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Summary record of the 599th meeting

Topic:
Consular intercourse and immunities

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" all reasonable steps " by " all appropriate steps ". He recalled the criticism of the term " reasonable " in another context by Mr. Amado at a previous meeting.

67. While he had no objection to the text of article 39, he would urge the deletion of the last sentence of commentary (3), which stated that the receiving State must protect the consul against abusive press campaigns. That sentence, taken in conjunction with the last sentence of article 39, which placed on that State the duty to take all reasonable steps " to prevent any attack " on the person, freedom or dignity of the consul, would create an obligation under international law which, in his opinion, was unacceptable as unconstitutional for the States belonging to most of the legal systems represented in the Commission. Those legal systems did not allow a preventive control of the press; they only provided for sanctions or liability *ex post facto* in the event of a wrongful exercise of the freedom of the press. Preventive measures could not be taken even to protect a foreign head of State or for that matter the head of State of the country concerned.

68. For those reasons, he urged the deletion of the last sentence of commentary (3), to which objection had been made by certain governments, including that of the Netherlands, and proposed that in the second sentence of commentary (6), after the words " having regard to ", the words " its constitutional law " should be inserted.

69. The CHAIRMAN, speaking as a member of the Commission, said that he agreed, for practical reasons, to the deletion of the last sentence of commentary (3). No such sentence had appeared in the commentary to the corresponding article of the draft on diplomatic intercourse and the Commission could not, of course, go further in the case of consuls than in that of diplomats. However, as a matter of principle, he could not agree with the statement made by Mr. Jiménez de Aréchaga. The legislation of all countries punished such acts as libel and slander, and legislative provisions of that type constituted precisely the measures contemplated in article 39.

70. Speaking as Chairman, he said that, if there were no objection he would take it that the Commission agreed to refer to the Drafting Committee article 39 as it stood, with instructions to take into account the Netherlands proposal and also to substitute the word " appropriate " for the word " reasonable " before the word " steps " in the second sentence, so as to conform with the language used in article 29 of the Vienna Convention.

It was so agreed.

The meeting rose at 6 p.m.

599th MEETING

Tuesday, 30 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/L. 137)

(*continued*)

[Agenda item 2]

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

ARTICLE 40 (Personal inviolability)

1. The CHAIRMAN invited consideration of article 40 of the draft on consular intercourse and immunities (A/4425).

2. Mr. ŽOUREK, Special Rapporteur, recalled that the drafting of article 40 at the twelfth session (538th, 539th and 540th meetings, where discussed as article 33) had been rendered difficult by the diversity of state practice in the matter. Nevertheless, the article had been on the whole well received by governments.

3. The provisions of the article were essentially based on the principle that consular officials were subject to the jurisdiction of the receiving State in both civil and criminal matters, except in respect of acts performed in the course of their duties. The article did not grant any personal immunity from jurisdiction, but merely exempted consular officials from imprisonment in certain limited cases.

4. In paragraph 1, in view of the diversity of state practice as reflected in the consular conventions in force, the Commission had offered two alternative texts. One would allow arrest or detention pending trial only in the case of an offence punishable by a maximum sentence of not less than five years' imprisonment. The other would have allowed such arrest or detention only in the case of a " grave crime ". Faced with those two alternatives, some governments, including those of Yugoslavia (A/CN.4/136) and Belgium and Chile (A/CN.4/136/Add.6 and Add.7), had expressed a preference for the first alternative; others, including those of Finland and Czechoslovakia (A/CN.4/136) and the Netherlands (A/CN.4/136/Add.4) had supported the second alternative. The Commission was therefore called upon to choose between the two. For his part, bearing in mind the comments of governments, he preferred the more general formulation in spite of its defects, because it was more likely to attract general support at an international conference.

5. Some governments, such as those of the United States (A/CN.4/136/Add.3) and Japan (A/CN.4/136/Add.9) wished to go further than the Commission; they had suggested that consular officials should be exempted not only from arrest or detention, but also from actual prosecution, except in the case of a crime punishable with a maximum penalty of imprisonment for one year.

