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Summary record of the 596th meeting

Topic:
Consular intercourse and immunities

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that interpretation. The United States Government had pointed out that the article, by eliminating any differentiation in treatment as between property leased by the sending State and property owned by it, established a new concept in the administration of property taxes: generally no distinction was drawn in the application of such taxes on the basis of who the lessee might be.

93. The Chilean Government (A/CN.4/136/Add.7) had proposed that, in order to bring the text of article 32 into line with commentary (2), it should be amended to read: " Consular premises owned or leased by the sending State or by the head of post shall be exempt . . ."

94. He had reserved his final opinion on the article until the results of the Vienna Conference were known, in the expectation that it would then be seen how far governments were prepared to go in granting exemption from taxation. In fact, that Conference had adopted, as article 23, paragraph 1, of the Vienna Convention a provision similar in terms to article 32 of the draft, but had added a paragraph 2 which greatly limited the scope of paragraph 1.[6] In point of fact, the operation of paragraph 2 would mean that in the great majority of cases paragraph 1 would not apply to leased premises because, in most countries, certain taxes were in fact payable by the lessor of the premises.

95. In conclusion, the Commission hardly adopt any other course than to incorporate into article 32 of the draft a second paragraph similar to article 23, paragraph 2, of the Vienna Convention. It was extremely unlikely that States would be prepared to grant a more liberal measure of tax exemption to consulates than to diplomatic missions, particularly since consulates were much more numerous than embassies. Nevertheless the Commission should endeavour in the commentary to article 32 to determine the scope of paragraph 2 of the article.

96. Mr. MATINE-DAFTARY said that, as he had pointed out during the discussion in the Vienna Conference, the insertion of paragraph 2 added nothing to the provisions of article 23 of the Vienna Convention. The owner of leased premises was subject to the local laws and was, of course, not exempt from any taxes which might be payable on the rent which he received. The fact that he rented his property to a diplomatic mission or to a diplomatic officer made no difference to his position in regard to local taxation.

97. The CHAIRMAN, speaking as a member of the Commission, admitted that, when he had taken part in the discussions at Vienna, he had been somewhat puzzled by the terms of article 23, paragraph 2.

98. The intention of those who had proposed that paragraph had been to make those taxes payable even if, under the terms of the lease, the mission had agreed to bear them. Cases had apparently occurred where a mission had subscribed to such an agreement and had subsequently sent a note to the Ministry of Foreign Affairs of the receiving State to the effect that, since diplomatic missions were exempted from taxation, it should not pay the tax in question. By stating that exemption did not apply to those taxes, paragraph 2 would have the effect of compelling a diplomatic mission to pay them if it had agreed to do so in the lease.

99. Mr. VERDROSS said that article 31 could not go further than article 23 of the Vienna Convention. He therefore proposed the addition of a paragraph 2, similar to paragraph 2 of article 23 of that Convention.

100. He pointed out that, in States where a land registry existed, certain dues were payable in respect of the registration of transactions relating to land. Those dues could be quite high and it was desirable to state in the commentary whether they constituted a tax from which the consular premises were exempt or whether they represented payment for the specific service of registering the transaction.

The meeting rose at 1 p.m.

596th MEETING

Thursday, 25 May 1961, at 9.30 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 32 (Exemption from taxation in respect of the consular premises) (*continued*)

1. The CHAIRMAN invited the Commission to continue its discussion of article 32 of the draft on consular intercourse and immunities (A/4425).

2. Mr. JIMÉNEZ DE ARÉCHAGA agreed with Mr. Verdross (595th meeting, para. 99) that article 32 should be redrafted so as to conform with the terms of article 23 of the Vienna Convention on Diplomatic Relations (A/CONF.20/13), since the Commission could not propose to give a greater measure of tax exemption to consular posts than that given to diplomatic missions.

3. As he understood it, paragraph 2 of article 23 of the Vienna Convention was designed to incorporate into the text of that Convention the idea expressed in commentary (2) to the corresponding article of the Commission's draft on diplomatic intercourse (A/3859, article 21). The commentary stated that the exemption did not apply to the case where the owner of leased premises specified in the lease that the taxes referred to in the

[6] Article 23, paragraph 2, of the Vienna Convention provides: "The exemption referred to in this article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or the head of the mission."

article were to be defrayed by the diplomatic mission, because that liability did not represent the payment of a tax as such but an increase in rent.

4. Therefore, under paragraph 2 of article 23 of the Vienna Convention a diplomatic mission could not claim tax exemption if it had contracted to pay a tax which, according to the law of the receiving State, was normally payable by the person contracting with the sending State or with the head of the mission. That clarification was important and should be given in the commentary to article 32, if the Commission incorporated into that article the proposed paragraph 2. That commentary, which should be along the lines of commentary (2) to article 21 of the draft on diplomatic intercourse, would replace the existing commentary (2) to article 32 which, as rightly pointed out by the Governments of Norway and the United States (A/CN.4/136, and Add.3), was not consistent with the text of article 32.

5. Mr. ŽOUREK, Special Rapporteur, replying to a question raised by Mr. Verdross (595th meeting, para. 100), said that fees payable for the registration of a land transaction in the land registry should be regarded as a tax. In most countries, the amount charged was much too high for it to be considered merely as payment for the specific service of registering the transaction.

