Document:-
A/CN.4/SR.600

Summary record of the 600th meeting

Topic:
Consular intercourse and immunities

Extract from the Yearbook of the International Law Commission:-
1961 , vol. I

which set out to provide consuls with more favourable conditions than those applicable to other aliens, in fact placed them in an inferior position in that regard.

71. Mr. AMADO said he could not agree with Mr. Ago's conclusions. The fact that there was a certain tendency to fuse diplomatic and consular functions could have no effect on the immunities of diplomatic agents and consular officials. For example, if a minister agreed to act as consul-general, he consented to perform certain specific functions which entailed equally specific immunities.

72. Further, the expression " personal inviolability " as applied to consuls might be regarded as a creation of the Commission. The Secretary to the Commission had said during the twelfth session (539th meeting, para. 26) that he shared the doubts which had been voiced regarding the expression. The Commission's decision to use the expression could not alter the fact that a consul was a relatively minor official of the sending State who performed certain functions.

73. Finally, he drew attention to paragraph (2) of the commentary, which made it clear that the inclusion of personal immunity clauses in consular conventions represented a reaction against the practice of refusing to recognize the personal inviolability of consular officials. It was obvious that the whole subject was in the process of evolution, and the Commission should therefore exercise the utmost caution in the matter.

74. Mr. PADILLA NERVO said that he had some hesitation in expressing an opinion on the draft text of article 40 and agreed with nearly all the views expressed by other speakers in the debate. He would nevertheless point out that the historical origins of the institution of the personal immunity and inviolability of diplomatic agents and the whole idea of their representative character were governed by two principal concepts. The first was that of safeguarding the dignity of the sending State and its representatives, and the consequent need to grant certain immunities without which their functions could not be exercised; the second was that of precluding impunity for offences. In considering the system of consular immunities as opposed to diplomatic immunities, the Commission should take account of the trend to regard the position of consuls as increasingly important. In consequence of developments in means of communication and of the growing importance of economic and commercial interdependence, diplomatic and consular functions were tending to be placed on a footing of equality in municipal law. In addition, certain functions could be entrusted to both diplomatic agents and consular officials. Accordingly, for the purpose of the applicability of the criminal law, it would be difficult to differentiate clearly between diplomatic agents and consular officials. He therefore agreed with Mr. Ago that it was illogical to grant to junior officials of a diplomatic mission immunities which were not enjoyed by high ranking consular officials; thus, the hybrid provisions of the article were hardly consistent either with logic or with practice.

75. The difficulty of accepting the principle of absolute immunity from jurisdiction for all consular officials — or assimilating them to diplomatic agents in that regard — lay in the fact that the dignity of the State must be safeguarded and, at the same time, officials must be enabled to discharge their functions with immunity from provisional detention for civil offences. If the system of the Vienna Convention were extended to consular officials — in view of the evolution of the two types of representation — the Commission's object might be achieved by providing for the possibility of a waiver of immunity by the sending State if a consular official was accused of a criminal offence; that State would naturally take the findings of the examining magistrate into account in deciding whether or not to waive immunity. Another difficulty might arise in cases where the sending State empowered a consul to carry out diplomatic acts; if that official were fully subject to the criminal jurisdiction of the receiving State, the dignity of the sending State would be prejudiced; conversely, however, the sending State might empower the consul to perform diplomatic acts with the express intention of preventing proceedings from being taken against him. Neither contingency would promote friendly relations between the two States concerned.

76. With the object of reconciling the two different points of view and of working out language acceptable to the majority at the plenipotentiary conference, it might be advisable to use wording less specific than that of article 40 as it stood. Moreover, the Commission would have to make up its mind whether it meant to codify existing rules of international law on the subject, as the Special Rapporteur implied, or intended to develop the law in the light of current trends towards the assimilation of the diplomatic and consular functions. The latter course entailed considerable risks; if it were found impossible to agree on a general formula stressing that the main objective of inviolability was to safeguard the dignity of the sending State and its representatives, it might be best to leave the article as it stood.

The meeting rose at 1.5 p.m.

600th MEETING

Wednesday, 31 May 1961, at 10.5 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities
(A/4425; A/CN.4/136 and Add.1-10, A/CN.4/137)

(continued)

[Agenda item 2]

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

ARTICLE 40 (Personal inviolability) *(continued)*

1. The CHAIRMAN invited the Commission to continue its discussion of article 40 of the draft on consular intercourse and immunities (A/4425).

2. Mr. PAL, referring to paragraph 1 of the article as proposed by the Special Rapporteur in his third report (A/CN.4/137), observed that it would be more accurate if the phrase " unless they commit a serious offence " were amended to read " unless they are accused of committing a serious offence", for the question whether or not a serious offence had been committed would be determined at the trial.

