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Summary record of the 587th meeting

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ARTICLE 6 (Communication and contact with nationals of the sending State)

60. Mr. ŽOUREK, Special Rapporteur, said that the comments on article 6 were contradictory. Some governments held that the article went too far, whereas others considered that it was not sufficiently comprehensive and failed to provide the consul with adequate scope. At that stage, he proposed to deal with only the first type of comment: he would deal with the others if the Commission decided to retain article 6.

61. He recalled that at the twelfth session the adoption of article 6 had been preceded by a long discussion.[3] For his part, he had expressed reservations regarding the article because its provisions gave too much scope to a particular consular function (534th meeting, para. 14). In addition, those provisions seemed to go too far on certain points.

62. A number of governments, including those of Denmark and Norway (A/CN.4/136 and Add.1), considered that the provisions of article 6 went too far. The Czechoslovak Government proposed the deletion of article 6 on the grounds that the powers of the consul to protect the interests of his nationals were regulated already in general terms by the provisions of article 4 on consular functions and that detailed regulation of the questions referred to in article 6 was a matter falling within the exclusive competence of the internal legislation of the receiving State (A/CN.4/136).

63. The United States Government had criticized article 6 on the grounds that its provisions appeared to give validity to procedures whereby a prisoner might be held *incomunicado*. Accordingly, that government had suggested that a maximum period of forty-eight or seventy-two hours be agreed upon for the purpose of that type of custody (A/CN.4/136/Add.3).

64. The opinions expressed by the seventeen governments which had sent in their comments showed that there was a wide divergence of views on the substance of article 6. It was therefore extremely unlikely that agreement would be reached on the provisions of the article in a future conference of plenipotentiaries at which as many as a hundred States might be represented. The conclusion to be drawn was that the subject dealt with in article 6 was not ripe for codification in a multilateral convention, and he therefore suggested that the Commission should carefully consider whether the article should be retained.

The meeting rose at 1 p.m.

[3] 534-537th meetings; article 6 was there discussed as additional article 30A.

587th MEETING

Wednesday, 10 May 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Co-operation with other bodies

[Agenda item 5]

1. Mr. LIANG, Secretary to the Commission, read a telegram dated 7 May 1961 from Mr. Charles Fenwick, Executive Secretary of the Inter-American Council of Jurists, to the effect that Mr. José Joaquín Caicedo Castilla had been designated as observer for the Inter-American Juridical Committee to attend the present session of the Commission.

2. The CHAIRMAN welcomed Mr. Caicedo Castilla.

3. Mr. Caicedo CASTILLA, Observer for the Inter-American Juridical Committee, thanked the Chairman for his kind words of welcome.

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

[Agenda item 2]
(*continued*)

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

ARTICLE 6 (Communication and contact with nationals of the sending State) (*continued*)

4. The CHAIRMAN invited the Commission to resume its discussion of article 6 of the draft on consular intercourse and immunities (A/4425).

5. Mr. YASSEEN urged that article 6 be retained as in the 1960 draft. Its provisions, in particular those set forth in paragraph 1 (a) and (b), were absolutely necessary.

6. The freedom of the nationals of the sending State to communicate with and to have access to their consul, and the consul's freedom of communication with his nationals, were not guaranteed by article 4, which dealt with consular protection. Those freedoms were an essential condition for the exercise of the consular function of protection, as recognized by the opening words of paragraph 1 (" With a view to facilitating the exercise of the consular functions . . ."). It was therefore necessary to safeguard them by means of an explicit provision in the terms of paragraph 1 (a).

7. Equally important was the duty set forth in paragraph 1 (b) of the competent authorities of the receiving State to inform the consul if one of his nationals was committed to custody pending trial or to prison. Unless

so informed, the consul would have great difficulty in finding out whether one of his nationals had been arrested and hence in performing his duty to protect the national.

