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Summary record of the 619th meeting

Topic:
Consular intercourse and immunities

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motor vehicles of the consulate would not be covered.

107. The CHAIRMAN suggested that the question should be referred to the Drafting Committee.

It was so agreed.

ARTICLE 25 (formerly article 29)
(Use of the national flag and of the State coat of arms)

108. The CHAIRMAN said that the Drafting Committee proposed the following text for article 25:

" The consulate and its head shall have the right to use the national flag and coat of arms of the sending State on the building occupied by the consulate and at the entrance door and on the means of transport of the head of post."

Article 25 was adopted.

ARTICLE 26 (formerly article 30) (Accommodation)

109. The CHAIRMAN said that the Drafting Committee proposed the following text for article 26:

" 1. The receiving State shall either facilitate the acquisition in its territory, in accordance with its laws, by the sending State of premises necessary for its consulate or assist the latter in obtaining accommodation in some other way.

" 2. It shall also, where necessary, assist in obtaining suitable accommodation for the members of the consulate."

110. Mr. ŽOUREK, Special Rapporteur, said that paragraph 1 was modelled on article 21 of the Vienna Convention, but he considered that the latter text was not very clear and that the Commission's own wording of the former article 30 (1960 draft) was preferable. The provision in the Vienna Convention seemed to impose on the receiving State the obligation, alternatively, either of facilitating the acquisition of the premises necessary for the mission or of helping the sending State to obtain accommodation in some other way, whereas in reality, in cases in which the law of the receiving State did not allow a foreign State to acquire the ownership of consular premises, the receiving State had only one obligation, viz, the second of the two mentioned. It had to be borne in mind that some States did not allow foreign States to buy property and the text of the Vienna Convention failed to indicate which of the two States concerned was to decide what alternative would be followed.

111. The CHAIRMAN, speaking as a member of the Commission, found article 26 satisfactory.

112. Mr. ERIM agreed that the text proposed by the Drafting Committee did not imply that the receiving State was obliged to allow the acquisition of premises. Mr. Verdross, in explaining the purport of article 21 of the Vienna Convention (595th meeting, para. 32), had made that perfectly clear.

Paragraph 1 was approved.

113. Sir Humphrey WALDOCK pointed out that in the English text there was no phrase equivalent to *dans la mesure du possible* (para. 2). To the best of his recollection the Commission had decided to insert that phrase because it might be more difficult to find suitable accommodation for members of a consulate than for diplomatic staff.

114. Mr. ŽOUREK, Special Rapporteur, explained that the Commission had decided not to follow article 21, paragraph 2, of the Vienna Convention strictly so as not to place too onerous an obligation on the receiving State in the case of consular relations.

115. Mr. ERIM considered that the text of the Vienna Convention should be followed faithfully, for in the provision under discussion the authorities of the receiving State were only to " assist " in obtaining suitable accommodation, which involved no absolute obligation.

116. Mr. YASSEEN considered that in practice the addition of the words *dans la mesure du possible* would make no difference at all, for it was always an implied condition that nobody was expected to do the impossible.

117. The CHAIRMAN, speaking as a member of the Commission, believed it advisable to adhere to the text of the Vienna Convention.

118. Mr. AMADO saw no need to depart from the text of the Vienna Convention. After all, the establishment of consulates was in the reciprocal interest and the receiving State stood to benefit as well as the sending State. Hence, the receiving State would not be averse, presumably, to giving the kind of assistance referred to in paragraph 2.

119. The CHAIRMAN suggested that paragraph 2 should be approved as it stood in the English text and that the French should be amended accordingly.

It was so agreed.

Article 26 was adopted, subject to that change.

The meeting rose at 6.10 p.m.

619th MEETING

Tuesday, 27 June 1961, at 10.10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities
(A/4425; A/CN.4/136 and Add. 1-11; A/CN.4/137)

(continued)

[Agenda item *2*]

DRAFT ARTICLES (A/4425): SECOND READING (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the text of the draft articles prepared by the Drafting Committee.

ARTICLE 27 (formerly article 31)
(Inviolability of the consular premises)

2. The CHAIRMAN said that the Drafting Committee proposed the following text for article 27:

" 1. The consular premises shall be inviolable. The agents of the receiving State may not enter them, save with the consent of the head of post.

" 2. The receiving State is under a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage and to prevent any disturbance of the peace of the consulate or impairment of its dignity.

" 3. The consular premises, their furnishings and other property therein and the means of transport of the consulate shall be immune from any search, requisition, attachment or execution. "

3. Mr. FRANÇOIS pointed out that under the proposed text of article 27, the means of transport of the consulate would be immune from search, requisition, etc. The consequence would be that in cases of traffic offences the police of the receiving State would be unable to examine a car belonging to a consular official. He considered that extension of the immunity unacceptable, and asked for an explanation.

4. Mr. AGO, speaking as Chairman of the Drafting Committee, explained that as instructed the Committee had followed the text of article 22 of the Vienna Convention on Diplomatic Relations, where a reference to means of transport had been inserted by decision of the Vienna Conference; the reference had not appeared in the corresponding provision of the Commission's 1958 draft on diplomatic intercourse (A/3859.)

5. Mr. FRANÇOIS said that the provision he was criticizing illustrated once again how wrong it was to try to equate the privileges and immunities of consuls with those of diplomats. He thought that States would be unwilling to agree to such virtual assimilation.

