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23rd meeting of the Second Committee

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judicial authority not later than forty-eight hours after his arrest: it would be desirable, particularly in a large country, to allow the police time to obtain the required warrant but the difficulties should not be so great that they could not do so within the specified period. The expression " competent judicial authority " did not refer only to a judge or court, but included all those with judicial functions, the independent exercise of which had for long ensured that a judicial decision would be objective and fair. Paragraph 2 (*d*) of the joint amendment provided a logical method for the solution of a conflict should one arise. The amendment had been drafted with the express intention of avoiding the possibility of friction between States, a possibility which would be removed by the consent of the sending State to the consular officer's arrest. The provision in paragraph 2 (*c*) had been included because, unless a consular officer could establish his identity, the police would not know that he was a consular officer and would arrest him. If a consular officer should leave his means of identification at home, he would have to rely on the courtesy of the police.

The meeting rose at 1.5 p.m.

TWENTY-THIRD MEETING

Wednesday, 20 March 1963, at 3.15 p.m.

Chairman: Mr. KAMEL (United Arab Republic)

Consideration of the draft articles on consular relations adopted by the International Law Commission at its thirteenth session (A/CONF.25/6) (*continued*)

Article 41 (Personal inviolability of consular officials) (*continued*)

1. The CHAIRMAN invited the Committee to continue its consideration of article 41 and the amendments relating to it.[1]

2. Mr. AVAKOV (Byelorussian Soviet Socialist Republic) said that article 41 had very understandably given rise to likely discussion in the International Law Commission, where it had been said, incidentally, that there was a tendency to interpret the idea of immunity too liberally. That opinion had been confirmed by the adoption of the Vienna Convention of 1961, which drew an implied distinction between consular and embassy staff.

3. The joint amendment (L.168) comprised restrictive features, but they were very difficult to define precisely. What was meant, for instance, by a " grave offence " ? Why did it specify a five-year term of imprisonment as the criterion for defining such an offence ? The same offence might carry different penalties in different countries, and it would be preferable to leave it to each State to solve that problem. It was not always easy to establish that an offender had been taken *in flagrante delicto*, and so far as identification was concerned the individual in question might not at all times carry on his person the papers enabling him to establish his status and identity. Paragraph 2 (*d*) of the joint amendment dealt with a rather improbable situation, which was essentially a matter for the receiving State. He considered that the enumeration in paragraph 2 of the amendment was entirely superfluous, and he would vote against the amendment. On the other hand, he would vote for the International Law Commission's draft and for the Hungarian amendment (L.143).

4. Mr. SRESHTHAPUTRA (Thailand) said that his delegation regarded the article concerning the personal inviolability of consular officials as one of the more important articles and preferred more precise language to that proposed by the International Law Commission because that might facilitate matters and to some extent prevent controversy between the receiving and the sending States. Accordingly, he approved of the joint amendment. However, the forty-eight-hour clause in paragraph 4 was liable to raise practical difficulties in his country, where a longer time-limit might be necessary by reason of local conditions; for instance, in some cases, owing to the difficult terrain, it took more than forty-eight hours to bring the arrested person back to the police station, and the investigation would begin as from then. For that reason, he asked for a separate vote on paragraph 4 of the joint amendment.

5. Mr. SPYRIDAKIS (Greece) said that the joint amendment was an improvement on the article as drafted by the International Law Commission, in that it was more precise, notably in the provisions concerning grave offence and *in flagrante delicto*. In addition, paragraph 2 (*c*) and paragraph 3 were useful clauses in that they provided for the release of the person concerned after he had established his identity. Although he had some doubts about the forty-eight-hour time limit — a twenty-four-hour time limit applied in Greece — he would vote for the amendment. He was entirely in favour of the South African amendment (L.148), which supplemented the joint amendment. He had no objection in principle to the amendments of Cambodia (L.126) and Romania (L.149), which were actually covered by draft article 43 and the joint amendment, respectively. On the other hand, he failed to see the object of the Byelorussian amendment (L.104/Rev.1) which would add nothing, at all events so far as Greek law was concerned. The Indonesian amendment (L.61) was, he thought, unacceptable, because it would grant excessive powers to nonjudicial authorities. He was prepared to accept the second part of the Yugoslav amendment (L.116), if the joint amendment was adopted.

