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Summary record of the 586th meeting

Topic:
Consular intercourse and immunities

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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 con-

suls 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.

8. The CHAIRMAN observed that the Commission had not taken any decision about retaining the wording of the 1960 text of paragraph 1, but had simply agreed that article 4 would specify the main consular functions and provide that some additional ones could be performed provided that they were not in breach of the law of the receiving State. That proviso could be embodied in paragraph 1 or in a separate paragraph; the precise wording could be settled by the Drafting Committee.

9. Mr. BARTOŠ assured the Special Rapporteur that he had carefully reflected on the implications of his suggestion before making it and had indeed discussed the matter with legal experts in his own country who had wide practical experience. The suggestion had been prompted by the fact that not infrequently consuls either sought to evade the legislation of the receiving State or to perform functions which were not provided for in its legislation. Moreover, it was rare that the receiving State promulgated laws dealing with the activities of consuls. That State was very often taken unawares by such activities, because its laws for preventing the malpractices of undesirable consuls could be enacted only after such practices had begun. Since the sending State was not bound to notify the receiving State of the functions vested in its consuls, certain functions could be assigned to them by means of confidential instructions, and some time might elapse before the local authorities realized that such functions were being carried out and before they could take any necessary counter measures. Such cases were not comparable to those where the sending State sought to intervene for the purpose of protecting human rights. If, as often happened, consular activities were inspired by political motives, the receiving State should have the right to lodge its objection, which usually took the form of a semi-official warning to the consul that he refrain from such activities, or of an official protest to his Government. Of course, the right to make such an objection must be exercised without discrimination.

10. He did not believe that the Special Rapporteur's analogy with exemptions from customs duties was valid, since fiscal questions were qualitatively different from the question of a consul's competence, which was, in essence, a political issue. It was no answer to say that the receiving State could rely on its general regulations for the purpose of objecting to some particular activity on the consul's part, for the objectionable activity would probably have its origin in confidential instructions and might be clandestine. Such cases were really political. The receiving State must be allowed discretionary, though not discriminatory, powers to put an end to activities which it regarded as undesirable.

11. He had not been convinced by the Special Rapporteur's arguments against his suggestion.

12. Mr. AGO said that he shared some of the fears expressed by Mr. Bartos. The introduction to paragraph 1 as approved at the twelfth session, by making the proviso concerning additional functions ("and also such functions . . .") complementary to the statement about the exercise of normal consular functions, had

given the matter less prominence than it would receive if the Special Rapporteur's new paragraph 2 were approved. In cases where certain functions were not expressly prohibited by law — and such a prohibition seemed to be very unusual — the legal position might give rise to disputes between consuls and the receiving State which would be most undesirable. Perhaps a solution might be found in a negative formula on the lines suggested by Mr. Bartos.

13. The CHAIRMAN, speaking as a member of the Commission, said that he also had some doubts about the new paragraph 2. The exercise of additional functions was subject to an express or tacit agreement between the two States concerned, and the new paragraph 2 went far beyond that proposition.

14. Mr. AGO, while agreeing with the Chairman that all consular functions were exercisable by virtue of an agreement between the States concerned, said that it would be excessively restrictive to stipulate that only those additional functions could be performed which were specifically provided for by a "relevant agreement in force". In the future, consuls might well be called upon to exercise new and useful functions which were not specified either in a multilateral convention of the type under discussion or in bilateral agreements in force. It should be possible to work out a text that would take that point into account as well as others raised during the discussion.

15. Mr. MATINE-DAFTARY said that the Chairman's remarks had confirmed his opinion that the new paragraph 2 was unnecessary; its purpose would be fulfilled by stating in paragraph 1 that the functions enumerated were not exhaustive. He agreed with the view that the exercise of additional functions specified by the sending State should be contingent on the absence of objections on the part of the receiving State: an express proviso to that effect should certainly be included.

16. Mr. BARTOŠ agreed with the Chairman that all consular functions were exercised by virtue of an agreement between the States concerned, but he also held, as did Mr. Ago, that for practical reasons consuls should be enabled to perform additional functions, particularly of a specialized nature, if there was no objection on the part of the receiving State. His government, for example, had had no objection whatever to United Kingdom consuls at one period selecting from amongst refugees in Yugoslavia applicants for resettlement in countries of the British Commonwealth not represented by diplomatic missions at Belgrade, although normally all matters concerning refugees were part of the duties of the United Nations High Commissioner for Refugees. The Yugoslav Government had seen no need for any special supplementary agreement with the United Kingdom covering the exercise of such functions and had considered a simple notification to be enough. It had, however, objected to the malpractices of certain consulates which had acted as depositories for some migrants desiring to evade the regulations for the normal transfer of funds, even though there had never been any provision on the matter directly addressed to consuls.

