Document:-
A/CN.4/SR.562

Summary record of the 562nd meeting

Topic:
Consular intercourse and immunities

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

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.

4. In his opinion, a multilateral convention should have greater force than a bilateral treaty. It was one of the cases in which form could have an effect on substance. For those reasons, he considered that the Commission could well indicate those rules which it regarded as mandatory.

5. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Ago's remarks (see 561st meeting, paragraph 23), said that the retention of article 59 as it stood would not diminish the importance of the draft articles. Existing bilateral conventions governed only a small part of consular relations throughout the world. The proposed multilateral instrument would serve to regulate consular relations between pairs of States which were at present not bound by any bilateral treaty, in other words, the greater part of inter-State relations. For evidence in support of his view he would mention only the fact that there were now over ninety States in the world and that before long there would be more than 100. Any one State had bilateral consular conventions with only a small fraction of the total number of States. Moreover, the multilateral convention was to apply even in cases where States were bound by a pre-existing bilateral convention, but in such a case it would govern only those questions which were not settled by the bilateral convention.

6. With reference to Mr. Yasseen's remarks, he said that articles 27 and 29 expressed universally accepted rules of customary national law. Even States which did not adopt the draft would have to observe those rules in the same manner as before.

7. He thought that it would be undesirable to lay down any rigid rule to prevent States from departing from the provisions of the draft articles. States should be free to grant not only greater, but also less extensive privileges than those stipulated in the draft articles, so long as their agreement affected only the relations between them. For example, two States might wish, by agreement, to grant to their respective consuls a lesser measure of customs exemption than that laid down in the draft articles. It was extremely unlikely, however, that two States would wish to depart in any way, in their reciprocal relations, from such rules as that of the inviolability of consular archives.

8. Mr. AGO said that the Special Rapporteur had assumed that all the bilateral provisions on consular intercourse were contained in consular conventions. In fact, provisions of that type were contained in a vast number of treaties, some of them very old, dealing with other subjects; treaties of establishment, treaties of friendship, commercial treaties and navigation treaties often contained provisions on consular intercourse and immunities.

9. Under the Special Rapporteur's draft article 59, all pre-existing provisions on consular relations would continue to stand, unless of course the parties agreed otherwise. For his part, he thought that that system would not favour the progressive modernization of the subject. It was by reason of that consideration that he had suggested (560th meeting, paragraph 25) that bilateral provisions should only remain in force between States both of which had accepted the draft if they so agreed. Under that system, the presumption would be in favour of the draft articles rather than in favour of the pre-existing provisions, as suggested by the Special Rapporteur.

10. With regard to Mr. Yasseen's question, he said that in his opinion the reply was that it was very hard to find, in an international multilateral convention, rules of a mandatory character incapable of being varied by bilateral treaty.

11. In fact, even if some of the rules laid down in the draft articles were to be specifically regarded as constituting *jus cogens*, it would be very difficult to prevent two States from adopting different rules in their reciprocal relations. He considered, however, that the fears expressed in that respect were baseless in so far as the fundamental rules of consular law were concerned. It was unthinkable, for example, that two States would by agreement decide that their respective consular archives would not be inviolable.

12. In conclusion, he suggested that the Commission should be asked to decide on the principle of including a provision which recognized the possibility for States of maintaining by mutual agreement pre-existing conventions and concluding new ones. When the Commission had taken a decision on that question of principle, the Drafting Committee could prepare an appropriate text.

13. Mr. YOKOTA supported the principle embodied in Mr. Ago's proposal (561st meeting, paragraph 1), which laid down the minimum requirement in the matter. States had an incontrovertible right to maintain in force, in their mutual relations, existing bilateral conventions concerning consular intercourse and immunities. Nor could their right to conclude such conventions in the future be questioned. Many points of detail which were dealt with in bilateral conventions, or which could be dealt with in the future in such conventions, were not covered by the draft.

14. With regard to the problem of the possible conflict of the provisions of the draft with those of bilateral treaties, he felt that the text proposed by Mr. Scelle (561st meeting, paragraph 19) went too far; it would impose upon States obligations which they would not readily accept. On the other hand, it would undermine the whole purpose of the draft if States were left completely free to depart from its provisions in all respects. The wisest course would be to refrain from including in the draft any explicit provision on the question and to leave such conflicts to be settled by the normal rules of interpretation.

