

Document:-  
**A/CN.4/SR.609**

**Summary record of the 609th meeting**

Topic:  
**Consular intercourse and immunities**

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of the Vienna Convention. The fact that that provision had been adopted at the Vienna Conference, however, gave rise to the danger that it might be introduced into the future convention on consular intercourse simply by analogy. It might therefore be advisable to insert a different version of the provision, to show the furthest limits to which the Commission was prepared to go and to take into account Mr. Erim's and Mr. Matine-Daftary's objections. The effects of that provision would be limited exclusively to cases where different methods of application were allowed. He would not, however, make a formal proposal for such a new paragraph.

63. The CHAIRMAN said that a large majority of the Commission seemed to be in favour of retaining article 64 as approved in 1960. He suggested that the article should be referred to the Drafting Committee, with instructions to make it clear in paragraph 1 that the clause related only to contracting parties to the convention.

*It was so agreed.*

The meeting rose at 6.5 p.m.

## 609th MEETING

*Tuesday, 13 June 1961, at 10.5 a.m.*

*Chairman:* Mr. Grigory I. TUNKIN

**Consular intercourse and immunities**  
(A/4425; A/CN.4/136 and Add.1-11, A/CN.4/137)

*(continued)*

[Agenda item 2]

DRAFT ARTICLES (A/4425) *(continued)*

ARTICLE 64 (Non-discrimination) *(continued)*

1. The CHAIRMAN, inviting the Commission to continue its consideration of the draft on consular intercourse and immunities (A/4425), said that Mr. Matine-Daftary wished to make a statement on article 64.

2. Mr. MATINE-DAFTARY said that, although he did not wish to reopen the debate on the advisability of including in the article a provision along the lines of article 47, paragraph 2(a), of the Vienna Convention on Diplomatic Relations (A/CONF.20/13), he wished to draw attention to the views he had expressed on the matter at the twelfth session (548th meeting, para. 78). At that time, he had suggested a radical amendment of the provision. In any case, he would reiterate his view (608th meeting, para. 55) that a restrictive interpretation of a provision of the convention by a particular State did not constitute violation of the convention. He would endeavour to convert his colleagues in the Drafting Committee to that view.

ARTICLE 65 (Relationship between the present articles and bilateral conventions).

3. Mr. ŽOUREK, Special Rapporteur, said that the two alternative texts submitted to governments had been the subject of debate in the Sixth Committee during the fifteenth session of the General Assembly, to which he had referred in his third report (A/CN.4/137, *ad* article 65). Of the governments which had sent in written comment, only that of Chile had preferred the first text (A/CN.4/136/Add.7); the Governments of Norway, USSR, Czechoslovakia, the United States, Poland, Belgium, Spain and Switzerland (A/CN.4/136 and Add. 2, 3, 5, 6, 8, and 11) had expressed general approval of the second text, and the Government of the Netherlands had given detailed and convincing reasons for its support of that text (A/CN.4/136/Add.4). Other governments had taken up an intermediary position or had reserved their opinion on the question. Thus, the Government of the Philippines (A/CN.4/136) had stated that its preference for the variant subordinating bilateral agreements to the convention would depend on whether its reservations to other draft articles were accepted. The Government of Japan had simply reserved its position with regard to the article (A/CN.4/136/Add.9). Finally, the Yugoslav Government (A/CN.4/136) considered that the first text was more acceptable and that it might be supplemented by a saving clause concerning the minimum guarantees stipulated in the draft or, alternatively, that it should be stressed that future conventions might be concluded provided that they were not, at least, in conflict with the basic principles laid down in the text. That solution corresponded more or less to the statement in paragraph (2) of the commentary; in that connexion, he drew attention to the opinion of the Netherlands Government that the principle stated in that commentary, though perhaps correct in theory, was unrealizable in practice.

4. In the light of those observations, he believed that the Commission should adopt the second text of the article without much further debate. One point that had to be settled, however, was whether the Netherlands Government's suggested addition of the words "and multilateral" should be approved. The Commission's intention at its twelfth session had clearly been that the provision should maintain in force only bilateral conventions, the reason being that the object of the draft was to codify the essential rules of consular law. That object would be unattainable if other multilateral conventions were to be kept in force, for either those other conventions contained provisions similar to those in the general convention in which case they were unnecessary, or else they contained provisions differing from those of the unified consular law that the Commission was establishing, in which case they would hamper the unification of consular law (A/CN.4/137 *ad* article 65). It should be noted that the provision in question did not mean that regional conventions on the matter (and the Netherlands Government's comment was concerned with such conventions) could not be concluded in future; but in respect of existing instruments, article 65 should, in his opinion, be limited

to bilateral conventions only, if the Commission wished to accomplish the principal object of writing a convention that codified the consular law for the whole world.