Those proposals would give consular officials not merely personal inviolability, but also a measure of immunity from jurisdiction and, if supported by the majority of States, would be acceptable to him.

6. Lastly, the Netherlands Government had proposed drafting changes which affected the substance of paragraph 1, inasmuch as they would restrict the scope of personal inviolability.

7. Paragraph 2, which specified that consular officials must not be committed to prison save in execution of a final sentence of at least two years' imprisonment, had attracted considerable comment from governments. The Governments of Norway (A/CN.4/136) and Denmark (A/CN.4/136/Add.1) wished the provision to be deleted altogether. The Government of Finland had criticized the paragraph as granting too wide a measure of inviolability and suggested that its provisions should be narrowed down substantially. The Netherlands Government also found paragraph 2 unsatisfactory and had suggested that it be replaced by a rule providing for consultation between the receiving State and the sending State in respect of the execution of any prison sentence pronounced against a consular official. The Swedish Government (A/CN.4/136/Add.1), while expressing no objection against paragraph 2 itself, had questioned the reasons given in the commentary for maintaining the paragraph.

8. The Belgian Government had suggested that the two-year limit be deleted; in his opinion, however, the reason given — that the limit in question was unknown in Belgian law — was not convincing. When the draft articles came to be adopted as an international convention, many States wishing to sign the instrument would be faced with the necessity of adjusting their legislation to its provisions. The Commission could not take into account the argument that a draft article was not consistent with the legislation of a particular State.

9. The Belgian Government had also pointed out that the wording used in paragraph 2 might be construed as ruling out custody and protection in cases of insanity. The Drafting Committee might consider that point.

10. The Yugoslav Government had suggested that article 40 should state that it was possible for the sending State to waive the immunity referred to in that article, and also that it must waive it in the case of an offence committed by a consular official if the sending State had no justifiable interest in preventing the institution of legal proceedings. Provision should also be made, in the opinion of the Yugoslav Government, to cover the obligation of the sending State to try any official who could not, because of his immunity, be tried or punished in the receiving State. In connexion with those comments, he emphasized that the article did not provide for immunity from jurisdiction, but for exemption from arrest or detention pending trial, in certain cases, and from committal to prison for short terms.

11. With regard to paragraph 3, the Norwegian Government, in addition to criticizing the text of the provision itself, had expressed the view that the provision did not support the interpretation placed on it in commentary (17). There appeared to be no reason why a consul should have the choice of being represented by his attorney in criminal proceedings; such a privilege would be at variance with the rule contained in article 42, paragraph 2, of the draft.

12. With regard to paragraph 4, a drafting change had been suggested by the delegation of Indonesia speaking in the Sixth Committee of the General Assembly (Special Rapporteur's third report, A/CN.4/137 *ad* article 40); that suggestion might be referred to the Drafting Committee.

13. Also of interest in regard to paragraph 4 was the proposal made by the Netherlands Government that paragraph 2 should be replaced by a rule providing for consultation between the receiving State and the sending State in respect of the execution of any prison sentence pronounced against a consular official.

14. In the light of those comments, he proposed in his third report a redraft of article 40. In paragraph 1 of the redraft, the formula " unless they commit a serious offence " was used, which was less precise and more general than the reference to a specific term of imprisonment. In spite of its defects, that formula would have the great advantage of avoiding the difficulties which would arise from differences in national legislation on the punishment of offences. He recalled that earlier, in his second report (A/CN.4/131), he had proposed a more precise formula, but the government comments had convinced him that only a more general formulation was likely to be widely acceptable.

15. If the Commission accepted his redraft of paragraph 1, it would also have to adopt the more general formula of " serious offence " in paragraph 2.

16. The Commission would also have to decide the important question of principle: should consular officials enjoy any immunity from jurisdiction in criminal matters? Some bilateral consular conventions granted such an immunity, but he did not think it advisable to include it in the draft articles.

17. He would certainly take into consideration all the remarks made in connexion with the commentary when preparing the final text of the commentary to the article.