17. Mr. GROS supported Mr. Bartos's suggestion that it would be in conformity with present practice and the needs of modern international life that consuls should be able to undertake additional functions, possibly of an *ad hoc* character, provided that there was no objection from the receiving State. Ultimately, the exercise of such additional functions, as much as that of ordinary consular duties, depended on agreement between the two States.

18. Sir Humphrey WALDOCK said that in general he agreed with Mr. Bartos, but could not subscribe to Mr. Pal's view. Although Mr. Ago was right in emphasizing that allowance must be made for cases where consuls undertook new functions in future, for that purpose it would surely be sufficient if the enumeration in paragraph 1 were expressly declared not to be exhaustive. In the form which that paragraph was being contemplated, it would not preclude the development of consular functions in new directions. On the other hand, it would seem somewhat inconsistent to add a provision on the lines of that contained in the new paragraph 2 allowing consuls to engage in activities which, by definition, did not belong to consular functions proper. If such activities as those mentioned by Mr. Bartos in the example he had given were generally undertaken by consuls, they would, in the course of time, be assimilated to regular consular functions.

19. Mr. VERDROSS shared Mr. Ago's concern that a provision should be drafted enabling consuls to exercise certain obviously useful functions which had not been foreseen at the time when bilateral conventions had been concluded. It should be possible to meet all the views expressed by some appropriate wording for inclusion in the introductory part of paragraph 1. That would be preferable to a separate clause concerning additional functions.

20. Mr. LIANG, Secretary to the Commission, observed that the consular functions enumerated in general terms as proposed both in the 1960 draft and in the new text, though not exhaustive, were intended apparently as the basis in an international convention for the exercise of those functions. Despite the qualification in the second sentence, the effect of the first sentence in paragraph 1, if taken in conjunction with the new paragraph 2, might prove too restrictive. The first sentence of paragraph 1 referred to relevant agreements in force; but if the draft articles ultimately became a general multilateral convention, what was to be the position of two States which became parties to it and between which no bilateral consular convention had been concluded?

21. It would certainly be difficult to claim that the present draft articles or existing bilateral conventions covered the whole range of possible consular functions. There was another source of functions, namely, customary international law. That had been mentioned in a similar context in the preamble to the Vienna Convention on Diplomatic Relations (A/CONF.20/13). There seemed to be a case for amending the new paragraph 2 so that it referred to customary international law rather than to the laws of the receiving State since, to the

best of his knowledge, no such laws existed prohibiting the exercise of certain consular functions.

22. Mr. SANDSTRÖM voiced his concern at the absence of a reference to instructions from the sending State, taking into account the agreements in force and any possible objection by the receiving State. He would not, however, propose a specific amendment in that connexion.

23. Mr. PADILLA NERVO considered that the difficulty encountered by the Commission was not due to the new paragraph 2 as such. In the case of bilateral agreements where consular functions were set forth in detail, such a paragraph would fill a definite need by admitting the possibility of temporary or additional functions which consuls might exercise. Under certain bilateral conventions, consuls could perform additional functions, provided that they were in conformity with existing rules of international law or practice. Another condition was that those functions should not be contrary to the laws of the receiving State and that the authorities of the receiving State should not object to their exercise. It was obvious that those conditions related only to additional functions, and not to the functions expressly enumerated in article 4 or in bilateral conventions.

24. The difficulty lay in the fact that the enumeration in that article was not exhaustive, but merely set forth somewhat general principles with a few examples; accordingly, it had been deemed necessary to include the sources of consular functions in the introductory part of paragraph 1. If that passage had been followed by an exhaustive enumeration of ordinary consular functions, then any reference to other, unspecified, additional functions would have had to be qualified by a proviso subordinating the exercise of such additional functions to the general principles of international law, custom, local law and the absence of objections on the part of the receiving State. As it stood, however, the general language of the provision could not be said to suffice for the purpose of the exercise of additional, unspecified, functions, and he agreed, therefore, with Mr. Bartos that a provision should be included concerning the receiving State's consent to the performance of additional functions.

