated by Mr. Yokota and examine the draft article by article so as to establish which applied to honorary consuls.

54. Mr. MATINE-DAFTARY said that, in order to bring to an end the fruitless discussion in which the Commission was engaged, he would not oppose the proposal made by Mr. Yokota and supported by Mr. Tunkin; but he wished to point out that, if the necessary distinction between the two categories was to be established, the procedure suggested by Sir Gerald Fitzmaurice should be followed.

55. The CHAIRMAN said that it was clear from the discussion that there was no avoiding a review of all the articles relating to privileges and immunities so as to decide which applied to honorary consuls. He had intended to make the same suggestion as Sir Gerald Fitzmaurice so that at least the first stage of the exploratory review could be carried out by the Drafting Committee. It would still remain for the Commission, of course, to take the final decisions and to determine which articles did not apply to honorary consuls and for what reason. It seemed hardly practical to pursue further discussion on article 56 until that review had been completed.

56. Mr. YASSEEN considered that it was outside the competence of the Drafting Committee

to discharge such a task. It was for the Commission to reach agreement first on what criteria should be applied for the purpose of deciding what privileges and immunities should be enjoyed by honorary consuls.

57. The Commission should examine the prevailing practice and remember that usually honorary consuls, if nationals of the receiving State, enjoyed limited privileges and even if they were not nationals of the receiving State did not always enjoy all the privileges extended to career consuls. The distinction he had drawn between facilities granted to consulates and privileges granted to consuls as such might be a useful criterion to embody in a rule of international law.

58. The CHAIRMAN pointed out with all due respect to the views expressed by Mr. Yasseen that, since wholly contradictory opinions had been put forward in the Commission, it would be difficult to agree on the guidance to be given to the Drafting Committee. The purpose of the procedure he had had in mind was for the Drafting Committee to clear the ground by reviewing *seriatim* all the articles relating to privileges and immunities so as to simplify the Commission's task of deciding which provisions should apply to honorary consuls. It was, of course, not for the Drafting Committee to establish what should be the law on the matter. If there were any objection to that procedure the Commission could conduct the review itself.

59. Mr. TUNKIN said that he had no objection of principle to referring article 56 to the Drafting Committee, though he doubted whether the time was ripe for doing so. The Commission's usual practice was to discuss a subject thoroughly before asking the Drafting Committee to frame its conclusions in appropriate language.

60. Since the Commission had not yet settled the fundamental principles which would govern its future decision concerning the applicability of certain articles to honorary consuls, it should first consider the existing practice. In the light of that preview it might be able to select the appropriate criteria, after which the actual wording of article 56 could be left to the Drafting Committee. The procedure advocated by Sir Gerald Fitzmaurice and the Chairman might mean that the Commission would have to renew the present discussion after the matter had been studied in the Drafting Committee for one or two days.

61. The CHAIRMAN noted that all members were agreed on the need for reviewing the articles on consular privileges and immunities to see which should apply to honorary consuls; the only matter at issue was whether that review should be carried out in the Commission itself or in the Drafting Committee.

62. Mr. BARTOŠ considered that the issue concerned the Commission's terms of reference and the duties of its members. He favoured Mr. Verdross's amendment and the procedure suggested by Mr. Yokota. To refer the whole question of the applicability of the draft articles to

honorary consuls to the Drafting Committee would be to delegate to that Committee a power to make decisions of substance which was quite unacceptable. On the other hand it would clearly be difficult to vote on each article without further study. Accordingly, if it was impossible to undertake such a study in the Commission, the best procedure might be to establish an *ad hoc* committee which would then report back to the Commission. It was only when the decisions of principle had been taken that the wording of article 56 could be left to the Drafting Committee.

63. Mr. EDMONDS emphasized that the Commission should not refer any matter of principle to the Drafting Committee until a clear decision had been reached. At earlier sessions, before 1959, the Commission had voted on texts of articles and amendments thereto before sending them to the Drafting Committee. In the present instance the only permissible procedure was for the members of the Commission to vote on the issues of substance. Otherwise, the Commission would either have to accept the Drafting Committee's report, which would not necessarily represent the considered views of the majority, or do the work over again.

64. The CHAIRMAN did not consider that it was contrary to United Nations practice to refer a problem to a small group for preliminary review. That method was frequently followed in the General Assembly. Technical questions could not easily be decided by vote and it was desirable for the Commission to aim at unanimity.

