Document:-
A/CN.4/SR.561

Summary record of the 561st meeting

Topic:
<multiple topics>

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

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.

---

[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

not apply in cases where two States were bound by provisions of a bilateral treaty that were defective; but surely one could trust States to have the good sense to denounce a bilateral treaty which was less satisfactory than a general convention.

5. The contention that article 59 was unnecessary because it embodied a self evident principle was over-simplified. Besides, some members of the Commission had questioned whether that principle was commonly accepted. As Mr. François had pointed out (560th meeting, paragraph 55), neither the maxim that a particular rule always prevailed over a general rule nor the maxim that later law superseded earlier law could be regarded as absolute. If the former were accepted as absolute, the inference would be that it was open to any two States to conclude a particular agreement violating a general rule of international law. And if the latter maxim were pushed to its extreme, it would mean that any general international instrument abrogated all previous bilateral agreements on the same subject, which was patently untrue; not even the United Nations Charter, which had established certain overriding rules of law, made any such claim. What course then should the Commission adopt ?

6. At first he had been tempted by Mr. García Amador's suggestion that the decision on article 59 should be deferred (*ibid.*, paragraph 64); but on reflection he found it difficult to accept because, as Mr. François had said (*ibid.*, paragraph 58), the Commission was expected to express an opinion on a technical matter which profoundly affected substance. Clearly, the attitude of governments to the draft as a whole would be greatly influenced by whether or not its acceptance affected previous conventions. In his opinion, the only correct course was to maintain article 59, for without such a provision a multilateral convention would hardly by acceptable to governments. Examples of analogous provisions occurred in the Havana Convention of 1928 (article 24), the 1958 Convention on the Territorial Sea and the Contiguous Zone (article 25),[1] the 1958 Convention on the High Seas (article 30) [2] and the second draft on extradition prepared by the Inter-American Council of Jurists (article 21).[3] Manifestly, without such a provision States would feel that they were taking a leap in the dark by accepting a general convention of the kind now under consideration.

7. Mr. Ago had suggested another solution viz., that it should be left to the parties to specify which of their existing bilateral conventions would remain unaffected by the multilateral instrument (*ibid.*, paragraph 25). Presumably, that would mean that signatory States would have to itemize in a separate declaration the bilateral conventions remaining in force. That method was not commonly used and, he believed, was less acceptable than the system of article 59. If the method proposed by Mr. Ago was followed, the States would, before ratifying or acceding to the multilateral convention, have to negotiate with all the other States with which they had concluded conventions relating to consular questions, and as a consequence the entry into force of the instrument being prepared by the Commission would be delayed.

8. Referring to article 59, paragraph 2, he said that one could not exclude the possibility that States parties to the multilateral instrument might in future wish to conclude more detailed bilateral conventions or even conventions departing in some respects from the multilateral instrument. Not to make allowance for that possibility would be to deny the possibility of development of international law. A provision of the kind contained in that paragraph was therefore essential.

9. Accordingly, in the light of all those considerations, he agreed with Sir Gerald Fitzmaurice that article 59 was indispensable; the wording of course could be left to the Drafting Committee.

10. Mr. BARTOŠ said that the issue raised by article 59 was of the greatest importance and could not be glossed over, particularly as there was considerable divergence of opinion among members. The Commission should view the matter by reference to its own task, which was to assist the General Assembly in fulfilling the aims of Article 13 of the United Nations Charter by encouraging Member States to codify and develop international law without preventing them from regulating matters of detail through bilateral agreements.

11. Unlike some members, he believed that there was a hierarchy of rules of international law so far as they were embodied in contractual instruments. All multilateral conventions contained certain obligatory clauses but left a considerable margin to signatory States to fill any gaps by means of bilateral agreements.

12. By accepting a general convention a State assumed certain legal obligations. Accordingly, a draft of the type under consideration made a positive contribution to the development of international law, but at the same time the proposed text contained a destructive element in that States could still regulate certain matters bilaterally, even in a manner at variance with the multilateral instrument. That difficulty had been well illustrated when the agreement on frontier health regulations concluded between Greece, Yugoslavia and Bulgaria, which went considerably beyond the International Sanitary Regulations, had been severely criticized in the World Health Assembly because it might create problems for other States. An analogous problem arose when preferential treatment was granted to certain

---

[1] United Nations Conference on the Law of the Sea, *Official Records, Plenary Meetings*, (United Nations publication, Sales No. 58.V.4, vol. II), document A/CONF.13/L.52, p. 135.

