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Summary record of the 584th meeting

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tions. Within those limits, the sending State could vest greater or lesser powers in its consul. In addition, the sending State could give its consul other powers, provided, of course, that the receiving State had no objection.

59. He considered that the content of the consular function could be defined only by international law; that content could not depend merely on the instructions given by the sending State.

60. Mr. ERIM drew attention to the comments of Finland (A/CN.4/136), to the effect that article 4, paragraph 1 was too broad and that some further general restrictions were desirable. Finland was the only State to have made such a comment.

61. Article 4, paragraph 1 was satisfactory in that it retained the idea of mutual consent in the matter of the delimitation of consular functions. The provision laid down two general restrictions: first, any extension by the sending State of the powers of its consul beyond the prescribed limits required the consent of the receiving State; second, the functions set forth in sub-paragraphs (a) to (f) were described as those " ordinarily exercised by consuls ". Under the first of those restrictions, it was possible for a receiving State to limit the functions of consuls, provided that it did so without breach of the provisions of the draft articles.

62. His preference went to paragraph 1 as it stood in the 1960 draft.

63. Mr. MATINE-DAFTARY said that the views expressed by Mr. Bartos on the one hand and by Mr. François and himself on the other could be reconciled by drafting the first sentence of the paragraph along the following lines:

" Subject to any relevant agreement in force, a consul exercises within his district such functions vested in him by the sending State as can be exercised without breach of the law of the receiving State."

64. Mr. BARTOŠ said that Mr. Matine-Daftary's proposal was acceptable.

65. The CHAIRMAN, speaking as a member of the Commission, said that the rule set forth in paragraph 1 had always been understood to be permissive, not mandatory, for the sending State. That State was under no obligation to authorize its consul to exercise all the specified functions. The provision meant simply that within the specified framework the sending State could choose the functions which it wished to vest in its consul.

66. The position of the receiving State was different. The rule in question imposed an obligation upon that State to permit the exercise of the specified functions.

67. That being so, a provision which merely stated that a consul could perform such functions, vested in him by the sending State, as could be exercised without breach of the law of the receiving State would have little value as an objecive rule of international law.

68. Mr. AMADO expressed surprise at the Finnish Government's comment that the terms of paragraph 1 were too broad. That paragraph specified two restrictions: first, that the functions should be those vested in the consul by the sending State; second, that it should be possible to exercise those powers without breach of law of the receiving State.

69. He would reiterate that the definition of the consular functions should be couched in general terms and be followed by a few examples, leaving out those which suggested an unduly general and important role, such as those set forth in sub-paragraphs (e) and (f). Whereas a diplomatic agent exercised broad functions throughout the territory of the receiving State, a consul exercised only limited functions within a small district.

The meeting rose at 1.5 p.m.

584th MEETING

Friday, 5 May 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Welcome to new member

1. The CHAIRMAN welcomed Mr. André Gros, whose experience and knowledge would, he was sure, make a valuable contribution to the Commission's work.

2. Mr. GROS, thanking the Chairman for his kind words of welcome, said that it would be a great honour for him to participate in the work of the Commission, although it was difficult for him to imagine that he could in any way replace his eminent teacher, the late Mr. Georges Scelle. He knew that Mrs. Scelle had deeply appreciated the tribute rendered to the memory of Professor Scelle at the opening meeting of the session.

3. Mr. LIANG, Secretary to the Commission, said that he had received a letter from Mrs. Scelle in reply to his telegram conveying the tributes paid by the Commission to the late Mr. Scelle. She thanked the Commission for its message and recalled her husband's long and close association with its work.

Consular intercourse and immunities
(A/4425; A/CN.4/136 and Add.1-9, A/CN.4/137)

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

[Agenda item 2]
(*continued*)

ARTICLE 4 (Consular functions) (*continued*)

4. The CHAIRMAN invited the Commission to resume its consideration of article 4 of the draft on consular intercourse and immunities (A/4425).

5. Mr. YASSEEN said that the itemization of consular functions in an international convention would give rise to international obligations as between the parties. The

receiving State would have a duty to permit the exercise of those functions; it could not, for example, prevent a consul from lending assistance pursuant to the convention to the nationals of the sending State. The sending State, for its part, would be debarred from entrusting non-consular functions to the consul. It would be free, of course, to entrust to him consular functions other than those specified, provided that those functions could be exercised without breach of the law of the receiving State.

6. There were therefore two categories of function: first, those to the exercise of which the receiving State could not object; second, those which could be exercised only in the absence of conflict with the law of that State. Lastly, it should be borne in mind that the itemization of consular functions by an international convention did not oblige the sending State to entrust to its consul all the functions itemized.