3. Turning to the substance of the question, he agreed with Mr. Gros that the use of the expression " a grave crime", without indicating any criterion for determining when a crime was to be regarded as grave for the purpose, as proposed in the Commission's alternative version of paragraph 1 of the article, would open the door to controversy. The Netherlands Government (A/CONF.4/136/Add.4) had preferred that alternative expecting that there might be consultations between the States concerned and, if necessary, an appeal to a third party for the purpose of determining the gravity of the crime. In practice, it would be the trying magistrate who would decide whether the crime in question was or was not grave, when in any case before him immunity would be claimed, and if the consular official claiming immunity was not satisfied by that decision, the official concerned would have to apply to the sending State, which would enter into correspondence with the receiving State. In the meantime, the consular officer would have to submit to detention. That difficulty would be obviated if some kind of criterion were laid down. In a number of national legal systems, such as India's, offences were differentiated according as they were compoundable or non-compoundable, bailable or non-bailable, cognizable or non-cognizable or triable by different classes of magistrate, or according to the different courts of first instance dealing with them or according to the form of instituting proceedings. Some such criterion might be used in the case of article 40.

4. He was inclined to accept Mr. Ago's suggestion (599th meeting, paras. 45 and 46) that consuls should not be arrested or detained pending trial at all but should be liable to imprisonment if sentenced. The acceptance of that thesis would mean that consular officials would have only an interim immunity, and not complete immunity from criminal jurisdiction. It would equally serve the fundamental purpose of immunity cited by Mr. Padilla Nervo (*ibid*, para. 75) namely, to maintain the dignity of the sending State and its representatives and to ensure the smooth performance of consular functions. The rule of exempting consular officials from liability to arrest and detention pending trial for all classes of crime would be to some extent a progressive development without going the whole length of absolute inviolability accorded to diplomatic agents by the Vienna Convention on Diplomatic Relations (A/CONF.20/13).

5. Finally, he was in favour of deleting paragraph 2. If consular officials were subject to the jurisdiction of the receiving State, it would be improper to grant them immunity from punishment even when found guilty under the law of that State.

6. Mr. AGO observed that the Commission's debate on article 40 had also embraced the substance of article 41 (Immunity from jurisdiction). Mr. Amado (*ibid*, para. 71), had criticized his suggestion at the same meeting as being too sweeping and had stressed the distinction between the functions of diplomatic agents and consular officials. He would assure Mr. Amado that he was fully aware of that distinction and had argued at the Vienna Conference in favour of granting immunities only to persons performing genuine diplomatic functions. The decisions of the Vienna Conference had, however, blurred the distinction and as a consequence immunities had been granted to persons whose functions could not be regarded as strictly diplomatic. Since under article 37 of the Vienna Convention the technical and administrative staff of diplomatic missions, including those employed in the consular section of a mission, had been granted complete personal inviolability, it would be contradictory in logic not to extend a like immunity to career consuls.

7. On the other hand, he agreed with Mr. Amado that in practice it was perhaps advisable that those immunities be restrictive. He also endorsed Mr. Verdross's view that, since all penalties should be executed in respect of consular officials, there was no need to specify in paragraph 2 the length of the sentence concerned. But, it would have been logical to provide for complete immunity of members of the consulate from liability to arrest or detention pending trial.

8. Mr. PAL had rightly pointed out that the use of the loose term " serious offence " or " serious crime " would lead to considerable difficulties. Who was to determine whether an offence was serious or not, or what maximum sentence should carry liability to arrest or detention? If the receiving State were left completely free to determine the gravity of the crime of which the consular official was accused, immunity would be practically abolished, since the courts of that State might arrest a consular official for an allegedly serious offence and prevent him from performing his functions for an indefinite period. The just and logical principle to be adopted, therefore, seemed to be that of presuming the consular official to be innocent so long as he was merely accused, but to provide that he was not protected by immunity after sentence had been passed. The risk of leaving the consular official entirely at the mercy of the courts of the receiving State would thus be avoided.