25. In that connexion, he would cite article 34 of the Consular Convention between Mexico and the United Kingdom,¹ in which in which the provisions of articles 18 to 32 relating to the functions exercisable by a consular officer were declared not to be exhaustive, and under which a consular officer was also permitted to perform other functions, provided that (a) they were in accordance with international law or practice relating to consular officers as recognized in the territory, or (b) they involved no conflict with the laws of the territory and the authorities of the territory raised no objection to them. Those provisos were applicable to additional functions, which were not specified in the bilateral agreement, but which might arise from time to time and

¹ United Nations Treaty Series, vol. 331 (1959), No. 4750, pp. 22 *et seq.*

could be performed, provided that the three conditions stipulated were fulfilled.

26. Mr. AGO said that the Commission was, in a manner of speaking, contradicting itself. If the enumeration in paragraph 1 (a) to (f) had been intended to be exhaustive, it would have been logical to add a clause on additional functions, but since the enumeration was acknowledged to be illustrative only, there seemed to be no need to include a provision on the lines of new paragraph 2. Moreover, the sources of definition of consular functions were described in paragraph 1 as being the articles of the convention and any relevant agreement in force; there was no mention of the rules of customary international law as a source and there was no need at all for such a mention. The best solution might be to bring the article closer into line with article 3 of the Vienna Convention on Diplomatic Relations; the statement that consular functions consisted, among others, of those described as the principal functions in the 1960 text would enable the Commission to avoid contradiction.

27. Mr. VERDROSS observed that, whereas there was no country whose law expressly prohibited any consular function, in a number of cases consular functions were expressly authorized by the municipal law of the receiving State.

28. Mr. ŽOUREK, Special Rapporteur, agreed with Mr. Verdross, but pointed out that the qualifying words ("provided that . . . not prohibited . . .") applied only to additional functions, and not to those cited as examples under paragraph 1. The difficulty was due to the fact that the Commission at its twelfth session had decided to refer to such functions vested in the consul by the sending State as could be exercised without breach of the law of the receiving State. A clarification of that point would represent a step towards agreement on a generally acceptable text. Mr. Ago's solution seemed the best.

29. The CHAIRMAN noted that the Commission seemed to be moving towards agreement. The agreed text which seemed likely to materialize would probably be more acceptable to the forthcoming international conference. Accordingly, the Drafting Committee might be instructed to prepare a text of article 4 along the lines of article 3 of the Vienna Convention and insert the paragraphs which the Commission had approved. Reference to bilateral conventions seemed to be unnecessary in view of article 65, and additional functions would undoubtedly be performed by consuls, with the consent of the receiving State, whether or not they were mentioned in the Convention. Accordingly, the omission of paragraph 2 would not result in the loss of any legal provision and would considerably simplify the issue.

30. Mr. MATINE-DAFTARY said he agreed in principle with Mr. Ago's proposal, but would point out to the Drafting Committee that there was a considerable difference in law between diplomatic and consular missions. The text of article 3 of the Vienna Convention could be followed, but it should be borne in mind that a consul was an official of the sending State, and not

its representative, and that his functions were therefore subject to the consent of the receiving State.

31. Mr. ŽOUREK, Special Rapporteur, said that he could not agree with Mr. Matine-Daftary because the differences between the position of diplomatic and that of consular officials were attributable to the degree and importance of their respective functions and not to their representative or other character. Since in most cases consuls were appointed by the Head of State or Minister of Foreign Affairs, it could not be denied that they represented the sending State in the consular district in order to protect the rights and interests of that State and of its nationals. It had long been recognized that consulates were organs of the State in the field of foreign relations. In any case, the Drafting Committee would no doubt study Mr. Matine-Daftary's remarks.

32. Mr. BARTOŠ endorsed Mr. Matine-Daftary's view that a consul was not the representative of the sending State, but was appointed to protect certain interests of that State. That was the current general conception of the consular status.

33. The CHAIRMAN observed that that issue had been discussed previously on a number of occasions. As Mr. Matine-Daftary had made no specific proposal, he proposed that the Drafting Committee should be instructed to prepare a text of article 4 along the lines of article 3 of the Vienna Convention on Diplomatic Relations, taking into account the proposals on individual paragraphs approved by the Commission during the current debate.

It was so agreed.

Article 4 was referred to the Drafting Committee for amendment in the light of the discussion.

ARTICLE 5 (Obligations of the receiving State in certain special cases)

34. Mr. ŽOUREK, Special Rapporteur, referred to the relevant passage in his third report (A/CN.4/137) and drew attention to a number of comments by governments on article 5. The proposal of the Japanese Government (A/CN.4/136/Add.9) would simplify the text of paragraph (a) and would therefore probably be acceptable to most members.

