Document:-
A/CN.4/SR.563

Summary record of the 563rd meeting

Topic:
Consular intercourse and immunities

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

67. Mr. AMADO could not agree that there was little difference between the Special Rapporteur's text and Mr. Ago's proposal. He had been in favour of omitting article 59 altogether, but in view of the Commission's decision to include an article, he thought that the wording should be as clear as possible. All the proposals and amendments should therefore be referred to the Drafting Committee.

68. Mr. EDMONDS said that the Drafting Committee should be given explicit directives. The Commission should vote on the two questions: 1. Would acceptance of the multilateral instrument, *ipso facto*, bring to an end existing bilateral consular conventions ? 2. Were States ratifying the multilateral instrument free to conclude bilateral conventions in the future ?

69. Mr. ŽOUREK, Special Rapporteur, thought that the only question to be decided by vote should be whether rectification of the multilateral instrument *ipso facto* abrogated existing bilateral consular conventions: that was the only fundamental point of law involved.

70. Mr. JIMÉNEZ DE ARÉCHAGA considered that the best course would be to refer all the proposals and amendments to the Drafting Committee. Nevertheless, if the Commission wished to take a general decision, it should first vote on the principle, common to the Special Rapporteur's text and Mr. Ago's proposal, that acceptance of the draft would be no impediment to the maintenance in force of existing bilateral consular conventions. If the Commission approved that principle, it could then take a vote on the *modus operandi*, in which it would it would have a choice between the Special Rapporteur's and Mr. Ago's solutions.

71. Mr. SANDSTRÖM, supported by Mr. Scelle, considered that certain nuances of the opinions of individual members would be lost in a vote on a general question of principle. The difference between those opinions was not as great as might seem at first sight, and it would therefore be best to refer the article, the proposals and the amendments to the Drafting Committee.

72. The CHAIRMAN said that he had made his original suggestion for a vote because some members wanted to give the Drafting Committee some guidance in preparing the article. He been unable to state the proposition as clearly as Mr. Ago might have wished, because the Commission would then have had to vote on the substance of the question. The position would now be clarified by a vote on whether all the proposals should be sent to the Drafting Committee, together with the records of the members' views. If that suggestion were defeated, any vote might be taken on the guidance to be given to the Drafting Committee.

73. Mr. MATINE-DAFTARY thought it would be inadvisable to refer all the proposals to the Drafting Committee. The two distinct views which had emerged during the debate were, first, that all existing bilateral consular conventions should simply remain in force and, secondly, that such conventions should remain in force, but with certain reservations. The decision could not be left to the Drafting Committee, and a vote should be taken on that point.

74. Mr. GARCÍA AMADOR thought that either the Commission or the Drafting Committee should also consider his concrete proposal, made early in the debate, that the attention of governments should be drawn to the subject of article 59, either in the Commission's report or in the commentary, in order to enable them to indicate their views on the relationship between the draft and existing bilateral conventions. The question was political, rather than technical, and hence the views of governments should be sought. The Commission could not presume to decide such a matter for governments.

75. Mr. ŽOUREK, Special Rapporteur, thought that, if the Commission wished to give guidance to the Drafting Committee, it might follow the voting procedure suggested by Mr. Jiménez de Aréchaga.

76. The CHAIRMAN did not think that that would be the most efficient way of solving the problem. He called for a vote on whether the Special Rapporteur's draft article 59 and the proposals and amendments relating thereto should be referred to the Drafting Committee.

It was decided by 9 votes to 6, with 2 abstentions, that the article and the relevant proposals and amendments should be referred to the Drafting Committee.

77. Mr. BARTOŠ and Mr. EDMONDS said that they had cast a negative vote because they considered that the Drafting Committee was not competent to settle such wide divergencies on a question of principle.

The meeting rose at 1.10 p.m.