8. The right of the consul to visit his imprisoned national, set forth in paragraph 1 (c), was largely covered by the general function of protection. That right was, however, extremely important and was connected with one of the most essential human rights: that of the right of defence of an accused. It was therefore desirable that it should be mentioned explicitly.

9. Paragraph 2 of the article, which specified that the freedoms referred to in paragraph 1 should be exercised in conformity with the laws and regulations of the receiving State, and added that those laws and regulations should not nullify those freedoms, served a threefold purpose: first to obviate any possible abuse on the part of the consul or his nationals of the freedoms in question; in the second place, to preclude any arbitrary application of the laws and regulations of the receiving State on the part of its authorities, who were required to give effect to the freedoms embodied in those laws and regulations; and, thirdly, to avoid any abuse on the part of the receiving State itself of its legislative and regulatory powers by specifying that it must not enact any laws and regulations which might render the freedoms in question inoperative.

10. He supported article 6 as a well-balanced text which took into account the various conflicting interests involved, but reserved his right to comment on drafting changes.

11. Mr. VERDROSS also supported article 6. The protection of the nationals of the sending State in their relations with the local authorities was possibly the most important of all consular functions. That traditional function could be performed only if the consul were free to communicate with his nationals and to visit them if they were detained. The freedoms mentioned in article 6, paragraph 1, were an essential corollary to the right of protection set forth in article 4. The recognition of the right of protection should therefore carry with it that of the means to exercise that right.

12. The wording of paragraph 2 should be improved. Instead of providing that the freedoms referred to in the article should be exercised in conformity with the laws and regulations of the receiving State, it should be stipulated that those laws and regulations could regulate only the manner of exercising such freedoms.

13. Mr. FRANÇOIS said that he shared the views expressed by the two previous speakers. He could not follow the Special Rapporteur's suggestion (586th meeting, para. 64) that the provision be dropped from the draft merely because a few governments had expressed objections to it. Of course, the Commission took into consideration all government comments, but those comments emanated from only a small number of governments and it would be an altogether unsatisfactory system to give, in effect, to two or three States the possibility of deleting an article from the draft, thereby depriving the great majority of States from expressing their views on that article in the diplomatic conference which would be convened to examine the draft.

14. In fact, the government replies showed that many States favoured article 6 and considered it as one of the most important articles of the whole draft. Some Government comments even suggested that the provisions of the article should be strengthened; for example, the Netherlands Government had proposed (A/CN.4/136/Add.4) that the expression " without undue delay " in paragraph 1 (b) should be supplemented by the words " and in any case within one month ". Although that amendment might perhaps make the provision unduly broad, the fact that it had been proposed showed the importance attached by the Netherlands Government to the freedoms set forth in paragraph 1.

15. Mr. EDMONDS said that he would strongly support the retention of article 6. He would go even further and broaden the terms of its provisions. In particular, in connexion with the right of a consul to visit his national who was in custody or imprisoned, promptness was necessary in order to ensure the effectiveness of the consul's action. Unless a consul could visit his national at the outset of the difficulties, he could not make proper arrangements for legal representation. It would serve little purpose to permit such a visit only after the accused had been held for weeks in secret confinement.

16. In article 6, the Commission dealt with a very fundamental human right and it should not retreat from the position which it had taken at its twelfth session. Rather, it should endeavour to take a step forward along the course which it had set itself.

17. Mr. PADILLA NERVO said that article 6 was perhaps the most important of all the provisions relating to consular functions. The rights therein set forth were intimately connected with the consul's exercise of his duties within his jurisdiction. If the consul were not allowed to communicate with his nationals throughout his district, his jurisdiction would in fact be limited within the narrow bounds of the city or port where the seat of the consulate was stituated.

18. The consul's freedom to communicate with his nationals, and their right to communicate with their consul, constituted the cornerstone of the whole structure of consular relations. As far as Mexico was concerned, the inclusion of an explicit provision guaranteeing those facilities of communication constituted a condition *sine qua non* for the signing of any bilateral consular convention. Those facilities were of great practical importance in the case of a country whose nationals travelled or worked abroad in large numbers.

