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A/CN.4/SR.560

Summary record of the 560th meeting

Topic:
Consular intercourse and immunities

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

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

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

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

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

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

It was so agreed.

The meeting rose at 1.20 p.m.

560th MEETING

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

Chairman: Mr. Luis PADILLA NERVO

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

[Agenda item 2]

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

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

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

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

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

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* Resumed from 559th meeting.

a view to its adoption; they could not rely upon scattered and uncertain references, since those were unlikely to be exhaustive.

4. Mr. VERDROSS explained that he had voted against the Special Rapporteur's draft article 58 because he considered it impossible, for two reasons, to render all the articles which were applicable to honorary consuls equally applicable to career consuls authorized to engage in gainful occupation. In the first place career consuls were different in nature from honorary consuls; and secondly, the Commission had decided that article 45 *(Duties of third States)* should not be applicable to honorary consuls but only to career consuls, even if the latter were gainfully employed, because it was not known in advance whether or not they would be engaged in commerce or other gainful occupation. In view of that and other differences between the two categories, he had been obliged to vote for the omission of article 58.

5. Mr. MATINE-DAFTARY felt obliged to explain why he had abstained from voting on the omission of article 58, although he had spoken against the article during the debate. At the preceding meeting (559th meeting, paragraph 87), the Special Rapporteur had in effect agreed to withdraw his text of article 58 and had endorsed his (Mr. Matine-Daftary's) suggestions, in order to meet objections which had been made. Under the procedure normally followed in such cases, the original article 58 no longer existed. He had been surprised that the Chairman, usually so courteous and indulgent, had somewhat hastily put to the vote a text which had already been withdrawn.

6. Mr. BARTOŠ explained that his vote against the omission of article 58 did not mean that he approved of the Special Rapporteur's wording of that clause. He had been obliged to vote against the omission to indicate his objection to such a cursory perusal of the serious practical problem of assimilating *consules missi* to *consules electi* in certain cases. The question deserved more exhaustive discussion than the Commission had held.

7. The CHAIRMAN pointed out to Mr. Matine-Daftary that he was always reluctant to take a vote on any subject without first trying to reach agreement; indeed, members had frequently requested him to take a vote on a given matter. In the case of article 58, he had had no other choice than to take a vote, in view of the motions and points of order that had been submitted : if those motions had been withdrawn, the discussion would undoubtedly have taken a different course. With regard to the question whether article 58 had in fact been before the Commission, he said that originally the Special Rapporteur had implied that if the Commission did not want a separate article on the subject he would not insist on his text, and Mr. Matine-Daftary, in putting forward his suggestion, had made it contingent on whether the Commission wanted to include any article on the matter in the draft. The Commission had decided by its final vote that it did not want to include a separate article on officials assimilated to honorary consuls.

ARTICLE 59 *(Relationship between the present articles and previous conventions)*

8. The CHAIRMAN invited the Commission to consider article 59, which was the first article in chapter III *(General provisions)*.

9. Mr. GARCÍA AMADOR thought that the Commission should first consider the advisability of including in the draft general provisions which in effect had the character of final clauses, especially since according to the note to chapter IV the final clauses would be formulated later. Moreover, it was the Commission's practice not to include final provisions in the drafts it prepared for plenipotentiary conferences. It might be better simply to draw the attention of governments to the question in the report, and to ask them for guidance.

10. Sir Gerald FITZMAURICE said he was in favour of inserting a clause along the lines of the Special Rapporteur's draft article 59, although it could be argued that what it provided for was self-evident. The subject of consular privileges and immunities and functions was, however, very commonly regulated by bilateral agreements, and the first question that many governments would ask in connexion with the draft would be to what extent the proposed multilateral instrument would affect existing conventions and the possibility of concluding future bilateral conventions. They would need reassurance on that point in explicit terms before agreeing to sign the proposed instrument. A clause on the subject should therefore be included, and while he did not regard the wording as ideal by any means, he thought that the drafting could easily be settled by the Drafting Committee.

11. Mr. YOKOTA agreed with Sir Gerald Fitzmaurice that the clause should be retained, and also that its wording could be improved. For instance, it hardly seemed necessary to go into so much detail merely to convey the idea that the provisions of the draft would not affect existing bilateral conventions. It could simply be stated that the articles would not affect conventions concluded or to be concluded between the States concerned. That, however, was a matter of drafting, and the Drafting Committee could no doubt produce a satisfactory text.