9. Mr. TSURUOKA said he was inclined to favour the idea of submitting two variants of the article to the plenipotentiary conference. The first variant should recognise immunity for consular officials on the same footing as diplomatic agents, but should provide for the possibility of waiver of the immunity by the sending State. That system had long been followed in diplomatic relations without serious inconvenience to either sending or receiving States, and its extension to consular officials might be justified by the growing trend towards recruiting diplomatic and consular staff under similar conditions and making the two categories of functions increasingly interchangeable. It would be advisable, however, to limit the scope of the first variant to consular officials and their families, and also to recommend in the commentary that the sending State should waive the immunity whenever possible, provided that the performance of

consular functions was not seriously hampered by such waiver and that it entailed no serious prejudice to the prestige of the sending State. The success of the system in the history of diplomatic relations was due to the delicate balance that had been established between the respect of the receiving State for the status of diplomatic agents and the sending State's respect for the legal system of the receiving State. It should be pointed out, however, that such a variant of article 40 would represent an innovation in existing international practice in the matter, and might be strongly resisted by certain States. The fact that a liberal trend had prevailed in respect of diplomatic immunities at the Vienna Conference did not guarantee similar success at the conference on consular intercourse, owing to the difference between the two functions. The Commission therefore would be wise to adopt a more conservative text; on the other hand, if it submitted a single draft, the conference might be led to adopt a hasty solution.

10. The second variant might be agreed upon by improving the text proposed by the Special Rapporteur. He was inclined to accept the phrase " unless they commit a serious offence " despite the arguments that had been advanced against it. With regard to paragraph 2, he agreed that the last phrase (" of imprisonment for a serious offence ") should be deleted.

11. Mr. MATINE-DAFTARY said he would confine his remarks to paragraphs 1 and 2 of article 40, since paragraphs 3 and 4 were essential to ensure that the exercise of the consular function would be hampered as little as possible. With regard to the Special Rapporteur's text of paragraph 1, under the codes of criminal procedure of all civilized States arrest or detention pending trial were stipulated in two cases. The first was that of " serious " offences — a term which was used in most codes — and it was for the examining magistrate to rule on the gravity of the offence. The second case was that where the examining magistrate ordered the accused person's provisional detention in order to prevent him from taking any action which might hamper the investigation, such as concerting with witnesses or persons accused with him as accomplices to give false evidence. The Special Rapporteur's text covered the first case, but not the second; it was, however, essential to include such a provision to enable the examining magistrate to conduct his investigation properly.

12. With regard to paragraph 2, he agreed with Mr. Verdross that all sentences must be executed. He could not, however, support Mr. Ago's suggestion, which would have the effect of preventing all provisional arrest or detention; if a consul were accused of murder in *flagrante delicto*, for example, it would be most inadvisable to leave him at large pending trial. He could not, therefore, agree to a provision under which a consular official could be imprisoned only in pursuance of a final sentence. Moreover, in no civilized country did the law provide for the execution of a penalty without final sentence. A distinction must be drawn between detention pending trial and imprisonment and a sentence passed by the court. He reiterated the need to provide for a consular official's detention pending trial in the case of a serious offence and to prevent interference with an investigation.

13. The CHAIRMAN, speaking as a member of the Commission, observed that it was not the Commission's practice to present alternative texts in its final drafts and it would be inadvisable to take such a course in the case of article 40. The various views that had been expressed might be mentioned in the commentary to the article, and participants in the plenipotentiary conference might use them as a basis for proposals.

14. Mr. AGO's suggestion that it should be laid down as a general rule that a consular official could not be detained or arrested except in execution of a sentence was logically very attractive and would certainly facilitate agreement. He very much doubted, however, whether the suggestion would be accepted by many States, for it went considerably further than existing practice in the matter. In virtually all States the arrest or detention of a consular official pending trial was admitted, although the conditions of imposing such arrest or detention differed widely. While he had no personal objection to the suggestion, he doubted the advisability of accepting it, exclusively on the ground that States were not ready to adopt such a principle. The text of paragraph 1 proposed by the Special Rapporteur was considerably closer to existing practice. Moreover, he believed that it covered both the situations referred to by Mr. Matine-Daftary.

15. He had originally been inclined to support the deletion of paragraph 2, but had since come to the conclusion that there was a cogent argument in favour of its retention. If a consular official could be arrested only in the execution of a final sentence, then that official would enjoy more favourable treatment than ordinary citizens. With regard to Mr. Matine-Daftary's remark, under the municipal law of many countries the courts could order provisional arrest or detention.

16. He agreed that the last phrase of paragraph 2 should be omitted, but reiterated that, if the whole paragraph were deleted, the article would in effect contain only one provision, i.e. that consular officials were not liable to arrest or detention pending trial unless they committed a serious offence.

17. Mr. VERDROSS said that, at first sight, he had been impressed by Mr. Ago's argument that there was a considerable contradiction between the granting of personal inviolability to the technical and administrative staff of diplomatic missions, under article 37 of the Vienna Convention, and refusal to grant similar immunity to career consuls, although the latter might perform much more important functions. Further consideration of the matter, however, had led him to the conclusion that the contradiction did not in fact exist. Members of the technical and administrative staff were assistants of the head of the diplomatic missions and might even, under article 19 of the Vienna Convention, conduct current administrative affairs of a diplomatic mission; the same applied to members of the consular sections of diplomatic missions who, in a small mission, might quite conceivably act as heads of post and, hence, as *chargés d'affaires* of the sending State. It was therefore

only proper to allow those staff members to enjoy diplomatic immunities, although their normal functions might be less important than those of career consuls.

