

Document:-
A/CN.4/SR.573

Summary record of the 573rd meeting

Topic:
Consular intercourse and immunities

Extract from the Yearbook of the International Law Commission:-
1960 , vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

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,

which should be expressly indicated in the commentary.

10. Mr. AGO said that the exemption in question was applicable to domestic staff rather than to persons employed in the consulate as such.

11. Mr. YOKOTA said that it would be a simple matter to explain that the exemption related to work performed in the domestic service of the consul or of members of his staff. He would have thought the interests of the receiving State were fully safeguarded by the provisions of article 21.

12. Mr. YASSEEN argued that exemption should certainly not be capable of being extended to a gainful private occupation carried on outside the consulate.

13. Mr. LIANG, Secretary to the Commission, did not think the Commission had intended to extend the application of the provision in the sense suggested by Mr. Yasseen. Certainly the meaning of article 35 as it stood was obscure, and if the Commission wished to make it applicable to persons other than the private staff of members of a consulate it would have to explain its reasons. It seemed to him inconceivable that a career member of a consular staff would want to engage in gainful private activities and, if so, should venture to seek exemption from the local legislation regarding work permits. He shared Mr. Ago's views about the scope of the exemption.

14. M. BARTOŠ considered that the exemption concerning work permits applied only to work performed in the consulate or to work carried out by members of the private staff of members of the consulate. That intention had not been clearly expressed by the Drafting Committee, and he agreed that some amendment was required together with an explanation in the commentary.

15. Mr. AGO believed that in most countries work permits were only required for unskilled labour and not for activities of a professional type; that fact should be brought out in the commentary.

16. Mr. MATINE-DAFTARY said that in most countries an alien was not allowed to accept any employment without a work permit. That fact should be clearly reflected in the text of the article itself, since it would be quite insufficient merely to mention it in the commentary, which tended to be ignored. If the Commission was unwilling to modify the article he must ask for a separate vote on the words "and work permits".

17. The CHAIRMAN put to the vote the text of article 35 up to the words "residence permits".

That text was adopted by 14 votes to none, with 1 abstention.

18. The CHAIRMAN put to the vote the words "and work permits".

Those words were adopted by 10 votes to 2, with 3 abstentions.

Article 35 as a whole was adopted by 14 votes to 1, with 1 abstention.

19. Mr. YASSEEN explained that he had voted against the inclusion of the words "and work permits" not because he disagreed with the interpretation given by the Special Rapporteur, but because in its present form article 35 was too general and might give rise to conflicting interpretations.

20. Mr. BARTOŠ said that he had abstained from voting on that phrase because he believed that the receiving State should not be entitled to require a work permit for work carried out in the consulate. At the same time, he had felt unable to vote against the inclusion of those words, since no individual could be deprived of the right to look for work. Under the legislation of his country that right was assured even for nationals of a country which did not grant reciprocal advantages to Yugoslav nationals.

ARTICLE 36 (*Social security exemption*)

21. Mr. TUNKIN asked why the proviso "if they are not nationals of the receiving State" contained in article 31 of the draft on diplomatic intercourse had not been inserted in article 36 of the present draft.

22. Mr. ŽOUREK, Special Rapporteur, replied that the commentary would explain that the enjoyment by nationals of the receiving State of the privileges and immunities conferred by the draft was subject in all cases to the general limitation laid down in article 42.

23. Mr. TUNKIN stated that the Special Rapporteur's reply had not fully satisfied him: article 42 of the draft did not refer to members of the families of consular staff. Article 36 as it stood did not correspond to article 31 in the draft on diplomatic intercourse, which did cover members of families forming part of the household of members of the mission.

24. Mr. ŽOUREK, Special Rapporteur, acknowledging the justice of Mr. Tunkin's criticism, suggested that article 42 be amplified to apply also to members of the families of consular staff.

25. Mr. TUNKIN said that that change would meet his point.

26. Mr. BARTOŠ asked for a separate vote on paragraph 4 of article 36, which he could not support because he considered that voluntary participation in the social security scheme of the receiving State should not be made conditional on the good will of that State. All persons should have the benefit of the local medical services, for example.

27. Mr. SANDSTRÖM thought that the drafting of article 36 was superior to that of the corresponding article in the draft on diplomatic intercourse, which had been formulated towards the end of the discussion, perhaps somewhat hastily.

