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Summary record of the 572nd meeting

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572nd MEETING

Monday, 27 June 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.90) *(continued)*

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

1. The CHAIRMAN invited the Commission to vote on Mr. Erim's first amendment for the insertion in paragraph 1, after the words " The consular premises ", of the words " used exclusively for the exercise of consular functions ".

Mr. Erim's first amendment was rejected by 8 votes 6, to with 1 abstention.

2. Mr. ERIM said that, his own amendment having been rejected, he would support Mr. Sandström's amendment for the insertion in paragraph 1, after the words " The consular premises ", of the words " as defined and limited in articles 1 (*b*) and 46, paragraph 3 " which, combined with Mr. Yokota's amendment for the insertion in article 1 (*b*) of the word " exclusively " before the words " used for the purposes of a consulates ", would achieve the same purpose.

3. Mr. PAL said that it was desirable to vote on Mr. Yokota's amendment before voting on Mr. Sandström's amendment. Until the definition of consular premises in article 1 (*b*) was settled, it would be difficult for him (Mr. Pal) to vote on Mr. Sandström's amendment.

4. Mr. ŽOUREK, Special Rapporteur, said that Mr. Yokota's amendment expressed the same idea as Mr. Erim's amendment which the Commission had rejected. He asked Mr. Yokota whether he maintained his amendment.

5. Mr. YOKOTA explained that he had put forward his amendment to article 1 (*b*) in order to allay the concern of certain members over article 25. If, however, article 25 were accepted by the Commission as it stood, he would withdraw his amendment.

6. The CHAIRMAN said that in that case Mr. Yokota's amendment to article 1 (*b*) would only be considered if article 25 was not adopted by the Commission in its present wording.

7. Mr. AGO requested an explanation with regard to the wording of Mr. Sandström's amendment. The reference to the definition of consular premises in article 1 (*b*) was clear; but he thought that the only passage in article 46, paragraph 3, which could be said to limit in any way the consular premises was the last sentence, specifying that non-consular offices installed in the consular premises should not be deemed to form part of those premises.

8. Mr. SANDSTRÖM, to meet Mr. Ago's point, said he wished to make two changes in his amendment: to insert, after the word " limited ", the word " respectively ", and, after the words " paragraph 3 ", the words in parentheses, " (last sentence) ".

9. Mr. YOKOTA pointed out that article 26 provided for exemption of the consular premises from taxation. If Mr. Sandström's amendment were adopted it would be necessary to include the same form of words after the words " consular premises " in article 26, and in several other articles too. In his opinion, such an addition would be inelegant.

10. Mr. ŽOUREK, Special Rapporteur, agreed with Mr. Yokota.

11. In fact, Mr. Sandström's amendment added nothing of substance. It was obvious that the term " consular premises " meant those premises as defined in article 1 (*b*). It was equally obvious that the provisions of article 25 had to be interpreted in conjunction with those of article 46, paragraph 3. If, however, those facts were stated in explicit terms in article 25, it would become necessary to do the same in all the other articles of the draft which referred to the consular premises. Otherwise, it might well be asked whether the omission of the qualifying phrase was intentional and what was the significance of its omission.

12. Mr. ERIM disagreed with the Special Rapporteur's interpretation. Article 25 dealt with the inviolability of the consulate and it was necessary to specify that inviolability attached only to the premises used exclusively for consular purposes. The same problem did not arise in connexion with article 26; exemption from taxation might well be granted to a consulate regardless of the fact that other institutions or agencies were installed in the consular premises.

13. Mr. TUNKIN said that the reference to the definition in article 1 (*b*) and to the restrictions specified in article 46, paragraph 3 did not affect inviolability as such.

14. The CHAIRMAN put to the vote Mr. Sandström's amendment with the two changes made by its author.

There were 7 votes for and 7 votes against the amendment, with 1 abstention. The amendment was not adopted.

15. The CHAIRMAN said that the Commission had now disposed of the amendments to paragraph 1. No amendments had been proposed to paragraphs 2 and 3, but there was still Mr. Erim's amendment for an additional paragraph 4 (571st meeting, paragraph 55).

16. Mr. MATINE-DAFTARY urged Mr. Erim to withdraw his amendment. If it were put to the

vote, the Commission would be placed in a difficult position, since its rejection might be construed as implying that the Commission believed that a right of asylum in consulates existed.