18. He agreed with the Chairman that the text of paragraph 1 proposed by the Special Rapporteur corresponded to existing practice in the matter. Most bilateral conventions provided that consular officials should not be liable to arrest or detention pending trial unless they committed a serious offence. He further agreed with the Chairman that paragraph 2 should be retained, subject to the omission of the last phrase. The resulting wording would provide the most just and precise solution. It should further be borne in mind that, if the relations between the sending and the receiving States made it necessary, the head of the receiving State, acting on the advice of the Minister for Foreign Affairs, could always pardon a foreign consul who had been sentenced by final judgement.

19. Mr. JIMÉNEZ de ARÉCHAGA said that he had two objections to Mr. Ago's suggestion concerning paragraph 1, the first based on expediency and the second on considerations of substance. With regard to the expediency of adopting Mr. Ago's solution, he pointed out that the Commission at its twelfth session had proposed two variants of paragraph 1. All the governments which had commented on article 40 had expressed the view that some qualifying reference — either to a serious crime or to a specific maximum sentence — should be made in the text. A totally new approach, at variance with the attitude reflected in their comments, would therefore come as a considerable surprise to those governments.

20. So far as substance was concerned, consular officials were subject to the municipal law of the receiving State in respect of their private acts; it was explained in paragraph (2) of the commentary that the provision for arrest pending trial in the case of serious crime was established in a number of bilateral agreements, some of them dating back to the eighteenth century. It was essential for consular officials to be treated on the same footing as ordinary citizens in respect of serious crimes committed when they were not exercising their consular functions. Furthermore, the Commission should bear in mind the possibility that the sending State might recall the consular official before the final sentence was passed. He agreed with Mr. Gros that the question of determining the gravity of a crime might raise some difficulty, but that difficulty would arise if a term of sentence were established. He had been impressed by Mr. Ago's argument that, if article 40 provided for the consul's immunity except in cases where the offence was punishable by a specified maximum sentence, the judge might go out of his way to declare a severe penalty applicable for the purpose of bringing the case within the scope of the exception. Moreover, the Commission should have confidence in national legal systems, which tended to impose provisional arrest and detention in increasingly fewer cases, reserving such measures for serious offences only, and to apply them only where they were indispensable for the prosecution or for the protection of the person of the accused.

21. With regard to paragraph 2, the vital passage was " save in execution of a final sentence of at least two years' imprisonment ". If the words " of at least two years' imprisonment " were deleted, there would be no reason to retain the paragraph, for without those words, the paragraph would mean in effect that a consul — as indeed any other person — could not be committed to prison except in execution of a final sentence — a provision similar to that adopted by the United Nations Commission on Human Rights in article 9 of the draft international covenant on civil and political rights (E/2573). It might be argued that the question of a consul's detention pending trial would remain; but that form of custody was covered by paragraph 1. Accordingly, paragraph 2 (without its last few words) would be redundant and could be omitted.

22. Mr. ŽOUREK, Special Rapporteur, said that, taking into account the opinion expressed by the Governments of Norway and Yugoslavia (A/CN.4/136), he had proposed in his third report (A/CN.4/ 137), a new article 50a dealing with the waiver by the sending State of the immunities specified in articles 40 and 41. The Commission would examine that proposal when it came to consider section III of his report concerning the additional articles suggested by governments for inclusion in the draft.

23. He could not agree to the suggestion by Mr. Tsuruoka that the Commission should submit two alternative texts. As indicated by the Chairman, it was not customary for the Commission to adopt that procedure in its final drafts. To do so in that instance would give a regrettable impression of indecision.

24. In connexion with Mr. Amado's remark on terminology (599th meeting, para. 72), admittedly the expression " personal immunity " was used in a number of consular conventions, some of them rather old. That expression, however, had given rise to considerable difficulties. For example, as pointed out in his second report (A/CN.4/ 131), two different interpretations had been given by the French courts. In certain cases, those courts had interpreted the term as equivalent to full immunity from jurisdiction; in other cases, they had held that personal immunity conferred only exemption from imprisonment, but not immunity from jurisdiction. It was therefore desirable to use the expression " personal inviolability", which was not open to such difficulties of interpretation.

25. Mr. Ago's suggestion that paragraph 1 be redrafted so as to protect consular officials from arrest or detention pending trial in all cases would constitute a desirable development of international law. It did not, however, correspond to the existing practice as shown by the consular conventions in force; those conventions, even in the rare cases where they granted consular officials immunity from jurisdiction, always stipulated an exception in respect of serious crimes.