15. Sir Gerald FITZMAURICE said that it seemed somewhat ungrateful to suggest that all existing provisions touching on consular matters should disappear upon the adoption of the Commission's draft articles. The Commission had largely drawn its inspiration from existing bilateral

consular conventions and from provisions in treaties of commerce and establishment. Surely, there would be no great harm if, so long as the parties so wished, existing provisions were maintained in force.

16. If the Commission had intended the proposed multilateral instrument to supersede all existing bilateral consular conventions, then, in strict logic, it should have covered the whole subject of consular intercourse and immunities in its draft. The States parties to existing bilateral conventions could not be expected to terminate them in favour of a multilateral instrument, unless that instrument covered all the details dealt with in the bilateral conventions.

17. Actually, the Commission had not intended to formulate a complete substitute for existing consular conventions. Its aim had been to state the fundamental law on the subject of consular intercourse. Two countries which were not bound by any bilateral convention could save themselves the trouble of preparing such a convention by simply applying the Commission's draft articles; but they might find it necessary to supplement the draft in some respects.

18. In that connexion, he pointed out that not all countries had the the same degree of interest in all the matters covered by consular law. Where there was a large resident foreign population in a country, bilateral consular conventions between that country and foreign States could be expected to contain detailed provisions on such question as the administration of the estates of deceased nationals of foreign countries. On the other hand, a country having large shipping interests would include, in the consular conventions which it signed with other countries, mainly provisions on shipping matters.

19. The Commission's text, for its part, contained an assembly of basic or necessary clauses, but did not cover all the details of such subjects as the administration of estates and shipping. It was therefore essential to make it clear that the Commission did not intend its text to affect the continued operation of existing conventions — if the parties wished to maintain them in force — or to prejudice the conclusion of future conventions.

20. Referring to the question whether States would be free to depart, by bilateral agreement, from the rules laid down in the draft articles, he said that in his opinion none of the provisions of the draft represented *jus cogens*. The departure from one of those provisions would only affect the relations between the two countries concerned, and he could not see any basis for excluding such a possibility.

21. It was true that there were certain rules, such as that concerning freedom of communication, which constituted fundamental principles of consular law and it was almost inconceivable that any two countries would deliberately provide in a bilateral treaty for the exclusion of such rules in the relations between them. But even if such an extraordinary situation were to arise — for example, if two very friendly countries were to agree on some mitigation of certain essential privileges — possibly as a concession to uninformed public opinion — there was no reason why those two countries should not be allowed to do so as between themselves. Their agreement in that respect would not alter in any way their obligations towards other countries under the multilateral instrument.

22. He agreed with the thought behind Mr. Ago's proposal, which proceeded from the desire not to encourage countries to maintain pre-existing bilateral provisions. In practice, however, the method suggested by Mr. Ago — viz., itemizing in a special declaration the bilateral conventions which were to remain unaffected by the multilateral instrument — would give rise to difficulties. Before signing the multilateral instrument, a government would have to examine all its bilateral treaties, and not merely the consular conventions, to determine which provisions dealing with consular law it wished to maintain in force. Moreover, the government would have to communicate with that of the other party with a view to concerting policy in the particular matter. Otherwise, a situation might arise in which one party made a declaration that it wished to maintain a particular bilateral treaty but the other party to that treaty failed to take similar action.

23. For all those reasons, the Commission should decide the question of principle whether its draft should contain a provision regarding the maintenance in force of existing bilateral conventions and the conclusion of such conventions in the future. If the Commission decided that such a provision was necessary, as he thought it was, a suitable formula could be drafted.

24. Mr. VERDROSS drew attention to article 33 of the Harvard Draft, which contained the same idea as the Special Rapporteur's text for article 59.

25. The arguments put forward by Mr. Ago (561st meeting, paragraph 24) and Mr. François (*ibid.*, paragraph 33) had convinced him that uniformity was not essential in the matter of consular law. It was therefore necessary to leave States free not only to expand, but also to curtail, by bilateral convention, the privileges set forth in the draft articles. Perhaps a passage should be included in the commentary stating that the freedom of States to conclude such bilateral conventions was limited by the general rules of international law.

26. That approach would not reduce the draft to the status of a mere model set of rules. The draft articles would apply in all cases where two States had not stipulated otherwise by bilateral convention. The fact that a rule did not constitute *jus cogens* did not mean that it was not binding. The rule would apply in the absence of any different treaty provisions.

27. The Commission should take a decision on three questions : (1) Whether, after acceptance of the multilateral instrument, pre-existing bilateral conventions concerning consular intercourse and immunities would remain in force; (2) whether

States would be able to conclude new bilateral conventions on the subject in the future; and (3) whether the freedom of the parties in the matter was subject to the observance of the general principles of consular law, as suggested by Mr. Scelle.