17. Sir Gerald FITZMAURICE said he could not accept that interpretation. He would vote against the proposed additional paragraph, not because he believed that there was a right of asylum in consulates, but because there already existed in article 46, paragraph 2, a provision which fully covered the points raised by Mr. Erim. Under that provision the consul had a general duty to refrain from a large number of acts. If any one act were singled out for special mention in article 25, the result would be to impair the general character of article 46, paragraph 2.

18. Mr. ERIM said that if the Commission agreed to include Sir Gerald Fitzmaurice's explanation in the commentary to article 46, he was prepared to withdraw his proposal for an additional paragraph 4 to article 25.

19. Mr. ŽOUREK, Special Rapporteur, said that a negative vote did not necessarily mean that the Commission did not accept the substance of a proposal. It might also mean that the Commission considered the proposed provision as superfluous, or that its introduction was undesirable in a particular draft.

20. At the previous meeting he had stated (*ibid.*, paragraph 74), in reply to Mr. Erim, that the point raised by him was covered by article 46, paragraph 2. He was quite prepared to explain, in the commentary to article 46, the idea contained in Mr. Erim's proposal for an additional paragraph to article 25.

21. Mr. TUNKIN said that, in view of the Special Rapporteur's undertaking, Mr. Erim's proposal might now be withdrawn.

22. Mr. SCELLE pointed out that article 46, paragraph 2, did not specify that there was no right of asylum in consulates. It was desirable to state in explicit terms that no such right existed and, for his part, he was prepared to accept a statement in the commentary, provided it gave a full explanation of the position.

23. Mr. BARTOŠ said that, in order to prevent any misunderstanding resulting from the vote, he wished to make it clear that he favoured the substance of Mr. Erim's proposal and was firmly of the view that there was no right of asylum in consulates.

24. Mr. AGO supported the inclusion in the commentary of a purely negative statement to the effect that no right of asylum in consulates existed. He could not, however, support a statement in the commentary along the lines of Mr. Erim's proposed paragraph. That suggested that the consul had an actual positive duty to hand over a person seeking refuge in the consulate.

25. Mr. ERIM said he had based the wording of his paragraph on article 19 of the Havana Convention.

26. He was prepared to withdraw his amendment on the understanding that the commentary to article 46 would explain that there was no right of asylum in consulates.

27. The CHAIRMAN said it was agreed that the commentary to article 46 should contain that explanation. On that understanding, he put to the vote article 25 as prepared by the Drafting Committee.

Article 25 was adopted by 13 votes to none, with 2 abstentions.

ARTICLE 26 *(Exemption in respect of the consular premises from taxation)*

28. The CHAIRMAN said that no amendments had been proposed to article 26.

29. Mr. EDMONDS said that the terms of article 26 as prepared by the Drafting Committee were virtually identical with those originally proposed by the Special Rapporteur. As he (Mr. Edmonds) had explained in the earlier debate on article 26 (531st meeting, paragraph 5), its terms did not express adequately the intention of the Commission, which was to exempt the consular premises from taxation. The provision now presented exempted the consul personally and the sending State as the owner of property. However, under the municipal law of a number of States of the United States of America, the primary liability for taxation attached to the property and not to the owner. Exemption of the owner from personal liability did not necessarily mean that the property itself was exempt from taxation.

30. Sir Gerald FITZMAURICE said that whatever might be the liability attaching to the property, ultimately the liability for tax would normally be discharged by a person. As he saw it, the exemption from taxation of the sending State in respect of the consular premises was sufficient to protect those premises. In addition, the property itself was inviolable and could therefore not be sold in satisfaction of fiscal liabilities.

31. The CHAIRMAN put to the vote article 26 as prepared by the Drafting Committee.

Article 26 was adopted by 11 votes to 1.

32. Mr. ŽOUREK, Special Rapporteur, said that he had voted for article 26 in the belief that its terms conferred a " real " immunity (immunité réelle) on the consular premises as such.

ARTICLE 27 *(Inviolability of the official correspondence, archives and documents)*

33. The CHAIRMAN drew attention to the amendment proposed by Mr. Bartoš, Mr. Scelle and Mr. Verdross to add the following sentence to article 27 : " The archives and documents of the consulate shall be kept and remain kept carefully

separated from the personal documents and papers of the consuls."

