Document:-
A/CN.4/SR.554

Summary record of the 554th meeting

Topic:
Consular intercourse and immunities

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

consular premises headed by consuls who were nationals of the receiving State did not enjoy inviolability, that decision would apply to both classes of consuls. That was a separate point, and might be decided upon later. The first decision to be taken, however, was whether there was any bar to inviolability on the grounds of the honorary or career status of the head of post.

65. Referring to the remarks of Mr. Edmonds he said that, according to Mr. Yasseen's proposal, the article would apply to consulates headed by honorary consuls in those cases only where the premises were used exclusively for consular functions. Mr. Edmonds could vote against that proposition and, if the Commission adopted that wording, a vote could be taken on whether the article was applicable to honorary consuls on that basis. At that stage, the only outstanding issue would be that of the nationality of the head of post, irrespective of his honorary or career status.

66. Mr. PAL said that his difficulty lay in the fact that the word " exclusively " did not appear in the Special Rapporteur's wording of article 25. From its absence it might be inferred that exclusive use for consular functions was not a necessary condition for the inviolability of premises so long as the head of post was a career consul. He could see no reason for such a distinction and, in those circumstances, he would find it difficult to vote for Mr. Yasseen's proposal.

67. Mr. YOKOTA pointed out that the difference was really one of practice rather than of theory. In theory, no consular premises, whether in charge of a career or an honorary consul, could be used for other purposes, but in practice, honorary consuls often used such premises — or, to be exact, part of such premises — for other activities, while career consuls did not. Accordingly, the insertion of the word " exclusively " was a necessary precaution in cases where the heads of post were honorary consuls.

68. Mr. LIANG, Secretary to the Commission, doubted whether the notion of exclusive use for consular functions applied at all to many consulates. For example, consuls at many posts lived in the buildings in which they had their offices and they might also share the premises with the trade mission of the sending State. Mr. Yasseen's proposal should therefore be amended so as to provide that the inviolability of the consular premises would depend on whether or not private business was conducted on the premises in addition to consular functions.

69. Mr. AMADO recalled that he had originally been agreeable to the idea of making separate provision for the institution of honorary consuls in the draft. Then a strong trend had become apparent in the Commission towards placing honorary and career consuls on the same footing, which constituted in effect an attempt to create a new rule of international law; now objections to that trend were crystallizing, in the light of purely practical considerations. The institution of honorary consuls was an important part of the general consular system, but the lengthy debates in the Commission had shown that there was a fundamental difference between honorary and career consuls.

70. Mr. MATINE-DAFTARY, commenting on article 10 of the Consular Convention between the United Kingdom and Sweden of 1952, said he did not believe that a general rule of international law could be based on a bilateral agreement, particularly on one concluded between two countries with such similar backgrounds. In any case, he construed that article to mean that the inviolability of consular premises did not apply if the head of post was an honorary consul.

71. Sir Gerald FITZMAURICE assured Mr. Matine-Daftary that the exception provided for in the article he had cited applied to career consuls as well as to honorary consuls.

72. Mr. MATINE-DAFTARY considered that the reference to a consular officer " who is a national of the receiving State or who is not a national of the sending State " was an implicit reference to honorary consuls.

73. Mr. FRANÇOIS considered that any vote taken at that stage would be based on misconceptions. It would be wise to follow the Special Rapporteur's suggestion and for the time being to take no decision on the question of the applicability of article 25 to consulates headed by honorary consuls. The commentary might state that the question had been discussed at length and that opinion had been divided; and governments might be asked to give their views on the question before a final decision was taken.

74. The CHAIRMAN recommended the Commission to adopt Mr. François's suggestion.

It was so agreed.

The meeting rose at 6 p.m.

554th MEETING

Friday, 3 June 1960, at 9.30 a.m.

Chairman: Mr. Luis PADILLA NERVO

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

[Agenda item 2]

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

ARTICLE 56 *(Legal status of honorary consuls) (continued)*

1. The CHAIRMAN invited the Commission to discuss the question of the applicability to hono-

rary consuls of the principle embodied in article 26 *(Exemption of consular premises from taxation)*.

2. Mr. YOKOTA proposed that the rule expressed in article 26 should apply to honorary consuls. The privilege involved in that rule belonged not to the consul personally but to the sending State itself.

3. Mr. YASSEEN said that he favoured the exemption of consular premises from taxation on condition that those premises were assigned exclusively for the exercise of consular functions.

4. Mr. TUNKIN recalled that the Commission had discussed at great length the meaning of the expression " mission premises " when it had considered the diplomatic draft and had arrived at the conclusion that the expression should be construed in a broad sense and include, for example, the embassy's garage.