6. Mr. AGO said that it was becoming increasingly difficult to maintain a distinction between consuls and diplomats after the decision of the Vienna Conference to extend to members of the administrative and technical staff of a diplomatic mission the privileges and immunities accorded to the diplomatic staff. It would be hard to deny to a consul-general an immunity enjoyed by junior members of a diplomatic mission.

7. Mr. FRANÇOIS stated that he must enter a reservation regarding article 27, paragraph 3.

8. Mr. ŽOUREK, Special Rapporteur, said that Mr. François's concern should be somewhat allayed by the fact that the provision in question referred to vehicles belonging to the consulate: the immunity did not cover vehicles which were the personal property of members of the consulate.

9. Mr. PAL urged the Commission not to reopen the discussion since it had decided to follow article 22 of the Vienna Convention.

Article 27 was adopted.

ARTICLE 28 (formerly article 32)
(Exemption from taxation of consular premises)

10. The CHAIRMAN said that the Drafting Committee proposed the following text for article 28:

" 1. The sending State and the head of post shall be exempt from all national, regional or municipal dues and taxes whatsoever in respect of the consular premises, whether owned or leased, other than such as represent payment for specific services rendered.

" 2. The exemption from taxation referred to in paragraph 1 of this article shall not apply to the said dues and taxes if, under the law of the receiving State, they are payable by persons who contracted with the sending State or the head of the consular post. "

Article 28 was adopted.

ARTICLE 29 (formerly article 33)
(Inviolability of the consular archives and documents)

11. The CHAIRMAN said that the Drafting Committee proposed the following text for article 29:

" The consular archives and documents shall be inviolable at any time and wherever they may be."

Article 29 was adopted.

ARTICLE 30 (formerly article 34) (Facilities for the work of the consulate)

12. The CHAIRMAN said that the Drafting Committee proposed the following text for article 30:

" The receiving State shall accord full facilities for the performance of the functions of the consulate."

Article 30 was adopted.

ARTICLE 31 (formerly article 35) (Freedom of movement)

13. The CHAIRMAN said that the Drafting Committee proposed the following text for article 31:

" Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the consulate freedom of movement and travel in its territory."

Article 31 was adopted.

ARTICLE 32 (formerly article 36)
(Freedom of communication)

14. The CHAIRMAN said that the Drafting Committee proposed the following text for article 32:

" 1. The receiving State shall permit and protect free communication on the part of the consulate for all official purposes. In communicating with the government, the diplomatic missions and the other consulates of the sending State, wherever situated, the consulate may employ all appropriate means, including diplomatic or consular couriers, the diplomatic or consular bag and messages in cipher. However, the consulate may install and use a wireless transmitter only with the consent of the receiving State.

" 2. The official correspondence of the consulate shall be inviolable. Official correspondence means all correspondence relating to the consulate and its functions.

" 3. The consular bag, like the diplomatic bag, shall not be opened or detained.

" 4. The packages constituting these bags must bear visible external marks of their character and may

contain only official correspondence and documents or articles intended for official use.

" 5. The consular courier shall be provided with an official document indicating his status and the number of packages constituting the consular bag. In the performance of his functions he shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

" 6. A consular bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a consular courier. The consulate may send one of its members to take possession of the consular bag directly and freely from the captain of the aircraft. "

15. The CHAIRMAN, speaking as a member of the Commission, referring to paragraph 1, asked for information concerning the practice of States. The freedom conferred by the second sentence of paragraph 1 seemed to be more extensive than was necessary; the provision in question should speak only of the consulate's freedom to communicate with the diplomatic mission and other consulates in the same territory.

16. Mr. ERIM saw no real objection to the scope of paragraph 1 and believed it would be difficult in practice to restrict it in the way suggested by the Chairman, particularly since there would be nothing to prevent the consulate from sending a communication to anywhere in the world through a diplomatic mission or another consulate in the same territory. It would not be right to restrict the application of an article designed to further the efficient conduct of consular work.

17. Mr. ŽOUREK, Special Rapporteur, said that in their comments the Governments of Denmark and Spain (A/CN.4/136/Add.1 and 8) had suggested a restriction of the kind mentioned by the Chairman. The practical objection to that course was that a consulate wishing to communicate with another consulate of the sending State in a neighbouring State would then have to channel its communication via the government of the sending State.

18. The usual practice was to send consular correspondence in the diplomatic bag but where there was no diplomatic mission in the receiving State a consular bag was used. Those two alternative methods were covered in paragraph 1.

19. The CHAIRMAN, speaking as a member of the Commission, said that he was not so much concerned with correspondence through the diplomatic bag as with telegraph messages in cipher. However, he did not wish to press for any modification of paragraph 1.

20. He noted that the reference to messages in code had been omitted, though it appeared in article 27, paragraph 1, of the Vienna Convention.

21. Mr. ŽOUREK, Special Rapporteur, explained that inasmuch as messages in code could be sent even by private individuals, it had not been thought necessary to mention them in the draft on consular intercourse.

22. Mr. AGO suggested that nevertheless the wording of the Vienna Convention should be followed and the words " code or " should be inserted before the word " cipher " in the second sentence of paragraph 1.

It was so agreed.

23. Mr. TSURUOKA questioned the utility of the phrase " like the diplomatic bag " in paragraph 3.

24. Mr. AGO, chairman of the Drafting Committee, explained that the words had been inserted because consular papers were sometimes sent in the diplomatic bag.

Article 32 was adopted.

