Document:-
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Summary record of the 608th meeting

Topic:
Consular intercourse and immunities

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69. There were two government comments on the substance of article 62. Finland (A/CN.4/136), in reply to the request for information on State practice made in the commentary, had stated that the rule contained in article 62 was observed by Finland. The Swiss Government had indicated that it made no distinction in matters of precedence between career consuls and honorary consuls, but had added that the system embodied in article 62 seemed preferable to the Swiss system.

70. In the circumstances, there being no objection from governments to the article, he suggested that it be adopted as it stood.

It was so agreed.

ARTICLE 63 (Optional character of the institution of honorary consuls)

71. Mr. ŽOUREK, Special Rapporteur, said that there had been no government comments on the substance of article 63, which could therefore be adopted as it stood. The Netherlands Government had proposed, as in the case of other articles, a change of terminology (replacement of " honorary consul " by " honorary consular official ").

72. Mr. MATINE-DAFTARY expressed his complete agreement with Mr. Amado's criticism of the expression " honorary consular official " (para. 44 above). The use of the term in order to cover a few rare cases would broaden its scope.

73. Mr. AGO observed that it would be interesting to find out whether, in State practice, use was made of honorary consular officers other than honorary consuls who were heads of post.

74. Mr. BARTOŠ pointed out that it was by no means rare for a private citizen, usually a merchant or shipping agent, to be appointed honorary consul at a place where there existed a career consul or consul-general of the sending State. He could cite a number of examples of that practice in relation to his country both as sending State and as receiving State. The honorary consular officer so appointed would give the career officer the benefit of his local experience and his knowledge of trade and shipping matters.

The meeting rose at 1.5 p.m.

608th MEETING

Monday, 12 June 1961, at 3 p.m.

Chairman: Mr. Grigory I. TUNKIN

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

(*continued*)

[Agenda item 2]

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

ARTICLE 63 (Optional character of the institution of honorary consuls) (*continued*)

1. The CHAIRMAN invited the Commission to continue the debate on article 63 of the draft on consular intercourse and immunities (A/4425).

2. Mr. YASSEEN, with reference to the Netherlands proposal (A/CN.4/136/Add.4), said that there were honorary consular officers other than the honorary consul head of post. He could cite a case where the honorary consul-general was assisted by his son, who acted in the capacity of honorary vice-consul. When the honorary consul-general was absent, his son replaced him.

3. Mr. PADILLA NERVO, in reply to the question asked by Mr. Ago (607th meeting, para. 73), said that Mexican law mentioned honorary consular officers. Article 78 of the regulations governing the Mexican consular service specified the method of compensating the services rendered by " honorary consular staff, which includes the categories of consul and vice-consul ".

4. In addition, Mexican law permitted the appointment of honorary consular agents by a consul-general, on condition that the Mexican Foreign Ministry was advised of the appointment.

5. Article 1(f) of the draft under discussion defined " consul " as any person appointed to exercise consular functions " as consul-general, consul, vice-consul or consular agent ". The term " honorary consul " used in article 63 therefore covered not only honorary consuls heads of post, but also the subordinate consuls serving in an honorary capacity.

6. Mr. ŽOUREK, Special Rapporteur, said that, although there existed some honorary consular officers other than heads of post, he thought it might be preferable to leave the expression " honorary consul " in article 63 and in the other articles of chapter III of the draft and to prepare a new provision stating that the expression meant any honorary consular official, whether head of post or not. Such a provision would make it possible to use the expression in question, which had been current for a very long time.

7. The CHAIRMAN suggested that the Drafting Committee be instructed to examine the terminology used in article 63 and to decide whether the term

" honorary consul " should be replaced by the wider term " honorary consular official."

It was so agreed.

ARTICLE 64 (Non-discrimination)

8. Mr. ŽOUREK, Special Rapporteur, said that two governments had commented on article 64. The Norwegian Government considered the article superfluous (A/CN.4/136). The Netherlands Government had proposed that the word " States " at the end of paragraph 1 should be replaced by "the Parties to the present Convention". He had some difficulty in formulating a rule of general international law, which applied to all States, in terms which would limit its application merely to those that became contracting parties to the multilateral convention under discussion.