19. For those reasons, he supported article 6 in its entirety, but wished to place on record his interpretation of paragraph 2, which stated that the freedoms referred to in paragraph 1 would be exercised in conformity with the laws and regulations of the receiving State. In his opinion, that provision could only mean that the consul's right to visit or to communicate with a prisoner was subject to whatever regulations were in force in the prison where the person in question was held. The provi-

sions of paragraph 2 could not have the wider meaning that the freedom of communication in general, as expressed in paragraph 1 (a), could be restricted by the receiving State.

20. The CHAIRMAN, speaking as a member of the Commission, recalled that article 6 had been adopted at the twelfth session after a long and difficult discussion.[1] The majority of the members appeared to favour retaining the article and he suggested it would not be wise to attempt to change materially the substance of a compromise formula which represented such a delicate balance between different views.

21. Nevertheless, a number of minor improvements could be made and he suggested the following alterations:

(i) The adoption of the Netherlands proposal that in paragraph 1 the word " consul " should be replaced by " consulate " or, where appropriate, by " a consular official " or " officials of the consulate ". That change would be in keeping with the form adopted in the Vienna Convention on Diplomatic Relations (A/CONF.20/13), which referred to the diplomatic mission as such. If the Commission approved, a similar change might be made in other articles of the draft for the sake of uniformity of terminology.

(ii) In paragraph 1 (a), the words " Nationals of the sending State shall be free to communicate with and to have access to the competent consul, and " might be deleted, so that the provision would read: " (a) The consul shall be free to communicate with and, where appropriate, to have access to the nationals of the sending State." That amendment would be consistent with the general tenor of the article, which referred to the consulate's freedom to communicate with its nationals and not to the rights of aliens in the receiving State.

(iii) In paragraph 2, the passage " subject to the proviso, however . . . " should be deleted, since it constituted an explanatory remark more suited to a commentary than to the text of the article. A decision along those lines had been taken in connexion with the article on freedom of movement in the Commission's draft on diplomatic intercouse (A/3859, commentary to article 24).

22. Mr. ERIM said that he supported the retention of article 6. Paragraph 1 was largely a codification of existing international law, and any attempt to delete such provisions as those of paragraph 1 (b) and (c) would represent a distinctly retrograde step in international practice.

23. The contents of paragraph 1 represented to some extent progressive development of international law, but such innovations as it contained were all sound and useful.

24. He agreed with the Chairman that no attempt should be made at that stage to alter materially the substance of an article which represented a delicate compromise, but he could not agree with the Chairman's suggestion that the final proviso of paragraph 2 should be relegated to the commentary. The proviso was extremely important and should appear in the article itself.

25. Mr. ŽOUREK, Special Rapporteur, explained that he had not disputed the importance of the question mentioned in article 6. He had only expressed doubts about its inclusion in the general structure of the draft convention and about the article's chances of acceptance by the necessary majority at the conference which was to prepare a multilateral convention. In view of the conflicting opinions expressed by governments on article 6, he was very sceptical of its chances of acceptance, but if the majority of the Commission nevertheless wished to retain article 6, he would not oppose the detailed consideration of the comments of governments.

26. He went on to consider in detail the government comments on the provisions of article 6. The Norwegian Government (A/CN.4/136) had found the freedoms provided for in paragraph 1 too extensive. That criticism was justified; article 6 was much broader than even the provisions of bilateral conventions which dealt with freedom of communication. Nevertheless, the Norwegian Government had suggested that freedom of communication might be extended so as to make it applicable in such cases of forced detention as quarantine or committal to a lunatic asylum. A similar suggestion had been made by the Netherlands and might be considered by the Commission.

27. The other Netherlands suggestion, that the expression " without undue delay " in paragraph 1 (b) be supplemented by the words " and in any case within one month ", would make the paragraph much too strict and so further lessen its chances of general acceptance.