563rd MEETING

Thursday, 16 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 60 *(Complete or partial acceptance)*

1. Mr. ŽOUREK, Special Rapporteur, introducing article 60, said that it offered States which did not send or accept honorary consuls the possibility of excluding chapter II (which grouped together the provisions relating to honorary

consuls) from their ratification of the instrument. The draft aimed at universality, being conceived as a general convention codifying general rules of international law. Nevertheless, States which did not send or accept honorary consuls could not be expected to ratify or accede to the whole instrument, including chapter II, or to accept as rules of general international law those relating to honorary consuls. The procedure of admitting partial acceptance would have the great advantage of ensuring the universality of the instrument without prejudicing the existing practice of States. In his opinion, his text of article 60 providing for partial acceptance was a happy technical solution, which would avoid the need for large numbers of reservations. For if the draft did not contain such an article, States which did not use the institution of honorary consuls would have no choice but to formulate reservations concerning the provisions relating to honorary consuls when accepting the convention. Reservations, although sometimes essential, were in general undesirable, for they tended to weaken the scope of a particular instrument; one party's reservation might impair irremediably the value of the whole instrument as between the State making the reservation and States which did not accept the reservation. A further advantage of the procedure of partial ratification or accession was that a State exercising the option might subsequently extend its ratification or accession to the whole instrument, if it were to change its views or if practical circumstances made it necessary for it to send or accept honorary consuls.

2. The procedure was not a new one, having been used in the case of the General Act concerning the Pacific Settlement of International Disputes of 1928. Furthermore, the Commission should not attach undue importance to the article in its first draft, which would be sent to governments for comments. It should therefore be possible to dispose of the matter rapidly. The wording would, of course, be modified when the Drafting Committee and the Commission had finally approved the structure of the draft, but the principle seemed clear enough for the Commission to come to a decision without difficulty.

3. Mr. YOKOTA observed that the question had already been referred to at length in connexion with other articles. So many members had opposed the article that he was surprised at the Special Rapporteur's insistence on including it. It seemed unnecessary to press for further discussion of the question in the Commission; the Drafting Committee, which had been entrusted not only with the wording of the articles, but with the consideration of the whole structure of the draft, could take article 60 into account in that context. It would therefore be wiser to defer further discussion until the Drafting Committee had finished its work.

4. He could not accept the reasons which the Special Rapporteur had given for partial ratification of the draft. He (the Special Rapporteur) seemed to have based the article on the assumption that a number of States opposed the institution of honorary consuls as such; but the debates in the Commission had shown that, on the contrary, the great majority of States appointed and received honorary consuls, and even if some States did oppose the institution, there was no reason for making the provisions concerning honorary consuls subject to separate ratification. A State which opposed the institution was free to refrain from appointing honorary consuls or to refuse to receive them. The fact that the convention contained provisions relating to honorary consuls should not serve as an impediment to ratification, since that instrument did not oblige States to receive or appoint honorary consuls. An analogy could be drawn with the case of consular agents, who were not appointed or received under the municipal law of some countries, including his own; nevertheless, that fact did not prevent such countries from acceding to conventions containing provisions relating to consular agents. Accordingly, he did not believe that the Special Rapporteur's argument that the omission of article 60 would prevent many States from acceding to the instrument as a whole was valid.

5. Mr. ERIM considered that the article was unnecessary and, since so much freedom of action had already been recognized for States, that it would nullify the Commission's work of codification. In agreeing to the inclusion of a provision on the lines of article 59, the Commission had agreed in principle that States which wished to regulate their consular affairs otherwise than as provided for in the multilateral instrument would be free to do so; by adopting that principle, the Commission had in effect turned the instrument into a set of rules to be followed by States which did not wish to conclude bilateral consular conventions. Accordingly, States were not prevented from derogating from the rules of the multilateral convention, and the adoption of article 60 would render the instrument practically ineffective in that particular respect.

6. Furthermore, the manner in which the article was worded seemed to give States an opportunity to ratify certain chapters *en bloc*, but did not give them the right to make exceptions in respect of specific provisions. The real question was: Did the Special Rapporteur not accept the State's right to formulate reservations to particular articles? Besides, the partial freedom, if considered in relation to article 59, represented yet another breach in the structure of the instrument. The Commission should submit to governments an integral convention, as a model for general lines of conduct in the matter of consular intercourse and immunities. States which did not wish to follow some of the rules laid down could, under article 59, maintain in force their existing bilateral conventions or conclude other bilateral consular conventions suitable to their needs. He therefore proposed that the discussion and the vote on article 60 should be postponed, pending the final decision on article 59.

