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Summary record of the 598th meeting

Topic:
Consular intercourse and immunities

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598th MEETING

Monday, 29 May 1961, at 3 p.m.

Chairman: Mr. Grigory I. TUNKIN

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

(resumed from the 596th meeting)
(*continued*)

[Agenda item 2]

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

ARTICLE 37 (Communication with the authorities of the receiving State)

1. The CHAIRMAN invited debate on article 37 of the draft on consular intercourse and immunities (A/4425).

2. Mr. ŽOUREK, Special Rapporteur, recalled that at the twelfth session (533rd meeting, when discussed as article 30) opinion had been divided on the question which were the authorities that consuls could address in the exercise of their functions. The text of article 37 as it stood was a compromise: it defined the authorities as those competent under the law of the receiving State (*cf.* article 37, commentary (1) to (4)).

3. The Yugoslav Government (A/CN.4/136) had suggested that a new passage should be added at the end of paragraph 2. The addition in question would have a restrictive effect in that it would preclude consuls from addressing central authorities except in cases where those authorities ruled in first instance. Although, as he explained in his third report (A/CN.4/137), he sympathized with the purpose of the amendment, it could not be easily fitted into the structure of article 37.

4. Logically the Chilean Government (A/CN.4/136/Add.7) was right in saying that paragraph 2 was unnecessary, but if that provision were deleted the Commission would have failed to take account of the practice of those States which did not allow their consuls to address the Ministry of Foreign Affairs of the receiving State. Of course, an exception to the rule stated in paragraph 2 might be laid down in bilateral conventions, which, if the second version of article 65 was approved, would remain in force automatically. In the interests of the sending State, paragraph 2 should be retained.

5. The Netherlands Government's amendment (A/CN.4/136/Add. 4), the substitution of " consular officials " for " consuls " was acceptable.

6. The Belgian Government (A/CN.4/136/Add.6) had provided a definition of " local authorities " in its comment and had also stated that under Belgian consular law consuls were never entitled to approach either the central authorities or local authorities outside their consular district, except in the case envisaged in paragraph 2 of article 37. That government considered that paragraph 3 should be deleted on the grounds that the procedure referred to was within the exclusive jurisdiction of the receiving State and was not a matter of international law. He did not agree. Paragraph 3, though of a declaratory nature, certainly had some practical value, for it stated that it was the receiving State that determined, for instance, whether and under what conditions consulates could address central authorities. However, there was room for improvement in the wording.

7. The United States Government (A/CN.4/136/Add.3) had given a somewhat different definition of local authorities from that of the Belgian Government.

8. Mr. BARTOŠ explained that the Yugoslav Government's intention was no doubt to draw attention to the case where certain matters, such as those pertaining to patents, maritime law or social insurance, came in certain countries within the competence of central authorities. Though such matters could be dealt with through the diplomatic channel, in general it was in the interest of both the sending and the receiving State that consuls should be able to address central authorities. Otherwise, in the absence of bilateral agreement or of a rule of the municipal law of the receiving State on the subject, a consul might be hampered in the exercise of his normal consular function of protecting a national of the sending State.

9. A provision in the draft to deal with that exceptional situation would not derogate from the principle that consuls normally communicated with local authorities.

10. Mr. AGO said that the compromise text of article 37, evolved after lengthy discussion, successfully reconciled differing points of views. Allowance was made in paragraph 1 for the possibility that matters coming within the scope of consular functions might be handled by different authorities in the receiving State, since the reference was not to central or local authorities but to those which were competent. While appreciating the reason for the addition suggested by the Yugoslav Government, which incidentally seemed to relate to paragraph 1 rather than to paragraph 2, he thought it unnecessary.

11. Though paragraph 3 might not be indispensable, it did spell out a generally accepted idea and there was no valid reason for dropping it.

