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**Summary record of the 540th meeting**

Topic:  
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into account the problem which Sir Gerald Fitzmaurice thought would arise if the local authorities were obliged to go to the consul's residence to take his statement of evidence.

The meeting rose at 1 p.m.

### 540th MEETING

Monday, 16 May 1960, at 3.55 p.m.

Chairman: Mr. Luis PADILLA NERVO

#### Filling of casual vacancy in the Commission (article 11 of the Statutes) [continued]\*

[Agenda item 1]

1. The CHAIRMAN announced that the members of the Commission, meeting in private, had elected two persons to fill the vacancies caused by the appointment of Mr. Ricardo J. Alfaro to the International Court of Justice and by the resignation of Mr. Thanat Khoman. The new members were Mr. Eduardo Jiménez de Aréchaga of Uruguay and Mr. Mustafa Kamil Yasseen of Iraq. The Secretariat would communicate the results of the elections to the persons concerned.

#### 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 33 (*Personal inviolability*) and ARTICLE 34 (*Immunity from jurisdiction*)

2. The CHAIRMAN, inviting the Commission to resume its consideration of article 33, paragraph 3, of the Special Rapporteur's draft (A/CN.4/L.86), referred to three points that had been raised in connexion with the evidence of consular officials against whom criminal proceeding were instituted. Mr. Tunkin had suggested (539th meeting, paragraph 16) that the obligation to appear before a court should be expressly stated. Some members had opposed the provision that the judicial authority requiring a consular official's deposition should take such deposition at the latter's residence or office. Lastly, Mr. Yokota had proposed an amendment (538th meeting, paragraph 64) stressing the desirability of avoiding interference with the performance of the consular official's duties.

3. Mr. ŽOUREK, Special Rapporteur, suggested tentatively that the paragraph should be replaced by the following text, which might be submitted to the Drafting Committee:

"In the event of criminal proceedings being instituted against a consular official of the sending State, that official shall appear before the court or before the administrative authorities. Nevertheless, the proceedings shall be conducted, except in the cases referred to in paragraph 1 of this article, with the respect due to the sending State and in a manner which will not hamper the exercise of consular functions."

4. Mr. SANDSTRÖM said that the "except" clause in the Special Rapporteur's tentative text was not satisfactory. Surely, the respect due to the sending State should be observed in all circumstances.

5. Mr. ŽOUREK, Special Rapporteur, said that he could not quite see how it would be possible to establish a distinction where detention was concerned. He thought the Drafting Committee would be able to draft a text acceptable to Mr. Sandström.

6. Mr. VERDROSS said that cases might occur where the sending State dismissed one of its consular officials owing to the nature of the offence he had committed.

7. Mr. AGO observed that in such cases the official concerned would be treated as an ordinary individual.

8. Mr. BARTOŠ agreed with Mr. Ago and thought that the draft fully covered the case referred to by Mr. Verdross.

9. The CHAIRMAN said that the tentative draft suggested by the Special Rapporteur and the opinions on paragraph 3 expressed in the Commission would be forwarded to the Drafting Committee.

10. Turning to paragraph 1, he recalled that Mr. Sandström had submitted a proposal (537th meeting, paragraph 41). Moreover, at the previous meeting (539th meeting, paragraph 5), Sir Gerald Fitzmaurice had questioned whether the provision also applied in cases where an offence was committed by the consular official while engaged on official business. Also at the previous meeting (*ibid.*, paragraph 6), Mr. Matine-Daftary had criticized the passage "the act committed constitutes a criminal offence against life or personal freedom", on the ground that consular officials might be liable to arrest or detention in the case of other criminal offences as well.

11. He invited members to comment on the principle raised in paragraph 1.

12. Mr. FRANÇOIS said he objected to the whole system set forth in the paragraph. In the first place, the provision seemed to imply that a consular official could be arrested in any case where he was taken *in flagrante delicto*, which had clearly not been the Special Rapporteur's intention. Naturally, an arrest should not be possible for minor offences. Secondly, the provision should not be limited to cases where a consular official was taken *in flagrante delicto*, for it was conceivable that conclusive evidence might be found, some time later, that the consular official had com-

\* Resumed from the 527th meeting.

mitted a serious offence. He thought that the more general provision in Mr. Sandström's proposal was preferable.