7. Mr. ŽOUREK, Special Rapporteur, recalled that the Commission had before it four different formulations for the opening sentence of article 4, paragraph 1. First, the 1960 text (A/4425); second, the text submitted in his third report (A/CN.4/137); third, the text proposed by the Belgian Government (A/CN.4/136/Add.6) and fourth, the one proposed by the Netherlands Government (A/CN.4/136/Add.4).

8. The 1960 text was not altogether clear. The second sentence specified that the functions described in sub-paragraphs (a) to (f) were the principal functions ordinarily exercised by consuls. That sentence could be construed as relating back not only to the first phrase of the first sentence (" the functions provided for by the present articles and by any relevant agreement in force "), but also to the second phrase (which spoke of the functions vested in the consul by the sending State). It might be inferred that not all the functions set forth in sub-paragraphs (a) to (f) were recognized as consular by modern international law. Indeed, that appeared to be the inference drawn in the Philippine comments (A/CN.4/136), where the view was expressed that the phrase " the principal functions ordinarily exercised by consuls are: " was no more than just a statement or a declaration and could not, where countries had no bilateral agreement or had domestic laws which did not touch on consular functions, be a source of consular power invocable under the proposed convention.

9. In his third report (A/CN.4/137), he had replied to that argument by pointing out that paragraph 1 mentioned not only the functions specified in the relevant agreements in force and those vested in consuls by the sending State, but also the functions provided for " in the present articles ". If therefore article 4 were adopted, it would constitute a direct source of rights and duties for States in the matter of consular law. Article 4 could not, in any circumstances, be interpreted as meaning that the receiving State could, for example, prevent a consul from acting as registrar or from lending assistance to his nationals.

10. It was precisely in order to avoid such misconceptions concerning the import of paragraph 1 that, in the new text which he proposed in the third report, he had removed the phrase " such functions vested in him by the sending State as can be exercised without breach of the law of the receiving State " from the opening sentence of paragraph 1 and incorporated its substance in a new paragraph 2. In that manner, it would be made clear that sub-paragraphs (a) to (f) enumerated functions recognized by international law as properly exercisable by consuls.

11. The Belgian proposal was taken from paragraph 1 of the second alternative text appearing in the commentary (11) to article 4 in the Commission's 1960 report. That proposal would incorporate the substance of sub-paragraphs (a) and (b) into the first sentence of paragraph 1. It would also make into a separate paragraph the phrase concerning the consular functions vested in the consul by the sending State. He had no objection to the Belgian proposal, for it was based on his own original proposal, but he feared that by dispensing with sub-paragraphs (a) and (b), it departed too much from the definition adopted by the Commission.

12. He could not accept the Netherlands text, which was unlikely to receive the support of governments. That text might be misconstrued as suggesting that the receiving State had the right to prevent the exercise of certain consular functions recognized by international law on the grounds that its legislation did not authorize that exercise.

13. The United States Government had proposed (A/CN.4/136/Add.3) that the reference to the functions which could be exercised without breach of the laws of the receiving State should be broadened to include those on which the law was silent and to which the receiving State did not object. Such a provision would be too broad; by enabling the receiving State to permit the consuls of some countries to exercise functions which it denied to others it opened the door to arbitrary action. It was always open to the receiving State to promulgate supplementary regulations placing certain restrictions on the exercise of consular functions by the consuls of all States in the cases in question.

14. Mr. PAL said that he favoured the proposed Netherlands text, subject to the addition of the words " *inter alia* " after the word " exercises " in order to emphasize that the list of functions was not exhaustive. Under paragraph 2 of the new draft submitted by the Special Rapporteur or other similar texts proposed, it might be possible for the sending State to ask its consul to carry out duties which were not part of the recognized consular function at all. It was essential to stress that the only latitude which the sending State had was that of giving more or fewer powers to its consul within the framework of the consular functions recognized by international law. That idea was very well expressed in the Netherlands text, which commenced with the words " To the extent to which they are vested in him by the sending State . . . "

15. Mr. SANDSTRÖM said the 1960 draft was not clear. It enumerated certain consular functions while at the same time suggesting that it was for the sending State to choose the functions to be vested in its consul.

The Belgian text, which began with a clear statement of the basic functions of a consul, was to be preferred. However, he would not object to the adoption of the Netherlands text as an alternative to the Belgian formulation.