28. Mr. MATINE-DAFTARY said that, in principle, he agreed with the views expressed by Mr. Scelle (561st meeting, paragraph 18 *et seq.*) and Mr. Bartoš (*ibid.*, paragraphs 10 *et seq.*), but thought that both the text proposed by Mr. Scelle and that proposed by the Special Rapporteur for article 59 entailed some danger.

29. If Mr. Scelle's proposed text was adopted, States at present bound by bilateral conventions would oppose the draft. And it was desirable to make the draft articles acceptable precisely to those States which maintained widespread consular relations, and for that reason, had in the past concluded a large number of treaties on the subject.

30. The text proposed by the Special Rapporteur was equally fraught with danger. If, as that text implied, the adoption of the draft did not change the existing situation materially, the draft articles would attract little attention from States.

31. Lastly, he could not accept the proposal of Mr. Edmonds (*ibid.*, paragraph 30) for it would encourage particularist tendencies. The Commission could not adopt such a proposal without renouncing its very role as the organ entrusted by the General Assembly, under Article 13 of the Charter, with the important mission of encouraging the progressive development of international law and its codification.

32. In conclusion, he agreed with Mr. García Amador (560th meeting, paragraph 64) that the question dealt with in article 59 had been raised prematurely. It would be better to submit the articles to governments first. If governments wished to raise the question of the relationship of the draft to pre-existing treaties, they could do so in their comments. Indeed, they could raise it at the much later stage of an international conference. He pointed out in that connexion that article 25 of the 1958 Convention on the Territorial Sea and the Contiguous Zone, which stated that the provisions of that Convention did not affect agreements already in force, as between States Parties to them, had not been drafted by the Commission but had been introduced into the Convention during the Conference on the Law of the Sea. Similarly, article 30 of the 1958 Convention on the High Seas had been introduced at the Conference. In his view, the introduction of those provisions had diminished the value of the two conventions and explained to some extent why they had attracted only few ratifications.

33. For all those reasons, he suggested that the question of including an article along the lines of article 59 should not be dealt with by the Commission at that stage.

34. Mr. SCELLE said that Mr. Yasseen and Mr. Verdross had admirably drawn attention to the central issue raised by article 59 : did international law admit the juxtaposition of permissive and mandatory rules ? To take an analogy from private law, an example of the former were rules pertaining to a marriage settlement. If, as Mr. Bartoš considered was the case, the Commission was engaged in preparing a draft multilateral convention, it would be a contradiction in terms to envisage a convention lacking in obligatory rules. Naturally, it could also contain rules of *jus dispositivum* which would serve as a guide to the parties but which they were not bound to follow.

35. It had never been suggested that the present draft should supersede all existing bilateral conventions; his own text, in which he had no particular pride of authorship, emphasized that previous bilateral conventions would remain in force and that others could be concluded after the ratification of the multilateral convention.

36. He did not suppose that Mr. Ago's remarks could have been interpreted to mean that in bilateral conventions States were free to derogate from principles of customary international law; such principles were obligatory. True, it was difficult sometimes to determine whether a particular convention initiated a new rule that would become customary law or whether it conflicted with an existing rule of customary law. In case of inconsistency, the older rule would prevail. In the present draft, however, the Commission had included a number of customary rules which were clearly mandatory.

37. Since in a multilateral convention there must be some rules of *jus cogens* from which the signatories could not derogate by means of special conventions, he had sought in his proposal to indicate in general terms all those cases in which signatories could conclude special bilateral conventions. He had been surprised by Mr. François' criticism (561st meeting, paragraph 33) of the wording he had used but was prepared to replace it by a more general formula of the kind which he understood Mr. Sandström intended to propose. All he was concerned to ensure was that no future bilateral convention concluded between signatories to the multilateral instrument could be regarded as valid if it departed from the obligatory provisions of the latter. Mr. Yasseen had mentioned examples of provisions which were *jus cogens*.

38. Though Mr. Ago's text was certainly preferable to that of the Special Rapporteur it failed to provide for the settlement of disputes concerning the reconcilability of the provisions of a particular convention with the obligatory provisions of a multilateral convention. The Special Rapporteur had not yet indicated whether he intended to include a general provision on the settlement of disputes in the draft. He (Mr. Scelle) had sought to make good that omission in paragraph 2 of his own text and, since it was questionable whether States would be willing to resort to arbitration, he had also envisaged conciliation which, not

being obligatory, might prove more acceptable. At the same time, he hoped that those few States which were willing to submit to the rules of international law rather than to use them for their own purpose would resort to arbitration for the settlement of disputes.

