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**A/CN.4/SR.559**

# Summary record of the 559th meeting

Topic:
**<multiple topics>**

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meration. He suggested that the article should be held to be applicable to honorary consuls.

*It was so agreed.*

64. The CHAIRMAN invited the Commission to consider the applicability to honorary consuls of article 44 *(Estates of deceased members of the consular staff or of deceased members of their families)*, which was not mentioned by the Special Rapporteur in the new article 56, paragraph 2.

65. Mr. ERIM pointed out that, while the general practice was not to grant the exemption conferred by article 44 to honorary consuls, there might be cases where an honorary consul who was a national of the sending State would agree to transfer his residence to the territory of a receiving State where his country had appointed him as consul. In that case, the transfer would be made for the express purpose of the exercise of consular functions. If the honorary consul concerned was not engaged in gainful occupation and carried on no activities other than his consular functions, there seemed to be no reason to deny him the exemption.

66. Mr. ŽOUREK, Special Rapporteur, observed that the case cited by Mr. Erim was a very exceptional one. It was impossible to base a general rule, intended to be acceptable to all States, on so rare an occurrence. He considered that the Commission should not recommend that the benefit of article 44 should be extended to honorary consuls, for in the overwhelming majority of cases honorary consuls themselves elected to reside in a certain country and were in no way eligible for the privilege in question.

67. Mr. ERIM said that, since the Commission did not seem anxious to extend the exemption to honorary consuls, he would not press his point, although the cases to which he had referred might well arise.

68. Mr. EDMONDS said that, for the purpose of the exemption accorded by article 44, he could see no logical basis for distinguishing between honorary consuls and career consuls or members of their families, provided that the persons concerned were not nationals of the receiving State.

69. Mr. JIMÉNEZ DE ARÉCHAGA pointed out that the Commission had already decided not to extend the benefit of tax exemption to honorary consuls; it was therefore only logical and consistent not to extend the exemption from estate, succession or inheritance duties to honorary consuls.

70. The CHAIRMAN, speaking as a member of the Commission, thought that the article was connected with paragraph (*c*) of article 38 *(Exemption from customs duties)*, which the Commission had decided not to apply to honorary consuls. Since an honorary consul's property was usually acquired in the receiving State that property fell under the exception in the first sentence of article 44. He agreed with the Special Rapporteur that the position of career consuls in that respect differed from that of honorary consuls.

71. Mr. EDMONDS pointed out that " a member of the consular staff " might be a person employed by an honorary consul and not a national of the receiving State. Accordingly, if the employees of a career consul enjoyed the exemption, there seemed to be no basis for making any distinction between them.

72. Mr. ŽOUREK, Special Rapporteur, drew Mr. Edmonds's attention to the fact that the members of the consular staff to whom article 44 applied were career officials and employees. The members of an honorary consul's family were, like the honorary consul himself, residents of the receiving State, and as such should not be exempted from estate duty. With regard to employees of the honorary consul, he pointed out that in so far as such employees were engaged in the honorary consul's private business, they were obviously not entitled to benefit by the exemption; if they were career consular employees, they enjoyed in any case the exemption conferred by article 44.

73. The CHAIRMAN suggested that article 44 should be held not to be applicable to honorary consuls.

The meeting rose at 6.15 p.m.

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## 559th MEETING

*Friday, 10 June 1960, at 9.30 a.m.*

*Chairman:* Mr. Luis PADILLA NERVO

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**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 asked Mr. Yokota, Chairman of the Drafting Committee, to explain the position regarding the drafting of article 45 *(Duties of third States)*, so as to enable the Commission to consider the question of the applicability to honorary consuls of the provisions of that article.

2. Mr. YOKOTA said that the Drafting Committee had not yet considered article 45. He recalled that when the article had been discussed, the Commission had agreed that the only duty of a third State was that of not hindering the transit through its territory of consular officers and members of their families (543trd meeting, para-

graph 77). Accordingly, the Drafting Committee would proceed on the basis that a provision along the lines of article 45, paragraph 3, was all that would be required.

3. Mr. ŽOUREK, Special Rapporteur, said that in the vast majority of cases, an honorary consul would already be a resident of the receiving State at the time of his appointment and would intend to remain there upon relinquishing his consular functions. Article 45, paragraph 3, was not therefore relevant to the case of honorary consuls.

4. He drew attention to article 45, paragraph 4, which dealt with the question of official communications in transit through a third State; the provisions of that paragraph should, he thought, apply to honorary consuls. He recalled that the Commission had decided to postpone consideration of the applicability of article 29 *(Freedom of communication)* to honorary consuls (554th meeting, paragraph 84). Inasmuch as article 45, paragraph 4, was related to the question of communications, he proposed that the applicability of that paragraph to honorary consuls should be discussed later in connexion with the applicability of article 29.