34. Mr. SCELLE explained that the amendment was mainly designed to give satisfaction to Mr. Tunkin who had rightly argued (554th meeting, paragraph 42) that the inviolability of official correspondence, archives and documents was only effective if the authorities of the receiving State were debarred from scrutinizing them for the purpose of determining whether any personal papers had been placed among official papers. The amendment would impose an obligation on the sending State to instruct its consuls to keep official papers quite separate. If the Special Rapporteur regarded such a provision as unnecessary, perhaps he would give his reasons.

35. Mr. ŽOUREK, Special Rapporteur, said that he had repeatedly recognized the utility of such a provision so far as honorary consuls were concerned but it was wholly unnecessary in the case of career consuls who were engaged exclusively in consular functions and did not carry on any other activities. The requirement laid down in the amendment might weaken the principle of the inviolability of the premises of career consuls since it could be interpreted to mean that the authorities of the receiving State were entitled to examine the consulate's papers with a view to satisfying themselves that they were in fact official consular papers.

36. Mr. SCELLE repeated the argument (*ibid.*, paragraph 52) he had advanced during the earlier discussion that it was invidious to suppose that only honorary consuls might engage in nefarious activities and, by relying on the inviolability of the premises, seek to hide compromising documents among official papers. The possibility of career consuls abusing their immunities in that way would be reduced if the amendment were adopted, though he agreed that it was more necessary in the case of honorary consuls.

37. Mr. AGO considered the amendment inadvisable; it had, incidentally, been drafted before the Commission's decision to separate the provisions relating to honorary consuls. It was quite exceptional for career consuls to be allowed by the sending State to engage in private activities, and for them the amendment was wholly unnecessary. Moreover, it could be positively detrimental inasmuch as it might be difficult to judge whether certain papers, which the consul had good reason to keep among his official papers, could be regarded as strictly personal ones. If the requirement laid down in the amendment was intended as a condition of the inviolability of official correspondence, it might be extremely dangerous since it might be held to allow the authorities of the receiving State to examine the papers.

38. Mr. TUNKIN agreed with Mr. Ago's interpretation of the possible consequences of the amendment. In his earlier observations on article 27 he had never intended to suggest that it should be modified in such a manner.

39. The CHAIRMAN, speaking as a member of the Commission, said that the amendment was modelled on article 30 of the Harvard Draft, but that article was concerned exclusively with the duties of the sending State. He opposed the amendment because it might be regarded as qualifying the principle of the inviolability of official correspondence.

40. Mr. SCELLE said that in the form proposed by the Drafting Committee, article 27 meant that all papers in a consulate, whether official or not, were inviolable. If that was the intention of the Commission, an express statement to that effect should be made in the commentary.

41. The CHAIRMAN put the amendment to the vote.

The amendment was rejected by 9 votes to 6, with 1 abstention.

42. The CHAIRMAN put to the vote article 27 as proposed by the Drafting Committee.

Article 27 was adopted unanimously.

43. Mr. SCELLE said that he had voted in favour of article 27 as it stood on the understanding that the Commission's intention as he had interpreted it would be explained in the commentary.

ARTICLE 28 *(Facilities)*

44. The CHAIRMAN put to the vote article 28 as prepared by the Drafting Committee.

Article 28 was adopted unanimously.

ARTICLE 28 *a (Free movement)*

45. Mr. TUNKIN said that article 28 *a* as drafted by the Drafting Committee imposed an excessive obligation on the receiving State. In his opinion, only in the consular district should consular officials enjoy full freedom of movement.

46. Sir Gerald FITZMAURICE explained that the article was modelled on article 24 of the draft on diplomatic intercourse and the Drafting Committee had seen no reason why in the case of consuls the obligation to accord freedom of movement should be narrower, for although consular officials would normally travel only within their consular district they might have to visit other districts or their own embassies. Perhaps Mr. Tunkin's doubts about the present wording related more to the phrase "shall ensure" and might have been removed if the phrase "shall not restrict" had been used. If at the 1961 conference on diplomatic privileges and immunities such an amendment were made to article 24 of the draft on diplomatic intercourse then a parallel change could be made to article 28 of the present draft.

