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Summary record of the 556th meeting

Topic:
Consular intercourse and immunities

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ceased to be the dominant aspect; but otherwise, in all cases where an honorary consul gave his whole time to his consular functions, the requirements of those functions must prevail. That being so, it was only logical to extend the privileges to honorary consuls and to await the reactions of governments.

50. Mr. VERDROSS emphasized that the Commission was at the moment engaged in transforming privileges and immunities which had formerly been accorded by international courtesy into rules of law. Article 33 was already a bold step as far as career — i.e. full-time — consuls were concerned, and it could not be made applicable to officials acting on a part-time basis.

51. Mr. JIMÉNEZ DE ARÉCHAGA referring to the point made by the Secretary, considered that if the Commission was to deny the special protection provided for in article 32 to honorary consuls, then, *a fortiori*, it could not extend to them the privileges accorded under article 33. The principal distinguishing feature of an honorary consul as recognized in the Anglo-Swedish Consular Convention was that he was not a *consul missus* but was chosen from the community in which he worked, and it would be going too far to grant the privileges of article 33 to honorary consuls who were not nationals of the receiving State, such as foreign merchants for example. Exceptional cases of that kind should be taken into account in addition to those covered in paragraphs 1 and 2.

52. Mr. ŽOUREK, Special Rapporteur, in reply to the Secretary, said that articles 32 and 33 dealt with quite separate questions and in any case the Commission had not decided that article 32 should be made applicable to honorary consuls but had asked the Drafting Committee to draft a more restrictive formula concerning the special protection to be accorded to honorary consuls.

53. Mr. Erim's argument that the decisive criterion was, in effect, whether or not an honorary consul was a national of the receiving State was an oversimplification and if accepted would be tantamount to imposing on States a single criterion. He was uncertain whether Mr. Erim's own country applied that criterion, and in that connexion he referred to the Turkish Act of 1 July 1948; he also recalled the Instruction of the Belgian Ministry of Finance of 1955. In any event the Commission had already decided that it should be left to States to establish the definition of honorary consuls and it could not go against its own decision. It would be wholly contrary to practice to stipulate that honorary consuls who were not nationals of the receiving State must enjoy all the privileges laid down in article 33.

54. The discussion would take a considerable time if the substantive arguments about the distinction between career and honorary consuls were brought up repeatedly in connexion with each article. The Commission was engaged in the first reading of the draft and the members who had not been convinced by his arguments might perhaps wait until governments had sent their observations.

The meeting rose at 6 p.m.

556th MEETING

Wednesday, 8 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 continue its discussion on the applicability of article 33 *(Personal inviolability)* (555th meeting, paragraph 36) to honorary consuls.

2. Mr. YASSEEN said that the personal immunities granted under the first three paragraphs of article 33 were so extensive that they should not be granted to honorary consuls, even if they were nationals of the sending or of a third State and even if they did not engage in commerce or in a private occupation, for the mode of appointment of honorary consuls was such that it offered little if any safeguard against malpractices. The institution of honorary consuls was a useful one, particularly for a State which could not afford to appoint career officials to all consular posts, and for that very reason governments were not always scrupulous in their choice. The immunities granted in article 33 formed a serious exception to the principle of the territoriality of criminal jurisdiction and should not be lightly accorded.

3. Mr. MATINE-DAFTARY said that the Commission must not go too far in attempting to place honorary consuls on the same footing as career consuls, for the legal status of the two differed greatly. Those members who considered that the two classes of consul were on a par — a view which, if it were embodied in the draft, would constitute a considerable development — probably had little knowledge or experience of the type of persons sometimes appointed honorary consuls, particularly in the East. It had been argued that there was no reason to deprive the small number of honorary consuls who were not nationals of the receiving State and who did not engage in commerce or in a gainful private occupation of the privileges laid down in article 33; his answer to that argument was that it would be wrong

to lay down so general a principle for so small a group.

4. The Commission should take existing practice into account and formulate a draft which had some chance of general acceptance. He could not therefore agree that article 33 should be made applicable to honorary consuls, for their relationship with the sending State was contractual and the latter had little control over them and could disclaim responsibility for their prejudicial acts. Career consuls, on the other hand, were government officials — often with the same training as diplomats — who were subject to the disciplinary board of the Ministry of Foreign Affairs; their status as established civil servants offered certain guarantees, which was not the case with honorary consuls.