16. The CHAIRMAN, summing up, said that the Commission was substantially in agreement on the following points:

(1) that article 4 should lay down an objective rule of international law setting forth certain consular functions as constituting the framework within which the sending State could give wider or narrower powers to its consul;
(2) that the enumeration given should not be deemed to be exhaustive;
(3) that reference should be made to other functions vested in the consul by the sending State which could be exercised without breach of the law of the receiving State;
(4) that a reference should be made to relevant agreements in force.

17. He therefore suggested that the Drafting Committee be instructed to prepare a draft for the opening passage of article 4, paragraph 1 in the light of the agreement on those points and taking into consideration the 1960 text, the new text proposed by the Special Rapporteur in his third report and the Netherlands text. The last-named did not affect substance, but expressed in different words the ideas on which the Commission was agreed. If there were no objection, he would take it that the Commission agreed to the course which he suggested.

It was so agreed.

18. The CHAIRMAN invited the Commission to consider sub-paragraph (a) of article 4.

19. Mr. ŽOUREK, Special Rapporteur, referred to his comments (583rd meeting, para. 27) on the Indonesian suggestion that the expression " nationals of the sending State " should apply only to individuals and exclude corporate bodies and also to the Norwegian proposal that the expression in question should cover stateless persons who had their domicile in the sending State.

20. He had already dealt with the Belgian proposal for deleting sub-paragraph (a) as a consequence of the Belgian Government's proposal that the concept contained in that sub-paragraph be embodied in the opening sentence of paragraph 1.

21. The United States Government had proposed the addition of the words " and of third States of which it is agreed he may accord protection ". He had no objection to the United States proposal, but the term " agreed " should be clarified so as to show that the receiving State's consent was necessary, as stated in article 7. That, however, was a special case and a specific reference to article 7 would suffice.

22. In the new text which he proposed for sub-paragraph (a) in his third report, he had introduced, as sub-paragraphs (aa), (bb) and (cc), a number of concrete examples of the consular protection of the interests of nationals. The introduction of those examples was all the more necessary since in the course of the discussion in the Sixth Committee of the General Assembly opinions had been voiced showing that the question had not been properly understood. The protection of nationals could never mean that the authority of the consul would be substituted for that of the local authorities. It was necessary to make it clear by specific examples that the protection envisaged in sub-paragraph (a) in no way implied a revival of the methods used at the time of the capitulations system. That protection implied only the duty of the consul to safeguard the interests and rights of nationals within the framework of the municipal law of the receiving State and of relevant international conventions. The examples given in the sub-paragraphs which he had introduced would make that meaning perfectly clear.

23. He had introduced only three sets of examples, which were to be found in a large number of consular conventions. A fourth example could be added, on the basis of the comments recently received from governments — the right of a consul to take the necessary steps to safeguard the interests of the heirs of a national of the sending State who died in the receiving State.

24. Mr. MATINE-DAFTARY proposed that some such adjective as " legitimate " be introduced before the word " interests ". He would have preferred a statement to the effect that the consul's function was to protect the rights of his nationals, rather than their interests. However, if the word " interests " were to be retained, it should be expressly stated that only legitimate interests deserved protection. At the very least, an explanation should be added in the commentary.

25. Mr. YASSEEN recalled the terms of article 15 (1) of the Universal Declaration of Human Rights: " Everyone has the right to a nationality." Statelessness was a deplorable anomaly, harmful both to the human beings who suffered from it and to international society at large. One of the unfortunate consequences of statelessness was that a stateless person was deprived of consular protection. Therefore, even if only for humanitarian reasons, he urged that due consideration be given to the Norwegian proposal (A/CN.4/136) to the effect that sub-paragraphs (a) and (b) be amended so as to enable a consul to protect not only his nationals but also stateless persons who had their domicile in the sending State.

26. It was undeniable that, under the rules of existing international law, a consul could only protect nationals of the sending State. But as a matter of progressive development of international law, the Norwegian proposal was an interesting one.

27. The proposal did not concern the protection of stateless persons in general, but only that of stateless persons domiciled in the sending State. In that connexion, considerable importance was attached to domicile by the legislation of a large number of States, many of which actually applied the law of domicile in all family and succession matters. It was worth noting that the concept of permanent residence had been introduced into some of the provisions of the Vienna Convention on Diplomatic Relations (A/CONF.20/13), which accordingly

reflected a tendency to give to permanent residence an importance almost equal to that attached to nationality. There was therefore nothing particularly revolutionary in stating that, in the absence of a nationality, the domicile of the person concerned could qualify him for consular protection.