[2] *Ibid.*, document A/CONF.13/L.53, p. 138.

[3] Inter-American Juridical Committee, *Second Draft Convention on Extradition*, Pan American Union (Washington, D.C.), p. 24.

categories of consuls in bilateral conventions, since that might be regarded as discriminatory vis-à-vis third States.

13. The Commission, being anxious to ensure the proper conditions for the exercise of consular functions, had decided to prepare a convention and to restrict its draft in a way that would fulfil that purpose; but if States were to be left free to ignore certain principles laid down in the draft or to contract out of them, the Commission would have succeeded neither in codifying nor in promoting the progressive development of international law. That consideration was not a technical one but one of substance. Of course, the Commission was free to frame model rules as it had done in the case of arbitral procedure, but in the present case it was not concerned with the drafting of model rules for such rules seldom found practical application.

14. Turning to the question of the relationship between general and bilateral conventions, he expressed the view that the former could never exclude the conclusion of the latter, subject to the proviso, however, that a bilateral convention must not conflict with the principles and purposes of a general convention on the same subject. Mr. François had been very cautious in his exposition of that doctrine (*ibid.*, paragraph 56). The Commission could clearly not regulate all the matters pertaining to consular intercourse and immunities; yet it could also not admit the idea that States were free to conclude bilateral conventions that would reverse or compromise the whole system laid down in the draft. It was already a considerable concession to accept transitional provisions that would give States time to decide which bilateral conventions would remain in force. In the meantime it must be absolutely clear that States which solemnly undertook to respect the principles of a general convention could not subsequently conclude bilateral conventions that were based on principles at variance with it.

15. Mr. TUNKIN said it was generally agreed that the Commission's duty was to formulate rules of international law that would be acceptable to States, and the divergence of opinion as to the means of making them acceptable should not be exaggerated. The Special Rapporteur had rebutted the argument that a provision of the kind contained in article 59 would greatly impair the value of the draft as a whole. State practice in the matter of consular relations was exceedingly diverse, and any attempt to impose absolute uniformity by means of a multilateral convention that abrogated existing bilateral conventions would only delay ratification of the present draft. On the other hand, if the draft could be rendered acceptable to all or at least a large majority of States, its unifying influence was likely to make itself felt soon, and once the convention gained in authority bilateral conventions might begin to lapse.

16. The principle, stated in Mr. Ago's proposal, that States would be entitled to maintain existing bilateral conventions after the entry into force of a multilateral convention was self-evident; but the suggestion, made by Mr. Ago at the previous meeting, that an express declaration to that effect was necessary if the bilateral conventions were not to be regarded as abrogated would impair the draft's chances of being ratified, for governments would hardly be willing to itemize in a special declaration all the bilateral conventions which they intended to remain unaffected by the multilateral instrument.

17. By reason of those practical considerations he thought that article 59 in the form submitted by the Special Rapporteur should be approved.

18. Mr. SCELLE said that Mr. Bartoš in his admirable exposition of the problem had quite rightly emphasized that everything depended on the Commission's intention. Mr. Bartoš had clearly stated the legal doctrine concerning the relationship of the present draft to previous conventions if it were to be regarded as a general multilateral instrument. He (Mr. Scelle) greatly hoped that the Commission would not approve article 59 in its present form since it was at variance with that indisputable doctrine.

19. The question to be settled was how to obviate conflicts between two successive conventions. Parties to a general convention could not conclude a limited convention that was at variance with the former unless they denounced it. The purpose of the Commission should be to ensure that existing bilateral conventions would remain in force and that future ones could be concluded that amplified the present draft, provided that they did not conflict with its provisions. Thus article 59 should be modified in that sense so as to lay down what was in effect a self-evident principle, and he accordingly submitted the following alternative text:

" 1. The signatories to the present multilateral convention agree that the bilateral consular conventions entered into between them before, or to be entered into between them after, the present instrument shall retain or shall acquire complete and entire validity to the full extent to which the said conventions confirm, supplement, extend or amplify the provisions hereof.

" 2. In the event of a dispute concerning any of these points, they agree to institute conciliation or arbitration proceedings."