5. Mr. AMADO said that the argument that article 33 should be applicable to honorary consuls left him in a state of perplexity. He was unable to see how a person whose link with the sending State was so tenuous and who was only temporarily invested with the dignity of acting on behalf of that State could be granted the personal inviolability attaching to a career consul who had been specially trained and who acted under the direct instructions of his government or the head of the diplomatic mission. The argument that honorary consuls not engaged in commerce or a gainful private occupation should enjoy certain privileges was untenable, because other members of their family might be gainfully occupied. Nor could he agree that the receiving State by the mere fact of accepting an honorary consul was bound to grant him personal inviolability.

6. He would have liked to be more liberal in the matter, but the arguments advanced by Sir Gerald Fitzmaurice (*ibid.*, paragraph 39), Mr. Erim (*ibid.*, paragraph 49) and the Secretary (*ibid.*, paragraph 44) had not convinced him. On the other hand he had considerable sympathy for Mr. François's view that honorary consuls who were needed by certain States must be accorded suitable conditions for the exercise of their functions.

7. Mr. FRANÇOIS said that, though prepared to champion the cause of honorary consuls, he recognized that all due weight must be given to existing practice and that the Commission could not introduce innovations unless it could show good reason for doing so. The issue was not as simple for him as it appeared to be for such members as Sir Gerald Fitzmaurice and Mr. Erim who considered that because of the restrictions already laid down in article 33 there was no need to distinguish between career and honorary consuls in its application.

8. Even if an honorary consul was not a national of the receiving State and did not engage in commerce or any other gainful private occupation, his status was essentially different from that of a career official. The fact that an honorary consul only exercised consular functions on a part-time basis was not decisive; what was really decisive was the fact that a career consul formed part of an established service, had been specially trained for his important duties and was subject to the disciplinary action of the sending State. In many countries, such as his own, the preliminary training of consuls and diplomats was the same and could lead to an appointment in either the consular or the diplomatic service. To the best of his knowledge it was not the practice to assimilate honorary consuls who were nationals of the sending State and were not engaged in commerce or any gainful private occupation to career consuls.

9. Another point which might be taken into account was the fact that the dignity of the sending State would not be damaged in the same way by a criminal act committed by an honorary consul as it would be if the act had been committed by a career official.

10. There was no force in the argument put forward by the Secretary particularly as the Commission had decided that the relevant provision would accord only a qualified special protection (under article 32) to honorary consuls.

11. By reason of those considerations, he was unable to agree that article 33 should be made applicable to honorary consuls. Moreover, if the Commission declared the article to be so applicable, the entire draft might well be unacceptable even to States which were prepared to receive honorary consuls.

12. Mr. AGO said that the question before the Commission should be discussed not in any partisan spirit but dispassionately and from a strictly practical point of view.

13. Analysing the text of article 33 he pointed out that the provision contained in paragraph 4 in no sense represented a special privilege but was a common usage that should obtain for both career and honorary consuls. Equally, the duty to appear before the competent authorities in the circumstances described in the first sentence of paragraph 3 was a duty surely owed by honorary consuls. And there were no reasons for excluding honorary consuls from the provision in the second sentence of paragraph 3.

14. On the other hand, he did not consider that the first two paragraphs of article 33 should be declared to be applicable to honorary consuls. In any event, the benefit of those two paragraphs was expressly stated not to extend to consuls who were nationals of the receiving State or who engaged in business; and as the majority of honorary consuls were nationals of the receiving State and carried on business, the number who would qualify for the benefit of the two paragraphs — if they were declared applicable to honorary consuls — would be very small.