6. Mr. HEUMAN (France) said that he shared the concern expressed at the previous meeting by the Czechoslovak representative. He thought that a text which so thoroughly revised the original draft as did the joint amendment (L.168) could hardly be described as an " amendment ". If a provision laid down a principle, then it was wrong to nullify the principle by subsequent

[1] For a list of the amendments to article 41, see the summary record of the 22nd meeting, footnote to para. 1. During that meeting, the amendments by Brazil (L.64), the Federal Republic of Germany (L.62/Rev.1), Italy (L.117), Spain (L.150) and the United Kingdom (L.134) had been withdrawn in favour of a joint amendment (L.168). The amendment by Switzerland (L.105) had been withdrawn.

restrictive provisions. Besides, the expression " grave offence " meant very little; it would suffice to speak of " crime ". He preferred the objective definition proposed by Romania (L.149). With regard to sub-paragraphs 2 (*b*), (*c*) and (*d*) of the joint amendment, he was in entire agreement with the Czechoslovak representative; commenting on sub-paragraph (*c*) in particular, he said that if the consul was unable to establish his identity, he placed himself *ipso facto* outside the protection of the convention. In any case, the risk of arbitrary action on the part of the police still remained. The situation contemplated in sub-paragraph (*d*) was rather paradoxical and, in the improbable case of its occurring, it should come under article 45.

7. The French delegation's main objection was that the close and extremely important connexion between crime and judgement was considerably weakened by paragraph 4 of the joint amendment. For that reason he would vote against the paragraph. He would abstain from voting on the Byelorussian amendment (L.104/Rev.1), since in France the ministère public was also a judicial authority. The Indonesian amendment (L.61) was entirely unacceptable for it would be inadmissible that the administrative or police authorities should take so serious an action as arresting a consul. Lastly, the proposal by Ghana to replace the word " and " by the word " or " would be an invitation to arbitrary action and he could not support it.

8. His vote would be determined to some extent by the voting procedure to be applied to the joint amendment.

9. Baron van BOETZELAER (Netherlands) said that he would have been able to accept the draft article 41, as amended by the Yugoslav amendment (L.116). Nevertheless, the joint amendment (L.158) was a great improvement and he would vote for it. At the same time, he was bound to say that paragraph 2 (*c*) seemed unnecessary and, moreover, did not remove the risk of arbitrary action. Paragraph 7, too, was liable to raise difficulties, inasmuch as the criterion of a maximum penalty of at least five years' imprisonment could not be applied equally in all countries owing to the diversity of municipal law. He therefore asked for a separate vote on that paragraph.

10. Mr. KONSTANTINOV (Bulgaria) said that any attempt to give a precise definition to certain situations would create difficulties. For that reason the joint amendment was not as satisfactory as the International Law Commission's draft. The general language of the draft made it acceptable to a larger number of delegations.

11. Mr. HABIBUR RAHMAN (Pakistan) said that the protection accorded by the draft article was greater than that granted by most national legal codes. Accordingly he was in favour of the joint amendment, except its paragraph 7: the notion of " grave offence " depended on the decision of the receiving State.

12. Mr. SILVEIRA-BARRIOS (Venezuela) said that in modern times there was a tendency to broaden the immunity of consular officials, despite a certain resistance which had found an echo in the debates of the International Law Commission. In Venezuela, consular officials did not enjoy the same immunities as the staff of diplomatic missions. With a view to maintaining that state of affairs, and yet not wishing to arrest contemporary trends, his delegation would vote for any balanced proposal which would have the effect of toning down the draft, more particularly any proposal which applied a shorter term of imprisonment for the purpose of measuring the gravity of an offence.

13. Mr. TÔN THÂT ÂN (Republic of Viet-Nam) said that the situations to which article 41 related were serious and liable to affect consular relations between countries. As complete a text as possible should therefore be adopted. The terms of the original draft article were too general, particularly those relating to " grave crime ". For that reason, he greatly preferred the joint amendment which employed more precise and specific language.