20. He would have been able to support Mr. Ago's proposal had it contained the essential proviso that existing or future bilateral conventions must not conflict with the principles laid down in the multilateral instrument.

21. Clearly, some provision must be made for the settlement of disputes concerning the reconcilability of the provisions of two conventions. The fate of the Commission's own draft on arbitral procedure proved the reluctance of governments to resort to arbitration. He had accordingly in paragraph 2 of his proposed text provided, in addition to arbitration, for the conciliation procedure referred to in Article 33 of the United

Nations Charter. The advantage of that procedure was that once it had been initiated the bilateral convention in question would remain in suspense. It should also be conducive to the progressive development of international law.

22. Mr. VERDROSS said that the Special Rapporteur had raised two questions in his most recent statement. The first concerned the relationship between the proposed multilateral instrument and pre-existing bilateral conventions; the second concerned its relationship to future bilateral conventions. For practical reasons, the majority of the Commission seemed prepared to accept the substance of paragraph 1 of the Special Rapporteur's draft article 59, concerning bilateral conventions antedating the multilateral instrument. With regard to the second question, the Special Rapporteur had said that States would be free to enlarge upon the provisions of the multilateral instrument and to develop international law through bilateral agreement. The vital question that remained was whether a State, having ratified the multilateral instrument, could conclude a bilateral convention restricting the rules of that instrument. The point was so important that he thought it warranted a vote in the Commission. Put in another way, the question was whether the rules laid down in the multilateral instrument could become applicable to a ratifying State only in the absence of bilateral conventions. In his opinion, the Special Rapporteur's verbal assurance conflicted with the wording of article 59. Perhaps the Special Rapporteur could eliminate the contradiction by accepting the addition of the words " which supplement and extend the rules laid down in these articles " at the end of paragraph 2 of article 59.

23. Mr. AGO said that the Special Rapporteur's and the Secretary's references to the codification of the law of the sea as examples of relations between multilateral and bilateral agreements were not entirely pertinent to the case now before the Commission. In dealing with consular intercourse and immunities, the Commission was faced, not with a few isolated bilateral conventions relating to certain specific points (as in the case of the law of the sea) but with a vast network of such conventions covering frequently all aspects of consular relations. The Commission's task was to unify those provisions. He was therefore surprised by the Special Rapporteur's claim that his system would simplify the achievement of the Commission's purpose. On the contrary, the Commission's work of codification would be largely nullified if all existing bilateral consular conventions were to remain in force automatically. The only purpose of the new instrument would be to fill the gaps which were not covered by bilateral conventions.

24. While he agreed that the proposed instrument should not be merely a set of model rules, he could not go to the opposite extreme, as did certain members. If it were assumed that the proposed instrument could entirely supplant the variety of rules laid down in bilateral consular conventions, its acceptance would necessarily carry with it the termination of all those bilateral conventions, with no possibility for the parties to maintain them in force even by positive action. That would be very difficult for some States to accept, particularly since certain bilateral conventions were extremely detailed and progressive; indeed, some had provided material for the Commission's draft. There would be no reason for the States concerned not to maintain such bilateral conventions in force, but article 59 should be so phrased as to convey that that would be the exception rather than the rule, and that States should expressly agree between them that certain specific bilateral conventions would remain in force. A similar reservation should be added concerning future bilateral conventions that might go further than the provisions of the multilateral instrument; while in practice it might be less important to provide for the possibility of concluding new bilateral conventions, it should be borne in mind that States could not be prevented from doing so.

25. He could not entirely agree with Mr. Scelle that the new instrument would represent *jus cogens* and that no existing or future bilateral consular convention could depart from the principles laid down in that instrument, although the bilateral convention might confirm, supplement, extend or amplify the provisions of the multilateral instrument. In such a matter as consular intercourse and immunities, it was clearly unnecessary to lay down too many imperative rules. Moreover, two States could agree to give their respective consular officers wider privileges than those provided for in the Commission's articles. For example, the Commission had decided not to extend certain privileges and immunities to honorary consuls; but a bilateral convention might make those facilities applicable to such officials. Furthermore, certain States might agree to grant consular officers certain exemptions in excess of those provided for in the draft. Hence the Commission's draft could hardly stipulate that no bilateral convention should derogate from the provisions of the multilateral instrument. Nor did he think that the absence of such a stipulation would matter greatly; for surely a State which was prepared to ratify the new multilateral instrument would not, in a bilateral convention, derogate from its fundamental principles.