ARTICLE 33 (formerly article 6) (Communication and contact with nationals of the sending State)

25. The CHAIRMAN said that the Drafting Committee proposed the following text for article 33:

" 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

" (a) Nationals of the sending State shall be free to communicate with and to have access to the competent consulate, and the officials of that consulate shall be free to communicate with and, in appropriate cases, to have access to the said nationals;

" (b) The competent authorities shall, without undue delay, inform the competent consulate of the sending State if, within its district, a national of that State is committed to prison or to custody pending trial or is detained in any other manner. Any communications addressed to the consulate by the person in prison, custody or detention shall also be forwarded by the said authorities without undue delay;

" (c) Consular officials shall be free to visit a national of the sending State who is in prison, custody or detention, for the purpose of conversing with him and arranging for his legal representation. They shall also be able to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment.

" 2. The freedoms referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must not nullify these freedoms. "

26. Mr. FRANÇOIS thought that the expression " legal representation " used in the English text of paragraph 1 (c) had a broader meaning than the French *représentation en justice* which presumably meant representation in court.

27. Mr. EDMONDS said that the phrase " legal representation " had two possible meanings: either representation by an authorized person such as an attorney, or representation in judicial proceedings. The provision contained in paragraph (c) should not be limited to the latter because the person concerned might be detained in connexion with some matter which would not come up before the court. The text should be more precise.

28. Sir Humphrey WALDOCK believed that for the purposes of the present text the phrase " legal represen-

reasons, to the use of the term "normal" (A/CN.4/136/Add.4, *ad* article 22).

24. Mr. EDMONDS said that the term "normal" could conveniently be dropped. That term suggested that there existed some average size of staff. By indicating, however, that the size of the staff should be reasonable, having regard to the circumstances and conditions in the consular district and to the needs of the particular consulate, it was being suggested that no such average size existed.

25. Mr. BARTOŠ asked why the Drafting Committee had not adopted the language used in article 11, paragraph 1, of the Vienna Convention, which spoke of the size of the staff being "kept within limits considered by it [the receiving State] to be reasonable and normal, having regard to..."

26. The CHAIRMAN pointed out that article 17 (former article 22) had been referred to the Drafting Committee without any specific instructions (594th meeting, para. 61).

27. Mr. ŽOUREK, Special Rapporteur, said that the Drafting Committee, considering that the Vienna Convention gave excessive latitude to the receiving State in the matter of the size of the staff, had preferred the objective formula which the Commission had originally adopted both in the 1958 draft on diplomatic intercourse (A/3859) and in the 1960 draft on consular intercourse (A/4425.)

28. Mr. BARTOŠ said that he preferred the text adopted at Vienna by a simple majority of the Committee of the Whole and by a two-thirds majority of the plenary Conference.

29. Mr. AMADO said that he, too, preferred the Vienna text. The mere reference to "reasonable and normal limits" was inadequate. The term "reasonable" was open to subjective interpretation. He did not like the term, but if it were to be used, he thought that it should be made clear who was going to decide what size was reasonable and normal.

30. The CHAIRMAN, speaking as a member of the Commission, recalled that the draft on diplomatic intercourse had originally contained a provision similar to article 17, but that it had been amended at the Vienna Conference; article 11 of the Vienna Convention had been the result of that amendment.

31. The two texts differed materially, but in practice their effects would be very much the same.

32. He did not think the decision adopted at Vienna was a very happy one, for it seemed to leave the matter very much to the discretion of the receiving State. A consulate was an organ of the sending State, and that State should have a say in determining the size of its staff.

33. For those reasons, he preferred the objective criterion, admittedly not very precise, of article 17, to leaving the matter to be decided by the receiving State.

34. Mr. AGO said that he shared the preference of the Chairman for the text of article 17.

35. Article 17 gave an objective criterion, albeit a somewhat vague one. In case of disagreement between the receiving State and the sending State, an impartial authority — arbitrator or court — could determine what size of staff was reasonable and normal in the particular circumstances.

36. In the Vienna text, on the other hand, there was no objective criterion on which an impartial ruling could be given, the criterion being not what was reasonable and normal but what the receiving State considered reasonable and normal.

37. He supported the retention of the word "normal", which introduced an element of comparison. A receiving State could not, for example, claim that a staff of fifty was normal for the consulate of one sending State and a staff of two normal for that of another.

38. Mr. BARTOŠ said that the amendment introduced at the Vienna Conference had been sponsored and supported by the small States, which wanted some safeguard against the introduction of an excessive number of foreign consular officials into their territory. The problem was a very real one in practice: there had been cases where a State which had few if any nationals in the area concerned and little or no commercial intercourse with the receiving State, and none of whose ships visited that State's ports, maintained therein a consulate having a staff of two hundred. With some States it was impossible to come to terms on that point because they did not accept the judicial settlement of disputes. The only means left to the small States was to reserve to themselves the right to say what constituted a reasonable size of staff.

39. Mr. MATINE-DAFTARY, speaking from his experience of the Vienna Conference, said that it was his impression also that the small States strongly favoured the innovation embodied in article 11 of the Vienna Convention. Unless a similar text were adopted in the draft on consular intercourse, those States might fear that their attemptsto keep w ithin bounds the numbers of foreign diplomatic agents might be circumvented by means of the appointment of a large number of consular officials.

40. Diplomatic functions were often intangible and it was therefore difficult to assess what number of diplomatic agents constituted a reasonable size of staff for a diplomatic mission. By contrast, in the case of consulates, the functions performed were visible and were connected with such tangible elements as the number of nationals of the sending State and the volume of trade between the two States concerned.