15. Mr. ERIM said that he had yet to be convinced that honorary consuls who were not nationals of the receiving State and did not engage

in a gainful occupation should be treated differently from career consuls. In so far as honorary consuls performed the same functions as career consuls, it would surely be wrong to deny them the privileges and immunities necessary for the performance of those functions. The fact that honorary consuls were not subject to the disciplinary action of the sending State was hardly relevant. If the Commission found that the existng law was deficient, then under the terms of its Statute it should fill the gap with a new rule. Perhaps those members who doubted whether States would be prepared to extend additional privileges to honorary consuls should wait to see what observations governments would submit on the subject. It was far from certain that States would necessarily be reluctant to accept such a provision as applicable to honorary consuls, particularly since it would benefit only a very small number, namely those who were not nationals of the receiving State and who did not exercise a gainful occupation.

16. Mr. HSU disagreed with the deduction made by the Secretary about the consequence to article 33 of the decision taken on article 32. Special protection was not in the usual course of events vital and was only necessary in an emergency when a consular officer might be attacked because he was a foreigner and serving a foreign country. Personal inviolability was altogether another question. Anyone acquainted with the East would realize that the crucial fact was that consular privileges and immunities represented an encroachment on the jurisdiction of the receiving State rather than on its sovereignty. The reason for the deep-seated resentment against such privileges and immunities was that they had the effect of exempting persons of foreign nationality from the duty to appear before the local courts. To perpetuate such a situation would be inadmissibly retrogressive. There were already serious reasons for not granting very extensive immunities and privileges to career consuls, and there was even less cause to be liberal towards honorary consuls who carried on non-consular occupations and who were not subject to the disciplinary control of the sending State. Accordingly, there was a strong case for withholding from them the privileges accorded under article 33; that course should not lead to any serious difficulty in practice.

17. Mr. SANDSTRÖM said that Mr. François's arguments had not persuaded him to alter his view that honorary consuls who were not nationals of the receiving State and were not engaged in gainful occupation should be assimilated to career consuls. Moreover, as Mr. Ago had said, if article 33 applied to honorary consuls, the number who would come within its terms would be very small.

18. Mr. YOKOTA thought that article 33 should apply to honorary consuls who were not nationals of the receiving State and were not engaged in gainful private occupation. He could not agree with the Special Rapporteur's view that if the Commission declared article 33 to be applicable to such honorary consuls it would be disregarding State practice and the terms of consular conventions. For example, the Consular Convention between the United States of America and Costa Rica of 1948, which did not distinguish between career and honorary consuls, stated in its article II, paragraph 1, that a consular officer who was a national of the sending State and not engaged in a private occupation for gain in the receiving State was exempt from arrest or prosecution in the receiving State except when charged with the commission of a crime punishable by imprisonment for one year or more. Nevertheless, he would not press the point and would be prepared to accept Mr. Ago's suggestion that only paragraphs 3 and 4 of article 33 should be applicable to honorary consuls. The Drafting Committee might make the necessary adjustment to the article.

19. Mr. ŽOUREK, Special Rapporteur, said the Commission seemed to be agreed that the question of the applicability of article 33 to honorary consuls was of little practical importance and the majority apparently considered that the article should not be mentioned in article 56, paragraph 2, among the provisions applicable to honorary consuls.

20. In reply to Mr. Yokota, he said that the provisions of bilateral conventions could not be taken as evidence of a general practice; besides, bilateral conventions of a particular group could not be accepted as guidance in the drafting of a multilateral convention. It was no solution to proceed on the premise that the definition of " honorary consul " was based on the criterion of nationality. In that case it could easily be argued that the article should be applicable to honorary consuls having the nationality of the sending State, but that argument provided no solution for cases where the definition of " honorary consul " was based on different criteria. Such a rule would not in any case reflect the general practice of States.

21. Nor could he agree with Mr. Ago that article 33, paragraph 3, should be applicable to honorary consuls. While it was perfectly clear that honorary consuls could not escape the duty laid down in the first sentence of that paragraph, the second sentence obviously contemplated career consuls only. An " official position " in the full sense of the expression was held by career consuls only, for honorary consuls performed official functions in addition to their private activities. Furthermore, the position of honorary consuls would not suffer any prejudice if paragraph 3 was not applicable to them.

22. He wished to dispel any idea that he was opposing systematically the institution of honorary consuls as such. After a thorough study of the practice and doctrine of States in the matter, he had concluded that many States resorted to the institution of honorary consuls and he had assigned

a suitable place in the draft to honorary consuls. He was sure that his approach would be confirmed by further research into State practice. He wished to warn the Commission against the tendency to place career consuls and honorary consuls on the same footing, for that tendency was patently at variance with the practice of States.