6. He proposed to expand paragraph (4) of the commentary by adding a few more examples to those given and he would take the opportunity to clarify the point in question.

7. Mr. VERDROSS said that certain bilateral conventions, such as that between the United Kingdom and Austria,[1] specified that taxes on transactions or instruments affecting transactions, such as taxes or dues on the sale or transfer of property, were also covered by the exemption. The Commission should take an express decision on the question whether such duties as registration fees for land transactions were covered by the exemption.

8. The CHAIRMAN, speaking as a member of the Commission, said that paragraph 2 of article 23 of the Vienna Convention was not sufficiently clear. According to its sponsors, it covered the case where a diplomatic mission had agreed, under the terms of the lease, to pay at ax which wa snormally payable by the other party.

9. He agreed that it was not possible to give consulates a greater measure of tax exemption than diplomatic missions, but an effort might be made to improve the wording of paragraph 2.

10. Mr. EDMONDS pointed out that in many countries, including the United States of America, taxes were levied primarily against the property and not upon individuals. Commentary (2) stated that the purpose of article 32 was to exempt the property itself, but that idea was not expressed in the text of the article, which exempted not the property but " the sending State and the head of post ".

11. In addition, article 32 did not make sufficiently clear the extent of the property covered by the exemption. In the frequent case where a consulate occupied only part of a building, only that part should be covered by the exemption.

12. Mr. AGO said that paragraph 2 had been included in article 23 of the Vienna Convention because certain delegations had been anxious to meet the wishes of the Treasury departments in their own countries, perhaps not fully grasping all the implications of the provision.

13. Both in connexion with a sale and with a lease of a property there existed in most countries taxes payable by both parties to the transaction. Where a diplomatic mission was the purchaser or lessee, it was, of course, exempted from any taxes payable by a purchaser or lessee. If, however, the mission undertook to reimburse to the vendor or lessor a tax normally payable by such vendor or lessor, the effect of paragraph 2 would be to preclude the mission from claiming exemption in order to avoid payment.

14. The only prudent course for the Commission was to adopt the same system in respect of consuls, since it was unthinkable that it should propose to give to consuls greater privileges than to diplomats. An explanation of the purpose of paragraph 2 should, however, be included in the commentary.

15. Mr. MATINE-DAFTARY said that he had voted for article 23, paragraph 2, at Vienna on the understanding expressed by Mr. Ago. The question of determining the taxpayer in respect of a particular tax was one for the legislation of the country concerned; that determination could not be affected by a clause in a private contract. If, therefore, a tax was payable by the owner of a building under the laws of the receiving State, and the property was leased to an embassy, and the ambassador agreed to pay the amount of the tax, that agreement remained a matter between the parties to the lease. It did not alter the fact that the taxpayer was the private owner and not the ambassador. Exemption could therefore not be claimed, and the ambassador had to carry out his agreement to refund to the owner the amount of the tax which he had undertaken to pay.

16. Mr. BARTOŠ agreed with Mr. Matine-Daftary that a private contract such as a lease could affect the financial position of the contracting parties but could not affect the application of the legislative provisions which specified who was to be the taxpayer.

17. The purpose of paragraph 2 of article 23 of the Vienna Convention was to prevent the owner of a property from obtaining an indirect benefit as a result of his having leased his property to a diplomatic mission.

18. The purchase or lease of property for the use of a diplomatic mission or consulate could give rise to a great many problems which varied from country to country, as he had learned from his experience in advising the Ministry of Foreign Affairs of his country in matters of that kind. Some of those problems were connected with the distinction between taxes which were of an objective character and those which were of a subjective character. Others arose out of the distinction between taxes charged on property as such and taxes charged on the utilization of property. A consulate was exempted from all taxes applicable in respect of the occupation or utilization of the consular premises.

[1] Cmd. 1300.

In that connextion, he cited the problem of the development charge in respect of the garden of a consulate. Opinions were divided: it was held by many that the charge should not apply to a garden which was used by the mission as an amenity.

19. He urged the Commission not to enter into details in article 32, but to adopt a provision along the lines of article 23 of the Vienna Convention, leaving practical difficulties tobe settled by the interested countries, usually on the basis of reciprocity, as was the existing practice.

20. Mr. YASSEEN said that he had understood article 23 of the Vienna Convention as dealing with the question of determining who should, in the final analysis, bear the burden of the tax. In that connexion, he did not think that the English " payable by " reflected the exact meaning of the French " à la charge de ".

21. At the Vienna Conference, he had taken the position that the statement contained in paragraph 2 was true, but that the provision was unnecessary because it merely expressed the self-evident fact that a private individual who was a taxpayer under the laws of the receiving State could not benefit from a tax exemption which applied only to diplomatic officials. The position was no different so far as consuls were concerned, and for that reason he doubted the advisability of including in article 32 of the draft a provision along the lines of article 23, paragraph 2, of the Vienna Convention.

22. Sir Humphrey WALDOCK, agreeing with the position taken by Mr. Ago, said that it would be wise to follow the example of the Vienna Conference and include paragraph 2. He agreed with Mr. Bartoš that there could be many complicated small problems arising from the provisions of local legislation and that those problems could best be settled by agreement between the two States concerned. In article 32, the Commission could deal only with general principles.