5. Mr. YOKOTA thought that the best course would be for the Commission to postpone consideration of the applicability of the whole of article 45 to honorary consuls. For his part, he reserved the right to propose that paragraph 3 of that article should apply to honorary consuls.

6. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to defer consideration of the applicability of article 45 to honorary consuls.

*It was so agreed.*

7. Mr JIMÉNEZ DE ARÉCHAGA said that the Commission had now completed its consideration of the new draft of article 56. No proposal had been made to exclude the application to honorary consuls of any of the articles in sections III and IV of the Special Rapporteur's draft (A/CN.4/L.86). The only proposals which had been made were those of the Special Rapporteur for the exclusion of the application to honorary consuls of certain articles in section II. There had been no such proposals with regard to the various articles in sections III and IV.

8. Mr. ŽOUREK, Special Rapporteur, said that, as the Commission would be aware, the draft would be rearranged. Chapter I, dealing with consular intercourse in general, would include most of the articles now appearing in sections III and IV. The new chapter II would deal with the privileges and immunities of career consuls; the new chapter III would deal with the legal status of honorary consuls. Lastly, the new chapter IV would contain general provisions.

9. He accordingly suggested that the Drafting Committee should be authorized to consider which of the articles of sections III and IV would, in the rearranged text, be incorporated in the new chapter I and to determine whether they should apply to honorary consuls as they stood or subject to certain amendments.

10. Mr. PAL pointed out that, as the draft for article 56 now stood, and more especially in the light of its paragraph 1 dealing with the applicability of section I of the draft, the Commission would also require to take some formal decision on the question of the applicability to honorary consuls of sections III and IV.

11. Mr. YOKOTA said that there would be no difficulty if the Special Rapporteur agreed that all the provisions of articles 46 to 53 should be declared applicable to honorary consuls. Otherwise it would be necessary for the Commission to examine them article by article.

12. After a brief discussion on procedure, in which Mr. SANDSTRÖM, Mr. MATINE-DAFTARY, Mr. ŽOUREK, Mr. JIMÉNEZ DE ARÉCHAGA, Sir Gerald FITZMAURICE, Mr. SCELLE, Mr. YOKOTA and Mr. TUNKIN took part, the CHAIRMAN said that the Commission would at some stage have to decide on the applicability to honorary consuls of articles 46 *et seq.* He suggested that it should do so forthwith, while all the arguments relating to the legal status of consuls were still fresh in the minds of members.

13. He asked whether there was any observation on the question of the applicability to honorary consuls of article 46 *(Duty to respect the laws and regulations of the receiving State).*

14. Mr. ŽOUREK, Special Rapporteur, said that the first sentence of article 46 clearly applied to honorary consuls. On the other hand, the second sentence, which specified the duty not to interfere in the internal affairs of the receiving State, should be qualified in so far as it was to apply to honorary consuls, for in many cases the latter were nationals of the receiving State and, as such, had political rights and duties as citizens.

15. The CHAIRMAN pointed out that when the Commission had discussed article 46 itself, the question mentioned by the Special Rapporteur had been raised and the article had been referred to the Drafting Committee together with three suggestions, one of which was that it should formulate the duty of non-interference in the internal affairs of the receiving State in terms which would, so far as they related to honorary consuls, restrict the scope of the duty to acts performed in their capacity as consuls (543rd meeting, paragraph 95). In that connexion, he drew attention to the meaning of the term " to interfere ". The citizen's normal participation in his country's political life was not an act of interference; the provision under discussion referred to the act of a person who availed himself of his official position to influence the internal affairs of a country in an unwarranted manner.

16. Sir Gerald FITZMAURICE said that the question at issue concerned not honorary consuls as such but any consul, including a career consul,

who happened to be a national of the receiving State.

17. Mr. TUNKIN said that the qualification cited by the Chairman had been formulated with reference to an honorary consul who was a national of the receiving State. In fact, he might be a national of a State other than the sending or the receiving State.

18. Mr. EDMONDS saw no difficulty in applying the provision under discussion to honorary consuls. If a person accepted an appointment as honorary consul, he might well be required to surrender some of his ordinary civic duties, in much the same way as members of the judiciary and certain other public servants in some jurisdictions had to renounce all active participation in politics.

19. Mr. AMADO said that the article could without difficulty be applied as it stood to honorary consuls. It was clear that the consul was not allowed to interfere in the internal affairs of the receiving State in his capacity as a consul.

20. Mr. ŽOUREK, Special Rapporteur, said that the purpose of the second sentence of article 46 was rather to prevent acts of interference in the internal affairs of the receiving State from being committed outside the exercise of consular functions. Since the sentence could give rise to some difficulty if applied to honorary consuls, he thought that some explanation should be given in the commentary on that point.