5. Mr. AGO recalled that, during the lengthy debates held on the subject at the twelfth session, some members had argued strenuously that, once the international law concerning consular relations had been codified, the new code should automatically supersede all other conventions on the subject, on the grounds that some of the rules set forth in the new code were imperative and could not be derogated from by bilateral agreement. He himself had finally suggested that two variants of the article should be submitted to governments (576th meeting, para. 5, where discussed as article 59). At that time, this first text had his preference, but in the light of the replies received from governments he had come to the conclusion that the second text was preferable because it eliminated the practical difficulties (such as scrutiny of existing treaties, renegotiation and others) which the first text would involve. Moreover, the second text had the advantage of conforming with the principle that the particular prevailed over the general. In practice, States which found that the provisions of the new code were preferable to those of bilateral agreements would alter their system of consular relations accordingly. If the second text were chosen, however, he could not agree with the Special Rapporteur that a distinction should be made between existing bilateral and existing multilateral treaties. Either all existing law on the matter should be left in force, or none of it; but it could not be said that existing conventions should remain in force if they had been signed by two States and not if they had been signed by a larger number. In the case of a multilateral treaty, if the group of States which had concluded it found that its provisions were worse than those of the general convention, they would take steps to substitute the general system for their own. The Netherlands Government's suggestion on the matter therefore represented the logical conclusion of the adoption of the second text.

6. Mr. EDMONDS said that article 65 was one of the most important provisions of the draft. The Commission was preparing a convention in the hope that it would be usable and would constitute a progressive development of the international law on consular relations. The number of existing conventions on the matter was very large; furthermore, lawyers were, on the whole, conservative, international lawyers were even more so, and international lawyers attached to Ministries of Foreign Affairs were the most conservative of all. That was only natural, for if a bilateral convention had given satisfaction for a number of years, a State would surely hesitate to change its provisions in any way. The only course that the Commission could take if it wished to secure the maximum number of ratifications was to provide that conventions already in force could be maintained and that others could be concluded. Moreover, the Commission had deliberately chosen not to deal with certain aspects of consular law. If a flexible provision were adopted, States which believed that the Commission's articles constituted a progressive development of international law would sooner or later

conform with the articles of the general convention. If ratification of the general convention meant that they would not be able to maintain their existing bilateral obligations, they would be much less willing to become a party to it. Although it might seem desirable that the general convention should govern all consular law, the insertion of an unduly stringent provision was impracticable. It was always difficult to determine whether one contract was in conflict with another; there would be no necessity to make such a determination if the Commission should adopt the second text. That would enable many States to see the advantage of bringing their consular relations into line with the general convention and, hence, to follow the Commission's leadership.

7. Mr. YASSEEN said that article 65 had a direct connexion with the codification of international law. Uniformity of law was one of the main aims of codification, and it was particularly necessary to safeguard the fundamental principles embodied in a general convention of codification.

8. In preparing a draft convention on consular law, the Commission should beware of injecting a germ which could destroy the entire body. Admittedly, not all the draft articles stated fundamental principles of international law, but some, such as the articles dealing with inviolability of the consular archives and freedom of communication certainly did so, and should be maintained and safeguarded. Accordingly, either the first or the second text might be adopted — and he agreed that the latter might be more practicable — but whichever the Commission chose, it should add a clause safeguarding the fundamental principles of the Convention in conformity with the alternative solution supported by some members at the Commission's twelfth session (576th meeting, paras. 2-7). There were no technical objections to the adoption of such a solution, for the principle *lex posterior derogat priori* was not an imperative rule, and States could stipulate among themselves that an earlier instrument would prevail over future ones — *lex prior derogat posteriori*. Some States had expressed themselves in favour of that system in the Sixth Committee and, moreover, the Yugoslav Government had suggested the addition of such a clause.

9. The CHAIRMAN, speaking as a member of the Commission, said that the first text was not only obscure, but was also theoretically untenable. A treaty might lay down rules which constituted *jus cogens*, but that fact did not preclude States from concluding treaties on the same subject. The fact that certain rules constituted *jus cogens* meant only that States could not derogate from them, but did not prevent States from going further than those mandatory rules.

