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Summary record of the 585th meeting

Topic:
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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,

as approved by the Commission at its twelfth session (A/4425), should be adopted.

It was so decided.

6. Mr. ŽOUREK, Special Rapporteur, referring to the comments of governments on paragraph (c), said that the Government of the United States (A/CN.4/136/Add.3) observed that the functions of a notary in the United States were not comparable to those of a notary in certain other countries. The difficulty, however, could be obviated by redrafting the provision, particularly since the expression " notarial functions and services " was common, even in consular conventions concluded by the United States. The Drafting Committee could no doubt find a satisfactory text. The same Government said that the words " civil registrar " were not easily identifiable in United States Law. That was also a drafting point which could be dealt with without too much difficulty. Finally, it stated that " administrative " was an ambiguous word, not really descriptive of functions to be performed. In that case, it might be more difficult to find another generic term describing the administrative functions performed by a consul; he would welcome suggestions from members of the Commission, for the United States Government had not proposed an alternative.

7. The Government of Poland (A/CN.4/136/Add.5) did not consider it exact to regard the actions of a notary as being of an administrative nature. To overcome the objection, paragraph 1 (c) might be divided into two parts, the first concerning the consul's function of acting as notary and as registrar of births, marriages and deaths, and the second relating to his exercise of functions of an administrative nature. An alternative might be to delete the word " other ", but a division of the clause would be both more elegant and more accurate, particularly in view of the wide field covered by both the functions in question.

8. The clause proposed by the Government of the Netherlands (A/CN.4/136/Add.4) for insertion after paragraph 1 (c) appeared as paragraph 1 (c) (hh) in his third report, with the addition of the words " in the manner specified . . . ". He had thought that the best solution for the Netherlands proposal related to a relatively minor function and to give it greater prominence would disturb the balance of paragraph 1. Alternatively, if paragraph 1 (c) were to be divided into two, the additional clause could become a sub-paragraph of the first part. In any case, it was for the Commission to decide, as it had done with earlier paragraphs, whether paragraph 1 (c) should contain examples of typical consular functions.

9. Mr. MATINE-DAFTARY, referring to the taking of evidence on behalf of courts of the sending State, observed that in national law letters rogatory were communicated by one judge to another. He doubted whether a court could ask a consul as such to execute letter rogatory; it was certainly inadmissible under Iranian law. The whole question depended on the wording of the opening clause of article 4; if the sending State were free to extend such powers to its consuls, the provision could stand, but if the power were extended to all consuls, the provision would be inadmissible.

10. Mr. ŽOUREK, Special Rapporteur, drew Mr. Matine-Daftary's attention to the qualifying phrase " in the manner specified . . ." which he had added to the Netherlands proposal. In drafting that provision, he had borne in mind the existing practice in accordance with the international Convention of 1905 relating to civil procedure, as revised in 1954.[1] Article 6 of that Convention stipulated that the provisions of the preceding articles were without prejudice to the right of each State to have documents addressed to persons abroad served directly through its diplomatic or consular agents. The article further provided that the right in question should be deemed to exist only if it was recognized in conventions between the States concerned or if, in default of such conventions, the State in whose territory service was to be effected did not object. That State could not object if the document was to be served on a national of the requesting State without duress. While that provision applied to the service of documents, the conditions stipulated by the said Convention in the case of letters rogatory were similar. Accordingly, if the legislation of the receiving State disallowed the execution of letters rogatory by the consul, they could be executed in that State only pursuant to conventions concluded between the States concerned or, in the absence of any such convention, if the receiving State raised no objection.

11. Mr. LIANG, Secretary to the Commission, observed that as drafted paragraph 1 (c) left it in doubt whether notarial functions to be exercised by the consul were intended to produce their effect in the receiving or in the sending State. Naturally, the courts of the receiving State could only give effect to the acts of a notary authorized to act as such in that State, and it was very unlikely that the receiving State would allow a consul to be appointed a notary. The same applied to the registration of births, deaths and marriages. Although the Special Rapporteur had clarified that particular function in clause (dd), it was still left in doubt whether the consul's functions in those respects were intended to take effect in the sending or in the receiving State. The Drafting Committee should therefore make it quite clear that the consul would not presume to act as a notary public of the receiving State.