12. He supported the Netherlands Government's amendment.

13. Mr. ERIM endorsed Mr. Ago's views about paragraph 3, but suggested that the order of the wording should be inverted so as to emphasize that it was the laws and usages of the receiving State which determined the procedure to be observed by consuls in communicating with that State's authorities: that change should give satisfaction to the Belgian Government.

14. Mr. MATINE-DAFTARY expressed the view that paragraph 1 in its flexible form as drafted covered all eventualities. If the words " and usage " were inserted after the words " under the law ", the provision would be complete and would cover the case where municipal law was silent on the point. If paragraph 1 were approved

as so amended, then paragraph 3, which as it stood was ambiguous, would become unnecessary.

15. Mr. BARTOŠ said that were it not for the second sentence in paragraph (4) of the commentary, which had aroused some doubts in his mind since it did not seem to tally exactly with the compromise reached on the text of the article, he would have had no difficulty in accepting paragraph 1 of the article.

16. Mr. YASSEEN considered that in the French text the words *le droit* should be substituted for the words *la législation* in paragraphs 1 and 3 so as to cover all internal regulations of the receiving State.

17. The CHAIRMAN, speaking as a member of the Commission, said that the Netherlands' amendment was acceptable, but he hoped that the Drafting Committee would also consider an alternative whereby the word " consulates " would be substituted for the word " consuls ". He also drew the Drafting Committee's attention to the desirability of using the mandatory form in paragraph 1 with the substitution of " shall " for " may "

18. He was not altogether satisfied with the phrase " laws and usages " in paragraph 3; it might be preferable to use the phrase "laws and regulations" which occurred in article 36 of the Vienna Convention on Diplomatic Relations (A/CONF.20/13) and would cover all mandatory rules established by the receiving State and usage.

19. It was doubtful whether it would be desirable to revise paragraph (4) of the commentary in the light of Mr. Bartoš's criticism. The paragraph accurately reflected the compromise reached at the twelfth session. The provision leaving it to the receiving State to determine which were the competent authorities that might be addressed by consuls in the exercise of their functions was flexible and more likely to command acceptance by States. The Commission had recognized in its commentary that practice varied.

20. Mr. BARTOŠ said that, although Mr. Yasseen's amendments did not fully resolve the problem, he could accept them. Any relevant legislative provision, customary law and case law might serve to determine which authorities could be addressed by consuls. In fact, what was really meant by the expression "the law of the receiving State " was that State's internal legal system.

21. Mr. AGO said there would be no objection to using the expression " laws and regulations " in paragraph 3, for the procedure for communicating with the authorities of the receiving State was in fact probably governed by regulations or even specific ministerial instructions. But he doubted whether the same expression would be appropriate in paragraph 1 which dealt with the entirely different question of the demarcation of competence between the different authorities of the receiving State. In the French text the word *droit*, though entirely acceptable, was probably less apt than the expression *système juridique* (" legal system "). Surely reference to usage would be quite out of place in paragraph 1.

22. There was some justification for Mr. Bartoš's criticism of paragraph (4) of the commentary. In paragraph 1 of the article the Commission had sought to indicate that the authorities which might be addressed by consuls were determined *ratione materiae* by the general legal system of the receiving State, for some matters were within the competence of central and others within that of local authorities. That idea had not been precisely conveyed in paragraph (4) of the commentary, which should be reviewed by the Drafting Committee.

23. Mr. VERDROSS said that there was a serious objection to using the word *droit* in the French text since the English equivalent was " law ". He believed that the expression *ordre juridique* would be comprehensive.

24. Mr. YASSEEN, explaining his amendment, said that the word *législation* did not cover all law. First, it did not embrace unwritten law—customary law and principles of jurisprudence. Further, it did not cover all written law. Strictly speaking, it could not indicate the rules made by authorities having regulatory power. On the other hand, the word *droit* embraced all legal rules, whatever their origin.

25. The expression " legal system " was too broad; as used, for instance, in Article 9 of the Statute of the International Court of Justice it did not mean the system of law of a particular country. However, he could accept the narrower expression " internal legal order ".