65. Mr. AMADO considered that the Commission should follow the procedure proposed by Mr. Yokota, but impose a time-limit of five minutes on each speaker. That should enable its learned members to expound their views.

66. Mr. AGO agreed that there was some force in Mr. Tunkin's and Mr. Yasseen's argument that the subject was not ripe for reference to the Drafting Committee, but he was certain that no member had ever suggested that the Commission should delegate powers to that body. In the past the Drafting Committee had been used to perform two entirely different functions, drafting in the strict sense and preparatory examination of material. On the present occasion that preparatory review could be carried out by the Commission itself, but that would be a lengthy process. If it were clearly understood that the Drafting Committee would only be asked to clear the ground he would have thought the procedure suggested by Sir Gerald Fitzmaurice might be the simpler one.

67. The CHAIRMAN confirmed that Mr. Ago had rightly interpreted his conception of what should be the Drafting Committee's task in the present instance.

68. Mr. YOKOTA associated himself with those members who were opposed to referring the matter to the Drafting Committee since it was beyond that committee's competence. In the interests of

speed it might be advisable to establish an *ad hoc* committee which would be more representative of the Commission as a whole.

69. Mr. SANDSTRÖM agreed with Mr. Ago but had no objection to the establishment of an *ad hoc* committee.

70. Mr. TUNKIN considered that the procedural problem was closely connected with the substance of the question. The members who wished to examine existing international practice wanted the matter discussed in the full Commission, while those who thought differently wished to refer the article to the Drafting Committee or to another small group. In his opinion, existing practice must be taken into account, and the plenary Commission alone could hold the necessary exchange of views. All that the Drafting Committee or the suggested *ad hoc* committee could do would be to resume the abstract discussion that had taken place in the Commission. Much time could have been saved if it had been decided earlier to confine the debate to the articles of the draft; but the discussion was still ranging very widely, and no real progress had been made.

71. Mr. AGO, speaking on a point of order, considered that, as many members of the Commission were not in favour of forwarding the article to the Drafting Committee or to an *ad hoc* group, it would be preferable to discuss it in the Commission itself.

72. Mr. BARTOŠ, speaking on a point of order, thought that the article should be forwarded to the Drafting Committee or to an *ad hoc* group, with the proviso that the body concerned should submit a special preliminary report on the article to the Commission.

73. The CHAIRMAN observed that the majority of the Commission seemed to be in favour of considering the draft article by article in plenary meeting.

74. The Commission would not need to discuss the applicability of article 17 to honorary consuls, for that article had been adopted earlier and was the only article expressly declared inapplicable to honorary consuls by the Special Rapporteur's draft of paragraph 1 of article 56.

75. Turning to paragraph 2 of the Special Rapporteur's article 56, which dealt with section II of the consular draft, he suggested that, in the absence of any objections, article 22 (*Use of the state coat-of-arms*) should be regarded as applicable to honorary consuls.

It was so agreed.

76. The CHAIRMAN suggested that, in the absence of any objections, paragraph (a) of article 23 (*Use of the national flag*), which the Special Rapporteur had included in his enumeration, should be regarded as applicable to honorary consuls.

It was so agreed.

77. The CHAIRMAN pointed out that the Special Rapporteur's enumeration did not mention article 23 (b).

78. Mr. GARCÍA AMADOR asked the Special Rapporteur to explain why he had made a distinction between two questions which were so similar, and which both related to the exercise of consular functions.

79. Mr. ŽOUREK, Special Rapporteur, said that the differentiation was based on State practice; of course, it was difficult to obtain all the necessary information on that practice, and the data would be more complete after governments had sent in their observations. The right to fly the national flag of the sending State on all means of personal transport was an important privilege and it had to be borne in mind that honorary consuls were very often nationals of the receiving State or of a third State and, as such, could not be held to represent the sending State. Moreover, in the great majority of cases, they were engaged in business or other private activities of a gainful nature which indeed was their main occupation. It would be very difficult to establish when they were using a means of transport in the course of their consular duties and when they were using it for private purposes.

80. Sir Gerald FITZMAURICE could not agree with the Special Rapporteur's view that it was not the general practice of States to allow heads of consular posts to fly the flag of the sending State on all means of transport. Many consular conventions in which consular officers were defined as career officers and honorary officers made no distinction between the two in that respect. The whole provision was governed by the phrase "used by them in the exercise of their functions"; that phrase might be further clarified by inserting the word "when" before "used". The nationality of the consul and the fact of his engaging in a gainful occupation were quite irrelevant in that context.