23. Mr. LIANG, Secretary to the Commission, said that what mattered was the nature of the tax. Certain taxes related to the property itself, others related to the use of the property.

24. As to the statement contained in the commentary (2) that the exemption to which article 32 related was " an exemption *in rem* ", he found it so ambiguous as to be incomprehensible. The taxes referred to in article 32 appeared to relate to the use of property and, in that connexion, he could give an example from his own experience. For several years, he had been a diplomatic official accredited to the United Kingdom and had rented an apartment in London. Since the rent payable for his apartment included a tax, he used to obtain remission of that tax by making the appropriate application through the Foreign Office. He saw nothing wrong in a diplomatic official's claiming such a remission, or in a receiving State's granting it, where the tax related to the use of the property. Unless such remission were granted, the absurd situation would arise of a diplomatic official's having to bear, in effect, twice the amount payable by an ordinary lessee, as had been pointed out by the Chairman.

25. In the light of those considerations, paragraph 2 of article 23 of the Vienna Convention could not be regarded as the codification of a generally accepted rule of international law. It constituted perhaps what the Commission's Statute called " progressive development of international law ".

26. Lastly, he drew attention to the relevant provisions of Section 8 of the Convention on Privileges and Immunities of the United Nations adopted by General Assembly resolution 6 (I) of 13 February 1946. Those provisions stated that, while the United Nations would not, as a general rule, claim exemption from taxes on the sale of moveable and immoveable property which formed part of the price to be paid, nevertheless, when the United Nations was making important purchases for official use of property on which such [duties and] taxes had been charged or were chargeable, Member States " will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax ". Those provisions were based on the premiss that the taxes were related to the use of the property and were not taxes on the property as such.

27. Mr. SANDSTRÖM said that it would be unwise in that context to give an interpretation of article 23, paragraph 2, of the Vienna Convention, although the Commission could not omit from article 32 a provision along the lines of that paragraph 2. While it would perhaps be undesirable to try to give an official interpretation in a commentary, he was personally inclined to accept the interpretation placed on the provision by Mr. Ago.

28. Mr. AGO said that the position had been clarified by the examples given by the Secretary and members of the Commission. It was necessary to include a provision along the lines of paragraph 2 of article 23 of the Vienna Convention so as to prevent persons who contracted with a consul from evading the provisions of the law.

29. Mr. GROS agreed with Mr. Ago.

30. Mr. MATINE-DAFTARY said that, while he was in agreement with the proposal to include paragraph 2, he could not agree with Mr. Sandström's suggestion that no interpretation should be given. The Commission should explain in the commentary the purpose of the provision.

31. Mr. ŽOUREK, Special Rapporteur, said that article 32 covered not only the lease of property, but also the sale of property to a consulate. Land transfers were usually subject to a duty and the article, even with the addition of paragraph 2, would not cover all the cases that might arise. For example, the law in certain countries made both purchaser and vendor liable jointly and severally for the payment of transfer dues and the vendor would try to pass on the whole of the burden to the purchaser. It was not clear how the provisions of the article would operate in such a case.

32. In conclusion, he said that the discussion had to some extent clarified the meaning of article 32 and the proposed additional paragraph 2, but that the implications were still not all completely clear. He would, of course, endeavour to give as full an explanation as possible in the commentary.

33. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to instruct the Drafting Committee to draft article 32 along the lines of article 23 of the Vienna Convention.

It was so agreed.

ARTICLE 33 (Inviolability of the consular archives and documents and official correspondence of the consulate)

34. Mr. ŽOUREK, Special Rapporteur, drew attention to a difference in terminology between article 33 and the corresponding article 24 of the Vienna Convention. The former referred to " consular archives, the documents and official correspondence of the consulate " while the latter mentioned only " the archives and documents of the mission ". A number of government comments also dealt with that question of terminology; the Union of Soviet Socialist Republics (A/CN.4/136/Add.2) had suggested that in article 1 (e) the expression " consular archives " should be defined as meaning " all documents, official correspondence and the consulate library, as well as any article of furniture intended for their protection or safe-keeping ". The Netherlands Government (A/CN.4/136/Add.4) had expressed the view that the words " the documents " were superfluous, since documents were covered by " archives ", and suggested that the appropriate change be made in both article 33 and article 1 (e).

35. With regard to the substance of article 33, there had been no objections from governments. The Yugoslav Government (A/CN.4/136) had suggested that the article would be more complete if the definitions of inviolable articles were incorporated in the body of the article. The United States Government (A/CN.4/136/Add.3) had pointed out that in the United States domestic mail service only firstclass mail was not subject to inspection and had urged that consideration should be given to the relevant provisions of postal conventions.

36. Accordingly, he proposed that questions of terminology should be left aside for the time being and that the Commission should adopt article 33 as it stood, on the understanding that the language would be later adjusted in order to reflect the decision which the Commission would take in regard to the definition of the expression " consular archives " in article 1.

37. Mr. VERDROSS suggested the insertion in the article of a second paragraph stating that the consular archives and documents and official correspondence of the consulate should be kept separate from the private correspondence of the consul and from other papers not connected with the consulate.

