YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1959

Volume I

Summary records of the eleventh session

20 April - 26 June 1959

UNITED NATIONS

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INTRODUCTORY NOTE

The summary records which follow were originally distributed in mimeographed form as documents A/CN.4/SR.479 to A/CN.4/SR.525. They include the corrections to the provisional summary records that were requested by the members of the Commission and such drafting and editorial modifications as were considered necessary.

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The documents pertaining to the work of the eleventh session of the Commission are reproduced in volume II of this publication.

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Mr. Roberto Ago	Italy
Mr. Ricardo J. Alfaro	Panama
Mr. Gilberto Amado	Brazil
Mr. Milan Bartoš	Yugoslavia
Mr. Douglas L. Edmonds	United States of America
Mr. El-Khouri	United Arab Republic
Mr. Nihat Erim	Turkey
Sir Gerald Fitzmaurice	United Kingdom of Great Britain and Northern Ireland
Mr. J. P. A. François	Netherlands
Mr. Francisco V. García Amador	Cuba
Mr. Shuhsi Hsu	China
Mr. Ahmed Matine-Daftary	Iran
Mr. Luis Padilla Nervo	Mexico
Mr. Radhabinod Pal	India
Mr. A. E. F. Sandström	Sweden
Mr. Georges Scelle	France
Mr. Grigory I. Tunkin	Union of Soviet Socialist Republics
Mr. Alfred Verdross	Austria
Mr. Kisabúro Yokota	Japan
Mr. Jaroslav Zourek	Czechoslovakia

Officers

Chairman:	Sir Gerald Fitzmaurice
First Vice-Chairman:	Mr. Shuhsi Hsu
Second Vice-Chairman:	Mr. Ricardo J. Alfaro
Rapporteur:	Mr. J. P. A. François
Secretary to the Commission:	Mr. Yuen-li Liang, Director of the Codification Division of the Office of Legal Affairs

AGENDA

Document A/CN.4/118

18 February 1959

The Commission adopted the following agenda at its 479th meeting, held on 20 April 1959:

1. Filling of casual vacancy in the Commission (article 11 of the Statute).
2. Consular intercourse and immunities.
3. Law of treaties.
4. State responsibility.
5. General Assembly resolution 1289 (XIII) on relations between States and intergovernmental organizations (adopted in connexion with the General Assembly's consideration of the draft articles on diplomatic intercourse and immunities).
6. Date and place of the twelfth session.
7. Planning of future work of the Commission.
8. General Assembly resolution 1272 (XIII) on control and limitation of documentation.
9. Other business.

