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Summary record of the 558th meeting

Topic:
Consular intercourse and immunities

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558th MEETING

Thursday, 9 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 consuls) (continued)

1. The CHAIRMAN invited the Commission to continue its discussion on the question of the applicability to honorary consuls of the principle embodied in article 37 (Exemption from taxation) (557th meeting, paragraph 70).

2. Mr. JIMÉNEZ DE ARECHAGA said that in his opinion article 37 on exemption from taxation should not apply to honorary consuls. Such consuls were often chosen from among persons who were substantial tax-payers and any suggestion that they enjoyed some measure of exemption from taxation might lead to competition for appointments as honorary consuls. Ultimately, the result would be that countries would be very reluctant to admit such consuls and the institution of honorary consuls might disappear.

3. He agreed that the article should contain a provision, as suggested by Mr. Verdross (ibid., paragraph 76), exempting from taxation any emoluments received by an honorary consul by reason of his consular duties. He suggested that the Commission should first vote on the Special Rapporteur's proposal that article 37 should not be mentioned, among the provisions the benefit of which extended to honorary consuls; it would then vote on the proposal of Mr. Verdross.

4. Mr. ŽOUREK, Special Rapporteur, said that he was prepared to agree to a proviso to the effect that honorary consuls who were not nationals of the receiving State and not carrying on a private gainful occupation in that State were exempt from all dues and taxes on the emoluments received by them in their capacity as honorary consuls.

5. Mr. SANDSTRÖM said that it was not necessary for the Commission to take a vote since no member had suggested that article 37 should apply to honorary consuls.

6. The CHAIRMAN said that, if there were no objection, he would take it as agreed that the benefit of article 37 would not apply to honorary consuls, and that a proviso should be added to the draft to the effect that an honorary consul who was not a national of the receiving State was not liable to taxation in that State in respect of emoluments received from the sending State for his services as consul.

7. Mr. BARTOŠ said that, although he had not pressed the matter to a vote, he wished to place on record his view that the receiving State was not entitled to tax any indemnity or emoluments received by one of its own nationals in his capacity as honorary consul of a foreign State.

8. The CHAIRMAN invited the Commission to consider the question of the applicability to honorary consuls of the principle contained in article 38 (Exemption from customs duties). He drew attention to the text provisionally adopted for that article by the Drafting Committee:

"In accordance with the provisions of its legislation, the receiving State shall grant exemption from customs duties, and from all other charges and taxes chargeable at the time of customs clearance, on"

“(a) Articles intended for the use of a consulate of the sending State;

“(b) Articles for the personal use of the members of the consulate, and of members of their families belonging to their households, including articles intended for their establishments.”

9. Mr. ŽOUREK, Special Rapporteur, said that, in his new draft of article 56, paragraph 2, he had proposed that honorary consuls should benefit from the provisions of article 38 (a) as originally drafted by him (A/CN.4/L.86), but not from those of sub-paragraphs (b) and (c) of the same article.

10. As now re-drafted, article 38 (a) corresponded to the original sub-paragraphs (a) and (b), but possibly he could accept its applicability to honorary consuls, because of the addition in the introductory paragraph of the words “In accordance with the provisions of its legislation”.

11. As to the provisions of article 38 (b) (the former sub-paragraph (c)), there could be no question of applying them to honorary consuls. The law of all States was very strict on that point and granted personal exemptions from customs duties to career consular officials only.

12. Mr. BARTOŠ said that from his experience he could say that the facilities mentioned in the original Special Rapporteur's draft for article 38 (a) and (b) applied also to honorary consuls. The personal privileges specified in sub-paragraph (c) were sometimes granted as a matter of courtesy.

13. Mr. SANDSTRÖM said that the former text of article 38 (a) had the advantage of mentioning specifically coats-of-arms. Perhaps it should be explained in the commentary that coats-of-arms were included in the exemption.

14. The CHAIRMAN, speaking as a member of the Commission, said that certain bilateral conventions provided for the exemption from cus-
toms duties of articles imported as samples of commercial products solely for display within a consulate and subsequently re-exported or destroyed (cf. article 17, paragraph 3(b), of the Anglo-Swedish Consular Convention of 1952). Perhaps some reference might be made to that question at the appropriate place in the draft.

15. Mr. YASSEEN said that it was not desirable to enter into too much detail in the draft articles. Perhaps the point mentioned by the Chairman could be dealt with in the commentary.

16. Mr. ŽOUREK, Special Rapporteur, said that it was preferable to leave the question of samples outside the scope of the draft altogether. Exemption from customs duty on commercial samples was usually granted in commercial treaties and had strictly no place in a multilateral instrument relating to consular intercourse and immunities.

17. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed that the principle embodied in article 38 (a) should apply to honorary consuls.

_It was so agreed._

18. The CHAIRMAN invited the Commission to consider the question of the applicability to honorary consuls of the principle embodied in article 39 (Exemption from personal services and contributions). He drew attention to the text provisionally adopted for article 39 by the Drafting Committee:

_"The receiving State shall:"

_"(a) Exempt members of the consulate, members of their families, and members of the private staff who are in the sole employ of members of the consulate, except those who are nationals of the receiving State, from all personal services and from all public service of any kind whatsoever;"

_"(b) Exempt the persons referred to in subparagraph (a) of this article, provided that they are not nationals of the receiving State, from material military obligations such as those connected with requisitioning, taxation and billeting."_

19. Sir Gerald FITZMAURICE pointed out that the benefit of the exemptions specified in article 39 was expressly limited to persons who were not nationals of the receiving State. He therefore suggested that article 39 should apply to honorary consuls as it stood; in other words, an honorary consul who was not a national of the receiving State would under the draft be exempted from personal services and contributions. It would be most undignified if a person received in the capacity of an honorary consul could be required to furnish such services by the receiving State.

20. Mr. SANDSTRÖM supported the suggestion of Sir Gerald Fitzmaurice.

21. Mr. ŽOUREK, Special Rapporteur, said that article 39 covered not only members of the consulate but also members of their families and members of their private staff. It was extremely unlikely that States would accept a provision extend-
27. However, the very least that could be accepted was that an honorary consul who was not a national of the receiving State should be exempt from personal services.

28. Mr. ŽOUREK, Special Rapporteur, said that the expression "consular employee" as used in the Anglo-Swedish Consular Convention included all consular officials other than the head of post. The restriction laid down in article 11, paragraph 5, therefore applied to all the consular staff, with the exception of the head of post; moreover, members of the family and private staff were also excluded from the benefit of the exemption.

29. As to military service, he pointed out that a general rule only nationals could be required to perform such service, and he proposed to mention that fact in the commentary.

30. Mr. SANDSTRÖM said that aliens who entered the United States of America as immigrants were liable to military service.

31. Mr. BARTOS added that New Zealand, Australia and a number of other countries applied a similar rule to immigrants.

32. Mr. YOKOTA said that paragraph 4 of article 11 of the Anglo-Swedish Convention referred not only to military, naval and air services but also to police, administrative or jury service of every kind.

33. Mr. EDMONDS said that he saw no reason why the benefit of article 39 should be limited to the head of post alone; he proposed that all the provisions of article 39 should apply to honorary consuls.

34. Mr. BARTOS proposed that a separate vote should be taken on the eligibility of honorary consular officials other than heads of post to the benefit of the exemptions accorded by article 39. Those persons should, in his opinion, likewise enjoy exemption from personal services and contributions.

35. Mr. PAL said that the Commission should also decide whether the benefit of the exemptions extended to members of the families of honorary consuls and their private staff.

36. The CHAIRMAN said that the Commission would therefore vote separately on the principle of the exemption from personal services and contributions of an honorary consul who was head of consular post; members of the family of an honorary consul who was head of post; honorary consular officials; the families of honorary consular officials; and employees and private staff.

37. He called for a vote on the proposal that the exemption should apply to honorary consuls who were heads of post.

The proposal was adopted by 15 votes to 1, with 1 abstention.

38. The CHAIRMAN called for a vote on the proposal that the exemption should apply to members of the family of an honorary consul who was head of post.

The proposal was adopted by 11 votes to 2, with 3 abstentions.

39. The CHAIRMAN called for a vote on the proposal that the exemption should apply to honorary consular officials.

The proposal was adopted by 9 votes to 3, with 5 abstentions.

40. The CHAIRMAN put to the vote the proposal that members of the families of honorary consular officials should enjoy the exemptions laid down in article 39.

The proposal was adopted by 7 votes to 5, with 5 abstentions.

41. The CHAIRMAN said that the Commission would now have to decide whether or not the exemption should be extended to the employees and private staff of honorary consuls.

42. Mr. ŽOUREK, Special Rapporteur, observed that there were no employees in consulates headed by honorary consuls.

43. Mr. ERIM disagreed with the Special Rapporteur. He had voted in favour of extending the application of article 39 to honorary consular officials on the ground that the exemptions provided for were necessary for the exercise of consular functions. Accordingly no distinction could be drawn between the various grades of honorary consular officials that should enjoy those exemptions: they could only be withheld from staff who were nationals of the receiving State.