10. The number of rules constituting *jus cogens* in modern international law was undoubtedly increasing; they related to the maintenance of peace and to the basic problems of international relations such as non-interference in the domestic affairs of States, respect of State sovereignty and the like. By contrast, the draft under discussion could hardly be said to contain such rules. The Commission should be careful to go no

further than was necessary and to choose the solution which, in the light of all the circumstances, was most likely to further the progressive development of international law. The observations of governments clearly showed a preference for the second text. He also believed that that text was much more practicable and much less controversial than the first.

11. With regard to the wording of the second text, he agreed with Mr. Ago that multilateral conventions should also be covered. From the logical point of view, he could see no harm in allowing regional conventions to remain in force if the States parties thereto so wished. He suggested that the word "bilateral" should be deleted and replaced by the word "existing," which would cover all conventions in force.

12. Mr. FRANÇOIS said he was glad that Mr. Ago had abandoned the arguments in favour of the first text advanced at the twelfth session. Yet, though preferring the second text, he could not go so far in criticizing the first text as the Chairman had done. That text would be unexceptionable if States were really prepared to agree that all their earlier conventions on the subject would be superseded by the general conventions. The situation if they were to do so would have some theoretical advantages, but the practical disadvantages of application were much greater, and for that reason he was in favour of the second text.

13. He did, however, agree with the Chairman that the intermediary solution advocated by Mr. Yasseen was not tenable. The fundamental importance of article 65 lay not so much in the general principles set forth in the draft, but in the whole question of the limitation of its provisions. In practice, it would be impossible to distinguish between the basic rules of *jus cogens* laid down in the instrument and rules from which States might derogate. Accordingly, the proposed addition would be pointless.

14. He also agreed with Mr. Ago and the Chairman that the provision should cover multilateral conventions. If those treaties were excluded, the implication would be that all existing regional conventions should be abrogated, but could be concluded in the same terms immediately after the entry into force of the new general convention. On the other hand, the Special Rapporteur had rightly pointed out that provisions of multilateral regional conventions which conflicted with those of the Commission's draft would seriously hinder the Commission in its basic aim of codifying international law. Especially in the future, regional legal institutions should exercise caution in drafting new instruments. He thought it extremely regrettable, for instance, that the legal Committee of the Council of Europe had begun to draft a European convention on consular relations before the Commission had completed its work on that subject. It would be most useful if the Special Rapporteur would record that view in his report.

15. Mr. JIMÉNEZ de ARÉCHAGA said that he was in favour of the second text which, moreover, had received the approval of the majority of governments. However, he agreed with the Norwegian Government that there was no reason why the provision should

be made applicable only to bilateral conventions, since the same general considerations applied equally to multilateral conventions and agreements. Furthermore, the Special Rapporteur rightly pointed out in his third report that provisions relating to consular intercourse and immunities were very often incorporated in conventions dealing with other subjects. The wording of the second text should therefore be altered to take into account all treaty provisions which related to consular relations.

16. He further agreed with the speakers who had urged that the provision should cover multilateral as well as bilateral conventions and agreements. Otherwise, article 65 would be at variance with other provisions of the draft which covered both types of agreement. For example, article 64, paragraph 2, could undoubtedly apply to multilateral conventions, and their implicit exclusion from article 65 was therefore illogical. From the practical point of view also, the omission might be interpreted as an attempt to replace existing multilateral conventions the provisions of which were not in conflict with those of the draft under discussion; such a possible interpretation might hamper the ratification of the convention in a number of regions.

17. With regard to Mr. Yasseen's suggestion, he agreed with Mr. François and the Chairman that the Commission would find it difficult to specify which provisions of the draft constituted basic principles of international law. With regard to consular intercourse and immunities, he did not believe that there were any principles of public policy from which States could not derogate in any circumstances; only rules such as that laid down in Article 103 of the United Nations Charter, which affected basic problems of international security, could be regarded as rules of *jus cogens*. Besides, states would be unlikely to forego in their agreements the basic principles of consular law deriving from customary international law.

18. Sir Humphrey WALDOCK said that he supported the second text of article 65 for reasons similar to those given by the Netherlands Government. Failure to adopt a text along those lines would seriously impede the ratification of the convention. The draft did not represent merely a codification of customary law in the matter; many of its provisions might be regarded as innovations and would depend on acceptance for their validity. Moreover, it might be assumed that the entry into force of the convention, when adopted, would be contingent on the deposit of a fairly large number of ratifications; but it should be remembered that only five States out of the requisite twenty-two had as yet ratified such a relatively uncontroversial instrument as the Convention on the High Seas (A/CONF.13/L.53). The Commission should therefore do nothing which would impede the ratification of its text.