28. A number of comments, including those of Japan (A/CN.4/136/Add.9) suggested the insertion of the words " at his [sc., the prisoner's] request " in connexion with the right of a prisoner to communicate with his consul. The question had been discussed at the twelfth session and the majority view had been that it was undesirable to limit the right of communication in that manner because the prisoner might be unaware of his right to communicate with his consul.

29. Lastly, the Belgian Government had suggested (A/CN.4/136/Add.6) a drafting amendment to paragraph 1 (c), which might be referred to the Drafting Committee.

30. Mr. AGO agreed with the Chairman that it would be undesirable to make any important changes in a text which reflected a compromise achieved with some difficulty.

31. There was, however, another reason for accepting article 6 without any substantial change. The majority of the governments which had sent in comments had not expressed any objection to article 6. Only the Government of Czechoslovakia had proposed the deletion of the article (A/CN.4/136), not so much because it had any objection to its substance but largely on the grounds that its contents were already covered by the provisions of article 4 on consular functions.

32. The Norwegian Government had taken the view

[1] 534th-537th meetings; article 6 was there discussed as additional article 30A.

(A/CN.4/136) that article 6, paragraph 1, set forth certain freedoms in extremely broad terms, but that the important and ill-defined reservations in paragraph 2 made those freedoms illusory. He understood the concern of the Norwegian Government, but it would not be easy to remedy that situation. If the provisions of paragraph 1 were made too categorical, they might command less support from governments because in certain cases they would give the consul broader rights than the law of the receiving State would allow. Moreover, a remedy against the danger indicated by the Norwegian Government was to be found in the last phrase of paragraph 2.

33. He agreed with the Netherlands suggestion that the references to the consul should be replaced by references to the " consulate " or to " a consular official ". On the other hand, he could not agree with the Belgian suggestion that article 6 should expressly specify the consul's right to address correspondence to nationals of the sending State who were in custody or imprisoned. Freedom of communication implied freedom of correspondence, and it was unnecessary to go into such great detail.

34. Nor could he support the Japanese Government's proposal that a consul's right to be advised of the arrest of one of his nationals and to communicate with him should be qualified by the condition that the national concerned must have made a request that the consul be informed. It might happen that a prisoner did not wish to be protected by his consul, but it was better to ignore that rare case rather than to run the risk of giving the local authorities a ready excuse for not advising a consul of the arrest of one of his nationals. The suggestion by Norway and the Netherlands that the consul's right to communicate with his nationals should be exercisable in all cases where a person was deprived of his freedom, including such cases as committal to a lunatic asylum, was a useful one and the Drafting Committee could be instructed to prepare a suitable formula to cover those cases, using perhaps the wording suggested by the Netherlands.

35. As to the Belgian Government's proposed redraft of paragraph 1 (c), the second sentence of that redraft would have the effect of giving the consul the same rights with respect to a national imprisoned in pursuance of a judgement as he had with respect to a national who was awaiting trial. He did not think that the two situations could be equated in that way. In the case of a prisoner who was serving a sentence, the consul's visit was mainly of a humanitarian character and did not have the same degree of urgency as his visit to arrange for the defence of an accused awaiting trial.

36. Mr. BARTOŠ said he could not agree to the proposed replacement of the references to " consul " by references to " consulate " in paragraph 1. The status of a consulate was completely different from that of a diplomatic mission; it was not the consulate as such, but the consul who had rights and duties in international law. It was significant that it was the consul personally who was granted an exequatur by the receiving State. In some countries, not only the head of the consular post, but all consular officers, were required to obtain an exequatur before they could perform their duties.

37. He could not agree with the Chairman's suggestion for the deletion from paragraph 1 (a) of the reference to the right of the nationals of the sending State to communicate with and to have access to their consul. From his recent experience, he could recall grave cases of Yugoslav nationals who had in fact been deprived of consular protection because they had not been allowed to communicate with their consul. Unless a consul could be reached by his nationals, it was difficult for him to be informed of their fate and of any difficulties in regard to which they might require his assistance.