14. Mr. MOUSSAVI (Iran) said that his delegation would vote for the joint amendment.

15. Mr. PETRENKO (Union of Societ Socialist Republics) said that article 41 was one of the most important in the draft convention on consular relations. It was also one of the most difficult, for it had to allow for differences in municipal law and had to be drafted in terms acceptable to all States. From the summary records of the International Law Commission's proceedings it was clear that it had tried to draft article 41 in general and flexible terms.[2] His delegation considered draft article 41 to be better than the amendments submitted. The Byelorussian amendment (L.104/Rev.1) would, however, improve the article by adding the reference to the " Procurator's Office ", which had power in some countries to order a person's arrest and detention. The International Law Commission had apparently been guided by the English system; the fact was, however, that in most countries the procurator's office had the same powers in some of those matters as the judicial authority. The Yugoslav amendment (L.116) would limit the scope of paragraph 2 of the draft article and raise difficulties of application. For those reasons, his delegation would be unable to vote for that amendment. The Hungarian amendment (L.115) filled a gap in the draft article and removed the apparent contradiction between paragraphs 3 and 1 of article 41.

16. As the Czechoslovak representative had said, the joint amendment was based on a principle different from that accepted by the International Law Commission. The definition of a " grave offence " proposed in that amendment was not acceptable, since it did not take account of the criminal law in force in the various States. In the Soviet Union, for instance, the penal code provided, in the case of grave crimes, for imprisonment for three to fifteen years, subject to extenuating or aggravating circumstances (e.g., recidivision). The convention could hardly ignore the laws applicable in the various countries represented at the Conference. Para-

[2] For relevant discussion, see the summary records of the twelfth (538th, 539th and 540th meetings) and thirteenth (599th and 600th meetings) sessions of the International Law Commission.

graph 2 (*b*) of the joint amendment was open to misuse for it failed to specify the degree of gravity of the offence, and the consul might thus be arrested or detained for a minor offence. The cases envisaged in sub-paragraphs (*c*) and (*d*) were so rare that it was surely unnecessary to make express provision for them in the convention. The time limit of forty-eight hours provided for in paragraph 4 would lead to difficulties in some States. In the Soviet Union, for instance, the procurator's office had to release the person arrested or else bring him before the competent court before the expiry of that period.

17. For all those reasons, he would support the International Law Commission's draft, as amended by the Byelorussian amendment (L.104/Rev.1) and by that of Hungary (L.115), and would vote against the joint amendment.

18. Mr. BOUZIRI (Tunisia) said that the article as drafted tended to grant to consular officials almost total inviolability, except in the case of a " grave crime ", an expression the meaning of which was not defined in the text and which would be left to be construed by national courts. The sponsors of certain amendments had attempted to define it by reference to the term of imprisonment. Although not a very satisfactory solution, that idea should, in the absence of other proposals, receive the Committee's approval. The joint amendment was a praiseworthy attempt at a compromise, but was obscure in some respects. Paragraph 2 (*a*) was too vague so far as the basis for the arrest was concerned; for instance, a consul might be unjustly arrested on a mischievous information because the offence of which he was accused was punishable by more than five years' imprisonment, which would obviously be a serious abuse. He proposed that the provision in question should read " the offence is a grave offence and serious charges are brought against him ". Secondly, as paragraph 2 (*b*) did not specify that the offence in question must be a serious one, one might gather the impression that a consul could be arrested *in flagrante delicto* even if the offence was a minor one; it would be better, therefore, to add the words " and the offence is a grave one ". Thirdly, paragraph 2 (*c*) as drafted might lend itself to arbitrary action by the police; he suggested that the provision should read " it has not been possible to establish his identity ". The police should attempt to establish the identity of a person arrested who claimed to be a consular official. If the three changes he had proposed were accepted, he would vote for the joint amendment. Otherwise, it would not be acceptable to his delegation.