LIST OF DOCUMENTS PERTAINING TO THE ELEVENTH SESSION OF THE COMMISSION

Document No.	*Title*	*Observations and references*
A/1316	Report of the International Law Commission covering the work of its second session	*Official Records of the General Assembly, Fifth Session, Supplement No. 12*
A/3623	Report of the International Law Commission covering the work of its ninth session	*Ibid., Twelfth Session, Supplement No. 9;* also reproduced in *Yearbook of the International Law Commission, 1957,* vol. II
A/3859	Report of the International Law Commission covering the work of its tenth session	*Ibid., Thirteenth Session, Supplement No. 9;* also reproduced in *Yearbook of the International Law Commission, 1958,* vol. II
A/4169	Report of the International Law Commission covering the work of its eleventh session	*Ibid., Fourteenth Session, Supplement No. 9;* also reproduced in *Yearbook of the International Law Commission, 1959,* vol. II
A/CN.4/23	Law of treaties: report by J. L. Brierly, Special Rapporteur	See *Yearbook of the International Law Commission, 1950,* vol. II
A/CN.4/63	Law of treaties: report by H. Lauterpacht, Special Rapporteur	*Ibid., 1953,* vol. II
A/CN.4/87 [and Corr.1]	Law of treaties: second report by H. Lauterpacht, Special Rapporteur	*Ibid., 1954,* vol. II
A/CN.4/91	Diplomatic intercourse and immunities: report by A. E. F. Sandström, Special Rapporteur	*Ibid., 1955,* vol. II
A/CN.4/96	State responsibility: International responsibility: report by F. V. García Amador, Special Rapporteur	*Ibid., 1956,* vol. II
A/CN.4/101	Law of treaties: report by G. G. Fitzmaurice, Special Rapporteur	*Ibid.*
A/CN.4/106	State responsibility: International responsibility: second report by F. V. García Amador, Special Rapporteur	*Ibid., 1957,* vol. II
A/CN.4/107	Law of treaties: second report by G. G. Fitzmaurice, Special Rapporteur	*Ibid.*
A/CN.4/108	Consular intercourse and immunities: report by Jaroslav Zourek, Special Rapporteur	*Ibid.*
A/CN.4/111	State responsibility: International responsibility: third report by F. V. García Amador, Special Rapporteur	*Ibid., 1958,* vol. II
A/CN.4/115 [and Corr.1]	Law of treaties: third report by G. G. Fitzmaurice, Special Rapporteur	*Ibid.*
A/CN.4/118	Provisional agenda	Adopted without change. See page ix above.
A/CN.4/119	State responsibility: International responsibility: fourth report by F. V. García Amador, Special Rapporteur	See *Yearbook of the International Law Commission, 1959,* vol. II
A/CN.4/120	Law of treaties: fourth report by G. G. Fitzmaurice, Special Rapporteur	*Ibid.*
A/CN.4/121	Notes on the practice of the United Nations Secretariat in relation to certain questions raised in connexion with the articles on the law of treaties	*Ibid.*
A/CN.4/122	Report of the International Law Commission covering the work of its eleventh session	Same text as A/4169
A/CN.4/L.79	Consular intercourse and immunities: proposals and comments submitted by Mr. Alfred Verdross regarding the draft provisional articles on consular intercourse and immunities (A/CN.4/108)	See *Yearbook of the International Law Commission, 1959,* vol. II
A/CN.4/L.80	Text of the draft provisional articles on consular intercourse and immunities proposed by Mr. Jaroslav Zourek, Special Rapporteur	Mimeographed. Reproduces the text of the draft provisional articles contained in A/CN.4/108
A/CN.4/L.82	Consular intercourse and immunities: proposals and comments submitted by Mr. Georges Scelle regarding the draft provisional articles on consular intercourse and immunities (A/CN.4/108)	See *Yearbook of the International Law Commission, 1959,* vol. II
A/CN.4/L.83 and Corr.1 and Add.1 to 7	Draft report of the International Law Commission covering the work of its eleventh session	Mimeographed
A/CN.4/L.84	Report of the Drafting Committee on the articles on consular intercourse and immunities	Ditto
ST/LEG/6	Handbook of final clauses	Ditto

INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE ELEVENTH SESSION

Held at the International Labour Office, Geneva, from 20 April to 26 June 1959

479th MEETING

Monday, 20 April 1959, at 3 p.m.

Chairman: Mr. Radhabinod PAL;
later: Sir Gerald FITZMAURICE

Opening of the session

1. The CHAIRMAN declared the eleventh session of the Commission open.

Election of officers

2. The CHAIRMAN called for nominations for the office of Chairman.

3. Mr. SANDSTRÖM proposed Sir Gerald Fitzmaurice, whose valuable services to the Commission were well known.

4. Mr. AMADO seconded the proposal.

5. Mr. ALFARO, Mr. SCELLE, Mr. MATINE-DAFTARY, Mr. BARTOŠ, Mr. TUNKIN, Mr. HSU, Mr. EDMONDS, Mr. YOKOTA and Mr. FRANÇOIS supported the proposal.

Sir Gerald Fitzmaurice was unanimously elected Chairman and took the Chair.

6. The CHAIRMAN paid a tribute to Mr. Pal for the way in which he had presided over the Commission's work at its tenth session. He thanked the members for electing him and said that he would endeavour to carry on the work in accordance with the Commission's traditions.

7. He called for nominations for the office of First Vice-Chairman.

8. Mr. SANDSTRÖM proposed Mr. Hsu.

9. Mr. PAL seconded the proposal.

10. Mr. MATINE-DAFTARY supported the proposal.

11. Mr. TUNKIN observed that the Commission's role was to frame rules of law governing relations between sovereign States; in that capacity, its function as a United Nations organ was to contribute to the maintenance of international peace. It was therefore regrettable that the legal system of the great Chinese people was not represented in the Commission. When he had raised that matter at the previous session, he had been told that the members of the Commission were elected in their personal capacity; he had pointed out, however, that they were nominated by Governments. The situation in which the People's Republic of China was not represented in the United Nations was abnormal and fraught with danger for the whole Organization. In the light of those considerations, he objected to the nomination of Mr. Hsu as First Vice-Chairman.