41. He urged the Commission to adopt the Vienna formula, which was the one likely to be accepted by governments at the future conference of plenipotentiaries. In the plenary Conference at Vienna the delegations of certain great Powers had proposed the restoration of the Commission's text as amended in the Committee of the whole in favour of the receiving State, but that proposal had been rejected by a two-thirds majority.

42. The CHAIRMAN, speaking as a member of the Commission, said that it was not accurate to describe the situation at Vienna as a clash between small and big Powers. Some great Powers had supported the amend-

ment incorporated into article 11 of the Vienna Convention.

43. The purpose of the objective rule of article 17, as of the corresponding article of the 1958 draft on diplomatic relations, was to avoid the missue of the powers of limitation of the receiving State in the matter. Cases had occurred in which unnecessary limitations had been imposed on certain diplomatic missions in order to harass a particular State for purely political reasons. The language of article 17 was a much better juridical formulation than article 11 of the Vienna Convention.

44. Mr. AMADO pointed out that the territory affected by the size of the staff of a consulate was that of the receiving State; hence his preference for the Vienna formula. However, he would not press his point of view and would abstain in the vote on the proposed article 17.

45. Mr. ŽOUREK, Special Rapporteur, said that the formula adopted at Vienna provided no criterion for the settlement on a juridical basis of a dispute between a receiving State and a sending State. That formula would therefore tend to complicate relations between States rather than help to solve difficulties.

46. Mr. ERIM pointed out that article 11 of the Vienna Convention did not give the receiving State an absolute and uncontrolled right to limit the size of the staff of a foreign diplomatic mission. The words "considered by it to be reasonable and normal" were qualified by the phrase "having regard to circumstances and conditions in the receiving State and to the needs of the particular mission ".

47. If a dispute occurred between the two States concerned, the dispute could be peacefully settled, if necessary by arbitration or judicial settlement, on the basis of the criterion thus set forth.

48. The Commission had consistently endeavoured to bring the draft on consular intercourse into line with the corresponding provisions of the Vienna Convention and he suggested that the Commission should adopt that course in the case of article 17. That was particularly indicated since, as the Chairman had pointed out, the two texts would not in practice produce very different effects.

49. Mr. SANDSTRÖM said that the question before the Commission was not which of the two texts was the more rational one from the juridical point of view but simply which of the two was the more practical one. The Commission was faced with the fact that a conference of plenipotentiaries had adopted article 11 of the Vienna Convention and there was every reason to believe that a receiving State would want to have the same control over the size of foreign consular staffs as over that of foreign diplomatic missions in its territory.

50. The governments represented at a future international conference dealing with consular relations were very unlikely to accept a text different from the Vienna formulation.

51. Mr. AGO said that where the choice lay between two equally good formulations, he would always agree that preference should be given to the Vienna text. The position in the present case, however, was different.

52. Under international law, a sending State had always been completely free to determine the size of its missions. In the text adopted by the International Law Commission for diplomatic missions, some say had been given to the receiving State in the matter. The Vienna Conference had carried that development even further by giving the receiving State the last word.

53. In his opinion, the Vienna Conference had gone too far. A text such as that of article 17 under discussion provided some criterion for a judicial settlement of a possible dispute between the receiving State and the sending State. In the case of article 11 of the Vienna Convention, no such criterion existed, because it left it to the receiving State to say what size it considered reasonable and normal.

54. For those reasons, he urged the Commission to adopt the text of article 17 as proposed by the Drafting Committee.

55. Mr. BARTOŠ said that it was not easy to obtain a two-thirds majority at an international conference, especially against large States and their supporters. It was significant that the smaller States had been able to gather such a majority at Vienna for article 11.

56. Much had been said of the possibility of judicial settlement. In the first place, not all States accepted that form of settlement. In the second place, even if a possibility of judicial settlement existed, article 17 as drafted placed the onus of proof on the receiving State: that State would have to prove why it considered that the size of the staff of the consulate concerned exceeded what was normal and reasonable. He therefore proposed that draft article 17 should be amended so as to bring it into line with article 11 of the Vienna Convention, which was not weighted in favour of the sending State.

57. Mr. ŽOUREK, Special Rapporteur, recalled that it was only after prolonged discussion that the Commission had adopted a formula analogous to that given in draft article 17 both in the 1958 draft on diplomatic intercourse and in the 1960 draft on consular intercourse. That formulation gave every safeguard to the receiving State, while providing an objective criterion in regard to the size of staff. He did not agree with Mr. Bartoš's interpretation of article 17. As pointed out in commentary (3) to the former article 22, if the receiving State considered that the consular staff was too large, it should first try to reach an agreement with the sending State, but if those efforts failed it would have the right to limit the size of the sending State's consular staff.

58. Lastly, he stressed that no objections had been put forward by governments in their comments. It would be strange for the Commission to amend an article which had received such general approval from governments.

59. Mr. PADILLA NERVO said that some of the arguments in support of the Drafting Committee's text for article 17 did not seem well founded. Although the future could not be predicted, it was virtually certain that the prospective conference of plenipotentiaries would follow the wording of article 11 of the Vienna Convention. A different version would undoubtedly provoke arguments. The question was not entirely a legal one and

tation" would probably be adequate. Otherwise he would suggest as a possible alternative the phrase "representation in legal proceedings." Presumably there was no intention to exclude representation prior to the court proceedings which were a necessary part of the defence. In that connexion, there might be some difference between English and Continental criminal procedure.

29. The CHAIRMAN asked whether "legal representation" meant also representation for business or other purposes not connected with judicial proceedings.

30. Mr. EDMONDS pointed out that a person might be detained in connexion with quarantine or customs regulations, matters which might not necessarily be referred to the courts at all.