19. Mr. AMLIE (Norway) said that the sponsors of the joint amendment had made a very commendable effort to find a formula which would strike a balance between the rather extensive protection accorded under the International Law Commission's draft and considerations which called for a less extensive protection. The amendment did not, hovewer, provide a solution. Paragraph 2 (*b*) opened the way to abuses against the consul. In many countries people were arrested for trivial offences; to arrest a consular official for such a trivial offence would be a breach of the respect due to him and the clause was therefore dangerous. With regard to paragraph 2 (*c*), a consular official who did not establish his identity was an anonymous person, and the convention could not include provisions relating to anonymous persons. With regard to paragraph 2 (*d*), he said that under article 45 the sending State could waive the immunities provided for in articles 41, 43 and 44; accordingly, paragraph 2 (*d*) was superfluous. Paragraph 7 of the joint amendment did not introduce a better criterion than the International Law Commission's text, because the severity of the penalty for a given offence might vary greatly from one country to another.

20. The Byelorussian amendment (L.104/Rev.1) was not acceptable, for the prosecuting authority was party to the case and was therefore not qualified to decide whether a consular official should be arrested. The Hungarian amendment (L.115), which would grant the consular official unduly great protection, was also unacceptable to the Norwegian delegation, which, however would support the South African amendment (L.148) as it added a useful clause requiring the receiving State to proceed promptly.

21. Mr. CHIN (Republic of Korea) expressed support for the joint amendment, despite certain reservations with regard to paragraph 2 (*c*). Paragraph 2 (*d*) seemed unnecessary.

22. Mrs. VILLGRATTNER (Austria) said that the joint amendment qualified the inviolability of consular officials. She agreed with the representatives of France and Norway that sub-paragraphs 2 (*b*), (*c*) and (*d*) served little purpose. Moreover, the terminology used in the amendment should be brought into line with that used in the other articles of the draft convention.

23. Mr. LEVI (Yugoslavia) said that the joint amendment had merely introduced confusion into the Committee's discussion. The text would weaken the clause on personal inviolability, and his delegation would vote against the amendment, and indeed against any draft along the same lines. The only two amendments that were acceptable to his delegation were those of the Netherlands (L.16) and Hungary (L.115). He added that his own delegation's amendment (L.116) should be regarded as an amendment to the original text, not as a sub-amendment.

24. Mr. HEUMAN (France) moved that the special rapporteur of the International Law Commission be invited to make a statement before the sponsors of the various amendments replied to the debate. The Commission had succeeded in preparing a balanced text, and the task of the Conference was to draft a convention acceptable to the largest possible number of governments. It would therefore be in the interests of the members of the Committee to hear Mr. Žourek's explanations.

25. Mr. ŽOUREK (Expert), speaking at the invitation of the Chairman, said that owing to the diversity of legislation and of consular conventions, article 41 was one of those which had given most trouble to the International Law Commission; yet its provisions had to be acceptable to the largest possible number of governments. The first draft submitted had gone rather

further than the latest draft, which had been adopted in the light of the comments received and which was based on two principles. First, in the interests of the exercise of his functions the consul should not be liable to arrest or to detention pending trial except in the case of a serious offence. Secondly, if the consul was found guilty by the judicial authority he could be imprisoned. The Commission had appreciated that its draft did not provide an ideal solution, for it did not exclude the possibility that by reason of a court decision a consul might be deprived of his liberty even for a minor offence. Nevertheless, the Commission had taken the view that it could not go any further, and had given the Conference the opportunity of making the provisions more specific. The Commission had also considered whether or not it should define the term " grave crime ", which it had finally used because of differences in municipal law, the different penalties for different offences and the fact that even in bilateral conventions a serious offence might be defined differently in regard to each of the contracting parties. The essential point was to restrict the number of cases in which a consul might be detained prior to a decision of the judicial authority, and the Commission had therefore stipulated in paragraph 2 that there must have been a judicial decision of final effect before the consular official could be imprisoned. It had intended to take account of the official nature of consular functions and at the same time to provide safeguards for the receiving State.