13. Mr. BARTOŠ agreed with Mr. François that there was no reason why a consul's liability to arrest should be limited to cases of *flagrante delicto*. Moreover, he queried the second condition which, according to the Special Rapporteur's draft, had to be fulfilled before a consul could be arrested — *viz.*, that the offence must have been an offence against life or personal freedom; the Special Rapporteur himself had admitted some hesitation, in view of the varying severity of penalties under different legal systems. Accordingly, it seemed inadvisable to stipulate that the consul was liable to arrest in those two cases only. A broader formula would be closer to modern realities.

14. Sir Gerald FITZMAURICE said he was not sure that it was necessary to lay down the condition that, for the exception to operate, the consul must have been taken *in flagrante delicto*, especially in view of the further condition that the act must have constituted a criminal offence against life or personal freedom. If those two conditions were read together, it became obvious that the really effective condition was that the act committed must constitute a criminal offence against life or personal freedom — an extremely vague expression. Secondly, there might be cases not involving jeopardy to life or personal freedom in which arrest might be justified.

15. The Commission might follow a system, which appeared in a number of consular conventions, of relating liability to arrest to the question whether the offence with which the consular official was charged was liable to a certain type of penalty; for example, under some treaties, a consular official was liable to arrest or detention in those cases only in which conviction carried a minimum sentence of three or five years' imprisonment. That criterium had the advantage of being quite definite, of ensuring that the offence was serious (as measured by the severity of the penalty), and of not limiting the provision to offences against life or personal freedom, since other offences might also be extremely grave.

16. He pointed out that a consul who committed an offence while engaged on official business (if, for example, he committed a traffic offence when hurrying to intervene with the local authorities) would be immune from the jurisdiction of the receiving State under article 34. If the consular official was thus immune, it was hardly desirable to arrest or detain him; accordingly, the paragraph might be made subject to exceptions in cases falling under article 34. It might be argued that it would be difficult for the police to decide on the spot whether the official was immune from jurisdiction, but that difficulty arose in many other contexts also.

17. Mr. ŽOUREK, Special Rapporteur, pointed out that the situation covered by article 33, paragraph 1, was one where no judicial proceedings

had yet been instituted and where the police or administrative authorities were acting without a court order. Consular officials should be protected against arrest or detention for frivolous reasons, and it was essential to determine clearly the cases in which detention pending trial was justified. The provision should be liberal, rather than severe; if a criminal offence were committed, judicial proceedings would be instituted in each case. In his opinion, the provision concerning a criminal offence against personal life or freedom was absolutely essential, in order to limit the consul's liability to arrest to really serious cases and to avoid his detention for any trivial offence. The Drafting Committee might be asked to draft a broader formula; but he still thought that if paragraph 1 were omitted, the draft would lack a fundamental provision.

18. Sir Gerald Fitzmaurice had raised the question of the relationship between articles 33 and 34. He (Mr. Žourek) would point out that acts performed by consular officials in the exercise of their functions were exempt from the jurisdiction of the receiving State and could in no circumstances constitute grounds for the arrest of such persons. He agreed that it would be difficult for the police to distinguish between acts performed by consular officials in the exercise of their functions and other acts; it might however be possible to co-ordinate articles 33 and 34 in a suitable manner.

19. He believed that article 33 had been discussed sufficiently exhaustively and doubted whether an accurate text could be worked out in the Commission. In the light of the discussion, the Drafting Committee might be able to prepare a text acceptable to the majority.

20. The CHAIRMAN thought that the Drafting Committee might need further guidance concerning paragraph 1. The Commission did not seem to be agreed on whether a specific reference should be made to cases where the consular official was caught *in flagrante delicto*. That criterion was not mentioned in article 14 of the Havana Convention of 20 February 1928<sup>1</sup> or in article II of the Consular Convention between the United States of America and Costa Rica of 12 January 1948.<sup>2</sup>

21. Mr. AGO referred to his earlier remark (538th meeting, paragraph 66) that the Special Rapporteur had been very liberal with regard to detention pending trial and excessively strict with regard to court sentences. That view he would maintain and he agreed with Sir Gerald Fitzmaurice that a provision might be drafted under which the consul's immunity from arrest, whether prior or subsequent to the court sentence, would be limited to cases where the offence was punishable by imprisonment for, say, less than three years. Some doubt had been expressed whether immunity from jurisdiction as provided for in article 34,

<sup>1</sup> League of Nations *Treaty Series*, vol. CLV (1934-1935), No. 3582, p. 299.