12. With regard to the Special Rapporteur's paragraph 1 (c) (ff), the issue of passports and visas was a very frequent and important consular function. It was difficult to conceive of it as being included among " functions of an administrative nature " as described in paragraph 1 (c). Since the scope of that function seemed to go well beyond the administrative field, he would suggest that in order to emphasize its importance it should be made the subject of a separate paragraph.

13. Mr. SANDSTRÖM expressed the view that paragraph 1 (c) should be amplified as suggested by the

[1] United Nations *Treaty Series*, vol. 286 (1958), No. 4173, p. 265 (where references to published text of the 1905 Convention are given in footnote 4).

Special Rapporteur in clause (hh), for two reasons. In the first place, the institution of notary was not highly developed in some countries, including his own; secondly, since the competence of consuls in connexion with the service of judicial documents and the taking of evidence on behalf of courts was a specific function, it might be useful to mention it separately.

14. Mr. YASSEEN opined that the qualifying phrase " of an administrative nature " was too broad and that it might be better to use the expression " similar functions of an administrative nature ".

15. He agreed with the Secretary that the function of issuing passports and visas was so important as to deserve a separate paragraph. Indeed, that was the function with which the layman most usually associated the consul.

16. Mr. BARTOŠ criticized the use of the word " other " in the description of functions of an administrative nature. In general legal theory, the notary was not regarded as an administrative official; the question whether a notary was a ministerial judicial official or an auxiliary official of the judiciary had been discussed at length at the recent Hague Conference on Private International Law in connexion with the draft convention dispensing with the legalization of foreign public documents,[2] and it had been decided, on the proposal of the Austrian delegation to the Conference, to create a special category for documents drawn up by notaries. In view of the considerable divergence of opinion on the matter, it was therefore dangerous to include notarial functions among functions of an administrative nature. In his opinion, the second part of paragraph 1 (c) should read " and to exercise certain functions of an administrative nature ". While his objection might be regarded as somewhat academic, it was clear from some of the comments of governments, particularly those of the Government of the United States, that there were several different concepts of notarial functions. To avoid controversy, the draft should take all the legal systems into account.

17. He also had some doubts concerning the Special Rapporteur's paragraph 1 (c) (dd), for it could not be said to be a rule of customary or general international law that consuls had authority to record and transcribe documents relating to births, marriages and deaths. Under the law of some countries consuls were not qualified to perform such acts.

18. The functions of receiving for safe custody money and securities belonging to nationals of the sending State, referred to in paragraph 1 (c) (ee) was also treated differently in different countries. That power was conferred on the consuls of some States by separate conventions, but the whole question was debatable, particularly where currency control was involved.

19. He agreed with Mr. Matine-Daftary's objections to paragraph 1 (c) (hh). Despite the Special Rapporteur's reference to the Conventions on Civil Procedure, great caution should be used in extending to consuls general powers of serving judicial documents and taking evidence on behalf of courts of the sending State. Certain limiting factors, such as the nationality of the parties concerned and duress, had to be taken into account in cases where the national concerned might fail to respond to the consulate's summons. Accordingly, it should be expressly provided that a response to a consulate's summons should in all cases be voluntary; otherwise, the abuses of the capitulations system, only too well known in Balkan history, might be given free rein. It should be expressly stipulated that the provision concerning letters rogatory should operate only as between nationals of the sending State, and never in cases where the courts of the receiving State were competent. In the absence of a special convention on the subject, a provision allowing the consul to execute letters rogatory could be construed as impairing the sovereignty of the receiving State. Without specific provisions safeguarding the competence of the courts and the sovereignty of that State, there would be a danger of interference by the sending State in the domestic affairs of the receiving State through the execution of letters rogatory on behalf of courts of the sending State. In an international code such as the Commission was drafting, the proliferation of illustrations proposed by the Special Rapporteur was liable to obscure the fundamental principle of the sovereignty of the receiving State; the Commission should take that aspect of its work extremely seriously.