39. Mr. ERIM thought that after Mr. Scelle's remarks it could be said that a common view was beginning to emerge. Mr. Scelle now accepted a distinction between mandatory and permissive provisions. Whereas at the previous meeting (561st meeting, paragraph 19) he had categorically affirmed that bilateral agreements could not derogate from a multilateral convention, he had just said (see paragraph 37 above) that it was only the mandatory provisions of the latter from which bilateral agreements concluded after ratification of a multilateral convention could not depart. In the abstract that was true. But even on that assumption parties to the multilateral convention could by express provision accept the right to derogate from all its articles. Accordingly, the question was: Were there any provisions in the draft which could properly be described as " mandatory " ? He was unable to agree that even such provisions as those contained in articles 27 and 32 of the draft should be regarded as *jus cogens*, for it was conceivable — hypothetically — that two States might agree that there was no need to guarantee the inviolability of consular archives or to accord any special protection to consuls beyond that accorded to aliens generally. An agreement of that sort would in no way affect the interests of a third State and would, therefore, be perfectly acceptable. The only provision of the present draft which could, perhaps, be regarded as one from which derogation by means of a bilateral treaty should not be allowed was article 6 *(classes of heads of consular posts)*, since such a derogation might affect third States. Secondly, the comparison between the present draft and civil law should not be pushed too far. The draft was not a code and by no means covered all matters relating to consular intercourse and immunities. The subject was not exhausted. That was why there would be no danger whatever in allowing States to conclude bilateral agreements either wider in scope than the draft or restricting its application. Such a possibility would contribute to the development of international law. The draft did not represent the definitive treatment of the subject; it was only a compromise.

40. Mr. SANDSTRÖM said that earlier in the discussion he had been inclined to favour Mr. Scelle's proposed text but the views since expressed by Mr. François and Mr. Yasseen had convinced him that that text went too far. Accordingly, he considered that the words " conform, supplement, extend or amplify the provisions hereof " in Mr. Scelle's text should be replaced by the words " do not depart from the fundamental principles of the present convention ". That was a more flexible formula which, though somewhat imprecise, would better safeguard the fundamental principles of the present draft. A proviso of that sort was particularly important to protect smaller States from being forced by more powerful States to accept unduly onerous conditions.

41. He proposed to vote for Mr. Scelle's proposal if his amendment was not accepted, and otherwise would support Mr. Ago's text.

42. He was opposed to Mr. García Amador's suggestion because it was important to obtain the views of governments on article 59.

43. Mr. AGO considered that the discussion had usefully narrowed the area of disagreement. The practical difficulties which some members, including Sir Gerald Fitzmaurice, thought his proposal would entail were more apparent than real. According to the system he had proposed, if one only of the signatories to a bilateral convention ratified the multilateral instrument the former would automatically remain in force as between the two States. On the other hand, if both signed the multilateral instrument then, as soon as the second State had ratified it, that instrument would automatically supersede the original bilateral convention unless the two parties to it agreed that, notwithstanding their acceptance of the multilateral instrument, the bilateral convention should remain in force. The practical effect would be that, if the multilateral instrument entered into force, the provisions concerning consular relations in old bilateral treaties of any kind would probably lapse but those detailed provisions of more recent consular conventions which States found necessary and convenient would by common accord between the parties probably remain in force. If the Commission maintained the system proposed by the Special Rapporteur in article 59, States would have to make an express agreement to revoke earlier conventions, and failure to do so might bring about uncertainty and difficulties in controversial cases.

44. He did not oppose Mr. Scelle's idea that multilateral conventions could contain some obligatory provisions, but considered in the present instance that most if not all of the rules contained in the draft could be regarded as *jus dispositivum*. After all, any two States were not even obliged to establish consular relations with each other, and he agreed with Mr. Erim that there was no *a priori* reason why two neighbouring and friendly States should be prevented from agreeing, for instance, that their respective consuls required no special protection over and above that granted to any alien.

45. In reply to Mr. Scelle's criticism that his (Mr. Ago's) text contained no reference to the procedure for the settlement of disputes, he said that whereas he favoured some provision for the settlement of disputes by conciliation or arbitration he would have thought that a general clause on that subject was needed in the draft rather than one solely applicable to disputes concerning

the relationship between the present draft and previous conventions.