18. In conclusion, he urged the Commission to concentrate on the government comments and not to reopen the discussion on the substance of the article, which had been thoroughly debated at the twelfth session. He emphasized that no government had suggested the deletion of the article.

19. Mr. VERDROSS supported the Special Rapporteur's proposed redraft of paragraph 1. It was consistent with the existing practice in the matter, which exempted consuls from arrest or detention pending trial unless they were charged with a serious offence. He also agreed with the Special Rapporteur's proposal that reference should be made to " a serious offence " and not to an offence punishable by a specified term of imprisonment, for it would be almost impossible to secure general acceptance for any particular term of sentence for the purposes of a multilateral convention.

20. He could accept one amendment to paragraph 1, so as to specify that inviolability would not apply in

the case of an act considered as a " serious offence " by the laws of both the sending State and the receiving State (*cf.* comment of United States Government).

21. He had some doubts with regard to paragraph 2. It was illogical to state that a consul could be prosecuted, but that, if he were sentenced to a term of imprisonment, the sentence could not be carried out. Some States applied a system under which it was possible to suspend, or even to expunge, a sentence if the offender did not commit a second offence within a specified period; that system, however, did not deprive the sentence of all legal effect. The purpose of paragraph 2, by contrast, was to create an absurd situation: a sentence would be passed by a criminal court but would not have any legal effect whatsoever.

22. The desired result could only be achieved logically by stating that consular officials were immune from prosecution in respect of offences punishable with a penalty of less than two years' imprisonment.

23. Lastly, he fully agreed with the Yugoslav Government that provision should be made for the possibility of the sending State waiving the benefit of the privilege set forth in the article.

24. Mr. EDMONDS said that, when adopting article 40 at its twelfth session, the Commission had recognized that the provisions of that article did not reflect an existing rule of international law, but represented a step forward in the direction of the development of that law. That fact was indicated in the commentary. He supported the action thus taken by the Commission, because he saw no reason for drawing any distinction between consuls and diplomats in regard to personal inviolability.

25. In paragraph 1, the method of defining an offence by means of an adjective like " serious " or " grave " was unsatisfactory; what seemed serious to one person or court might not seem so to another. For that reason, both paragraphs 1 and 2 should be couched in more specific terms.

26. A further question affecting paragraph 2 was whether an offence should be defined in terms of the duration of imprisonment. In many countries, including the United States, the term of imprisonment was not fixed until after conviction. The same offence might be punished in one case by one year's imprisonment and in another by ten years' imprisonment. It was therefore preferable to speak of inviolability in terms of the sentence actually imposed and not in terms of the sentence which might be imposed.

27. In conclusion, he urged that the article should be retained as it stood, with the first alternative text for paragraph 1; if governments had any objection to that text, they could amend it at the international conference to which the draft articles would be submitted.

28. Mr. MATINE-DAFTARY said that the comments of governments confirmed him in the views which he had expressed on the article at the twelfth session (538th meeting, para. 6 and 540th meeting, paras. 40-45). A provision of that type was workable only in a bilateral convention between two countries whose legislation was very similar, but it was totally impracticable in a multilateral instrument. From his experience as a former member of the judiciary, he could also state that the proposed system would represent an unwarranted interference with the operation of the courts on the part of the Ministry of Foreign Affairs of the receiving State, since that Ministry would have to inquire — before giving its fiat to the institution of proceedings — whether the offence with which a consul was charged was punishable by a particular term of imprisonment.

29. Another unsatisfactory feature of the provisions of the article was that they might interfere with the proper investigation of a case in which a consul was only one of the accused; in that event, it might be in the interests of the investigation to prevent the accused consul from communicating with other persons.

30. He could not support a provision the meaning of which depended on the interpretation of so vague an expression as " serious offence". It was not clear whether it was intended that the offence should be a serious one for the consul, for the receiving State or in the eyes of public opinion. The clear issue before the Commission was whether consuls should have immunity from jurisdiction in criminal matters or not. Any attempt at half measures would create an anomalous position and would not function properly in practice.