38. Mr. MATINE-DAFTARY remarked that it was not possible to give to consulates the same broad measure of inviolability as to diplomatic missions in regard to archives, documents and papers.

39. In the first place, unlike a diplomatic officer, a consul could be tried for an offence by local courts and, in that case, the local judicial authorities should be able to search for evidence wherever it could be found.

40. In the second place, a consul acted as notary public and registrar of births, marriages and deaths. Therefore, the consular archives or records could be cited in the courts of the receiving State in order to prove, for example, that a person had been married at the consulate; the consul might favour the other spouse by withholding the register of marriages. In such cases, the registrar was safeguarding private interests and not State secrets. A formula should therefore be sought which would make the consular archives accessible to the local judicial authorities in those cases.

41. Sir Humphrey WALDOCK supported the suggestion of Mr. Verdross and drew attention to the provisions of article 53, paragraph 3, which required the offices used by the consulate to be kept separate from those of other institutions or agencies installed in the consular premises.

42. Mr. AGO said he could not agree with Mr. Verdross and Sir Humphrey Waldock. The question only arose in regard to honorary consuls, who could have activities other than those connected with their consular duties. And so far as they were concerned, article 55 in any case specified that the inviolability of consular archives, documents and official correspondence was conditional on their being kept separate from the private correspondence of the honorary consul and from the books and documents relating to any private activity which he carried on.

43. There was no need for a similar provision for career consuls, who did not carry on private gainful activities. The only non-official papers which a career consul might have would be his private correspondence, the privacy of which should in any case be protected.

44. The fact that a consul acted as notary rendered it all the more necessary to guarantee the inviolability of the consular archives because of the rule of professional secrecy which applied to documents recorded by a notary.

45. He strongly opposed any suggestion that exceptions should be allowed to the rule of inviolability, for it would be easy for the receiving State to use such exceptions to render the rule inoperative in practice. He would go even farther and suggest that the language used in article 24 of the Vienna Convention should be introduced into article 33, so as to state that the archives, documents and correspondence " shall be inviolable at any time and wherever they may be ". It might be necessary to keep consular archives and documents in a place other than the consulate, and it was desirable to state that inviolability continued to apply.

46. Mr. FRANÇOIS agreed with Mr. Ago that the provision on the separation of the archives and official documents from non-consular papers was necessary only in the case of honorary consuls, who were already covered by article 55; also that it would be not only undesirable, but dangerous, to introduce any exception into article 33.

47. He noted with surprise that article 24 of the Vienna Convention referred only to " the archives and documents

of the mission ". He could not understand why the article made no reference to correspondence. Article 33 of the consular draft should contain such a reference, because it was intended to cover correspondence addressed but not yet delivered to the consulate. Such correspondence would certainly not be covered by the term " archives".

48. The CHAIRMAN explained that, in the Vienna Convention, the inviolability of the official correspondence was set forth, not in article 24 but in article 27, paragraph 2, which explained that the term meant all correspondence relating to the mission and its functions. That explained the absence of a reference to official correspondence in article 24.

49. Mr. ŽOUREK, Special Rapporteur, said that, although it was true that some consular conventions required consular papers to be kept separate from the private correspondence of a career consul, that requirement was a relic of the past when the majority of career consuls had engaged in private gainful occupations. It was as unnecessary to prescribe such a requirement for career consuls as in the case of diplomats. A clause of the kind suggested by Mr. Verdross might lend itself to malpractices. No exception should be made that might weaken the principle of inviolability. As to honorary consuls, the great majority of whom engaged in private gainful occupations, article 55 of the draft fully met Mr. Verdross's point.

50. In reply to Mr. Matine-Daftary, he said that a consul was hardly likely to refuse to produce on request a copy of a marriage certificate, for example. If such a case should occur, however, the person requesting the production of the document would be free to apply to the authorities of the sending State. He would be hardly likely to bring proceedings in the receiving State.

51. Mr. PAL recalled that at the twelfth session (531st meeting, paras. 9 and 12) Mr. Scelle had suggested the insertion of a provision on the lines of Mr. Verdross's proposal, but the Special Rapporteur had indicated that such a provision would be uncalled for in the case of career consuls, for the practice of their engaging in gainful private occupation had become almost obsolete.

52. Article 33 should be retained and there should be no objection to adding the words " wherever they may be " used in article 24 of the Vienna Convention, as that change would be fully consonant with the Commission's intention as revealed in its commentary on the 1960 draft article.

53. Sir Humphrey WALDOCK said that if the question of the separation of consular from other papers was in fact settled by article 55, on the grounds that the question could not arise except in connexion with honorary consuls, he would be satisfied. However, after reading paragraph (4) of the commentary to article 53, which did not relate to honorary consuls, and which stated explicitly cases where the offices of institutions or agencies were installed in the buildings of a consulate occurred with some frequency, he had some doubts.

54. Mr. ŽOUREK, Special Rapporteur, explained that at the twelfth session (A/4425, article 54, commentary (5)) the Commission had decided that the question of the applicability of certain provisions to honorary consuls would be held over pending the receipt of the comments of governments.