26. To sum up, he could not agree with the system proposed by the Special Rapporteur; rather he considered that the most the Commission could do would be to draft article 59 in terms which would allow States to maintain certain bilateral conventions in force, without however stating that all such agreements would automatically remain in force. The Commission should beware of laying down too categorical a rule in the matter.

27. Mr. HSU said he was disappointed by the texts proposed as replacements for the Special

Rapporteur's article 59. Mr. Ago's proposal was an improvement so far as form was concerned, and the first proposition in that text was more acceptable than the Special Rapporteur's paragraph 1. In the second proposition, however, Mr. Ago seemed to have accepted the Special Rapporteur's system. In his (Mr. Hsu's) opinion, there was no need for any such provision, which would merely serve to nullify the Commission's work.

28. If a proposal along the lines of the Special Rapporteur's article 59 or of Mr. Ago's text were introduced at the plenipotentiary conference on consular intercourse and immunities, he might find himself in a position where he would be obliged to vote for it for the sake of agreement. But the Commission's duty was to try to lay down rules of international law acceptable to the community of nations; the special interests of individual States must be left aside, and the purely political considerations involved should be left to diplomats. Accordingly, he believed that article 59 should be omitted, unless the objections that had been raised could be disposed of satisfactorily.

29. Mr. EDMONDS said that the Commission should approve an article on the subject of the relationship between the consular draft and bilateral conventions, but he was not in favour of the Special Rapporteur's wording of article 59. In his opinion, there was no question of codification; the article was concerned with the extent to which the provisions of the draft would affect existing or future bilateral agreements. Governments contemplating signature of the new multilateral instrument would be concerned primarily with its effect on existing bilateral conventions and on their freedom to conclude other such agreements. The majority of bilateral conventions now in force went much further and into greater detail than did the Commission's articles; it was therefore unreasonable to suppose that any governments which approved the Commission's draft would wish to abandon bilateral conventions concluded after much negotiation and dealing with particular problems arising in the consular relations between the Parties thereto.

30. His main criticism of the Special Rapporteur's draft related to the second sentence of paragraph 1. It was extremely difficult to determine what questions would not be governed by the previous conventions. It might even be said that most of the Commission's articles applied in some degree to the provisions of all existing bilateral consular conventions. In order to remove any doubts on that score, he suggested that the article might be drafted in the following terms:

"The provisions of these articles shall not affect any existing bilateral convention concerning consular intercourse and immunities. Any party accepting these articles is free to enter into any bilateral convention concerning consular intercourse and immunities. Such convention shall solely govern their relations except to the extent that the parties specifically adopt the provisions of these articles in whole or in part."

31. The first sentence of that proposal expressly preserved the validity of existing consular bilateral conventions. If parties believed that the new multilateral instrument improved upon the provisions of those conventions, they would be free, but under no obligation, to renounce them, and the validity of any provisions they had accepted in order to meet special problems would not be affected. Under the remainder of the proposal, States would be free to conclude bilateral conventions in the future, on the understanding that their acceptance of the Commission's articles did not preclude their acceptance of bilateral conventions particularly suited to their needs. In that way, the progressive provisions of existing bilateral conventions would not be automatically abrogated by acceptance of the multilateral instrument and, if States regarded any of the provisions of the multilateral instrument as an improvement over those of bilateral conventions, they might benefit by them. He could not agree with the contention that all existing bilateral conventions should be extinguished by the Commission's draft or that that draft should prevent the conclusion of more detailed and more progressive bilateral conventions in the future.

32. Mr. FRANÇOIS agreed with Mr. Scelle that it would be inadmissible if the Commission approved a text under which, in contravention of the established principles of international law, a State could subscribe to a multilateral instrument and would be free at the same time to enter into bilateral conventions stipulating provisions at variance with the multilateral instrument. Nevertheless, he could not regard Mr. Scelle's remarks as very pertinent to the Commission's draft; they were more pertinent to such topics as State responsibility, human rights and the law of the sea. During the past weeks, the Commission had been primarily concerned with working out compromise provisions on the rights, privileges and immunities to be granted to consuls, and it was therefore hard to say what the principles of international law in the matter really were. In his opinion, a State which failed to grant consuls exemption from stamp duty or which refused them the right to fly the flag of the sending State on all means of transport would hardly be committing a violation of the rules of international law.