20. Mr. MATINE - DAFTARY fully supported Mr. Bartos's view that a notary's functions could not be regarded as administrative only. The function of executing letters rogatory on behalf of courts of the sending State was a purely judicial, and in no way an administrative, function. It was also true that to confer that judicial power upon consuls would be tantamount to perpetuating the capitulations system. Accordingly, it might be advisable to mention the function of serving judicial documents among those exercisable by the consul, but to specify that the function of executing letters rogatory was not, unless expressly provided for in bilateral conventions, an ordinary consular function. A codification of the general rules of international law concerning consular relations was not the right context for a provision empowering the consul to execute letters rogatory.

21. Mr. ŽOUREK, Special Rapporteur, said that he had drafted paragraph 1 (c) (hh) in order to incorporate the proposal of the Netherlands Government. The proposal was therefore not his proposal, but that of the Netherlands. However, there were no grounds for the concern expressed by certain members that the provision might recall vestiges of the capitulations régime. The proviso " in the manner specified by the conventions in force . . ." clearly meant that on no account would a consul perform any judicial functions otherwise than with the concurrence of the receiving State; the sovereignty of that State was therefore fully safeguarded.

22. It was worth noting that under the provisions of the Hague Conventions relating to Civil Procedure of 1905 and 1954, judicial documents could be served and letters rogatory executed on behalf of courts by a dip-

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2 *Nederlands Tijdschrift voor Internationaal Recht*, vol. VIII (1961), January 1961, pp. 98 *et seq.*

lomatic or consular agent if the conventions in force between the States concerned admitted such a procedure, or, in the absence of any such convention, if the receiving State did not object.

23. It was of considerable practical importance to make provision for the exercise of such functions by consuls, where possible, because in such a case it would suffice if the form prescribed by the procedural laws of the sending State were observed. A great many consular conventions contained such provisions.

24. Lastly, he agreed with Mr. Yasseen that the function of issuing passports and visas was an extremely important consular function. In view of that importance, the Drafting Committee might perhaps be authorized to decide whether the example in paragraph 1 (c) (ff) should form the subject of a separate paragraph of the article.

25. Mr. ERIM emphasized that the service of judicial documents constituted a judicial, or in some cases quasi-judicial, act. Hence it did not come within the general terms of paragraph 1 (c), which mentioned notarial functions; registration of births, marriages, and deaths; and functions of an administrative nature.

26. For those reasons the Special Rapporteur's paragraph 1 (c) (hh) should constitute a separate clause and not a subdivision of paragraph 1 (c). As to the wording of the proposed provision, the objection of Mr. Matine-Daftary and Mr. Bartos was met by the qualifying phrase " in the manner specified . . .". That phrase made it an essential condition that the act in question had to be permitted by the legislation of the receiving State.

27. Mr. AGO proposed that paragraph 1 (c) as approved at the previous session should be adopted, subject to the substitution of the word " certain " for " other " before " functions of an administrative nature ". That wording would avoid the difficulty which had arisen because the 1960 draft suggested that the functions of a consul as notary and registrar were administrative in character.

28. He proposed that the examples given in the Special Rapporteur's draft paragraph 1 (c) (aa) to (ee) and (gg) be omitted. The functions of notaries and registrars varied from country to country and it was therefore not only unnecessary, but even dangerous, to give those examples in a multilateral instrument. In any case, some of those examples were even outside the scope of the general terms of paragraph 1 (c); thus the functions specified in (ee) (custody of money and securities) came not under the heading of notarial functions, but rather under the general heading of " assistance to nationals " covered by paragraph 1 (b).

29. The function of issuing passports and visas, on the other hand, was so important that it should form the subject of a separate clause.

30. Lastly, with regard to the acts referred to in the Netherlands proposal, he said that two possible situations might arise. First, the consul might merely transmit the request to the judicial authorities of the receiving State, who served the document or took the evidence themselves. Secondly, there was the possibility that the consul might himself serve the document or take evidence. In either case, the acts should form the subject of a separate clause, for they could not be considered as part of some general administrative function.