47. Mr. TUNKIN said his doubts had not been removed by sir Gerald Fitzmaurice's explanation; he moved that article 28 *a* be reworded so as to indicate that the receiving State was bound to

ensure freedom of movement in the consular district but not in the whole of its territory.

48. The CHAIRMAN put Mr. Tunkin's amendment to the vote.

Mr. Tunkin's amendment was rejected by 11 votes to 2, with 2 abstentions.

Article 28a as prepared by the Drafting Committee was adopted by 14 votes to 1 with 1 abstention.

ARTICLE 29 *(Freedom of communication)*

49. Mr. TUNKIN asked what was meant by the expression " special couriers ", which was not to be found in the draft on diplomatic intercourse.

50. Mr. YOKOTA, Chairman of the Drafting Committee, explained that during the earlier discussion on article 29 (531st meeting, paragraphs 37 and 38, and 532nd meeting, paragraph 29) some members had said that consular documents were often entrusted to couriers who were not diplomatic couriers in the strict sense.

51. Mr. TUNKIN said that the institution of diplomatic couriers was well established; he considered that it would be inadvisable to introduce a new category of couriers.

52. Sir Gerald FITZMAURICE explained that the term " other special couriers " had been inserted by the Drafting Committee to cover the various possibilities which had been mentioned during the earlier discussion in the Commission. For example, an official of a consulate or a consular servant might be sent to collect consular correspondence received at the embassy in the normal diplomatic bag or he might be sent to an airport to collect consular correspondence which had been entrusted to the captain of an aircraft.

53. Mr. PAL suggested that paragraph 1 should end at the words " all appropriate means ". The clause would then be comprehensive and it would be unnecessary to introduce terms not used in the diplomatic draft.

54. Mr. AGO considered that although theoretically Mr. Pal's suggestion was acceptable there were practical reasons for mentioning the kind of means that might be employed for the purpose of communication; otherwise endless disputes could arise as to whether a particular means was " appropriate ". The enumeration at the end of paragraph 1 served a useful purpose.

55. Mr. ŽOUREK, Special Rapporteur, said that the category of special couriers had been included by the Drafting Committee to cover special cases. For example, the sending State might not have a diplomatic mission in a particular country and the communications of consulates would then have to be entrusted to messengers other than diplomatic couriers. The same would apply in cases where the consular bag had to be carried from a consulate to the diplomatic mission of the sending State.

56. Mr. GARCÍA AMADOR asked whether the obligations in article 28 *a* and 29 were different in nature. If they were not, he failed to see why the words " shall ensure " were used in article 28 *a* and the words " shall permit and protect " in article 29.

57. Mr. TUNKIN considered that at the present late stage the Commission should not depart from the wording of the draft on diplomatic intercourse which had been so carefully considered.

58. Mr. SANDSTRÖM observed that since article 28 *a* dealt with freedom of movement, it would be inappropriate to speak of protection in that article.

59. Mr. AGO said that the expression " shall ensure " could certainly not be used in article 29 since it might convey the impression that the receiving State had itself to effect the communications of the consulate, which was absurd.

60. Mr. GARCÍA AMADOR said it was now clear that there was a difference in nature between the obligation laid down in article 28 *a* and that laid down in article 29.

61. Mr. MATINE-DAFTARY felt that the Drafting Committee had failed to carry out the Commission's instructions to follow the wording of the draft on diplomatic intercourse. He was opposed to the introduction of an entirely unknown category of special couriers.

62. Mr. AGO said that consulates might not always be able to avail themselves of the diplomatic couriers or of the diplomatic bags used by the embassies of their respective countries; allowance should be made for such circumstances in the text.

63. Mr. MATINE-DAFTARY said he was willing to accept the Drafting Committee's text if an explanation on the lines of that given by Mr. Ago were inserted in the commentary.

64. The CHAIRMAN suggested that an explanation on the lines of that contained in paragraph 3 of the commentary on article 25 in the draft on diplomatic intercourse be inserted in the commentary.

It was so agreed.

Article 29 as prepared by the Drafting Committee was adopted unanimously.

ARTICLE 30 *(Communication with the authorities of the receiving State)*

65. Mr. TUNKIN observed that the consular district was not mentioned in the Drafting Committee's text for article 30, paragraph 1, whereas article 4, paragraph 2 (Consular functions) provided that a consul might deal only with the local authorities. Under paragraph 1 as proposed by the Drafting Committee, however, consuls might address any authority, including central authorities other than the Ministry of Foreign

Affairs of the receiving State. He asked for an explanation of that wording.