12. Mr. PAL considered that some points of substance, as well as of drafting, were involved. He inquired whether the passages " the present articles shall in no way affect conventions previously concluded " and " the present articles shall be no impediment to the conclusion in the future of bilateral conventions " meant that the privileges and immunities provided for in the draft could be limited by existing or future bila-

teral agreements, or whether they meant only that such agreements could extend greater privileges and immunities than those stipulated in the draft. According to his understanding, the Commission's task was to lay down the minimum provisions; but the article as it stood might involve restrictions on those provisions.

13. Sir Gerald FITZMAURICE considered that States should have discretion to grant greater or less extensive facilities. In some respects, the Commission had gone beyond some of the existing bilateral consular conventions, and some of the parties to those bilateral conventions would sign the proposed multilateral instrument only on the strict understanding that it would not affect the provisions of conventions granting less extensive privileges and immunities. The point to be set forth in clear terms by the Drafting Committee was that no bilateral consular convention, whether more or less extensive than the draft, would be affected, with the proviso that those conventions applied exclusively as between the parties concerned and that the proposed multilateral instrument would be fully applicable as between those parties and third States with which they had no bilateral convention, if such third States had themselves ratified the multilateral instrument.

14. Mr. PAL observed that, if that interpretation was correct, the whole draft should be read as subject to existing or future bilateral consular conventions, and would operate only in the absence of such conventions. The matter was in fact left to the agreement of the States parties, the present convention being intended only to provide for cases of omission.

15. Mr. MATINE-DAFTARY doubted the desirability of including a provision which would in no way encourage the formation of general international law, since the upshot would be that the entire field of consular relations would be governed by bilateral conventions. In that event, there seemed to be no need for a multilateral instrument. The question might be raised at the plenipotentiary conference, when States Parties to many bilateral conventions might make reservations if they saw fit, but an express provision on the lines of article 59 would not advance the cause of the development of general international law and would destroy the whole structure of the draft.

16. Mr. TUNKIN said that, while he understood Mr. Matine-Daftary's preoccupation, in his view the ideal of a uniform instrument, accepted by all States to replace the vast network of bilateral conventions, was a case of *le mieux est l'ennemi du bien*. In the absence of a clause along the lines of article 59, many States parties to bilateral conventions which wanted to keep them in force would be obliged to exchange notes stating that the conventions were not automatically abrogated by signature of the multilateral instrument. In actual fact, while there might be a trend for the time being towards keeping bilateral conventions in force, States might gradually depart from that trend by concluding fewer such conventions, and the multilateral instrument would gradually take their place. In the meanwhile, however, the fate of the draft might be jeopardized by the omission of a clause along the lines of article 59.

17. Mr. ŽOUREK, Special Rapporteur, said that for practical and psychological reasons he considered the article indispensable. States which were bound by many bilateral conventions, containing different rules for consular officers and going much further than the Commission's draft did in some respects, would not be prepared to abandon their consular conventions in favour of the proposed multilateral instrument. The Commission itself had stressed that the draft should stipulate only the essential provisions and should not go into too much detail; certain questions had deliberately been left for settlement by bilateral convention. Nevertheless, he agreed with Mr. Tunkin that the resulting instrument would have a unifying influence, in that future bilateral conventions would be based on the essential rules of that instrument. Moreover, parties to bilateral conventions might compare the advantages of those conventions and those of the multilateral instrument and, if they considered that the bilateral conventions were exceeded by the multilateral instrument, they could terminate the former of their own free will and allow their consular relations to be governed by the provisions of the latter. But the unifying influence of the new convention should operate without prejudice to the freedom of the will of the States, if it were declared that all the provisions of bilateral conventions which were inconsistent with those of the multilateral instrument would be abrogated, many States would hesitate to sign the instrument. Article 59 had been included in the draft precisely for the purpose of facilitating the acceptance of the proposed convention.