46. Mr. EDMONDS said it seemed to be the general view that ratification of a multilateral convention by any two States would not, *ipso facto*, annul any previous bilateral convention between them and that it would not debar them from concluding further bilateral conventions dealing with matters of special interest in greater detail than had been done in the multilateral instrument.

47. He had no great objection to Mr. Ago's proposal except that it did not indicate clearly what would be the position if parties to the multilateral instrument wished subsequently to enter into a separate bilateral convention.

48. Referring to article 33 of the Harvard Draft, he said he knew from personal experience that it was not always an easy matter to decide whether the provisions of one agreement were or were not consistent with the provisions of another; that difficulty would be overcome by a statement in the draft to the effect that none of the provisions of the multilateral convention would affect subsequent bilateral conventions unless the former had been specifically accepted by the parties.

49. He said he would not press his own proposal and would be quite satisfied if the wording were left to the Drafting Committee. However, he insisted that the Commission must reach a decision concerning the effect of the present draft on existing conventions and concerning the conditions on which parties to it could subsequently conclude bilateral conventions.

50. Mr. TUNKIN, commenting on some of the proposals relating to article 59, expressed the view that Mr. Scelle's text was impracticable, unnecessarily complicated the whole matter, and might, if adopted, make the whole draft unacceptable to a number of States.

51. Mr. Ago's text and that of the Special Rapporteur for article 59 had the same general purpose of leaving signatories of the multilateral instrument free to maintain in force existing bilateral conventions or to conclude new ones if they wished. Nevertheless, Mr. Ago's text would also complicate the situation. In the first place, if Mr. Ago's proposal was adopted, States wishing to sign the multilateral instrument would be obliged to do so in complete ignorance of the fate of existing bilateral conventions, inasmuch as the other parties to such conventions might hold different views on their maintenance or abrogation. Secondly, Mr. Ago's proposal would have the effect of compelling a State which intended to ratify the multilateral instrument to review all the earlier bilateral consular conventions to which it was a party and to enter into fresh negotiations with all the other parties concerned; it was quite possible that a large number of bilateral conventions would have to be negotiated and ratified for the purpose of expressly preserving the validity of existing conventions.

52. In his opinion, the Commission's best course would be to refer the Special Rapporteur's text and Mr. Ago's proposal to the Drafting Committee for amalgamation. The new article should state, in particular, that bilateral consular conventions would not be automatically abrogated by accession to the multilateral instrument and that States would be left free to conclude new bilateral agreements.

53. Mr. HSU proposed that the words " in so far as they are not in conflict with the general principles of the present articles " should be added at the end of Mr. Ago's proposal. Although that phrase might seem self-evident, he believed that it touched on a basic principle. While the first point made in Mr. Ago's proposal was acceptable and necessary, and its omission would lead to the misconception that accession to the multilateral instrument automatically entailed abrogation of all bilateral consular conventions, he thought that the second point gave States excessive latitude for concluding new agreements. The purpose of preparing a multilateral instrument was to put an end to the regulation of consular practice by bilateral convention only, and it therefore seemed inadvisable to encourage States to conclude new bilateral conventions unless they were called for by exceptional circumstances.

54. Mr. ŽOUREK, Special Rapporteur, replying to remarks made during the debate, said it was not strictly accurate to say that few States had concluded bilateral consular conventions. In fact there were many such conventions; what could be said was that, by comparison with the large number of sovereign States in the world, the area covered by those conventions was relatively small. For example, although theoretically consular conventions could be concluded with over ninety States, his own country has concluded only half a dozen. Accordingly, although certain States had concluded large numbers of bilateral conventions, it could not be contended on those grounds that such States would not sign the multilateral instrument if article 59 were included, because from the geographical point of view a large area of inter-State consular relations remained to be covered by such conventions.

55. He did not think it possible to follow Mr. Matine-Daftary's suggestion that the problem with which article 59 was concerned should not be solved at the current session. Governments should be offered a precise clause concerning the relationship between the draft and existing conventions, in order that they could make up their minds with respect to the draft.

56. In reply to Mr. Scelle's question whether he (the Special Rapporteur) intended to include any reference to the settlement of international disputes in the article, he observed that such a reference was unnecessary, since the whole problem of settlement of disputes was a separate problem that was regulated by numerous international agreements. Moreover, such a provision would be all the more unnecessary in an instrument relating to

consular intercourse and immunities as in the matter of consular intercourse and immunities States were always anxious to settle any disputes through negotiation; and in any case it was evident from the collection of judicial decisions in Stowell's *Consular Cases* [1] that, whereas questions affecting the legal status of consular officials had quite often been adjudicated by national courts, there were virtually no decisions by international judicial bodies on the subject. That proved that disputes concerning the prerogatives of consuls were generally settled through the diplomatic channel. If any exceptionally serious disputes arose, States had a wide choice of procedures, such as negotiation, conciliation, paritary commissions, commissions of investigation, arbitration, and, finally, appeal to the International Court of Justice.