31. Mr. ŽOUREK, Special Rapporteur, stated that the proviso in paragraph 2 was open to misinterpretation as he had indicated in the Drafting Committee, but it had been proved impossible to devise a more satisfactory wording. Under the procedural codes of most countries, persons in prison, custody or detention could be visited on the judge's authorization which was sometimes withheld, particularly if the person in custody or detention were held incomunicado. In such a case a consul was not entitled to rely on the proviso in paragraph 2 as a ground for claiming that in a specific instance action taken in conformity with the laws and regulations of the receiving State nullified the rights and freedoms specified in article 33.

32. Mr. PAL believed that the general expression "legal representation" should be retained because, for the purpose of the protection of the interests of a national of the sending State in the receiving State, he might need to be represented in matters not necessarily connected with any proceedings before a court. Article 33 should be viewed in conjunction with article 4 and it should be remembered that clause (c) provided for the case where the national would otherwise be helpless. Clause (c) was really intended to secure freedom of access to the person in detention. The purpose for which access was sought was not material so long as the person seeking access was otherwise competent. Any specification of the purpose would tend to curtail the freedom of access.

33. Mr. ŽOUREK, Special Rapporteur, agreed with Mr. Pal's argument but pointed out that the Drafting Committee would be submitting a new article dealing with representation in general. Article 33 dealt with the more limited question of the representation of detained nationals, or nationals against whom criminal proceedings had been instituted. Accordingly, in article 33 it was only necessary to make provision for their defence.

34. The CHAIRMAN believed that the French text of paragraph 1 (c) might be accepted as it stood and that in the English text the phrase in question might be amended to read "representation in legal proceedings."

That amendment to the English text of paragraph 1 (c) was adopted.

35. Mr. JIMENEZ de ARÉCHAGA said he had no objection to the amendment suggested by the Chairman but was unable to endorse the Special Rapporteur's restrictive interpretation of paragraph 1 (c).

36. Mr. GROS said that there was no fundamental difference between the English and French texts since the latter certainly should be interpreted to mean that a detained person could be represented before the court proceedings had begun.

37. Mr. TSURUOKA suggested that the word "free" should be substituted for the word "able" in the second sentence of paragraph 1 (c).

Mr. Tsuruoka's amendment was adopted. [1]

38. Mr. AMADO said that the difficulties of interpretation to which the expression "his legal representation" had given rise could be avoided if the passage beginning "arranging ..." were replaced by "making the necessary arrangements for his defence" (*pourvoir aux besoins de sa défense*).

39. He had supported the proposal in Mr. Tsuruoka's amendment because it was evident from the language used in paragraph 2 that the rights specified in paragraph 1 (c) constituted freedoms.

40. The CHAIRMAN, speaking as a member of the Commission, pointed out that in view of the provisions of paragraph 2, it would be going too far to use the expression "shall be free" in paragraph 1 (c). It would be more correct to say "shall be able" in both sentences of that paragraph.

41. Sir Humphrey WALDOCK said that the word "able" was technically inadequate. In order to maintain the balance between the various provisions of paragraph 1, it would be more correct to use the word "free" throughout.

42. With reference to Mr. Amado's suggestion, he said that the Drafting Committee had been instructed to formulate paragraph 1 (c) in such a manner as to cover not only cases of detention in criminal proceedings but also other forms of detention, such as committal to a lunatic asylum. Such cases were important and it was essential that the consul should be allowed to visit his nationals in order to make arrangements for the purpose of taking legal steps to challenge the propriety of the committal in question. Mr. Amado's suggested formulation would only cover the case of detention in criminal proceedings.

43. The CHAIRMAN, speaking as a member of the Commission, said that it was appropriate to use the words "shall be free" in paragraph 1(a), which dealt with freedom of communication in ordinary circumstances. In the particular case of an imprisoned national, covered by paragraph 1(c), the consul could not have the same freedom of communication. It was therefore justified to use a different expression.

44. Mr. AMADO suggested that in paragraph 1(c) an expression such as "shall be permitted" or "shall be allowed" should be used.

45. Sir Humphrey WALDOCK said that "shall be permitted" would be acceptable.

46. Mr. YASSEEN suggested that in French the

[1] But see paragraphs 72 and 78 below.

expression *avoir la possibilité* should be used in paragraph 1(c).

47. He agreed that the expression to be used in that paragraph should not be the same as that used in paragraph 1 (a). The latter dealt with freedom of communication in ordinary circumstances, the former with the right to visit a person under detention.

48. Mr. BARTOŠ said that, under the municipal law of most countries, a lawyer did not represent his client in criminal proceedings; he assisted his client and gave him all the technical help needed by him for his defence. The lawyer did not act as his client's attorney and did not commit him in the manner in which a representative would do. It was therefore inappropriate to speak of " legal representation," an expression which was used chiefly in civil law and which denoted the right to act on behalf of another person. That important distinction was reflected in consular conventions, which did not refer to legal representation but to the right to organize the defence of persons arrested or imprisoned.

49. For those reasons, he wished to enter an express reservation in regard to the use of the expression " legal representation". He proposed to abstain from voting on the passage concerned.

50. Mr. JIMÉNEZ de ARÉCHAGA agreed that there was an important difference between paragraph 1(a) and paragraph 1(c). Paragraph 1(a) dealt with the freedom of communication between a consul and his nationals without any previous authorization. In that paragraph, it was appropriate to use the expression " shall be free."