35. With regard to the United States Government's comment that it would seem enough for local authorities to seek out next-of-kin when minors or incompetents were in difficulties (A/CN.4/136/Add.3, *ad* article 5), he would point out that the cases in question were always urgent and required emergency measures of protection. Since the search for next-of-kin might take a long time, it would be better to retain the Commission's text.

36. The Governments of Yugoslavia, the Soviet Union and the Netherlands (A/CN.4/136 and Add.2 and 4) had suggested that the scope of paragraph (c) should be extended to include aircraft of the sending State, a course that he found acceptable.

37. The most controversial point had been raised by the Government of Belgium, which proposed the inser-

tion of a new sub-paragraph (A/CN.4/136/Add.6) extending the receiving State's duty of notification. While he had no objection to that extension, regarding it as a most useful provision for the protection of the interests of the nationals of the sending State, he doubted whether it would be acceptable to the majority of participants in the plenipotentiary conference.

38. Mr. ERIM said that the Belgian Government's proposal gave rise to considerable practical difficulties. How could the authorities of the receiving State know, at the time of the probate of a will of one of its nationals, whether a national of the sending State was a beneficiary? The notary or the court concerned might know, but the government authorities were unlikely to hear of all such cases. At the twelfth session Mr. Edmonds had criticized paragraph (a) on the grounds that it imposed too heavy a burden on the authorities of the receiving State (545th meeting, para. 49) the difficulties of implementing the paragraph proposed by the Government of Belgium would naturally be even greater. The new paragraph proposed by that government should not therefore be inserted in paragraph 5.

39. Mr. SANDSTRÖM, concurring, said that difficulties would inevitably arise if the receiving State were to be required to report to the consulate every case of the kind contemplated by the Belgian Government's amendment. Such cases arose, of course, but it was not advisable to deal with them in article 5.

40. With regard to the placing of the article, he agreed with the Netherlands comment that both article 5 (Obligations of the receiving State in certain special cases) and article 6 (Communication and contact with nationals of the sending State) were out of place in section I of chapter I, which dealt with consular intercourse in general; their proper context was section II of chapter II, which dealt with the facilitation of the work of the consulate.

41. Mr. AMADO expressed surprise at the Belgian proposal that the competent consul should be advised "without delay" of the existence in his district of an estate in which one of his nationals might be interested. He asked whether any existing consular convention placed a duty of that kind on the receiving State. It would be unwise to attempt to deal with the question in article 5.

42. Mr. EDMONDS said that the difficulties arising in connexion with article 5 were attributable to the imperative terms of the opening passage: "The receiving State shall have the duty." In the case of countries having a federal constitution, difficulties would inevitably arise if such a specific obligation were to be imposed upon the federal government. In the United States, for example, the federal Government had no access to vital statistics and was not in any way concerned in the questions relating to minors. All functions in those matters were entirely within the jurisdiction of state and local authorities. The provisions of sub-paragraphs (a) and (b), introduced by the mandatory language of the opening passage, were entirely unworkable as far as the United States of America was concerned.

43. For those reasons, he suggested that the Drafting Committee should be asked to consider the possibility of drafting the opening words of article 5 in less categorical terms, possibly along the following lines: "The receiving State shall, if records are available to it (a) in the case of the death in its territory of a national of the sending State, send a copy of the death certificate to the consulate . . ."

44. Mr. BARTOŠ said that there was nothing strange in the Belgian suggestion in so far as the countries which had adopted the Klein system of judicial procedure were concerned. In that system, in cases of inheritance, before either of the claimants had instituted court proceedings for the adjudication of the dispute, the courts or the notary exercised jurisdiction in non-contentious matters (*jurisdiction gracieuse*). There should be no difficulty, under that system, for a court or notary to advise the competent consul whenever it became apparent that one of his nationals had an interest in the estate of a deceased person.

45. In reply to Mr. Amado's question, several of the countries which had adopted the Klein system of judicial procedure had included in consular conventions or in conventions on judicial co-operation a provision along the lines proposed in the Belgian comment.

46. For those reasons, he had for his part no objection to the Belgian suggestion. The conference of plenipotentiaries would show how much government support there was for the proposal.