81. Mr. AGO thought that the Special Rapporteur's explanation of his reason for distinguishing between the two paragraphs of article 23 merely confirmed once again his (Mr. Ago's) earlier contention that the reason for any distinction did not lie so much in the honorary status of the honorary consul: in reality, it lay rather in his nationality or in the fact that he engaged in a gainful occupation. He agreed with Sir Gerald Fitzmaurice that those criteria were immaterial to the applicability of article 23 (b) to honorary consuls. Any consul, when performing consular functions, was acting as an agent of the sending State and there seemed to be absolutely no reason why an honorary consul should be allowed to fly the flag of the sending State on the premises of the consulate and not on means of transport used in the exercise of consular functions. For career as well as for honorary consuls, the flag indicated that they were engaged upon the business of the sending State, and was

in no way an indication of their personal nationality or occupation.

82. Mr. JIMÉNEZ DE ARÉCHAGA thought that the privilege referred to in article 23 (b) should be enjoyed by honorary consuls, particularly since it was to be extended only to heads of consular posts.

83. Mr. BARTOŠ observed that in many cases, such as solemn public occasions, the consul, whether career or honorary, was acting on behalf of the sending State and that it was difficult to distinguish between career and honorary consuls in the matter. Accordingly, he considered that article 23 (b) should apply to honorary consuls.

84. Mr. MATINE-DAFTARY said that, though not strongly opposed to extending the applicability of the provision to honorary consuls, he considered that it would be difficult in practice to prevent such officials from flying the national flag of the sending State when engaged in business having nothing to do with the exercise of their consular functions. There was no way in which a local authority could establish whether a car being driven through the streets and flying such a national flag was on its way, say, to a government department or to the private business office of the honorary consul.

85. Mr. SANDSTRÖM agreed that the provision should be applicable to honorary consuls. In many consular districts, particularly in large ports, it was important that the local authorities should be able to recognize the vehicle, vessel or aircraft used by a foreign consul, in order to give him the privileges to which he was entitled.

86. The CHAIRMAN, speaking as a member of the Commission, endorsed Mr. Sandström's view. Moreover, in matters of precedence, it would be invidious to deprive an honorary consul of the right to fly the flag of the sending State, when the career consuls of other sending States could exercise that right.

87. Speaking as the Chairman, he observed that the majority of the Commission considered that article 23 (b) should apply to honorary consuls and drew attention to Sir Gerald Fitzmaurice's suggestion to insert the word "when" before "used".

88. Mr. HSU asked for a vote on the question of the applicability of article 23 (b) to honorary consuls, in view of the dissenting opinions that had been expressed.

It was decided by 12 votes to 3, with 1 abstention, that article 23 (b) should be applicable to honorary consuls.

89. The CHAIRMAN invited the Commission to consider the applicability of article 24 (*Accommodation*) to honorary consuls.

90. Sir Gerald FITZMAURICE pointed out that, since the private residence of the consular officer was not mentioned in the article and since the

right was accorded to the sending State itself, no differentiation should be made in cases where the sending State was represented by an honorary consul. The purpose of the article was to facilitate the procurement of premises necessary for a consulate, irrespective of the status of the head of post. There seemed to be no reason, therefore, why that provision should not be applicable to honorary consuls.

91. Mr. YASSEEN and Mr. YOKOTA agreed with Sir Gerald Fitzmaurice that the provision should be applicable to honorary consuls, since its purpose was to facilitate the exercise of consular functions.

92. Mr. MATINE-DAFTARY said that he was in favour of extending the applicability of article 24 to honorary consuls who were not engaged in activities of a gainful nature, but he could not endorse Sir Gerald Fitzmaurice's arguments. In his opinion, honorary consuls seldom required the assistance of the receiving State in procuring suitable premises for consulates.

93. Mr. SANDSTRÖM said that, while he was in favour of applying article 24 to honorary consuls, it was in fact illogical to state that the provision was applicable to such officials. The way in which the question was put to the Commission confirmed that the Special Rapporteur's formulation of article 56 was inappropriate, and that it would have been wiser to enumerate the articles which were not applicable to honorary consuls.

94. Mr. BARTOŠ thought that article 24 should apply to honorary consuls. Countries such as his own, which employed honorary consuls and often found it difficult to obtain premises for their consulates, were particularly interested in the extension of the facilities of the receiving State to all consular officers.