31. Mr. FRANÇOIS said it was his impression that the Netherlands proposal contemplated both the case where a consul merely transmitted a request to the judicial authorities of the receiving State and the case where the consul himself performed the functions in question.

32. With the proviso " in the manner . . ." introduced by the Special Rapporteur, there was no danger of the functions in question being exercised otherwise than with the concurrence of the receiving State and in agreement with its legislation. He thought that the Special Rapporteur's draft paragraph 1 (c) (hh) constituted a useful addition to the article.

33. Mr. BARTOŠ drew attention to the words " in the manner specified " placed before the words " by the conventions in force " and the words " in any other manner " before the words " compatible with the laws of the receiving State " in the paragraph 1 (c) (hh) under discussion. That language merely covered the question of form; it would not exclude the possibility of a consul's performing the acts in question in cases which were not specified in a convention in force or in the laws of the receiving State. Conceivably, the municipal law of the receiving State might debar a consul from performing such functions.

34. In practice, it was rare that such a prohibition was laid down expressly by legislative provision. Rather, what happened in international practice was that the receiving State was dissatisfied and objected to the consul's exercising certain functions not specified in the conventions. In modern international practice, if the receiving State raised objections to the exercise of certain functions, the consul must discontinue to exercise them. That was why he took the view that consular functions not specified in the conventions could not be exercised by the consul in face of objection by the receiving State, and that it was not necessary that the prohibition must be laid down in the laws. The exercise of functions by a consul was not always of legal character; very often it was political in nature.

35. Mr. ŽOUREK, Special Rapporteur, said the provisions of article 53 on the duty of consuls to respect the laws and regulations of the receiving State covered the question of substance.

36. Mr. ERIM pointed out that the functions of notaries varied from country to country. In many common law countries, a notary public could receive evidence in the form of an affidavit. The notary public might thus perform the function of taking evidence on behalf of a court.

37. Admittedly, the issuing of passports and visas was an essential consular function, but it was covered by the term " administrative functions " : it was therefore not absolutely essential to specify it separately.

38. Mr. ŽOUREK, Special Rapporteur, said that the certification of commercial invoices was also an impor-

tant day-to-day function of consuls, but if it were to be specified separately it should, like that of issuing passports and visas, be mentioned under the general heading of administrative functions.

39. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed on paragraph 1 (c) as contained in the Special Rapporteur's third report, subject to the replacement of the words " other functions " by some such expression as " certain functions " or " similar functions ". The actual wording could be left to the Drafting Committee.

It was so agreed.

40. The CHAIRMAN said that the Commission had before it a proposal to delete the examples given in paragraph 1 (c) (aa), (bb), (cc), (dd), (ee) and (gg) of the Special Rapporteur's draft. If there were no objection, he would take it that the Commission agreed on the deletion of those examples.

It was so agreed.

41. The CHAIRMAN said that the Commission appeared to be in general agreement that paragraph (c) (ff) should form the subject of a separate clause, because the issuing of passports and visas was one of the consul's most important functions. If there were no objection, he would take it that the Commission wished the Drafting Committee to prepare a suitable text.

It was so agreed.

42. The CHAIRMAN said that some members had suggested that the example given in the Special Rapporteur's draft paragraph 1 (c) (hh) should be omitted, while others wished it to stand. A further suggestion had been made that the provision in question should constitute a separate clause.

43. Mr. PAL supported Mr. Ago's proposal to the effect that the example in (hh) should constitute a separate provision from sub-paragraph (c).

44. Mr. AMADO said that the example in question was most necessary. The Netherlands proposal proceeded from an unrivalled experience in consular matters and the proviso introduced by the Special Rapporteur would ensure that in no circumstances would a consul perform the acts in question otherwise than in keeping with the laws of the receiving State.

45. The correct context for the proposed provision was of course outside paragraph 1 (c), because the functions envisaged were not administrative in character.

