Document:-
A/CN.4/SR.535

Summary record of the 535th meeting

Topic:
<multiple topics>

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

resident of long standing was fully conversant with the language, laws and customs of the State of his residence. In the treatment of aliens, it was essential to avoid not only discrimination against them, but also discrimination in their favour. The fact that the right of communication was exercised subject to the observance of the laws of the receiving State did not, of course, mean that that State could, by its legislation, prohibit all communication between a consul and his nationals.

51. For his part, he agreed with all the principles embodied in the proposed new article, but doubted whether some of its provisions would be acceptable to governments. For example, some governments might not be prepared to accept it as a general duty of the receiving State to inform the consul of the sending State when any of his nationals were detained. Another possibility might be to state that, wherever the person detained so requested, his consul should be notified.

52. Lastly, the right of protection could not be interpreted as prevailing over the rules of municipal law concerning such matters as criminal procedure and security regulations in the vicinity of zones where there were atomic plants.

The meeting rose at 1.10 p.m.

535th MEETING

Monday, 9 May 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)*

ADDITIONAL ARTICLE 30 A *(continued)*

1. The CHAIRMAN invited the Commission to continue its debate on Sir Gerald Fitzmaurice's draft new article 30 A.

2. Sir Gerald FITZMAURICE said the discussion had clearly shown that a great many members agreed that a provision along the lines of his article 30 A should be included in the draft. At the same time, the desire had been expressed that some measure of flexibility should be introduced into the wording of the article. He was prepared to give satisfaction to some extent to that desire provided that it could be done without detriment to the basic principle which the article enshrined.

3. It had been pointed out that the proposed new article could give rise to difficulties because its provisions might conflict with municipal law. He could not accept the implication that a provision should not be included in the draft merely because it might call for some change in the municipal law of some participating countries. A treaty would serve no useful purpose if it contained only provisions which conformed with the existing law and practice of the participating countries; the whole point of signing a treaty was that it would involve some change for at least certain of the contracting parties.

4. Nor could he accept the suggestion that the whole draft article should be made subject to the provisions of the municipal law of the receiving State. Such an approach would completely nullify the purpose of his proposal. That consideration was particularly important because the provisions of his text were designed to prevent the circumvention of certain basic principles of justice which were safeguarded by international law.

5. Some members had expressed the view that his proposal embodied an innovation; others had rightly pointed out, in reply, that the proposed text was already included in a large number of existing consular conventions. In fact, there was an even more profound reason to justify the proposal: consular conventions contained a provision of the kind because under customary international law the receiving State had an obligation to respect the consul's right of access to his nationals and a duty to advise the consul whenever one of them was arrested. From his experience of over thirty years as legal adviser to a government, he could state that the failure to observe those obligations was a prime cause of friction between countries and a source of frequent incidents and much controversy. Accordingly, the Commission would be doing a real service to the international community by including in the consular draft definite provisions to deal with the matter.

6. With regard to the opening words of paragraph (*b*) he said he was quite prepared to accept some modification of language; nevertheless, he thought that it would not be sufficient merely to set forth the right of the foreign national concerned to request that his consul be informed of his arrest. In many instances, particularly in the case of a foreign visitor or temporary worker, the alien concerned had little knowledge of his rights and was unlikely to be aware of the provisions of a consular convention applicable in his case. In addition, even in highly developed countries, local authorities could in practice be indifferent to, or even ignorant of, any duties they might have under a consular convention. It was necessary to safeguard the right of protection in an effective manner and, to that end, the government of the receiving State should have at least an obligation to ensure that the local authorities took steps within a reasonable time to inform the consul of the arrest of one of his nationals.

7. Some speakers had referred to the questions of human rights and treatment of aliens which were indirectly affected by his proposal. In that connexion, he emphasized that his proposal, like the analogous provisions of consular conventions, related to the basic function of the consul to protect his nationals vis-à-vis the local authorities.

That was one of the main reasons for the existence of consuls, and a consul's duties in that regard could not be carried out effectively unless his right of access to his nationals, and the right of those nationals of access to him, were safeguarded. And it was precisely when one of those nationals was under arrest that the question of safeguarding, those rights became vital.