66. Sir Gerald FITZMAURICE pointed out that the consul might address only the authorities which were competent under the law of the receiving State. The purpose of the provision was to allow for the many cases where services were centralized and where there were no competent authorities in the consular district; for example, in the United Kingdom all matters relating to copyrights, patents and trade names were dealt with by a central department in London, and not in any consular district. The provision was supplemented by paragraph 3 of the article, which referred to the relevant international agreement and the laws and usages of the receiving State.

67. Mr. BARTOŠ observed that the consul might be obliged to address, not the central authorities, but the competent local authorities outside the consular district concerned. In Yugoslavia, for example, recruitment, with which consuls might be concerned, was dealt with in command regions which did not correspond to the districts of the civil administration; the same applied to customs districts. All consular districts, on the other hand, corresponded to the boundaries of the civil administration. Accordingly, the consul might be obliged to address himself to authorities outside his consular district. He would vote in favour of the article.

68. Mr. TUNKIN still did not consider the wording of paragraph 1 satisfactory. Although he would vote for the article, he thought that the meaning of paragraph 1 should be clarified in the commentary.

Article 30 as prepared by the Drafting Committee was adopted unanimously.

ARTICLE 30 *a (Communication and contact with nationals of the sending State)*

69. Sir Gerald FITZMAURICE, in reply to a question by Mr. Erim, said that article 30 *a*, like article 28 *a*, did not confer on the consul the right to visit a national in a prohibited area. That could easily be explained in the commentary.

70. Mr. TUNKIN said he would abstain from voting on article 30 *a* because the wording was unnecessarily complicated. He did not wish to submit an amendment at that late stage.

71. Mr. EDMONDS said that, during the discussion on the original article, he had said (536th meeting, paragraph 36) that provision should be made for private communications between the consul and the national of the sending State. Nevertheless, that provision might be implicit in the article, and he would vote for it.

Article 30 a *as prepared by the Drafting Committee was adopted by 12 votes to none, with 2 abstentions.*

ARTICLE 31 *(Levying of consular fees and charges and exemption of such fees and charges from taxes and dues)*

Article 31 as prepared by the Drafting Committee was adopted unanimously.

ARTICLE 32 *(Special protection and respect due to consuls)*

Article 32 as prepared by the Drafting Committee was adopted by 14 votes to none, with 1 abstention.

ARTICLE 33 *(Personal inviolability)*

Paragraph 1

72. Mr. MATINE-DAFTARY said he would vote against the article for reasons that he had explained during the Commission's earlier debates (539th meeting, paragraphs 6 and 21 to 24, and 540th meeting, paragraphs 40 to 45).

73. Mr. TUNKIN asked that the vote be taken paragraph by paragraph.

74. With regard to paragraph 1, he doubted whether the criterion of an offence punishable by a maximum sentence of not less than five years' imprisonment would be generally acceptable to all States. While similar provisions occurred in some bilateral conventions, the law varied so greatly from country to country that it was impossible to lay down any specific term of imprisonment as a general rule. It would be better to adopt a more general formula, imposing an obligation on States, but leaving the details to be settled under municipal law.

75. Mr. EDMONDS agreed that paragraph 1 was unacceptable, but for a different reason from that mentioned by Mr. Tunkin. It was impossible to know with any certainty, at the time an offence was committed, whether it was punishable by a maximum sentence of five years' imprisonment. Arrests were often made on an open charge and the penalty for the offence upon conviction might not become known until the prosecutor filed a complaint or indictment.

76. Sir Gerald FITZMAURICE could not agree that the provision was unworkable; its inclusion in many bilateral agreements had raised no difficulty. The Drafting Committee had been of the opinion that the phrase " arrest or detention pending trial " would not rule out purely temporary arrest or dentention, but would prevent the consul from being held throughout the period between the ascertainment of the offence and his trial. It would be recalled that in the Special Rapporteur's draft (A/CN.4/L.86) a decisive condition governing a consul's liability to arrest had been the flagrancy of the offence; but that provision had been criticized on the grounds that it would render the consul liable to arrest even for a petty offence. The criterion of a grave offence had also been suggested, but had been rejected because of its vagueness. The criterion of an offence

punishable by a maximum sentence of five years' imprisonment seemed to be objective and would ensure that a consul would not be arrested unless the offence was indeed grave. He was fully aware of the difficulty of finding an appropriate wording.