23. The CHAIRMAN, speaking as a member of the Commission, said that he had not been convinced by arguments in favour of establishing entirely different treatment for honorary and career consuls. Those arguments did not seem to be entirely juridical, but to be based on political considerations and on the convenience of States in special situations. It was hard to agree that different treatment should be given to honorary and career consuls, when any consul was obviously placed in an official position by reason of his performance of consular functions. If it were taken as a premise that article 33 would not apply to consular officials who were nationals of the receiving State or engaged in commerce or in some other gainful occupation, the logical conclusion should be drawn, and all consuls, whether honorary or career, who did not answer that description should be treated on an equal footing. Nor could it be objected that a consul might engage in a gainful occupation in secret, for such a person would not come within the terms of the original premise.

24. In his opinion, the privilege of personal inviolability was accorded by reason of the consul's official position, which was closely connected with the general principle of maintaining the dignity of the sending State. It could not be said that the dignity of that State would be prejudiced to a lesser extent by disrespectful treatment of an honorary consul than by similar treatment of a consul belonging to the career service. He knew of a case where a State which had appointed an honorary consul having the nationality of the receiving State had regarded its dignity as having been so prejudiced by an attack on the sister of that honorary consul that it had broken off diplomatic relations with the receiving State.

25. State practice in the matter was obviously not uniform, and he agreed that it was for the sending and receiving States to agree on any privileges and immunities in excess of those laid down in the draft. Nevertheless, lack of uniformity should not prevent the Commission from taking a decision; it had done so in the past without proving conclusively what the general practice in a given case really was. He did not believe that, from the legal point of view, one could differentiate between honorary and career consuls in the matter of personal inviolability. Even if the Commission accepted the fact that the privileges and immunities and the functions of honorary consuls were more limited than those of career consuls, he still believed that honorary consuls should be given the same treatment as career consuls in respect of the functions which they performed. For his part, he considered that all the paragraphs of article 33 should be applicable to honorary consuls; while he would accept the majority view, that would not mean that he had been convinced by the arguments presented.

26. Speaking as Chairman, he called for a vote on the applicability of paragraph 1 of article 33 to honorary consuls.

It was decided by 10 votes to 7, with 3 abstentions, that paragraph 1 should not be applicable to honorary consuls.

27. The CHAIRMAN called for a vote on the applicability of paragraph 2 of article 33 to honorary consuls.

It was decided by 10 votes to 7, with 3 abstentions, that paragraph 2 should not be applicable to honorary consuls.

28. The CHAIRMAN said that the Commission would now decide on the applicability of paragraph 3 of article 33 to honorary consuls.

29. Mr. TUNKIN observed that the text of article 33 had been adopted provisionally only by the Drafting Committee; it had not yet been adopted by the Commission. It had been suggested in earlier debate in the Commission that, although consular officials were under a duty to appear before the competent authorities, a provision should be added to the effect that they could not be forced to appear. Since the Commission might yet decide to include such a provision in paragraph 3, Mr. Ago's argument in favour of its applicability to honorary consuls might be proved invalid.

30. Sir Gerald FITZMAURICE pointed out that the paragraph had been referred to the Drafting Committee in substantially the same form as that in which that Committee had provisionally adopted it. The consensus of the Commission had been that there was no situation in which career consuls were exempted from liability to appear before the competent authorities.

31. The CHAIRMAN drew attention to the fact that the Special Rapporteur had submitted a tentative text of the paragraph for forwarding to the Drafting Committee (540th meeting, paragraph 3), and the latter had not greatly changed that text.

32. Mr. YOKOTA endorsed the Chairman's remarks. Furthermore, the Drafting Committee had considerably altered paragraphs 1 and 2 of the article.

33. Mr. VERDROSS proposed that the vote on the paragraph should be postponed until the final text of the article had been adopted by the Commission. The ideas contained in paragraphs 1 and 2 were much clearer than that of paragraph 3; furthermore, that paragraph contained a reference to paragraph 1, which might be misleading in view of the result of the vote on the applicability of paragraph 1 to honorary consuls.