18. Mr. BARTOŠ regarded the question as both doctrinal and practical. Bilateral consular conventions laid down contractual provisions concerning the operation of consulates, whereas the Commission's draft was intended to unify and universalize the rules governing consular relations. The Commission had been aware from the outset that it could not provide for every contingency and had agreed to leave certain questions to be settled by bilateral or regional agreements. Nevertheless, the rules that it had adopted constituted the minimum necessary for the maintenance of the status and operation of consulates.

19. In his opinion, any provisions of bilateral conventions which did not go so far as that minimum should be regarded as abrogated upon signature of the proposed multilateral instrument. Otherwise, States which were not parties to bilateral conventions but which signed the multilateral instrument would be governed by the system of the latter, but signatory States which

were parties to bilateral conventions conferring the lesser privileges and immunities could apply the rules of the multilateral instrument to a limited extent only. That situation would be absurd chronologically, for at the time when the bilateral conventions had been entered into the general rules embodied in the multilateral instrument had not existed, and yet the States concerned would be deprived of the benefit of those rules.

20. So far from furthering the progressive development of international law, article 59 constituted an invitation to take a retrograde step, and that under the auspices of the United Nations. It was obvious that if a bilateral convention conferred greater privileges and immunities than the draft, that convention should remain in force; but the possibility, open under article 59, paragraph 2, of according less extensive facilities could not be countenanced. The continuance in force of contractual provisions antedating the multilateral instrument was not an argument in favour of the proposition that a State would be free to accede to that instrument and at the same time to ignore it in its future relations with certain countries. Nor was it a sound argument to say that States should be allowed to become accustomed to the provisions of the multilateral instrument; draft article 59 in effect left the door wide open to any signatory which wished to disregard the provisions of that instrument.

21. Mr. JIMÉNEZ DE ARÉCHAGA supported article 59 as drafted by the Special Rapporteur. In reply to Mr. Pal's remarks, he pointed out that States bound by existing bilateral conventions were free to diminish the privileges and immunities conferred by a later multilateral agreement, if they so desired. The only way of avoiding that effect would be to insert a provision along the lines of Article 103 of the United Nations Charter, which stated that, in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter would prevail. If such a clause were added, the proposed instrument would become an overriding law; such a course, in addition to defeating the whole purpose of the instrument through the understandable reluctance of States to sign it, was not justified by the subject matter of the draft.

22. Mr. HSU agreed with members who had spoken against the article and believed that, if it were retained, paragraph 2 should be considerably amended. The purpose of the instrument was to bring about harmony in consular practice, and that purpose would be defeated if paragraph 2 were retained in its present form. Moreover, if the whole subject were left open to settlement by bilateral convention, there was no need for a multilateral instrument or for a plenipotentiary conference.

23. Mr. AGO admitted the validity of the practical argument that it would be easier for States to accede to the proposed instrument if they could be sure of being able to maintain the existing network of bilateral conventions if they so desired. From the theoretical point of view, also, it might be questioned whether the Commission had been simply codifying rules of international law and particularly whether it had confined itself to stating generally accepted rules. In fact, much of its draft would be based on the example of certain consular conventions and consist of provisions selected, as representing sound law, from those conventions. Yet, inasmuch as it was concerned not only with codification but also with the progressive development of international law, the simple rule that the particular prevailed over the general and that therefore existing bilateral conventions ought to prevail over the general law as set forth in the present multilateral convention did not hold good.

24. While it might be easier for States to accede to the multilateral instrument if it contained such a clause, in practice the instrument would to some extent be nullified by article 59 as now drafted. The new instrument would merely serve to fill gaps in the network of bilateral conventions and, while attracting a large number of ratifications might be regarded as a laudable aim, the final result would be that the rules laid down in the instrument would be applied even less widely than they would if the article were omitted. The real advantage of codification was to unify and rationalize rules of international law; if all bilateral conventions were to remain in force, that advantage would be largely nullified.

25. The Commission was faced with a dilemma. To contend that the proposed convention would extinguish all existing bilateral conventions and would rule out the possibility of keeping them in force, would be going too far; on the other hand, the system proposed in article 59, namely to maintain all existing conventions in force, was also too far-reaching, since it would have the effect of limiting too greatly the effect of the multilateral convention. A compromise solution might be to provide that it would be open to States, notwithstanding their accession to the new instrument, to agree to maintain existing bilateral conventions in force, not merely by tacit understanding but by positive action. Such a provision would promote the authority of the multilateral instrument, but would not be too extreme, as it would respect the will of States.