5. In considering the question of the applicability of article 26 to the premises used by an honorary consul, the approach should be different. The term " consular premises " should be construed as meaning not a whole building in which perhaps only one room was used as a consular office, but only that part which served for the exercise of the consular function. Accordingly, he suggested that the term " consular office " should be used instead of " consular premises ".

6. Mr. YOKOTA supported Mr. Tunkin's suggestion, which, he thought, involved a drafting point that could be left to the Drafting Committee.

7. Mr. YASSEEN said that the condition which he had suggested was intended to achieve the same purpose as Mr. Tunkin's amendment, in that it implied that exemption from taxation was limited to the office actually used as a consulate.

8. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed that article 26 should apply to honorary consuls and that the Drafting Committee should be instructed accordingly; in addition, the comments of Mr. Yasseen and Mr. Tunkin should be referred to that committee.

It was so agreed.

9. The CHAIRMAN invited the Commission to consider the question of the applicability to honorary consuls of the principle contained in article 27 *(Inviolability of the archives and documents)*.

10. Mr. SANDSTRÖM drew attention to the provision contained in paragraph 3 of the Special Rapporteur's article 56, a provision which affected the application of the rule expressed in article 27.

11. Mr. ŽOUREK, Special Rapporteur, said that the principle of article 27 was contained in paragraph 3 of his draft article 56, subject to the additional condition that the official papers of honorary consuls must be kept separate from their private correspondence and from books and documents relating to any non-consular occupation in which they might be engaged; such a condition was stipulated in a large number of consular conventions. The reason was that the vast majority of honorary consuls were engaged in commerce or some other gainful occupation.

12. He thought that the Commission, instead of discussing the applicability of article 27 to honorary consuls, should consider his proposal for paragraph 3 of article 56.

13. Mr. YOKOTA agreed on the need to lay down the rule that the official correspondence, archives and documents of honorary consuls should be kept separate from their private correspondence and from books or documents relating to their non-consular occupation. He suggested, however, that that rule should be expressed in a separate sentence by replacing by a full stop the comma after the word " seizure " deleting the words " provided that " and commencing a new sentence with the words: " They shall be kept separate from . . .".

14. Official correspondence, archives and documents of honorary consuls should not be liable to seizure or search merely because they happened to be mingled with private documents and papers. For those reasons, he proposed that the obligation to keep official material separate from private papers should be laid down as a separate rule and not as a condition *sine qua non* of their inviolability.

15. Mr. BARTOŠ said he would support the Special Rapporteur's text for article 56, paragraph 3, if after the words " relating to their non-consular occupation " a phrase along the following lines was added: " or to non-consular activities carried on in the premises of the consulate ". There were many instances of non-consular activities being carried on by persons other than the honorary consuls in the premises used by the consulate. The case had occurred in Yugoslavia of the consular documents and records being mixed with the books and documents pertaining not to a profession exercised by the honorary consul himself, but to the activities of a commercial or industrial undertaking.

16. He strongly opposed Mr. Yokota's suggestion that the duty of the receiving State to respect unconditionally the inviolability of the archives should be established as an absolute rule and that the honorary consul's duty to segregate official from private papers should be enunciated separately, thus transforming what should be a condition into a mere recommendation.

17. In fact, the two duties involved — that of the receiving State to respect the consular archives and documents and that of the honorary consul to keep them separate from his private papers — were mutually complementary. If the honorary consul failed in a duty which was placed upon him by a rule going back to the earliest days of consular intercourse, the receiving State could not be accused of a breach of international law if, for example, its income-tax inspectors examined the books and documents of the honorary consul

which contained both official and private material. In one case which had occurred in Yugoslavia the expenses and receipts of a consulate had actually been entered in the books of a commercial undertaking.

18. Moreover, for practical reasons, it was obvious that if the honorary consul neglected to segregate official from private papers, the competent official of the receiving State who was carrying out an inspection would have to examine, at least cursorily, all the documents concerned in order to ascertain which were official and which private. In his opinion, an official of the receiving State who found a consular document should not only not examine it any further but was under a duty of secrecy with regard to any information he might have obtained in the course of the inspection.

19. Lastly, there was a very strong argument in favour of making the segregation of papers a condition of inviolability: unless honorary consuls realized that inviolability might be lost through neglect, they might be tempted to be careless in carrying out their duty not to mingle official with private papers.

20. Sir Gerald FITZMAURICE supported Mr. Yokota's suggestion and recalled that the Commission had discussed at great length whether the inviolability of the diplomatic bag should be made conditional on its being used exclusively for official material. The Commission had, on that occasion, reached the conclusion that it should express in one paragraph (article 25, paragraph 3, of the diplomatic draft) the rule that the diplomatic bag must not be opened or detained and, in a separate paragraph (article 25, paragraph 4) the rule that the diplomatic bag should only contain diplomatic documents or articles intended for official use. It had been rightly felt that where abuse of the privilege was suspected by the receiving State, the correct course would be to make representations at the government level. The suspicion should not provide grounds for disregarding the rule of the inviolability of the diplomatic bag.