31. The CHAIRMAN, speaking as a member of the Commission, said that the question of principle raised by Mr. Matine-Daftary was a very real one, especially if the relevant provisions of the Vienna Convention on Diplomatic Relations (A/CONF.20/13) were borne in mind. By virtue of article 31, paragraph 1, and article 37, paragraph 2, of that Convention, members of the administrative and technical staff of a diplomatic mission enjoyed full immunity from the criminal jurisdiction of the receiving State. The draft, on the other hand, did not propose to grant immunity from criminal jurisdiction even to the head of a consular post, thus placing him in a much less privileged position than a subordinate member of the staff of a diplomatic mission. That inconsistency was totally unjustified in view of the functions performed by the two groups of persons concerned. However, he would refrain from drawing the logical conclusion and proposing that consuls should be given immunity from criminal jurisdiction, because he did not believe that States would accept such a proposal.

32. With regard to paragraph 1, he agreed with Mr. Verdross in supporting the Special Rapporteur's proposal that the general expression " serious offence " should be used, possibly with the addition of the words " and when apprehended *in flagrante delicto* ", in preference to a clause defining those offences in terms of the penalty applicable. However, since consuls, unlike diplomatic officers, were subject to the jurisdiction of the receiving State, it would be natural to give priority to the local law for the purpose of defining what constituted a serious offence.

33. He did not think that any major difficulty would arise from the use of an expression such as " serious offence ". In the legislation of practically all countries, criminal offences were divided into a number of categories: the method of classification varied from country

to country, but it could be left to the receiving State to say whether an offence belonged to the more serious class of crimes. It was hard to believe that the receiving State would take an arbitrary decision in that regard; its authorities could be expected to apply objectively the classification in force in that State.

34. Another argument in favour of that course was that the provisions of bilateral conventions which dealt with the situation envisaged in the article were invariably couched in more or less general terms, leaving the details to the legislation of the receiving State.

35. Lastly, as pointed out by Mr. Verdross, in view of the diversity of national law, it was very improbable that States would agree on a more precise and specific definition of the offences referred to in paragraph 1.

36. With regard to paragraph 2, he agreed in substance with Mr. Verdross that its provisions were logically inconsistent with the system adopted by the Commission. It was contradictory to state that a sentence could be passed on a person but that in some certain cases it could not be executed. In addition, the provisions of paragraph 2 were at variance with the practice of many States and would give rise to objections. Logically, the Commission should either accept the principle of the complete immunity of consular officials from jurisdiction for certain offences, or admit, without qualification, the committal to prison of a consular official who was sentenced to imprisonment.

37. The Commission could hardly suggest the granting of immunity from criminal jurisdiction to consuls because that proposal would not be acceptable to States. It should therefore face the fact that, in the absence of such immunity, the provisions of paragraph 2 were bound to attract objections as they stood. Probably the best course would be to delete the words " of at least two years' imprisonment "; paragraph 2 would then state that a consular official could only be committed to prison " in execution of a final sentence ".

38. There was a gap in paragraph 3, since its provisions did not state whether it was possible to use measures of compulsion in order to oblige a consular official to appear before the competent authority. He believed it had been the intention of the Commission to preclude the use of such measures and it was therefore desirable to state that intention explicitly.

39. Mr. FRANÇOIS expressed a preference for the second alternative text for paragraph 1, *in fine*. He admitted that there was much substance in the objections put forward by Mr. Matine-Daftary, but the text in question, although uncertain, represented the lesser of two evils.

40. With regard to paragraph 2, the objections put forward by Mr. Verdross and the Chairman were logically correct. Nevertheless, the anomalous situation of a person being liable to sentence but not to the execution of the sentence occurred also in the case of diplomats. There were cases in which a member of the diplomatic staff could be sentenced by a court, but the majority of writers were of the opinion that even in those cases a sentence against a diplomat could not be carried out.

41. The argument in favour of exempting a consul from serving a sentence of short-term imprisonment was that the imprisonment would detract unnecessarily from the dignity of the consular office. It would be quite unacceptable for a consul to be sent to prison for a term of one week, for example, for a minor breach of the law.