26. Mr. AMADO expressed strong opposition to the expression " legal order ", which was quite inappropriate. The expression " laws and regulations " would suffice, perhaps with a reference to practice as well.

27. It was paradoxical that under paragraph 2 consuls of a State which had no diplomatic mission in the receiving State would be able to approach the Ministry of Foreign Affairs, whereas consuls of a State which had more extensive relations with the receiving State would not.

28. The CHAIRMAN, speaking as a member of the Commission, said that the phrase " legal order " was not appropriate since it conveyed a certain concept of law. He preferred the expression " municipal law ".

29. Mr. ŽOUREK, Special Rapporteur, opined that the second sentence in paragraph (4) of the commentary could only be interpreted to mean that the competent authorities were determined *ratione materiae* and were designated by the receiving State.

30. The CHAIRMAN suggested that article 37 be referred to the Drafting Committee in the light of the discussion and of the drafting points raised.

It was so agreed.

ARTICLE 38 (Levying of consular fees and charges, and exemption of such fees and charges from taxes and dues)

31. Mr. ŽOUREK, Special Rapporteur, said that the article, which stated a rule of customary law, had not met with any objections on the part of governments. When discussing the provision at its twelfth session (537th meeting, paras. 26-37, where discussed as article 31) the Commission had not settled the question of the extent to which contracts concluded at a consulate between private persons were exempt from the taxes and dues

levied by the law of the receiving State, though it proposed a solution in paragraph (4) of the commentary which also asked for information. Some of the governments which had sent comments had taken a position on that matter, most of them being in favour of the proposed solution. For example, the Government of Finland (A/CN.4/136) had observed that such taxes or dues were only chargeable in Finland if documents drawn up at consulates were presented to Finnish authorities for the purpose of producing legal effects in Finland, but not if they were to be employed outside Finland. The Government of Norway (A/CN.4/136) also had stated that it was natural to grant exemption from taxes and dues in the case of documents between private persons which were not intended to produce legal effects within the receiving State. Finally, the Belgian Government had stated that only instruments executed at the consulate between private persons and intended to produce effects in the receiving State were liable to the taxes and dues provided for by the legislation of that State.

32. On the basis of those observations, he suggested in his third report that a new paragraph should be added to the article itself, stating the exception concerned. The new paragraph added that the documents not exempt were those which were to produce " direct " legal effects in the receiving State, for it was possible that certain deeds, particularly those relating to family law and certain obligations, would produce indirect effects in the territory of the receiving State. In any case, the Commission had to decide whether it wished to include a provision along the lines he proposed; the final wording might be left to the Drafting Committee.

33. Mr. VERDROSS, referring to paragraph 1, observed that the exact meaning of the verb " to levy " was not entirely clear. If a consul had already drawn up the instrument in question, he had no means of compelling the person concerned to pay the fee or charge. Accordingly, some such phrase as " without, however, being able to resort to coercive measures " should be added at the end of the paragraph.

34. Mr. BARTOŠ said that two absolutely distinct ideas were involved. The first was contained in article 38, paragraphs 1 and 2, as drafted; the second was dealt with in the comments of the Finnish Government. The first idea was, as the Special Rapporteur had said, the generally-accepted one that the receiving State could not impose taxes and dues on consular fees and charges. The question raised in the Finnish Government's comments, however, was that of the tax treatment, in the light of their further use, of documents on which consular fees and charges had already been levied. That question had nothing to do with consular privileges and immunities, but related, rather, to the question of avoidance of double taxation. It was inadvisable to go into the question in detail in the draft on consular intercourse; it was enough to provide that the sending State was exempted in the receiving State from all taxes and dues on consular fees and charges.

35. Mr. YASSEEN asked whether, if the Commission accepted the inclusion of a new paragraph 3, the provision would be limited to bilateral and multilateral deeds, as its wording — " documents executed at the consulate between private persons " — seemed to imply. In his opinion, the provision should be general and should apply to all juridical acts, even unilateral ones.