28. Mr. EDMONDS said that in his opinion paragraph 2 (b) was unnecessary. Why should the receiving State be interested in knowing whether members of the private staff were covered by the social security system of the sending State or of a third State? And why should the receiving State require a foreigner to subject himself to its social security system if the foreigner and his employer were willing to exempt him from social security in the sending State?

29. Mr. ŽOUREK, Special Rapporteur, said that it would be contrary to the fundamental purpose of social security systems and not in the interests of the person concerned if he could not benefit from the social security system of the receiving State in the event of his not being covered by the social security system of the sending State or of a third State.

30. Mr. EDMONDS said he would vote against that provision, which was out of place in the draft.

31. The CHAIRMAN put to the vote paragraphs 1, 2 and 3 of article 36.

Those paragraphs were adopted by 15 votes to 1.

Paragraph 4 was adopted by 14 votes to 2.

Article 36 as a whole was adopted by 14 votes to 1, with 1 abstention.

ARTICLE 37 (*Exemption from taxation*)

Article 37 was adopted unanimously.

ARTICLE 38 (*Exemption from customs duties*)

Article 38 was adopted by 15 votes to none, with 1 abstention.

ARTICLE 39 (*Exemption from personal services and contributions*)

32. Mr. TUNKIN asked whether in the draft on diplomatic intercourse exemption from personal services and contributions had been extended to members of the private staff.

33. Mr. ŽOUREK, Special Rapporteur, replied that article 36, paragraph 3, of the draft on diplomatic intercourse might be interpreted as implying that private servants of the head or of members of the mission were exempted from personal services or at any rate that the receiving State should not require them to perform services in a manner which would interfere unduly with the performance of their duties. The exemption extended in article 39 of the present draft to private staff of members of a consulate who were not nationals of the receiving State was a more definite one.

34. Mr. TUNKIN, stating that he had no objection to article 39, explained that he had only wished to ascertain whether the departure from the draft on diplomatic intercourse had been deliberate.

Article 39 was adopted by 15 votes to none, with 1 abstention.

35. Mr. BARTOŠ suggested that the Secretary should draw the attention of the 1961 conference on diplomatic intercourse and immunities to the fact that in article 39 of the present draft the Commission was proposing a wider exemption for members of the private staff of consular officials than that accorded to the staff of diplomatic agents under article 36 of the draft on diplomatic intercourse.

ARTICLE 40 (*Liability to give evidence*)

36. Mr. MATINE-DAFTARY regretted that the Drafting Committee had ignored his contention (541st meeting, paragraph 32) that members of the consulate could not refuse to comply with a request by the courts of the receiving State for the production of official documents such as certificates of marriage or death. If the Commission was unwilling to meet his objection to paragraph 3 he would have to ask for a separate vote on that paragraph.

37. Mr. ŽOUREK, Special Rapporteur, said that he intended to explain the scope of paragraph 3 in the commentary, and hoped that would satisfy Mr. Matine-Daftary.

38. Mr. EDMONDS said that he agreed with Mr. Matine-Daftary. Some documents were of a purely public character and should certainly be produced on a proper order by a court. It would be no solution of the question to put an explanation to that effect in the commentary, as the explanation would not be consistent with the terms of paragraph 3 as it now stood.

39. The CHAIRMAN put to the vote paragraphs 1 and 2 of article 40.

Those paragraphs were adopted unanimously.

Paragraphs 3 was adopted by 10 votes to 3, with 2 abstentions.

Article 40, as a whole, was adopted by 13 votes to 2.

ARTICLE 41 (*Acquisition of nationality*)

40. Mr. SCALLE, pointing out that the French term "ménage" could only comprise husband, wife and, at most, their children, and was therefore considerably narrower than the English term "household", suggested that the word be replaced by *foyer*.

It was so agreed.

Article 41 was adopted unanimously, subject to the change in the French text.

ARTICLE 42 (*Members of the consulate and of the private staff who are nationals of the receiving State*)

41. The CHAIRMAN informed the Commission that Mr. Verdross had wished to propose an amendment replacing the words "in respect of official acts performed in the exercise of their functions" in paragraph 1 of article 42 by the

words "in respect of acts within the scope of their functions".