77. Mr. SANDSTRÖM thought that the best course might be to adapt the provision to the criminal law of the countries concerned. For example, as defined in the Consular Convention between the United Kingdom and Sweden of 1952, the expression " grave offence " meant in the United Kingdom an offence punishable by imprisonment for five years or more, and in Sweden an offence punishable by imprisonment for four years or more (article 2 (9) of the Convention).

78. Mr. EDMONDS said that the provision would be clearer if it stated simply that a consul was not liable to detention pending trial unless charged with an offence punishable by a maximum of five years' imprisonment. He proposed the deletion of the words " arrest or ".

79. Mr. YASSEEN agreed with Mr. Edmonds that the provision might be difficult to apply and controversial in practice, for no one could know in advance what sentence would be imposed in respect of a particular offence. Furthermore, he did not see why the Drafting Committee had chosen a maximum of five years' imprisonment; in most of the countries which recognized a tripartite division of criminal acts into " crimes " " délits " and " contraventions ", a crime was punishable by a sentence of not less than three years' imprisonment. While it was understandable that consuls should not be arrested for a " contravention ", or offence, they should surely be liable to arrest for a crime.

80. Mr. AGO pointed out to Mr. Yasseen that, in some bilateral conventions, the maximum penalty specified in analogous provisions marking the point at which a consul's immunity to arrest ceased was five years' imprisonment. Five years was not a really high maximum, for the minimum might be as little as only a few months. In any case, any specific figure was bound to be arbitrary; for countries which observed the theoretical distinction between " crimes et délits " (felonies and misdemeanours), the simple clause " except in the case of a felony " might suffice, but the clause would probably not be applicable for countries following a different legal system.

81. Mr. SANDSTRÖM agreed that the tripartite classification mentioned by Mr. Yasseen was unknown to the law of a number of countries, including his own.

82. Mr. ŽOUREK, Special Rapporteur, said that it was extremely difficult to draft a generally acceptable provision on the question, although the Commission was obviously agreed on the principle that some personal inviolability should be extended to consuls. As Mr. Sandström had pointed out, the law varied widely from country to country. In particular, some countries did not recognize the classification of punishable offences into " crimes ", " délits " and " contraventions ", so that Mr. Ago's suggestion would not meet the case.

83. The Commission was faced with a choice between two procedures : it could either name a hypothetical term of imprisonment as a criterion or insert a general clause; that would have the disadvantage of vagueness, but it might be acceptable to all States. In his original draft, he had combined those two conditions, but had limited the cases in which a consul could be arrested as far as possible. A consul being subject to the jurisdiction of the State of residence, justice must take its course, and he could not be absolved from responsibility in the case of a serious crime. What was important was to limit the number of cases where a consul could be imprisoned pending trial. That was why he had put forward the criterion of *flagrante delicto* if the act constituted a criminal offence against life or personal freedom. The Drafting Committee, however, had thought that such a provision might limit unduly the powers of the receiving State, and the outcome of its lengthy deliberations was the present paragraph 1.

84. Sir Gerald FITZMAURICE thought the effect of Mr. Edmonds' amendment would be to give the receiving State complete freedom to arrest a consul on the most trifling pretext. Such a solution was unacceptable and, moreover, was not in accordance with general practice.

85. Mr. LIANG, Secretary to the Commission, drew attention to the phrase " do not carry on any gainful private activity ". The accumulation of adjectives seemed to be unnecessary since public activity could hardly be regarded as gainful. He did not believe that it was to be found in many bilateral agreements.

86. Mr. ŽOUREK, Special Rapporteur, said that the phrase occurred in a number of bilateral consular conventions, and was usually preceded by the words " commerce or other "; the Drafting Committee had thought that the reference to commerce was superfluous. He could not agree with the Secretary that private activity was always gainful, for it might be carried on for humanitarian or social purposes.

87. Mr. EDMONDS said that in view of Sir Gerald Fitzmaurice's comments he withdrew his amendment, but proposed instead the deletion of the provison, " except in the case of an offence punishable by a maximum sentence of not less than five years' imprisonment ". The purpose of detention pending trial was to ensure the defendant's presence in court; such a provision was hardly necessary in the case of a consul.