28. Mr. FRANÇOIS said that the additional provisions proposed by the Special Rapporteur were open to some criticism. For example, the proposed sub-paragraph (aa) seemed to suggest that the sending State could take action to see that the interests of its nationals were protected, even in the absence of any request by the nationals concerned. In fact, the position was that it was for the national himself to decide whether he wished his interests to be protected by his consul. The proposed sub-paragraph (bb) was open to the same criticism. It appeared to set forth the right of the sending State to safeguard the rights and interests of its nationals regardless of their wishes. That sub-paragraph had its origin in a proposed additional article, reproduced in commentary (12) to article 4 which would have had the effect of enabling a consul to represent the nationals of the sending State without producing a power of attorney. That article had been opposed in the Commission and had not been adopted. As to the proposed sub-paragraph (cc), questions of guardianship in private international law were notoriously complex; it had been found necessary in every case to conclude special conventions in order to enable consuls to act. He therefore doubted the wisdom of introducing that sub-paragraph.

29. Sub-paragraph (a) therefore should be left as drafted in 1960, without the additions proposed by the Special Rapporteur.

30. Mr. AMADO reiterated his strong opposition to the elaborate enumeration which was being proposed. A consul was an official of the sending State established in a city — usually a port — for the purpose of exercising mainly economic functions. The 1960 text seemed to place the emphasis on the right of the sending State to define the powers to be vested in its consul. Instead, the Special Rapporteur's new text, omitting the reference to functions vested in the consul by the sending State, commenced with the statement that a consul exercised within his district the " functions provided for by the present articles and by any relevant agreement in force ". In the light of that formulation, it was not necessary to include sub-paragraph (a), the essence of which was already contained in the initial sentence. In addition, the expression " to protect the interests of the nationals of the sending State " was much too broad and vague and could only weaken the more precise language of the opening passage of paragraph 1.

31. In conclusion, he wished to place on record his objection to the vague formulation of sub-paragraph (a), although, if the majority accepted it, he would consent to its inclusion in article 4, paragraph 1.

32. Mr. VERDROSS supported the new text proposed by the Special Rapporteur. He agreed with Mr. Matine-Daftary's remark concerning the term " interests "; it would be preferable to refer to rights rather than to interests, even legitimate interests. It would be giving consuls excessively broad functions to authorize them to protect the interests rather than the rights of their nationals.

33. With regard to the Norwegian proposal on the protection of stateless persons domiciled in the sending State, he did not agree with the analogy drawn by Mr. Yasseen from certain provisions in the Vienna Convention on Diplomatic Relations. The provisions in question concerned the position of permanent residents in relation to the local authorities of the receiving State. In the Norwegian proposal, what was involved was the protection of a stateless person in a country outside his place of residence. He did not think that international law warranted the suggestion that a consul could protect an alien resident of his country.

34. Mr. YASSEEN replied that he had not attempted to draw an analogy from the Vienna Convention, but had merely said that certain provisions of that Convention reflected the increasing importance attached in international law to the concept of permanent residence. Of equal importance was the fact that under the rules of conflict applicable in private international law in a great many countries domicile, rather than nationality, was decisive in family and succession cases.

35. Lastly, the Norwegian proposal did not mean that any alien resident in the sending State would be eligible for protection by that State's consuls abroad; it was concerned strictly with persons without any nationality who were domiciled in the sending State. He saw no reason why, in the absence of a nationality, domicile in the sending State should not qualify the person concerned for the protection of that State's consuls.

36. Mr. SANDSTRÖM expressed the opinion that a consul could certainly intervene to protect a national of the sending State, even before an interest could be regarded as having become a right.

37. He shared the views expressed by Mr. François and Mr. Amado about the wording of sub-paragraph (a).

38. The question of the protection of stateless persons should not be dealt with in the draft under consideration. The Commission's draft convention (A/2693) prepared at its sixth session, when it had discussed the topic of statelessness, under which stateless persons should be placed under the protection of the State of domicile had not been adopted by the General Assembly on the grounds that such persons were under the protection of the High Commissioner for Refugees.

39. Mr. BARTOŠ said that sub-paragraph (a) should be retained as drafted and that its scope should not be restricted. Interests often had to be protected before they assumed the character of rights in the legal sense. For example, nationals of the sending State travelling through the receiving State should be protected against possible interference with their rights as individuals in the course of formalities applied by the receiving State.

40. In the past his government had sometimes been compelled to address a special request to the receiving State to allow Yugoslav consuls to exercise their functions in cases where Yugoslav citizens had been unable to

invoke their rights to protection because of inability to communicate with their consuls.