34. Mr. AGO appealed to Mr. Verdross not to press his proposal. That procedure might set a dangerous precedent, since all the articles of the

draft had been referred to the Drafting Committee and had not yet been adopted by the Commission. Moreover, if paragraph 1 was ultimately not adopted, the reference to it in paragraph 3 would automatically be deleted.

35. Mr. EDMONDS said that it would not be proper to vote on the applicability of any provision in chapter I of the draft to honorary consuls before the Commission had adopted a final text for that chapter.

36. After a procedural discussion, Mr. ŽOUREK, Special Rapporteur, pointed out that paragraph 3 of article 33 contained two sentences, each stating a different rule of international law. He therefore proposed that separate votes should be taken on the two sentences.

37. Mr. VERDROSS withdrew his proposal.

38. The CHAIRMAN called for a vote on the applicability of the first sentence of paragraph 3 of article 33 to honorary consuls.

It was decided by 16 votes to none, with 3 abstentions, that the sentence should be applicable to honorary consuls.

39. The CHAIRMAN called for a vote of the applicability of the second sentence of paragraph 3 of article 33 to honorary consuls.

It was decided by 10 votes to 6, with 4 abstentions, that the sentence should be applicable to honorary consuls.

40. The CHAIRMAN called for a vote on the applicability of paragraph 4 of article 33 to honorary consuls.

It was decided by 17 votes to none, with 3 abstentions, that paragraph 4 should be applicable to honorary consuls.

41. Mr. YASSEEN said that he had abstained from voting on the applicability of the first sentence of paragraph 3 of article 33 because that sentence was unnecessary now that the Commission had decided that paragraphs 1 and 2 should not apply to honorary consuls. He was not of course in any way opposed to the principle set forth in the sentence in question; he merely considered that a provision of that nature was not necessary. It went without saying that an honorary consul was under a duty to appear before the competent authorities in the event of criminal proceedings being instituted against him.

42. The CHAIRMAN invited the Commission to discuss the question of the applicability to honorary consuls of the principle embodied in article 34 *(Immunity from jurisdiction)* of the draft on consular privileges and immunities, and drew attention to the text for that article as provisionally adopted by the Drafting Committee:

" Members of the consulate shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of their functions."

43. Mr. VERDROSS said that the formula " in respect of acts performed in the exercise of their functions " was much too broad and could include an ordinary crime committed during the performance of official duties. He suggested the replacement of the words in question by the phrase " in respect of their official acts " (à raison des actes de leur fonction). If so amended, the provision would cover acts of State only.

44. The CHAIRMAN said that Mr. Verdross's suggestion related to the substance of article 34, whereas at the moment the Commission was considering only the applicability of the article to honorary consuls. If there was no objection, he would take it that the Commission agreed that article 34 should apply to honorary consuls, as indeed was proposed in the Special Rapporteur's new article 56, paragraph 2. (551st meeting, paragraph 18).

It was so agreed.

45. The CHAIRMAN invited the Commission to consider the question of the applicability to honorary consuls of the principle embodied in article 35 *(Exemption from obligations in the matter of registration of aliens and residence permits)* of the draft, and drew attention to the text provisionally adopted for that article by the Drafting Committee:

" Members of the consulate, members of their families and their private staff shall be exempt from all obligations under local legislation in the matter of registration of aliens, residence permits and work permits."

46. He noted that the Special Rapporteur's draft article 56, paragraph 2, did not mention article 35 among the provisions applicable to honorary consuls.

47. Mr. ERIM thought it was not unreasonable that honorary consuls should enjoy the relatively minor privileges provided for in article 35. The reason why career consuls were exempted by the article from certain formalities regarding registration and residence permits was that the formalities were unnecessary since the consul's arrival was notified to the Ministry of Foreign Affairs.

48. Mr. BARTOŠ said that it was the practice in many countries, including Yugoslavia, to exempt foreign honorary consuls from the duty to register as ordinary aliens and that exemption applied also to their families. The practice did not represent a serious concession on the part of the receiving State, for the persons concerned were in fact registered with the Protocol Division of the Ministry of Foreign Affairs, as were of course career consular officers and their families.