12. The CHAIRMAN observed that the Commission had to respect the terms of its Statute. All members were elected in their personal capacity, whatever might be the method of nomination, and any member was eligible for any office. He therefore felt obliged to rule that the nomination of Mr. Hsu for the office of First Vice-Chairman was valid.

13. Mr. BARTOŠ stated that, with all due personal regard for Mr. Hsu, he would be unable, on grounds of principle, to vote for his election. He considered that Mr. Hsu's acceptance of the candidature would not be in the best interest of the Commission. He would, however, respect Mr. Hsu's exercise of the office if he were elected.

14. The CHAIRMAN called upon the Commission to vote on the election of Mr. Hsu.

Mr. Hsu was elected First Vice-Chairman by 11 votes to 1, with 2 abstentions.

15. Mr. HSU thanked the Commission for the honour done to him. While he quite understood the motives of the objection that had been raised to his election, he did not think that the matter should have been referred to in a technical commission. With regard to the representation of Chinese law in the Commission, he observed that that system had been practically abolished by communism on the Chinese mainland. He therefore felt that he was in the best position to represent the system.

16. The CHAIRMAN called for nominations for the office of Second Vice-Chairman.

17. Mr. SANDSTRÖM proposed Mr. Alfaro.

18. Mr. PAL seconded the proposal.

19. Mr. TUNKIN and Mr. YOKOTA supported the proposal.

Mr. Alfaro was unanimously elected Second Vice-Chairman.

20. The CHAIRMAN called for nominations for the office of Rapporteur.

21. Mr. SANDSTRÖM proposed Mr. François.

22. Mr. PAL seconded the proposal.

23. Mr. SCELLE, Mr. AMADO, Mr. BARTOŠ, Mr. EDMONDS and Mr. MATINE-DAFTARY supported the proposal.

Mr. François was unanimously elected Rapporteur.

Adoption of the agenda (A/CN.4/118)

24. The CHAIRMAN suggested that the Commission should first adopt the substance of the provisional agenda (A/CN.4/118), although it might have to discuss the order in which the items would be considered.

The provisional agenda was unanimously adopted.

25. Mr. EL-KHOURI said the Commission would have to decide whether to deal first with item 3 (*Law of treaties*) or with item 4 (*State responsibility*). In his opinion, item 3 did not demand urgent attention, for States freely entered into treaties with each other in conformity with well-established practice. In the

matter of State responsibility, however, the world was waiting eagerly for the Commission's guidance. Furthermore, the Special Rapporteur for item 3 had just been elected Chairman and would probably have to relinquish the Chair while the item was discussed. In view of those considerations, he thought that item 4 should be taken first.

26. The CHAIRMAN observed that the Commission might find it difficult to decide on the order in which it would take agenda items, because Mr. Žourek, the Special Rapporteur on consular intercourse and immunities, and Mr. García-Amador, the Special Rapporteur on State responsibility, would not arrive at Geneva for about a week.

27. Mr. LIANG, Secretary to the Commission, said that the members of the Commission who had not yet arrived for the session had been in touch with him, indicating their expected date of arrival. Some would arrive at Geneva in the next few days and others in the course of the following week.

28. In particular, he had received a letter from Mr. Žourek indicating that the latter's arrival would be delayed for a few days owing to his duties as *ad hoc* judge of the International Court of Justice in the Israel-Bulgaria case being heard at The Hague. In his letter, Mr. Žourek regretted that his absence would mean that the Commission would have to begin its work with some item other than item 2 (*Consular intercourse and immunities*). Since most of the session would be devoted to that item, he did not think that the Commission would be able to do justice to more than one additional substantive item. Of the two remaining substantive items he felt that preference should be given to item 3 (*Law of treaties*) over item 4 (*State responsibility*).

29. Mr. SANDSTRÖM did not think that the fact that the Chairman was also the Special Rapporteur on the law of treaties would hamper the Commission's discussion of that item. A similar situation had existed when Mr. Scelle, Special Rapporteur on arbitral procedure, had been Chairman. He suggested that the Commission should begin by discussing item 3 (*Law of treaties*).