8. To regard the question as one involving primarily human rights or the status of aliens would be to confuse the real issue. In that connexion, some members had expressed the view that an alien's right could not be greater than those of a national of the receiving State. In reality, the object of his proposal was to ensure that an alien had rights equal with a national's in the circumstances covered by the text. A foreign resident of long standing might, of course, have a sufficient knowledge of the local language, customs and laws, but normally an alien was at a disadvantage compared with the local inhabitants. His knowledge of the language was often inadequate, as was his knowledge of the local administration, customs and laws; he was often unaware of his rights and had no family or friends to arrange for his defence. It was only by means of the effective exercise of consular protection that he could expect to be placed in a position comparable to that of a national of the receiving State.

9. Of course, administrative difficulties might arise for certain countries with regard to some of the proposed provisions and he was quite prepared to accept drafting changes to meet those difficulties, provided that the basic principle of the proposal was maintained.

10. He agreed with those members of the Commission who felt that consular protection could not, in the draft under consideration, be based on the principle of reciprocity. Some countries had a greater interest in the subject than others because many of their nationals travelled or temporarily resided or worked abroad. The best course would therefore be to allow the normal rule to operate — viz., that where a country did not carry out a provision of a convention, it would naturally be estopped from invoking that provision against other participating countries.

11. With regard to the placing of article 30 A and to the remarks made on that question by the Secretary to the Commission, he agreed with Mr. Ago that, while the proposed new article might be better placed elsewhere in the draft, its three paragraghs were interdependent and should be kept together.

12. He agreed that the consul's right to protect his nationals and arrange for their legal representation existed also in civil proceedings. The reason, however, why that right, which was inherent in the general right of protection, was generally not mentioned in consular conventions was that an explicit provision on the subject was really unnecessary. A person involved in civil litigation was at liberty and could therefore make arrangements for his legal representation and apply to his consul for help and advice. The position was, of course, altogether different in the case of criminal proceedings; the alien concerned was under arrest and would not, in the absence of express provisions, be free to communicate with his consul.

13. The Special Rapporteur had pointed out that the matters dealt with in the proposed new article were covered by the general terms of article 4 on consular functions (A/CN.4/L.86). Actually, article 4 dealt with the substance of the right of protection, whereas the proposed article 30 A was of a procedural character; its provisions were intended to provide a consul with the means of carrying out the function of protection set forth in article 4. It was not enough to proclaim the right of protection; that right could be frustrated or nullified by the local authorities if it were possible for them to cut off all communication between a consul and his nationals.

14. Mr. ERIM said he fully agreed with Sir Gerald Fitzmaurice that the proposed new article 30 A dealt with the rights and duties of consuls and not with the protection of human rights or the status of aliens. If the subject under discussion had been the protection of human rights, he (Mr. Erim) would not have hesitated to advocate the grant of those rights in their most advanced form and the taking of the most effective possible measures to protect them. But the discussion should be confined to the basic purpose of the proposed provision and should not be broadened to cover other subjects which were involved only incidentally in the proposed provision.

15. Secondly, he also agreed with Sir Gerald that the provisions of the proposed new article could not be made subject to municipal law. The proposal reflected certain existing rules of customary international law which should prevail over the national legislation of participating States.

16. While he thus agreed with the substance of the proposal, he considered that some of its more particular provisions should be expressed in less categorical terms. The consul's right of access to his nationals, set forth in paragraph (*a*), could not be stated in absolute terms. The person concerned might, for example, be engaged on defence work and hence be resident in an area to which access was restricted or prohibited for security reasons. In a case of that kind, it should be specified that the person concerned had the right to go and see his consul if his consul could not go and see him in the prohibited area.

17. As to the duty of the local authorities, under paragraph (*b*), to inform the consul of the arrest of one his nationals, he said he would go so far as to suggest that the local authorities should be required to inform the consul of the arrest immediately. However, with regard to the right of access, he considered that some allowance should be made for the secrecy of the early stage of the investigation under the laws of criminal procedure of certain countries, where major crimes were involved. Perhaps the best solution would be to specify a time limit of, say, one or two days

beyond which the consul could not be denied access to the prisoner.

18. Lastly, in paragraph (*c*), he saw no reason why the consul's right to visit one of his nationals who was in custody should be conditional " upon notification to the appropriate authority ". The opening words of the next sentence (" Any such visit shall be conducted in accordance with the regulations . . . ") were surely quite sufficient, and there was no need to specify a separate obligation for the consul always to notify in advance the appropriate authorities of his intention to visit his national in custody.