36. The CHAIRMAN, speaking as a member of the Commission, said that, a comparison between article 38 of the draft and article 28 of the Vienna Convention showed that the wording of the former was unduly elaborate for the relatively minor matter dealt with. Article 28 of the Vienna Convention did not mention that the diplomatic mission was entitled to levy fees and charges and so avoided the difficulty referred to by Mr. Verdross. It would be wiser to redraft article 38 along the simple and comprehensive lines of article 28 of the Vienna Convention.

37. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Bartoš, said that the question raised in connexion with paragraph (4) of the commentary to the article did not relate exclusively to the utilization of the documents in question in the territory of any State. The main question was that of the circumstances in which the document was drawn up. If a contract were concluded at the consulate between two persons, was it exempt from dues and taxes levied in the receiving State on such contracts? The inclusion of a provision making the position clear seemed to be desirable in view of the comments of three governments.

38. The point made by Mr. Verdross was somewhat academic, since the consul had no means of using coercive measures in the receiving State. The matter was governed by the general rule that if a document were drawn up within the territory of the receiving State, certain fees were charged for it.

39. With regard to the Chairman's reference to the difference between article 38 of the draft and article 28 of the Vienna Convention, the discrepancy was more apparent than real. The text of article 38, although more explicit than that of the corresponding provision of the Vienna Convention, in fact set forth a similar provision. Moreover, article 28 of the Vienna Convention implied that a diplomatic mission was entitled to levy fees and charges for official acts. He could accept either formulation, but much preferred the text of article 38 as drafted because it clearly set forth the right of the sending State to levy fees and charges in the territory of the receiving State.

40. In reply to Mr. Yasseen, he observed that the documents in question would always be between private individuals and hence could be either bilateral or multilateral. Finally, he stressed the practical interest of including a new third paragraph in the article.

41. Mr. BARTOŠ reiterated the distinction he had drawn between the two separate questions involved. The first related to the validity of documents drawn up at a consulate, whereas the second concerned the possibility of using such documents for purposes of further taxation. A number of States were conducting a vigorous campaign against double taxation, under the auspices of the International Chamber of Commerce, but it was a fact that certain States imposed double taxation on documents drawn up at consulates and extended no

reciprocal exemption in respect of the taxation of consular fees and charges. He was opposed to introducing the second concept into the article, since it was not incompatible with consular privileges and immunities, but related rather to questions of legal assistance. The " unless " clause in the proposed new third paragraph might give rise to abuse under the pretext that the documents would produce effects in another country; a person requesting assistance from the consul was obliged to pay the fees and charges provided by the law of the sending State, and the new paragraph might open the way to avoidance of such payment.

42. With regard to the point raised by Mr. Verdross, in practice the consuls could and did use an indirect kind of coercion to obtain payment. In the event of the person's failure to pay the consular fees the consulate had a lien on the document. Accordingly, while he agreed with Mr. Verdross that direct coercion could not be used without the consent of the receiving State, the consul had means of bringing pressure to bear. While he would not oppose an addition along the lines suggested by Mr. Verdross, he thought that the possibility of indirect sanctions was self-evident.

43. Mr. MATINE-DAFTARY supported in principle the suggestion that article 28 of the Vienna Convention should serve as a model for article 38 of the draft. However, the language of that article 28 should be adjusted so as to cover dues and taxes imposed not only by the receiving State itself, but also by its territorial and local authorities, as specified in article 38, paragraph 2.

47. Paragraph 1 of article 38 could mean any one of three things. It could mean that a consulate was entitled to levy fees and charges, or that it could only levy fees and charges in accordance with the law of the sending State or even both things at the same time. In practice, a consul could only execute instruments in accordance with the law of the sending State, but if a party wished to rely on such an instrument vis-à-vis the authorities of the receiving State, the law of that State would apply. That law could contain, in addition to any requirements regarding the validity of the transaction itself, taxation provisions specifying, for example, that the instrument was liable to stamp duty. In that event, it was clear that the consul would not be called upon to collect the tax due to the receiving State as well as the consular fee.