30. Mr BARTOŠ agreed. The Commission should not lose time and, in the temporary absence of the Special Rapporteurs on the other substantive items, should take advantage of the presence of Sir Gerald Fitzmaurice.

31. Mr. HSU also supported Mr. Sandström's suggestion.

32. Mr. MATINE-DAFTARY agreed that the Commission might begin its work with item 3. However, he was not happy over the prospect of interrupting the consideration of that item, in order to take up item 2 upon Mr. Žourek's arrival. That difficulty might be avoided by taking up first an item that could be disposed of in a few days, such as item 5 (General Assembly resolution 1289 (XIII) on relations between States and inter-governmental organizations).

33. Mr. LIANG, Secretary to the Commission, said that, while that suggestion was attractive, item 5 appeared on the agenda only for the information of the Commission, since the terms of General Assembly resolution 1289 (XIII) rendered premature any substantive, or even a procedural, discussion at that stage. He cited the operative part of the resolution and suggested that the members of the Commission might wish to consult the summary records of the discussion which had preceded the adoption of the resolution.

34. Mr. AMADO felt that the Commission, before going into new questions, should lose no time in tackling substantive items which were ready for examination. The subjects covered by items 2 and 3 alone were so vast that the whole of the eleventh session might be consumed by their discussion. He was concerned about the amount of completed work which the Commission would be able to present to the next session of the General Assembly, and accordingly he urged the Commission to begin the examination of item 3 without delay.

35. Mr. MATINE-DAFTARY withdrew his suggestion in view of the explanation given by the Secretary. He had made it only in order to avoid interruption in the consideration of item 3.

36. The CHAIRMAN agreed that the suggestion was ruled out by the terms of General Assembly resolution 1289 (XIII). All the Commission could really do was to take note of the resolution and resolve that, in due course, consideration would be given to the matter. He hoped that the Commission would be able to agree to defer any substantive discussion of the resolution to a later session.

It was agreed that, pending the arrival of Mr. Žourek, the Commission should begin its work with the consideration of item 3 (Law of treaties).

37. The CHAIRMAN observed that, as Special Rapporteur on the law of treaties, he would have to act in a dual capacity during the consideration of that item. He would prefer to vacate the Chair during the discussion, but it was for the Commission to decide on the course of action he should take.

38. Mr. EDMONDS and Mr. AMADO saw no incompatibility between the two functions. On the contrary, they thought that it would be expedient and time-saving to combine them. Sir Gerald Fitzmaurice could give up the Chair if, at any time, he felt that it would be better to do so.

39. The CHAIRMAN said that, if there was no objection, he would remain in the Chair, but would yield it to the First Vice-Chairman if, at any stage of the discussion, he felt that would be the proper course.

40. He suggested that the Commission might begin its consideration of the item with his first report (A/CN.4/101), that relating to the conclusion of treaties.

It was so agreed.

41. Mr. LIANG, Secretary to the Commission, referring to item 1 of the agenda (*Filling of casual vacancy in the Commission*) announced that some nominations had been received and that a few members of the Commission had suggested to him the desirability of not discussing the item at the very beginning of the session.

42. The CHAIRMAN said he was sure that the Commission would agree that there should be a certain delay until all the members had arrived. He suggested that any closed meeting to discuss the filling of the vacancy should be deferred for approximately two weeks.

It was so agreed.

The meeting rose at 4.25 p.m.

480th MEETING

Tuesday, 21 April 1959, at 9.45 a.m.

Chairman: Sir Gerald FITZMAURICE

Law of treaties (A/CN.4/101)

[Agenda item 3]

1. The CHAIRMAN said that during its eleventh session the Commission would probably not have much time to spend on item 3 (*Law of treaties*), as it would have to devote most of its time to item 2 (*Consular intercourse and immunities*) and some to item 4 (*State responsibility*). The Special Rapporteur on State responsibility had indicated that he had prepared a fourth report dealing with a particular aspect of the subject which was self-contained and on which agreement might be reached within two or three weeks.

2. He thought the Commission might either deal with articles 37 to 40, concerning reservations, in the first report on the law of treaties (A/CN.4/101) or else consider the articles in their numerical sequence, with the possible omission of articles 4 to 13, which might be held over until later.

3. Mr. SANDSTRÖM proposed that all the time not taken up by the discussion of item 2 be devoted to item 3, since that topic of the law of treaties had been on the Commission's agenda since its establishment.