9. As to the text of the article, it differed from that of article 44 of the draft on diplomatic intercourse (A/3859) in that paragraph 2 (a) of that article had been dropped. At its twelfth session the Commission had arrived at the conclusion that the passage in question was unsatisfactory (article 64, commentary (3)) although, of course, it had then been too late to change the text of the diplomatic draft. In spite of the explanation given in commentary (3), the Vienna Conference had adopted as article 47 of the Convention on Diplomatic Relations (A/CONF.20/13) a text which included the provisions of the said paragraph 2 (a). Opinions at the Conference, however, had been divided, as shown by the fact that a proposal to replace article 44 of the diplomatic draft by the text of article 64 of the consular draft had been defeated in the Committee of the Whole by the narrow margin of 30 votes to 20, with 19 abstentions.[1]

10. The Vienna Conference had also inserted in paragraph 2 (b) (corresponding to paragraph 2 of article 64) the words "by custom or agreement." Those words were unduly restrictive because countries might grant broader privileges than those specified in the draft articles by some other means, such as domestic legislation.

11. The Commission was faced with the problem of the situation created by the adoption at Vienna of paragraph 2 (a). One solution would be to eliminate article 64 altogether, but a decision to that effect might be open to misinterpretation. He therefore proposed that article 64 should be adopted as it stood, for the reasons which had led the Commission to adopt that text in 1960 were still valid.

12. Mr. EDMONDS said that article 64 was a very important article, especially if read in conjunction with article 65 (second text). The provisions of articles 64 and 65 were, in fact, complementary. Article 64, paragraph 2, described the situation which would arise under bilateral agreements between States. Because of the importance of the provisions contained in article 64, he urged the Commission to retain the text which it had adopted in 1960.

13. Mr. FRANÇOIS expressed doubts regarding the Special Rapporteur's argument against the Netherlands amendment. A State which did not sign the proposed multilateral convention could not rely on article 64, paragraph 1, nor for that matter could it avail itself of any of the provisions of the convention in its relations with States which were parties to it.

14. Mr. MATINE-DAFTARY said that both the view expressed by the Special Rapporteur and that expressed by Mr. François were defensible. He was inclined to agree with the Special Rapporteur that the intention of the Commission was to draft rules for universal application and he therefore tended to favour the retention of the word " States ". If that word were retained, however, it was essential to add a clause modelled on article 47, paragraph 2 (a), of the Vienna Convention, to cover the case where a State not a party to the Convention claimed the benefit of article 64, paragraph 1, in its relations with a State which was a party. In that event, the latter would be able to rely on paragraph 2 (a) for the purpose of applying restrictively the provisions of the Convention vis-à-vis the non-party State.

15. Mr. ŽOUREK, Special Rapporteur, said that the purpose of article 64 was to set forth in paragraph 1 a general rule of international law, which, as pointed out in commentary (1), was inherent in the sovereign equality of States. The article went on to provide, in paragraph 2, that where a receiving State granted privileges and immunities more extensive than those provided for in the draft articles, it was free to do so on the basis of reciprocity.

16. The draft contained articles which embodied existing rules of customary international law; hence it was appropriate to refer in paragraph 1 to " States " in general rather than to the " Parties to the Convention ". Of course, where the provisions of the draft contained innovations which constituted progressive development of international law, those provisions would only apply to the contracting parties.

17. Mr. YASSEEN supported article 64 as adopted in 1960. The Commission should not be influenced by the adoption at Vienna of the paragraph 2(a) in question, which the Commission had rightly dropped from the text.

18. There was an important reason of principle for not including paragraph 2(a). As he saw it, all rules of law should be applied according to their plain meaning; one could not talk of provisions being applied " restrictively ", or for that matter extensively.

19. Paragraph 2 of article 64 accurately expressed the situation. The draft articles guaranteed an irreducible minimum of privileges and immunities. Beyond that, States could, of course, grant more extensive privileges; in that event, and only in that event, would the question of reciprocity arise.