26. Mr. Matine-Daftary had suggested that it would be an unwarrantable interference with the course of justice to prevent an examining judge from arresting a consul in the interests of the investigation of a case. In fact, many consular conventions stipulated that a

consul could be arrested only if charged with a crime of a serious character. In the circumstances, the Commission could not take the view that a consul could be arrested on a minor charge simply because the examining judge considered it useful in order, for example, to prevent contact with other accused persons. The purpose of the provisions of article 40 was to reconcile the respect due to the laws of the receiving State with the need to prevent any interference with the smooth working of consular relations. For that purpose, a criterion based on the seriousness of the offence was necessary. In any case, the municipal law of a State would be unlikely to admit of the arrest pending trial of a person charged with a minor offence; he had himself served with the judiciary for four years and could state that, in his country at least, custody pending trial was ordered only where an accused was charged with a serious crime.

27. He agreed with Mr. Jiménez de Aréchaga that paragraph 1, which gave expression to a well-established international practice, could not be materially altered without giving governments cause for considerable surprise, since none of them had suggested that consular officials should be exempted from arrest or detention pending trial in all cases, regardless of the nature of the charge.

28. As to paragraph 2, the deletion of the qualifying proviso " of at least two years' imprisonment " would not make the paragraph superfluous, as had been suggested. Without the words in question, its provisions would serve to state that a consular official's personal freedom could not be subjected to any restriction save in execution of a final sentence. That formulation would make it clear:

(i) That a consular official could only be committed to prison in execution of a " final sentence ", an expression which excluded a decision that was still subject to appeal;

(ii) That a consular official could not be committed to prison by virtue of a mere order from a judge in connexion, for example, with a statement made by him as a witness;

(iii) That a consular official could not be deprived of his personal freedom by virtue of a mere administrative decision or a police warrant;

(iv) That a consular official could not be subjected to any restriction upon his personal freedom other than committal to prison, i.e. to measures of compulsion constituting imprisonment.

29. Mr. YASSEEN said that the Commission should not depart from the existing practice of granting immunity from jurisdiction to consular officials only in respect of acts performed in the course of their official duties. That practice was evidenced by numerous consular conventions.

30. The Commission should not be unduly impressed by the broad measure of immunity from jurisdiction granted by the Vienna Convention to members of the administrative and technical staff of diplomatic missions. The provisions of article 36, paragraph 1, of the draft articles on diplomatic intercourse and immunities (A/3859) submitted to the Vienna Conference would have given members of the administrative and technical staff who were not nationals of the receiving State the same immunity as diplomatic agents. That proposal of the Commission had been the subject of much criticism and the Conference had, in the first place, rejected immunity from jurisdiction in civil matters. An attempt had then been made to reject or limit immunity from criminal jurisdiction and the provision on the subject had, as a result, failed to obtain the necessary majority. But subsequently the original paragraph itself of the article providing immunity for members of the administrative and technical staff had failed to obtain the necessary majority. Many delegations, however, had taken the view that the important question of the position of such staff in criminal law could not be ignored in a convention on diplomatic relations. Accordingly, the discussion had been reopened and, somewhat reluctantly, many delegations had contributed with their votes to the adoption of the text which appeared as article 37, paragraph 2, of the Vienna Convention. In the circumstances, the text in question could not be cited in support of the suggestion that there existed some trend in favour of broadening the scope of immunity from jurisdiction. The Vienna Conference had in fact shown more reserve in respect of that point than had the Commission in its draft on diplomatic intercourse.

31. For those reasons, he considered that, on the whole, the Commission would do well to adopt the text proposed by the Special Rapporteur. In paragraph 1, he preferred the expression " a serious offence " to the referencet o a specified term of imprisonment. The latter criterion lacked precision because penalties varied in nature and the length of the sentence was not always a criterion of its severity. Indeed, in the penalty scale, even a short sentence of hard labour was regarded as more severe than a longer term of imprisonment.

32. As to Mr. Ago's suggestion that consular officials should be protected from arrest or detention pending trial in all cases, he said he would be prepared to accept the suggestion because of the position and functions of the officials concerned. Such a provision would not be altogether inconsistent with the municipal law of many countries, which admitted the possibility of the release on bail of an accused, regardless of the nature of the crime with which he was charged, particularly on the grounds of his personal standing.

33. In paragraph 2, he thought that the final proviso " of at least two years' imprisonment " should be deleted. The introduction of that proviso was an innovation which was not compatible with the general principles applicable in the matter. As a matter of drafting, the initial provision " Except in the case . . . " should also be dropped, so that paragraph 2 would read: " The officials referred to in paragraph 1 shall not be committed to prison or subjected . . . save in execution of a final sentence ".