38. He also strongly opposed the suggestion that the consul's right to be informed of the arrest of one of his nationals and to communicate with him should be made conditional on that national's request. Any such limitation would make it possible for the local authorities to scrutinize a request for consular protection and to claim perhaps that it was baseless or frivolous.

39. He supported the proposal for broadening the scope of paragraph 1 so as to cover all cases of deprivation of freedom. He had known cases where, on the pretext of quarantine, persons had been detained and not allowed to communicate with their consul. It was important not to be impressed by the name given to a form of deprivation of freedom and to guarantee freedom of communication with the consul to any foreigner in all such cases.

40. It was of the utmost importance that the consul should be informed without delay of the arrest of one of his nationals, for only if he was informed promptly was he able to take the necessary steps to ensure the legal representation of his national before proceedings were instituted against him. Such was the practice, for example, in the relations between Italy and Yugoslavia. No less than two million persons annually crossed the frontier between the two countries without passports, and the few inevitable cases of incidents and arrests which occurred gave rise to so few difficulties that the joint supervisory committee established by the two countries had had practically no cases to consider.

41. Lastly, he could not agree with the suggestion by the Special Rapporteur that certain proposed changes should be left to the Drafting Committee. The Commission itself should give the Drafting Committee precise directives on all points of substance and take a decision if it wished to make any changes to the 1960 text.

Mr. Ago, First Vice-Chairman, took the Chair.

42. Mr. SANDSTRÖM said that he agreed with nearly all the arguments put forward in support of article 6 as adopted at the twelfth session and agreed that the right of nationals of the sending State to communicate with the competent consul should be specified, since that was the chief means of obtaining information.

43. He was in favour of extending the application of paragraph 1 (b) to other types of detention.

44. Sir Humphrey WALDOCK said that his own views

approximated closely to those of other members. Having studied the records of the discussion at the twelfth session, he had reached the conclusion that there was an overwhelming case for maintaining paragraph 1. His only doubt related to the form in which it had been drafted. If the Commission had intended sub-paragraph (a) to have a wider application than to the case of a national of the sending State detained or in prison, perhaps it would be desirable to re-cast the article into three paragraphs, the first stating the general principle, the second containing the substance of sub-paragraph (b) and (c) and the third dealing with the subject of paragraph 2.

45. Mr. PAL said that article 6 should be retained. There was no force in the reasoning that, because article 4 particularized several functions, the execution of each of which would more or less involve similar detailed ancillary provision, there was no occasion to select only one such particular function for such detailed treament as was done in article 6. The functions with which article 6 was concerned might well require special mention.

46. There was, however, one matter — more or less of drafting — to which he would draw the Commission's attention. Article 4 in its paragraphs 1 (a) and 1 (b) drew a distinction between " protecting " and " helping and assisting ". So far as that distinctive treatment stood, perhaps article 6 should expressly mention functions aimed at helping and assisting as well as protecting nationals of the sending State following the distinction made in article 4. The ancillary matters dealt with in article 6 were certainly pertinent also in relation to the function of " helping and assisting ", as particularized in paragraph 1 (b) of article 4.

47. The CHAIRMAN noted that the Commission seemed to be generally agreed that article 6 should stand; even the Special Rapporteur was prepared to accept that course. It therefore remained for the Commission to discuss in greater detail the instructions to be given to the Drafting Committee.

48. In reply to a question by the CHAIRMAN, Mr. PAL confirmed that he wished to propose the inclusion of the words " and help and assistance to " after the words " protection of " in paragraph 1.

49. Mr. ŽOUREK, Special Rapporteur, voiced his doubts of the necessity for the amendment, since the very general term " protection " could be taken in that context as including help and assistance.

50. Sir Humphrey WALDOCK observed that by referring to " protection " only the introduction to paragraph 1 seemed to narrow the application of sub-paragraph (a) to those cases envisaged in sub-paragraphs (b) and (c), whereas it seemed likely that the Commission had intended to give sub-paragraph (a) a wider scope.