45. In conclusion, the points intended to be covered by paragraph 1 seemed to be largely academic; a provision along the lines of article 28 of the Vienna Convention, adjusted so as to cover territorial and local taxes as well as national taxes, would suffice for article 38.

46. Mr. JIMÉNEZ de ARÉCHAGA supported the Special Rapporteur's view that article 38 should not be altered so as to bring it into line with article 28 of the Vienna Convention.

47. He recalled that the Vienna Conference had merely adopted as article 28 the substance of the text proposed by the International Law Commission itself in its 1958 report as article 26 (A/3859).

48. With respect to consuls, however, the Commission had adopted the more extensive formulation in the two paragraphs of article 38 because consulates, and not diplomatic missions, were the authorities chiefly concerned with instruments of the type under discussion. Also, the Commission had intended to cover certain points raised by some governments and mentioned by Mr. Bartoš. For those reasons, he urged the Commission to be consistent with its own decision and not to alter the article adopted in 1960.

49. As to the proposed additional paragraph, he agreed with Mr. Bartoš in opposing it. In so far as it meant to say only that the receiving State could not tax a consular act as such, the proposed paragraph 3 was unnecessary. For that purpose, the provisions of paragraph 2 were quite sufficient. If, on the other hand, it was intended to deal with the question of taxation of contracts, the provision should not be entertained by the Commission. That question could only be dealt with by a convention on double taxation. If the Commission were to touch upon that delicate matter in such an incidental and limited manner, its decision might be interpreted *a contrario* in support of the contention that private contracts, if not executed before a consul, were taxable under the local legislation, even if they were only intended to produce their effects in a foreign country.

50. Mr. ERIM said that the terms of article 28 of the Vienna Convention implied the right of a diplomatic mission to charge certain fees. That language was perhaps suited to diplomatic missions, which did not have frequent occasion to levy fees and charges. However, in the case of consulates, which charged fees in the course of daily business, a more explicit provision was desirable in order to lay down the accepted rule of customary international law in the matter.

51. The question of coercion, which had been referred to by Mr. Verdross, could arise only in theory: a consul might, for example, ask the support of the local authorities in collecting certain dues from one of his nationals. In practice, however, the consul would make sure that his fees were paid before performing the service requested of him. If in a rare case, he sustained a loss as a result of the failure of one of his nationals to pay the fees, the consul was responsible towards the sending State and had to make good the deficiency. In fact, the terms of paragraph 1 did not imply the right of coercion. By analogy, in internal legislation, it was customary to set forth in separate and distinct provisions the right to levy a tax and the right to impose measures of coercion for its collection. The language used in paragraph 1 in no way suggested that a consul might be entitled to ask for the support of the local authorities to collect consular dues.

52. With regard to the proposed additional paragraph, he agreed with those who opposed its inclusion. The question dealt with in that proposed additional paragraph was outside the scope of consular relations proper.

53. Mr. VERDROSS said that paragraph 1 was not only superfluous but dangerous. If the language used in article 28 of the Vienna Convention were adopted, paragraph 1 would be unnecessary because the consulate's right to levy dues and charges would be implicit in the

language in question. Paragraph 1 was, in addition, dangerous in that it specified that the fees and charges were those "provided by the law of the sending State". Would the receiving State be entitled to enquire whether the fees charged conformed with the law of the sending State or were purely arbitrary? If the receiving State did not have that right, the provisions of paragraph 1 had no international effect and should therefore be omitted. For those reasons, he agreed with Mr. Bartoš and proposed the deletion of paragraph 1 and the redrafting of article 38 along the lines of article 28 of the Vienna Convention.