4. Mr. PAL and Mr. MATINE-DAFTARY agreed with Mr. Sandström.

5. Mr. YOKOTA also agreed, particularly as members elected in 1956 had never participated in the discussion of the law of treaties. They would welcome some general discussion on the scope of the code.

6. Mr. BARTOŠ suggested that most of the available time be given to one of the main subjects on the Commission's agenda, namely the law of treaties. A rapid examination should be given to all the articles, as the composition of the Committee had changed since the subject had last been discussed. He personally was prepared to endorse the earlier majority decisions in almost all cases, but the newer members should be enabled to express an opinion, even on those articles which, it had been suggested, should be held over temporarily. Any divergencies of opinion on such matters should be expressed, since, otherwise, the newer members would have to assume the responsibility for decisions taken before they had become members of the Commission. He did not expect any particular difficulties, since the codification in the report had been done efficiently.

ARTICLES 1 and 2

7. The CHAIRMAN suggested that it would be undesirable to take a decision on the discussion of item 4 (*State responsibility*) until the Special Rapporteur on that topic was present, especially as the Commission had decided, after considerable discussion at its previous session, to place both State responsibility and the law of treaties on its agenda for the current session. He had not suggested that decisions previously taken should be endorsed automatically. He had pointed out, as the Special Rapporteur, when a general discussion had taken place on the first report on the law of treaties, that articles 4 to 9 did not strictly belong to the opening part of the code, but had been included there because the subjects dealt with in them were so important that it might well be thought that they should be placed at the beginning of a codification of the law of treaties. The Commission had decided that they should preferably be dealt with in the proper place. His own feeling that the discussion of articles 4-9 should be deferred was reinforced by the fact that a great deal of material relating to them had been embodied in his fourth report on the effects of treaties (A/CN.4/120). That decision might be taken when the Commission reached article 4.

8. Speaking as Special Rapporteur, he referred to the text of the draft code which he had prepared (A/CN.4/101). He explained that article 1 was intended to indicate the scope of the report. It was not specially concerned with the conclusion of treaties, but with the code as a whole and contained a definition of the term "treaty".

9. Article 1, paragraph 3, might be left aside for the present. The subject of the application of the code to international organizations had been considered fairly carefully by the Commission in connexion with one of the reports by Mr. Brierly. It had been felt that the law of treaties was in itself sufficiently complicated in so far as it dealt with States and that codification would become far too complicated if it also tried to embrace treaties between international organizations or between such organizations and States. It had been decided to discuss, first, the code as it applied to relations strictly between States and to discuss subsequently what modifications or additions to the code would be needed to cover treaties to which international organizations were parties. Questions of drafting might be left until the substance had been thoroughly debated.

10. He had included the proviso that the code did not apply to international agreements not in written form, because Mr. Brierly and Sir Hersch Lauterpacht had held that a code of treaty law could apply only to treaties drawn up in written form. That did not, of course, imply that international agreements could never be concluded verbally. Instances were rare, but had occurred; notably, in the case concerning the Legal Status of Eastern Greenland (1933)[1] the Permanent Court of International Justice had held that international agreements might be made verbally. It would be difficult, however, to frame a precise set of rules for international agreements to which the procedures of signature and ratification did not apply. The Commission might agree that a treaty meant an instrument in writing, without prejudice to the validity of oral agreements.

11. The reference in article 1, paragraph 1, to the two paragraphs of article 2 indicated the two forms of treaties, namely the single instrument, howsoever designated, which was signed by participating countries, and the international agreement embodied in a series of instruments, the most familiar of which was the exchange of notes. Article 1, paragraph 2, had been included in order to remove any doubt about the application of the code to instruments which, although in fact treaties, were not called treaties. The term "treaty" had, in fact, been used in its most compendious sense. True, it would be possible to use the term "international agreements", but that was rather cumbrous and "the law of treaties" was the traditional

[1] Publications of the Permanent Court of International Justice, *Judgments, Orders and Advisory Opinions*, series A/B, No. 53.

name for the subject. The great majority of agreements were now concluded by an exchange of notes rather than by a single instrument.

12. Article 2, paragraphs 1 and 2 (*Definition of "treaty"*) elaborated the ideas set out in article 1, but certain additional phrases had been incorporated and were discussed in the commentary.