20. The discussion on the Netherlands proposal could only affect the drafting. The position with regard to substance was clear; the provision of article 64, paragraph 1, would apply to the States which became parties to the proposed multilateral convention. For States not parties to the convention those provisions would constitute *res inter alios acta.*

[1] See *United Nations Conference on Diplomatic Intercourse and Immunities*, Committee of the Whole, summary record of the 37th meeting.

21. It was true that many — although not all — articles of the draft codified existing rules of customary international law. However, even those articles would be binding — as articles of a convention — only upon the contracting parties to the convention. Non-party States were perhaps under a duty to observe the rules of customary international law expressed therein, but that did not mean that the articles as such would be binding upon those States.

22. Mr. JIMÉNEZ de ARÉCHAGA supported Mr. Matine-Daftary's suggestion that article 64 should be redrafted along the lines of article 47 of the Vienna Convention.

23. The principle of reciprocity, expressed in article 64, paragraph 2, could apply both to the extensive application of the draft articles and to their restrictive application. He realized that the Commission had decided at its twelfth session not to include paragraph 2(a), but had been overruled by the plenipotentiaries at the Vienna Conference. It was therefore appropriate to include paragraph 2(a) in the text.

24. There was an additional reason for its inclusion; any discrepancy between the Vienna Convention and the draft on consular intercourse could lead to unwarranted conclusions with regard to the scope and application of the rules contained in the latter.

25. He did not believe that the Netherlands amendment affected merely the drafting. As interpreted by the Special Rapporteur, the provisions of article 64, paragraph 1, constituted a stipulation in favour of third States. That fact involved an important technical question. If the draft articles merely codified existing international law, the Special Rapporteur would be right in advocating the retention of article 64 as it stood. But in fact many of the provisions of the draft articles (e.g. those concerning the personal inviolability of consuls and those relating to the privileges of members of their families) constituted innovations, accepted by the Commission as progressive development of international law.

26. Since the draft articles were intended to do more than simply restate existing international law, it would not be fair to give unconditionally all the rights specified therein to a State which did not accept all the duties. Paragraph 2(a) of article 47 of the Vienna Convention would then serve as a valuable safety valve and would meet the objections put forward by Mr. François and the Netherlands Government. The contracting parties to the proposed multilateral convention would in that way be enabled to restrict the application of the draft articles vis-à-vis a State not a party to the convention.

27. Mr. MATINE-DAFTARY pointed out that the Vienna Convention began with the words " The States Parties to the present Convention ". If, therefore, any one of the articles were expressly declared to be applicable to all States, one would have to accept the interpretation put forward by the Special Rapporteur. It was, however, essential to include the provisions of paragraph 2(a) in order to make it possible for a State party to the proposed Convention to apply its provisions restrictively vis-à-vis a non-party State which claimed the benefit of its provisions.

28. Mr. AGO said that the term " States " as used in paragraph 1 could not but mean the signatory States. The draft was only in part a restatement of customary international law. Many of its provisions went far beyond existing international law, and it was unthinkable that a State party to the future Convention should be asked to accord all the privileges stated therein to a State which was not a party. There was, no doubt, an irreducible minimum of privileges and immunities which should be granted to all consuls, but there was no rule of customary international law requiring all consuls to be treated alike.

29. As a general rule, the draft should be brought into line with the corresponding articles of the Vienna Convention. In the case of article 64, however, it would not be advisable to introduce the provisions of paragraph 2(a) of article 47 of the Vienna Convention because those provisions were quite unsatisfactory. The provisions of the draft articles were sufficiently clear and they should be applied as they stood. The suggestion that they might be applied " restrictively " was particularly dangerous because it would tend to weaken the obligations assumed by States under the convention. The use of the term " restrictively " seemed to imply that it was possible, by way of retaliation, lawfully to reduce the obligations set forth in the draft articles.

30. For those reasons, he urged the Commission to retain article 64 as adopted at the twelfth session.

31. Mr. SANDSTRÖM pointed out that the opening words of article 64 " In the application of the present articles " made it plain that the States referred to were the contracting parties.