44. Mr. ŽOUREK, Special Rapporteur, pointed out that if exemptions were to be granted on the sole ground that they were necessary for the exercise of consular functions, there was no reason whatever for granting the exemption to families of honorary consuls. Furthermore, he said that the Commission had not subordinated the enjoyment of the exemptions laid down in article 39 to the condition that the person in question must not also be otherwise gainfully occupied.

45. Mr. MATINE-DAFTARY said that, if the Special Rapporteur's interpretation of the Commission's decision was correct, he (the speaker) would have to withdraw his affirmative vote in favour of making article 39 applicable to honorary consuls.

46. Mr. ERIM emphasized that if the exemptions provided for in article 39 were necessary for career consuls, their families and staff, they were no less necessary for honorary consuls, their families and staff, since the same functions were being performed in both cases. It was exceptional for States to require aliens to perform the services referred to in article 39.

47. There remained the question whether or not the exemptions in article 39 should be subordinated to the condition that the person concerned did not engage in another gainful private occupation.
48. Mr. YOKOTA said that the Commission should vote on whether or not the employees and private staff of honorary consuls should enjoy the exemptions laid down in article 39.

49. The CHAIRMAN put to the vote the proposal that the benefit of the exemptions accorded by article 39 should extend to the employees and private staff of honorary consuls.

The proposal was rejected by 11 votes to 2, with 4 abstentions.

50. The CHAIRMAN invited the Commission to consider whether the benefit of article 40 (Attendance as witnesses in courts of law and before the administrative authorities) should be extended to honorary consuls.

51. Mr. ŽOUREK, Special Rapporteur, explained that he had not included article 40 in the enumeration contained in his draft article 56, paragraph 2, because he thought that article 56, paragraph 4, provided sufficient protection for honorary consuls in the matter of attendance as witnesses. Indeed, the Commission could hardly go further since honorary consuls, whether nationals of the receiving State or not, were subject to the jurisdiction of that State. The fact that they had undertaken to perform certain functions on behalf of another State could not affect their obligations vis-à-vis the local courts in any matter not involving the exercise of their official functions.

52. A rule of that sort should be acceptable to all States, whatever criteria they employed for the definition of “honorary consuls”. The discussion should be directed primarily to article 56, paragraph 4, though of course members might wish also to refer to article 40.

53. Mr. YOKOTA observed that the duty laid down for career consuls in article 40, paragraph 1, was, a fortiori, owed by honorary consuls as well.

54. Paragraphs 2 and 3 of article 40 had not yet been considered by the Drafting Committee, but, as members would recall, the Commission had decided that they should be amalgamated and that they should include a stipulation on the lines of that inserted in article 33, paragraph 3, to the effect that all due respect should be paid to the official position of the honorary consul and that local authorities should refrain from acts liable to hamper the exercise of his consular functions. If paragraphs 2 and 3 were to be re-drafted on those lines they should also be made applicable to honorary consuls, as should paragraph 4.

55. Mr. ŽOUREK, Special Rapporteur, agreed with Mr. Yokota that article 40, paragraph 4, should apply to honorary consuls. The purpose of that paragraph had been to introduce the succeeding provisions establishing the privileges and immunities consequent upon the requirement contained in paragraph 1. It was self-evident that the rules concerning the conduct of criminal or civil proceedings applied automatically to honorary consuls if no express exception were made. He had not intended to accord a privileged position to honorary consuls which was unlikely to obtain the assent of States. Accordingly, he believed that article 56, paragraph 4, which reproduced in summary form the substance of article 40, paragraph 4, would suffice to cover the position of honorary consuls.

56. After a brief procedural discussion, the CHAIRMAN suggested that article 40, paragraph 4, should apply to honorary consuls, and that article 56, paragraph 4, should be accepted, on the understanding that paragraphs 2 and 3 of article 40 would be considered after they had been adopted by the Drafting Committee.

It was so agreed.

57. The CHAIRMAN invited the Commission to consider the applicability to honorary consuls of article 41 (Acquisition of nationality), which the Special Rapporteur had not included in the enumeration in article 56, paragraph 2.

58. Mr. ŽOUREK, Special Rapporteur, said that he had omitted article 41 from his enumeration because, in the vast majority of cases, honorary consuls were residents of the receiving State. There was therefore no reason to exempt such persons from the nationality laws of the country in which they had settled for reasons independent of their consular functions. The fact that they had agreed to act on behalf of the sending State did not alter their status of foreign residents; that was the essential point of difference between career and honorary consuls, since the former were appointed to different countries to occupy an official position and the choice of the country where they resided was not their own, but that of the government of the sending State.