7. Mr. BARTOŠ considered that the question raised by article 60 was substantive rather than technical. He could understand the point of view of those who believed that the institution of honorary consuls was undesirable, although he personally did not share that opinion. The question whether all countries used the institution or not was immaterial; States were not obliged by the proposed instrument to appoint or accept honorary consuls and were therefore free to exercise their own judgment in the matter, irrespective of the inclusion of article 60. Nevertheless, he would submit that the effect of the Special Rapporteur's solution was to attach different values to the various chapters of the draft: chapter I would be regarded as compulsory, and chapter II as optional. It would be preferable by far to leave States free to refuse to recognize the institution of honorary consuls. Besides, even a State which did not ratify chapter II would not be debarred from receiving or even sending honorary consuls, if the other parties concerned agreed.

8. Mr. EDMONDS said that the article was quite unnecessary and should be deleted. A State which did not appoint or receive honorary consuls would not have in its territory any consular officials to which chapter II would apply. If at any later date it changed its mind about the appointment or acceptance of honorary consuls, it would be free to take advantage of the provisions of the chapter. There was no need to defer action on the article pending a decision on other clauses.

9. Mr. GARCÍA AMADOR drew attention to his statement at the beginning of the discussion of chapter III *(General provisions)* (560th meeting, paragraph 9), when he had suggested that the Commission should discuss first whether general provisions having the character of final clauses should be included in the first draft. He had made that suggestion in order to avoid a debate on substance, and his apprehensions had unfortunately been confirmed. The Commission had conducted a long and inconclusive discussion on article 59 and was now running the risk of embarking on a long debate on the question of reservations. The practice of discussing final clauses was contrary to the Commission's usual procedure. To avoid further substantive discussion, he suggested that a vote should be taken on the question whether articles 59 and 60 should be included in the draft.

10. Mr. MATINE-DAFTARY said that, since he had no sympathy for the institution of honorary consuls, he welcomed the Special Rapporteur's initiative in providing an opportunity for States not to ratify chapter II. Nevertheless, it might be wiser to follow a somewhat different procedure and to attach chapter II to the draft as an optional annex, as had been done in the case of the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes adopted at the first United Nations Conference on the Law of the Sea, 1958.

11. The reason for that suggestion was that under the procedure proposed by the Special Rapporteur, States might be obliged to accede to whole chapters and, as Mr. Erim had pointed out, might be debarred from making reservations to individual provisions. If the effect of article 60 was to remove the right to make reservations, he thought that the best way of making the provisions on honorary consuls optional would be to embody them in a separate optional annex. He was of the opinion that, in the present state of international law, States regarding themselves as sovereign were free to make reservations to any instrument that they signed.

12. Mr. ŽOUREK, Special Rapporteur, pointed out to Mr. Matine-Daftary that the partial acceptance proposed in article 60 only affected the chapter on honorary consuls. He also assured him that the provision in no way excluded the possibility of making reservations, which would be dealt with in chapter IV *(Final clauses)*. The inalienable right of sovereign States to make reservations was not affected by article 60, which had been included in the draft with a view to ensuring the universality of the proposed instrument.

13. In reply to Mr. Yokota, he said that the number of States which did not accept the institution of honorary consuls was immaterial. The essential point was that a sovereign State could not be obliged to accept an institution to which it objected. He had as yet heard no convincing argument against the procedure proposed in article 60; the option of partial acceptance was in no way intended as questioning the value of the institution of honorary consuls. On the contrary, knowing that they rendered valuable services to many States, he had devoted a special chapter of his draft to honorary consuls.

14. He thought that Mr. Erim's fears that the draft would be rendered ineffective by article 60 were exaggerated. The article in no way affected the existing international practice; it simply made it possible for States which neither appointed nor recognized honoray consuls not to commit themselves to provisions concerning such consuls. But the recommended procedure would in no way prejudice the position of States favouring the institution. He could not agree with Mr. Yokota that the case of consular agents was analogous, since consular agents were one of the classes of consuls, whereas honorary consuls formed a separate category of consuls. Furthermore, a State which had acceded to the multilateral instrument as a whole but which did not recognize the institution of honorary consuls, would be placed in an embarrassing position if it wished to refuse the exequatur to an honorary consul. The procedure set forth in article 60 would eliminate all ambiguity and all germs of dispute in the matter and, as he had pointed out, could not harm any State.