21. The CHAIRMAN noted that the Commission agreed that the first sentence of article 46 should be applicable to honorary consuls. So far as the second sentence was concerned, he suggested that the comments made in debate should be referred to the Drafting Committee together with the Commission's opinion that article 46 should apply to honorary consuls.

*It was so agreed.*

22. The CHAIRMAN invited the Commission to consider the question of the applicability to honorary consuls of the principle embodied in article 47 *(Jurisdiction of the receiving State).*

*It was agreed that the principle embodied in article 47 should apply to honorary consuls.*

23. The CHAIRMAN invited the Commission to consider the question of the applicability to honorary consuls of the principle embodied in article 48 *(Obligations of the receiving State in certain special cases).*

24. Mr. ŽOUREK, Special Rapporteur, said that the application to honorary consuls of the provisions of article 48 could give rise to some difficulty. The article laid down the duties observable by the receiving State in certain cases concerning questions of inheritance, guardianship and shipping. Now, honorary consuls were not always authorized to deal with such questions, and hence it was doubtful whether article 48 could without qualification be declared applicable with respect to honorary consuls generally.

25. Sir Gerald FITZMAURICE said that there could be no conceivable objection to the application of article 48 to honorary consuls. If a national of the sending State died in the receiving State, the obligation to notify was towards the sending State and it was immaterial whether the recipient of the copy of the death certificate was an honorary consul or a career consul.

26. Similarly, in the event of the shipwreck of a vessel flying the flag of the sending State, it was that State as such, or the shipowners, who would be vitally interested in being promptly advised of the occurrence. He pointed out in that connexion that it was precisely at seaports that honorary consulates were often found. The rights concerned resided in the State: they were not personal privileges of consuls.

27. Mr. VERDROSS proposed that the Commission should decide that article 48 was applicable in principle to honorary consuls and state in the commentary that the notifications provided for in the article would, of course, be sent only to an honorary consul who had competence in the particular matter.

28. Mr. AMADO said that he could not see what harm would be done if the receiving State advised an honorary consul of the death in its territory of one of the nationals of the sending State, so that the consul could make the necessary arrangements with the appropriate authorities of the sending State.

29. Mr. YOKOTA pointed out that the notifications mentioned in article 48 (*b*) and (*c*) were to be made to " the competent consulate ". The The words " in whose district the death occurred " in sub-paragraph (*a*) of the article contained the same idea. It was therefore obvious that if an honorary consul did not have the necessary competence to receive such notifications, the notifications would then be made to another consulate which possessed such competence.

30. Mr. FRANÇOIS expressed surprise at the Special Rapporteur's statement that a great many honorary consuls were not empowered to deal with questions of inheritance, guardianship and shipping. Netherlands honorary consuls, at any rate, always possessed full competence regarding the matters referred to in the three sub-paragraphs of article 48.

31. Even where a country limited the powers of one its honorary consuls in the manner suggested by the Special Rapporteur, no difficulty would arise if the receiving State still notified the consul in the cases specified in article 48. The honorary consul would convey the notification to the competent authority or consular officer of the sending State.

32. Mr. BARTOŠ said that, from his experience regarding both honorary consuls of Yugoslavia abroad and honorary consuls of foreign countries in Yugoslavia, he could say that, whatever restrictions might be placed on the powers of an honorary

consul, they would rarely, if ever affect any of the matters involved in the provisions of article 48.

33. For a country like Yugoslavia, many of whose nationals migrated abroad, it was essential to maintain a network of honorary consuls, one of whose functions was to take note of the death of Yugoslav nationals abroad and to take the necessary steps to safeguard the rights of heirs living in Yugoslavia.

34. Seafaring countries also maintained honorary Consuls at a large number of seaports to deal, among other matters, with those mentioned in article 48 (*c*). If a vessel flying the flag of the sending State was wrecked or ran aground, the honorary consul, acting in agreement with the master of the vessel, took the necessary steps with damage appraisers (commissaires d'avaries) to assess the damage.

35. The obligations mentioned in article 48 were owed by the receiving State to the sending State itself, not to the consul. It mattered little whether the sending State entrusted the protection of its interests to a career consul or to an honorary consul: the facilities to be extended by the receiving State should be the same in both cases.

36. There were, of course, cases in which under the law of the sending State the honorary consul might not be empowered to take certain measures. For example, the inventory of the estate of a deceased national of the sending State whose death had occurred in the receiving State might have to be drawn up by a career consul. Those questions were, however, internal matters of the sending State.