59. The CHAIRMAN suggested that article 41 should be regarded as inapplicable to honorary consuls.

It was so agreed.

60. The CHAIRMAN observed that article 42 (Members of the consular staff who are nationals of the receiving State) was also omitted from the Special Rapporteur's enumeration and that a tentative suggestion had been made in the Drafting Committee that the substance of that article should become paragraph 2 of article 34.

61. Sir Gerald FITZMAURICE thought that the case might be covered by the Special Rapporteur's proposal that article 34 should apply to honorary consuls. In any case, the provision had no direct relevance to the position of honorary consuls, and could be passed over.

62. The CHAIRMAN suggested that the Commission should take no decision on article 42, pending its final wording and placing by the Drafting Committee.

It was so agreed.

63. The CHAIRMAN observed that article 43 (Duration of consular privileges and immunities) was included in the Special Rapporteur's enu-
meration. He suggested that the article should be held to be applicable to honorary consuls.

It was so agreed.

64. The CHAIRMAN invited the Commission to consider the applicability to honorary consuls of article 44 (Estates of deceased members of the consular staff or of deceased members of their families), which was not mentioned by the Special Rapporteur in the new article 56, paragraph 2.

65. Mr. ERIM pointed out that, while the general practice was not to grant the exemption conferred by article 44 to honorary consuls, there might be cases where an honorary consul who was a national of the sending State would agree to transfer his residence to the territory of a receiving State where his country had appointed him as consul. In that case, the transfer would be made for the express purpose of the exercise of consular functions. If the honorary consul concerned was not engaged in gainful occupation and carried on no activities other than his consular functions, there seemed to be no reason to deny him the exemption.

66. Mr. ŽOUREK, Special Rapporteur, observed that the case cited by Mr. Erim was a very exceptional one. It was impossible to base a general rule, intended to be acceptable to all States, on so rare an occurrence. He considered that the Commission should not recommend that the benefit of article 44 should be extended to honorary consuls, for in the overwhelming majority of cases honorary consuls themselves elected to reside in a certain country and were in no way eligible for the privilege in question.

67. Mr. ERIM said that, since the Commission did not seem anxious to extend the exemption to honorary consuls, he would not press his point, although the cases to which he had referred might well arise.

68. Mr. EDMONDS said that, for the purpose of the exemption accorded by article 44, he could see no logical basis for distinguishing between honorary consuls and career consuls or members of their families, provided that the persons concerned were not nationals of the receiving State.

69. Mr. JIMÉNEZ DE ARECHAGA pointed out that the Commission had already decided not to extend the benefit of tax exemption to honorary consuls; it was therefore only logical and consistent not to extend the exemption from estate, succession or inheritance duties to honorary consuls.

70. The CHAIRMAN, speaking as a member of the Commission, thought that the article was connected with paragraph (c) of article 38 (Exemption from customs duties), which the Commission had decided not to apply to honorary consuls. Since an honorary consul's property was usually acquired in the receiving State that property fell under the exception in the first sentence of article 44. He agreed with the Special Rapporteur that the position of career consuls in that respect differed from that of honorary consuls.

71. Mr. EDMONDS pointed out that "a member of the consular staff" might be a person employed by an honorary consul and not a national of the receiving State. Accordingly, if the employees of a career consul enjoyed the exemption, there seemed to be no basis for making any distinction between them.

72. Mr. ŽOUREK, Special Rapporteur, drew Mr. Edmond's attention to the fact that the members of the consular staff to whom article 44 applied were career officials and employees. The members of an honorary consul's family were, like the honorary consul himself, residents of the receiving State, and as such should not be exempted from estate duty. With regard to employees of the honorary consul, he pointed out that in so far as such employees were engaged in the honorary consul's private business, they were obviously not entitled to benefit by the exemption; if they were career consular employees, they enjoyed in any case the exemption conferred by article 44.

73. The CHAIRMAN suggested that article 44 should be held not to be applicable to honorary consuls.

The meeting rose at 6.15 p.m.

559th MEETING

Friday, 10 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. The CHAIRMAN asked Mr. Yokota, Chairman of the Drafting Committee, to explain the position regarding the drafting of article 45 (Duties of third States), so as to enable the Commission to consider the question of the applicability to honorary consuls of the provisions of that article.

2. Mr. YOKOTA said that the Drafting Committee had not yet considered article 45. He recalled that when the article had been discussed, the Commission had agreed that the only duty of a third State was that of not hindering the transit through its territory of consular officers and members of their families (543rd meeting, para-