21. Accordingly, he agreed that the rule on the separation of official and private papers should not be a condition of inviolability. The archives and documents of the consulate were the property of the sending State and should be inviolable in all circumstances. If an abuse were suspected, the government of the receiving State could request that of the sending State to recall or discharge the consul, but it would not be correct to proceed to a violation of the consular archives.

22. Mr. EDMONDS said that the rule proposed by the Special Rapporteur was much too harsh. In his opinion there was much force in the arguments put forward by Mr. Bartoš but it was a general principle of law that an innocent party should not pay the penalty for another's dereliction. Honorary consuls often had no special training for their work and it would be too stringent to deprive the sending State of the benefit of the inviolability of its archives and documents because of some neglect by its honorary consul which had led to an intermingling of papers.

23. For those reasons, he agreed with Mr. Yokota's suggestion; the duty to segregate official from private papers should not be made a condition of inviolability.

24. Mr. SANDSTRÖM said that he had not been convinced by the arguments put forward either by the supporters or the opponents of the Special Rapporteur's draft for article 56, paragraph 3. In his opinion, the real test of inviolability should be the answer to the question: were the archives and documents concerned kept in the consular office? Material kept in the private residence of the honorary consul, and not in premises exclusively used as a consulate, could hardly enjoy complete inviolability.

25. Mr. BARTOŠ said that there was no analogy between the case under discussion and the diplomatic bag. Diplomatic correspondence was sent either in a closed diplomatic bag or by diplomatic courier. If diplomatic correspondence was enclosed with non-diplomatic papers sent through the post as an ordinary parcel and not as a diplomatic bag, there could be no guarantee that the customs authorities might not open the parcel for inspection. The Commission had therefore laid down in article 25 of the diplomatic draft, as a condition of inviolability, that diplomatic correspondence should be sent either by means of the diplomatic bag or by diplomatic courier.

26. He recalled he had already expressed the view that if a consul indicated that certain cabinets or safes contained only consular archives, his statement should be accepted. If, however, the consul mixed his official documents with his private papers, and certain officials of the receiving State were entitled to inspect the latter, it was obvious that some examination would have to be made, superficially at least, of all the documents in order to tell them apart. Even such a cursory examination would be a departure from the strict rule of inviolability.

27. The position was in fact that inviolability applied wherever archives and documents were clearly shown to be official archives and documents. He mentioned, by way of analogy, the case of a diplomat in Yugoslavia who had refused to show his special identity card when challenged for a traffic offence; he had been taken to the police post where he had shown his card. Upon his subsequent protest and its rejection, it had been agreed by his ambassador that he had been at fault in not producing the evidence of his status from the outset. In like manner, consular archives and documents, in order to enjoy inviolability, needed to be clearly identifiable as such. If the honorary consul responsible for them made the mistake of rendering their ready identification impossible, the sending State would have to bear the consequences of that neglect.

28. Mr. ŽOUREK, Special Rapporteur, said that

he regretted that he was unable to accept Mr. Yokota's amendment. The argument put forward by Mr. Edmonds seemed to him to militate for the strict enforcement of the rule on the separation of official from private documents. Honorary consuls might be inclined to neglect the discharge of the duty imposed by that rule if they did not know that the loss of inviolability of consular archives and documents might result from their neglect.

29. The formula proposed by Mr. Yokota was not practicable. If, in the case of a routine inspection, the revenue officials of the receiving State found the commercial books and documents of the honorary consul mixed with his consular documents, they could not abstain from carrying out their duties, for if they did they would in effect be granting inviolability to private papers.

30. Sir Gerald FITZMAURICE said that he could not understand the Special Rapporteur's illustration. If the revenue officers, when inspecting private ledgers and documents, found consular material, the principle of inviolability should apply to that material, but would not apply to any other. Neither he nor Mr. Yokota had suggested that private books and documents should be inviolable because an official document had been found among them. It was the consular archives and documents which were inviolable.

31. If the Special Rapporteur's argument was a valid one, it should surely apply not only to honorary consuls but also to career consuls who engaged in commerce. Logically, then, a proviso should be added in article 27 to the effect that the inviolability would not attach to the papers of a consul, whether career or honorary, who engaged in commerce.

32. Mr. ŽOUREK, Special Rapporteur, drew attention to article 58 of his draft (A/CN.4/L.86), under which the provisions relating to honorary consuls were to apply, *mutatis mutandis*, to career consular officials who were authorized to engage in commerce or other gainful occupation in the receiving State. Therefore, in the rare event of a career consul being engaged in trade, that consul would be treated in the same manner as an honorary consul and inviolability would be conditional upon his keeping the official archives and correspondence separate from his private correspondence and from his business books and documents.