<sup>2</sup> United Nations *Treaty Series*, vol. 70 (1950), No. 896, p. 32.

entailed personal inviolability with regard to immunity from arrest or detention. In his opinion, such immunity was self-evident in cases where the consul enjoyed immunity from jurisdiction. He could conceive of cases in which the consul might be tried without being arrested, but to be arrested without trial was inconceivable. As article 34 provided for immunity from jurisdiction, the consequences which it entailed were probably implicit in article 33. Apart from that, several speakers had considered the possibility of qualifying the word "acts" in article 34 by the term "official". The Drafting Committee should ponder the matter deeply before restricting article 34 too greatly. When once the immunity from jurisdiction was too severely qualified, the result might be a draft under which consuls would have virtually no immunity whatsoever. The key idea was that consuls were exempt from arrest and detention when acting as consuls, but not when they were acting as private individuals.

22. Mr. YOKOTA said that the Commission should decide whether it wished to retain the idea of capture *in flagrante delicto*, whether to retain in paragraph 1 the condition that the act committed must constitute a criminal offence against life or personal freedom, in order that the "except" clause could operate, or whether the condition should be replaced by some such phrase as that which appeared at the end of paragraph 2, and, if so, whether the term of imprisonment to be specified should be one year or two years.

23. Mr. ERIM observed that some points still remained obscure and should be cleared up before the article was sent to the Drafting Committee. In speaking about detention pending trial the Specil Rapporteur had considered two possibilities, which should be dealt with separately. First, there was the case of capture *in flagrante delicto*, where the offender was taken in the act or immediately afterwards. Secondly, there was the offence where there was no flagrancy; in that case, it was the judge alone who decided whether detention in custody was necessary. When the case was one of a person taken *in flagrante delicto*, the situation might be complex: the offender would be arrested by the police and the juge d'instruction would not intervene until some twenty-four or forty-eight hours later. If the Commission's draft specified the criminal offences for which a consul could be arrested by reference to a minimum term of imprisonment — without contemplating cases where the offender was taken *in flagrante delicto* — the police would not be able to decide on the spot whether they could or could not make an arrest. The position was much more complicated than it would be in the case of a diplomatic agent, who had merely to identify himself to be released. If a consul committed an offence and the police arrested him in the act, it would not become apparent until later — i.e., when he was brought before the judge and after the first stage of the investigation was over — whether the offence was punishable by imprisonment for one year, two years or three years. What would the police do in the

meantime? He thought the Commission could not ignore the impression which would be created in the public mind if under its draft an offender taken *in flagrante delicto* remained at liberty simply because the police had learned that the person concerned was a consul. The Commission must decide whether it wished to specify that the consul involved in a serious criminal offence and taken *in flagrante delicto* should remain free or liable to detention pending a court order. If the expression "*in flagrante delicto*" was retained, the police would by implication have power to arrest and detain a consul until the juge d'instruction had decided whether the offence was one punishable by imprisonment for the term specified and whether there was reason to detain the accused person in custody.

24. Mr. ŽOUREK, Special Rapporteur, replied that Mr. Erim's point was well taken and was a strong argument in favour of retaining the fundamental rule concerning the consul's liability to arrest for a flagrant offence. Perhaps a formula might be devised, not so precise as that used at the end of paragraph 2, to enable the police to arrest a consul when public opinion was roused. For that reason he was not in favour of the idea, mentioned by Mr. Yokota, that the last phrase in paragraph 1 might be replaced by the last phrase in paragraph 2. As he had explained in his second report (A/CN.4/131, paragraph 60), different conventions mentioned different terms of imprisonment as the criterion governing the consul's liability to arrest, and he had taken the shortest term as the one most likely to be acceptable to the majority of governments. He would certainly not have any objection to specifying a term of three years in the Draft, so that governments could comment thereon. The Commission might take its final decision on that point in the light of the governments' comments.

25. Mr. SANDSTRÖM did not agree that Mr. Erim's argument was such a strong one in favour of retaining the reference to flagrant offences. The police would of course always have to determine the nature of the crime in the light of circumstances. Once that had been done, it would be possible for them to refer to the penal code for the purpose of discovering the penalty.