42. The system, however, was open to one grave objection. Offences against traffic regulations almost invariably involved comparatively mild penalties. In recent years, members of the consular staff in the Netherlands and elsewhere had been showing an alarming disregard for traffic regulations, confident that no action could be taken against them. Matters had reached such a point that the enforcement of all sentences of imprisonment in respect of traffic violations committed by consular officials should be seriously considered.

43. It was precisely for that reason connected with traffic offences that he objected to the provisions of paragraph 2.

44. Mr. AGO said that the more article 40, a key article, was examined, the more its imperfections stood revealed. He agreed to a large extent with the views expressed by Mr. Verdross. Personally, he had opposed the extraordinarily liberal extension of immunity to the administrative and technical staff of a diplomatic mission finally decided upon by the Vienna Conference. But in his opinion after that Conference, it was wrong that members of technical or administrative staff or minor officials of a consular section in a diplomatic mission should enjoy a greater immunity than that accorded, for example, to a consul-general. Though the Chairman was right in thinking that States would probably not agree to the equation of consular with diplomatic immunities, perhaps the Commission should take it upon itself to point out what should be the logical consequence of the criteria adopted at the Vienna Conference.

45. As to paragraph 2, he agreed with Mr. Verdross that either complete immunity from jurisdiction should be granted or execution of a final sentence must be allowed against a consular official. He therefore supported the Chairman's suggestion that the words " of at least two years "imprisonment " be deleted. Moreover, it was undesirable to maintain a provision which was apt to encourage courts to impose sentences of over two years so as to be able to commit a consular official to prison. With that amendment, a consular official could be imprisoned in execution of a final sentence, which might be for more or less than two years. However, under the criminal law of most countries it was usual to award suspended sentence against persons without a criminal record who were convicted of a minor offence.

46. As to paragraph 1, consular officials should certainly not be liable to arrest or detention pending trial, particularly as they were not likely to evade appearance in court. In any case, the risk of such a possibility would be less serious than the danger that the receiving State might detain a consular official before any trial, on the mere basis of an accusation which subsequently might prove to be entirely unfounded.

47. With reference to Mr. Verdross's suggestion concerning the definition of "serious offence" as meaning an act regarded as such by the law of both States — as was done in extradition treaties — although preferable, such a definition would also not work satisfactorily. For so long as the court had not ruled on the particular case, it would be impossible to say that the offence in question was in fact a "serious" one within the meaning of the law.

48. If the Commission decided to maintain the system it had envisaged at the previous session, to render it consistent with the terms of the Vienna Convention and suitable for practical application, article 41 would have to be recast on more liberal lines.

49. Mr. JIMÉNEZ de ARÉCHAGA expressed a preference for the alternative text proposed for paragraph 1. He doubted whether States would accept a provision exempting consuls from detention pending trial, since in the case of serious crimes such exemption might provoke a popular outcry.

50. As to the suggestion of the United States Government that consular officials should be subject to the criminal jurisdiction of the receiving State in the case of serious crimes in those cases only where the act was a crime under the law both of that and of the sending State, an analogous rule occurred in numerous extradition treaties, but that rule should not apply in the case in point since consuls were subject to the local jurisdiction.

51. He saw no particular objection to the deletion of paragraph 2, which indeed would become redundant if the words " of at least two years' imprisonment " were deleted since it would then cover the same ground as paragraph 1.

52. With regard to paragraph 3, consular officials against whom criminal proceedings had been instituted should certainly appear before the competent authorities and he agreed with the Norwegian Government that there was no reason for allowing them the privilege of being represented by an attorney.

53. He supported the Special Rapporteur's redraft of paragraph 4. Furthermore, as suggested by the Norwegian and United States Governments, a provision concerning waiver of immunity was certainly necessary and should be inserted after article 41. Such a provision was unnecessary in article 40 if paragraph 2 were deleted.