13. Mr. BARTOŠ agreed that oral agreements, although not constituting a formal treaty, could exist *ad probandum*. Exchanges of notes, memoranda and the like were now the most usual form of international agreement. Modern practice tended to discard the formal instruments fashionable in the past. The codification of treaty law should certainly correspond to present practice. However, the phrase "international agreements not in written form" (article 1, paragraph 1) seemed somewhat too compressed and might well be redrafted. The validity of agreements not in written form might be left to be determined by judicial or arbitral decision. What was meant in article 1, paragraph 1, was certainly clear from the commentary, but, taken in isolation, that paragraph might not seem flexible enough.

14. Mr. PAL said he found some difficulty in discussing articles 1 and 2, since he was not clear whether the Commission was purporting to state the law which would apply to and affect the existing treaties. If it was, he was not sure whether the Commission intended merely to compile the existing regulations or might in any way depart from them in subsequent articles. If it did so, the validity of existing treaties thought at present valid might be jeopardized and affected injuriously. He would like that to not happen.

15. Mr. ALFARO agreed with the Special Rapporteur's definition of the term "treaty", but thought the reference to international agreements not in written form might be unnecessary and the last sentence in article 1, paragraph 1, might therefore be omitted. That sentence introduced an element of doubt: What was the law applicable to such agreement not in written form? The Commission might consider the advisability of including a special article defining such international agreements after it had completed its work on the code as a whole.

16. Mr. SCELLE agreed with Mr. Alfaro concerning the difficulties of including a reference to international agreements not in writing.

17. In his opinion, the title of the code was inaccurate. From the point of view of continental jurists, "treaties" meant documents drawn up in specific forms and with due solemnity and subject to ratification. It was not clear enough merely to state that all possible international agreements could be included under that title. For example, the word "treaty" could not apply to an exchange of notes; such an exchange constituted an international agreement, but not a treaty properly so called. He would therefore be inclined to alter the title to "Law of Treaties and International Agreements". Moreover, it was equivocal even to ask the question whether an oral agreement could be regarded as a treaty. Such an agreement might be legally valid, but could in no case constitute a treaty in the traditional sense.

18. He further considered there was some unnecessary duplication in the first two articles; article 2, paragraphs 1 and 2, reproduced a number of the provisions of article 1. The fundamental condition of a contractual instrument was reciprocal agreement between the contracting Governments; nevertheless, having reached agreement, the Governments concerned were free to choose the form in which they wished to set forth the instrument. It was possible, moreover, that a code be more suitable than a convention for embodying the law of treaties.

19. Mr. TUNKIN observed that the question whether the law of treaties should be embodied in a code or in a convention had been discussed before in the Commission. The question would undoubtedly arise again, but should not be examined at the present juncture; he therefore reserved his opinion on the subject.

20. With regard to the title of the provisions, he considered that the "law of treaties" was the best that could be found. The addition of a reference to international agreements would not clarify the situation.

21. Mr. Scelle had advanced some interesting arguments, which involved important questions of constitutional law; but the Commission should approach its work from the point of view of international law, on the assumption that constitutional provisions would not be affected. The general title, in which treaties meant agreements between States, was satisfactory from the point of view of international law alone.

22. He agreed with the Special Rapporteur that it was advisable to deal only with agreements between States which were in written form. Oral agreements were very rare in modern times and hence should be disregarded in the discussion, since the drafting of regulations to cover them would only complicate an already complex matter.

23. He doubted whether it was advisable to delete the last sentence of article 1, paragraph 1, as Mr. Alfaro had suggested. The final decision on that point might be reached later, after various other articles had been discussed. It would be useful, however, to retain the sentence for the time being, since otherwise there might be some doubt as to the Commission's attitude towards international agreements not in written form.

24. Mr. PAL did not think a change in the title of the code advisable. The Commission had been instructed to study "the law of treaties", and had undertaken that study. The term "treaty" either did or did not include any international agreement. If it did, then "law of treaties" would embrace it. If it did not, such an agreement would remain outside its scope. In either case, no change in title was called for.

25. He considered that Mr. Alfaro's suggestion to delete the second sentence of article 1, paragraph 1, and Mr. Scelle's suggestion to combine article 1 and article 2, paragraphs 1 and 2, were both drafting points, which should not be dealt with for the time being.