32. He saw no serious objection to including a provision along the lines of article 47, paragraph 2(a), of the Vienna Convention, for it was conceivable that a particular rule of the draft, for example one concerned with the privileges and immunities of a member of a consular official's family, might be applied in a restrictive way owing to differences of approach as between, say, East or West European countries. Alternatively, more favourable treatment than that laid down in the draft in the matter of customs or tax exemptions might be accorded.

33. The CHAIRMAN, speaking as a member of the Commission, agreed with Mr. Ago's interpretation of the Commission's intention. It was possible that a contracting party might expressly undertake to apply the provisions of the convention to a non-contracting party, but the Commission had not intended to cover that eventuality. From the drafting point of view there might be some objection to using the term " Contracting Parties " in article 64, for as it stood the draft was not described as a " convention ". The point could be explained in the commentary and a future conference of plenipotentiaries might decide to change the wording.

34. Some articles in the draft stated rules of customary law, and if those rules became conventional rules by virtue of signature of the multilateral convention the contracting parties would still be bound by customary rules vis-à-vis non-contracting parties. However, they

were under no obligation to apply conventional rules created by the Convention to the latter.

35. He did not agree with Mr. Jiménez de Aréchaga's interpretation. In his opinion, article 47, paragraph 2(a) of the Vienna Convention dealt with the restrictive application of the Convention's provisions themselves; paragraph 2(b) by contrast was concerned with the quite distinct case where States agreed to apply, or customarily applied, as between themselves a rule which was more liberal than that laid down in the Convention.

36. Believing that the Vienna Conference had been mistaken in its decision to insert paragraph 2(a), he considered that article 64 should be retained as it stood.

37. Mr. VERDROSS said that article 47, paragraph 2(a), of the Vienna Convention was not particularly felicitous; it simply stated the principle of retorsion. He preferred the text of article 64 as adopted in 1960.

38. Sir Humphrey WALDOCK agreed with the views expressed by Mr. Yasseen and Mr. Ago. It was quite unthinkable that the contracting parties could impose obligations on third States or that a multilateral convention conferred rights on the latter in regard to non-discrimination. Since article 65 did refer to " the Parties ", it might be possible to use the expression " Contracting Parties " in article 64, which as it stood was undoubtedly open to misinterpretation, as the discussion had disclosed. Furthermore, it would be appropriate to establish consistent terminology in articles 64 and 65.

39. He associated himself with the criticisms concerning article 47, paragraph 2, (a) of the Vienna Convention, the principal one being that it seemed to imply a possible choice between a restrictive or a liberal interpretation of the Convention. From the legal point of view there could only be one way of applying the Convention, and any dispute would have to be submitted to judicial settlement. If a contracting party violated the provisions of the Convention by a restrictive interpretation, there would be a clear right of retorsion.

40. On the matter of restrictive interpretation the Commission ought to consider the relationship between articles 64 and 65, since the latter provided for the possibility of maintaining in force existing bilateral conventions or the conclusion of new bilateral conventions in the future, which might create a special regime between the two signatory States of a more restrictive character, say, in regard to tax exemptions or other privileges and immunities. At the moment article 64, paragraph 2, provided for a more liberal regime on a reciprocal basis, but not for a more restrictive one. That omission, perhaps should be made good, though not by means of a provision modelled on article 47, paragraph 2 (a), of the Vienna Convention.

41. Mr. FRANÇOIS said he did not see much force in the Chairman's argument that the term " Contracting Parties " could not be used in article 64. All ambiguity should be avoided and members should take warning from the fact that even the Special Rapporteur himself had interpreted the word " States " in the contrary sense to that intended by the Commission.

42. Mr. ERIM agreed with Mr. François that the drafting of paragraph 1 should be reviewed. Clearly a non-contracting party could not claim any of the benefits conferred under the multilateral convention, but a point of such importance could not be relegated to the commentary. Of course, a contracting party could extend the benefits of the convention to third States, but that situation was not contemplated in article 64.