95. Mr. ŽOUREK, Special Rapporteur, explained that he had not included article 24 in his enumeration because, in the vast majority of cases, the sending State was not faced with the question of procuring premises where honorary consuls might perform their consular functions. Such officials usually exercised those functions at their own business premises and, at most, might be obliged to rent an extra room for consular purposes. Moreover, under the municipal law of most States, inviolability was not extended to the premises of honorary consuls. The Commission should be on their guard against the notion that there existed only one kind of consulate and that any difference between them depended solely on the question whether the head of the post was a career or an honorary consul. He stressed the fact that there were two kinds of consulate, viz. ordinary consulates and honorary consulates.

96. Mr. VERDROSS thought that all possible cases should be covered by the provisions of a multilateral convention. Accordingly, the right of a sending State to acquire buildings where

necessary should be provided for, even if the head of post were an honorary consul.

97. The CHAIRMAN, speaking as a member of the Commission, observed that the question to be decided was whether the sending State had the right to procure the necessary premises irrespective of the status of the head of post, even if the majority of States did not exercise that right.

98. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Verdross, said that, in cases where consular activities were so extensive as to justify the purchase of a building by the sending State, that State would establish an ordinary consulate and would appoint a career consul to the post. As a matter of principle, he considered that the extension of the benefit of article 24 to honorary consuls could not be justified as a general rule substantiated by national legislation.

99. Mr. AGO thought that the Special Rapporteur was over-simplifying the issue. An honorary consul who was a national of the sending State but a resident of the receiving State could not necessarily accommodate a consulate in his private office space; often such a consul had to find additional premises for the performance of the consular functions.

100. With regard to the whole of sub-section A, he pointed out that the sub-section related, not to consuls but to consulates, irrespective of the status of the head of post.

101. Mr. ŽOUREK, Special Rapporteur, could not agree with Mr. Ago. By the article concerning classes of heads of consular posts, heads of post were divided into four classes, which did not include honorary consuls, and the appointment of those officials was subject to the consent of the receiving State.

102. The CHAIRMAN, speaking as a member of the Commission, said that he knew of cases where States appointed a career consul to a given post, rented premises for his office, and later replaced the career consul by an honorary consul, who performed consular functions on the same premises. If article 24 were not applicable to honorary consuls, the question arose whether the sending State would be obliged to vacate the premises concerned on appointing an honorary consul to the post.

103. Mr. TUNKIN said that, while he had no particular objection to extending the applicability of article 24 to honorary consuls and would abstain from voting on the issue, he could not agree with Mr. Ago's argument, which was based on the as yet unproved premise that a consulate was a consulate, irrespective of the status of the head of post. It should be borne in mind that the Commission had not decided to place honorary consuls on the same footing as career consuls; Mr. Ago's assumption was therefore premature.

104. Mr. BARTOŠ, referring to the Yugoslav Government's practice in consular relations with Switzerland prior to the Second World War, said that in one case a consul-general had been an honorary consul, while the vice-consul serving under him had been a career consul, because the honorary consul had not fulfilled certain conditions of the Yugoslav consular service. In another consular post, a career consul had been withdrawn and a banker had been appointed as honorary consul, on condition that the consular archives were kept separate from his private documents. In another State, an honorary consul had at first exercised his functions on his own premises but subsequently other firms which were in competition with his and which had connexions with Yugoslavia had objected and had asked him to obtain separate accommodation for his consular duties, and the Yugoslav authorities had been obliged to procure such premises for him.

105. Article 24 related to consulates *per se*, without differentiating between honorary or career consulates. Accordingly, the provision should be applicable to honorary consuls as well as to career consuls.

106. Mr. AGO fully agreed with the Special Rapporteur that the choice of an honorary or a career consul depended upon agreement between the sending and the receiving States. Nevertheless, he regarded that as yet another argument in favour of equal treatment of the two categories for the purposes of article 24: if a career consul was replaced by an honorary consul at a given post, with the agreement of the receiving State, the honorary consul should be entitled to the same facilities, so far as consular premises were concerned.

107. In reply to Mr. Tunkin, he observed that, in referring to sub-section A as a whole, he was not assuming that the Commission had already decided to place honorary and career consuls on the same footing, but merely pointing out that the sub-section related to consular premises only, and not to the status of the head of post. There were honorary and career consuls, but there were no honorary or career consulates.