37. He was firmly of the opinion that all the provisions of article 48 should apply to honorary consuls.

38. Mr. ŽOUREK, Special Rapporteur, said that he had only sought to emphasize that there might be some difficulty in making article 48 applicable to honorary consuls because the matters enumerated in the three sub-paragrapgs did not always fall within their competence. For example, under Japanese legislation, honorary consuls were not empowered to concern themselves with enquiries into accidents at sea. Some honorary consuls were purely figureheads, and in such cases it would be quite inappropriate to impose on the receiving State the duty to make the notifications mentioned in article 48 to honorary consuls.

39. The suggestion made by Mr. Verdross (see paragraph 27 above) would be quite acceptable to him.

40. The CHAIRMAN, speaking as a member of the Commission, doubted whether the question of the applicability of article 48 to honorary consuls could be settled by reference to the competence of such consuls. The article described certain obligations which the receiving State owed towards the sending State. It would not be for the former to decide whether a particular matter lay within the competence of an honorary consul.

41. Mr. AMADO shared that view. The receiving State had a duty to report certain events occurring in its territory and affecting nationals or interests of the sending State to a consulate of the latter.

42. He criticized the word " immediately ", which occurred in sub-paragraphs (*b*) and (*c*), as not sufficiently precise in a legal text.

43. Mr. JIMÉNEZ DE ARÉCHAGA considered that article 48 should apply to all honorary consuls without exception, because it related directly to the exercise of their functions. Since it was not concerned with privileges and immunities, no distinction should be made in its application as between career and honorary consuls. If in any individual case the matters referred to in article 48 did not come within the competence of an honorary consul, the requisite reservations would presumably be made by the receiving State before granting the exequatur.

44. Mr. SANDSTRÖM agreed with the Chairman's interpretation of the purport of article 48 which certainly ought to apply to honorary consuls since the receiving State must be obliged to make the specified notifications.

45. Mr SCELLE said that manifestly article 48 should apply to honorary consuls and thought that some of the arguments aired during the discussion were not relevant. The fact that an honorary consul might not have competence in one or other of the matters mentioned in article 48 was purely a question for the sending State and in no way affected the obligations of the receiving State to notify a consulate of the sending State. He would have thought that, in the absence of express objections, such provisions of the draft should be assumed to apply to honorary consuls.

46. Mr. ŽOUREK, Special Rapporteur, referring to Mr. Amado's criticism to the word " immediately " said that although that particular term might not be sufficiently precise, some such term was absolutely necessary, for unless the notification were made promptly the obligations laid down in article 48 would become meaningless. In the case of a shipwreck, for example, every hour might count.

47. Mr. MATINE-DAFTARY hoped that the Drafting Committee would bear in mind his criticism of the title of article 48 which he had made during the discussion on its application to career consuls. The Drafting Committee should also bear in mind that, since the Commission had now gone somewhat further than the Special Rapporteur had contemplated in his new draft of article 56, paragraph 2, a reference to section III of the draft would have to appear in that clause.

48. He agreed that article 48 should be applicable to honorary consuls.

49. The CHAIRMAN suggested that, as it was generally agreed that article 48 should be applicable to honorary consuls, the text would now be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*

50. The CHAIRMAN asked whether there was any objection in principle to the proposition that the provisions of section IV *(End of consular relations and immunities)* should apply to honorary consuls, subject to such drafting changes as might be necessary; for example, article 49, item 1, would not apply.

51. Mr. ERIM asked whether it should be inferred from the Chairman's remarks that, except as otherwise expressly provided, the articles in section IV would apply to honorary consuls. If so, the Drafting Committee would certainly have to amend the Special Rapporteur's text of article 56.

*It was agreed that section IV should apply to honorary consuls.*

52. The CHAIRMAN invited the Commission to consider whether article 53 *(Non discrimination)* should apply to honorary consuls.

53. Mr. BARTOŠ suggested that article 53 should be transferred to chapter III since it properly belonged among the general provisions. That procedure should not give rise to difficulty for any State which did not wish to ratify chapter II because it did not favour the institution of honorary consuls.

54. Mr. ŽOUREK, Special Rapporteur, said he had no objection to Mr. Bartoš's suggestion. The principle of non-discrimination should certainly apply to honorary consuls. The wording of article 53 had been discussed at length at an earlier stage and should not be considered now.

55. Mr. BARTOŠ suggested that it might suffice for the Commission to decide that article 53 should apply to honorary consuls, leaving it to the Drafting Committee to decide what should be the proper place of that provision in the draft.

*It was so agreed.*

56. The CHAIRMAN stated that the Commission had now completed its discussion on the applicability of the articles of the draft to honorary consuls.

57. Mr. BARTOŠ asked whether the Commission had expressly stipulated the condition that, for the purpose of the application of the articles to an honorary consul, the latter must not be a national of the receiving State or be engaged in a gainful occupation.