54. Mr. AMADO said that he was impressed by the arguments put forward by Mr. Verdross and was inclined to favour the deletion of paragraph 1. Clearly, if the consular functions set forth in article 4 included that of levying certain fees and charges and a consulate was established in the receiving State, that consulate was entitled to levy those fees and charges in the territory of the receiving State. He saw no reason to restate that fact in article 38.

55. As to paragraph 2, he proposed the deletion of the reference to the territorial or local authorities of the receiving State. It was sufficient to specify that the receiving State should not levy any tax or due on the consular fees and charges, for it was that State which owed the obligation, under international law, not to tax consular fees.

56. Mr. ŽOUREK, Special Rapporteur, said that he would withdraw the proposed paragraph 3. The matter would be referred to in the commentary, so that the attention of governments would be drawn to the question.

57. With regard to article 38 as adopted in 1960, he pointed out that none of the governments had submitted any objections to the text of either paragraph 1 or paragraph 2. Unlike Mr. Verdross, he did not think that paragraph 1 was superfluous. Article 28 of the Vienna Convention sufficed in the case of diplomatic officers, who were not amenable to the jurisdiction of the receiving State. Consuls, however, were subject to the jurisdiction and to the laws of the receiving State, save in respect of acts performed in the exercise of their functions, and it was therefore desirable to state in explicit terms that they were entitled to levy consular fees and charges. Nor could he see any danger in the statement that the fees and charges were those provided by the law of the sending State. That statement did not mean that the receiving State was empowered to check whether the consular fees conformed with the law of the sending State. All that it meant was that the fees applicable for consular acts were those laid down in the scale established by the sending State. That statement reflected the universal practice in the matter and served to indicate that neither the receiving State nor the private individuals affected could question the scale of fees laid down by the sending State for its consulates.

58. The CHAIRMAN, summing up the position, said that the majority of the Commission seemed to favour the retention of paragraph 1 as drafted in 1960.

59. With regard to paragraph 2, there appeared to be general agreement to instruct the Drafting Committee to consider to what extent its terms could be simplified by drawing upon the language of article 28 of the Vienna Convention.

60. Lastly, the Commission did not appear to favour the proposed additional paragraph which the Special Rapporteur had withdrawn.

61. If there were no objection, he would take it that the Commission agreed to refer article 38 to the Drafting Committee with instructions to re-examine the wording of paragraph 2 in the light of article 28 of the Vienna Convention.

It was so agreed.

ARTICLE 39 (Special protection and respect due to consuls)

62. Mr. ŽOUREK, Special Rapporteur, said that only two governments had submitted comments on article 39. The Netherlands Government (A/CN.4/136/Add.4) had proposed a drafting amendment replacing "consuls" by "consular officials" and suggested that the last sentence of commentary (3) be deleted. Those changes could be accepted.

63. The comment of the United States Government (A/CN.4/136/Add. 3) dealt with substance: it was to the effect that the United States Federal Government was without authority to protect a foreign consular officer from what he or his government might consider a slanderous press campaign; freedom of the press was guaranteed by the United States Constitution.

64. That objection, which related to the constitutional relationship between a federal government and the governments of the constituent States, had been raised also in connexion with other provisions of the draft. It formed part of the general problem of the observance of international law. It was precisely the purpose of a codification convention on consular relations to unify, as far as possible, the provisions of consular law. When the draft articles came to be adopted as a multilateral convention by an international conference, with any amendments that might be made, that convention would make it incumbent upon each of its signatories to adjust or complete its national legislation so as to conform with the rules of international law embodied in the convention. No State would adduce its own laws to justify failure to comply with its international obligations. If the receiving State were obliged to grant consular officials special protection, it should include steps to protect them against abusive press campaigns.

65. For those reasons, he proposed that the Commission should adopt article 39 as it stood, subject only to the drafting changes proposed by the Netherlands Government.

66. Mr. JIMÉNEZ de ARÉCHAGA suggested that the Drafting Committee should be asked to redraft article 39 in the light of the language of article 29 of the Vienna Convention, and in particular, to replace the expression

" 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.