19. He agreed with earlier speakers that article 65 should cover multilateral as well as bilateral agreements and shared Mr. François's regret that the Legal Committee of the Council of Europe had begun to draft a convention on consular relations before the Commission had completed its work on the same subject.

Admittedly, that Committee was not making very rapid progress, but it would indeed be a serious criticism of the Commission's work if the European convention departed greatly from the general convention prepared by the Commission.

20. With regard to Mr. Yasseen's suggestion, he drew attention to the difficulty of enumerating the fundamental principles of the draft in view of the fact that the consular relations *per se* were based on the consent of the States concerned. Some fundamental principles were undeniably set forth in the draft; for example, the immunity of consular officials in respect of acts performed in the exercise of their functions and freedom of communication were principles of general international law. It was unlikely, however, that any bilateral treaties specifically departed from those principles.

21. With regard to the wording of the second text, he drew attention to the obscurity of the phrase "shall not affect bilateral conventions". It was not clear from the debate during the twelfth session what the Commission's intentions had been with regard to the relations between the general convention and bilateral agreements. The point in doubt was whether the general convention would be totally displaced by pre-existing conventions, or only *pro tanto*. The general convention should govern the provisions of bilateral agreements, except where that was excluded by the terms of the bilateral agreement. The Commission had not clearly expressed its intentions with regard to the text of the draft, and reference should rather be made to the fact that acceptance of the articles would not put an end to existing bilateral conventions and would not preclude the conclusion of future conventions.

22. Mr. VERDROSS noted that governments had shown a preference for the second of the two alternative texts, which should therefore be adopted by the Commission.

23. There remained the problem whether the article should expressly state that the draft articles contained fundamental principles of consular law which should prevail over existing bilateral agreements and from which subsequent bilateral agreements could not derogate. In that connexion, he said that the expression "fundamental principles" was not sufficiently clear: the article should state that the draft contained certain imperative or *jus cogens* principles of consular law which should be respected.

24. He noted with satisfaction the Chairman's statement acknowledging the existence of *jus cogens* principles in international law and adding that their number tended to increase. He had always maintained that those principles existed and had opposed Professor Paul Guggenheim's contention that all the provisions of international law constituted *jus dispositivum* and that States were free at any time to derogate from them in bilateral conventions.

25. Unless a statement along the lines which he had suggested was included in article 65, the wording of the second text could give the impression that all the

provisions of the draft articles constituted *jus dispositivum* and that States could derogate from them at will.

26. Mr. MATINE-DAFTARY said that the second text was, from the practical point of view, preferable for the States of Europe and America, which already had multilateral and bilateral conventions governing their consular relations.

27. The approach of both texts was similar, in that they would leave the American States with their own system, embodied in the Convention regarding consular agents, signed at Havana in 1928,<sup>1</sup> and the European States with the rules embodied in their numerous bilateral conventions. Indeed, the European States appeared to be about to frame a multilateral system of their own. The work done by the Commission would thus appear to be intended only for the use of the countries of Asia and Africa. Under the second text, the States of Europe and America were not even required to take the trouble of stating explicitly which of the pre-existing conventions would remain in force.

28. He was frankly disappointed with the results of the Commission's work, which did not correspond to the aim set forth in Article 13, paragraph 1(a), of the Charter of the United Nations. By virtue of that provision of the Charter, which constituted the reason for the Commission's existence, it was its duty to codify and develop international law on a universal basis.

29. The least that could be done would be to adopt a provision along the lines suggested by Mr. Verdross, stating that bilateral agreements could not derogate from those provisions of the draft articles which embodied rules of *jus cogens*.

30. Mr. LIANG, Secretary to the Commission, said that from the point of view of theory there should be no difficulty regarding the application of the *lex posterior* rule to which the Chairman and Mr. Ago had referred.

31. If the Commission had adopted the Special Rapporteur's proposal on article 4 and had included in the draft a detailed statement of the consular functions, the problem would, at least in part, have been solved. The Commission, however, had not attempted to unify in great detail all the rules governing consular relations; much less had it intended to unify all existing consular conventions. It had not embarked on a comprehensive codification covering all the ramifications of consular law.

32. In the circumstances, there could be no doubt that the text of the draft articles could not replace existing bilateral conventions. Nor could there be any question of higher law, as under Article 103 of the Charter or the rule of inconsistent treaties under Article 19 of the Covenant of the League of Nations.