26. In reply to the representative of France, who had asked what considerations had influenced the drafting of paragraph 1, at the Commission's twelfth session, he explained that in the 1960 provisional draft the safeguard against detention pending trial had been the clause " except in the case of an offence punishable by a maximum sentence of not less than five years' imprisonment ", with the variant " except in the case of a grave crime ".[3] The then paragraph 2 had contained the proviso " save in execution of a final sentence of at least two years' imprisonment ".

27. Replying to a question by the Italian representative concerning the anomalous position of a consul who actually was sentenced to imprisonment, he said that the case was rare; if it arose, the sending State would recall the consul concerned.

28. Mr. ANGHEL (Romania) said that the question of " grave crime " might be referred to the drafting committee for consideration in connexion with article 1 (Definitions). He added that he would not press for a vote on the amendment contained in document L.149.

29. Mr. EVANS (United Kingdom) said that the discussion had confirmed his delegation's opinion that there were two main weaknesses in paragraph 1 of article 41 as drafted by the International Law Commission. In the first place, the text was not well balanced because it granted an excessive inviolability to consular officials and unduly restricted the jurisdiction of the receiving State. Secondly, it did not define the meaning of the expression " a grave crime ". That was why his delegation had sponsored the joint amendment.

30. None of the arguments advanced against paragraph 2 of the joint amendment was really convincing. To those representatives who had said that the question involved could be settled through the diplomatic channel, he would reply that, in fact, that would not be possible; to those who thought that the question was dealt with by implication in the International Law Commission's draft, the answer was that the draft convention should be as explicit and precise as possible; and to those who, like the representative of Tunisia, had complained that the paragraph was vague and did not sufficiently specify the circumstances in which arrest might be effected, he would point out that the circumstances were specified in the law of every country.

31. The sponsors of the joint amendment were prepared to accept the Tunisian proposal for replacing paragraph 2 (*c*) by the words " it has not been possible to establish his identity ". It would be wrong, however, to delete the sub-paragraph. In deference to the view of some representatives that paragraph 2 (*d*) was superflous and that the point was covered by article 47, the sponsors of the joint amendment were prepared to delete the provision in question, and also the corresponding words in paragraph 3.[4] With regard to paragraph 7, the Pakistan representative had said that one and the same offence might be regarded as more or less serious according to the country. The sponsors of the joint amendment thought, however, that an attempt should be made to define the meaning of the expression " grave offence ". He was prepared to agree that paragraph 7, like the other paragraphs, should be put to the vote separately.

32. Mr. HONG (Cambodia) said that he would not press his delegation's amendment (L.126) to the vote.

33. Mr. HARASZTI (Hungary) said that none of the speakers had denied the merits of the Hungarian delegation's amendment (L.115). The representative of the Federal Republic of Germany had proposed that that amendment be embodied in paragraph 1. That proposal was acceptable, but should be referred to the drafting committee.

34. Mr. JAMAN (Indonesia) said that the joint amendment was acceptable to his delegation. If it were approved, his delegation's amendment (L.61) would be withdrawn; otherwise he would ask that the amendment be put to the vote.

35. Mr. SPYRIDAKIS (Greece) requested under rule 40 of the rules of procedure that each paragraph be put to the vote separately.

36. Mr. JESTAEDT (Federal Republic of Germany) explained that his delegation opposed paragraph 1 of the article because in the case of serious offences committed by consular officials, the receiving State must be in a position to take immediate steps; that situation had occurred in practice. The representatives of the Soviet Union, and of the Ukrainian and the Byelorussian

[3] See *Yearbook of the International Law Commission, 1960*, vol. II (United Nations publication, Sales No. 60.V.I, vol. II), p. 168.

[4] These changes were incorporated in a revised version of the joint amendment (A/CONF.25/C.2/L.168/Rev.1).

Soviet Socialist Republics had opposed the inclusion of the expression " *in flagrante delicto* " in the article. Yet the expression appeared in a German-Soviet agreement and had not given rise to any difficulty. He failed to see, therefore, why paragraph 2 (*b*) of the joint amendment should not be acceptable.

37. Mr. BOUZIRI (Tunisia) moved the adjournment of the meeting.

The motion was carried by 26 votes to 25, with 12 abstentions.

The meeting rose at 6.20 p.m.