19. Mr. ŽOUREK, Special Rapporteur, said that after listening to the discussion on the draft new article [30 A] proposed by Sir Gerald Fitzmaurice, he wished to propose a compromise text in the following terms :

" *Communications with nationals of the sending State*

" In order to facilitate the exercise of the consul's function of protecting the nationals of the sending State resident or present within his district :

" (*a*) A consul shall, subject to the provisions of article 46 of these draft articles, have freedom of communication with and access to such nationals, and they shall have freedom of communication with the consul, and also (unless subject to detention) of access to him;

" (*b*) When a national of the sending State is committed to custody pending trial, or to prison, within the consular district, the local authorities shall be bound to notify the competent consul of the sending State if the person in custody or imprisoned so requests. The consul shall be permitted to visit a national of the sending State who is in custody or imprisoned and to arrange for that national's representation in court in conformity with the law of the receiving State."

20. He had been rather disturbed that the discussion had gone beyond what seemed to him the proper province of consular law and had impinged upon such matters as human rights and the legal status of aliens in a State. There was, of course, no question about the right of consuls to communicate with their nationals, but he had been surprised to note that some members of the Commission apparently thought it unnecessary to add a provision concerning respect for the receiving State's laws in terms similar to those used in the diplomatic draft. It was inconceivable that governments would accept a provision purporting to entitle a consul to see a prisoner in defiance of the local law. Because the Commission had decided that the consular and diplomatic drafts should, where such a course was warranted, be consistent, *inter se*, he had included in his draft article 46 *(Duty to respect the laws and regulations of the receiving State)* a parallel provision to that contained in article 40 of the diplomatic draft; and the new article 30 A he was now proposing contained a cross-reference to draft article 46.

21. In his draft of article 30 A he had combined paragraphs (*b*) and (*c*) of Sir Gerald Fitzmaurice's draft because there did not appear to be any real distinction, so far as the consul's prerogatives were concerned, between a national who was in custody pending trial and one who had been sentenced. The main difference between his and Sir Gerald's draft was that, under his own text, the exercise by the consul of the right granted to him by the article in question was made dependent on the municipal law of the receiving State. Again, under his text, the local authorities' duty to inform the consul would be subject to the request of the national detained : he had inserted that provision because, during the discussion, some members of the Commission had requested it. Paragraph (*c*) of Sir Gerald Fitzmaurice's draft referred to prison regulations; he (Mr. Žourek) considered that the text should expressly provide that visits and arrangements for representation in court were governed by the law of the receiving State.

22. Mr. BARTOŠ expressed his appreciation of the spirit of compromise in which the Special Rapporteur had prepared a new draft of article 30 A. However, it must be recognized that compromises were sometimes unacceptable because they would conflict with vital principles at stake. Sir Gerald Fitzmaurice had explained why he believed that it should be the duty of the authorities of the receiving State to notify the consul of the detention of a national, and that such notification should be independent of the prisoner's request. If the local authorities had no duty to inform the consul unless requested to do so by the prisoner, the whole principle of consular protection would be undermined. It should normally be possible to inform the consul of the arrest within three hours by telephone or otherwise; if it took forty-eight hours for the local authorities to inform the magistrate and another three days for the magistrate to inform the consul, there would often be a disastrous delay in preparing a prisoner's defence.

23. In his opinion, there were two considerations involved. Firstly, the Commission's definition of the consul's functions should be comprehensive. A code such as the Commission was preparing was an integrated whole and in its definition of the consular functions the human rights of a foreigner could not be ignored, for it was precisely one of the consul's functions to protect those rights of his nationals. Secondly, while it was of course correct, as the Special Rapporteur had said, that the consular draft should take into account the corresponding provision of the draft on diplomatic intercourse, it was no less true that, both in diplomatic and in consular relations, international law prevailed — in case of conflict — over municipal law. Naturally, the receiving State would decide its own procedure and regulations, but they could not supersede the provisions of the international code of consular intercourse. Consular visits to nationals who had been detained must take place in accordance with the receiving State's regulations governing the arrangement of the visit, but those regulations must not stop the visit. The competence of the receiving State in that respect

was in fact limited by international law. Concluding, he said he would be prepared to support Sir Gerald Fitzmaurice's draft or a draft which combined Sir Gerald's with the Special Rapporteur's.