46. Mr. YASSEEN, with reference to the remarks by Mr. Bartos, proposed that the Drafting Committee should be asked to amend the language of the proviso " in the manner . . ." so as to cover not only form, but also substance. The draft should specify that consuls could serve judicial documents or execute letters rogatory in those cases only in which they were authorized to do so by the relevant conventions or by the municipal law of the receiving State.

47. Mr. SANDSTRÖM pointed out that the first sentence of article 4, paragraph 1 as approved at the twelfth session provided that a consul exercised the functions which were vested in him by the sending State in so far as they could be exercised without breach of the law of the receiving State. That provision appeared to be general enough to subordinate any act of the consul to the condition that it must not break the law of the receiving State.

48. Mr. YASSEEN in reply said that the passage cited by Mr. Sandström did not cover all the functions entrusted to the consul. In particular, it did not apply to the functions conferred upon the consul " by the present articles ". The exercise of the functions specified in the various sub-paragraphs and, in particular, in the proposed additional sub-paragraph, would not, therefore, be subject to the proviso in question.

49. Mr. ŽOUREK, Special Rapporteur, reiterated that the question of substance was covered by article 53 on the duty of consuls to respect the laws and regulations of the receiving State. If the law of that State precluded the consul from serving judicial documents on behalf of the courts of the sending State, the provision proposed in paragraph 1 (c) (hh) would not apply.

50. However, he had no objection to the Drafting Committee being asked to review the draft provision in question from the point of view of substance as well as of form.

51. Mr. MATINE-DAFTARY said that if the text in clause (hh) were to be retained it should be removed from paragraph 1 (c), for it dealt with judicial and not with administrative functions.

52. The CHAIRMAN said that it seemed to be generally agreed that the text in clause (hh) of the Special Rapporteur's draft article 4, paragraph 1 (c) should be separated from its existing context. If there were no objection, he would take it that the Commission agreed that the Drafting Committee should be asked to prepare a suitable text.

It was so agreed.

53. The CHAIRMAN invited debate on article 4, paragraph 1 (d) as proposed by the Special Rapporteur in his third report.

54. Mr. ŽOUREK, Special Rapporteur, said that he had followed the Norwegian Government's suggestion (A/CN.4/136) that sub-paragraph (d) should refer explicitly to crews. The Japanese Government (A/CN.4/136/Add.9) had proposed the deletion of the words " and boats " on the ground that they were covered by the word " vessels ". He had originally proposed such wording so as to conform with the distinction made in French between " *navire* " and " *bateau* " in certain international conventions. In English, a single term would probably suffice.

55. The Norwegian Government had found paragraph 1 (d) as approved at the twelfth session too vague and believed that some of the functions listed in the commentary to the second variant were so important that they should be mentioned in the body of the article itself. He had accordingly done so in his proposed new clauses (bb), (cc) and (dd).

56. Mr. YASSEEN favoured the insertion of a refer-

ence to crews in paragraph 1 (d) since it was in the obvious interest of the flag State of a vessel or of the State in which an aircraft was registered that the consul should extend necessary assistance to the crews. Regarded as an undertaking, the vessel or aircraft was dependent on its crew, and such a reference was all the more necessary because some members of the crew might not be nationals of the sending State.

57. Mr. VERDROSS expressed the view that the scope of paragraph 1 (d) (dd), laying down as it did a rule of customary law, was far wider than that of paragraph (d) itself; the provision should accordingly stand on its own and not in its present subordinate position.

58. Mr. SANDSTRÖM, agreeing with Mr. Yasseen, said that Mr. Verdross's argument was equally applicable to clauses (aa), (bb) and (cc), which dealt with functions that could hardly come under the heading of assistance and were more in the nature of judicial functions.

59. Mr. GROS, referring to the drafting amendment proposed by the Japanese Government, considered that as far as the French text was concerned the word " *navires* ", which was sometimes used in Conventions relating to inland waterways navigation — on the Rhine, for example — would suffice if it were explained in the commentary that the expression included river craft.