15. Mr. MATINE-DAFTARY said he was satisfied by the Special Rapporteur's explanations.

16. Sir Gerald FITZMAURICE said that he could not share the Special Rapporteur's view that a State which had ratified the whole instrument would be in an embarrassing position if asked to accept an honorary consul. The main fallacy of the Special Rapporteur's argument lay in that point. The fact that some States — in his opinion, a small minority — did not recognize the institution of honorary consuls was no argument for including article 60. Nothing in the draft obliged States to receive or to appoint honorary consuls, and it could not be contended that by ratification a State was estopped from refusing the exequatur to such officials.

17. The Special Rapporteur's assertion that the inclusion of the clause would obviate the necessity for many reservations was based on the same fallacy. No country would be obliged to make reservations because its total freedom in the matter of sending or receiving honorary consuls was in any way affected by ratification or accession to the instrument as a whole. The faculty of States to propose reservations in respect of individual articles was quite a different thing from an option of partial acceptance. Accordingly, the provision was unnecessary even for the Special Rapporteur's purpose of preserving the freedom of action and the *status quo ante* of countries which did not recognize the institution of honorary consuls. The only cogent reason for such a provision would have been the presence in the draft of a provision compelling States to appoint and receive honorary consuls; but no such provision existed.

18. Mr. AGO considered that the article was not only unnecessary, but inappropriate. It was most undesirable to expose a work of codification not only to the normal risk of possible reservations, but to the more serious danger of an option to accept or reject certain rules. The Commission recognized the existence of the institution of honorary consuls; at the same time it recognized that each State was free to decide whether to appoint or admit such officials. When once a State had decided to send or receive honorary consuls, the Commission recognized that the rules set forth in chapter II would apply. Governments did not necessarily adhere to the same policy; any government might decide for practical reasons to admit or appoint honorary consuls or not to do so, and the decision might also be changed in time. Moreover, since under article 11, a government was entitled to refuse the exequatur to any consul, the Special Rapporteur's contention that embarrassment might be caused by having to refuse honorary consuls was not tenable. And under article 20 the receiving State might inform the sending State that a member of the consular staff was not acceptable. Accordingly, there was no reason to adopt a precision which might create the impression that some of the rules of international law laid down in the draft were optional and others compulsory. The 1958 Convention on the Territorial Sea and the Contiguous Zone had been ratified by States having no sea coast; that action denoted recognition by the States concerned that the rules laid down in the Convention governed the situation of maritime States. The same principle should surely apply to the institution of honorary consuls : States not having such an institution might very well recognize that the rules laid down in the draft governed the position of honorary consuls with respect to States which did have the said institution.

19. Furthermore, the effect of article 60 might be dangerous. Certain States might resort to partial acceptance because they disapproved of the institution of honorary consuls, but others who used the institution might take the course of partial ratification because they wished to apply rules other than those contained in the instrument. He appealed to the Special Rapporteur not to insist on article 60; if governments reacted strongly to the absence of such a provision, it would still be open to the Commission to include it in the final draft, but it seemed unnecessary to provide such a clause at that stage.

20. Mr. FRANÇOIS thought the debate had shown the close connexion between article 60 and the whole question of reservations. If reservations to the instrument were admitted, a State which wished to do so could make a reservation to chapter II as a whole. He had been surprised to hear certain members express the view that the right to make reservations was inherent in sovereignty; in his opinion, the right depended solely on the nature of the instrument concerned and he was inclined to think that the draft instrument before the Commission was one to which few if any reservations should be admissible.

21. Members who had spoken against article 60 had contended that States which did not wish to appoint or admit honorary consuls conserved full freedom of action. He could not wholly agree with that argument, since certain difficulties might arise in practice. For example, in connexion with article 45 *(Duties of third States)* countries acceding to the convention as a whole would be obliged to recognize the application of the article to honorary consuls also. It might be preferable to allow the provision to apply to honorary consuls if the State concerned recognized the institution, but to admit reservations in the case of States which did not recognize it. While that might be regarded as a matter of detail, it constituted an exception to the absolute freedom of deciding whether or not honorary consuls should be appointed or received.