55. Mr. VERDROSS pointed out that, so far from excluding the possibility that career consuls might carry on a gainful private occupation, the draft expressly recognized that possibility in article 40, paragraph 1. Accordingly, if his suggestion were not accepted, a proviso should be inserted in article 33 stipulating that in the case of a career consul who carried on a gainful occupation the provisions of the article would not apply unless the consular archives, documents and official correspondence were kept separate from non-consular papers.

56. Mr. BARTOŠ observed that one of the problems was how to determine which documents formed part of the consular archives, a matter on which it was not easy to frame precise rules, as the discussions at the Vienna Conference had shown. Though he had voted in favour of article 24 of the Vienna Convention, he had not found it altogether satisfactory.

57. It was true that the commentary to article 33 provided some explanation of what was meant by consular archives, documents and official correspondence, but those definitions would not appear in the text of the article itself and their absence might create difficulties of interpretation. Though a multilateral convention should not be overburdened with excessive detail, the Drafting Committee should be instructed to devise rather more precise wording.

58. Any paper addressed to a consulate should become part of its archives, since freedom to communicate with a consul was a vital element of consular protection; any attempt to restrict the application of the article by reference to the origin of a document should be withstood.

59. In general, the private correspondence of consular officials should, for the purposes of the article, be placed on a par with official correspondence because of the difficulty of differentiating between private, semi-official and official letters. Some might be private in character but contain material of an official nature. On the other hand, he was fully aware of the possibilities of abuse; in one case, for example, a foreign consul in Yugoslavia had received correspondence concerning forged Yugoslav bank notes. In a provision stating the rule of the inviolability of consular archives, it was desirable to provide definitions where possible, and the possibility of abuse for criminal purposes had to be weighed against the need to maintain an essential rule.

60. Mr. PADILLA NERVO said that, as the commentary emphasized, the rule stated in article 33 was of fundamental importance; if any exception to the rule were allowed the principle of the inviolability of consular archives would be seriously weakened and possibly frustrated. It was usual in consular conventions to stipulate that correspondence bearing an official stamp was inviolable and not liable to seizure by authorities of the receiving State. In practice, career consuls were seldom allowed by their own country's regulations to

engage in gainful private activities, and accordingly the safeguard provided for honorary consuls in article 55 should suffice.

61. Article 33 should stand, possibly with the addition of a phrase such as that used at the end of article 24 of the Vienna Convention. Later, after the terms of article 55 had been settled, the Commission might consider whether it was advisable to draft a specific clause providing that career consuls who carried on a private occupation should segregate the consular from the non-consular papers.

62. Mr. AGO said that Mr. Verdross had drawn attention to what was in fact an exceptional case. If by implication the provision in article 40, paragraph 1, cited by Mr. Verdross admitted the possibility that career consuls might engage in a gainful private activity, the reason might be that the Commission had not at the twelfth session taken a final decision on the question of preventing career consuls from engaging in gainful private activities. In the light of article 42 of the Vienna Convention, however, it seemed desirable to insert a corresponding prohibition in the provisions of the draft concerning career consuls. If it was expressly laid down that career consuls were not allowed to engage in a gainful private activity, Mr. Verdross's suggested amendment would become unnecessary. Perhaps the suggestion could be taken up after that more general issue had been settled and in the meantime article 33 might be approved in its existing absolute form.

63. Mr. MATINE-DAFTARY said that he sympathized with Mr. Verdross's suggestion, but considered that the discussion it had provoked was somewhat academic because even if very strict obligation were imposed upon a consul to keep official documents separate, there was no sanction that could be applied for failure to comply with it.

64. Sir Humphrey WALDOCK said that Mr. Verdross's suggestion could perhaps be discussed in conjunction with article 53. It would certainly be inconsistent not to stipulate that documents should be kept separate if the requirement laid down in article 53, paragraph 3, concerning premises were retained.

65. All that had been suggested was that the duty to keep consular papers separate should be stated and there was no question of prescribing sanctions against failure to do so. The question was not of major importance but could arise, for example, in the case where an investigation became necessary into the papers belonging to a shipping agency run from an extension of a consulate.

66. Mr. ŽOUREK, Special Rapporteur, said that Mr. Verdross had drawn attention to a real, though infrequent problem. The Commission had decided not to include a provision of the kind contained in article 35, paragraph 2, of his original draft (A/CN.4/108), in recognition of the fact that under the law of certain States career consuls were allowed to engage in gainful private activity. That was the practice, for instance, of the United States as indicated in the United States Government's comment on articles 54-63 (A/CN.4/136/Add.3).

67. There were two possible ways of dealing with Mr. Verdross's suggestion: either to insert a provision prohibiting career consuls from engaging in a gainful private occupation, or to insert in the draft a new article assimilating career consuls engaged in private gainful occupations to honorary consuls. Under such an article, the requirement contained in article 55 (concerning the segregation of consular from other papers) would be extended to that category of consular officials. A decision on the latter question would ultimately have to be taken, but he suggested that for the time being the most convenient procedure might be to refer article 33 to the Drafting Committee as it stood.

It was so agreed.

ARTICLE 34 (Facilitation of the work of the consulate)

68. Mr. ŽOUREK, Special Rapporteur, said that the only government to comment on article 34 was that of the United States of America, which considered that the article might be deleted. His opinion was that the article, which stated a general rule, should be retained.