51. The CHAIRMAN, speaking as a member of the Commission, suggested that the essential purpose of article 6 was to ensure that consuls could exercise their function of protecting nationals of the sending State. Clearly, the receiving State could not prevent them from giving help and assistance. While understanding the object of Mr. Pal's amendment, he believed it might alter the purpose and structure of the article.

52. Mr. PAL said that, although in general parlance the word " protection " would probably be regarded as including help, if the distinction made between the two in article 4 were not carried over to article 6, the scope of the latter might be open to misconstruction.

53. Mr. ŽOUREK, Special Rapporteur, said that Mr. Pal's amendment might have precisely the effect which he had wished to avoid, in that it might make article 6 inapplicable in those instances where the consul needed to communicate with a national of the sending State, but not for the purpose of providing either protection or assistance.

54. Mr. SANDSTRÖM believed the difficulty could be overcome by deleting the words " the protection of ".

55. Mr. BARTOŠ said that Mr. Pal's amendment had great practical value because in the cases contemplated in sub-paragraphs (b) and (c) help and assistance were often needed as well as protection, as, for example, if the person detained had to make the necessary arrangements for his defence. It was essential to ensure freedom of communication between the persons concerned and their consuls in all cases.

56. Mr. ŽOUREK, Special Rapporteur, expressed the fear that the inclusion of Mr. Pal's amendment would give rise to misunderstanding of the purpose of article 6. The only way of meeting Mr. Pal's point seemed to be by deleting the reference to protection in the introductory words.

57. The CHAIRMAN observed that there were two alternatives: either to delete the words " the protection of " in paragraph 1, or to redraft the article so as to incorporate the substance of sub-paragraph (a) in the first paragraph, thereby establishing the general principle of freedom of communication, and then to insert in the second paragraph an introduction more or less on the lines of the existing one to paragraph 1, followed by sub-paragraphs (b) and (c).

58. Mr. YASSEEN said that he was inclined to favour Mr. Sandström's amendment to paragraph 1, which would make the article more general and would probably be more consistent with its purpose.

59. Mr. BARTOŠ expressed his preference for the second alternative outlined by the Chairman with the modifications in sub-paragraphs (b) and (c) already agreed upon.

60. Mr. PADILLA NERVO said that he also favoured the second alternative on the grounds that the freedom of communication was the cornerstone of the article and should be stated in paragraph 1 so that it would govern the subsequent provisions. It certainly should take precedence over those concerned with protection. The freedom of communication was expressly laid down in Mexico's consular conventions with the United States of America and with the United Kingdom.

61. Mr. ŽOUREK, Special Rapporteur, said that he would prefer to retain the article as drafted, with the deletion of the reference to protection in paragraph 1,

because the introduction to that paragraph constituted a link with the preceding articles. An introductory sentence in such a general form would govern sub-paragraphs (b) and (c) as well as sub-paragraph (a).

62. Mr. YASSEEN expressed doubts whether a general introduction of the kind favoured by the Special Rapporteur would meet Mr. Pal's point that the cases dealt with in sub-paragraph (b) and more particularly sub-paragraph (c) were more likely to call for assistance than for protection.

63. Mr. SANDSTRÖM recalled the suggestion (586th meeting, para. 40) that articles 5 and 6 should be transferred to chapter II, section II. Perhaps it would be wiser to wait until that had been settled before taking any final decision about the structure of article 6, which would probably be affected by its position in the draft.

64. The CHAIRMAN, speaking as a member of the Commission, said that the facilities dealt with in chapter II, section II, were of a different nature from the principle laid down in article 6, which was fundamental to the exercise of consular functions. He doubted whether it would be appropriate to transfer article 6 to that section; its importance would be better brought out by leaving it where it stood.

65. As there was no great difference between the two alternative solutions, and since some members preferred to keep the present structure, it would perhaps be preferable to retain article 6 in chapter I.

It was so agreed.