108. Mr. ŽOUREK, Special Rapporteur, pointed out to the members who had quoted examples from national practice that a clause of a multi-lateral treaty could not be based on exceptions. Mr. Ago's case for equality of treatment for honorary and career consuls could be proved only when the observations of Governments had been received. His study of the large number of provisions appearing in national legislations led him to doubt very much whether Mr. Ago's views would find support in the observations of governments. Personally, he considered that the status of the head of post determined the character of the consulate; he had as yet heard no convincing proof that the same rules applied to consulates headed by honorary consuls and to those headed by career consuls.

109. Mr. VERDROSS pointed out that the provision in article 24 was particularly necessary for the effective performance of consular functions by honorary consuls in socialist States, where real property was owned by the State. For the purpose of obtaining premises the honorary consul would be obliged to rely on facilities offered him by the receiving State.

110. The CHAIRMAN called for a vote on the applicability of article 24 (*Accommodation*) to honorary consuls.

It was decided by 12 votes to 2, with 2 abstentions, that article 24 should be applicable to honorary consuls.

The meeting rose at 1.10 p.m.

553rd MEETING

Thursday, 2 June 1960, at 3.30 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 56 (*Legal status of honorary consul*) (continued)

1. The CHAIRMAN invited the Commission to discuss the question of the applicability to honorary consuls of the principle embodied in article 25 of the draft on consular privileges and immunities.

2. Sir Gerald FITZMAURICE suggested that the Commission should simultaneously consider the applicability of article 25 (*Inviolability of consular premises*), 26 (*Exemption of consular premises from taxation*) and 27 (*Inviolability of the archives and documents*) to honorary consuls. Whatever conclusion was reached in relation to one of those provisions would logically be valid for all, inasmuch as they had in common the essential element of the direct interest of the sending State in the premises and archives in question.

3. Mr. JIMÉNEZ DE ARÉCHAGA thought it would be better to deal with the applicability of the three articles to honorary consuls separately. Those three articles dealt with the most important issues; in addition, in connexion with article 27, the Commission would have to consider paragraph 3 of article 56 in the Special Rapporteur's revised text (551st meeting, paragraph 18).

4. Mr. YOKOTA also thought the applicability of each of the three articles to honorary consuls

should be discussed separately, for various reasons. For example, he considered that the principle of the inviolability of consular premises required some qualification in so far as it was to apply to consulates headed by an honorary consul. Inviolability should attach only to an office used exclusively for the exercise of the consular function and kept separate from the premises used by an honorary consul for his private business.

5. In theory, even where a career consul was in charge, the principle still applied that consular premises should not be used for non-consular purposes. In practice, however, there was seldom occasion to apply that rule to career consuls, whereas honorary consuls were very often engaged in commerce or some other gainful occupation. Accordingly, he thought that a special provision should be added to the effect that consular offices must be kept separate from premises used by an honorary consul for other activities.

6. Mr. YASSEEN said that he was prepared to accept the inviolability of the premises of a consulate in the charge of an honorary consul, with the addition of the following proviso: "if those premises are assigned exclusively for the exercise of consular functions."

7. Mr. MATINE-DAFTARY said that in practice it would be extremely difficult to apply such a provision. It would not be at all easy to check whether a consul who had outside activities did in fact use the consular premises for purposes other than the exercise of consular functions.

8. Accordingly, for practical reasons, he was prepared to accept the applicability of all the provisions of articles 25, 26 and 27 to an honorary consul on condition that the consul was a national of the sending State and did not engage in commerce or in some other gainful occupation in the receiving State.

9. Mr. SANDSTRÖM said that it was immaterial whether from the point of view of their applicability to honorary consuls, articles 25, 26 and 27 were discussed separately or together. The result would be the same in both cases.

10. As to the proviso proposed by Mr. Yasseen, he said the condition which it specified seemed much too strict. A consul might be engaged in research or study which was outside his official duties; if he carried on that research or study in the consular premises there would be no reason to deprive the consulate of inviolability. Perhaps the condition to be laid down should be that the premises must not be used for the conduct of trade. He was not, however, prepared to propose a definite formula at that stage.

11. The CHAIRMAN said that, in view of the differences of opinion, it would be preferable to deal with each article separately. He therefore invited members to discuss the applicability of article 25 to honorary consuls, together with Mr. Yasseen's proposal.

12. Mr. ŽOUREK, Special Rapporteur, sup-