26. Sir Gerald FITZMAURICE said that, despite the views expressed by some members and especially by the Special Rapporteur, he still harboured serious doubts about the wisdom of including the expression *in flagrante delicto*. The expression could not be taken in isolation but was coupled with the phrase "and the act committed constitutes a criminal offence against life or personal freedom". The second phrase appeared to limit the possibility of arresting a consul to cases in which he was caught *in flagrante delicto*; but, as Mr. François had pointed out, good grounds for charging him might be established subsequently. Hence the qualification *in flagrante delicto* seemed relatively useless in isolation, and if it stood in

isolation a consul might be arrested for a quite minor offence. If the passage "the act . . . . freedom" were retained, the immediately preceding passage became useless or restrictive. If it was established that a criminal offence had been committed, there was no reason why the alleged offender should not be arrested if *prima facie* grounds for a charge existed. The only criterion should therefore be the nature and gravity of the offence. As he had suggested before, it would be undesirable to limit the liability to arrest merely to criminal offences against life or personal freedom; there were other equally grave offences for which consuls should be equally liable to arrest and detention. The sole solution was not to specify the crime, but to make the liability to arrest dependent on the severity of the sentence. As soon as it was stated to be an offence punishable by imprisonment for a term of three or more years, the idea of the gravity of the offence was automatically present.

27. Mr. AGO observed that if each of the terms in paragraph 1 were considered in isolation, the stipulation that consular officials must be caught *in flagrante delicto* would be too broad and that concerning the criminal offence against life or personal freedom too narrow. Mr. Erim, on the other hand, had raised a pertinent question: Who could decide the arrest of a consul? In his own view, only the judicial authority had that power, never the police, at least not without a specific warrant from the judicial authority. If a consul was arrested, two questions arose: first, had he been acting in the exercise of consular functions or in a private capacity? And secondly, did the act committed render him liable under the penal code to a term of imprisonment sufficient to justify the arrest? Such serious questions could not be left to be answered by the police. The very fact that reference was made to an offence punishable by imprisonment for a certain term showed that only the judicial authority, not the police, could decide on the arrest.

28. Mr. AMADO said that he had been waiting to hear some reference to the "clameur publique" in connexion with the concept of arrest *in flagrante delicto*. In all codes based on the French and Italian codes of criminal procedure, the object of provisions concerning *flagrante delicto* was to prevent an escape. If a consul was arrested by reason of a flagrant offence, the decision concerning his release would be given later. He did not think that a provision concerning arrest *in flagrante delicto* actually appeared in any consular conventions. He had not found it himself and therefore preferred some such language as that of article 20 of the Harvard Draft<sup>3</sup> or article 14 of the Havana Convention or the formula used in Mr. Sandström's amendment (537th meeting, paragraph 41). In some cases excessive precision might be more of a

disadvantage than an advantage. The key point was that the authorities responsible for maintaining public order must have power to arrest anyone caught *in flagrante delicto*. Detention pending trial was equally necessary for the protection of a suspect. Some general term might well be used, and governments might be allowed to interpret it as they thought best. The Commission would be ill-advised to drop the expression "*in flagrante delicto*" without pondering the issue deeply.

29. Mr. BARTOŠ agreed with the view that, for the purpose of determining the gravity of the offence, the decisive criterion should be the severity of the penalty. In that connexion, he said he preferred a reference to a term of imprisonment of two or three years to a reference to a one-year term.

30. He pointed out that, under the normal constitutional safeguards for personal liberty in most countries, a person was not liable to arrest or detention pending trial unless he was charged with an offence of some gravity, and the criterion of gravity was normally the fact that the offence was punishable by a certain term of imprisonment. It was therefore unthinkable that consuls should be deprived of what was an elementary constitutional safeguard. In their case, the protection should, if anything, be greater because any hasty decision to arrest a consul could be harmful to good relations between the sending State and the receiving State.

31. For similar reasons, he thought that a person's fate — and *a fortiori* the arrest of a consul — should not be determined by the *clameur publique*.

32. The role of the police was to maintain order, not to make arrests of their own accord. In the case of a flagrant crime, the police could, of course, apprehend a person and take him to the competent judge who would, if necessary, order an arrest. As a guarantee of personal liberty, however, it was normal to specify that the person apprehended must be brought before the competent judge within a short time. Indeed, it was customary in such a case to advise the judge on duty by telephone.

33. Most consular conventions signed between the two world wars, and since the Second World War, contained a provision to the effect that consular officers were not liable to arrest or detention pending trial, except in respect of offences so serious as to be punishable by imprisonment for a term of two, three or five years, as the case might be.

34. Mr. SCHELLE expressed surprise at the range of the discussion on what had struck him as a relatively simple point.

35. Sir Gerald Fitzmaurice had given the key to the problem by pointing out that if an act committed by a consular officer constituted a serious criminal offence, there appeared to be no reason why that officer should be liable to arrest only if apprehended *in flagrante delicto*.

<sup>3</sup> Harvard Law School, *Research in International Law. (II) The Legal Position and Functions of Consuls* (Cambridge, Mass., Harvard Law School, 1932), p. 335.