58. After consulting Yugoslav jurists he had come to the conclusion that, for the proper performance of their consular functions, certain minimum privileges and exemptions must be accorded even to those honorary consuls which did not fulfil the conditions he had mentioned. In other words, the intention of the draft should be not so much to grant personal privileges and immunities to honorary consuls as to ensure that their consular functions could be performed without impediment. Some clear stipulation to that effect should appear in the draft.

59. Mr. VERDROSS observed that the point had been dealt with by the Commission which had considered in relation to each article whether it was applicable even to those honorary consuls who were nationals of the receiving State and who were engaged in a gainful occupation.

60. Mr. SCELLE agreed with Mr. Verdross.

61. Mr. ŽOUREK, Special Rapporteur, also considered that the matter raised by Mr. Bartoš had been settled by the Commission.

62. Mr. BARTOŠ suggested that it might be more satisfactory if the Drafting Committee be requested to consider whether or not explicit provision were necessary on the subject.

63. Mr. TUNKIN thought that procedure would be acceptable.

64. The CHAIRMAN suggested that article 56 could now be referred to the Drafting Committee for revision in the light of the foregoing discussion and with a request to consider the point raised by Mr. Bartoš.

*It was so agreed.*

ARTICLE 57 *(Precedence of honorary consuls)*

65. Mr. ŽOUREK, Special Rapporteur, explained that article 57 was based on existing practice. At its eleventh session the Commission had adopted certain rules concerning precedence (see article 15 in document A/CN.4/L.86) and he had therefore thought it sufficient to refer to those rules in article 57. The only objection to which such a provision might be open would be that a distinguished person who acted as an honorary consul would not have precedence over a career consular official. But whatever rules concerning precedence were adopted might well be open to like objections.

*Article 57 was approved.*

ARTICLE 58 *(Officials assimilated to honorary consuls)*

66. Mr. ŽOUREK, Special Rapporteur, introducing article 58, said that, in studying the position of honorary consuls, he had been struck by the fact that certain national legislations and consular conventions placed career consuls who were authorized by the sending State to engage in commerce or other gainful occupation in the receiving State on the same footing as honorary consuls so far as eligibility to privileges and immunities was concerned. Where that was the case the receiving State could not grant to such persons all the privileges and immunities which career consuls enjoyed. Accordingly, he had thought it advisable to include in his draft a special article, stipulating that career consular officials who were authorized to carry on a business or profession should be treated on the same footing as honorary consuls. He added that the number of career consuls answering that description was much smaller than that of honorary consuls.

67. He had been able to find few instances of national legislation allowing career consuls to engage in gainful occupation in addition to their consular functions, and the examples that he had found usually dated back a considerable time. In that connexion, he said it would be most desirable if the United Nations Secretariat published in its *Legislative Series* extracts from laws and regulations concerning the diplomatic and consular services; he thought that some very interesting provisions touching on the subject of article 58 could come to light.

68. Some members might criticize the article as unnecessary on the ground that the condition that a career consul must not engage in outside occupations was laid down elsewhere in the draft. His (the Special Rapporteur's) answer to that possible criticism would be that the condition was not stipulated in all the articles in which it should be laid down. For example, it was not stipulated in article 37 *(Exemption from taxation)*, nor in article 38 *(Exemption from customs duties)*. If the Commission accepted the principle stated in article 58, it would be possible to dispense in the other articles with a provision stating the principle. From the point of view of legislative technique that would certainly be a sounder procedure than to repeat the condition in question in numerous articles of the draft. If, however, the Commission should prefer not to accept article 58 as a " blanket " provision, the condition would necessarily have to be specified in the individual articles.

69. The CHAIRMAN, speaking as a member of the Commission, thought that the presence of a special article would be confusing and would tend to reopen a discussion on the comparability of honorary and career consuls. Secondly, he thought that a separate provision was unnecessary because the privileges of career consuls engaged in commerce or other gainful occupation were, under the terms of the relevant articles, restricted by that very fact. To review all the articles afresh for the purpose of considering in what circumstances career consuls might be assimilated to honorary consuls would be a most undesirable and wasteful procedure.

70. Mr. BARTOŠ said the Special Rapporteur had made a commendable effort to draft a rule concerning a question that had not been settled by doctrine. Whereas under the practice of most States career consuls were not allowed to engage in business, it was true that the legislation of some countries allowed such officials to exercise professions or to act as commercial agents. Accordingly, practical difficulties might arise in cases where the subject was not regulated by bilateral agreements.

71. Nevertheless, for the purpose of the assimilation of career consuls to honorary consuls the mere fact that a career consul was authorized by the law of the sending State to engage in commerce or other gainful occupation did not constitute sufficient grounds. If the career consul did not in fact carry on a business, he should have the same privileges and immunities as other career consuls. Besides, for the purpose of carrying on a non-consular occupation a consul needed not only the permission of the sending State but also the consent of the receiving State. And even if both States permitted the consul to carry on outside activities, his status should be in no way affected, and his privileges in no way diminished, so long as he did not in fact engage in commerce or gainful occupation.