26. Mr. VERDROSS said that he favoured the idea expressed by Mr. Bartoš. According to the ancient maxim *lex posterior derogat priori*, the provisions of the multilateral instrument would supersede those of bilateral treaties with respect to States which signed and ratified that instrument, in so far as they were in conflict with the multilateral instrument.

27. If for practical reasons and in order to facilitate the draft's acceptance by governments, the Commission considered that the draft should

contain a provision on the relationship between it and pre-existing conventions, a short article along the lines suggested by Mr. Ago would perhaps be sufficient.

28. Mr. MATINE-DAFTARY explained that it had not been his intention that the Commission should accept a rule contrary to that embodied in draft article 59. He had simply suggested that the Commission should refrain from including an article along those lines. It was an accepted rule that new general law did not affect pre-existing special law. It was, however, undesirable to draw the attention of governments at that stage to the possibilities offered by that rule. It was better to leave it to governments to raise that question during the plenipotentiary conference or at the time of signing the proposed multilateral instrument. It could well be that only some of them would be interested in maintaining pre-existing bilateral agreements.

29. Mr. LIANG, Secretary to the Commission, said that the question which had been raised was one of the most difficult ones encountered by the Commission in its study of the draft on consular intercourse.

30. There were some precedents in multilateral conventions for the provisions of article 59, paragraph 1. The 1958 Convention on the Territorial Sea and the Contiguous Zone stated in its article 25 :

" The provisions of this Convention shall not affect conventions or other international agreements already in force, as between States Parties to them." [1]

31. Article 30 of the 1958 Convention on the High Seas was identical. But it was significant that the preamble to that Convention stated that its articles were adopted by the United Nations Conference on the Law of the Sea " as generally declatory of established principles of international law".[2] Few treaties existed which regulated the subject of the high seas and those few dealt only with certain special topics; the purpose of the 1958 Convention was primarily to state the already existing rules of general international law in the matter.

32. So far as the draft on consular intercourse and immunities was concerned the position was different. The draft contained certain important innovations. For example, article 41 concerning the nationality of children of consular officers expressed what was no doubt a sound principle but one which was largely at variance with existing State practice : it departed from the rules in force under the nationality legislation of the United Kingdom and the United States of America, for example. With regard to honorary consuls, the Commission had likewise adopted a number of innovations. Therefore, in view of the element of progressive development in the draft, it would seem that a State which accepted its provisions and ratified them would be under a legal duty to bring its practice into line with them.

33. As to paragraph 2 of article 59, he said there existed no precedent for such a provision in a multilateral convention. If it were adopted, it would largely nullify the usefulness of the whole draft and reduce it to a set of model rules, similar to the set of articles on the subject of arbitral procedure which the Commission had prepared. He felt that the Commission should consider the matter very thoroughly before taking a decision on that paragraph.

34. Mr. SCELLE considered that article 59 should be deleted because its provisions would impair the scope of the proposed multilateral instrument.

35. The proposed provisions appeared to state two obvious facts. Paragraph 1 indicated in its first sentence that two States were free to maintain in force a bilateral convention existing between them; that was the meaning of the words " and still in force between them ". However, he doubted the wisdom of drawing attention to that fact in the actual text of the draft.

36. Paragraph 2 also stated the obvious, so long as it was understood that the parties to a future bilateral convention which departed from the terms of the multilateral instrument previously signed by them would have to denounce the multilateral instrument before entering into the bilateral convention. There again, he saw no useful purpose in drawing attention to that obvious fact.

37. So far as the second sentence of paragraph 1 was concerned, he said he could not see its connexion with the idea contained in the first sentence of the paragraph.

38. For his part, he felt that the Commission should either adopt a provision which enhanced the role of the proposed multilateral instrument or else drop article 59 altogether.