51. Paragraph 1(c) dealt with the possibility of visiting a person in prison, and a visit of that type would be subject to prior authorization. For that reason, he supported the suggestion that in paragraph 1(c) the expression " shall be permitted " should be used.

52. As a result, paragraph 2 would have to be amended to read: " The freedoms and permissions (*les libertés et facultés*) referred to ... ".

53. Mr. AGO agreed that it would not be appropriate to speak of " freedoms " in connexion with the provisions of paragraph 1(c), which differed from those of paragraph 1(a). The rights envisaged were more in the nature of legal faculties and were exercisable in the special case of visiting an arrested or imprisoned national of the sending State.

54. He supported Mr. Amado's suggestion that paragraph 1(c) should refer to the organization of the prisoner's defence. The consular official did not himself undertake that defence: he took steps to arrange for a lawyer to defend him.

55. Mr. ŽOUREK, Special Rapporteur, said that, as explained by Sir Humphrey Waldock, the Drafting Committee had intended to cover in paragraph 1(c) all forms of deprivation of freedom and not only arrest or imprisonment in connexion with criminal proceedings. Accordingly, it would not be appropriate to use the narrower and more precise wording suggested by Mr. Amado.

56. He therefore urged the Commission to retain the more general expression " legal representation."

57. Mr. GROS said that the expression *représentation en justice* was the broadest one possible in French. It would cover arrangements for the defence of any person deprived of his freedom, regardless of the circumstances and of the authority dealing with his case. It would cover, for example, the case of a person accused of tax evasion, which was dealt with by an administrative body.

58. Mr. BARTOŠ pointed out that a lawyer who defended a person accused of tax evasion did not " represent " his client: he could not, for example, enter into a settlement on his client's behalf.

59. Mr. PADILLA NERVO said that, regardless of the language used, the purpose of paragraph 1(c) was to enable the consul to visit his imprisoned national.

60. It was, however, essential to use the same language in both sentences of paragraph 1(c), the first of which dealt with a prisoner awaiting trial and the second with a prisoner serving a sentence.

61. The CHAIRMAN said that the Commission had accepted Mr. Tsuruoka's suggestion that the same language should be used in both sentences of paragraph 1(c).

62. Mr. AGO noted that paragraph 2 spoke of " freedoms " in connexion with all the provisions of paragraph 1. It would therefore perhaps be preferable to amend the expression.

63. The CHAIRMAN, speaking as a member of the Commission, suggested that it would be more appropriate to replace the word " freedoms " by " rights " in paragraph 2.

64. Mr. JIMÉNEZ de ARÉCHAGA supported the Chairman's suggestion.

65. Mr. YASSEEN pointed out that the Chairman's suggestion would meet the point raised by Mr. Ago. Both the freedoms specified in paragraph 1(a) and the " ability " proposed in paragraph 1(c) constituted rights.

66. Sir Humphrey WALDOCK said that it would not be inappropriate to speak of " rights and freedoms " in paragraph 2.

67. Mr. AMADO stressed that it was not customary to speak of freedoms being " exercised." " Freedom " was essentially an abstract concept.

68. Mr. PADILLA NERVO emphasized that article 33 set forth the rights of a consul in the exercise of his most important duties.

69. Consular functions were set forth in article 4. By virtue of sub-paragraphs (e), (g) and (h) of that article, a consul was entitled to take all steps necessary to arrange for the legal defence of the interests of a national of the sending State who was accused of an offence, or committed to a lunatic asylum.

70. Article 33 did not add anything to those functions; its provisions dealt with the right of a consul to communicate with the nationals of the sending State. Paragraph 1(c) set forth the right to visit a national of the sending State who was imprisoned and to converse with

him; the consul could use that opportunity to give the prisoner news of his family or to discuss arrangements for his defence.

71. To his mind, it was unnecessary in paragraph 1(c) to refer specifically to the organization of the defence of the national concerned or to his legal representation.

72. The CHAIRMAN said that he had been asked by Mr. Ago, who had been called away from the meeting, to propose on his behalf an amendment replacing in paragraph 1(c) the words " shall be free " in the first sentence, and " shall be able " in the second sentence, by the uniform expression " shall have the right."

73. As a result, in paragraph 2, the word " freedoms " would be replaced by " rights."

74. Speaking as a member of the Commission, he said that that proposal was quite acceptable to him.

75. Mr. SANDSTRÖM said that he preferred the use of the words " shall be free " throughout. In that manner, the word " freedoms " could be retained in paragraph 2.

76. He pointed out that the provisions of paragraph 1(b) could not be governed by those of paragraph 2.

77. Mr. ŽOUREK, Special Rapporteur, said that the point mentioned by Mr. Sandstrom could be dealt with by transferring paragraph 1(b) to article 34, dealing with certain obligations of the receiving State.

78. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to adopt paragraph 1 with the amendment proposed by Mr. Ago.

Paragraph 1, as amended, was adopted.

79. Mr. PADILLA NERVO said that he was not submitting an amendment, but wished to record his opinion that the phrase in paragraph 1(c) " arranging for his legal representation " expressed part of the consul's functions and did not depend on the right to visit a national in prison, custody or detention. A consul would have that right whether he visited such a national or not. The consul's right to visit a national in prison should not be restricted to the limited purpose of arranging for his defence.

80. The CHAIRMAN drew attention to paragraph 2 and the proposal that the word " rights " should be substituted for the word " freedoms."

81. Mr. PADILLA NERVO said that the word " rights " appeared only in the amended paragraph 1 (c), so that the reference in paragraph *2* would be to that sub-paragraph alone.