24. Mr. VERDROSS said that legal representation was a general right of foreign nationals who had been detained and it could not be made dependent on their request for consular assistance. Foreigners were often ignorant of their rights under consular treaties. The local authorities should have the responsibility of informing the consul of the arrest of one of his nationals without awaiting a request from the prisoner. He could not, therefore, approve the qualification in paragraph (*b*) of the Special Rapporteur's draft which read " if the person in custody or imprisoned so requests ".

25. Mr. SCELLE agreed with Mr. Bartoš that the protection of individual and human rights was one of the consular functions. Inasmuch as the status of aliens was governed by law, and was not merely a de facto status, and as, in case of conflict, international law prevailed over municipal law, any local law that hampered the consul in his exercise of the essential function of protecting his fellow citizen's human rights in the receiving State would be superseded by the rules of international law as embodied in the Commission's code. Indeed, he would go so far as to say that a consul could provoke an international debate on the validity of a local law which conflicted with a principle of international customary or treaty law.

26. Nor did he think that the Commission should be influenced too much by the chances of its draft of securing the acceptance of a majority of governments. It was open to governments at any time to enter into bilateral agreements. But it was the Commission's duty to codify and also to promote the progressive development of international law.

27. Mr. TUNKIN said he was broadly in agreement with the view expressed by previous speakers concerning the relationship between international and municipal law. If the law of the receiving State concerning the matter under discussion conflicted with international law, that State's international responsibility might well be engaged; he thought, however, that that problem exceeded the scope of the Commission's draft.

28. There was both a national and an international aspect to the matter of communication between a consul and his nationals. The consul's protection of his nationals in his consular district was an international function, and the consul certainly should have the means of carrying out that responsibility — a rule which all States did in fact observe. On the other hand in communicating with his nationals and in arranging for their defence the consul had to respect the regulations in force in the receiving State. He thought that idea was very well expressed in article 10 of the Havana Convention of 1928.[1] The provisions of that article were obviously regarded as being in keeping with existing international law. The legislation of all countries recognized the principle of communication between the consul and his nationals, but nevertheless in the codes of some countries there were restrictions which governed the procedures to be followed. The question was whether the Commission should depart from those accepted principles of international law. He did not believe that the suggestion that consuls should have complete freedom, and hence were not necessarily bound to observe the local legislation or procedures, would be generally accepted. He suggested that a formula might be found which would give expression to the principle of freedom but which would at the same time oblige the consul to respect the laws and procedures of the receiving State. The Special Rapporteur's new draft appeared to come nearer to that idea than Sir Gerald Fitzmaurice's, but he personally still had an open mind.

29. He doubted whether the majority of States would accept the proposition that it was the receiving State's duty to inform the consul immediately when one of his nationals was detained. On the other hand he questioned the wisdom of including the phrase " if the person in custody or imprisoned so requests ", as the Special Rapporteur had done in paragraph (*b*) of his draft article.

Tribute to the memory of Sir Hersch Lauterpacht

30. The CHAIRMAN announced that news had just been received, in a telegram addressed to Sir Gerald Fitzmaurice, of the sudden death of Sir Hersch Lauterpacht, whose works and teaching were so well known to every student of international law.

The members of the Commission observed a minute of silence in tribute to the memory of Sir Hersch Lauterpacht.

31. Sir Gerald FITZMAURICE expressed his gratitude for the Commission's tribute to one whom, he believed, all who had known him had regarded as a truly great man. Sir Hersch had been brought up in the brilliant school of Austrian jurists, but had moved to England after the First World War as a result of painful circumstances, in which he had lost most of his family. For the remainder of his life he had made England — where he had become a naturalized British subject — and particularly Cambridge, his home, and had not relinquished his ties with the University of Cambridge even on his election to the International Court of Justice. Sir Hersch had taught brilliantly at the London School of Economics and at Cambridge, where he had held the Whewell Chair of International Law, in which he had been preceded by Lord MacNair. Hardly any man had made an equal impact on the study of international law during his lifetime, both as a writer, as a teacher and as a judge of the International Court, and no one had better combined great knowledge of the law, the deepest integrity and broad humanity. Both he (Sir Gerald) personally and the United Kingdom owed a very great deal

[1] League of Nations *Treaty Series*, vol. CLV (1934-1935), No. 3582, p. 297.

to Sir Hersch Lauterpacht, and his country was proud to be able to claim him as one of its nationals.