22. Mr. TUNKIN saw much value in the suggestion of Mr. García Amador. The provisions of article 60 probably fell into the category of final clauses and it was not the general custom of the Commission to include final clauses in its drafts. As a rule, the Commission only prepared substantive articles on the topics which it discussed.

23. He was concerned at the view expressed by

certain members, who from the beginning had been in favour of assimilating honorary consuls to career consuls, that there should not be any separate chapter on the subject of honorary consuls; he felt that if the Drafting Committee were to submit a draft in which no such separate chapter was included, the Commission would reopen its lengthy discussion on the subject of honorary consuls.

24. The discussion of the legal status of honorary consuls had shown that in many respects it differed from that of career consuls, and the Commission should have arrived at the conclusion that honorary consuls constituted a distinct institution. He therefore suggested, for the consideration of the Drafting Committee, that, if it decided to include provisions on honorary consuls in the same articles which dealt with career consuls, it should submit to the Commission a second draft in which honorary consuls were dealt with in a separate chapter.

25. Mr. LIANG, Secretary to the Commission, said that Mr. García Amador had raised a very important point which affected the whole technique of the Commission's work. The Commission had always regarded itself as an expert body whose views were based on independent research and free discussion. The conclusions of the Commission had therefore been generally embodied in drafts dealing with substantive matters only.

26. It was true that, on occasion, the Commission had included in some of its drafts certain provisions falling into the category of final clauses, generally in cases in which the Commission had dealt with a subject on which no customary rules of international law existed and the making of new law was involved. For example, the Commission itself had drafted final clauses for its draft conventions on the subject of statelessness, which was a subject for progressive development and in regard to which there were no rules of customary law. The government representatives attending the conference of plenipotentiaries on that subject in 1959 had, however, drafted fresh final clauses.

27. As a general rule, however, the Commission had not tried to anticipate the extent to which States might wish to undertake obligations concerning a whole draft or part of it. The Commission had limited its work to substantive provisions, leaving such question as entry into force, reservations and denunciation to be decided by the representatives of governments participating in a conference. The extent to which States would wish to be bound by convention was in reality a political decision which governments themselves would take after examining minutely the provisions of a draft. The International Law Commission was not in a position to predict what the attitude of eighty or ninety governments might be in that regard. He recalled in that connexion the reply he had ventured to give to the Israel representative in the Sixth Committee, when that representative had asked why no final clauses had been appended to the Commission's draft on diplomatic intercourse and immunities.[1]

28. When the Commission had dealt with the topic of the law of the sea it had not included final clauses in all its drafts. It had done so only in the texts on fishing and conservation of the living resources of the high seas because those clauses were, in that case, an integral part of the substance of the draft; without the creation of the proposed machinery, the principle embodied in the draft could not operate. It had therefore been appropriate in that case for the substantive provisions to be reinforced by final clauses.

29. For those reasons, he agreed with the view of Mr. García Amador and Mr. Tunkin that the Commission should not endeavour to deal with the question of complete or partial acceptance raised by the proposed article 60. Indeed, the same remark applied to article 59 on the relationship between the draft articles and bilateral conventions, but the Commission had already discussed that question at length. He felt that the Commission could save considerable time if it decided not to deal with the subject matter of article 60. The draft on consular intercourse and immunities contained both a restatement of existing international law and rules aimed at the progressive development of international law, and it was quite impossible for the Commission to anticipate to what extent States would wish to accept the proposed new rules.

30. He recalled that the 1958 Conference on the Law of the Sea had adopted the provisions of the Convention on the High Seas " as generally declaratory of established principles of international law ". That language had not been used in the Convention on the Territorial Sea and the Contiguous Zone or in the Convention on the Continental Shelf, a circumstance which indicated that the Conference had not regarded all the provisions of those conventions as declaratory of existing international law in the same manner. He felt that where, as in the case of consular intercourse and immunities, a substantial part of the provisions of a draft was concerned with the creation of new international law, it was all the more important that it should be left to the States represented at an international conference to decide on the extent to which they would wish to be bound by the proposed new rules.