69. The CHAIRMAN suggested that article 34 be referred to the Drafting Committee for consideration in the light of the terms of the corresponding article (article 25) of the Vienna Convention, where slightly different wording was used.

It was so agreed.

ARTICLE 35 (Freedom of movement)

70. Mr. ŽOUREK, Special Rapporteur, said that he had commented on the observation made by the Yugoslav Government in his third report (A/CN./4/137).

71. In reply to the comment of the United States Government, which was in principle opposed to travel restrictions, he recalled that the article was modelled on the corresponding article in the draft on diplomatic intercourse and immunities adopted by the Commission after lengthy discussion and accepted by the Vienna Conference (article 26 of the Vienna Convention). There was no need to reopen discussion on the matter and the article could be referred to the Drafting Committee.

72. The CHAIRMAN, speaking as a member of the Commission, explained that the Vienna Conference had not made any change in the relevant provision submitted by the Commission and which now appeared as article 26 in the Vienna Convention. The text had been the result of a determined effort to achieve a compromise.

73. Mr. BARTOŠ considered that the Commission should not seek to go beyond the compromise accepted by the Vienna Conference so as not to jeopardize the liberty of the freedom of movement which should be observed to the greatest extent possible, except when the requirements of national security made that impossible. He therefore agreed with the purpose of the amendment suggested by China (A/CN.4/136/Add.1).

Article 35 was adopted.

ARTICLE 36 (Freedom of communication)

74. Mr. ŽOUREK, Special Rapporteur, said that the representative of Ghana, speaking in the Sixth Committee (659th meeting) at the fifteenth session of the General Assembly, had suggested that it should be specified whether article 36, as well as other articles of the draft, were to be regarded as conferring rights or privileges. [2] That view seemed to derive from the belief that consular privileges were not based on law. In that connexion, he would point out that the word " privileges " was used to designate certain rights, belonging to the sending State, which were accorded to consular officials as distinct from other foreign residents. On the other hand, immunities represented the prerogatives whereby consular officials were exempted from the jurisdiction of the receiving State. But both categories of benefit were based on international law.

75. A number of governments had commented on the article, some tending to limit the consulate's communication. The Government of Denmark (A/CN.4/136/Add.1), considered that freedom of communication should be restricted so that, besides maintaining contact with the government of the sending State and that State's diplomatic mission accredited to the receiving State, consulates should be free to communicate only with the consulates of the sending State situated in the same receiving State. The Government of Spain (A/CN4./136/Add.8) had suggested that the scope of the article should be restricted along the same lines, pointing out that the extension of freedom of communication to other consulates of the sending State, wherever situated, was at variance with the principle of treaties to which Spain was a party.

76. The second set of comments related to the much-discussed point whether, in certain special cases, permission should be given to open the consular bag. The Danish Government had proposed a provision, to be added to paragraph 3, stating that in such cases the authorities of the receiving State might request that a sealed courier bag should be opened by a consular official in their presence, and the Spanish Government had suggested a similar addition. The Government of Japan (A/CN.4/136/Add.9) had suggested that paragraph 2 should be amended to state that the bags, if certified by the responsible officer of the sending State as containing official correspondence only, should not be opened or detained; that government also proposed a drafting amendment to the text. Finally, the United States Government considered that the diplomatic bag might in certain circumstances be refused by the receiving State, that the right to operate a radio transmitter (admissible in the case of diplomatic missions) did not necessarily exist in the case of consulates, and that the article did not exempt consular officials from payment of postage.

77. The main question for the Commission to decide seemed to be whether or not to restrict the principle of free communication stated in paragraph 1. His view was that the article should be retained as it stood, since the restrictions proposed by the Danish and Spanish Governments would entail considerable delay in the despatch of consular business by diverting communication to diplomatic and other channels. With regard to the proposal that the authorities of the receiving State should in special cases be allowed to open the consular bag, the essential principle which the Commission had adopted in the cases of the inviolability of the consular premises and the consular archives should be retained, particularly since the question had been discussed at length during the Commission's twelfth session (531st, 532nd and 572nd meetings, where discussed as articles 27 and 29), and since the draft article was in conformity with the corresponding article of the Vienna Convention.

78. Furthermore, article 27 of the Vienna Convention contained an additional provision on diplomatic couriers *ad hoc*. The Commission's draft provided a similar clause relating to the designation of special couriers in cases where the sending State used diplomatic couriers, but needed to find a means of communication between consulates and the diplomatic mission or where the sending State had no diplomatic mission in the receiving State. Finally, article 27, paragraph 7, of the Vienna Convention provided that a diplomatic bag might be entrusted to the captain of a commercial aircraft; the Commission might wish to insert a similar provision in article 36 of the present draft.

79. Mr. VERDROSS said that, in principle, he agreed with the Special Rapporteur that the present wording of article 36 should be retained. The qualifying phrase, however, concerning the installation and use of wireless transmitters, which had been added to article 27, paragraph 1, by the Vienna Conference should apply *a fortiori* to consulates and a similar phrase should be added at the end of article 36, paragraph 1.