43. He could not agree with Mr. Ago's opinion concerning article 47, paragraph 2 (a), of the Vienna Convention. In a multilateral convention there was no harm in stating certain self-evident rules and, clearly, if one State applied provisions of the convention restrictively vis-à-vis another State, that other State had the right to retaliate. The fact that the Vienna Conference had decided to insert such a provision indicated that it would serve some purpose.

44. He considered that article 64 should be modelled on article 47 of the Vienna Convention.

45. Mr. PADILLA NERVO expressed a preference for article 64 as it stood. He was not very much in favour of using the term " Contracting Parties " in article 64, the terminology of which should differ from that of article 65 so as to stress that the first dealt with a multilateral convention and the second with bilateral instruments.

46. He had not attended the Vienna Conference and had no direct knowlege of the reasons why sub-paragraph (a) had been inserted in article 47. In his opinion it was quite the most regrettable provision in the whole of the Vienna Convention, because it allowed some latitude of application, whereas in fact what was required was strict compliance with the precise terms of the Convention. It seemed a great mistake to imply that States could avoid fulfilling the obligations of the Convention on the grounds that they were taking retaliatory action. If one contracting party did apply a particular provision restrictively to another State, then that other State could secure redress by diplomatic means. He could only explain the insertion of sub-paragraph (a) by the fact that the mode of applying certain provisions in the Vienna Convention was left to the discretion of States as, for example, those concerning the size of a diplomatic mission or the extent of customs exemptions. Since members of a consulate enjoyed much less extensive privileges and immunities, such a provision was probably unnecessary in the draft under discussion and, in any event, he would be strongly opposed to one modelled on sub-paragraph (a).

47. Paragraph 2 of article 64 should also stand, because the most-favoured-nation clause was often inserted in bilateral conventions, such as the consular convention between the United States and Mexico.[2]

48. Mr. JIMÉNEZ de ARÉCHEGA, explaining that he had not been present during the discussion of the article at the twelfth session, said that he was surprised to learn that the Commission had intended to refer in article 64, paragraph 1, to the " Contracting Parties ", a

[2] United Nations *Treaty Series*, vol. 125 (1959), No. 431, pp. 302 *et seq.*

meaning which was not borne out by the text itself or by paragraph (1) of the commentary. Clearly both would have to be revised, otherwise the wording was open to the interpretation that any State could claim the right not to be discriminated against as though the provision were *erga omnes*. If the text were appropriately redrafted he would not insist on the inclusion of a provision on the lines of article 47, paragraph 2 (a), of the Vienna Convention which had only seemed essential to him on the assumption that paragraph 1 in article 64 referred to all States.

49. Mr. PAL considered that article 64 should stand as drafted, subject to the revision of paragraph 1 so as to remove any ambiguity.

50. Though he was not in favour of a provision on the lines of article 47, paragraph 2 (a), of the Vienna Convention he would not criticize it as severely as some members of the Commission had done. The paragraph contemplated the possibility of restrictive application of some of the provisions. There were indeed provisions admitting of restrictive or liberal application even without any variation in their construction. Where, for example, there was scope for same discretion, some latitude was necessarily left in the application of such a provision, and that did not necessarily involve two alternative interpretations. Some light had been thrown on that point by Mr. Matine-Daftary at the twelfth session (548th meeting, para. 78), who had suggested a provision reading " In the case of the rules which allow a certain latitude to the receiving State, the scope of their application shall be based upon the principle of reciprocity".

51. Mr. BARTOŠ said that, although inclined to take the universalist point of view in regard to multilateral treaties, he did not think that those instruments always represented a source of international law. In positive international law, according to the principles adopted by the Nuremberg International Military Tribunal, certain clauses of multilateral treaties reflected the legal conscience of mankind and as such were mandatory not only *inter partes*, but also for third States, which had to observe them as rules of positive customary international law. That conclusion of the Nuremberg Tribunal had been endorsed in General Assembly resolution 95 (1). Nevertheless, he did not believe that every provision which the Commission inserted in a multilateral convention could be held to answer that description; most of those provisions therefore constituted obligations between the parties. With regard to the wording used, he believed that it did not make very much difference whether reference was made to States or to contracting parties, since the word " State ", for the purposes of the convention, was construed to mean a State party to that instrument.