31. Mr. JIMÉNEZ DE ARÉCHAGA supported the suggestion of Mr. García Amador that the Commission should not deal with article 60 at that stage. For the reasons given by Mr. Edmonds and other speakers, he saw no need to include the provisions of that article. If such an article were included, many States might think, notwithstanding anything that might be said in the commentary, that article 60 was the only provision on the subject of reservations and that therefore the

[1] See *Official Records of the General Assembly, Thirteenth Session*, Sixth Committee, Official Record of the 572nd meeting, paras. 13 to 15, pp. 104 and 105.

only reservations permissible would be those mentioned in that article.

32. Mr. ERIM said that the explanations given by the Special Rapporteur had confirmed him in his opinion that article 60 did not serve any useful purpose. Since States were not obliged either to send or to accept honorary consuls, a provision of the type of article 60 was quite unnecessary. Article 59 already gave enough freedom of action to States.

33. With regard to the question of reservations, he said that it was not uncommon to limit the right of the signatories to a multilateral treaty to formulate reservations. Article 19 of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas and article 12 of the 1958 Convention on the Continental Shelf provided examples of such a limitation.

34. Mr. ŽOUREK, Special Rapporteur, said that the right to formulate reservations, which was inherent in the sovereignty of the State, could not be curtailed without the consent of the State.

35. He did not believe that the provisions of article 59 would accomplish the purpose which article 60 was intended to achieve. A State which did not admit honorary consuls would certainly find it difficult to enter into a bilateral convention providing for the exclusion of such consuls with a State which on the contrary wished to make the maximum use of the institution of honorary consuls.

36. Nor could he agree with Mr. García Amador that it would be wrong to include article 59 in the draft. It was essential to indicate to governments whether and how far existing bilateral conventions would be affected by the draft articles.

37. Article 60, admittedly, was in a different position and could be regarded as one of the final clauses. But it was vital, for from it the States would gather that they were not bound to accept the draft *in toto*. It was for that reason that the article had already at that stage been included in the draft. He did not agree with the Secretary that the Commission should not discuss final clauses; the Commission had done so in the past in connexion with other drafts and could usefully do so in the future. However, in view of the lack of time, he was prepared to withdraw article 60, as far as the current session of the Commission was concerned, on the understanding that the Commission would reconsider the question in the light of governments' comments.

38. Mr. AGO thanked the Special Rapporteur for withdrawing article 60 and said that he agreed with him that the Commission could do useful work in connexion with final clauses by making suggestions also regarding such clauses.

39. As to the point covered by article 60, he agreed with Mr. Tunkin that it was desirable to have a separate chapter on honorary consuls and suggested that the purpose of article 60 would be much better served by including in that chapter an article stating that States remained completely free both not to make use of honorary consuls and not to receive such consuls. A provision of that kind would give those States which either did not send, or did not receive, honorary consuls the necessary safeguards without the difficulties involved in the system of article 60 or, in general, in the system of reservations.

40. Mr. YOKOTA said that the question whether the draft should or should not contain a separate chapter on the subject of honorary consuls had not yet been decided. The general structure of the draft and the placing of certain articles had been referred to the Drafting Committee. It was only if the Drafting Committee decided that there should be a separate chapter on honorary consuls that the issue of including an article along the lines of article 60 would arise. On that understanding he would agree to the Commission's deferring consideration of article 60.

41. Mr. BARTOŠ supported the suggestion made by Mr. Ago for a special article which would have the effect of fully safeguarding the position of States which either did not wish to send honorary consuls or did not wish to receive them. The formula suggested by Mr. Ago would fully serve the purpose intended in article 60 without any departure from the general rules laid down in the draft articles.

42. He added that the question was an important one which should be decided by the Commission. Therefore, subject to drafting, he supported the suggestion made by Mr. Ago, which would have the effect of incorporating in the draft a tacit reservation clause.

43. The CHAIRMAN said that the withdrawal of article 60 at that stage by the Special Rapporteur brought to an end the discussion on the subject. He therefore took it that the Commission agreed that no further decision was necessary and that all other points raised in connexion with the discussion of article 60 would be noted for the consideration of the Drafting Committee.

It was so agreed.

44. Mr. MATINE-DAFTARY pointed out to Mr. François that he had not discussed the question of reservations but had merely observed in passing that sovereign States considered themselves entitled to exercise the right to make reservations. The topic of reservations to multilateral conventions had been referred to the Commission by General Assembly resolution 478 (V) and would be studied thoroughly later.