33. Codification carried with it the danger of creating unduly rigid law and of disregarding divergent opinions. The proposed multilateral instrument should take into account the practice of States as reflected in bilateral conventions, which governed only their relations *inter se*. If parties to such conventions wished to go further than did the Commission's draft, or not so far, they would hesitate before signing an instrument containing a clause which precluded them from

doing so. He was therefore in favour of retaining the Special Rapporteur's text, perhaps with some drafting improvements; he could not support Mr. Scelle's proposal. Commenting on that proposal, he said it would be extremely difficult to determine the extent to which bilateral consular. conventions confirmed, supplemented, extended or amplified the provisions of the multilateral instrument ; secondly, while he was usually in favour of arbitration, as a mode of settling disputes, he did not think that the procedure was appropriate in the circumstances referred to in Mr. Scelle's proposal. In his opinion, States should be given latitude to depart from the provisions of the multilateral convention in existing and future bilateral conventions, since the provisions that the Commission had adopted related to practice rather than to principle.

34. Mr. AMADO did not think that the Commission should be unduly concerned with the reaction of governments to the draft instrument it was preparing; those reactions would become evident at the plenipotentiary conference and, besides, governments would have an opportunity of commenting on the text in the near future. The Commission's task was to codify international law and promote its progressive development; he had been surprised to hear Mr. François express the view which amounted to a denial of that task.

35. Nor could he agree with Mr. Tunkin's view that the Special Rapporteur's draft article 59 should stand on the ground that its adoption would hasten the unification of international law on consular relations. The Commission's duty was to state the principles for such unification in the form which it considered most desirable, and to submit that instrument to the conference. The existence of the instrument would serve as a rallying point for States, which would gradually see their way towards ratifying it. But if the instrument were opened for signature with an escape clause, giving all signatories the latitude not to comply with its provisions, the unification of international law on consular intercourse and immunities would in practice be retarded. He therefore believed that article 59 should be omitted, and that the draft should be forward to governments for their comments without any such provision.

36. Mr. PAL said that some provision along the lines of article 59 would have to be retained. He did not agree that, even in the absence of such a provision, the normal rules of interpretation would always produce the results set forth in the Special Rapporteur's draft. The rules referred to by the several speakers might apply only if the two sets of norms were on the same juridical plane. Norms purported to be of law could not be subject to modification by mere consensual rules of some of the parties unless the set of legal norms itself subjected them to such modification.

37. If the intention of the Commission was to raise the provisions of the draft to the level of law, one could legitimately expect future bilateral conventions to be brought into conformity with those provisions. If there were any gaps in the provisions of the draft, it would be legitimate to allow those gaps to be filled by bilateral agreement. For example, the Consular Convention of 1952 between the United Kingdom and Sweden contained detailed provisions on shipping questions which were not covered at all by the Commission's draft. In his opinion, if the United Kingdom and Sweden accepted a general instrument such as that which the Commission was preparing, the provisions concerning shipping in their bilateral treaty would remain in force between them. He also believed that States would remain free to enter into bilateral conventions in the future also for the purpose of filling such gaps in the Commission's draft articles.

38. It had been suggested that a provision along the lines of article 59 would nullify the effects of the whole draft. He could not agree with that extreme view. That again depended on what the Commission purported to do in making the rules. If the intention was to leave the field to the agreements of the parties, the rules now framed operating only in the absence of such agreements, there would be nothing wrong in the present provision. The whole draft might be declared operative only in the absence of an agreement between the parties. It was quite common for municipal law, particularly in some fields like partnership, to state that certain provisions applied in the absence of agreement between the parties. Provisions of that nature were intended to fill any gaps left by the parties to an agreement. Accordingly, there would have been nothing objectionable in adopting a similar approach when codifying certain provisions of international law, if the purpose was the same. He, however, understood the purpose of the Commission to be quite different. The Special Rapporteur himself claimed unifying effect for the rules; others claimed them as giving norms of law, though not existing, yet meeting the demands of progressive development in the field. With that object in view such a wide provision would be wholly inapt.