42. Mr. MATINE-DAFTARY supported the amendment.

Mr. Verdross' amendment was rejected by 9 votes to 3, with 4 abstentions.

Paragraph 1 of article 42 was adopted by 15 votes to none, with 1 abstention.

43. Mr. YOKOTA, Chairman of the Drafting Committee, suggested that paragraph 2 be referred to the Drafting Committee for modification in the light of Mr. Tunkin's observations concerning article 36 and of the Special Rapporteur's reply thereto; article 42, paragraph 2, should stipulate clearly that it applied also to members of the families of the consular staff and of the private staff. He suggested that the Commission should endorse such an amendment in principle and leave the precise wording to the Drafting Committee.

The amendment to paragraph 2 was approved in principle by 14 votes to none.

Paragraph 2, as amended, was adopted by 15 votes to none, with 1 abstention.

Article 42, as a whole, as amended, was adopted by 15 votes to none, with 1 abstention.

44. Mr. ŽOUREK, Special Rapporteur, suggested that a suitable wording for the beginning of article 42, paragraph 2, might be "Other members of the consulate and members of the private staff, as well as members of the families of members of the consulate and of private staff who are nationals . . ."

ARTICLE 43 (*Duration of consular privileges and immunities*)

45. Mr. ŽOUREK, Special Rapporteur, observed that in keeping with an earlier decision the French term "ménage" would have to be replaced by "foyer".

46. Mr. MATINE-DAFTARY said that he objected to the expression "in respect of acts performed by members of a consulate in the exercise of their functions" in paragraph 3. He asked for a separate vote on paragraph 3 and said that he would abstain from the vote on that paragraph.

Paragraphs 1 and 2 were adopted unanimously.

Paragraph 3 was adopted by 13 votes to 1, with 2 abstentions.

Article 43 as a whole was adopted by 15 votes to none, with 1 abstention.

ARTICLE 44 (*Estate of a member of the consulate or of a member of his family*)

Article 44 was adopted unanimously.

ARTICLE 45 (*Obligations of third States*)

47. Mr. TUNKIN asked the Special Rapporteur whether, under the text proposed, the obligations of a third State would not in some respects be greater than those of the receiving State.

48. Mr. ŽOUREK, Special Rapporteur, said that they would not. While the provisional draft article originally submitted by him had intentionally, in the interest of members of the consulate, been meant to confer on third States obligations greater than those owed by the receiving State, it had been decided in the Drafting Committee that the obligations of third States could in no case be greater than those of the receiving State.

49. Mr. BARTOŠ observed that his earlier objection to paragraph 1 was no longer applicable in view of the insertion of the reference to article 33.

Article 45 was adopted unanimously, subject to the omission of the words "sur ce territoire" as redundant (change affecting the French text only).

ARTICLE 46 (*Respect for the laws and regulations of the receiving State*)

50. Mr. TUNKIN asked why the terms of paragraph 1 departed from those of the corresponding provision in article 40 of the draft on diplomatic intercourse and immunities, in particular why the words "the exercise of the consular functions or" had been inserted.

51. Mr. BARTOŠ also asked for an explanation.

52. Sir Gerald FITZMAURICE said that it was clear, from the very nature of the diplomatic function, what was a diplomatic agent's relationship to the laws and regulations of the receiving State. Consuls, on the other hand, had to treat with local authorities on a great variety of questions and there was a greater danger that they might be hampered in carrying out their consular functions. It had therefore been felt that the additional phrase should be included in article 46.

53. Mr. YOKOTA recalled that at an earlier meeting (543rd meeting, paragraph 95) the Drafting Committee had been asked to include a provision to the effect "that the duty [to respect local law] should be without prejudice to the carrying out of normal consular functions connected with matters of internal administration."

54. Mr. MATINE-DAFTARY asked whether article 46 could be construed to mean that in the exercise of their functions consuls did not have to respect the laws and regulations of the receiving State.

55. Mr. BARTOŠ observed that consuls were subject to the jurisdiction of the receiving State and were required to respect the law of that State unless that law conflicted with the rules of international law governing the status of consuls or with a treaty. If consuls were granted privileges and immunities by treaty, it was precisely in order to permit them to exercise their consular functions.