33. Sir Gerald FITZMAURICE said that logic would then require that elsewhere an exception should be made for the case in which an honorary consul was not engaged in commerce.

34. Mr. ŽOUREK, Special Rapporteur, said that an honorary consul might be engaged in an occupation other than commerce. He did not believe that States would accept the rule of inviolability of the archives in regard to such consuls unless it was made conditional on the segregation of official archives and documents from private papers.

35. The CHAIRMAN said that three points of view appeared to have been expressed. Some members held the opinion that the inviolability of consular archives and documents was absolute and that the obligation to keep them separate should be expressed as a distinct rule but should not be made a condition *sine qua non* of such inviolability. The Special Rapporteur and some other members considered that the inviolability should be conditional on the separation of official from private papers, as laid down in article 56, paragraph 3. Lastly, Mr. Sandström considered that the test of this inviolability was whether the archives and documents were kept in the consular office.

36. Mr. FRANÇOIS said that he held a fourth view: where consular documents and archives were not kept separate, they still enjoyed a measure of inviolability. Inspection was not precluded, but if a document was found to relate to the consular function, its inviolability should be respected.

37. Mr. PAL drew attention to the actual terms of article 27. The article contained the simple statement that "the archives and documents of the consulate shall be inviolable". How could such a provision be held to be inapplicable because an honorary consul was in charge?

38. On the specific question of the applicability of article 27, he thought that all the members of the Commission were agreed that the rule laid down in that article applied to honorary consuls.

39. Mr. EDMONDS, referring to Mr. François's remarks, said that the draft article would allow consular documents to be examined before they were protected by inviolability. In other words, the inviolability would attach at a moment when all the damage might well have been done.

40. He admitted that the question was fraught with difficulty. Nevertheless, he thought that if an honorary consul failed to separate official from private papers the sending State was very largely an innocent party and should not suffer for the neglect of its honorary consul. Besides, who was to judge whether the occasional mingling of some documents justified the total disregard of the inviolability rule?

41. Mr. MATINE-DAFTARY said that if the discussion continued along its present course, the Commission might find that it would have to amend article 27, which related solely to career consuls.

42. Mr. TUNKIN said that the discussion had been needlessly complicated by the attempt to cover all conceivable eventualities. There seemed to be general agreement on the principle that the archives and documents of the consulate should be inviolable, which meant that the authorities of the receiving State had no access to them. If those authorities could scan or handle archives and documents in order to establish whether they were official ones connected with consular business there would be no effective inviolability. Accor-

dingly, he considered that the inviolability should be dependent on the fulfilment of two conditions only : firstly, the official documents must be kept separate from private papers, and secondly, they must be kept in the consular office.

43. Mr. JIMÉNEZ DE ARÉCHAGA agreed that article 27 was applicable to honorary consuls with a proviso on the lines contained in article 56, paragraph 3. The only outstanding question was whether that proviso should be drafted as a condition or as a separate obligation. That question might well be referred to the Drafting Committee.

44. Mr. AMADO considered that Mr. Yokota's view was not far removed from that of the Special Rapporteur. It was essential to require that sending States and honorary consuls exercised a proper sense of responsibility in handling their archives and documents, which must be kept separate from private papers if the provisions of article 27 were to apply.

45. The CHAIRMAN, speaking as a member of the Commission, said the fact that the principle of inviolability might be genuinely misconstrued or abused did not affect the validity of the principle itself. It was impossible in a legal text to enunciate a general principle in such a way as to cover all possible contingencies. Hence he saw no force in the argument that the privilege of inviolability should be withheld because an honorary consul might hide private documents in official files so as to avoid lawful investigation by local authorities. In such a case, whatever the status of the consul, the courts of the receiving State were entitled to demand the production of the documents in question; but the proposition that the authorities of the receiving State could demand to see consular files so as to make sure that they contained only official papers was utterly incompatible with the principle of inviolability.

46. He considered that article 27 should be applicable to all consuls, whether career or honorary, and that a stipulation should be added to the effect that official papers should be kept separate from private papers and that they should be kept in the consular office. That formula would, he thought, be broad enough to satisfy most members, and yet would not qualify the generality of the principle of inviolability.

47. Mr. YOKOTA suggested that perhaps the Commission could agree that in principle article 27 was applicable to honorary consuls and insert in the commentary a summary of the different views expressed. After the observations of governments had been received the Commission would find it easier to decide subject to what conditions the article would apply to honorary consuls.

48. Mr. EDMONDS agreed that if the majority voted in favour of article 27 being applicable to honorary consuls it would be desirable to explain in the commentary the views expressed about the conditions governing the application of the article.