41. The Commission should certainly consider the possibility of providing for consular protection for stateless persons by consuls of the State of domicile in all countries except the country of origin. Possibly, following the example of certain international conventions, a separate article might be devoted to that matter.

42. There were no general rules of international law regulating the question of dual nationality, but there were a number of bilateral agreements and arrangements on the subject. For example, under the arrangement between Yugoslavia and the United States of America, Yugoslavs with dual nationality who went to the United States with Yugoslav passports were regarded as Yugoslav nationals in that country, and United States citizens with dual nationality who had retained their Yugoslav nationality on return to Yugoslavia while still holding United States passports were considered by Yugoslavia as United States citizens until such time as they took up permanent residence. However, problems of consular protection for persons with dual nationality should not be dealt with in article 4, which should relate to the more general type of function performed by consuls.

43. Sub-paragraph (a) should also apply to bodies corporate.

44. The CHAIRMAN, speaking as a member of the Commission, considered that the suggestion made by the United States Government to extend consular functions to include the protection of the interests of nationals of third States was a useful one, but should be taken up in connexion with article 7.

45. In view of the fact that explanations in the commentary would not appear in the text of any multilateral convention ultimately adopted, the Drafting Committee would have to consider whether the word " nationals " covered " bodies corporate " or whether some more explicit reference to them would be necessary.

46. He was not in favour of a provision concerning the protection of stateless persons, for it would raise numerous and thorny problems.

47. With regard to the point made by Mr. Matine-Daftary, the Commission might follow the wording of article 3, paragraph 1 (b) of the Vienna Convention, since to judge by the discussions at the Vienna Conference the wording of sub-paragraph (a) was likely to give rise to objections.

48. He had been surprised by Mr. François's criticism of the Special Rapporteur's proposed new sub-paragraph (aa), which simply stated a rule of international law concerning relations between States. Of course, the extent to which a consul was entitled to exercise his right of protection was in each case determined by the law of the sending State.

49. Sub-paragraph (a), although general in form, was acceptable and sub-paragraphs (aa), (bb) and (cc) would serve a useful purpose in that they specified, though not exhaustively, some of the functions ordinarily performed by consuls. There was no reason why the draft should not be explicit where that was feasible.

50. Mr. ERIM considered that sub-paragraph (a) in its general form was adequate and should not be amplified by a detailed enumeration of the kind proposed by the Special Rapporteur, which could not be exhaustive and was unlikely to facilitate relations between the consul and the receiving State. Indeed, it could have the opposite effect of creating difficulties, particularly as it was impossible to foresee what kind of functions consuls might have to perform in the future.

51. He shared Mr. Matine-Daftary's view that some formula should be worked out expressly stating that a consul was only concerned with protecting the " legitimate " interests of nationals of the sending State, despite the safeguard provided by article 53.

52. He had considerable sympathy both on humanitarian and on legal grounds for Mr. Yasseen's suggestion about the protection of stateless persons. If the State of domicile agreed to protect stateless persons so much the better, and there was no reason why the Commission should not include a special provision on that matter. Such action would be in line with the efforts made by the United Nations on other occasions to find a means of providing protection, whether national or international, for such persons.

53. Mr. LIANG, Secretary to the Commission, suggested that article 65 of the Commission's 1960 draft was relevant to the discussion. It would be remembered that the most far-reaching solution proposed for article 65 had been inspired by the view that a multilateral convention would automatically abrogate existing bilateral agreements on the same subject and would preclude States from subsequently adopting any provisions inconsistent with the former. The first and the second variant reflected the view that existing bilateral agreements could remain in force in one way or another and that the multilateral convention would regulate only questions not covered by them.

54. At the twelfth session he had had occasion to point out — and that view had been supported by Sir Gerald Fitzmaurice — that the Commission's draft in some respects was too detailed, and in others not detailed enough (560th meeting, paras. 29-33 and 43-49). That criticism could certainly be levelled against article 4, which had been framed in very general terms as compared to analogous provisions in bilateral conventions. The Special Rapporteur's new proposals, though they amplified the text, could also give rise to difficulties. For instance, with the introduction of the concept of safeguarding rights and interests in the new sub-paragraph (bb), the Special Rapporteur advocated that a consul could have the right to implement the more general right of protection. Sub-paragraph (cc) was surprisingly detailed when considered in juxtaposition with the two preceding sub-paragraphs.

55. In the matter of consular relations, customary international law, by contrast with the provisions of bilateral conventions, did not develop an abundance of detailed rules, and hence a statement on the lines of that contained in the last paragraph of the preamble

to the Vienna Convention on Diplomatic Relations might not suffice. He would therefore suggest that the original text of article 4 was preferable.