TWENTY-FOURTH MEETING

Thursday, 21 March 1963, at 10.45 a.m.

Chairman: Mr. KAMEL (United Arab Republic)

Consideration of the draft articles on consular relations adopted by the International Law Commission at its thirteenth session (A/CONF.25/6) (*continued*)

Article 41 (Personal inviolability of consular officials) (*continued*)

1. The CHAIRMAN said that the Committee would proceed to vote on article 41, the discussion having been closed at the end of the previous meeting.

2. Mr. HEUMAN (France), on a point of order, asked whether the revised joint proposal submitted by the delegations of Brazil, the Federal Republic of Germany, Italy, Spain and the United Kingdom (L.168/Rev.1) could still be held, after careful study, to be an amendment as defined by rule 41 of the rules of procedure. The joint amendment did not merely add to, delete from or revise " part " of the original proposal; it would replace the whole of the International Law Commission's draft of article 41, as was recognized by the sponsors in the introduction of their proposal which, they said, should " replace the article ". In the view of his delegation, therefore, it must be considered as a new proposal relating to the same question under rule 42 of the rules of procedure, and he would ask the Chairman to decide accordingly. The International Law Commission's draft of article 41, together with the amendments (in the true sense) to that draft, would then according to rule 42 have to be considered before the new proposal. His delegation wished the International Law Commission's draft to be given prior consideration because of the rule, unwisely accepted by the Committee, that the only amendments permissible during the discussion were those sub-amendments to written amendments which were approved by the sponsors of the original amendments. The application of that rule meant that it would be possible for a minority to impose its will on the majority of the Committee by stifling discussion and preventing votes on important matters of principle. If the revised joint proposal were adopted by the Committee no separate consideration could be given, or vote taken, on the vital phrase omitted from that proposal, " pursuant to a decision by the competent judicial authority " because the sponsors of the joint proposal had refused to accept the suggested sub-amendment. They had also been able to reject in the same way other sub-amendments proposed during the discussion, leaving no right of appeal.

3. If the Chairman should rule that the joint proposal was an amendment as defined in rule 41, the French delegation would appeal against his ruling. If the Committee then voted to accept the ruling, the French delegation would immediately move that the Committee should decide to reverse the rule concerning the submission of amendments which had resulted in the present unfortunate situation.

4. The CHAIRMAN said that in his opinion the joint amendment (L.168/Rev.1) was an amendment in accordance with rule 41. The first four paragraphs of the amendment replaced paragraph 1 of the International Law Commission text; paragraphs 5 and 6 of the amendment revised paragraphs 2 and 3 of the International Law Commission text; while paragraph 7 of the amendment added to the original draft. In his view, consideration of the amendment in that way would avoid a long discussion on procedure. Under rule 22 of the rules of procedure, however, a representative might appeal against the Chairman's ruling and, in accordance with the statement by the French representative, he would immediately put his ruling to the vote to allow the Committee to decide freely whether or not it accepted the ruling.

5. Mr. LEVI (Yugoslavia) regretted that he could not accept the Chairman's ruling. Although the United Kingdom representative had said that the sponsors of the joint amendment accepted paragraphs 2 and 3 of the International Law Commission draft, a comparison of the texts showed that in fact changes of substance had been made in those paragraphs and that the joint proposal replaced the whole of article 41.

The ruling of the Chairman, that the joint amendment (L.168/Rev.1) was an amendment as defined in rule 41 of the rules of procedure, was upheld by 28 votes to 25, with 9 abstentions.

6. Mr. HEUMAN (France), speaking on a point of order, moved that the Chairman should put to the vote the proposal of the French delegation that the Committee should reverse the rule it had previously adopted and should decide that oral sub-amendments to written amendments could be accepted during the discussion, even if they were opposed by the sponsors of the original amendments.

7. The CHAIRMAN ruled that the Committee should vote first on article 41 and then on the proposal of the French delegation.

8. He would put the article to the vote, paragraph by paragraph, on the basis of the three paragraphs in the original International Law Commission draft. The Committee would vote first on the text furthest removed in substance from paragraph 1 of that draft, which