60. Mr. ERIM said he was not convinced by the Norwegian Government's arguments. All the examples mentioned in that government's comment were covered by the general definition given in paragraph 1 (d).

61. He had no objection to the addition of a reference to crews, if needed in the interests of clarity.

62. Mr. AGO agreed with Mr. Verdross that clause (dd) should be separate, but was not of the same opinion as Mr. Sandström concerning clauses (aa), (bb) and (cc) which dealt with matters that were essentially procedural. Sub-paragraphs (d) and clause (dd) were the only ones that need be retained in the article itself.

63. Sir Humphrey WALDOCK said that the term " vessel " was generic and would cover " boats " in the English text.

64. He agreed with the Norwegian Government on the need to spell out certain additional functions in paragraph 1 (d) and, though recognizing that the function referred to in (dd) was the most important of those in the Special Rapporteur's enumeration, he considered that Mr. Sandström was right in thinking that others should also be mentioned. For instance, consuls might be called upon to conduct investigations in a vessel in port concerning an incident which had occurred on the high seas. Such an investigation would be an internal matter for the flag State and was not covered by clause (dd). Some general reference should be made to the fact that consuls could legitimately exercise functions of wider scope than those specified in (dd).

65. Mr. AMADO considered that paragraph 1 (d) should be amended, for the matters referred to in the succeeding clauses were not all connected with the giving of assistance.

66. Mr. BARTOŠ said that the right of a consul to inspect vessels of the sending State was universally recognized in modern maritime law. The question of the application of sanctions for failure to observe certain rules was another matter. Some reference to that important function should certainly be made.

67. Mr. SANDSTRÖM believed that the essence of clauses (aa), (bb) and (cc) could be conveyed in a text on the following lines: " To take statements and note the customary particulars."

68. The CHAIRMAN suggested that, since no objection had been raised as to the substance of paragraph 1 (d) and its sub-clauses as proposed by the Special Rapporteur, they could be referred to the Drafting Committee for redrafting in the light of the discussion.

It was so agreed.

69. The CHAIRMAN invited comments on article 4, paragraph 1 (e).[3]

70. Mr. ŽOUREK, Special Rapporteur, said that paragraph 1 (e) had not given rise to any comment by governments.

71. The CHAIRMAN, speaking as a member of the Commission, proposed that the paragraph 1 (e) be referred to the Drafting Committee with a request that it give some consideration to modifying the text, which was tautologous in that it referred both to furthering trade and to promoting the development of commercial relations.

It was so agreed.

72. The CHAIRMAN called for comments on article 4, paragraph 1 (f).[3]

73. Mr. ŽOUREK, Special Rapporteur, said that there were no comments from governments on paragraph 1 (f).

74. The CHAIRMAN, speaking as a member of the Commission, proposed that the Drafting Committee be instructed to take into account the wording of article 3, paragraph 1 (d) of the recently adopted Vienna Convention on Diplomatic Relations (A/CONF.20/13) when reviewing the text of article 4, paragraph 1 (f) of the draft.

75. The CHAIRMAN called for comments on paragraph 2 of article 4 as proposed in the Special Rapporteur's third report.

76. Mr. ŽOUREK, Special Rapporteur, said that he had inserted the new paragraph 2 at the Norwegian Government's suggestion. Certainly such a provision would make for greater clarity and would obviate the article 4 being misconstrued.

77. The CHAIRMAN, speaking as a member of the Commission, pointed out that at its previous session the Commission had in fact approved such a proviso. It could appropriately follow the statement of general functions in paragraph 1 of the article.

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[3] The text of article 4, paragraphs 1 (e) and (f), included in the draft as adopted at the twelfth session (A/4425, para. 28), is reproduced unchanged in the Special Rapporteur's third report (A/CN.4/137).