49. Naturally, the position of an honorary consul who was a national of the receiving State was quite different. Such a person would, for example, have a duty to register for military service.

50. Mr. ŽOUREK, Special Rapporteur, said that he had excluded article 35 from the enumeration in article 56, paragraph 2, because honorary

consuls could be nationals of the sending State, of the receiving State or of a third State; in addition they were authorized to engage in a gainful occupation. Even if they were not nationals of the receiving State, they generally carried on an occupation in that State and, in the particular matter with which article 35 was concerned, were subject to the same regulations as applied to otther resident aliens. In the circumstances, no State would agree to a general rule relieving all honorary consuls of the duty to obtain residence permits and work permits.

51. The wisest course was therefore to exclude article 35 and to await the replies of governments, which would provide some information on the existing practice of States.

52. Sir Gerald FITZMAURICE said that it was clear from the terms of article 35 that in no event would a person who was a national of the receiving State be eligible for the exemption conferred by the article. The article was concerned exclusively with persons who were aliens in the receiving State.

53. In the circumstances, there should be no difficulty in exempting an honorary consul from the requirement of a residence permit. It would be most strange if the receiving State, after consenting to receive a particular person as consul, were to require him to obtain a residence permit. The consent of the receiving State should, *ipso facto*, imply permission for the honorary consul to reside in the country as long as his duties lasted.

54. With regard to the matter of work permits, he thought there would be no special difficulty if the honorary consul engaged in commerce or some other gainful occupation: for the purpose of carrying on those activities, he would require a permit in the same way as any other alien. However, it should be made clear that on no account would an honorary consul need a work permit for the purpose of exercising the consular function itself.

55. Mr. BARTOŠ agreed that the grant of an exequatur by the receiving State should relieve the honorary consul of all obligations under local legislation in the matter of immigration and residence permits. If it were not so, the aliens control authorities would be in a position to nullify the effect of the grant of an exequatur.

56. The practice could hardly affect the interests of the receiving State, for that State was free at any time to withdraw the exequatur, if necessary. There could also be no doubt that if an honorary consul wished to engage in a gainful occupation, he would have to conform with local legislation and the authorities concerned could, if need be, decline to give him a work permit for such occupation; in no circumstances, however, could the authorities cancel his residence permit so long as his exequatur was still in force.

57. For those reasons, the only possible conclusion was that article 35 should apply to honorary consuls who were not nationals of the receiving State.

58. Mr. TUNKIN drew attention to article 13, paragraph 5, of the Consular Convention between the United Kingdom and Sweden of 1952, which implied (by its silence on the subject of honorary consuls) that it was not the State practice to exempt honorary consular officers — as distinct from career officers — from the requirements of local legislation regarding the registration of aliens and residence permits. The reason was that such an exemption was not essential for the purpose of the honorary consul's official duties. For his part, he would agree that an honorary consul who was a national of the sending State should be exempted from the requirement of a residence permit, provided that he was not engaged in any non-consular activity. As to work permits, they were of course not required for the exercise of consular duties but the fact that a person was an honorary consul would not exempt him from the duty to obtain a work permit for his other activities.

59. Lastly, he could not accept the extension of the benefit of article 35 to all the members of a consulate, members of their families and their private staff. Whatever exemptions were granted under the article should apply only to the honorary consul himself.

60. Mr. ŽOUREK, Special Rapporteur, explained that an honorary consul to whom an exequatur had been granted would obviously not require a work permit to perform his consular duties. The question of a residence permit was, however, different. Under the law of the receiving State, the honorary consul might be required to obtain such a permit although it would be surprising if the responsible authorities were to refuse him such a permit when he had already been granted the exequatur. There was a parallel in the treatment accorded in certain countries to international officials. Those officials were, in the practice of certain countries, given special identity cards which took the place of residence permits. The card was not refused when once the international official had been admitted into the country.

61. Lastly, he drew attention to the fact that article 35 did not cover only an honorary consul who was a head of post, but also other members of the consulate, members of their families and even their private staff. Those persons were ordinary aliens in the receiving State and could not be exempted from the requirements of local legislation in the matter of registration of aliens and residence permits.