56. Mr. ŽOUREK, Special Rapporteur, agreed with Sir Gerald's explanation. For example, a consul might have to communicate with the local authorities regarding a decision affecting a national

of the sending State which violated a treaty. In such a case it was conceivable that the consul might be accused of interfering in the internal affairs of the receiving State.

57. In reply to Mr. MATINE-DAFTARY, he said that a consul had the duty to respect all the laws of the receiving State, with the exception of any legislative provisions that imposed a duty from which he was exempted by virtue of the articles being prepared by the Commission or by virtue of an unchallenged rule of general international law or, lastly, by virtue of a provision in a consular convention.

58. Mr. LIANG, Secretary to the Commission, pointed out that while there was a theoretical justification for including the phrase "without prejudice to the exercise of the consular function", it was actually out of place since the idea expressed was understood as basic throughout the draft and to mention it in article 46 might lead to confusion. It was very difficult to draw a fine line of distinction between consular and diplomatic functions so far as the question under discussion was concerned, and since it did not appear in the corresponding article of the draft on diplomatic intercourse and immunities, it would be better to omit the phrase in article 46.

59. Mr. TUNKIN said that since the privileges and immunities of consuls were recognized by the receiving State for the purpose of permitting the exercise of consular functions, it seemed to him that the phrase under discussion could be omitted. To include it would be very dangerous because it might be construed as meaning that a consul could ignore any law whenever he was exercising his consular functions.

60. Mr. AGO said that the phrase under discussion was included for a certain purpose in compliance with an instruction by the Commission, but he agreed with Mr. Tunkin that it was open to misinterpretation and that it would be dangerous to retain it.

61. Mr. MATINE-DAFTARY observed that the Special Rapporteur's reply related to "privileges and immunities" but not to the phrase under discussion. He would support its omission.

62. Mr. BARTOŠ said that he would not oppose the deletion of the phrase in question since privileges and immunities were granted for the purpose of permitting consuls to exercise their functions.

63. Mr. YOKOTA said that in the light of the discussion he agreed that the phrase might be misconstrued and should therefore be deleted.

It was unanimously agreed to omit the words "the exercise of the consular functions or".

Article 46 as amended was adopted unanimously.

ARTICLE 48 (*Obligations of the receiving State in certain special cases*)

64. Mr. EDMONDS recalled his earlier observation that the duty specified in paragraph (a) was

too broad (545th meeting, paragraph 49). It would be impossible in practice, at least so far as the United States of America was concerned, to impose the obligation to report the death of every foreign national.

65. Mr. ŽOUREK, Special Rapporteur, said that the Drafting Committee had considered Mr. Edmonds' observations. The limitation of the obligation to the case of deceased nationals who had owned property in the receiving State would make the provision inapplicable to the case of a national who had owned property in the sending State, where a copy of the death certificate would be important for the purpose of succession to the estate. Also, a sending State might be interested in the certificate for other reasons — for example, for the purpose of vital statistics. As to the possibility of amending part of the paragraph to read "of a person known to be a national of the sending State", he said it was obvious that the obligation of the receiving State could only arise if its authorities learned that the deceased had been a national of the sending State. That point would be made clear in the commentary.

66. Mr. SANDSTRÖM suggested, but not as a formal proposal, that article 48 might be inserted after article 28, instead of after article 4.

Article 48 was adopted by 11 votes to 1, with 1 abstention.

ARTICLE 49 (*Termination of a consul's functions*)

67. Mr. MATINE-DAFTARY said that the words "the functions of the head of post shall be terminated" were misleading. The actual functions would, in the events described, be exercised by someone else and would therefore continue. He had suggested before that the word "functions" should be replaced by the word "mission" (546th meeting, paragraph 10).

68. Mr. ŽOUREK, Special Rapporteur, said that the Drafting Committee had considered the suggestion. In the context the term "functions" meant those of the particular consular official and not consular functions in general.

69. The CHAIRMAN recalled that the Commission had decided to refer not to "consular functions" but to "the functions of a consular official", and also to follow article 41 of the draft on diplomatic intercourse as closely as possible (*ibid.*, paragraph 24).