36. Mr. AMADO had drawn attention to the essential duty of the police, which was to prevent a breach of the public peace. In conformity with that essential duty, the police were expected to take action not only against flagrant offenders but also against madmen or drunken persons. It was clear that in cases of that sort the police would have to act, even if the person disturbing the peace was a consul, and any different view was untenable. The police had no power to arrest a person or place him in custody; their duty was to apprehend a person who disturbed the peace and take him to the competent judge, who could order that person's arrest. The police were concerned with "inhibition", not with jurisdiction.

37. For all those reasons, he was definitely in favour of retaining the reference to flagrant offences, but did not approve of the qualifying provision "and the act committed constitutes an offence against life or personal freedom". He did approve, of course, of a provision limiting the power to arrest consuls to cases of serious offences, the seriousness being measured by the severity of the penalty. Such a provision should, however, be kept separate from the one referring to flagrant offences.

38. The Drafting Committee could perhaps adopt a text laying down that judicial action could proceed against consuls in the event of grave criminal offences and, in particular, in the case of flagrant offences. The question of the gravity of the offence, and indeed also the question whether a flagrant offence had or had not occurred, would have to be settled by the appropriate judicial authority. At the early stage, when the police was called upon to intervene, it would have to act on the basis of appearances, but its action, even when restraining or apprehending a person, did not constitute an arrest or detention in custody.

39. Lastly, he would once more point out that the use of somewhat vague terms was often essential when formulating rules of international law.

40. Mr. MATINE-DAFTARY expressed disapproval of the whole system embodied in article 33 as proposed by the Special Rapporteur. The provisions of that article constituted an unwarranted limitation upon the action of the judicial authorities. Moreover, it attempted to replace, in respect of consuls, the whole of the code of criminal procedure and penal code by the provisions of a single article.

41. He submitted that the Commission should only be concerned with protecting consuls from malicious or slanderous accusations. He therefore saw no sense in a provision which limited the power to arrest a consul to the case in which he committed a criminal offence punishable by a term of imprisonment of one year or two years. It would be most anomalous to allow a consul to go unpunished for committing an offence such as embezzlement, which in certain countries was not punishable by more than two years' imprisonment.

42. As to the police, there could be no doubt that it had no power to issue warrants of arrest. The police had, however, the duty to apprehend flagrant offenders. In that connexion, he pointed out that the concept of a flagrant offence, as construed in modern criminal law, covered more than just the case of an offender caught in the act of committing his offence.

43. Since the intention of the Commission was to regulate, in relation to consular officers, the matter of detention in custody, he ventured to suggest that consuls might perhaps be placed on the same footing as a class of persons who, under the municipal law of the receiving State, enjoyed relative inviolability, such as members of Parliament and members of the judiciary, who could not be prosecuted under the criminal law without the authorization of Parliament or the Supreme Council of the Judiciary, as the case might be. To prevent mischievous accusations, those bodies did not lift the immunity of such persons until after they had thoroughly inquired into the evidence produced in support of the charges made against such persons. In the case of consuls, the *Chambre de mise en accusations*, sitting in private as a *Chambre de Conseil*, might hear the doyen of the consular corps or the diplomatic representative of the sending State.

44. Perhaps the suggestion might be included in the commentary on the article, and governments might be invited to submit observations thereon.

45. The purpose of his suggestion was that a judicial body should be responsible for sifting the charges and evidence against the consular officer concerned and to decide whether the evidence was sufficient for criminal proceedings to be instituted.

46. Mr. ŽOUREK, Special Rapporteur, recalled that the whole purpose of article 33 was to provide that, while criminal proceedings should be brought against consular officials in the ordinary way, such officials should be left at liberty except in cases where particularly serious offences were involved.

47. His reasons for drafting the article as he had done were twofold. First, a consular official, like any other accused person, was entitled to the benefit of the presumption of innocence. Secondly, in the interests of good international relations, it was desirable that an official of a foreign State should not, saving in exceptionally grave cases, be kept away from his duties while a trial against him was pending.

48. In reply to Mr. Amado, he said that a reference to flagrant offences was contained, for example, in the Consular Convention of 1 March 1924 between Italy and Czechoslovakia (article 7),<sup>4</sup> and in certain other consular conventions.