33. There undoubtedly existed certain imperative or essential principles, such as that relating to the immunity of jurisdiction of consuls in respect of acts performed in the course of their official duties, to which Sir Humphrey Waldock had referred. Those principles, however,

<sup>1</sup> *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No. 58.V.3), pp. 422-425.

existed under customary international law and could always be invoked regardless of whether that fact was stated in the draft convention or not,

34. It might be well to consider the antecedents of article 65. The Havana Convention regarding Consular Agents contained an article 24, which was similar to the second text of article 65 of the Commission's draft. The Harvard draft prepared by Mr. Quincy Wright on the legal position and functions of consuls contained an article 33 reading:

"Nothing in the present Convention shall affect any agreement in force between any of the parties conferring special functions on consuls; nor shall this convention preclude any of the parties from entering into an agreement inconsistent with this convention in so far as it may concern only the interests of the parties thereto."<sup>2</sup>

35. It was interesting to note that the Harvard draft intended to maintain agreements in force only in so far as they conferred "special functions" on consuls, not in respect of other matters. The latter would include questions of privileges and immunities. Existing consular conventions dealing with those matters would be superseded by the draft convention. That approach was less drastic, if compared with the Commission's draft.

36. Sir Humphrey Waldock had drawn attention to the need to examine the second text so as to make clear the meaning of the expression "shall not affect". If that expression were construed narrowly, the proposed multilateral convention would not affect the existence of a bilateral convention, but, by virtue of the *lex posterior* theory, it could and would affect particular provisions of pre-existing treaties. For example, if a bilateral consular convention contained provisions on taxation and the two countries concerned subsequently signed the multilateral instrument, the provisions of the latter on taxation would override those of a bilateral convention. That might not be what was intended.

37. The CHAIRMAN said that, in the existing state of international law and factual circumstances, it was difficult to imagine that a convention would be concluded containing a clause that precluded all possibility of concluding future agreements on the same subject. With reference to the statement of the Secretary to the Commission, he said it could not be suggested that all rules of customary international law constituted *jus cogens*. States could, by mutual consent, derogate from many rules of customary international law. Only some rules of customary international law, to which he had referred in his previous statement, could be described as *jus cogens*.

38. He saw no reason to set up as *jus cogens* any of the rules embodied in the draft articles. His opposition was based largely on practical considerations: the inclusion of a provision along the lines suggested by some members would make it difficult for many States to accept the draft articles.

39. Mr. BARTOŠ said that the proposed text of article 65 undermined the whole structure of the draft. The adoption of that text would represent the renunciation by the Commission of the results of its labours. The Commission had taken great pains to prepare draft articles which reflected the existing practice of States. It had done so with the aim of unifying international law as far as possible, and it could not then suggest that the work of codification which it had prepared would not be binding on States. The Commission had not been asked to prepare model articles on consular relations, but to codify the international law on the subject.

40. Regardless of the terminology used, whether reference was made to *jus cogens*, to fundamental rules or to basic principles, there could be no doubt that the draft articles set forth certain minimum and mandatory rules. That was true, for example, of the rules relating to the immunity of consuls in respect of acts performed in the course of their official duties, and also of those which safeguarded the free operation of the consulate. The Commission could not, without abdicating its responsibility towards the United Nations and towards international law, virtually invite States in article 65 to derogate at will from the provisions of the draft articles.

41. He did not think that the sovereignty of States enabled them, after having signed a general convention, to enter into special agreements derogating from its provisions without having previously denounced it. In his view, a State which accepted certain international obligations by virtue of a convention, thereby and to that extent limited the exercise of its sovereign rights.

42. He warmly supported the compromise suggestion made by Mr. Verdross, which would safeguard those rules which were imperative without affecting the freedom of States to enter into special agreements in respect of other matters, such as the extension of the consular functions. The functioning of consulates as an institution required the observance of certain rules of positive international law, which the Commission had, by its prolonged labours, carefully formulated, and he urged the Commission not to give States *carte blanche* to derogate from those rules.

43. Mr. AGO said that the existing conventions covered a much wider geographical area than Mr. Matine-Daftary had suggested. Italy, for example, had one well-known consular convention with another European country, that very recently concluded with the United Kingdom, but there existed numerous provisions on consular matters in treaties and other conventions concluded by Italy with countries of Asia and of other continents.

44. The question before the Commission was whether there existed in the draft convention any *jus cogens* rules, in other words, rules rendering null and void any provisions of a later convention which were incompatible with them. He believed that there might exist such rules in international law, but that they were naturally not many. They might include, for instance, those concerning the respect due to the integrity of sovereign States, or

<sup>2</sup> Harvard Law School, *Research in International Law*. (II), *The Legal Position and Functions of Consuls* (Cambridge, Mass., Harvard Law School, 1932), p. 369.

o the consequences of a tort, or to the freedom of the high seas. Those few rules were laid down by customary international law. But it was doubtful whether only *jus cogens* rules could be introduced by a convention, and it was his belief that the draft under consideration contained no such rules.