49. Mr. MATINE-DAFTARY disagreed with Mr. Yokota. The true purpose of the commentary was to explain the meaning of provisions which needed explanation. It was not the proper place for reservations, as had been demonstrated in the case of the Commission's draft on the law of the sea, where reservations stated in the commentary had been overlooked at the United Nations Conferences on the Law of the Sea.

50. Mr. SCELLE said that there seemed to be general agreement on the principle that article 27 should apply to honorary consuls but thought that the condition that official documents should be kept separate from private papers would be valid vis-à-vis career consuls as well, for the latter were, after all, just as liable to hide compromising papers in official files. If a consular officer, whether career or honorary, were interrogated by the authorities of the receiving State as to whether certain documents were official or not, his word would have to be accepted because if the documents could be examined the principle of inviolability would have no meaning.

51. Mr. ŽOUREK, Special Rapporteur, observed that since honorary consuls were often engaged in gainful occupation, certain conditions had to be fulfilled in order that they could enjoy the benefit of article 27. Once those conditions were decided upon the Commission could consider whether article 27 itself called for modification. With a few exceptions, career consuls were exclusively engaged on official business and hence, in general, it was not necessary to lay down the same conditions as for honorary consuls. The latter, on the other hand, were in the great majority of cases engaged in private occupations of a gainful nature, and that was their main activity. In that respect the position of career consuls was the exact opposite of that of honorary consuls.

52. Mr. SCELLE, disagreeing with the Special Rapporteur, said he failed to see why the integrity of honorary consuls should be questioned and why it should be assumed that career consuls would never abuse their privileges and immunities.

53. The CHAIRMAN said that the Commission would probably have to establish what was the majority view by voting. Since it had decided to conduct an exploratory review of earlier articles in order to decide which applied to honorary consuls, it was not at present concerned with the final wording of article 56, paragraph 3, but with the question whether the principle of article 27 was applicable to honorary consuls and whether the latter's enjoyment of the benefit of the article should be subject to certain conditions.

54. Mr. TUNKIN agreed that the Commission must first come to some conclusion about the applicability of article 27, but as the inviolability of archives and documents was also the subject of article 56, paragraph 3, the Commission had somewhat confused the discussion by dealing with that text as well. However, he saw no diffi-

culty in voting on the principle and subsequently on the conditions to which it should be subject.

55. The CHAIRMAN pointed out that one of the questions that would have to be settled was whether the requirement that official documents should be segregated from non-consular papers was a condition *sine qua non* of the application of article 27 to honorary consuls.

56. Mr. BARTOŠ said that it would be difficult to vote on the issue of whether or not article 27 was applicable to honorary consuls — and he believed it was generally accepted to be so applicable — until the Commission had decided whether the enjoyment of the benefit that provision was contingent on the fulfilment of certain conditions. What those conditions should be was not a subsidiary question but an important issue of substance. Accordingly if the applicability of article 27 to honorary consuls were put to the vote first (before the conditions, if any, had been settled) he would be compelled to abstain.

57. Mr. ŽOUREK, Special Rapporteur, asked whether it might not be desirable to vote first on Mr. Yokota's amendment to article 56, paragraph 3 (see paragraph 13 above), since there appeared to be no fundamental disagreement about the applicability of the principle of the inviolability of archives and documents to honorary consuls.

58. Mr. EDMONDS said that, logically and in keeping with the procedure it had adopted in discussing article 56, the Commission should first decide whether article 27 was applicable to honorary consuls.

59. Mr. AMADO said that members could only vote in favour of article 27 being made applicable to honorary consuls on the understanding that its applicability might be subordinated to certain conditions.

60. Sir Gerald FITZMAURICE considered that the procedure suggested by the Special Rapporteur would be simpler. It seemed to be the general consensus that article 27 applied to both career and honorary consuls, and hence it seemed hardly necessary to vote on that issue. The crucial question was whether the application of the article to honorary consuls should be subject to certain conditions.

61. Mr. TUNKIN pointed out that there was a well established procedure in the United Nations for voting on amendments. Perhaps the present difficulty could be resolved if article 59, paragraph 3, were treated as an amendment to article 27.

62. Mr. EDMONDS asked how members who did not think the application of article 27 to honorary consuls should be subject to conditions could express their view if the procedure suggested by the Special Rapporteur were followed.

63. Sir Gerald FITZMAURICE believed that those members would prefer to vote in favour of article 27 being applicable to honorary consuls even at the risk of its being subsequently made subject to conditions, rather than allow the principle of inviolability to be rejected.

64. The CHAIRMAN, speaking as a member of the Commission, thought that the obligation to keep official documents separate and in the consular office should not be regarded as an absolute condition of the applicability of article 27 to honorary consuls. That point would be met if Mr. Yokota's amendment were adopted. Perhaps it would be simpler if that preliminary issue were put to the vote first.