88. Mr. AGO thought that Mr. Edmonds' new proposal simplified the situation, but would make the article difficult for States to accept. If it rendered the consul immune from detention pending trial even in very serious cases, the draft would be going much farther than any existing bilateral consular convention.

89. Since it was obvious that the Commission could not agree on a satisfactory text, he would suggest that the provision should be adopted as prepared by the Drafting Committee but that the attention of governments should be drawn to the problem in the commentary.

90. Mr. TUNKIN thought that the deadlock could be broken by offering alternative texts to governments. One might be the text prepared by the Drafting Committee and the other the same text but with the proviso amended to read simply " except in the case of a serious offence ".

91. The CHAIRMAN pointed out that Mr. Tunkin's second alternative was similar to article 20 of the Harvard Draft.

92. Mr. YASSEEN said that, if that formula were approved, each State would decide for itself what was the maximum penalty justifying the arrest of a consul.

93. Mr. EDMONDS said that the Commission was discussing an academic point. Very few consuls were arrested or detained for grave offences. His objection to Mr. Tunkin's formula was that it would impose on every policeman the duty to determine whether a particular offence was or was not " serious ". The purpose of both his proposals was to provide an element of certainty in the application of the rule laid down. The practical result of the adoption of his latest amendment would be to extend to the consul the necessary immunity from arrest or detention, in view of the fact that in practice a person having consular status because of his position was unable to evade appearance in court and would not disobey an order requiring him to be present at a certain time and place.

94. Mr. AGO supported Mr. Tunkin's proposal that the Commission should submit alternative texts to governments, but only on the understanding that the criterion was truly objective and that both the receiving and the sending States should have a say in deciding whether a particular offence with which a consul was charged was serious.

95. The CHAIRMAN put Mr. Edmonds' amendment for the deletion of the final clause to the vote.

Mr. Edmonds' amendment was rejected by 11 votes to 1, with 4 abstentions.

96. The CHAIRMAN put to the vote Mr. Tunkin's proposal that alternative texts for paragraph 1 should be offered to governments, one to be the Drafting Committee's text and the other the wording proposed by Mr. Tunkin himself, on the understanding that the expression " serious offence " would not be interpreted unilaterally by the receiving State.

Mr. Tunkin's proposal was adopted by 10 votes to 2, with 4 abstentions.

97. Mr. EDMONDS said he had voted against Mr. Tunkin's proposal because he did not believe that the Commission should submit alternatives to governments and also on the ground that the rule should be stated unequivocally.

98. Mr. SANDSTRÖM said that he had voted against the proposal because the paragraph as worded by the Drafting Committee would have elicited clearer replies from governments.

99. Mr. SCELLE said that in voting for the proposal he had made the mental reservation that the paragraph would be valuable only if it were subject to a general clause providing for arbitration in cases of dispute.

100. The CHAIRMAN put paragraph 1 to the vote.

Paragraph 1 was adopted by 14 votes to 2.

Paragraph 2

101. Mr. TUNKIN said he had considerable doubts concerning the words " of at least two years' imprisonment ". They made the paragraph self-contradictory in two ways. First, if a consul was regarded as subject to the jurisdiction of a court, it was illogical to provide for any exception whatsoever based on the severity of the sentence imposed. Secondly, from the practical point of view, the words might conceivably influence the judgement of the court to pronounce a heavier sentence than the normal, because otherwise a consul would be immune from all punishment. He therefore proposed that the words be deleted.

102. Sir Gerald FITZMAURICE observed that the effect of Mr. Tunkin's amendment would be to nullify the whole paragraph. No one, whether a consul or not, could be committed to prison except in pursuance of a final sentence. The purpose of the paragraph was to give a consul partial immunity from the consequences of criminal process; to some extent the provision thus placed consuls on the same footing as diplomats, although the latter had complete immunity while the immunity of consuls was limited. Furthermore, he did not believe that courts would be influenced by the provision in the manner suggested by Mr. Tunkin; surely sentences were related to the gravity of the offence.