45. He had been the first to suggest that the provisions relating to honorary consuls should be grouped together in a separate chapter of the draft, and hoped that that suggestion would be given some thought by the Drafting Committee.

ADDITIONAL ARTICLE *(Representation of nationals before the authorities of the receiving State)*

46. The CHAIRMAN invited the Commission to consider the additional article proposed by the Special Rapporteur in the following terms:

" The consul shall have the right to appear, without producing a power of attorney, before the courts and other authorities of the receiving State for the purpose of representing nationals and bodies corporate of the sending State that owing to their absence or for any other reason are unable to defend their rights and interests in due time. This right shall continue to be exercisable by the consul until the persons or bodies in question have appointed an attorney or have themselves assumed the defence of their rights and interests.

47. Mr. ŽOUREK, Special Rapporteur, explained that he was proposing the additional article because it was most desirable that a multilateral convention should confirm the consul's right *ex officio* to represent the nationals of the sending State who were unable to defend their rights and interests in person before the judicial and administrative authorities of the receiving State. That prerogative was indispensable to the exercise of consular functions, one of which was the function of protecting and defending the rights and interests of the nationals of the sending State, including those of bodies corporate having the nationality of that State. It was hard to visualize how the consul could discharge that function if he were not entitled to address inquiries to the courts and administrative authorities concerning cases affecting his nationals, to communicate information and proposals tending to safeguard the rights of nationals of the sending State and, if necessary, to arrange for the representation of those nationals in court. It would be useful to receive the comments of governments on the provision, which might perhaps be inserted immediately after article 4 *(Consular functions)*.

48. Mr. BARTOŠ said it was certainly a rule of customary law that consuls had the right to represent nationals of the sending State; express provisions to that effect occurred in a number of consular conventions notably those concluded by the United States with other countries.

49. The existence of the right was recognized even in the absence of any specific treaty provision, and he therefore supported the inclusion of the article proposed by the Special Rapporteur.

50. Mr. VERDROSS considered that the new article would represent a great step forward though he doubted whether there was such a general rule of law already in existence. Certainly it was important for the Commission to express a view on the matter.

51. However, he had some criticism to offer of the way in which the article was drafted. First, he did not believe that the French expression " pleins pouvoirs " was appropriate in the context. Secondly he considered that the second sentence should be omitted, for it might be interpreted to imply that once the persons or bodies in question had assumed the defence of their rights and interests the consul was no longer entitled to give assistance : that was manifestly not so.

52. Mr. SANDSTRÖM said that a provision of the kind proposed might have some value but it could also have undesirable results. If it was included certain safeguards would have to be introduced, for example to protect persons from having their rights and interests defended by a consul who was not qualified to act in that capacity.

53. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Sandström, said that a consul would in most instances entrust the actual conduct of a case to a lawyer. It was undoubtedly better to ensure that the rights and interests of absent persons were protected — even if there was the element of risk which Mr. Sandström had mentioned — than that nothing at all should be done.

54. Referring to Mr. Verdross's remarks he said that the expression " pleins pouvoirs " appeared in certain consular conventions; still, he was willing to consider alternative wording. So far as Mr. Verdross's second suggestion was concerned, he said he would be unwilling to omit the second sentence, for it indicated when the right exercised by virtue of the provision contained in the first sentence came to an end. The right to protect interests of nationals of the sending State conferred by the article was a strictly limited one.

55. Mr. BARTOŠ pointed out that the matters which were apparently causing Mr. Sandström concern were regulated by domestic law. For example, according to the consular regulations of Yugoslavia, if the consul or vice-consul at any post was not a qualified lawyer, a lawyer of the receiving State was consulted in any particular case.

56. Sir Gerald FITZMAURICE endorsed the principle embodied in the additional article but considered that the text would have to be modified. If the text were amended the kind of objection raised by Mr. Sandström could be easily overcome. For example it could be made clear that representation in court was usually entrusted to a lawyer. It was the consul *ex officio* who represented nationals and bodies corporate of the sending State as an agent.