62. Mr. LIANG, Secretary to the Commission, said that he knew of no case of a member on the staff of an international organization having been subjected to the requirement of applying for a residence permit, either in New York or at Geneva. Such a requirement would be inconsistent with all the agreements at present in force between the United Nations and the host States.

63. So far as the position of an honorary consul was concerned — on the assumption of course that he was not a national of the receiving State — he said it would be inconsistent with the grant

of the exequatur to require him to register as an alien and to apply for a residence permit. The very fact of his being accepted as an honorary consul should suffice.

64. Mr. YASSEEN noted that article 35 referred to several distinct questions some of which were more important than others. It was understandable that an honorary consul should be exempted from the requirement of registration as an alien because honorary consuls were registered with the Ministry of Foreign Affairs. As to residence permits, he felt that the authorization to act as a consul should imply permission to reside in the country since such permission was necessary for the exercise of the consular function.

65. By contrast, he could not agree to the exemption of honorary consuls from the duty to obtain work permits if they wished to engage in any kind of occupation; such an exemption was not necessary for the performance of consular duties.

66. Mr. AGO pointed out that the question of registration as an alien would only arise in the case of an honorary consul who entered the receiving State for the first time. As a general rule, an honorary consul was already a resident at the time of appointment and, if not a national of the receiving State, would by then have carried out his obligations in the matter of registration as an alien. In the case of an honorary consul who entered the country for the first time, there was no reason to require him to register as an alien; the notification of his arrival under article 21 of the draft should suffice.

67. The question of exemption from residence permits should not give rise to difficulties either. If the receiving State granted the exequatur to an honorary consul, it should not make any difficulties regarding his residence permit.

68. So far as work permits were concerned, he said it could simply be explained in the commentary that the exemption referred only to the honorary consul's work as a consul and not to his other activities, if any.

69. The CHAIRMAN said that in view of the remarks of some of the members, the question of the applicability of article 35 to honorary consuls could not perhaps be considered without qualification. The question should perhaps be put to the Commission whether an honorary consul who had been granted an exequatur was thereby relieved of the duty to obtain a residence permit and also of the duty to obtain a work permit in regard to his duties as a consul.

70. Mr. ŽOUREK said that even in that form he could not vote in favour of the applicability of article 35 to honorary consuls because the result would be to exempt an honorary consul who entered the country for the first time of the obligation to register as an alien and to obtain a residence permit, whereas honorary consuls resident in the receiving State at the time of their appointment would be subject to that obligation. The consequence would be a strange situation, for the same class of consuls would be subject to two different sets of regulations owing to accidental circumstances, according to whether they arrived in the receiving country before appointment as honorary consuls (which was generally the case) or after their appointment (which was rare).

71. Mr. MATINE-DAFTARY proposed that the exemption should apply only to an honorary consul who was a national of the sending State and who did not engage in any gainful occupation. It should not apply to members of his family or staff.

72. The question of a work permit in regard to consular duties did not arise; it had never been suggested that a consul, whether honorary or not, required a work permit to perform his duties.

73. Sir Gerald FITZMAURICE said that he saw no basis for establishing a distinction between honorary consuls and honorary consular officers. If a person was accepted in a consular capacity he should not need a residence permit or a work permit for carrying out his duties. Otherwise, a situation could arise where police action might nullify the grant of the exequatur. Once a person was accepted as an honorary consular officer, he would only need a work permit for his non-consular activities, if any, but the exercise of his consular duties could not be made conditional on his obtaining a residence or work permit.

74. Mr. ŽOUREK, Special Rapporteur, pointed out that not all honorary consular officials were subject to the procedure of the granting of an exequatur. In certain countries, for example, the appointment of a consular agent was merely notified to the Ministry of Foreign Affairs and required no exequatur or express authorization.

75. Mr. PAL said that, if a work permit was not demanded under any local law for the purpose of discharging consular duties, the reference in article 35 to exemption from the need for such permits would appear to be unnecessary and somewhat misleading even in relation to career consular officers. Subject to that, there was no reason why honorary consuls as such should be placed on a different footing in that respect.