39. Mr. ERIM pointed out that many States had signed bilateral conventions which regulated a large variety of questions and which covered much more ground than the Commission's draft. Some of the bilateral conventions gave greater prominence to questions of shipping and navigation, others to the position of aliens — matters which were not dealt with in the draft. Thus, States would always need to have recourse to bilateral conventions. Unless a provision along the lines of article 59 were included in the draft, those States would be placed in the awkward position of having to adjust the provisions of the pre-existing bilateral treaties, so as to bring them into line with the provisions of the multilateral instrument, before they could subscribe to the

[1] United Nations Conference on the Law of the Sea, *Official Records*, vol. II, *Plenary Meetings* (United Nations publication, Sales No. 58.V.4, vol. II), p. 135.

[2] *Ibid.*

later instrument. Problems of consular intercourse were not dealt with solely in bilateral consular conventions; they were also determined, for example, in trade or establishment agreements. A clause enabling States to maintain existing bilateral conventions was therefore essential.

40. Nor was there any valid ground for preventing States from entering in the future into bilateral treaties which departed from the provisions of the draft articles, whether the bilateral treaties granted greater privileges or less. There were some rules of international law, such as those contained in the Charter of the United Nations, which were of an imperative character. Other rules, however, could be varied by agreement between the States concerned, a number of those concerned with consular intercourse and immunities often belonged to that category.

41. He considered that most of the draft articles would always serve for the guidance of States. For example, some of the Conventions signed at The Hague in 1899 and 1907 had remained unratified but still provided jurists with inspiration for practice and served as models for the drafting of international instruments.

42. For those reasons, he thought that a provision on the subject-matter of article 59 was essential and he was inclined to favour a formula such as that suggested by Mr. Ago.

43. Sir Gerald FITZMAURICE said that the Commission was, from a practical point of view, faced with something of a dilemma. If a provision along the lines of article 59 were to be retained, it might perhaps deter States from ratifying the draft articles because they might regard themselves as licensed to continue to rely on existing bilateral conventions. If, however, a provision along those lines were not included in the draft, States might be deterred from signing an instrument which did not expressly stipulate that it would not prejudice existing bilateral conventions or prevent the conclusion of any in the future.

44. In matters such as the law of the sea and diplomatic intercourse, there existed a great deal of basic international law, which the Commission had been called upon to codify. In the matter of consular intercourse, on the other hand, the position was different: the draft articles as approved by the Commission would to a great extent represent a synthesis of the provisions of existing bilateral conventions. The reason was that, unlike the law of the sea, for example, in which only a few specific points were governed by bilateral treaties, the subject of consular relations was covered in its entirely by a large number of bilateral conventions.

45. In one sense, in that it inevitably covered much less ground, the Commission's draft fell short of many existing bilateral consular conventions. It was clear that States parties to such conventions would wish those subjects which fell outside the scope of the draft articles to continue to be governed by the provisions of bilateral conventions.

46. In other respects, the draft articles went beyond existing conventions. In some ways, the draft assimilated consular officials to diplomatic officers. He felt that the innovations adopted by the Commission probably represented a step forward, but it could not be denied that those innovations represented to some extent departures from the existing practice of States. Unless the States concerned were allowed so to speak to contract out of those innovating provisions of the draft so far as their bilateral relations went, they might be unwilling to accept it.

47. A provision along the lines of article 59 would be unnecessary if the draft were intended as a set of model rules or simply as a codification of a new branch of the law to be recommended for approval by the General Assembly under sub-paragraph (*a*) or sub-paragraph (*b*) of article 23, paragraph 1, of the Commission's Statute.

48. The position was altogether different if the draft was looked upon as a potential multilateral convention. Countries whose consular relations had been working satisfactorily under existing bilateral consular conventions would not wish to put the provisions of those conventions back into the melting pot. Moreover, those existing bilateral conventions went into much greater detail than the draft articles, so that the latter would have to be greatly expanded if there was any intention that they should supplant existing bilateral provisions.

49. For his part, he hoped that the draft articles would be embodied in a multilateral convention at an international conference. A provision on the subject dealt with in article 59 would then be necessary and should perhaps take the form suggested by Mr. Ago.

50. Mr. AMADO said that he could not agree with Sir Gerald Fitzmaurice. Referring to the remarks made by the Secretary, he said that it would be deplorable if the Commission were to elaborate model rules rather than a multilateral convention.

51. All members were familiar with the problem of reservations to treaties. He regarded article 59 as a somewhat novel method of enabling signatories to make a far-reaching reservation. Mr. Ago's suggestion would introduce the system of reservations used extensively in treaties concluded between Latin American countries.