80. Mr. YASSEEN observed that international practice in the matter did not quite conform with the provisions of article 36. Nevertheless, he was in favour of retaining the article as drafted, if only as a step towards the progressive development of international law. Moreover, article 36 represented a corollary to article 33 dealing with inviolability of the consular archives, and documents and official correspondence of the consulate, and it would therefore be illogical not to apply the principle of absolute inviolability to the means of communicating consular documents. For that reason also, the article should be supplemented by the paragraphs that had been added to the corresponding article of the draft on diplomatic relations.

81. Mr. SANDSTRÖM observed that, in the case of the draft under discussion, it might be unnecessary to include a paragraph on special couriers, since paragraph 1 already referred to " all appropriate means, including diplomatic or other special couriers ".

82. The CHAIRMAN observed that the Commission seemed to be agreed on adopting article 36 as it stood. The outstanding question was whether certain additional provisions of article 27 of the Vienna Convention should be incorporated in the text.

83. Mr. BARTOŠ pointed out that the decision of

[2] See also Special Rapporteur's third report (A/CN.4/137), *ad* article 36.

the Vienna Conference to provide absolute inviolability for the diplomatic bag had by no means been unanimous. Nearly one-third of the participants had wished to include a provision under which the bag could be either opened or denied admission by the authorities of the receiving State in certain special cases. In view of that difference of opinion even in the case of the diplomatic bag, it would be advisable for the Commission to take a specific decision on the corresponding clause of article 36.

84. The CHAIRMAN observed that the matter had been discussed thoroughly in the Commission at previous sessions. Moreover, proposals to the effect described by Mr. Bartoš had been rejected by the Vienna Conference, and there seemed to be no need to reopen the question in the Commission. If the Commission proceeded from the assumption that the consular bag should be given a different status from that of the diplomatic bag — an incomplete inviolability or incomplete freedom of movement — that channel of communication might in practice be closed. Accordingly, reference to certain opinions voiced at the Vienna Conference would be pertinent only if the Commission decided to reopen its debate on the subject, and he had seen no indication of such a wish. Neither the decision of the Vienna Conference nor the comments received from governments seemed to justify a reversal of the Commission's decision.

85. Mr. ERIM said that the decisions of the Vienna Conference could not serve as an argument for providing the same freedoms and immunities to consulates and to diplomatic missions. He agreed with Mr. Bartoš that many governments were unlikely to agree to such assimilation; moreover, a number of governments had suggested amendments to article 36 under which the authorities of the receiving State would be able to open the consular bag in special cases. Lastly, in view of the lengthy discussions and divergent opinions at the twelfth session on the idea contained in paragraph 2, it could not be said with any accuracy that the Commission had unanimously accepted the principle of assimilation.

86. Sir Humphrey WALDOCK said that the essential question was whether or not the Commission believed that, in the case of communication, consulates should be treated on the same footing as diplomatic missions. If that question were answered in the affirmative, it would be logical to draft article 36 along the lines of article 27 of the Vienna Convention, since the latter applied to communications from diplomatic missions to consulates, while the former dealt with communications from consulates to diplomatic missions.

87. Mr. SANDSTRÖM, referring to the point he had made earlier in the meeting, considered that the reference to the protection of the special courier in paragraph (4) of the commentary to article 36 might be incorporated in the article itself.

88. Mr. FRANÇOIS, recalling the lengthy debates during the twelfth session on the possibility of opening the consular bag in special cases, observed that some of the members who had accepted the present text had done so on the understanding that paragraph 2 did not completely exclude the opening of the bag. That paragraph was, in his opinion, closely related to paragraph 3, which stated that the bags should contain only documents or articles intended for official use. Accordingly, if it were suspected that the bags contained other documents or articles, the authorities of the receiving State might open them, on the full responsibility of that State if the suspicions proved to be unfounded. Article 27 of the Vienna Convention also implied that possibility, and he therefore had no serious objection to article 36 being drafted along the lines of that text.

89. The CHAIRMAN, speaking as a member of the Commission, said that he could not agree with Mr. François's interpretation of article 27 of the Vienna Convention. It had never been the intention of the Commission or of the Vienna Conference to make the inviolability of the diplomatic bag conditional. The provision of article 27, paragraph 3, of the Vienna Convention imposed an obligation on the receiving State, whereas paragraph 4 of that article imposed an obligation on the sending State. If the receiving State had any doubts concerning the contents of the diplomatic bag, it was nevertheless not justified in opening or detaining the bag; it might use any other means at its disposal and it had many possibilities in that connexion, but Mr. François's interpretation was a dangerous one, and had in fact been rejected by the Commission. He fully endorsed Sir Humphrey Waldock's remarks and considered that, if the principle of assimilating the inviolability of the diplomatic bag to that of the consular bag were adopted, it would be logical to draft article 36 along the lines of article 27 of the Vienna Convention.

90. Mr. BARTOŠ observed that, despite the divergences of view revealed during the discussion, at the voting the majority of the participants in the Vienna Conference had declared themselves in favour of an absolute guarantee. Accordingly, Mr. François's interpretation of article 27, although logical, did not correspond to the formally expressed will of the Conference.