78. Mr. BARTOŠ said that from the purely academic point of view he was not opposed to such a provision. However, it could not be maintained in regard to consular functions that anything not expressly prohibited by the laws of the receiving State was permissible, and the Commission would be unwise to overlook the influence of political considerations. The Commission's task was not only to find an acceptable legal formula, but also to take into account the realities of the modern world and of inter-State relationships. Paragraph 1 specified the normal functions exercised by consuls, and in his opinion the restriction stipulated in paragraph 2 was inadequate to protect the interests of the receiving State. It would therefore be necessary to add a further safeguard in paragraph 2 stipulating that a consul might perform additional functions provided that there were no objection on the part of the receiving State.

79. Mr. ŽOUREK, Special Rapporteur, stated that the Governments of the Netherlands and Poland (A/CN.4/136/Add.4 and 5) both considered that the provision appearing as paragraph 3 of his third report was redundant on the ground that the relations between the consul and the authorities of the receiving State were regulated in article 37. The Commission would remember that the provision contained in that paragraph had been inserted in article 4 for the reason that a consul's contact with the local authorities was one of the salient features of the consular function. However, reference to that question in article 4 was not indispensable and he would have no objection to the paragraph being omitted.

80. Mr. YASSEEN believed that the paragraph should be dropped. As it dealt with the method of exercising consular functions it had no place in an article concerned with the nature of those functions.

The meeting rose at 6.5 p.m.

586th MEETING

Tuesday, 9 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.4/137) (*continued*)

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

[Agenda item 2]

ARTICLE 4 (Consular functions) (*continued*)

1. The CHAIRMAN invited further debate on article 4, paragraph 2, as proposed in the Special Rapporteur's third report (A/CN.4/137).

2. Mr. MATINE-DAFTARY said that it was conceivable that the sending State might authorize its consuls to carry out " additional " functions which, though not expressly prohibited by the laws of the receiving State, might be at variance with the latter's economic or political interests; in such circumstances the safeguard provided in paragraph 2 would be inadequate. If paragraph 1 specified that the functions which it enumerated were not exhaustive, paragraph 2 would become superfluous.

3. Mr. ŽOUREK, Special Rapporteur, endorsed the Norwegian Government's suggestion that the provision in question should form part of article 4 (A/CN.4/136).

4. The suggestion made by Mr. Bartos (585th meeting, para. 34) that the exercise of additional functions should be contingent on the absence of objections from the receiving State, though at first sight it appeared reasonable, might have the consequence that a receiving State would arbitrarily raise objections to the exercise of certain functions in a specific case without applying the same objections to other consuls. The Commission had consistently taken the view that the measures taken by the receiving State with regard to foreign consuls within its territory must be applicable to all consuls within its territory. In that connexion, there was an example in the last two sentences in paragraph (3) of the commentary to article 46 (A/4425) concerning exemption from customs duties. He urged Mr. Bartos to give further thought to the implications of his suggestion.

5. It had been argued that the reference to the " law " of the receiving State in the first sentence of article 4 as approved at the twelfth session might be construed narrowly to mean strictly statute law. Perhaps if the word " law " were replaced by the words " laws and regulations ", the interests of the receiving State would be fully protected without any need for the further safeguard suggested by Mr. Bartos.

6. Mr. AMADO expressed the hope that the Drafting Committee would carefully review the wording of article 4, which in some respects was very defective; for example, in paragraph 1 (c) the expression " to act as notary " was inappropriate in the context; it would be preferable to speak of the consul performing notarial functions.

7. Mr. PAL pointed out that paragraph 2 of the Special Rapporteur's new text had become necessary because of the modifications he had made in the opening passage of paragraph 1. To the best of his recollection the Commission had not accepted the new text during the current debate, but had approved, subject to some drafting changes (584th meeting, para. 16), the introductory part of paragraph 1 as adopted in 1960, a text which was more comprehensive and provided some sort of definition. The fate of the new paragraph would hinge upon the drafting changes made in the opening paragraph. If that earlier text stood as adopted at the twelfth session, then the Special Rapporteur's new paragraph 2 would become unnecessary and misleading. Clearly, the additional functions referred to in the new paragraph 2 had to be consular functions, of which paragraph 1 gave only some examples. As formulated, the new paragraph 2 would be wide enough to include new consular assignments also.