54. Mr. ŽOUREK, Special Rapporteur, observed that the final form of article 40 would depend on whether or not the Commission wished to strengthen the position of consuls. He agreed with the Chairman and Mr. Ago that adoption of the present text would create some inconsistency with the system embodied in the Vienna Convention, which conferred extensive immunity on members of the staff of a diplomatic commission.

55. He would be prepared to advocate a greater degree of personal inviolability than envisaged in the article, but was not convinced that such a liberalization would be acceptable to governments, a consideration which the Commission as an organ of the General Assembly could not fail to bear in mind.

56. With regard to Mr. Verdross's argument that it was illogical not to allow the execution of a final sentence if complete immunity from jurisdiction were not given, the same lack of logic would be found in article 31 of the Vienna Convention. The application of article 32, paragraph 4, of that Convention would lead to a similar element of inconsistency. Analogous provisions concerning the personal immunity of consuls had been included in many conventions ever since the Convention of Pardo of 1769. The element of inconsistency could be removed either by conferring complete immunity from jurisdiction — save in cases of crime — or by deleting paragraph 2 in article 40.

57. As to Mr. Matine-Daftary's criticism of the expression " serious offence ", he could only reply that, though it was admittedly imprecise, it did appear in many conventions. Its interpretation must be left to the States concerned and he doubted whether a more satisfactory alternative could be found for insertion in a multilateral convention.

58. He agreed with Mr. Jiménez de Aréchaga that States were unlikely to accept the suggestion made by Mr. Ago that consuls should be exempt in every case from detention pending trial. His general conclusion was that the Commission should retain the rule as laid down in paragraph 1 with the alternative wording proposed for the end of that paragraph.

59. Mr. VERDROSS said that Mr. François seemed to be under some misapprehension. There were no exceptions to the rule that diplomatic agents enjoyed absolute immunity from criminal jurisdiction. The only exceptions were in respect of civil or administrative jurisdiction. There was, of course, a fundamental difference between a sentence in criminal proceedings and a judicial decision in civil proceedings. For a decision in civil proceedings, even though not executed, always created an obligation on the party to take some action, whereas a criminal sentence was meaningless if it could not be executed. That was why article 32, paragraph 4, of the Vienna Convention provided that " Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment "; but it did not so provide for waiver of immunity from jurisdiction in respect of penal proceedings.

60. It was essential to include in the draft a provision concerning the waiver of immunity from jurisdiction.

61. Mr. GROS said that he would have hesitated to speak on an article which had been discussed in such detail at the twelfth session when he had not been present, but the importance of the subject prompted him to express his opinion.

62. He had the gravest doubts about applying the criterion of " a serious offence " in a multilateral convention. As Mr. Verdross had rightly pointed out, such a criterion could only have meaning in a bilateral convention between two States which either had similar legal systems defining the same types of crime as " serious ", or which agreed to define such crimes in the convention itself. As an example of the kind of difficulty such a criterion might create in a multilateral convention,

one State had introduced the death penalty in connexion with motor accidents. If therefore the criterion of " a serious offence " were to be kept, a list of such offences would have to be included in the draft text.

63. Mr. AGO had pointed out the contradiction between the rules concerning the immunity of the subordinate staff of diplomatic missions, under the Vienna Convention, and the rules contemplated in the draft for heads of consulates. While admitting the force of that observation, he did not reach the same conclusion as Mr. Ago, who appeared to be thinking of the equation of consular officials with embassy staff. If they were really equated in that way, the distinction between diplomats and consuls would virtually vanish so far as their immunity from jurisdiction was concerned.

64. If, without going to such extreme lengths, the Commission decided to extend a greater degree of immunity from jurisdiction to consuls than the draft accorded, a provision should be included to allow for waivers of immunity. Given the scope and nature of diplomatic functions, a sending State could have grounds for declining to accede to the receiving State's request for a waiver in the case of a diplomat, but in the case, for example, of a consular official involved in a serious motor accident the sending State would be more or less obliged to make the waiver. Such a provision was essential if article 40 could not be maintained as drafted.