32. Mr. SCELLE said that, as a Frenchman and a professor of international law, he wished to express his esteem and friendship for Sir Hersch Lauterpacht and his widow. He hoped that Sir Gerald Fitzmaurice would transmit to Lady Lauterpacht his deepest and most sincere condolences.

33. Mr. LIANG (Secretary to the Commission), speaking as a representative of the United Nations Secretariat, expressed his deep regret at the passing of Sir Hersch Lauterpacht. Sir Hersch had been associated with the Commission's work even before its establishment, for he had been the author of a memorandum issued by the Secretariat comprising a survey of the topics suitable for codification by the International Law Commission. Sir Hersch had been a member of the Commission from 1952 to 1954 and its Rapporteur in 1553. The Commission's report from 1953 had been distinguished by unrivalled scholarship.

34. Mr. BARTOŠ said that only two days previously he had received a letter from Sir Hersch Lauterpacht from London on a matter they had been discussing, so that the news of his death had been a particularly unexpected blow. As a member of the Commission and a Yugoslav jurist, he wished to pay a particular tribute to the judge, the jurist and the man so greatly esteemed by all students of international law in Yugoslavia. Sir Hersch Lauterpacht's edition of Oppenheim was regarded in Yugoslavia as a classic.

35. Mr. VERDROSS recalled that Sir Hersch Lauterpacht had received his first doctorate of law from the University of Vienna. As the greatest modern authority on international law and as a very noble personality, Sir Hersch had been universally admired and respected.

36. Mr. AMADO said that the late Sir Hersch Lauterpacht had been a giant in the world of international law. On occasions when his views had been disputed, Sir Hersch had brought all his vast erudition to bear on all arguments to see whether his own views would stand improvement or correction. It had not been merely his erudition that had been so striking, but also his supreme quality of integrity and clarity of mind. He wished to pay a heartfelt tribute to Sir Hersch Lauterpacht on his own behalf and on that of Brazil.

37. Mr. EDMONDS associated himself with the tributes paid by members of the Commission to the late Sir Hersch Lauterpacht. He had enjoyed Sir Hersch's friendship as a fellow member of the International Law Commission and had found him always friendly, simple and gracious. Sir Hersch's professional talents were held in no less esteem in the United States than in the United Kingdom and were especially respected and admired by those in the State Department responsible for dealing with matters of international Law. Sir Hersch had contributed as much to the study of international law as any jurist in modern times. His sudden death was a grievous loss to his friends and to all scholars in the subject which he had pursued with distinction for so many years.

38. Mr. AGO said he had been honoured to enjoy the friendship of so great a man as Sir Hersch. When he had spent some days at Sir Hersch's home at Cambridge, he had been greatly struck by the exceptionally candid way in which it had been possible to communicate with him. International jurists had lost a master, but — what was sadder — they had lost a friend.

39. Mr. HSU deplored the passing of a great scholar and a warm-hearted man who had stood for ideals of which the world was so greatly in need at the present time. Sir Hersch's death was a great loss not only to international law in particular, but to the world in general.

40. The CHAIRMAN, speaking in his personal capacity, recalled the affection and admiration in which Sir Hersch Lauterpacht was held by students of international law in Mexico. It had been his ambition when young to traval to England and to study under Sir Hersch, and he had in fact been privileged to study under him at the London School of Economics. Many years later, he had received letters from Sir Hersch which he had always cherished. He wished to pay to the memory of the late Sir Hersch Lauterpacht a tribute on his own behalf and also on behalf of Mexican jurists, whom Sir Hersch had so greatly influenced.

41. Mr. PAL said that the sad news had come as a severe blow. He had known Sir Hersch Lauterpacht intimately since 1953. He wished to associate himself with the tributes paid by the previous speakers, and would suggest that, out of respect for the memory of Sir Hersch Lauterpacht, the meeting should adjourn.

42. The CHAIRMAN said that he was sure that the Commission would wish him to transmit its condolences to Lady Lauterpacht and to comply with Mr. Pal's suggestion.

The meeting rose at 5.30 p.m.

536th MEETING

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

Chairman: Mr. Luis PADILLA NERVO

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

[Agenda item 2]

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

ADDITIONAL ARTICLE 30 A *(continued)* *

1. The CHAIRMAN invited the Commission to continue its debate on the two texts for a new

* Resumed from the 535th meeting.