66. The CHAIRMAN drew attention to the Netherlands Government's amendment (A/CN.4/136/Add.4) to paragraph 1 (a). If the Commission accepted that amendment, the paragraph might be referred to the Drafting Committee.

It was so agreed.

67. Mr. FRANÇOIS drew attention to the Netherlands Government's observation on paragraph 1 (b).

68. Mr. GROS pointed out that the addition of the specific time limit of one month might have effects contrary to the intention of the Netherlands Government, since junior officials might interpret the phrase as meaning permission to postpone providing the required information for the maximum period of a month.

69. Mr. ERIM, Mr. YASSEEN and the CHAIRMAN, speaking as a member of the Commission, concurred with that view.

70. The CHAIRMAN proposed that paragraph 1 (b) should be referred to the Drafting Committee, with the Netherlands Government's proposed amendment consequential to its amendment to paragraph 1 (a) and with instructions to expand the paragraph to cover all cases of forced detention, such as quarantine, hospitalization and committal to mental institutions.

It was so agreed.

71. Mr. ŽOUREK, Special Rapporteur, expressed the view that the sentence proposed by the Belgian Government (A/CN.4/136/Add.6, *ad* art. 6, 1 (c)) concerning the consul's right to correspond with any national of the sending State who was serving a prison sentence was covered by the general provision on the right of communication in paragraph 1 (a).

72. He drew attention to the Netherlands Government's proposed amendment to paragraph 1 (c).

73. The CHAIRMAN proposed that paragraph 1 (c) should be referred to the Drafting Committee with instructions to incorporate the Netherlands Government's amendment.

It was so agreed.

74. Mr. MATINE-DAFTARY opined that in paragraph 2 as drafted the passage " in conformity with the laws and regulations " was too elastic and would be open to abuse. Perhaps the Drafting Committee could find a formula providing a more specific safeguard.

75. Mr. VERDROSS suggested the phrase " in the manner provided for in the laws and regulations in the receiving State ".

76. Mr. ERIM observed that, if paragraph 2 were intended to qualify the entire paragraph 1, it would have to be amended in some respects, for communication between the consul and nationals of the sending State should, in principle, always be free. Paragraph 2 should relate only to the consul's visits to detained persons under paragraph 1 (c). If communications, which generally meant exchanges of letters, were made subject to the provisions of the laws and regulations of the receiving State, then, for example, the government of that State would be entitled to open the consul's correspondence addressed to his nationals in cases where the mail of aliens was censored.

77. Mr. MATINE-DAFTARY said that the main object of restricting the scope of paragraph 2 to the authorization in paragraph 1 (c) would be to avoid abuse of visits by a consul in cases where the examining magistrate had prescribed a period of isolation for the detained person. In order not to restrict unduly the other freedoms set forth in the article, it might be best to delete paragraph 2 and to draft the opening phrase of paragraph 1 (c) to read: " The consul shall be permitted, in conformity with the laws and regulations of the receiving State, to visit . . .".

78. Mr. ERIM, supported by Mr. MATINE-DAFTARY, held that paragraph 2 should be retained in order that the proviso in the second part of the paragraph should not be lost. The paragraph should, however, be rendered applicable to paragraph 1 (c) only, since paragraph 1 (a) related to a fundamental freedom and paragraph 1 (b) to an obligation of the authorities of the receiving State.

79. The CHAIRMAN, speaking as a member of the Commission, said he had some doubts concerning the application of paragraph 2 to paragraph 1 (c) only. For example, if the government of the receiving State declared a curfew, it could hardly be maintained that nationals of the sending State could have access to their consulate at all times.

80. Mr. ŽOUREK, Special Rapporteur, pointed out

that, according to the commentary on article 6, the Commission at its twelfth session had intended paragraph 2 to apply to all the sub-divisions of paragraph 1. Moreover, article 53 provided that, without prejudice to the privileges and immunities recognized by the Convention or by other relevant international agreements, it was the duty of all persons enjoying consular privileges and immunities to respect the laws and regulations of the receiving State. The two basic ideas in article 6, on the other hand, were to set forth the right of communication and to make it clear that that right must be exercised in conformity with the laws and regulations of the receiving State. Those basic concepts could not be changed without reopening the whole debate. The Drafting Committee could probably work out a satisfactory text, in the light of the comments made by governments and members of the Commission.