45. He had been impressed by the statement of Sir Humphrey Waldock. The text of article 65 would have to be clarified in order to show that if there were pre-existing bilateral conventions, it did not mean that the draft multilateral convention would have no effect on the parties to such bilateral conventions. It was only in matters really covered by the provisions of the pre-existing bilateral conventions — which were often limited rules — that the rules of the multilateral convention were not applicable as a consequence of special law prevailing over general law.

46. Lastly, it would be both unnecessary and dangerous to make any statement on the possibility of concluding conventions on consular relations in the future. It was logical to state the position with regard to existing conventions, but there was no need to refer to future agreements. A convention was never intended to set forth rules for all eternity. States signing a convention were surely not supposed to have renounced the right to conclude new ones.

47. Any reference to future conventions would also be dangerous because, as indicated by Mr. Bartoš, it would detract from the aim pursued in the codification of consular law. The whole purpose of the Commission's work was to endeavour to unify certain rules of international law which were dispersed in numerous texts, often difficult to trace. The Commission should therefore refrain from drawing the attention of the States too much to their undoubted right to conclude other conventions in the future; on the contrary, the commentary should, first, suggest that States should review existing conventions in order to see to what extent they should be maintained, and secondly, express the hope that States would refrain from concluding in the future conventions which materially departed from the principles laid down in the draft articles.

48. Mr. PAL recalled that at the twelfth session the Commission had touched upon a point raised by Sir Humphrey Waldock, but perhaps had not discussed it in sufficient detail. He referred to the interpretation of the provision given by Sir Gerald Fitzmaurice and to his own (Mr. Pal's) deduction from that argument (560th meeting, paras. 13 and 14). The Commission's final conclusion had been that the provisions of the draft would not affect corresponding provisions in bilateral conventions, but that matters not covered by bilateral conventions would be regulated by the multilateral instrument (*cf.* commentary 1(b) on article 65).

49. Mr. AMADO said that the discussion at the twelfth session had taken a somewhat theoretical turn and had provoked some rather extreme opinions. For example, Mr. Scelle had defended the thesis that parties to a general convention could not conclude a limited convention at variance with the general convention without denouncing it (561st meeting, para. 19). He

himself had said it would be deplorable for the Commission to engage in elaborating model rules rather than a multilateral convention, and had described the provision under discussion as a novel method of enabling signatories to make a far-reaching reservation (560th meeting, paras. 50 and 51). He had also expressed regret that Sir Gerald Fitzmaurice had not attempted to discuss the arguments put forward by Mr. Bartoš and Mr. Scelle and had instead approached the problem from a purely practical standpoint (*ibid.*, para. 52).

50. At a later stage in the discussion at the twelfth session, he had pointed out that the draft would serve as a rallying point for States, but that if the instrument were opened for signature, with an escape clause giving all signatories latitude not to comply with its provisions, the unification of international law on consular intercourse and immunities, which must be the goal, would in fact be retarded, and he had accordingly argued against the inclusion of a provision concerning the relationship between the draft and previous conventions (561st meeting, para. 35).

51. It seemed inappropriate to talk of *jus cogens* in the context of consular relations where there was room for slightly different shades of opinion. Nor did he think the Commission could retain the reference to future conventions, since States would not accept dictation of that sort.

52. He could, however, favour a provision on the lines suggested by Sir Humphrey Waldock.

53. Mr. ŽOUREK, Special Rapporteur, said that the Commission was clearly veering towards the second alternative. That text should be read as meaning that if two contracting parties were not bound by a previous consular convention the multilateral convention would apply *in toto*. If, however, they had previously concluded a bilateral convention, then the provisions of that bilateral convention would remain valid, and any matter not covered by the bilateral convention would be governed by the terms of the multilateral convention.

54. He wished to assure Mr. Matine-Daftary, who seemed to minimize the importance of the multilateral convention, that even if it included article 65 the draft would have considerable influence and authority. The convention would *per se* have great persuasive force. In the first place, it would probably be used as a basis for future bilateral conventions even by non-signatory States which would turn to it as a source of the essential rules. Secondly, the existing consular conventions covered a relatively narrow sector of consular relations; even the older States had concluded such conventions with only some ten or twenty states, whereas there were more than 100 States in the modern world. Consequently the draft would also have great immediate practical value.