34. Mr. GROS said that he was sceptical of the argument advanced in support of using the criterion " a serious offence " and based on the use of expressions of that type in bilateral consular conventions. Every one of such conventions had been discussed and negotiated by the two States concerned and invariably included a

definition of the term " serious crime " or " serious offence " used in the text of the convention. In the absence of a definition, it would be practically meaningless to use an expression of that kind in a multilateral treaty.

35. It was, therefore, not possible to draw a general rule of international law from the terms used — but also defined with precision — in bilateral consular conventions. The purpose of the codification attempted by the Commission was to reduce the possibilities of dispute. The use without further definition of an expression such as " a serious offence " would invite difficulties of interpretation and would thereby create problems instead of solving them. If such an expression were used, it would be necessary to give, at least in the commentary, an enumeration of the crimes deemed to be " serious " for the purposes of the draft. The list in question would be drawn from existing bilateral consular conventions. In the absence of such a list, however, he would maintain his objection to the proposed expression.

36. With reference to the remarks by Mr. Matine-Daftary, in practice it was rare that a consul was charged with a crime of violence. Traffic accidents, debts and, occasionally, alleged activities foreign to the consular function, were the source of the problems which arose.

37. There were two further comments of detail he would make in connexion with Mr. Matine-Daftary's remarks. One was that in French law, as in the law of other countries, it was possible for the Court to order the arrest of a person in court; a witness could, for example, be arrested as a result of a statement made by him. Also, a person could be committed to prison in pursuance of a sentence that was not final: for instance a person sentenced to a term of imprisonment might on occasion have to serve his sentence even if an application for judicial review had been lodged with the *Cour de Cassation*, the highest judicial authority. Pending that Court's decision, the prisoner might have to spend many months in prison. It was necessary to bear those facts in mind in the drafting of paragraph 1. The other point was that the examining judge was usually empowered to keep an accused in custody for as long as was considered necessary to ascertain the truth in the case; the judge's powers were thus very broad. For that reason the article under discussion should specify in which cases consular officials could be arrested. Since those officials did not enjoy immunity from jurisdiction in such cases, there were cases in which they could be arrested, but a restrictive definition would, in such cases, be required.

38. Mr. MATINE-DAFTARY, replying to the Special Rapporteur, said that he had never suggested that a person could be held in custody pending trial on a trivial charge. He had merely pointed out that, in addition to his powers of arrest in respect of grave crimes, an examining judge had also the power to order any accused to be held in custody provisionally for the purpose of preventing contact with other accused.

39. If, as the Special Rapporteur had suggested, one of the purposes of article 40, paragraph 1, was to ensure that a consular official would not be liable to arrest by administrative order, the paragraph would have to specify that the arrest or detention envisaged must be ordered by the " judicial authorities ".

40. As to paragraph 2, he was not opposed to its retention if the proviso " of at least two years' imprisonment " were deleted. With that deletion, the paragraph would state, as was indeed the case in most countries, that a person could not be committed to prison otherwise than in execution of a final sentence. For his part, he did not know of any system of criminal law which made it possible to execute a penalty so long as an appeal against the decision was still possible. There was a difference between conviction and a warrant for arrest, which was merely part of the process of investigation. However, it might be worth while providing *expressis verbis* that a final sentence was indispensable for a consul's imprisonment, for such a provision would constitute a safeguard against the execution of the penalty pending appeal (if that should be possible under any system of municipal law).

41. Mr. AGO stressed the need to avoid all confusion between immunity from jurisdiction and personal inviolability. All members of the Commission agreed that consular officials were immune from jurisdiction only in respect of acts performed in the course of their official duties. So far as their personal inviolability was concerned, it would not be unduly liberal to exempt consular officials from arrest or detention pending trial in all cases. Under the law of numerous countries, including the United States, it was possible for any accused, regardless of the seriousness of the charges against him, to obtain his release on bail.

42. He fully agreed with Mr. Gros that it was unsound to try to derive a general rule of international law from the use of expressions like " serious offence " in bilateral conventions. In all such conventions, a precise definition of the term was given on the basis of the municipal law of the two countries concerned.

43. If, therefore, the Commission were to retain some criterion in paragraph 1 he would make three suggestions. First, the use of the term " offence " should be avoided for it was much too broad and could include even breaches of administrative regulations. He urged the use of an expression such as " serious crime ". Second, the commentary should contain examples of such crimes, to show that, for example, breaches of the law by negligence were not included. Third, the commentary should indicate that the Commission had contemplated the possibility of admitting the exemption of arrest or detention pending trial in all cases, but had reached the conclusion that far the time being it could not go beyond the existing practice. A commentary of that type would serve the purpose indicated by Mr. Tsuruoka of suggesting to governments the possibility of an alternative course of action without submitting the two alternative texts, a procedure which the Commission did not follow in its final drafts.