70. Mr. LIANG, Secretary to the Commission, suggested that the words at the end of paragraph 2 "that it considers the said functions to be terminated" should be replaced by words similar to those used at the end of paragraph 2 of article 20 — for example, "that it refuses to recognize them as members of the consular staff". He made that suggestion because paragraph 1 of article 20 had no connexion with paragraph 2 of article 49.

71. Mr. AGO pointed out that section IV did

not deal with the end of consular relations, as the proposed title implied, but with the termination of consular functions.

72. Sir Gerald FITZMAURICE said that the words "and immunities" in the title of section VI could be omitted, since there was no mention of the termination of immunities in the section.

73. Mr. TUNKIN drew attention to the wording of the title of section IV and of article 41 in the draft on diplomatic intercourse, and proposed that the substance of article 49 and its title should be formulated along similar lines.

74. Mr. AGO observed that in that case the word "grounds" should not be used in the text of article 49.

Mr. Tunkin's proposal was agreed to.

Article 49 was adopted by 15 votes to none, with 1 abstention, subject to the effects of Mr. Tunkin's proposal.

ARTICLE 50 (*Maintenance of consular relations in the event of the severance of diplomatic relations*)

75. Mr. AGO pointed out that it was understood that article 50 could have no meaning unless combined with that of article 2, paragraph 2, if adopted.

Article 50 was adopted unanimously.

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

76. Mr. TUNKIN asked why the words "for their departure as soon as they are ready to leave" in paragraph 2 had been included in place of "in order to enable persons . . . to leave at the earliest possible moment", the words which appeared in the corresponding article (article 42) of the draft on diplomatic intercourse.

77. Sir Gerald FITZMAURICE explained that while it could be assumed that a diplomatic official would wish to leave as soon as possible, a consular official might require a little time to wind up his affairs in view of the great variety of consular functions.

78. Mr. TUNKIN said that he saw no reason for departing from article 42 of the draft on diplomatic intercourse, but in view of the late stage in the session's work he would not press for a change.

Article 51 was adopted by 13 votes to none.

ARTICLE 52 (*Protection of consular premises and archives and of the interests of the sending State*)

79. Mr. BARTOŠ asked for a separate vote on paragraph 3. He would vote against it because it failed to provide for the restoration of archives by the receiving State.

Paragraphs 1 and 2 were adopted by 13 votes to none, with 1 abstention.

Paragraph 3 was adopted by 13 votes to 1.

Article 52 as a whole was adopted by 13 votes to none, with 1 abstention.

80. Mr. MATINE-DAFTARY explained that he had abstained from the vote because he considered that paragraph 1 (b) might be applied to situations where the procedure described would be inadvisable.

ARTICLE 53 (*Non-discrimination*)

81. Mr. YOKOTA, Chairman of the Drafting Committee, said the Committee proposed that article 53 together with the article concerning the relationship between the draft and bilateral consular conventions should be included in a separate "chapter IV" entitled "General provisions".

The proposal of the Drafting Committee was agreed to.

Article 53 was adopted by 13 votes to none, with 1 abstention.

The meeting rose at 1 p.m.

574th MEETING

Tuesday, 28 June 1960, at 3.30 p.m.

Chairman: Mr. Luis PADILLA NERVO

Consular intercourse and immunities
(A/CN.4/L.86, A/CN.4/L.90 and Add.1) [*continued*]

[Agenda item 2]

PROVISIONAL DRAFT ARTICLES
(A/CN.4/L.90/Add.1) (*continued*)

1. The CHAIRMAN drew attention to the provisional draft articles of chapter III (Honorary consuls) prepared by the Drafting Committee (A/CN.4/L.90/Add.1).

ARTICLE 56 (*Legal status of honorary consuls*)

2. Mr. YOKOTA, Chairman of the Drafting Committee, commenting on the text prepared by the Committee, said that, in conformity with the Commission's decision (551st meeting, paragraph 81, and 559th meeting, paragraphs 50 and 51) article 56, paragraph 1, stated that chapter I, sections I and IV of the draft relating to consular intercourse and immunities (A/CN.4/L.90) were applicable to honorary consuls. Paragraph 2 enumerated the articles of that draft which were applicable to honorary consuls without any modification. It would be recalled that the Commission had decided that certain articles might be rendered applicable to honorary consuls with a few changes, and the Drafting Committee had thought that if those articles were simply omitted, the implication would be that they did