56. The Convention relating to the Status of Stateless Persons [1] adopted by the United Nations Conference on the Status of Stateless Persons in 1954 was not very helpful in the discussion of the suggestion made by Mr. Yasseen because that Convention did not provide for the protection of stateless persons outside the territory in which they resided.

57. Mr. MATINE-DAFTARY welcomed the support of Mr. Verdross and Mr. Erim for his suggestion. He would remind Mr. Sandström and Mr. Bartos of the doctrine equating right and right of action and advancing the thesis that a right could be either static or dynamic; it became dynamic when it was contested, but remained static when it was not. Accordingly, the replacement of the word " interests " by the word " rights " would meet Mr. Sandström's and Mr. Bartos's objections. A consul could not take any action in excess of that taken by a legal counsel; some counsel refused to plead a case which they did not regard as just, but if every counsel took that course, there would be no more justice in the world.

58. He supported the Chairman's suggestion that nationals of the sending State should be further qualified as individuals and bodies corporate.

59. Mr. PADILLA NERVO said that the text of paragraph 1 (a) as approved by the Commission at its twelfth session (A/4425, para. 28) was fully adequate, since it established a general principle. He agreed with the Secretary, however, that if the first text of article 65 was adopted, and existing bilateral consular conventions were not automatically maintained in force, it would be wise to include in the draft some of the principles and consular functions enumerated in bilateral agreements; on the other hand, if the second text of article 65 was adopted, and pre-existing bilateral agreements remained in force, it would be wiser to retain in article 4 only the basic principles of consular law on which bilateral agreements would be based.

60. He could not agree with the suggestion for the replacement of the word " interests " by " rights ". The term " interests " had a wider meaning than " rights "; moreover, the context of the convention and the provisions of other articles made it perfectly clear that only legitimate interests were at issue, since the consul could not exercise functions which constituted a breach of the municipal law of the receiving State. The situation was made clear by a number of bilateral conventions. For example, the Consular Convention between Mexico and the United Kingdom [2] provided in its article 18 that a consular officer was entitled, within his district, to protect the nationals of the sending State and their property and interests. The article then listed four ways in which the consul could exercise protection, including enquiry into any instance which had occurred affecting the interests of any such national, and ended with the provision that a national of the sending State should have the right, at all times, to communicate with the appropriate consular officer and, unless subject to lawful detention, to visit him at his consulate. The Convention further provided, in another article, that a consul could, within his district, promote the commercial, economic and cultural interests of the sending State.

61. With regard to the position of stateless persons, the question was mainly humanitarian and, hence, a matter to be settled by special conventions and not by general rules of international law. Inclusion of a reference to stateless persons would, moreover, give rise to disputes of a political character at the conference and would cause governments to make reservations to the convention.

62. Mr. GROS observed that paragraph 1 (a) as approved by the Commission at its twelfth session confirmed the widely-recognized interpretation of consular protection as protection of interests, before any question of the violation of rights arose. The reference to rights, therefore, might result in a restriction of existing practice, which no member of the Commission would surely advocate. He would point out to Mr. Matine-Daftary that a consul's activities differed from those of legal counsel in that a consul acted as an official of the sending State in the exercise of the right of protection of the State for its nationals. In fact, there were three guarantees against the abuses which Mr. Matine-Daftary seemed to fear. In the first place, the action of consuls was only one case of normal relations between the sending and the receiving State which presupposed the principle of good faith; accordingly, the interests protected by consuls must be assumed to be legitimate. Secondly, consuls were required to respect the municipal law of the receiving State. Lastly, they were bound under the convention to act in conformity with the rules of international law.

63. Mr. FRANÇOIS said he agreed with most of the Chairman's remarks, with the exception of the statement that, under international law, the sending State itself could decide how far to go in safeguarding the interests of its nationals. That thesis seemed to ignore the fact that through the consul the sending State exercised its competence in the territory of the receiving State, which also had to have its say in the matter. Thus, if the sending State went so far as to safeguard the interests of its nationals before the courts of the receiving State against their will, the municipal law of the receiving State had to be taken into account.

64. Mr. EDMONDS said that it would be best to retain the reference to interests in paragraph 1 (a), and not to refer to rights or legitimate interests. In many cases, the validity of the position of a national of a sending State might be unknown, and the consul could not be expected to decide at the outset — and before the local courts had decided — whether or not that position was correct. Moreover, the consul's function was not to protect illegal or improper claims, but to protect the national of a sending State at least to the

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[1] E/CONF.17/5/Rev.1 (United Nations publication, Sales No.: 56.XIV.1).