72. Mr. MATINE-DAFTARY thought that the effect of article 58 was to create yet a third category of consul. The fact that such a strange and peculiar institution existed in a few national legislations did not justify the Commission in encouraging its perpetuation by referring to it in a multilateral convention. Accordingly, he thought the article should be omitted from the draft.

73. Mr. ERIM agreed with the Chairman and Mr. Matine-Daftary that the article might be omitted; alternatively, he suggested that its substance might be expressed quite differently in the draft. One further reason for omitting the article was the language used in article 1 *(Definitions)*, paragraph (*f*) (*i*), where a career consul was defined as a government official of the sending State, receiving a salary and not exercising in the receiving State any professional activity other than that arising from his consular function. And in paragraph (*h*) of the same article the expression " consular official " described any person, including a head of post, who exercised consular functions in the receiving State. Accordingly, the persons referred to in article 58 could not be regarded as coming within the definition of career consuls. That objection might, however, be overcome by a redrafting of article 58.

74. A more serious objection, in his view, was that the Commission had decided in connexion with article 56 that honorary consuls might enjoy certain privileges and immunities, provided that they did not engage in gainful occupation and were not nationals of the receiving State. If, however, article 58 was adopted as drafted by the Special Rapporteur, those privileges and immunities would be granted to certain consular officials even if they engaged in commerce or in some other gainful occupation.

75. Sir Gerald FITZMAURICE said that article 58 was both unnecessary and undesirable. The complete assimilation of a category of career consuls to honorary consuls was hardly consistent with the Special Rapporteur's theory that there was an inherent difference of status between honorary consuls and career consuls. If, as the Special Rapporteur contended, the fact that a career consul was an official of the sending State was a sound basis for distinguishing between the two categories, the fact that a career consul was engaged in commerce or other gainful occupation should not obliterate the difference.

76. In his opinion, the best solution would be,

not to assimilate career consuls who were allowed to engage in business to honorary consuls, but rather to modify the application of certain individual provisions to such persons. Certain articles of the draft obviously applied only to those consuls whether career or honorary) who did not engage in commerce or other gainful occupation. If a general article on the lines of article 58 were included, however, it might be inferred that certain provisions of the draft which did not contain any such limitation should nevertheless be read as implying one, as a result of the proposed article, and that would give rise to considerable difficulties of interpretation.

77. Mr. VERDROSS said he was in favour of omitting article 58. In the first place, it was illogical to exclude career consuls engaged in gainful occupations from the benefit of some of the articles and to provide a general article as well concerning such consuls. Secondly, he agreed with Mr. Bartoš that the mere permission to engage in commerce or other gainful occupation was an insufficient criterion for differentiation; the true test should be : did the person in question in fact carry on an outside occupation ? Lastly, it was not only the articles conferring some material advantage that contained a proviso that their benefit did not extend to consuls who engaged in business in the receiving State; the proviso also occurred in article 33 *(Personal inviolability)*. Accordingly, the Drafting Committee should be asked to review all the articles of the draft and to insert the proviso concerning career consuls who engaged in gainful occupations wherever it was required.

78. Mr. EDMONDS said that article 58 should be omitted. He had understood Mr. Erim to say that the article on definitions should be modified to meet the Special Rapporteur's point; if the definition of the expression " honorary consul " were involved, such officials could not in his opinion be defined as persons not receiving any regular salary from the sending State. In the United States, for example, some honorary consuls received a modest but regular compensation for their services; in article 58, however, the career consuls concerned were distinguished from honorary consuls by the phrase " although officials of the sending State receiving a regular salary ". It should be borne in mind that many honorary consuls were not authorized by the laws of the sending State to engage in commerce or other gainful occupation and did not in fact engage in such occupation. He took the position that an honorary consul was a person authorized to perform consular functions, and his title, designated by the sending State, was of no concern to a receiving State.

79. Mr. ŽOUREK, Special Rapporteur, observed that the definition of " honorary consul " was not in issue. Article 58 related to career consular officials only.

80. Mr. PAL considered that article 58 should be omitted from the draft. The Special Rapporteur had simplified the Commission's position in the matter by anticipating possible difficulties and offering alternatives. He (Mr. Pal) believed that the simplest course would be to omit article 58, since in his view the necessary provisions had already been made in individual articles in the draft; otherwise, a discussion similar to that held in connexion with article 56, paragraph 2, would ensue, and that would be most undesirable at the present stage. Any attempt to assimilate career consuls to honorary consuls in the circumstances specified in the article would also involve re-examining all the articles dealing with honorary consuls which had already been adopted.