55. It would be far too difficult and, moreover, unnecessary to draw a distinction between the provisions constituting rules of *jus cogens* and those constituting *jus dispositivum*, and as States had already been invited to comment on two alternative texts for article 65 they would be surprised at being presented with a third variant and were unlikely to find it acceptable. He could



insert in the commentary a statement to the effect that the Commission hoped that future conventions would be based on the present text.

56. Mr. GROS pointed out that a provision of the kind under discussion appeared in many multilateral conventions. A prime example of an international instrument that had to be accepted without reference to the retention of existing conventions was the Convention on the Territorial Sea and the Contiguous Zone (A/CONF.13/L.52), which had made a real contribution to the progressive development of international law by creating new rules; yet even that Convention contained a provision (article 25) recognizing the validity of existing conventions or other international treaties.

57. Perhaps the discussion had gone somewhat beyond the confines of article 65, which he thought useful and even necessary for practical reasons. In matters of codification, there should be no fear of adopting a pragmatic standpoint, and such an attitude in no way diminished the respect due to the doctrine expounded with such mastery by the late Mr. Scelle. The state of consular relations had been well described by Mr. Ago. Some States had a well-established and virtually worldwide system of consular relations established in conventional texts, but for others, particularly the newly-independent States, a multilateral convention would be of special importance. He agreed with the Special Rapporteur that the draft, whether eventually ratified or not, would be of considerable significance. The fact that the 1958 Convention on the High Seas, which to the best of his knowledge did not contain a single new element of law, had not been ratified in no way diminished its value.

58. The world had not reached the stage at which an international legislative authority could impose legislation on States. As the Special Rapporteur had indicated, the Commission's task was essentially to persuade, and he firmly believed that, in the case under consideration, article 65 would not diminish the force of the draft, which would either be accepted by States having no consular relations or be used as a basis for the conclusion of bilateral conventions. By its very existence, therefore, the text would constitute a landmark in the development of international relations.

59. Mr. ERIM favoured the second alternative for article 65 but agreed with other members that the wording was ambiguous and open to different interpretations. Paragraph 1(b) of the commentary did not seem to tally with the text itself.

60. The CHAIRMAN, speaking as a member of the Commission, said the second variant meant that the multilateral convention would not abrogate existing bilateral conventions.

61. Mr. PADILLA NERVO subscribed to the views expressed by Mr. Verdross, Mr. Bartoš and Mr. Amado and also agreed with Sir Humphrey Waldock's analysis of the meaning of the second variant. As in the case of article 47, paragraph 2(a) of the Vienna Convention, he believed that article 65 was unnecessary and ought to be dropped; it neither added to nor modified the powers of States. He had not been particularly impressed by the Special Rapporteur's argument that since two

alternative texts had been submitted to governments for comment, they would expect a provision of some sort concerning the relationship between the draft and multilateral conventions. Some reference to the problem could be made in the commentary so as to help a future conference of plenipotentiaries to reach a decision.

62. He agreed with the doubts expressed at the previous session by Mr. García Amador (560th meeting, para. 9) as to the advisability of including a general provision having the character of a final clause.

63. The Commission had sought to codify the law and also to give some impetus to the progressive development of the law in a liberal direction. In his references to provisions in various consular conventions, he had cited those which were liberal rather than those which were restrictive. He was convinced that the draft would exercise a more effective influence, particularly on new States, which perhaps considered that they had not had a part in the creation of certain existing rules in the sphere of consular relations, if article 65 were deleted. He agreed with Mr. Gros that, irrespective of the number of ratifications, the draft would prove to be valuable.

64. Mr. FRANÇOIS pointed out that the Commission had refrained from inserting a provision in its draft articles concerning the law of the sea about the relationship between them and bilateral conventions, but had mentioned the question in its report (A/3159, para. 31). The United Nations Conference on the Law of the Sea had inserted an identical provision both in the Convention on the Territorial Sea and the Contiguous Zone (A/CONF.13/L.52, article 25) and in the Convention on the High Seas (A/CONF.13/L. 53, article 30), reading "The provisions of this Convention shall not affect conventions or other international agreements already in force, as between States parties to them". Thus, no mention had been made of the relationship between those Conventions and future inter-State agreements. Perhaps article 65 might be framed on similar lines.

65. The CHAIRMAN, summing up the discussion, said that the majority seemed to favour the second variant for article 65, subject to the deletion of the words "and shall not prevent the conclusion of such conventions in the future". He suggested that the text be referred to the Drafting Committee, together with the drafting points raised during the discussion.