[2] United Nations *Treaty Series*, vol. 331 (1959), No. 4750, pp. 22 *et seq.*

point where his position could be determined as being in conformity with the municipal law of the receiving State. A reference to rights would be both disadvantageous to the relationship between the consul and the national of the sending State and not in accordance with existing practice in the matter.

65. Mr. AGO agreed with the members who believed that the term " legitimate interests " should not be used. In the first place, the term " legitimate interests " had a precise meaning in the law of some countries, and its use in a general definition might lead to confusion. Secondly, as Mr. Edmonds had pointed out, it was not for the consul, but for the local courts to judge whether or not the interests concerned were legitimate. As a rule, the consul could not of course intervene if the interests of the national were manifestly non-legitimate. However, the use of the term would raise a delicate questions in cases where the national's interests were not legitimate under the law of the receiving State, but where that law was itself not in conformity with international law; the consul might be prevented from justly intervening in such cases. In view of those considerations, the phrase " within the limits permitted by international law ", used in article 3, paragraph 1 (b) of the Vienna Convention on Diplomatic Relations, should be used in paragraph 1 (a).

66. Mr. ŽOUREK, Special Rapporteur, replying to comments made by members, said that he intended to define the word " national " to include both individuals and bodies corporate. In that connexion, he would refer to his third report (A/CN.4/137).

67. With regard to Mr. Yasseen's suggestion, which coincided with the observations of the Norwegian Government, it would not be advisable to insert any reference to stateless persons. Such an important problem could not be solved in a context dealing with consular protection; moreover, the majority of States would be unable to accept such an innovation in positive law. Furthermore, it was stated in paragraph 16 of the Schedule to the Convention relating to the Status of Stateless Persons that the travel document for stateless persons did not in any way entitle the holder to the protection of the diplomatic or consular authorities of the country of issue, and did not *ipso facto* confer on those authorities a right of protection.

68. With regard to the suggestion that the word " rights " should be substituted for " interests ", he recalled the discussion on the subject during the eleventh session, when he had proposed the expression " rights and interests " (517th meeting, para. 1; and A/4169, p. 118, commentary). It had been decided, however, to conform with the wording of the draft on diplomatic intercourse (A/3859) which referred to interests only, and to state in the commentary that interests included rights. The fact that article 3 of the Vienna Convention referred to interests only seemed to indicate that that wording should be retained in the article relating to consular functions in the draft under consideration.

69. With regard to the question whether examples of typical consular functions should be included, an unduly general definition would be open to misinterpretation. In expressing a preference for the text of article 4, paragraph 1 of the 1960 draft, Mr. Erim had evidently wished to draw attention to the drawbacks of an enumeration. Admittedly, there were dangers in any allegedly exhaustive enumerations; but if it was expressly stated that certain functions were listed as examples only, the drawbacks vanished. Nor could it be maintained that enumeration could create difficulties for consuls vis-à-vis the receiving State. If the article was drafted in general terms, a consul might, for example, propose to the authorities of the receiving State the appointment of a trustee for a national of the sending State, and those authorities might refuse on the grounds that their understanding of the consular functions was more restrictive. That was the reason why he had added some typical functions, which the Commission might regard as being in the interests of the development of consular relations, advantageous to both the States concerned and tending to eliminate friction between them.

70. Nor could he agree with the argument that the problem would be solved by the operation of the second text of article 65 (maintaining in force existing bilateral consular conventions). A detailed enumeration of consular functions would be in no way prejudicial to the provisions of existing bilateral conventions; moreover, there was a widespread tendency to ignore the fact that bilateral conventions covered only a very small sector of consular relations between States, particularly since so many new States had been established. Lastly, the Commission could not ignore the many requests in the comments of governments for the insertion of references to specific functions. While agreeing with Mr. François that a number of complex problems were involved, he believed that the Commission should choose from the provisions of bilateral conventions the elements which were generally acceptable. It should not be too difficult to agree on examples which would render the convention more acceptable to the States requesting an illustrative definition.

71. Mr. VERDROSS suggested that all members of the Commission, both those who regarded the term " interests " as too broad and those who found the term " rights " or " legitimate interests " too restrictive, would be satisfied by the use of the wording of article 3, paragraph 1 (b) of the Vienna Convention on Diplomatic Relations.

72. Mr. ERIM said that, although the Special Rapporteur's explanations had answered some of his stronger objections to an enumeration, he still had some doubts on the wisdom of using examples; sub-paragraphs (aa), (bb) and (cc) could create difficulties in connexion with existing bilateral conventions and with the municipal law of the receiving State.