65. If Mr. Ago's thesis were accepted, the Commission would have to model the article on the relevant provisions of the Vienna Convention, and that would undermine the very concept of the consular institution, which was defined in terms of functions and immunities. He feared that to blur the distinction between the role of the diplomat and the role of the consul in such a manner might bring to naught the work of the Special Rapporteur.

66. Mr. BARTOŠ observed that the Commission was concerned with a fundamental question of principle — namely, whether or not career consuls should enjoy absolute personal immunity. Such complete immunity was mentioned in certain bilateral conventions, but as yet the trend was very cautious; for example, in a number of consular conventions concluded by the United Kingdom, the United States and France, personal immunity on the same footing as that of diplomatic agents was extended to career consuls-general only. Mr. Gros had rightly pointed out that the paramount consideration was that of the functions performed; but in cases where both diplomatic and consular functions were performed by the same mission, in what way would the immunities of minor officials of the consular sections of diplomatic missions be differentiated from those of career consuls?

67. The Vienna Conference's decision to extend immunity from criminal jurisdiction to the administrative and technical staff of diplomatic missions did not reflect the general opinion of the participants, but had been adopted in order to break a deadlock which had threatened the Conference with utter failure; and yet, the States which would attend the plenipotentiary conference on consular relations were to be asked to extend to consular officials a provision which had been accepted as a last resort — although, of course, it constituted a rule of positive international law.

68. He would be prepared in the draft under discussion to accept the rule of the complete immunity from criminal jurisdiction, even for employees of the consulate, but he could not agree to a provision which, while in effect maintaining the criminal jurisdiction of the receiving State over consular officials, would prevent that State from exercising the right to arrest or detain consular officials pending trial. Under the article as it stood, a consul who committed an offence under the ordinary law could not be remanded in custody provisionally; he remained at liberty, with full enjoyment of his consular rights, was free to communicate with his government and could even leave the territory of the receiving State without hindrance. Accordingly, it would be absolutely illogical to state on the one hand that the jurisdiction of the receiving State remained, but on the other to deprive that State of all possibility of enforcement except with the consul's goodwill. Moreover, if a person holding consular rank was immune from criminal jurisdiction, the courts of the receiving State could not institute proceedings against him and he would be placed on exactly the same footing as a diplomatic agent.

69. He would be prepared to defy official opinion in his own country and, in the interests of the progressive development of international law, to agree to extend the full immunity from criminal jurisdiction to career consuls, thus placing them on a par with diplomatic agents in that respect. Alternatively, the Commission might prepare two variants of the article, the first containing both the rule of absolute immunity and a provision concerning its waiver, and the second providing for the immunity of consular officials in respect of official acts performed in the exercise of their functions only. In the latter case, consular officials would be subject to the jurisdiction of the receiving State in other respects, and the cases in which provisional arrest or detention might be resorted to should be enumerated.

70. It was also extremely difficult to specify, in terms of a maximum sentence, in what cases a consular official would be liable to arrest or detention pending trial; penalties for acts *ejusdem generis* varied greatly from country to country, ideas concerning the treatment of offenders were evolving, and political and military offences posed a special problem. He therefore preferred the alternative wording of " except in the case of a grave crime " in paragraph 1, which was more elastic. Besides, whereas article 40 as it stood spoke of a maximum sentence of not less than five years' imprisonment [first alternative of paragraph 1], the corresponding provisions of most European codes dealing with penal procedure usually did not provide for compulsory arrest or detention pending trial except in the case of an offence punishable by a maximum sentence of not less than ten years' imprisonment. The draft provision was in that way more severe towards consuls than was the ordinary law of many countries towards ordinary citizens. Lastly, under many European codes examining magistrates were obliged to inform aliens arrested or detained pending trial of the reasons for such action, a provision which had not been included in the article. Accordingly, the draft convention,

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

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

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

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

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

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

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

The meeting rose at 1.5 p.m.

600th MEETING

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

Chairman: Mr. Grigory I. TUNKIN

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

(continued)

[Agenda item 2]

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

ARTICLE 40 (Personal inviolability) *(continued)*

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