*It was so agreed.*

66. Mr. BARTOŠ explained that he would not be altogether satisfied with such a text, which might be regarded as a compromise ensuring that the multilateral convention would not modify existing contractual relations between States. He feared, however, that such a provision might have the effect of maintaining in force certain quasi-colonial clauses in existing consular conventions between the more advanced and the less advanced countries: clauses which were at variance with what he would call the fundamental rules of consular law.

67. Mr. YASSEEN said that if the Commission were unable to adopt the course advocated at the twelfth session by some members, viz. that a clause should be added expressly safeguarding the fundamental principles



of the draft in relation to existing and future conventions, he would support Mr. Padilla Nervo's view that article 65 should be deleted. The problem would thus be subject to the relevant general principles of international law. But it might be decided in a different way by the plenipotentiary conference, as had happened at the first United Nations Conference on the Law of the Sea. The question was a highly political one, for it concerned the value States attached to the maintenance of previous conventions and their future liberty of action in respect of the draft convention under consideration.

68. Mr. MATINE-DAFTARY said that he had been encouraged by Mr. François's observations to express support for the course suggested by Mr. Padilla Nervo. He also felt bound to point out that the insertion of a provision in the Conventions on the Territorial Sea and the Contiguous Zone and on the High Seas had caused certain established maritime States to withhold their ratification, by reason of the existing treaty relations they already had with other States. The inclusion of article 65 in the draft would probably have the same effect.

69. Mr. EDMONDS said he was opposed to the deletion of the final phrase in the second variant now approved by the Commission: he would have preferred the original text.

The meeting rose at 1.15 p.m.

## 610th MEETING

Wednesday, 14 June 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

### Consular intercourse and immunities (A/4425; A/CN.4/136 and Add.1-11, A/CN.4/137)

(continued)

[Agenda item 2]

#### DRAFT ARTICLES (A/4425) (continued)

1. The CHAIRMAN invited the Commission to consider the additional articles proposed by the Special Rapporteur for inclusion in the draft on consular intercourse and immunities (A/4425).

ARTICLE 54*bis* (Legal status of career consular officials who carry on a private commercial or professional activity)

2. Mr. ŽOUREK, Special Rapporteur, said that in his first report (A/CN.4/108) he had included a provision (article 35, paragraph 2) concerning the status of career consuls who engaged in a gainful private activity. That provision had been rejected by the Commission (559th meeting, when discussed as article 58). It would appear,

however, from the observations of governments that a provision of that kind was necessary in the draft because some countries, such as the United States (A/CN.4/136/Add.3), allowed their career consuls to engage in gainful activities outside the consular functions. At the same time, governments were evidently anxious not to extend to that special intermediate category the full privileges and immunities granted to career consuls who pursued no other activity outside their consular functions.

3. The problem did not arise in regard to diplomatic agents who, under article 42 of the Vienna Convention on Diplomatic Relations (A/CONF.20/13), were expressly prohibited from practising in the receiving State any professional or commercial activity for personal profit. It seemed unlikely that a parallel prohibition for career consular officials would be accepted by States and he therefore proposed that in the light of existing practice an additional article be inserted in the draft, placing career consuls who engaged in a gainful private activity on the same footing as honorary consuls, so far as consular privileges and immunities were concerned. The new article would read:

"Career consular officials who, while being officials in the public service of the sending State, carry on a private commercial or professional activity, shall be deemed to have the status of honorary consuls."

4. Mr. YASSEEN said that it would be appropriate to treat career consular officials who carried on a gainful activity on a par with honorary consuls, but it should be made clear in the text that that equation applied in respect of privileges and immunities. In addition, the phrase "while being officials in the public service of the sending State", which seemed superfluous, might be deleted.

5. Mr. SANDSTRÖM expressed doubts about the need for such a provision, inasmuch as the position of the career consuls contemplated could be regulated by the sending State.

6. Mr. MATINE-DAFTARY said that such a provision would fit in with the logical structure of the draft and took account of existing practice.

7. He was not, however, wholly satisfied with the wording proposed by the Special Rapporteur. The expression "professional activity" was too broad. It was unthinkable, for example, that a career consul who undertook to give a course of lectures at a university should thereby be deprived of certain privileges and immunities. Surely the phrase "gainful private activity" was preferable.

8. The CHAIRMAN suggested that the wording used in article 42 of the Vienna Convention might serve as a model.

9. Sir Humphrey WALDOCK said that he could not quite see how the new article would fit into the general scheme of the draft in which specific provisions had already been inserted to cover the case of career consuls who engaged in gainful private activity. There would seem to be some inconsistency in bringing career consuls who had been previously treated as officials in the public service within the scope of the chapter dealing with