65. Mr. TUNKIN observed that that might constitute a departure from the usual procedure whereby amendments were voted in the order of their submission. The Special Rapporteur's text of article 56, paragraph 3, if treated as an amendment to article 27, had not only been presented earlier than Mr. Yokota's amendment but was also furthest removed from the original. Personally, he would find it difficult to support Mr. Yokota's amendment if it were put to the vote first. On the other hand he might be willing to vote for it if the Special Rapporteur's text were rejected.

66. Mr. YOKOTA pointed out that since the Special Rapporteur's text of article 56, paragraph 3, constituted the original proposal, his (Mr. Yokota's) amendment should be voted on first.

67. Mr. LIANG, Secretary to the Commission, considered that, from the procedural point of view, article 27 was not involved. In effect, paragraph 3 of article 56, when approved, would be added to article 27, because it would contain the provisions concerning honorary consuls not yet included in that article. Since the Commission's purpose at the moment was to decide which of the earlier articles in the draft were applicable to honorary consuls, paragraph 3 of article 56 was an independent proposal; Mr. Yokota's proposal was an amendment to that paragraph and should therefore be voted on first. While it might be argued that paragraph 3 of article 56 was an amendeent to article 27, since it was an addition to that article, it should be borne in mind that the other articles of the draft had not been treated in the same way.

68. Mr. TUNKIN said that such a procedure would be acceptable to him, on the understanding that the Commission had paragraph 3 of article 56 before it as a separate proposal.

69. Sir Gerald FITZMAURICE wished to make an emphatic reservation with regard to the Secretary's interpretation of the procedural situation. The point was essentially one of drafting. In the case of certain earlier articles (e.g., articles 25 and 26) the question of their applicability to honorary consuls had already been decided, but the Commission might subsequently agree to word those articles differently; in the case of article 27, too, it might decide to refer only to the official correspondence of the consulate. It was not really correct to speak of the official correspondence of honorary

consuls; the correspondence they conducted in the exercise of their consular functions was the official correspondence of the consulate. Accordingly, the matter was one of placing and drafting, and the substance of the question was not affected.

70. The CHAIRMAN said he would call for a vote on Mr. Yokota's amendment.

71. Speaking as a member of the Commission, he said that his vote in favour of the amendment should be construed simply as support for the proposition that the inviolability of the documents of honorary consuls should not be subordinated, absolutely and categorically, to the condition that official papers must be segregated from private papers. Nevertheless, he was willing to accept a provision obliging the honorary consul to separate the two categories of documents.

72. Mr. SANDSTRÖM said he would vote against Mr. Yokota's amendment, even though it related to a rule of behaviour for honorary consuls which could hardly be contested. The statement of that rule in article 56, paragraph 3, would not, however, solve the problem of how to distinguish between the official archives, which were inviolable, and the private correspondence of the honorary consuls, which obviously did not enjoy that immunity.

73. Mr. SCELLE said that he would vote against Mr. Yokota's amendment for yet another reason. The question of separating official archives from private correspondence was not mentioned in article 27, which referred only to the archives and documents of the consulate. Since the Commission was discussing the applicability of the articles of the draft to honorary consuls, it could only consider an amendment to article 56, paragraph 3, if an analogous provision existed in article 27. Otherwise, the position of career consuls who did not keep their private papers separate from the consular archives would not be covered, and the provision would discriminate against honorary consuls as such.

74. The CHAIRMAN put Mr. Yokota's amendment to the vote.

The amendment was rejected by 12 votes to 3, with 1 abstention.

75. The CHAIRMAN put the Special Rapporteur's text of paragraph 3 of article 56 to the vote.

The paragraph was adopted by 12 votes to 2, with 3 abstentions.

76. Mr. SCELLE said that he had voted against both the amendment and the paragraph because both were unsatisfactory. Furthermore, he considered that a sentence requiring the separation of private documents from the consular archives should be added to article 27, in order to make it clear that the condition applied to career consuls as well as to honorary consuls.

77. Mr. BARTOŠ said that he had voted in favour of paragraph 3 of article 56, on the understanding that the rule concerning the separation of official from private papers should apply to career consuls as well.

78. The CHAIRMAN pointed out that the Special Rapporteur had included article 28 in the enumeration in article 56, paragraph 2. He therefore suggested that, if there were no objections, article 28 should be regarded as applicable to honorary consuls.

It was so agreed.

79. Mr. YOKOTA, speaking as Chairman of the Drafting Committee, pointed out that the Commission had approved and referred to the Drafting Committee a new article (28 A) on freedom of movement, which was not mentioned in the Special Rapporteur's enumeration.