44. Lastly, he agreed with Mr. Matine-Daftary that paragraph 1 should specify that the arrest or detention envisaged must be effected by order of the competent judicial authority; in other words, the detention of consuls by order of an administrative or political autho-

rity would not be admissible. A provision on those lines would provide a valuable safeguard against interference with a consul's official duties.

45. Mr. SANDSTRÖM opined that the second alternative offered in paragraph 1 was too vague. The first alternative was also not precise enough, for the duration of a sentence depended upon the criminal law of the State concerned. Moreover, such a proviso would not be workable in practice except in truly reciprocal stipulations in bilateral conventions, as e.g. in the Consular Convention of 1952 between the United Kingdom and Sweden.[1] Article 14 of that Convention stipulated that a consular officer could not be subject to detention in custody pending trial unless accused of a grave offence as defined in article 2 (9), and the latter article laid down that a " grave offence " meant one for which a sentence of imprisonment for five years or over might be awarded in the United Kingdom and one for which a sentence of imprisonment of four years or over might be awarded in Sweden. A provision of that nature could not of course be devised for a multilateral convention.

46. He was not opposed to the idea of exempting consuls altogether from detention pending trial in view of the special position they occupied and since the likelihood of their committing serious offences was extremely small.

47. On the other hand, paragraph 2, which did not serve any very useful purpose, could be deleted.

48. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Matine-Daftary's remark that detention pending trial could be ordered in the case of serious crimes or, if necessary, for the purposes of the investigation, pointed out that those two contingencies were provided for in the text of article 40 as it stood. But in view of the practice of States and following the precedents contained in bilateral conventions, the Commission had decided to exempt consuls from such forms of custody if charged with offences that were not serious.

49. He had only mentioned the rule according to which consuls could not be detained for breach of administrative orders in connexion with paragraph 2, which in its existing negative form clearly excluded the possibility of such detention.

50. The CHAIRMAN said that after lengthy discussion the Commission should be in a position to take a decision on article 40. The consensus of opinion seemed to be in favour of the adoption of the Special Rapporteur's proposed new text for paragraph 1 as reproduced in his third report, with the addition of the proviso suggested by Mr. Matine-Daftary and supported by Mr. Ago that such arrest or detention pending trial could only be ordered by the competent judicial authority. The exact wording of the proviso could be left to the Drafting Committee.

51. Mr. BARTOŠ said he would be prepared to vote for such an addition if it were clearly understood that detention for quarantine purposes, for instance, was an entirely different matter. There had been a case where the departure of certain Yugoslav consular officials from Beirut had been held up by the quarantine authorities.

52. Mr. ŽOUREK, Special Rapporteur, confirmed that article 40 as drafted referred only to detention ordered by judicial authorities.

53. The CHAIRMAN put to the vote the addition proposed by Mr. Matine-Daftary to paragraph 1 in article 40.

The proposal was adopted by 12 votes to 1, with 4 abstentions.

54. Mr. GROS asked whether the Commission had decided whether the word " offence " or the word " crime " should be used in paragraph 1.

55. The CHAIRMAN suggested that that point could be left to the Drafting Committee.

56. Mr. PADILLA NERVO emphasized that the point was one of substance, since the practical effect of using the one or the other term would be quite different.

57. Mr. ŽOUREK, Special Rapporteur, said that in some countries the classification of criminal acts corresponded to that used in France — namely, *crime*, *délit* and *contravention*. In other countries the expression " serious offence " was used, not the term " crime ". If the Commission so wished, he could by way of example indicate in the commentary the kind of offences which were defined as serious in consular conventions.

58. He was strongly opposed to the use of the word " crime " and since there was no disagreement on the meaning of the exception laid down in paragraph 1 he could see no reason why the Commission should not adopt the term " serious offence ". He had chosen the word " offence ", which by reason of its generality should be acceptable to all States.

59. The CHAIRMAN considered that as there was no disagreement over the meaning of " serious offence " the choice of wording most likely to be acceptable to States could be left to the Drafting Committee, which would probably have to study the language used in bilateral conventions and national laws.

60. Mr. BARTOŠ said that since during the past twenty years the tripartite classification mentioned by the Special Rapporteur had been abandoned in new penal codes, he would be prepared to vote only for some generic term.

61. Mr. YASSEEN emphatically agreed with Mr. Padilla Nervo that the Commission was not discussing a drafting point; in countries where the tripartite classification was used, all crimes were by definition serious.

62. The CHAIRMAN observed that the Commission would have to use a general term rather than one borrowed from the law of a particular group of States.