76. Mr. VERDROSS suggested that the Special Rapporteur's proposal to omit article 35 from the enumeration in article 56, paragraph 2, be accepted, on the understanding that the commentary would explain that the grant of an exequatur dispensed an honorary consul from all obligations under local legislation in the matter of registration of aliens and residence permits.

77. Mr. LIANG, Secretary to the Commission, drew attention to the considerable difficulties which had arisen, particularly during the First and Second Conferences on the Law of the Sea, whenever the Commission had introduced into the commentary on an article significant qualifications to its provisions. Representatives had been led to speak on the text of articles without making

allowance for qualifications contained in the commentary.

78. He stressed the inadvisability of a practice which had been unfavourably commented upon both in the General Assembly and in academic circles.

The meeting rose at 1.5 p.m.

557th MEETING

Thursday, 9 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 said that the Commission had to take a decision on the question of the applicability to honorary consuls of the principle embodied in article 35 (*Exemption from obligations in the matter of registration of aliens and residence permits)* (556th meeting, paragraph 45).

2. Mr. ŽOUREK, Special Rapporteur, said that the best procedure for the Commission would be to take a decision on the suggestion made at the previous meeting by Mr. Verdross *(ibid.*, paragraph 76) that article 35 should not be mentioned among the provisions the benefit of which was to enure to honorary consuls under article 56, paragraph 2, and that it should be explained in the commentary that an honorary consul who had been granted an exequatur was, *ipso facto*, relieved of the duty to register as an alien and to obtain a residence permit.

3. He drew attention to the fact that an honorary consul had a dual capacity, and that, in view of his private activities, which constituted his principal occupation, it was difficult for the receiving State to exempt him from the legislative provisions governing the entry and residence of aliens.

4. The CHAIRMAN said that the majority of the members appeared to agree that article 35 should apply to an honorary consul, provided that he was not a national of the receiving State and that he did not engage in commerce or in any other gainful occupation. He suggested that the Commission take a decision on that point and then proceed to deal with the proposal made by Mr. Matine-Daftary at the previous meeting *(ibid.*, paragraph 71) that the provisions of article 35 should not apply to members of the family and private staff of an honorary consul.

5. Mr. AGO said that proceedings would be greatly simplified if article 35 were divided into two paragraphs; the first paragraph would deal with the questions of registration of aliens and residence permits and the second with the question of work permits.

6. If the provisions of article 35 were divided in that manner, it would be easy for the Commission to decide that the enumeration in article 56, paragraph 2, would include article 35, paragraph 1, but would not include article 35, paragraph 2.

7. Mr. ŽOUREK, Special Rapporteur, stressed that a great many States did not draw any distinction based on the nationality or occupation of honorary consuls, and, to distinguish them from career consuls, defined them as consuls who did not belong to the career consular service.

8. That being so, it would be difficult to apply any provision which differentiated as between various kinds of honorary consuls for the purpose of the applicability of the various privileges and immunities set forth in the draft articles.

9. Mr. TUNKIN said that an honorary consul was at the same time a private citizen and it might be necessary for the local authorities to apply to him their aliens' control legislation. He suggested that the Commission should vote first on the original proposal, implied in the Special Rapporteur's new draft of article 56, paragraph 2 (which did not mention article 35), that the benefit of article 35 should not extend to honorary consuls.

10. The CHAIRMAN, speaking as a member of the Commission, agreed that the scope of the functions of an honorary consul, as defined by the sending State, could be more limited than those of a career consul; he also agreed that an honorary consul might in State practice not have as many privileges as a career consul. However, such privilieges as were granted to a consul were always based on the same grounds viz., his official position and the need to facilitate the performance of the consular function. The basis of those privileges was the same, whether the person concerned was a career officer or an honorary consul.

11. For those reasons, he could not accept the exclusion of an honorary consul from the benefit of a particular privilege for no reason other than his honorary status. He would therefore vote in favour of the applicability to honorary consuls of the exemption from obligations in the matter of registration of aliens and residence permits.

12. Mr. AMADO said that he had been orginally under the impression that the draft on consular intercourse and immunities dealt primarily with career consuls. Now, as a result of the discussion,