80. Mr. ŽOUREK, Special Rapporteur, explained that he had not included the new article in his enumeration because it would be difficult for States to accept in a multilateral convention a clause which allowed certain broad facilities to honorary consuls, who were in many instances nationals of the receiving State. The article was yet another illustration of the difference between the *de jure* and the *de facto* position of honorary consuls and he had not felt justified in including the new provision in his enumeration.

81. After a brief procedural discussion, the CHAIRMAN suggested that no decision should be taken on the applicability of article 28 A to honorary consuls until the Commission had had an opportunity to discuss the clause in its final form.

It was so agreed.

82. Mr. ŽOUREK, Special Rapporteur, observed that article 29 *(Freedom of communication)*, which he had included in his enumeration, had since been considerably extended in scope during the Commission's discussions. Until the Drafting Committee submitted its final text of that article, the Commission was hardly in a position to decide whether the article in its revised and much amplified form should be applicable to honorary consuls; personally he strongly doubted whether it should be so applicable. For practical reasons, therefore, he suggested that, as in the case of article 28 A, a decision concerning the applicability of article 29 to honorary consuls should be held over pending receipt of the Drafting Committee's text.

83. Mr. FRANÇOIS thought it was extremely difficult to discuss the applicability to honorary consuls of articles that had been referred to the Drafting Committee. It might be wiser to defer the whole debate until the final texts were before the Commission.

84. The CHAIRMAN thought that the Commission could proceed with its discussion in the case of articles to which no substantive changes had been proposed. He suggested that the decision on article 29 should be deferred.

It was so agreed.

85. Mr. ŽOUREK, Special Rapporteur, said that the scope of article 30, which he had included in his enumeration, had been considerably amplified; it now consisted of three paragraphs instead of one.

86. The CHAIRMAN suggested that a decision on the applicability of article 30 to honorary consuls should be deferred.

It was so agreed.

87. Mr. YOKOTA, speaking as Chairman of the Drafting Committee, said that article 31, which was included in the Special Rapporteur's enumeration, had not been substantially altered.

88. Sir Gerald FITZMAURICE said that, while he was in favour of extending the applicability of article 31 to honorary consuls, the fact that the Commission had to take a decision on the question proved that the Special Rapporteur's conception of the whole structure of the draft was fundamentally false. The question whether or not article 31 should apply to honorary consuls did not really arise; the article dealt with official acts of the sending State performed by its representatives, and those acts were exactly the same whether they were performed by honorary or career consuls.

89. The procedure which the Commission was following was incorrect; it was entirely unnecessary to decide whether a provision having nothing to do with the consul's status (the subject of article 56 being the " legal status of honorary consuls ") should or should not apply to an honorary consul. The correct procedure would have been to decide upon the few cases where an honorary consul would be placed in a special position by reason of his honorary status.

90. The CHAIRMAN pointed out to Sir Gerald Fitzmaurice that the Commission had agreed to review all the earlier articles of the draft in order to determine later whether or not honorary consuls had a distinct status.

91. He suggested that in the absence of any objections, article 31 should be regarded as applicable to honorary consuls.

It was so agreed.

92. Mr. YOKOTA, speaking as Chairman of the Drafting Committee, recalled that an amended text of article 32 *(Duty to accord special protection to consuls)* had been approved by the Commission and referred to the Drafting Committee; the Commission should therefore have no difficulty in considering the applicability of the article to honorary consuls. The Special Rapporteur had not included article 32 among those enumerated in article 56, paragraph 2.

93. Sir Gerald FITZMAURICE thought that, while the article might not be applicable to consuls who were nationals of the receiving State, it should apply to honorary consuls as such because many of them were nationals of the sending State. If the Commission were to decide that the article was not applicable to honorary consuls, the receiving State would be debarred from according special protection to any honorary consuls — a state of affairs which yet again illustrated the shortcomings of the system that the Special Rapporteur had followed.

94. Mr. TUNKIN considered that Sir Gerald Fitzmaurice's conception of the whole question was not in keeping with existing practice. An honorary consul might possibly be a national of the sending State, but the essential point was that he was not a State official; his performance of consular functions was merely incidental. Such a person might devote a few hours a week to his consular functions; the receiving State could not be expected to accord him special protection while he was engaged on private business or was at leisure. It would be no more than realistic to differentiate between honorary and career consuls by reason of their status as officials, and not by reason of their nationality. Accordingly, he did not consider that article 32 should be made applicable to honorary consuls.

95. The CHAIRMAN, speaking as a member of the Commission, could not agree that it was the practice of States never to regard honorary consuls as officials or members of the consular service. For example, under the relevant Mexican regulations honorary consuls and vice-consuls were defined as members of the foreign service.

96. Mr. BARTOŠ agreed with the Chairman. In Yugoslav municipal law, too, Yugoslav honorary consuls, in view of the functions which they performed, were in many cases deemed to be public officials; they had a duty to uphold the dignity of the State they represented by their personal behaviour, and they could be recalled or dismissed, or could even be brought before a disciplinary board, if their behaviour was considered improper.