73. For example, the verb " to see that " in sub-paragraph (aa) was extremely vague, and added nothing to the verb " to protect " in sub-paragraph (a). Similarly, the reference to safeguarding the rights and interests of the nationals of the sending State in sub-paragraph (bb) was included in the protection which was the acknowledged consular function in international practice. Those additions were bound to necessitate further

explanations and might lead to disputes. Finally, the institution of guardianship and trusteeship, referred to in sub-paragraph (cc), was in most countries regulated by the civil code, and guardians and trustees were appointed by the judge. Accordingly, the provision might be regarded as introducing a new practice, not in conformity with the existing legislation of potential signatories of the convention.

74. Mr. ŽOUREK, Special Rapporteur, said that he could not agree with Mr. Erim that the verb " to see that " was less precise than the verb " to protect ". Moreover, protection had in the past had certain disagreeable connotations. Although he did not insist on the use of the term " to see that ", he thought it better to use the most precise wording possible. Nor could he agree that the verb " to safeguard " was too strong, particularly if it was remembered that, obviously, the consul had to proceed in accordance with the municipal law of the receiving State. For example, if the receiving State allowed a consul to appear before the courts, he could do so to safeguard the rights and interests of a national of the sending State; otherwise, he must instruct counsel to do so. Similar considerations applied to the consul's role in the appointment of guardians and trustees (sub-paragraph (cc)). It was true that guardians and trustees were usually appointed by the judge; but very often the consul's function under sub-paragraph (cc) was merely to propose a person for such appointment. The status of minors and persons lacking full capacity who were nationals of the sending State was determined by the municipal law of that State; the consul was therefore entitled to take provisional measures for their protection. Even if the municipal law of the receiving State did not provide for that contingency, it would be modified by the multilateral convention which would be signed and would become law between the contracting States. Accordingly, the insertion of that example could only lead to reciprocal advantage for the States concerned. Also, paragraph 1 (a) should be expanded to include a provision concerning the consul's functions with regard to the estates of deceased persons nationals of the sending State.

75. The CHAIRMAN said that the Commission should reach a decision on the type of definition it wished to include in article 4. He called for a vote on the Special Rapporteur's proposal that some examples of typical consular functions should be included in paragraph 1 of the article.

The Special Rapporteur's proposal was rejected by 11 votes to 4.

76. The CHAIRMAN suggested that the Drafting Committee, in preparing a new text of article 4, paragraph 1 (a), should be instructed to take into account article 3, paragraph 1 (b) of the Vienna Convention on Diplomatic Relations and also the comments made during the debate.

It was so agreed.

The meeting rose at 1.10 p.m.

585th MEETING

Monday, 8 May 1961, at 3.15 p.m.

Chairman: Mr. Grigory I. TUNKIN

Welcome to new member

1. The CHAIRMAN welcomed Sir Humphrey Waldock, whose experience and knowledge would, he was sure, make a valuable contribution to the Commission's work.

2. Sir Humphrey WALDOCK thanked the Chairman for his kind words of welcome. He expressed his admiration for the Commission's recent achievements and his appreciation of the honour done to him in inviting him to participate in its work.

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

[Agenda item 2]

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

ARTICLE 4 (Consular functions) (*continued*)

3. The CHAIRMAN referred to the Commission's decision (584th meeting, para. 73) that article 4, paragraph 1 (a) should not mention examples. In the light of that decision, he asked the Special Rapporteur whether he would withdraw some of the examples that he had suggested for the subsequent paragraphs.

4. Mr. ŽOUREK, Special Rapporteur, said that, in preparing his third report on consular intercourse and immunities (A/CN.4/137), he had felt obliged to add some of the most typical examples of consular functions under paragraph 1 (b). He must, however, point out that his role in that second reading of the draft was different from that at the previous session, since he had to analyze and systematize the comments of governments and, where necessary, with a view to facilitating the debate and the adoption of a generally acceptable text, submit proposals. With those considerations in mind, it was for the Commission to decide whether or not it was necessary to include examples, and the Special Rapporteur was not obliged to defend the opposite point of view. Since the Commission had decided not to include examples in paragraph 1 (a), he would not urge discussion of the examples under paragraph 1 (b). That would save time and he therefore proposed that the Commission proceed to consider paragraph 1 (c), on which a number of governments had commented.

5. The CHAIRMAN suggested that, since the Special Rapporteur was prepared to withdraw his proposed examples to paragraph 1 (b), the text of that paragraph,