39. The problem for the Commission was how far it wished to go in imposing uniform provisions, particularly for the purpose of avoiding discriminatory practices. His impression was that the Commission intended to state the minimum rules on the subject of consular intercourse and immunities. On that basis, the Commission might make provision for leaving pre-existing bilateral conventions unaffected so far as they did not fall short of that minimum and insisting that future bilateral agreements must not depart from the minimum rules, on a principle analogous to that underlying the most-favoured-nation clause in the commercial field. He could not, however, go so far as Mr. Scelle who wanted in fact to make all the articles of the draft imperative. Further, consular relations having themselves been declared in the draft as based on consent,

there would be nothing wrong in allowing the principle of the maxim *volenti non fit injuria* to operate in that context.

40. In conclusion, he considered that the formula suggested by Mr. Ago would be of assistance in the drafting of a provision for the purpose.

Organization of the Commission's work

41. Mr. LIANG, Secretary to the Commission, suggested that the Commission, following its practice at previous sessions, should devote two meetings, possibly on 20 and 21 June 1960, to the discussion of the topic of State responsibility (agenda item 3). It was desirable that the Commission's discussion of the topic should take place while the observer for the Inter-American Juridical Committee was present at Geneva. He recalled that the topic was on the agenda both of the International Law Commission and of the Inter-American Council of Jurists. The observer for the Inter-American Juridical Committee, which carried on the preparatory work for the Inter-American Council of Jurists, would wish to hear the Commission's discussion on the subject of State responsibility and he was not in a position to remain until the end of the Commission's present session.

42. He said that Professor Sohn of Harvard Law School was present at Geneva. It was desirable, in view of the study on state responsibility which was being pursued by the Harvard Law School, that Professor Sohn should also be able to attend the Commission's discussion on that subject.

43. He thought the adoption of his suggestion would not interfere with the Commission's schedule of work because, while the Drafting Committee was preparing the final draft articles on consular intercourse and immunities, the Commission would have to consider other items on its agenda. Subject therefore, to the views of the special rapporteurs on the topics of consular intercourse and State responsibility, he ventured to suggest that the Commission should devote two meetings early in the following week to a discussion of the subject of state responsibility.

44. Mr. SANDSTRÖM said that he could not approve the suggestion made by the Secretary to the Commission. The Commission should give priority to the topic of *ad hoc* diplomacy (agenda item 5). It was very important that the Commission should discuss that topic before the Vienna conference on the subject of diplomatic intercourse and immunities. It was unfortunate that the Commission could only prepare a preliminary draft on the subject of *ad hoc* diplomacy and would have no time to obtain government comments on that draft in accordance with the normal procedure. But the Commission should at least prepare a preliminary draft for the benefit of the Vienna conference.

45. Mr. SCELLE supported Mr. Sandström; the Commission had barely the time necessary to complete its discussion of the draft on consular intercourse and immunities and it was essential that it should also discuss *ad hoc* diplomacy. Besides, he did not think that any useful purpose was served by short general discussions on subjects to which the Commission could devote no more than one or two meetings during a session.

46. Mr. YOKOTA shared the misgivings expressed by the previous speakers with regard to the time available to the Commission. Speaking as Chairman of the Drafting Committee, he added that, if requested by the Commission, the Committee could submit some of the articles of the draft on consular intercourse before the others in order to speed up the work of the Commission.

47. Mr. LIANG, Secretary to the Commission, pointed out that he had not suggested that the subject of State responsibility should receive priority, but simply that the Commission should adhere to its custom of devoting some attention to that subject at each of its sessions. He had merely suggested that two meetings might be devoted to the discussion of the subject of state responsibility. He considered that if the Commission were not to discuss that subject on Monday 20 June, it would still have to do so on some later date, when the observer for the Inter-American Juridical Committee and Professor Sohn would no longer be present.

48. Mr. GARCÍA AMADOR said he was surprised by the strong resistance to the Secretary's suggestion. He recalled that he had agreed that priority should be given to the question of *ad hoc* diplomacy, in view of the proposed Vienna conference (527th meeting, paragraph 13). He pointed out, however, that, by virtue of an express decision of the General Assembly, the Commission was asked to give priority to the subject of state responsibility.