49. In reply to Mr. Matine-Daftary, he emphasized the fact that the aim of the article was not to place consular officials outside the jurisdiction of the State of residence in respect of any offence,

<sup>4</sup> League of Nations *Treaty Series*, vol. XXXIV (1925), No. 867, p. 65.

however slight. His sole object was to confine arrest and detention pending trial to particularly serious cases and to ensure that a consul was not compelled to serve a prison sentence when the offence involved was a minor one. If and when a consul was sentenced under a final judgment, he would have to serve his sentence like any other person, provided that the offence was one punishable by a term of imprisonment of a length which had still to be determined.

50. The CHAIRMAN suggested that paragraphs 1 and 2 of article 33 be referred to the Drafting Committee with the following general indications: the majority of the members had expressed the opinion that the notion of the gravity of the crime should be one of the main criteria; on the other hand, the explanations furnished by Mr. Amado and Mr. Scelle with regard to the expression *in flagrante delicto* and detention pending trial made it possible to consider both notions in the wording of article 33; it had been agreed that the decision to be taken with regard to the gravity of the criminal offence must be made by the judicial authority. The Drafting Committee's text would, of course, be by no means final, since the Commission would examine it and would subsequently receive comments from governments. The suggestion made by Mr. Matine-Daftary might perhaps be discussed separately.

51. Mr. YOKOTA objected that the Drafting Committee would simply have to go over the same arguments as the Commission unless the latter decided whether the expression "caught in *flagrante delicto*" was to be retained or not.

52. The CHAIRMAN replied that the explanations given by some members seemed to weigh in favour of its retention. Whatever the Commission's text might provide, the practice of arresting overt offenders would undoubtedly continue in real life, since the police was responsible for protecting public order. He proposed that article 33 be referred to the Drafting Committee with the indications he had outlined.

*It was so agreed.*

The meeting rose at 6.20 p.m.

#### 541st MEETING

Tuesday, 17 May 1960, at 10 a.m.

Chairman: Mr. Luis PADILLA NERVO

Consular intercourse and immunities  
(A/CN.4/131, A/CN.4/L.86) [continued]  
[Agenda item 2]

PROVISIONALS DRAFT ARTICLES  
(A/CN.4/L.86) (continued)

ARTICLE 40 (*Attendance as witnesses in courts of law and before the administrative authorities*)

1. Mr. ŽOUREK, Special Rapporteur, introducing article 40, said that paragraph 1 expressed an

accepted principle of international law. The fact that members of the consular staff were obliged to attend as witnesses, either in civil or in criminal proceedings, was stated in virtually all consular conventions. In his view, the same rule applied to attendance before administrative authorities.

2. The next two paragraphs of the article dealt with the application of the principle stated in paragraph 1. The provisions of those paragraphs were based on those of a number of consular conventions and proceeded from the general idea that the evidence of the consular official or employee concerned should be taken in a manner consistent with the respect due to him and so as not to hinder the exercise of his official duties.

3. The rules governing the point in the conventions could be classified into four broad groups. In the first were the rules similar to article 7 of the 1928 Consular Convention between Belgium and Poland of 12 June 1928:<sup>1</sup> a consular official or employee was treated practically in the same manner as any other witness, except that the judicial authority requesting him to appear was not allowed to threaten him with penalties in the event of non-appearance. Provision was usually made for the possibility of postponing the consular officer's deposition on grounds of health or urgent official duties, but that provision was no more than the application of a general rule to the specific case of consuls.

4. The second group consisted of rules giving the consular officer the choice between appearing in person and having his evidence taken at the consulate or at his residence. His proposal for article 40 followed those precedents.

5. In the third or intermediate group of rules, the consular officer, if unable to appear, was allowed to make a deposition in writing. Some consular conventions added that a written deposition could be made in those cases only where it was permissible under the laws of the receiving State. A variant of that rule provided that the court would take all necessary steps to avoid interference with the performance of the official duties of the consular officer and, in the case of a head of consular post, would arrange for the taking of his testimony at the consulate.

6. A fourth or mixed rule, which was that of article 15 of the Havana Convention of 1928<sup>2</sup> drew a distinction between civil and criminal cases. Personal attendance by a consular officer as a witness was compulsory in criminal cases, and the only requirement was that he should be treated "with all possible consideration to consular dignity and to the duties of the consular office". In civil cases, on the other hand, provision was made for the taking of evidence at the residence or office of the consular officer concerned.

7. He thought that the Commission could adopt any of those solutions, except the first, which

<sup>1</sup> League of Nations Treaty Series, vol. CXXIII (1931-1932), No. 2803, p. 31.

<sup>2</sup> *Ibid.*, vol. CLV (1934-1935), No. 3582, p. 299.