82. The CHAIRMAN disagreed. The Draft Covenant on Human Rights (E/2573), for instance, included all liberties and rights.

83. Mr. PADILLA NERVO said that he could not accept paragraph 2. The proviso related only to paragraph 1(c), for the general right of communication laid down in paragraph 1(a) was a fundamental right and the basis of the protection of nationals and of consular functions, and hence could not be qualified by the proviso. The only possible limitation on that fundamental right was that mentioned in article 31. No other limitation was admissible in the case of nationals who were at liberty. So far as detained nationals were concerned the consul's right to visit them should be subject to no other limitations than those laid down in the relevant regulations.

84. The CHAIRMAN noted that no objection had been raised to the amendment substituting the word " rights " for the word " freedoms " in paragraph 2.

Article 33, paragraph 2, as amended, was adopted.

85. Mr. PADILLA NERVO entered a reservation to paragraph 2.

Article 33, as amended, was adopted.

ARTICLE 34 (formerly article 5)
(Obligations of the receiving State)

86. The CHAIRMAN said that the Drafting Committee proposed the following text for article 34:

" The receiving State shall have the duty:

" (a) in the case of the death of a national of the sending State, to inform the consulate in whose district the death occurred;

" (b) to inform the competent consulate without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending State;

" (c) if a vessel used for maritime or inland navigation, having the nationality of the sending State, is wrecked or runs aground in the territorial sea or internal waters of the receiving State, or if an aircraft registered in the sending State suffers an accident on the territory of the receiving State, to inform without delay the consulate nearest to the scene of the occurrence."

Article 34 was adopted.

ARTICLE 35 (formerly article 37) (Communication with the authorities of the receiving State)

87. The CHAIRMAN said that the Drafting Committee proposed the following text for article 35:

" 1. In the exercise of the functions specified in article 4, consular officials may address the authorities which are competent under the law of the receiving State.

" 2. The procedure to be observed by consular officials in communicating with the authorities of the receiving State shall be determined by the relevant international agreements and by the municipal law and usage of the receiving State."

88. He asked for an explanation concerning the phrase " relevant international agreements ".

89. Mr. ŽOUREK, Special Rapporteur, explained that the reference to international agreements had been included in article 37 of the 1960 draft and had been considered necessary, as communication with the authorities of the receiving State was regulated in certain international conventions.

Article 35 was adopted.

ARTICLE 36 (formerly article 38) (Levying of fees and charges and exemption of such fees and charges from taxes and dues)

90. The CHAIRMAN said that the Drafting Committee proposed the following text for article 36:

" 1. The consulate may levy in the territory of the receiving State the fees and charges provided by the laws and regulations of the sending State for consular acts.

" 2. The sums collected in the form of the fees and charges referred to in paragraph 1 of this article, and the receipts for such fees or charges, shall be exempt from all taxes and dues in the receiving State."

Article 36 was adopted.

ARTICLE 37 (formerly article 39) (Special protection and respect due to consular officials)

91. The CHAIRMAN said that the Drafting Committee proposed the following text for article 37:

" The receiving State is under a duty to accord special protection to consular officials by reason of their official position and to treat them with due respect. It shall take all appropriate steps to prevent any attack on their persons, freedom or dignity."

Article 37 was adopted.

ARTICLE 38 (formerly article 40) (Personal inviolability of consular officials)

92. The CHAIRMAN said that the Drafting Committee proposed the following text for article 38:

" 1. Consular officials may not be subjected to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority.

" 2. Except in the case specified in paragraph 1 of this article, consular officials shall not be committed to prison or subjected to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect.

" 3. If criminal proceedings are instituted against a consular official, he must appear before the competent authorities. Nevertheless, the proceedings shall be conducted with the respect due to him by reason of his official position and, except in the case specified in paragraph 1 of this article, in a manner which will hamper the exercise of consular functions as little as possible."

Article 38 was adopted.

ARTICLE 39 (Duty to notify in the event of arrest, detention pending trial or the institution of criminal proceedings)

93. The CHAIRMAN said that the Drafting Committee proposed the following text for article 39:

" In the event of the arrest or detention, pending trial, of a member of the consular staff, or of criminal proceedings being instituted against him, the receiving State shall promptly notify the head of the consular post. Should the latter be himself the object of the said measures, the receiving State shall notify the sending State through the diplomatic channel."

Article 39 was adopted.

ARTICLE 40 (formerly article 41) (Immunity from jurisdiction)

94. The CHAIRMAN said that the Drafting Committee proposed the following text for article 40:

" Members of the consulate shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions."

Article 40 was adopted.

ARTICLE 41 (formerly article 42) (Liability to give evidence)

95. The CHAIRMAN said that the Drafting Committee proposed the following text for article 41:

" 1. Members of the consulate may be called upon to attend as witnesses in the course of judicial or administrative proceedings. Nevertheless, if a consular official should decline to do so, no penalty may be applied to him.

" 2. The authority requiring the evidence of a consular official shall avoid interference with the performance of his functions. In particular it shall, where possible, take such testimony at his residence or at the consulate or accept a statement from him in writing.

" 3. Members of the consulate may decline to give evidence concerning matters connected with the exercise of their functions and to produce official correspondence and documents relating thereto. In this case, the authority requiring the evidence shall refrain from imposing any penalty on them."

96. Pointing out that the phrase " no coercive measure " had been used in the 1960 text, he asked whether the word " penalty " was broad and strong enough.

97. Mr. ŽOUREK, Special Rapporteur, said that the change had been made by the Drafting Committee because the question had been raised whether a fine was a coercive measure or not. The French word *sanction* was unambiguous.