52. He regretted that Sir Gerald Fitzmaurice should have made no attempt to discuss the arguments put forward by Mr. Bartoš and Mr. Scelle and had instead discussed the question raised by article 59 from the purely practical viewpoint. The Commission could not disregard the general treatment of reservations in international instruments concluded under United Nations auspices. In the present draft the Commission had sought to contribute to the progressive development of international law and had had to look into bilateral

conventions for evidence of as yet non-existent general rules. It was unthinkable that the outcome of that arduous effort should be treated as a set of model rules.

53. He agreed with Mr. Scelle that article 59 added nothing useful to the draft and that it provided a most undesirable method of making prior reservations.

54. Mr. SANDSTRÖM agreed with Mr. Pal that the maintenance of article 59 would greatly weaken the draft as a whole : indeed, such a provision would certainly not promote the progressive development of international law.

55. Mr. FRANÇOIS agreed with Mr. Ago, Sir Gerald Fitzmaurice and Mr. Erim. Article 59 should be retained, though it did require modification. It was often difficult to reconcile the principle that a particular law prevailed over a general one with the principle that a later law overruled an earlier one. If the Commission failed to indicate whether the present draft affected or did not affect existing bilateral conventions, grave uncertainty would result.

56. In his opinion it could not be claimed that any existing bilateral convention which did not accord with the draft was thereby abrogated. Time must be allowed for the requisite adjustments to be made, particularly as the draft by no means covered all the matters regulated by existing consular conventions or by national regulations. Indeed, it would not always be easy to decide which specific issues had been covered. The whole question whether two States or a group of States could conclude a convention derogating from a multilateral convention was extremely controversial and had been the point at issue in the *Oscar Chinn* case.[3] The generally accepted view was that a new convention that was not wholly consistent with a previous treaty did not invalidate the earlier instrument if the latter's purpose was not materially impaired by the new one. Since the purpose of the present draft was not to secure complete uniformity of all rules concerning consular intercourse and immunities, it would be open to any two States or to a group of States to conclude an agreement that was not entirely consistent with the draft. In the sphere of consular relations uniformity was not as necessary as, for example, in the case of the regime of the high seas.

57. The problems raised by article 59 were not comparable to the general problem of reservations. With bilateral conventions remaining in force, the present draft, if it ultimately became a multilateral convention, would undoubtedly in time influence the practice of States and would even be accepted by those which decided to retain for the time being somewhat different rules already established in bilateral conventions.

58. Clearly the Commission should express an opinion on the technical question of the relationship between the draft and existing conventions, and he therefore favoured a provision of the kind embodied in article 59. If the matter were left for final settlement by a diplomatic conference, considerable weight would probably be given to the Commission's opinion, as had been the case at the two United Nations Conferences on the Law of the Sea.

59. Mr. YOKOTA said if it were assumed that the draft would eventually become a multilateral convention, article 59 could not be dispensed with altogether. In international law there was no well established hierarchy of rules as existed in municipal law and therefore even a general multilateral convention did not necessarily possess overriding force to abrogate existing bilateral treaties. Hence, from the theoretical point of view, article 59 was necessary and it was also necessary for practical reasons, because without such a provision States might hesitate to sign.

60. On the other hand, he recognized that there were weighty objections to article 59 on the ground that it was not conducive to the progressive development of international law.

61. Perhaps the problem might be resolved by inserting in the preamble of the draft a statement on the lines of that included in the preamble of the Convention on the High Seas, 1958, to the effect that the provisions of the draft were generally declaratory of established principles of international law : such a statement would serve as a reminder to States that they should abide by the rules contained in the draft.

62. Turning to the wording of article 59, he suggested that it should be less categorical and that the words " shall not automatically " should be substituted for the words " shall in no way " in paragraph 1. The second sentence of that paragraph was self-evident and gave the undesirable impression that the scope of the draft was limited ; accordingly, he suggested that the sentence be omitted.

63. Lastly, he suggested that, in deference to comments made during the discussion, a statement should be inserted in the commentary to the effect that the present articles should be taken into account in the application of bilateral conventions. In that manner the essential elements of article 59 could be retained.