103. Mr. TUNKIN could not agree that the deletion of the last phrase would render the provision meaningless. Similar clauses occurred in many bilateral conventions; their purpose was to cover the situation where a court of first instance has considered a case and had decided on a penalty, which was subject to appeal. Nevertheless, he would not press his proposal.

104. Mr. LIANG, Secretary to the Commission, agreed with Mr. Tunkin that the deletion of the phrase would not render paragraph 2 meaningless. While it could be argued that such a provision was self-evident, the Commission had adopted a number of other clauses which were equally obvious.

105. The CHAIRMAN put paragraph 2 to the vote.

Paragraph 2 was adopted by 14 votes to 1, with 1 abstention.

Paragraphs 3 and 4

Paragraphs 3 and 4 were adopted by 15 votes to 1.

Article 33 as a whole was adopted by 14 votes to 2.

Date and place of the thirteenth session
(resumed from the previous meeting)

[Agenda item 9]

106. Mr. LIANG, Secretary to the Commission, said it had been suggested at the previous meeting that an interval of two weeks should be allowed between the end of the 1961 Conference on Diplomatic Intercourse and Immunities and the beginning of the Commission's thirteenth session. He had consulted the Secretary-General of the United Nations, who has agreed that the thirteenth session of the International Law Commission should begin on 1 May 1961 and end on 7 July. That information would be included in the Commission's report.

The meeting rose at 6.25 p.m.

573rd MEETING

Tuesday, 28 June 1960, at 9.30 a.m.

Chairman: Mr. Luis PADILLA NERVO

Consular intercourse and immunities
(A/CN.4/L.86, A/CN.4/L.90) ***[continued]***

[Agenda item 2]

PROVISIONAL DRAFT ARTICLES
(A/CN.4/L.90) *(continued)*

1. The CHAIRMAN invited the Commission to continue its consideration of the provisional draft articles prepared by the Drafting Committee.

ARTICLE 34 *(Immunity from jurisdiction)*

2. The CHAIRMAN drew attention to the amendment proposed by Mr. Verdross substituting the words " in respect of the acts within the scope of their functions " for the words " in respect of acts performed in the exercise of their functions ".

3. As Mr. Verdross had had to leave he had asked, in the event of his amendment being rejected, that his views be recorded that consuls enjoyed immunity from jurisdiction in respect of official acts only-namely, those attributable to the sending State. Consequently, he considered that the Drafting Committee's formula was too broad since it also covered offences committed by consuls in their private capacity during the exercise of their functions.

4. Mr. ŽOUREK, Special Rapporteur, said the amendment was unacceptable because it tended to weaken the position of consuls and might hamper the free and independent exercise of consular functions. It was by no means always easy to determine whether a specific act definitely formed part of the consular functions. Some learned authors had even advanced the theory of " functional offences ". The formula proposed by the Drafting Committee was correct and corresponded to analogous provisions in a large number of consular conventions: it in no way prejudiced the rights of nationals of the receiving State.

5. Mr. FRANÇOIS said the Drafting Committee's text for article 34 was not very satisfactory; at least the word " acts " should be qualified by the adjective " official " to remove the discrepancy in the wording of article 34 and article 40, paragraph 2. The question of the immunity of consuls from jurisdiction raised a whole series of difficulties, even at the national level. In view of the shortage of time perhaps it might be advisable provisionally to accept the Drafting Committee's text pending the discussion at the 1961 conference on diplomatic intercourse and immunities of article 29 of the draft on diplomatic intercourse and the receipt of the observations of governments on the present draft.

6. The CHAIRMAN put Mr. Verdross' amendment to the vote.

The amendment was rejected by 8 votes to 4, with 2 abstentions.

Article 34 was adopted by 10 votes to 2, with 2 abstentions.

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

7. Mr. ŽOUREK, Special Rapporteur, in reply to a question by Mr. YASSEEN concerning the expression " work permits ", explained that the intention was to exempt consuls and members of the consular staff from the duty to obtain for members of their private staff the usual work permits required for aliens by the receiving State. An explanation to that effect would appear in the commentary.

8. Mr. MATINE-DAFTARY said he could accept article 35 on condition that the exemption from the duty to obtain work permits applied solely to employment in the consulate itself; without such a safeguard the article would be far too liberal and might be held to apply to any kind of employment undertaken in the receiving State.

9. Mr. YASSEEN agreed on the previous speaker's interpretation of the scope of the exemption,