97. The CHAIRMAN, speaking as a member of the Commission, urged members to ponder the practical consequences of excluding honorary consuls from the provisions of article 32. Honorary consuls were bound to attend State functions together with other foreign consuls. In certain international situations, there might be a reaction of public opinion in a given State against a country represented by an honorary consul. In that event, would the receiving State be absolved from the duty to prevent attacks on the person, freedom or dignity of the honorary consul?

98. Mr. SCELLE said he could not agree with Mr. Tunkin that honorary consuls devoted only a small part of their time to consular functions. They might have exactly the same duties to perform as full-time career consuls, and for that matter career consuls might also have a considerable amount of leisure time at their disposal. Moreover, article 32 referred to " foreign consuls ", an expression which did not necessarily mean a national of the sending State. The consul might be a national of a third State, but his

duty would be to protect the interests of the nationals of the sending State, whatever his own nationality. Admittedly, the provision should not apply to consuls who were nationals of the receiving State, but subject to that exception all consuls should have the same special protection, because they exercised the same functions. In law, the only basis on which the different classes of consular officials could be distinguished was the difference in the mode of appointment. He reiterated his view that career consuls and honorary consuls were all officials and consequently had the same basic legal status. Accordingly, special protection was due to them all, with the exception of those who were nationals of the receiving State, and even they were in many respects entitled to such protection.

99. Mr. AMADO said that Mr. Scelle had stated some undeniable facts. Nevertheless, it should be borne in mind that the position of a business man or a banker would be considerably strengthened by his appointment as an honorary consul. To extend yet further privileges to persons whose standing in the community was already high was a step not to be taken lightly. He could appreciate the arguments in favour of both the opposing schools of thought, and would therefore find it extremely difficult to vote on the question of the applicability of article 32 to honorary consuls.

100. Mr. SCELLE observed that, if the receiving State believed that the appointment of an honorary consul might lead to an abuse of privileges, it could refuse to grant him the exequatur. Once it had consented to the appointment, however, it could hardly refuse to accord the honorary consul special protection; up to a point, that was also the case even if he was a national of the receiving State.

101. The CHAIRMAN, speaking as a member of the Commission, observed that members seemed to envisage specific persons in specific positions when referring to hypothetical appointments of honorary consuls. For example, Mr. Amado seemed to see the honorary consul as a man of property and high standing in the foreign community; surely, however, not all honorary consuls were in that position. In his opinion, the question of the applicability of article 32 to honorary consuls hinged on the possibility of public reaction against a consul by reason of the fact that he represented the sending State, even if he was a national of the receiving State. If such a person incurred any danger through representing the sending State, he should be protected from attack against his person, freedom or dignity, and it should not be assumed *a priori* that a national of the receiving State, who was subject to the laws of that State, would abuse such protection in order to evade the jurisdiction of his country.

The meeting rose at 1.5 p.m.

555th MEETING

Tuesday, 7 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.86) *(continued)*

ARTICLE 56 *(Legal status of honorary consuls) (continued)*

1. The CHAIRMAN invited the Commission to continue its discussion on the applicability of article 32 *(Special protection and respect due to consuls)* to honorary consuls, and drew attention to the text of the article as provisionally adopted by the Drafting Committee, in the following terms:

" The receiving State is bound to accord special protection to the foreign consul by reason of his official position, and to treat him with due respect. It shall take all reasonable steps to prevent any attack on his person, freedom or dignity." *

2. Mr. MATINE-DAFTARY observed that the text was identical with that approved by the majority of the Commission (538th meeting, paragraph 47); he had not voted for it because it was so vague. The objections he had made at the time (*ibid.*, paragraph 45), applied *a fortiori* to honorary consuls, who might enjoy certain guarantees against abuse of authority under articles 33 *(Personal inviolability)* and 34 *(Immunity from jurisdiction)*, but should no tbe given special protection, particularly if they were nationals of the receiving State. He therefore did not think that article 32 should be made applicable to honorary consuls, and reserved the right to refer to the matter again in connexion with articles 33 and 34.

3. Mr. JIMÉNEZ DE ARÉCHAGA observed that at the moment the Commiss'on;s task was not to review article 32, but to decide whether it was applicable to honorary consuls. He had been impressed by the view that an honorary consul often had the dual personality of a foreign resident of the receiving State and of honorary representative of the sending State. In the former capacity, the honorary consul enjoyed in any case the ordinary protection accorded to resident aliens, and to grant him special protection under article 32 would be going too far. Like Mr. Amado, he did not oppose the institution of honorary consuls, since over 50 per cent of all Latin American consuls

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* References to article 32 in this summary record should be construed as references to the text reproduced above.