81. Mr. AMADO said that all questions relating to communication and contacts between consuls and the nationals of the sending State should be examined within the framework of observance of the laws of the receiving State. Moreover, respect for the laws and regulations of the receiving State was the subject of article 53.

82. There was a serious error in the drafting of article 60. It would be seen that the only freedom mentioned in that article was the freedom of communication, dealt with in paragraph 1 (a); paragraph 1 (b) dealt with a duty of the competent authorities of the sending State, while paragraph 1 (c) was in effect an authorization. Nevertheless, paragraph 2 referred to " freedoms " in the plural. He could not agree with the Special Rapporteur that paragraph 2 applied to the whole of paragraph 1; the best course would be to relegate paragraph 2 to the commentary.

83. The CHAIRMAN, speaking as a member of the Commission, suggested to Mr. Amado that it would be unwise to eliminate from the article the proviso in the second part of paragraph 2.

84. Mr. ERIM recalled that, during the twelfth session, it had been pointed out (534th meeting, para. 27) that an examining magistrate might prohibit communication with a detained person. Paragraph 2 had been inserted to meet that objection; the last phrase of the paragraph had been included to provide against cases where the receiving State might wish to abolish all visits to detained persons. He agreed with Mr. Amado that the only freedom referred to in the article was that set forth in paragraph 1 (a); since paragraph 1 (b) referred to action by the local authorities of the receiving State, paragraph 2 obviously applied only to paragraph 1 (c), and could not be regarded as restrictive of any freedom.

85. The CHAIRMAN observed that, if the Commission wished to restrict the application of paragraph 2 to paragraph 1 (c), the first phrase of paragraph 2 should begin with the words " The authorization referred to in paragraph 1 (c) of this article . . .".

86. Mr. ŽOUREK, Special Rapporteur, maintained that it was quite clear that paragraph 2 referred to the whole of paragraph 1. If its application were restricted to paragraph 1 (c), there would be a contradiction of other articles of the convention, particularly article 53. For example, where paragraph 1 (b) was concerned, if a national of the sending States were imprisoned and held *incomunicado* in conformity with the laws and regulations of the receiving State, the consul could not communicate with him. A number of other special circumstances and emergency regulations in the interests of the security of the receiving State might affect communications between the consul and nationals of the sending State. Accordingly, the application of paragraph 2 could not be limited to paragraph 1 (c).

87. Mr. PADILLA NERVO endorsed the views expressed by Mr. Erim and Mr. Amado. The only freedom referred to in article 6 was that of communication under paragraph 1 (a), and that was obviously subject to the provisions of article 53. Under paragraph 1 (c), however, the consul was given an express authorization, and a special reference to the laws and regulations of the receiving State therefore seemed indicated. He would support the wording suggested by the Chairman.

88. Mr. SANDSTRÖM endorsed Mr. Padilla Nervo's remarks.

89. The CHAIRMAN proposed that paragraph 2 should be referred to the Drafting Committee, which would take into account the wishes expressed by the majority of the Commission.

It was so agreed.

The meeting rose at 1 p.m.

588th MEETING

Friday, 12 May 1961, at 10 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)

[Agenda item 2]
(*continued*)

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

ARTICLE 7 (Carrying out of consular functions on behalf of a third State)

1. The CHAIRMAN invited debate on article 7 of the draft on consular intercourse and immunities (A/4425).

2. Mr. ŽOUREK, Special Rapporteur, said that the only government which had commented on article 7 was that of the Netherlands (A/CN.4/136/Add.4). The amendment proposed by that government extended the scope of the article but did not alter its basic purpose, and accordingly the Commission might accept it. He would draw attention, however, to the Commission's