49. For his part, he had no great interest in a very short discussion limited to one or two days, but he felt that such a discussion would serve at least to acknowledge the interest which the Inter-American Juridical Committee and the Harvard Law School took in the work of the Commission on the subject of state responsibility.

50. Mr. HSU said that to allow two meetings for a discussion of state responsibility seemed unjustifiable in view of the lack of time. He thought, however, that the Commission might like to set aside one meeting or even half a meeting for the Special Rapporteur and Professor Sohn to report on their study of the subject.

51. Mr. AGO thought that a special meeting should be scheduled at which the Commission would hear the Special Rapporteur on the topic of state responsibility, Professor Sohn of Harvard Law School and the observer for the Inter-American Juridical Committee. He did not feel, however, that a very short discussion, limited to

some two meetings, would do justice to the topic of state responsibility. It was desirable that the Commission should concentrate on the topic at one of its future sessions.

52. Mr. GARCÍA AMADOR said that his views on the subject of state responsibility were set forth in the various reports which he had prepared as special rapporteur (A/CN.4/96, 106, 111, 119 and 125). Accordingly, he felt no special urgency to address the Commission on the subject. He was, however, greatly interested in hearing the views of members. Even the brief discussions which had taken place at previous sessions had provided him with valuable material for the preparation of his reports. It was not unlikely that the observer for the Inter-American Juridical Committee and Professor Sohn were very much in the same position and were much more interested in hearing the views of the members than in addressing the Commission.

53. Mr. EDMONDS suggested that the discussion should be limited to certain specific aspects of the question of state responsibility.

54. Sir Gerald FITZMAURICE said that, for his part, he was prepared to attend one or two additional meetings for the purpose of discussing the subject of state responsibility, if the Commission felt that its ordinary meetings were going to be fully taken up by the subjects of consular intercourse and *ad hoc* diplomacy.

55. He noted that at its previous session the Commission had briefly discussed a draft on state responsibility prepared by the Harvard Law School. Since then the Harvard Law School had prepared a new draft which took into account observations made by members of the Commission at the time. He suggested that Professor Sohn should be invited to explain the difference between the latest draft and its predecessor. The members of the Commission would thus have an opportunity to comment on any points which attracted their attention as a result of that explanation. He suggested that the Commission should devote the meeting on 20 June 1960, to hearing Professor Sohn and discussing his statement. The Commission would then be in a position to decide whether a second meeting should be devoted to the subject.

56. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to devote its meeting on Monday, 20 June 1960, to the subject of state responsibility and to hear Professor Sohn of Harvard Law School at that meeting. In addition the Commission might hear the observer for the Inter-American Juridical Committee if he should wish to speak on the subject.

It was so agreed.

The meeting rose at 1 p.m.

562nd MEETING

Wednesday, 15 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. Mr. YASSEEN thought that the difference of opinion on the subject of article 59 reflected, firstly, the desire to secure acceptance of the draft convention by a large member of States and, secondly, the desire to safeguard the authority of the draft when once it had been adopted. Some members had argued that the convention should not prevail over pre-existing bilateral agreements and should not prevent the parties thereto from making bilateral agreements departing from its provisions. Others, however, had taken the view that the multilateral instrument when once adopted, prevailed and that the latter, which had the object of unifying the international law concerning consular relations, should prevail over pre-existing bilateral agreements and debar the parties from departing from its provisions by international agreements. Those members thought it undesirable to allow States which had accepted the draft to regard that acceptance as a mere formality and to consider themselves completely free to depart from its provisions.

2. That reasoning, though correct in principle, did not apply with equal force to all the provisions of the draft. Some of those provisions were fundamental — for example, those of article 27 *(Inviolability of the archives and documents)* and article 29 *(Freedom of communication)* — whereas others constituted what French jurists termed " règles supplétives " or " règles dispositives ". The fundamental principles should prevail, but the same could not be said of the " règles dispositives " or " supplétives ". In the circumstances, the Commission might specify which of the draft articles should be regarded as mandatory, or in other words as provisions which signatories could not contract out of by bilateral agreement.

3. It might be asked whether it was possible to lay down mandatory rules by means of multilateral conventions. In that connexion, he drew attention to Article 103 of the Charter, an instrument which, despite its very special character, was technically nothing other than a multilateral convention.

* Resumed from the 561st meeting.