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ADDITIONAL PROTOCOL ON CONSULAR FUNCTIONS TO THE
VIENNA CONVENTION ON CONSULAR RELATIONS

Chairman's report on the results of the
informal consultations

1. Pursuant to General Assembly resolution 46/61, adopted on 9 December 1991, the Sixth Committee undertook informal consultations on the additional protocol on consular functions to the Vienna Convention on Consular Relations (agenda item 135), which were held in meetings between 22 September and 29 October 1992.
2. The task was to decide on the future of the proposal of the Governments of Austria and Czechoslovakia (A/45/141, annex) which had been put forward in 1990 and was actively discussed in 1990 and 1991 during the forty-fifth and forty-sixth sessions of the General Assembly.
3. The views of States reflected in the reports of the Secretary-General (A/46/348 and Add.1 and 2, and A/47/327 and Add.1) or expressed during the debate on this question in the Sixth Committee during the forty-fifth and forty-sixth sessions of the General Assembly indicated that all the Governments appreciated the initiative of Austria and Czechoslovakia in proposing this item and presenting a draft Additional Protocol which enabled States to discuss aspects of international consular law.
4. So far as the substance of the matter is concerned, there were two views expressed. Some delegations during the initial debate spoke in favour of the elaboration of such a document as proposed by the sponsors. However, according to the views expressed by other delegations in the course of those debates in the Sixth Committee and in subsequent written comments, reflected in the above-mentioned reports of the Secretary-General, they considered the Vienna Convention on Consular Relations of 1963 to be a carefully drafted and effective legal instrument which fully maintained its validity, and expressed

their concern that the elaboration of a new instrument might restrict the flexibility needed in the exercise of consular functions.

5. The co-sponsors pointed out that, in presenting their proposal, they referred in particular to the following points:

(a) While the Vienna Convention on Consular Relations of 24 April 1963, as one of the most important international instruments emanating from the work of the International Law Commission, has proved its value over the years, an analysis of its rules shows that it mainly concentrates on consular privileges and immunities, while lacking detailed rules relating to consular functions;

(b) The system chosen by article 5 of the Vienna Convention - a non-exhaustive enumeration of the most important consular functions recognized by international law by way of example - is characterized by a certain lack of precision;

(c) For that very reason, a number of countries have tried to fill this lacuna by bilateral agreements aimed at the laying down of more detailed rules in relation to consular functions. More than 200 bilateral agreements on consular questions, many of which concentrate particularly on questions of consular functions, have been concluded in spite of the existence of the Vienna Convention. This proves that, in practice, the regulation contained in article 5 was not sufficient;

(d) Such bilateral agreements, however, differ in content and are only in force between a limited number of countries. They have been concluded especially by States the relations between which have reached a certain level. They are frequent between developed countries, or between developed and certain developing countries. However, they are rather an exception between the developing countries themselves. The lack of an adequate treaty regulation of the exercise of consular functions is felt especially by small developing countries;

(e) The present situation shows that the method of bilaterally regulating consular functions has its objective limits. On one hand, it has the advantage of making it possible for two States to regulate in their mutual relations the exercise of consular functions, taking maximum account of their specific needs. On the other hand, it has the disadvantage of being too expensive and requiring considerable effort. This situation warrants a multilateral approach, with the aim of arriving at a universally applicable definition of consular functions.

6. At the 1st meeting of the informal consultations, on 22 September 1992, there was a general exchange of views on the draft additional protocol on consular functions to the Vienna Convention on Consular Relations. At the end of that meeting, it was agreed that only certain key articles of the draft would be selected for further consideration, instead of going through the draft protocol article by article.

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7. At the 2nd meeting, on 24 September 1992, five key articles of the draft additional protocol were selected, namely, articles 3, 4, 5, 15 and 16, and were the subject of specific comments by a number of delegations. In the course of those comments, some participants kept an open mind as to what might be achieved by further discussions on the articles. Others, however, pointed out the difficulties which might be encountered if an attempt were to be made to draw up new detailed provisions. They gave an example in which such an attempt had indeed produced an instrument which has, however, not been brought into force. At the meeting, the co-sponsors of the draft protocol consequently suggested the preparation of an optional protocol instead of an additional protocol, as had originally been envisaged. At the end of the meeting it was clear that the idea of producing a detailed protocol, whether additional or optional, did not enjoy widespread support.