57. The majority of the Commission seemed agreed that the draft should contain a clause providing for the maintenance in force of existing bilateral conventions and for the possibility of concluding such conventions in the future. Opinions seemed to be divided only on the question whether the freedom of States in the matter should be limited and, if so, what the extent of the limitation should be. His own view was that it would be inadvisable to restrict that freedom unduly, but Mr. Scelle and Mr. Ago were in favour of more or less considerable limitations. Mr. Ago's proposal, though not fundamentally different from his own, was open to criticism from the practical point of view in that it would mean that parties to bilateral agreements would, before ratifying the multilateral convention, virtually have to revise their whole system of bilateral consular conventions and to enter into fresh negotiations with all the States with which they had concluded consular conventions. While in principle that procedure was desirable, in practice many States would hesitate to shoulder such a heavy burden. It would be more practicable to allow the existing network of bilateral consular conventions to remain intact, lest the entry into force of the multilateral instrument be delayed.

58. While it was of course open to the Commission to refer article 59 and all the relevant proposals and amendments to the Drafting Committee, his personal opinion remained that the system which he had proposed in article 59 was the only practicable one. His view was supported by the only existing multilateral instrument on the subject, the Havana Convention of 1928 regarding Consular Agents, which provided in its article 24 that the Convention did not affect obligations previously undertaken by the contracting parties through international agreements; and article 26 of the Havana Convention regarding Diplomatic Officers contained the same provision. [2]

59. Mr. AGO said that, while Mr. Hsu's proposal did not give rise to any major objections, he did not think that the addition was altogether appropriate. In the first place, it was not likely that many future bilateral consular conventions would conflict to any great extent with the general principles of the multilateral instrument. Secondly, the addition would open the door to a discussion of what the general principles of the Commission's articles really were. Widly, of these general principles did not constitute *jus cogens*, be could not see why it was necessary to stipulate that States must not depart from those principles.

60. The CHAIRMAN declared the debate on articles really were. Thirdly, if those general principles did not constitute *jus cogens*, he could on the subject of the relationship between the draft and previous conventions should be included.

61. Mr. GARCÍA AMADOR asked whether the decision would apply to both the provisional and the final drafts.

62. The CHAIRMAN said that no decision could be taken in respect of the final draft until the observations of governments had been received.

63. He called for a vote on the question whether an article on the relationship between the Commission's draft and previous conventions should be included.

It was decided by 13 votes to 5, with 1 abstention, that such an article should be included in the draft.

64. The CHAIRMAN observed that it would be difficult for the Commission at that stage to examine in detail each proposal and amendment relating to article 59. It might simplify the procedure if the Commission voted on the general question whether the ratification of the multilateral instrument would *ipso facto* affect the maintenance in force of existing bilateral consular conventions.

65. Mr. AGO thought that the proposition on which the Chairman wished to take a vote was not quite clear. For instance, if the proposition was to be understood in the sense that existing bilateral conventions would cease automatically upon the ratification by both their parties of the multilateral instrument unless the parties agreed otherwise, his vote would be favourable. His vote would be different, however, if the intention was to suggest that existing bilateral agreements would be maintained in force unless they were expressly abrogated upon ratification of the multilateral instrument.

66. Mr. YOKOTA thought that the four main proposals before the Commission could be devided into two groups. The Special Rapporteur's text of article 59 and Mr. Ago's proposal, which did not differ really from each other, might form one group, and Mr. Scelle's and Mr. Edmonds' proposals might form the other group. The Commission should decide which principle of the two groups should be adopted, and then refer it to the Drafting Committee.

[1] Ellery C. Stowell, *Consular Cases and Opinions*, Washington, D.C., John Byrne, 1909.

[2] Text cited in *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, pp. 419 to 422.

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

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

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

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

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

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

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

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

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

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

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

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

The meeting rose at 1.10 p.m.

563rd MEETING

Thursday, 16 June 1960, at 9.30 a.m.

Chairman: Mr. Luis PADILLA NERVO

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

[Agenda item 2]

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

ARTICLE 60 *(Complete or partial acceptance)*

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