64. Mr. GARCÍA AMADOR observed that in making a procedural suggestion at the outset of the discussion on article 59 (see paragraph 9 above) he had foreseen that it might be difficult to reach agreement on the article. His expectation had proved correct and there was no sign of any consensus of opinion emerging. Without making any formal proposal, he would therefore reiterate the view that it might be wiser to defer

[3] Publications of the Permanent Court of International Justice, *Judgments, Orders and Advisory Opinions*, series A/B, No. 63.

a decision on the article. He had been prompted to make his suggestion by the experience of the Inter-American Council of Jurists which, in 1959, after discussing an analogous provision in a draft convention on extradition, had referred it to the Inter-American Juridical Committee with a request that that body prepare alternative texts for submission to the diplomatic conference that was to be convened to consider the draft.

65. As had been pointed out, the Commission usually discussed whether to recommend that the General Assembly itself should examine a particular draft or whether it should be submitted to a diplomatic conference. Perhaps a diplomatic conference would be the proper forum for considering a provision of the kind embodied ina rticle 59.

66. Mr. LIANG, Secretary to the Commission, referring to certain comments made concerning his earlier remarks, explained that he had not intended to suggest that the present draft should be submitted to the General Assembly as a set of model rules. He had only sought to emphasize that if article 59, paragraph 2, were retained the utility of the draft would be greatly impaired. A flood-gate would be opened, and States would avoid the obligations assumed after becoming parties to the convention. He had in no way wished to advocate that the draft should be a set of model rules; indeed, he hoped that the draft would become a multilateral instrument.

67. The second draft convention on extradition prepared for the Inter-American Council of Jurists by the Inter-American Juridical Committee in 1957 contained a provision (article 21) stipulating that it did not abrogate existing bilateral extradition treaties, but that if such treaties lapsed the provisions of the convention would come into effect immediately.[4] If article 59, paragraph 2, were modified so as to stipulate that in cases where States accepted the present draft then future bilateral conventions should apply only to questions not governed by the draft, it would be less open to criticism.

68. Referring to Mr. Yokota's suggestion that the preamble should contain a statement on the lines of that contained in the preamble to the Convention on the High Seas, 1958, he pointed out that he could not share his view since, whereas the Convention to a great extent codified customary law, much of the Commission's draft on consular intercourse and immunities would be regarded as a piece of international legislation and as creating new law.

The meeting rose at 6 p.m.

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[4] Inter-American Juridical Committee, *Second Draft Convention on Extradition* (Washington, D.C., Pan American Union), p. 23.

561st MEETING

Tuesday, 14 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 59 *(Relationship between the present articles and previous conventions) (continued)*

1. The CHAIRMAN invited the Commission to continue its consideration of article 59. He drew attention to the following text proposed by Mr. Ago to replace the Special Rapporteur's draft article 59 :

" Acceptance of the present articles shall be no impediment to the maintenance in force by the parties, in their mutual relations, of existing bilateral conventions concerning consular intercourse and immunities, or to the conclusion of such conventions in the future."

2. Mr. ŽOUREK, Special Rapporteur, said that he wished to put forward certain considerations which might help the Commission to reach a conclusion on article 59 without too much delay. In drawing up the text of that article he had been guided by the assumption that the draft would eventually take the form of a multilateral convention. The Commission had endorsed that assumption. The General Assembly's decision to refer the Commission's draft on diplomatic intercourse and immunities to a conference of plenipotentiaries (resolution 1450 (XIV)) seemed to have justified that assumption.

3. The argument that the inclusion of article 59 would greatly impair the value of the whole draft and would not promote the progressive development of international law was based on an oversight. After all, only a small number of States had concluded consular conventions and those were mainly concerned with matters of special importance to the signatories. He therefore maintained the contrary view that the draft's chances of acceptance would be greatly enhanced by the inclusion of article 59. Since under the terms of the article the draft would also apply to States bound by existing bilateral conventions in respect of matters not regulated in those conventions, the effect of article 59 would actually be to enlarge the scope of the draft.

4. If the draft was treated as a set of essential rules it would ultimately have a unifying effect though in its present form it did not seek to impose unification in the matter of consular relations. Mr. Bartoš had contended that it would be paradoxical if a multilateral convention did