91. Mr. MATINE-DAFTARY recalled that he had defended the text of article 27 of the Vienna Convention and had spoken against the amendments to it. It had always been his attitude, however, to differentiate between the privileges and immunities of diplomatic missions and those of consulates; his natural inclination, therefore, would be to support Mr. Erim's views. On the other hand, since the majority of the Commission had already decided in favour of absolute inviolability of the consular archives and documents and official correspondence of the consulate, it would be illogical not to maintain the same inviolability in respect of freedom of communication.

92. Mr. ŽOUREK, Special Rapporteur, said that he also was unable to accept Mr. François's interpretation of article 27 of the Vienna Convention. Three proposals made at the Vienna Conference authorizing the opening of the diplomatic bag in certain cases had all been rejected and the principle of inviolability of the diplomatic bag had thus been firmly confirmed. Moreover, paragraph (1) of the commentary on article 36 stated that the article predicated a freedom essential for the discharge

of consular functions and, together with the inviolability of consular premises and that of the consulate's official archives, documents and correspondence, formed the foundation of all consular law. In the light of that statement, there seemed to be no reason to reverse the Commission's earlier decision.

93. Mr. FRANÇOIS asked whether, in the case of a consular bag being opened and being found to contain nothing but diamonds or drugs, the State which had opened the bag should apologize to the sending State.

94. Mr. ERIM thought that, since the Commission was debating the comments of governments it should give conclusive replies to some objections raised. For example, the Belgian Government (A/CN.4/136/Add.6) did not consider that the principle expressed in paragraph 2 was absolute and had stated that, according to usage, the authorities of the receiving State could open the consular bags if they had serious reasons for their action, but must do so in the presence of an authorized representative of the sending State. That serious objection, and others like it, deserved the Commission's full consideration. The Belgian Government's observation made it obvious that a statement of the principle as an absolute rule was an innovation in international law and a step towards identifying diplomatic with consular law.

95. Mr. ŽOUREK, Special Rapporteur, queried whether the " usage " referred to by the Belgian Government could be identified with customary law. Nor could he agree that it was the general usage to allow the authorities of the receiving State to open the consular bags. The Commission had, in the case of a number of articles, proposed the unification and development of international law; in the case of article 36, the proposed rule, was perfectly justifiable.

96. Mr. AGO suggested that, in the case cited by Mr. François, the sending State and the receiving State should apologize to each other, since each would be guilty of violating a rule of international law.

97. Since the Commission had admitted the principle that the correspondence of the consulate might be carried in either the diplomatic or the consular bag, and since the principle of absolute inviolability for the diplomatic bag had been accepted in article 27 of the Vienna Convention, it would be illogical to differentiate between the two means of communication.

98. The CHAIRMAN observed that the majority of the Commission seemed to be in favour of according the consular bag the same inviolability and freedom of movement as those accorded to the diplomatic bag. He suggested that article 36 should be referred to the Drafting Committee with instructions to recast it along the lines of article 27 of the Vienna Convention.

It was so agreed.

99. Mr. BARTOŠ stressed that the decision on article 36 had not been unanimous.

The meeting rose at 1 p.m.

597th MEETING

Friday, 26 May 1961, at 10.15 a.m.

Chairman: Mr. Grigory I. TUNKIN

Date and place of the next session

[Agenda item 7]

1. Mr. LIANG, Secretary to the Commission, observed that it had been the Commission's practice to meet towards the end of April for ten weeks until the beginning of the summer session of the Economic and Social Council, early in July. That practice was governed by operative paragraph 2 (d) of General Assembly resolution 1202 (XII), which provided that the annual session of the Commission should be held in Geneva without overlapping with the summer session of the Council. That session would begin on Tuesday, 3 July 1962; the Secretariat therefore suggested that the Commission's next session should begin on Tuesday, 24 April, and continue until Friday, 29 June 1962.

2. The CHAIRMAN suggested that the Commission should adopt the dates proposed by the Secretariat.

It was so agreed.

Co-operation with other bodies (*continued*)

[Agenda item 5]

3. Mr. LIANG, Secretary to the Commission, said that the Secretariat had been in touch with the legal bodies of the Organization of American States and the Asian-African Legal Consultative Committee. The previous meeting of the Inter-American Council of Jurists had been held at Santiago, Chile, in September 1959 when he had acted as observer and had reported to the Commission at its twelfth session (A/CN.4/124). At Santiago, the Council had decided to hold its next meeting at San Salvador, El Salvador, but had not decided on the date. The Secretariat had since been in correspondence with the Pan American Union and with the delegation of El Salvador to the United Nations; Mr. Urquía, the head of that delegation, had informed the Secretariat that the fifth meeting of the Inter-American Council would be held at the beginning or in the middle of 1962. An earlier date had been suggested; but, since the work of the Council was closely linked with the Conference of American States to be held at Quito, Ecuador, no definite decision could be made until after that conference. The Commission had been invited to send an observer to the fifth meeting of the Council, but the decision on that could be deferred.

4. The Asian-African Legal Consultative Committee's session at Tokyo in February-March 1961 had been attended by Mr. García Amador, as the Commission's observer, pursuant to the decision at the twelfth session (A/4425, chap. IV, para. 43). Mr. García Amador's written report would be circulated as a document of