57. Mr. MATINE-DAFTARY expressed doubts about the practical utility of the article in its present form which was too elliptical and left many questions unanswered. It did not specify the nature of representation by a consul, nor whether a person would be bound by the action taken by the consul vis-à-vis the authorities of the receiving State on his behalf in the same way as he would be bound by the action of a person holding a power of attorney. It did not explain whether a person represented by a consul would lose the rights usually accorded to absent parties by most codes of procedure. Lastly, it failed to take account of the fact that in some countries only a member of the bar could appear before the courts. In view of those serious omissions he considered that the article should either be deleted or be drafted in far greater detail.

58. Mr. ERIM shared Mr. Sandström's doubts about the additional article. Moreover, it happened

that persons living abroad were not on particularly good terms with the authorities of their own country. In the Commission of Human Rights of the Council of Europe he had had occasion to examine complaints from persons who considered that their interests had not been adequately defended by agents of their own State.

59. He did not find the Special Rapporteur's wording particularly satisfactory. The French word " représenter " was so broad that it might cover every aspect of legal proceedings and could result in consuls exceeding their competence. The expression " pleins pouvoirs " was also too broad. Finally, the expression " bodies corporate " needed careful definition. Did the Special Rapporteur mean it to refer only to companies in which the government of the sending State was the majority shareholder?

60. He added that some allowance should be made for the possibility that some persons or bodies corporate did not wish their interests to be defended by a consul.

61. Mr. JIMÉNEZ DE ARÉCHAGA said that the principle stated in the additional article would be totally unacceptable to many countries, particularly in Latin America. In countries where there was a large foreign population that enjoyed complete equality in civil law with the nationals of the receiving State, such a provision would be discriminatory in effect. In cases where the civil code was modelled on the Code Napoléon and where, consequently, the rights and interests of absentees were safeguarded, such a provision would confer special advantages on foreigners. The words " or for any other reason " in the first sentence of the additional article greatly extended the scope of the right of representation by consuls and might even lead to something in the nature of a system of capitulations.

62. Such a controversial function did not form part of the whole scheme envisaged in article 4, and he thought that the purpose which supporters of the additional article had in mind was already covered in paragraph 1 of that article.

63. Mr. SANDSTRÖM said that the kind of safeguard which should necessarily accompany a rule of the kind envisaged in the additional article was that a consul could represent a national or body corporate of the sending State if, for example, that national or body could not appear before the court of the receiving State within the time limit specified. In his opinion, the consul was not entitled to exercise the broad powers which the additional article, as drafted, purported to confer.

64. With the proper safeguards a provision of that kind might fulfil a useful purpose.

65. Mr. VERDROSS agreed with the Special Rapporteur that the right of representation differed from the right of consuls to protect nationals of the sending State, but it was necessary to indicate in the second sentence that after the person or corporate bodies in question had assumed the defence of their own rights and interests the consul's right to protect his nationals should not lapse.

66. Mr. FRANÇOIS questioned the utility of the additional article and agreed with Mr. Erim that it might have grave disadvantages. For example there was a great deal of uncertainty about the nationality of bodies corporate, and he doubted whether mere drafting changes could make the article acceptable. He was therefore inclined to oppose the article.

The meeting rose at 1 p.m.

564th MEETING

Thursday, 16 June 1960, at 3.30 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 *(Representation of nationals before the authorities of the receiving State) (continued)*

1. Mr. ŽOUREK, Special Rapporteur, said he wished to reply to some of the criticisms concerning his proposed additional article (for the text of the draft article, see 563rd meeting, paragraph 46). It had been said (*ibid.*, paragraph 58) that the article should make allowance for the case where nationals resident abroad were on bad terms with the government of the sending State. In his opinion such special cases could hardly be provided for in the article itself, though they might be mentioned in the commentary. In any event, the persons referred to might eventually, as was contemplated in the second sentence of the article, themselves assume the defence of their rights and interests, since the consul's action in the matter was provisional.

2. With regard to Mr. Erim's objection to the use of the word *representer* (*ibid.*, paragraph 59), he pointed out that the consul's power of representation would be limited to urgent measures indispensable for the protection of the rights and interests of absent nationals. In practice, the consul would only obtain information concerning the court case and appoint a lawyer until the persons or bodies in question had themselves assumed the defence of their rights and interests. The consul would not of course personally undertake the defence of the person concerned in court, for only rarely was a consul also a lawyer acquainted with the law of the receiving State.

3. He did not think that Mr. François's objec-