47. With reference to the question raised by Mr. Edmonds, he realized that a federal government would find it hard to give effect to a provision of the type of article 5. He understood that, in the United States of America, the courts of the eastern states had generally taken the view that consular conventions entered into by the federal Government were binding upon them except where a "federal clause" had been specifically included in the convention concerned. The Supreme Court of California, and those of a number of western states tended to take the opposite view and did not regard the terms of consular conventions as directly binding upon state courts if state laws contained different rules and reserved to the courts the right to interpret the meaning of the conventions. In a very recent case, in which the Yugoslav Government was interested, however, and in which the State Department had argued for the binding character of a consular convention, the Supreme Court of the United States had ruled that the provisions of the consular convention concerned were binding upon the authorities and courts of the constituent states of the Union.

48. Mr. EDMONDS agreed with Mr. Bartoš that a consular convention was binding upon the courts of the constituent states of a federal union in so far as substantive law was concerned. In such matters as property rights, such provisions must be — and indeed were — respected by all the authorities of the states. In fact, he had himself written opinions in the Supreme Court of California to that precise effect. The question at issue, however, was a different one. It concerned not a matter of substantive law but the gathering of information

which was scattered in many places and which was not accessible to the federal Government. Considerable difficulties would arise if a duty were to be placed upon the federal authorities to give information which could only be obtained by inspecting records that were outside their control. It was for that reason that he had suggested a more flexible formulation for article 5.

49. Mr. GROS said that the question raised by Mr. Edmonds was not one of mere drafting but an important question of principle. The point to be decided was whether all States parties to the proposed convention would assume a legal obligation to transmit the information referred to in article 5. In the case of a federal State, it was the responsibility of the federal authorities to make the necessary legal and material arrangements to enable it to carry out its obligations, in each case taking account of the special relationship between the federal and the state authorities. That obligation raised no new problem and in 1930 the federal question had been discussed in connexion with State responsibility at the Conference for the Codification of International Law. He noted that Brazil also was a federal State and that Mr. Amado had not suggested any similar difficulties in regard to his country.

50. Mr. AGO said that the problem mentioned by Mr. Edmonds arose whenever a federal State signed a treaty. Perhaps the problem would appear less formidable if it were remembered that the expression "the receiving State" did not mean only the federal authorities in the case of a federal State. It covered all the authorities of the signatory Party, including federal, state and local authorities. The distribution of powers as between those various authorities was a purely internal matter; it was for the municipal law concerned to determine whether the consul would be advised by a local or by a federal authority in the cases specified in article 5. It would be illogical to set forth in article 5 a duty only for the cases where the federal authorities had jurisdiction. The duty in question should be placed upon the contracting parties themselves; in each case, there should be some authority in the country concerned having the power to give the information to be communicated to the consul under article 5.

51. The Belgian proposal might be acceptable in principle, but in practice it would give rise to much difficulty. A State could be required to advise a consul of the death of one of his nationals because it was comparatively easy in most cases to determine the nationality of a deceased person. But it was an altogether different matter to require the consul to be notified of all cases in which one of his nationals happened to have an interest in an estate left in the receiving State. For those reasons, the Belgian proposal was not practicable.

52. Mr. LIANG, Secretary to the Commission, said that he would not discuss the question of the extent of the duty of a federal government to enforce the obligations contracted by the State as such. That was a problem of a general character which could not well be considered in detail at that stage. The position in legal theory was that the federal government was always regarded as the "societal agent" of the State, to quote

the expression used by Professor Borchard. The federal government usually made arrangements with the constituent states to see how international obligations could be carried out by them.

53. The question raised by Mr. Edmonds had been settled by means of a provision, along the lines of the article 5 under discussion, in the Treaty of Friendship, Commerce and Consular Rights between the United States of America and Germany, signed at Washington on 8 December 1923. That treaty contained an article XXIV, the first paragraph of which provided:

"In case of the death of a national of either High Contracting Party in the territory of the other without having in the territory of his decease any known heirs or testamentary executors by him appointed, the competent local authorities shall at once inform the nearest consular officer of the State of which the deceased was a national of the fact of his death, in order that necessary information may be forwarded to the parties interested."²

54. Apparently, some arrangements had been possible in that case whereby the federal Government of the United States of America could carry out a provision of the type of article 5.

55. Mr. AMADO said that he had been impressed by the statement of Mr. Sandström regarding the placing of article 5 and he agreed that the proper place for that article was before article 34.

56. The CHAIRMAN said that the first question to be decided was whether an additional sub-paragraph along the lines proposed by the Belgian Government should be introduced into article 5. The great majority of members had expressed themselves against the proposal. If there were no objection, he would therefore take it that the Commission agreed not to include the proposed additional sub-paragraph.

It was so agreed.