52. With regard to the negative and positive hypotheses in paragraphs 2 (a) and 2 (b) of article 47 of the Vienna Convention, he observed that the participants in the Vienna Conference had included paragraph 2 (a) for political, rather than for juridical reasons. The result was something which could not be regarded as desirable in international law: no jurist could recommend opening the door to what amounted to reprisals. He believed that many of those who had voted for the provision had been unaware of its full implications; in any case, the Commission must proceed from juridical grounds, and could leave it to the politicians who would attend the plenipotentiary conference to decide whether or not they wished to introduce a similar provision into the convention on consular intercourse. The Commission was using the analogy of the Vienna Convention to facilitate its work, but it should only follow the provisions of that instrument insofar as they represented an improvement on the Commission's own text; in his opinion, that could not be said of article 47 of the Vienna Convention.

53. Mr. ŽOUREK, Special Rapporteur, said that Mr. Matine-Daftary was attributing to him an opinion which he did not in fact hold. His objection to the Netherlands amendment was based on the difficulty of formulating a general principle and restricting it only to the contracting parties. It had never entered his head, however, that the benefit of the clauses of the Convention might be claimed by States other than the contracting parties and that those States should be able to claim the privileges and immunities of the convention for their consuls. The Drafting Committee must consider the wording carefully, in order to exclude all possibility of such a serious misinterpretation. The whole matter would also be explained in the commentary. Apart from that point, he thought that the Commission was agreed on the substance of the article and could approve it in the form in which it had been approved at the twelfth session.

54. Mr. MATINE-DAFTARY thought that the Commission should take a firm decision on the Netherlands' amendment. He could not agree with Mr. Bartoš and the Special Rapporteur that there was no difference between " States " and " States Parties to the Convention," particularly since paragraph (1) of the commentary stated unequivocally that paragraph 1 of article 64 set forth a general rule inherent in the sovereign equality of States and did not confine that rule to the contracting parties. The fact that the amendment was proposed by the government of a country with such a long tradition of international law seemed to call for the utmost caution in the matter. Members of the Commission were, of course, entitled to their personal interpretations of provisions of the draft, but it should be borne in mind that the resulting convention would be applied and interpreted by national authorities and courts in the future.

55. Furthermore, he could not agree with members who had strongly criticized paragraph 2 (a) of article 47 of the Vienna Convention. The terms of a multilateral instrument could, in his opinion, be applied restrictively. For instance, if State A considered that the term " members of his family " applied only to a consul's wife and minor children, and a consul was appointed to country B, where the term was interpreted to mean a consul's wife and all his children, irrespective of age, it might be said that the application of the provisions was liberal in State B and restrictive in State A. There should be no cause for complaint if the authorities of State B applied

to the consul of State A the treatment extended by the government of his country to the consuls of State B.

56. Mr. LIANG, Secretary to the Commission, observed that the views he had expressed on the subject during the twelfth session (548th meeting, para. 74) coincided with the purport of Mr. Ago's statement both at that session and at the current meeting. He did not think it could be accurate to speak of restrictive or liberal application; application could be either restrictive or liberal, but restrictive application, which was less than the application of the convention, would constitute a violation of the convention. On the other hand, if a State accorded more extensive privileges than did the convention, the question of application did not arise. He had hoped that paragraph 2(a) of article 44 of the draft on diplomatic intercourse would be changed at the Vienna Conference; he now thought it would be unfortunate if the Commission were to perpetuate the obscure provision that had been included in the Vienna Convention, particularly since article 64 as adopted in 1960 was so much more logical and clear.