81. Mr. SCELLE thought that the Special Rapporteur, after having sought to minimize the privileges and immunities of honorary consuls, was going too far in attempting to relegate career consuls engaged in commerce or other gainful occupation to the same unfavourable position. He (Mr. Scelle) maintained the view that there was no difference in legal status between the two categories of officials; but a discussion of article 58 might raise difficulties which had already been settled and it would be wise to omit the provision, to avoid further complications.

82. Mr. MATINE-DAFTARY, while maintaining his original opinion on article 58, suggested that the Special Rapporteur might redraft the article to provide simply that career consuls authorized by the laws of the sending State to engage in commerce or other gainful occupation should be assimilated to honorary consuls. Unless it was so revised, it might be best to omit the article.

83. Mr. ŽOUREK, Special Rapporteur, pointed out to Mr. Scelle that when introducing article 58 he had offered the Commission two alternative procedures in the matter; Mr. Scelle's strictures could therefore hardly be justified.

84. He did not believe that the problem of officials assimilated to honorary consuls would be eliminated by deleting the article. If the Commission dropped article 58, the problem of the legal status of career consuls who carried on a private gainful occupation would remain unsolved. Mr. Erim had discerned a seeming contradiction between article 58 and article 1 on definitions, but it should be borne in mind that article 1 would subsequently be reviewed. Furthermore, article 58 was concerned with provisions to be applied to career consuls, and not with provisions applicable to honorary consuls who were engaged in commerce or other gainful occupation. In assimilating certain career consuls to honorary consuls, the rules governing honorary consuls were applicable; accordingly, where certain restrictions had been introduced for honorary consuls, those would apply equally to the career consuls concerned.

85. In reply to Mr. Verdross, he pointed out that he had at no time considered both including a " blanket " article concerning career consuls who engaged in commerce and inserting a proviso

concerning such consuls in all the relevant articles in the draft. Precisely because he had drafted the special article 58, he had omitted the proviso from certain articles where it was indispensable, such as the articles on exemption from taxation and from customs duties. Such a proviso would obviously have to be inserted if article 58 were omitted; but he had thought it would be more convenient to have a separate article than to repeat the provision in many clauses.

86. He had included the criterion of authorization by the laws of the sending State to engage in commerce or other gainful occupation because it appeared in some of the national laws he had studied. Nevertheless, he agreed that an acceptable decisive test might be whether the consul, if permitted to do so, in fact engaged in a gainful occupation apart from his official function. He would therefore be prepared to amend article 58 on those lines.

87. The debate had led him to conclude that the article was indeed necessary. Inasmuch as the category of career consuls referred to in that clause existed, they should be governed by certain rules, if only for the sake of avoiding practical difficulties. Even if the Commission decided that the provision should be repeated in every relevant article, it would seem advisable to follow Mr. Matine-Daftary's suggestion and to state that members of the consular staff, or at least consular officials, who engaged in commerce or other gainful occupation in the receiving State should cease to enjoy the status of career consular officials and should benefit only by the privileges and immunities applicable to honorary consuls. That minimum provision would correspond to State practice, as expressed in national legislation and in consular conventions. He added that it was an unsound procedure — in any case in which a difficulty arose — simply to omit the provision intended to resolve the difficulty.

88. Mr. LIANG, Secretary to the Commission, said he did not see how any career consul could be assimilated to an honorary consul. It might be provided, for example, that honorary consuls who were nationals of the sending State and were not engaged in gainful occupation should be assimilated to career consuls; but there was no need for such a provision, since the question was usually covered by bilateral agreements. Moreover, it would be difficult to cover all the possible situations in a single article. The difference of status between career consuls who engaged in gainful occupation and other career consuls in certain respects was also dealt with in national legislations and bilateral agreements; in view of the amorphous character of the category of honorary consuls and in the absence of uniformity of practice, it would be best to omit any general provision concerning the assimilation of certain career consuls to honorary consuls.

89. Mr. ŽOUREK, Special Rapporteur, could not agree with the Secretary that the situation of honorary consuls was amorphous. The Commission had decided that every State should decide for itself on the criteria to be used in defining honorary consuls; in addition, the privileges and immunities applicable to honorary consuls had been settled during the Commission's review of all the articles of the draft. Lastly, the fact of engaging in gainful occupation did not deprive the official in question of this status of career consul; if he engaged in such occupation, he would cease to enjoy some of the immunities of career consuls, but would be eligible for the partial immunities accorded to honorary consuls. Nor did he agree that the matter was entirely covered by national legislations and by bilateral agreements.

90. The CHAIRMAN thought that the Commission was in a position to take a decision on article 58.

91. Mr. AMADO agreed that the Commission should take a decision on the article. The majority of members seemed to think that a general provision on the lines of article 58 was undesirable. He appealed to the Special Rapporteur and Mr. Matine-Daftary not to insist on the introduction of a new text, since the Commission's long debates on the subject had shown that the position of honorary consuls should be distinguished from that of career consuls. A reference to any assimilation of the two categories would nullify the work of several weeks.