57. The CHAIRMAN said that the consensus of the Commission was to retain article 5 in the form agreed to in 1960, with the amendment proposed by Japan to sub-paragraph (a) (A/CN.4/136/Add.9) and with the inclusion of a reference to aircraft in sub-paragraph (c).

58. Mr. BARTOŠ said that inland waterways craft should also be mentioned. The Drafting Committee should also consider mentioning internal waterways, in addition to the territorial sea of the receiving State.

59. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to entrust to the Drafting Committee the drafting of article 5 with the proposed changes, as well as the decision on the placing of the article.

It was so agreed.

² *Laws and regulations regarding diplomatic and consular privileges and immunities*, United Nations, *Legislative Series*, vol. VII (United Nations Publication, Sales No.: 58.V.3), pp. 435-436.

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

60. Mr. ŽOUREK, Special Rapporteur, said that the comments on article 6 were contradictory. Some governments held that the article went too far, whereas others considered that it was not sufficiently comprehensive and failed to provide the consul with adequate scope. At that stage, he proposed to deal with only the first type of comment: he would deal with the others if the Commission decided to retain article 6.

61. He recalled that at the twelfth session the adoption of article 6 had been preceded by a long discussion.³ For his part, he had expressed reservations regarding the article because its provisions gave too much scope to a particular consular function (534th meeting, para. 14). In addition, those provisions seemed to go too far on certain points.

62. A number of governments, including those of Denmark and Norway (A/CN.4/136 and Add.1), considered that the provisions of article 6 went too far. The Czechoslovak Government proposed the deletion of article 6 on the grounds that the powers of the consul to protect the interests of his nationals were regulated already in general terms by the provisions of article 4 on consular functions and that detailed regulation of the questions referred to in article 6 was a matter falling within the exclusive competence of the internal legislation of the receiving State (A/CN.4/136).

63. The United States Government had criticized article 6 on the grounds that its provisions appeared to give validity to procedures whereby a prisoner might be held *incomunicado*. Accordingly, that government had suggested that a maximum period of forty-eight or seventy-two hours be agreed upon for the purpose of that type of custody (A/CN.4/136/Add.3).

64. The opinions expressed by the seventeen governments which had sent in their comments showed that there was a wide divergence of views on the substance of article 6. It was therefore extremely unlikely that agreement would be reached on the provisions of the article in a future conference of plenipotentiaries at which as many as a hundred States might be represented. The conclusion to be drawn was that the subject dealt with in article 6 was not ripe for codification in a multilateral convention, and he therefore suggested that the Commission should carefully consider whether the article should be retained.

The meeting rose at 1 p.m.

587th MEETING

Wednesday, 10 May 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Co-operation with other bodies

[Agenda item 5]

1. Mr. LIANG, Secretary to the Commission, read a telegram dated 7 May 1961 from Mr. Charles Fenwick, Executive Secretary of the Inter-American Council of Jurists, to the effect that Mr. José Joaquín Caicedo Castilla had been designated as observer for the Inter-American Juridical Committee to attend the present session of the Commission.

2. The CHAIRMAN welcomed Mr. Caicedo Castilla.

3. Mr. Caicedo CASTILLA, Observer for the Inter-American Juridical Committee, thanked the Chairman for his kind words of welcome.

Consular intercourse and immunities

(A/4425; A/CN.4/136 and Add.1 to 10; A/CN.4/137)

[Agenda item 2]
(continued)

DRAFT ARTICLES (A/4425) (continued)

ARTICLE 6 (Communication and contact with nationals of the sending State) (continued)

4. The CHAIRMAN invited the Commission to resume its discussion of article 6 of the draft on consular intercourse and immunities (A/4425).

5. Mr. YASSEEN urged that article 6 be retained as in the 1960 draft. Its provisions, in particular those set forth in paragraph 1 (a) and (b), were absolutely necessary.

6. The freedom of the nationals of the sending State to communicate with and to have access to their consul, and the consul's freedom of communication with his nationals, were not guaranteed by article 4, which dealt with consular protection. Those freedoms were an essential condition for the exercise of the consular function of protection, as recognized by the opening words of paragraph 1 ("With a view to facilitating the exercise of the consular functions . . ."). It was therefore necessary to safeguard them by means of an explicit provision in the terms of paragraph 1 (a).

7. Equally important was the duty set forth in paragraph 1 (b) of the competent authorities of the receiving State to inform the consul if one of his nationals was committed to custody pending trial or to prison. Unless

³ 534-537th meetings; article 6 was there discussed as additional article 30A.