63. Mr. MATINE-DAFTARY observed that the expression " serious offence " should give general satisfaction, whereas the use of the word " crime " might cause difficulties for certain countries.

[1] *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations *Legislative Series*, vol. VII (United Nations publication, Sales No. 58.V.3), pp. 467 *et seq.*

64. Mr. AGO pointed out that the Commission could hardly hope to find a term that would be consistent with the legal parlance of every country in the world. He was categorically opposed to the use of the word " offence " which could, in some countries such as France and Italy, include a breach of administrative regulations. The word " crime " had a general connotation familiar everywhere and comprised classes of offences which in some countries were defined as " serious ".

65. Mr. AMADO said that the expression " serious offence " was not known in the penal code of a number of countries, including his own. He was therefore opposed to its use, but if the Commission decided otherwise, at least it should be qualified by the words " under the criminal law ". He would have supported the suggestion of Mr. Gros that the type of offence envisaged in paragraph 1 might be enumerated.

66. The importance of the principle of " inviolability " would be seriously diminished if its application could be restricted by reason of an " offence ".

67. Mr. ŽOUREK, Special Rapporteur, pointed out to Mr. Amado that in the language of criminal lawyers the term " offence " was a generic one meaning any violation of the criminal law. If qualified by the adjective " serious ", the term would be equivalent to the term " crime " as used by certain countries.

68. Mr. YASSEEN pointed out the very great difference between a " serious offence " and a " serious crime ".

69. Mr. FRANÇOIS proposed that the matter be referred to the Drafting Committee in the light of the discussion.

70. Mr. PADILLA NERVO said that the question should be settled by the Commission itself to forestall possible difficulties later. Since the consensus appeared to be that the exception stated in paragraph 1 referred to a crime and not to a simple violation of the law, some acceptable definition in terms of the duration of the sentence was necessary.

71. In reply to a question by the chairman, Mr. EDMONDS said that in United States legal terminology, an offence which could be a breach of administrative rules was different from a crime, which was much more serious. The discussion had served to confirm his view that far greater precision was required in paragraph 1. His original objection to the expressions " grave crime " or " serious offence " had been that they were open to very different interpretations. He therefore proposed that the Commission should vote on the first alternative in the text approved at the previous session. The phrase " an offence punishable by a maximum sentence of not less than five years' imprisonment " had at least some meaning for all States.

72. Mr. AMADO said that if the clause used the expression " serious offence ", it would fail to convey the Commission's intention that consuls could only be detained in the case of what were designated in some countries as crimes of an atrocious character.

73. Mr. PADILLO NERVO considered that Mr. Edmond's proposal should be put to the vote first since it concerned the text originally submitted to governments for comment. The decision on that proposal would give better guidance to the Drafting Committee.

74. The CHAIRMAN, observing that as the Commission had already started the voting on article 40 it could not take up Mr. Edmonds's proposal until the vote had been concluded, put to the vote Mr. François' proposal that paragraph 1 should be referred to the Drafting Committee in the light of the discussion.

The proposal was adopted by 7 votes to 5, with 5 abstentions.

Article 40, paragraph 1, as proposed by the Special Rapporteur (A/CN.4/137), as amended, was adopted, subject to drafting changes.

75. The CHAIRMAN said that the Commission appeared to be in favour of his suggestion that the words " of imprisonment for a serious offence " in paragraph 2 of the Special Rapporteur's redraft of article 40 should be omitted.

76. Mr. JIMÉNEZ DE ARÉCHAGA said that he would be unable to support paragraph 2 as amended by the Chairman if it could in any way be construed to imply that consuls were granted any special privileges since the right granted by that paragraph was enjoyed by any individual, as was proved, for instance, by article 5, paragraph 1 (a), of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950).[2]

77. The CHAIRMAN said that paragraphs 3 and 4 in the Special Rapporteur's redraft were, presumably acceptable for they had not given rise to amendments.

78. The Commission would recall that the Special Rapporteur had prepared a separate article concerning the waiver of immunity (A/CN.4/137, article 50 a) which would be discussed later.

79. He suggested that article 40, as amended, should be referred to the Drafting Committee.

It was so agreed.

80. Mr. AMADO said that the statement made in paragraph (20) of the commentary was highly questionable and he hoped that it might be reconsidered by the Special Rapporteur.

81. The CHAIRMAN suggested that the Special Rapporteur might be asked to summarize in the commentary the views expressed about the relationship between article 40 and the parallel provisions of the Vienna Convention as well as those put forward concerning the desirability of giving consular officials absolute immunity from arrest and detention.

It was so agreed.

The meeting rose at 1.5 p.m.

[2] United Nations, *Treaty Series*, vol. 213, pp. 221 *et seq.*