92. Mr. MATINE-DAFTARY, speaking on a point of order, thought that, in view of the fact that the Special Rapporteur had in effect agreed to withdraw his draft article, the Commission should give him an opportunity to submit a new text of article 58. He therefore moved the adjournment of the debate.

*The motion was rejected by 10 votes to 7, with 1 abstention.*

93. Mr. BARTOŠ moved the adjournment of the meeting.

*The motion was rejected by 10 votes to 6, with 1 abstention.*

94. The CHAIRMAN called for a vote on whether a separate article on officials assimilated to honorary consuls should be included in the draft.

*It was decided by 10 votes to 6, with 5 abstentions, not to include such an article in the draft.*

## Co-operation with other bodies (A/CN.4/124) [*continued*] *

[Agenda item 8]

95. Mr. LIANG, Secretary to the Commission, reported that on 3 June 1960 he had received a letter from the Secretary of the Asian-African

* Resumed from the 544th meeting.

Legal Consultative Committee — an intergovernmental body — stating that the fourth session of that Committee was to be held at Tokyo in March 1961 and that among the topics on that session's agenda were the status of aliens, including the question of diplomatic protection of nationals abroad and State responsibility; extradition; arbitral procedure; and the legality of nuclear tests. In addition, other questions raised by the governments of participating countries might be discussed.

96. The letter added that, at its third session held in January 1960, the Committee had adopted provisional recommendations concerning the admission, treatment and expulsion of aliens, and provisional recommendations concerning the principles of extradition. In addition the reports adopted at its second session on the functions, privileges and immunities of diplomatic agents and the immunity of States in respect of commercial transactions had been reconsidered in the light of comments received from governments. The summary report of the proceedings, which was expected to be ready by July, would be forwarded to the Commission. Finally, the Committee's Secretary had asked whether the Commission wished to send an observer to the fourth session.

97. He recalled that in 1958 and 1959 the Commission had received similar invitations to send an observer to attend the Committee's sessions. On those two occasions the Commission had replied that it was unable to do so because the Committee's sessions had been too close to the General Assembly and because it had been impossible to obtain the necessary credits.

98. Subsequently, a number of representatives of Asian and African countries had expressed the hope, both to him and to members of the Commission, that the Commission would send observers as it had done in the case of the Inter-American Council of Jurists. They had intimated that the Committee would try to schedule its sessions for a period when the General Assembly was not meeting and that it was anxious that its work of codification should be of service to the Commission.

99. He suggested that if the Commission decided to send an observer a statement to that effect should be included in its report so that the necessary financial arrangements could be made. He hoped that it would be possible to obtain more information about the duration of the Committee's session and about the subjects to be discussed.

100. The CHAIRMAN suggested that the matter should be taken up at a later meeting after members had had time for reflection.

*It was so agreed.*

The meeting rose at 1.20 p.m.

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## 560th MEETING

*Monday, 13 June 1960, at 3 p.m.*

*Chairman:* Mr. Luis PADILLA NERVO

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### 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 58 *(Officials assimilated to career consuls) (continued)* *

1. The CHAIRMAN invited members to explain their votes on article 58 (559th meeting, paragraph 94).

2. Mr. HSU said he had voted against the omission of article 58, because its omission would deprive the Special Rapporteur of the opportunity he had requested to present an improved version of the article for the Commission's consideration. He had voted as he had in the belief that the Special Rapporteur deserved the courtesy of being allowed to submit a new article and because he thought that article 58 had an intrinsic value which the Commission could not ignore without provoking criticism. By successive decisions of the Commission the privileges and immunities of the honorary consul, in so far as they were not directly related to his functions as an official, had been limited by earlier clauses of the draft for two reasons. In the first place, since an honorary consul was usually a part-time official, engaged in commerce or in some other gainful occupation, and often a national of the receiving State, the privileges and immunities granted to him would be more open to abuse; secondly, since honorary consuls had not in the past been entitled to the same privileges and immunities as diplomats or career consuls, they could be denied those privileges and immunities without undue hardship. Accordingly, if career consuls were by their own acts to assimilate themselves to honorary consuls in certain important respects, it would be only logical and proper for the Commission to assimilate them to honorary consuls in the matter of privileges and immunities.

3. He could not share the views of members who had voted against article 58 on the ground that the substance of the article was covered by other provisions of the draft. It could not be correct in principle merely to gloss over problems of codification or to treat them in a haphazard manner. When a suitable general article on a particular problem existed, the task of the codifiers was to give it adequate consideration, with

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* Resumed from 559th meeting.