98. Mr. JIMÉNEZ de ARÉCHAGA suggested that the words " coercive measure " should be restored; under the procedural law of most Latin American countries a witness who refused to testify was liable to be conducted before the judge by force. Such action could hardly be called a penalty.

99. Mr. SANDSTRÖM observed that a similar procedure existed in Swedish law.

100. Mr. ŽOUREK, Special Rapporteur, said that he thought merely a matter of language was involved. Under many conventions a *subpoena* could not be served on a consul. In other words he could not be threatened with a fine or with being physically brought before the court in the event of non-appearance. The French word *sanction* covered all cases.

101. Sir Humphrey WALDOCK said that the English word " penalty " did not do so. It would be better to use two terms together: " no coercive measure or penalty."

102. Mr. BARTOŠ pointed out that other sanctions than those mentioned existed. A witness might be detained. Under Belgian law a witness who refused to

testify was liable to be fined a specified sum for each day of refusal. In other countries a recalcitrant witness was liable for damages caused by his non-appearance. An English expression should therefore be found to correspond to the French term *sanction*.

103. The CHAIRMAN, speaking as a member of the Commission, said that he also preferred the use of two terms in English. He suggested that the phrase " no coercive measure or penalty " should be used in the English text and *aucune mesure de coercition ou autre sanction* in the French.

It was so agreed.

104. The CHAIRMAN, speaking as a member of the Commission and referring to paragraph 3, suggested that the last sentence was not necessary. The similar sentence was necessary in paragraph 1, because that paragraph established the obligation to give evidence and it might follow that coercion might be applied in case of refusal to do so, but no such obligation was stated in paragraph 3.

105. Mr. ŽOUREK, Special Rapporteur, explained that the sentence had been included by the Drafting Committee in paragraph 3 after considerable discussion. The article applied to two categories of persons. In paragraph 1 the exemption was recognized only in the case of consular officials, whereas paragraph 3 covered all members of the consulate. The exemption had therefore had to be repeated in paragraph 3 to cover also employees of the consulate other than consular officials. Its retention might be of great practical use in certain States.

106. Mr. LIANG, Secretary to the Commission, observed that the last sentence in paragraph 3 was not only useless but might cause difficulties. It seemed to imply that the authority was entitled to impose a penalty and would in fact be applying a self-denying ordinance if it did not do so. But the paragraph referred to the official acts of members of the consulate and to the receiving State's duty under international law not to require evidence concerning matters connected with the performance of official acts.

107. Sir Humphrey WALDOCK agreed with the Secretary. The sentence was inappropriate because the immunity referred to in paragraph 3 was really the immunity of States, not of individuals.

108. The CHAIRMAN, speaking as a member of the Commission, recalled that during the debate on article 42 of the 1960 draft he had drawn the Drafting Committee's attention to the expression " may decline ". It would be better to replace it by " are under no obligation ". If there was no obligation, the question of a penalty did not arise at all. The second sentence in paragraph 3 should therefore be deleted.

Those two amendments were adopted. [2]

Article 41, as amended, was adopted.

The meeting rose at 1.5 p.m.

[2] With the consequential change of " and to produce" to " or to produce ".

620th MEETING

Wednesday, 28 June 1961, at 10.20 a.m.

Chairman: Mr. Grigory I. TUNKIN

Law of treaties

[Agenda item 4]

1. The CHAIRMAN said that a great deal of material on the law of treaties had accumulated, but the Commission had not been able to discuss more than part of it. At its eleventh session, in 1959, the Commission had discussed fourteen articles in the first report by Sir Gerald Fitzmaurice, the then Special Rapporteur (A/CN.4/101). The topic had been dealt with by a succession of Special Rapporteurs whose methods had not been identical. The first Special Rapporteur (Professor Brierly) had tried to draft some articles. The most recent Special Rapporteur had tried, with the Commission's authorization, to prepare a code. The problem was now what the Commission should do in the future and what instructions it should give to the new Special Rapporteur, Sir Humphrey Waldock. The Commission had a certain amount of experience and should be able to give the Special Rapporteur specific instructions. The first question was whether an attempt should be made to prepare a code or a draft convention. If the Commission decided in favour of a draft convention, it would then have to decide what kind of articles it wished, whether they should be extremely detailed, as in Sir Gerald Fitzmaurice's drafts, or more general. The Commission should also decide what parts of the law of treaties should be taken first by the Special Rapporteur, since he could hardly be expected, even on the basis of the material already available, to submit a report covering the whole field to the Commission's next session.

2. Mr. JIMÉNEZ de ARÉCHAGA observed that the law of treaties was too vast a subject for the Commission or its Special Rapporteur to cover in its entirety in one year. The three previous Special Rapporteurs had never attempted to deal with the topic as a whole, but had covered specific aspects in separate reports. It was true that enough reports were now available to embrace the whole subject, but the Commission should not expect a mere digest. The differences of approach and incompatibilities in the previous reports alone made it imperative that the new Special Rapporteur should submit his own original report. The Special Rapporteur himself should select some specific aspect; the Commission should not attempt to indicate to him what it should be, but should leave him ample discretion. When surveying the earlier reports, the Special Rapporteur might well find that certain aspects of the law of treaties were riper than others for codification.

3. If that restriction were imposed on the Special Rapporteur, the Commission must also accept it for itself at its next session. That was essential if progress were to be made. The Commission would not be devoting its time to minor subjects, but would be approaching important subjects step by step. Mr. Žourek had esti-