8. After a brief exchange of views on the results of the second meeting, the 3rd meeting, on 29 September 1992, was adjourned at the request of the co-sponsors of the draft protocol, who wanted more time to consult more informally, with a number of delegations, to try to work out more concrete proposals to be suggested to the plenary of the Sixth Committee on the item.

9. At the 4th meeting, on 7 October 1992, the results of the consultations conducted by the co-sponsors were reported by them. The main suggestion made by the co-sponsors was that further discussions on the item should be based only on article 15 of the draft protocol. In making this suggestion, the co-sponsors circulated an informal paper in the form of a draft resolution setting out the text of article 15 as the main focus. 1/

1/ Paragraphs 3 and 4 of the operative part of the draft resolution read as follows:

"3. Affirms the following principles with regard to article 36 of the Convention:

- The competent authorities of the receiving State shall notify the consular post of the sending State promptly, at the latest within five days, of the preventive detention, arrest or other restriction of the personal freedom of a national of the sending State, if the person concerned does not object against the notification. The measures taken by the consular officer shall also include the right to propose in accordance with the laws and regulations of the receiving State that criminal proceedings shall be conducted in the sending State;
- The competent authorities of the receiving State shall transmit promptly any communication addressed by the person concerned to the consular officer. The receiving State shall also ensure that letters from the consular officer to detained nationals of the sending State shall be transmitted to the addressees without undue delay;

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10. The idea of drafting a new provision along the lines of the text suggested in the informal paper circulated by the co-sponsors was the subject of extensive comments by the participants at the 4th meeting. Some participants made suggestions for specific amendments to the texts. Others raised more fundamental questions about the necessity of singling out only article 15 and presenting its text in the form of a resolution. Some questioned whether it was appropriate to state in a resolution principles which might depart from the Vienna Convention. There was also the view that only a full and complete draft protocol merited consideration. At the end of the meeting there was also a general view that only after the general debate, taking into account the results of the consultations, could an appropriate draft resolution be prepared to enable the Sixth Committee to complete its consideration of this item at the current session.

11. During the 5th meeting, on 8 October 1992, the co-sponsors reported on the results of consultations they had conducted, which re-emphasized the need to focus only on article 15 of the draft. The brief exchange of views that followed resulted in the suggestion that delegations which had made some specific suggestions on the said article would consult together with the Chairman and try to examine this specific approach further. As a result of these consultations two major suggestions emerged:

(continued)

- Consular officers shall also have the right to communicate with nationals of the sending State who have been taken into preventive detention or arrested, who are serving a term of imprisonment or who have been subjected to any other form of deprivation of personal freedom, to visit them and speak with them regarding all matters relating to the performance of consular functions in that case, in particular, the protection of the rights and interests of the persons concerned, as well as the circumstances of their detention. Consular officers shall also have the right to assist the persons concerned in appointing a legal representative. The competent authorities of the receiving State must accord the said right to the consular officer, at the latest, one week after the date of preventive detention, arrest or other deprivation of personal freedom and thereafter at appropriate intervals, without prejudice to his other rights under the Convention, the consular officer must, however, refrain from intervening if the person concerned expressly objects thereto in the presence of the consular officer and a representative of the competent authorities of the receiving State;

"4. Recommends to States to take into account the above principles in their implementation of article 36 of the Vienna Convention on Consular Relations."

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(a) The first suggestion was that efforts be made to draw up some general principles using article 15 as the basis and emphasizing the need to take into account the relevant developments of human rights law in this area. According to this approach, the principle so formulated would indeed be incorporated in an appropriate draft resolution which the Sixth Committee, after the general debate on the item, would consider in completing its work on the item at the current session;

(b) The second approach was that the entire draft protocol prepared by the co-sponsors, together with specific comments as had been made at the current session of the Sixth Committee, which would include the comments made on article 15, should be transmitted to Governments for their further consideration and comment, thus envisaging that this item would remain on the agenda of the Sixth Committee in the future.

12. However, it became clear that neither of the above two proposals enjoyed widespread support.

13. During the last three meetings of the informal consultations, on 12, 23 and 29 October, the participants in the consultations considered the draft report of the Chairman. It was concluded that, in the absence of agreement on the substance as well as on the procedures to be followed, the Sixth Committee should recommend to the General Assembly to take note of the report of the Sixth Committee on the matter.