57. Mr. ERIM said that the existing text of article 64 might be less dangerous if article 47 of the Vienna Convention had not been adopted. If the provision of paragraph 2(a) were omitted from the article, the effect would be that a State wishing to apply the convention on the same footing as another State would be open to criticism for discrimination. For example, if the receiving State referred to in article 50, paragraph 2, of the draft granted negligible privileges and immunities, and the right of retorsion were not recognized, discrimination might be alleged. Article 47 of the Vienna Convention was not so unfortunate as many members seemed to think. If the provision of paragraph 2 (a) of that article were omitted from the draft on consular intercourse, victims of restrictive application as a measure of retorsion could always allege discrimination against them, which would be a shocking claim on the part of a State which itself had begun the application regarded as restrictive. When the same treatment was meted out to it, it should not have the right to complain of discrimination against it. He would welcome the operation of the rule of law in international relations and he hoped that one day it would be impossible to take the law into one's own hands. Unfortunately, that day had not yet dawned. Article 47, paragraph 2(a) might constitute a correct provision regarding a State which strayed from the common interpretation given by the other contracting parties. He believed that participants in the plenipotentiary conference would find it hard to subscribe to a clause without that provision. That had been obvious at the Vienna Conference.

58. Mr. BARTOŠ could not agree with Mr. Matine-Daftary's and Mr. Erim's views on the scope of article 47, paragraph 2(a) of the Vienna Convention. If reciprocity had been stipulated, the situation would be quite different. A number of States were scrupulous in their application of rules of international law, but did not wish those to be rules applied to their nationals in a manner other than that current in their own country. For example, Yugoslavia did not allow its diplomatic agents and consular officials to enjoy the wider privileges and immunities offered by some countries, because it did not wish its relations with the countries concerned to become those of creditor and debtor in the matter of privileges. The principle of reciprocity was based ultimately on courtesy.

59. Mr. Erim's interpretation was in fact based on the political considerations that had caused paragraph 2(a) to be adopted by the Vienna Conference. If the States did not grant the minimum provisions of the Vienna Convention to diplomatic agents, the right of retorsion could be claimed. In his opinion, that was a dangerous view, which was the consequence of the poor organization of international justice. If governments were to be judges of violations of international instruments and of erroneous interpretations of international law, there would be no end to the resulting abuses. On the other hand, the same objections did not apply to paragraph 2 (b) of article 47 of the Vienna Convention. The Convention guaranteed certain minimum privileges and immunities and, if more favourable treatment was extended by custom or by agreement between States, on a bilateral and reciprocal basis, it might be objected theoretically that a third State could allege discrimination if similar treatment were not extended to its consuls; but it should be borne in mind that certain practices in relations between some States were not admissible in relations between others. Some margin should be left for the interplay of political relations, and the minimum provisions of the conventions should be left as the basis for diplomatic and consular relations, in the hope that more liberal treatment would eventually follow throughout the world.

60. Mr. AGO observed that the Commission must bear some of the responsibility for the adoption of paragraph 2(a) of article 47 of the Vienna Convention, since at its tenth session it had included the provision in article 44 of the draft on diplomatic intercourse (A/3859, chap. III). It was only at its twelfth session, when considering a similar problem in the consular draft, that the Commission had realized the disadvantages of the provision and had ommitted it from the 1960 draft (article 64, commentary (3)).

61. He could not agree with Mr. Erim's and Mr. Matine-Daftary's arguments. The fact, for instance, that a State granted more or fewer privileges and immunities to members of the family, as indicated in article 50, paragraph 2, could not be described as restrictive or liberal application of the Convention, but as the mere exercise of a complete freedom. On the other hand, a State which granted more favourable treatment than that required by the provisions of the Convention would in effect not be applying the Convention, any more than would a State which granted less favourable treatment. There was no such thing as restrictive or liberal application, but merely application or non-application and any mention of restrictive application was tantamount to suggesting to States that they might conceal behind that term an actual violation of the terms of the Convention.

62. Sir Humphrey WALDOCK observed that the general view of the majority was against including a provision along the lines of paragraph 2 (a) of article 47

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

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

It was so agreed.

The meeting rose at 6.5 p.m.

609th MEETING

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

Chairman: Mr. Grigory I. TUNKIN

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

(continued

[Agenda item 2]

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

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

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

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

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

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

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