26. Mr. SCELLE said that he maintained his position with regard to the title. The Special Rapporteur himself had stated that treaties properly so called were much rarer than other international agreements; and yet the title "law of treaties" implied that the Commission should deal only with that specific and exceptional form of international agreement. The title should correspond to the actual subject of the code; it might be more satisfactory to use the title "law of international agreements, including treaties".

27. Mr. BARTOŠ said he opposed the deletion of the last sentence of article 1, paragraph 1, since it provides a solution for a difficult problem.

imply a preference for the one or the other variat

28. With regard to the title of the code, he observed that the question had been discussed for many years and should not be raised again in detail. Moreover, he was not sure that modern continental practice in the matter of ratification and validity in constitutional law was as rigid as Mr. Scelle seemed to assume. Only recently, the Yugoslav and French Ministries of Foreign Affairs had exchanged instruments ratifying an agreement concerning settlement of debts. The agreement related to the rights of French nationals abroad and its only legal basis was the French Civil Code; nevertheless, the heads of the Yugoslav and French delegations had decided that the agreement and its annexes should enter into force after ratification or approval by the competent authorities of both parties under constitutional provisions. According to Mirkine-Guetzevich, certain new constitutions expressly enumerated the types of treaties and international agreements which required ratification. Under Yugoslav law, which was analogous to that of some western countries, treaties and other international agreements of a military or political character as well as those which involved some amendment to municipal law were ratified by the National Assembly whereas the other treaties and international agreements were ratified by the Federal Executive Council. Thus, it was usually for government authorities to decide whether a particular instrument had to be ratified or not, and the decisive criterion was generally whether or not the international instrument in question affected matters within the domestic jurisdiction.

29. Accordingly, although Mr. Scelle was right in saying that treaties were solemnly concluded and must always be ratified, the same might be true in practice of other international agreements. The fact that the words "treaties and other international agreements" were used in many constitutions did not affect the Commission. The Sixth Committee of the United Nations General Assembly, in making rules for registration of treaties, had not construed the word "treaty" restrictively. Similarly, the Special Rapporteur had used the formula "law of treaties" to mean any instrument by which the States concerned undertook international contractual obligations.

30. Mr. LIANG, Secretary to the Commission, drew attention to Article 102 of the Charter of the United Nations concerning the registration of treaties, which referred to "every treaty and every international agreement . . .". He did not think that the word "treaty" had the same background in international law and in constitutional law; the distinction was further borne out by the reference to "treaties and other sources of international law" in the Preamble to the Charter, for those words were certainly not used in the strict sense in which the word "treaties" was understood in constitutional law. The same was true also of the reference to "the interpretation of a treaty" in Article 36 of the Statute of the International Court of Justice and of the reference to "international conventions, whether general or particular" in Article 38 of the Statute. Accordingly, there were many precedents for the use of the word "treaty" in the generic sense; application of the specific, or constitutional meaning might cause difficulties.

31. Mr. HSU considered that the title should be left in its present form for the time being. While he appreciated Mr. Scelle's difficulty, which was not peculiar to continental jurists, he agreed with the Secretary to the Commission that there was authority for using the word "treaty" in a generic sense.

32. He also believed that it would be unwise to delete the last sentence of article 1, paragraph 1.

33. Mr. YOKOTA agreed that the second sentence of article 1, paragraph 1, should be retained. The validity of international agreements not in written form was not prejudiced by article 1; that seemed to be the correct approach, in view of the Eastern Greenland case, in which the validity of a verbal agreement had been doubted, but had been upheld by the Permanent Court of International Justice.

34. Mr. TUNKIN observed, with regard to the title of the code, that the nomenclature of international agreements was becoming less and less important. The same type of agreement was often given a different title, as might be seen from the United Nations Treaty Series. Moreover, the USSR had recently concluded a consular treaty with Austria, which was analogous to consular conventions concluded with other countries. The simplest solution would be to assume that the term "treaty" comprised all forms of international agreements, or more precisely, all forms of express agreements between States embodied in formal instruments. The alternative would be to entitle the code "law of international agreements", which would avoid possible difficulties with respect to the constitutional law of some States. Personally, however, he would prefer to retain the original title.

The meeting was suspended at 11.25 a.m. and resumed at 11.50 a.m.

35. Mr. AMADO thought that, although the text of the second sentence of article 1, paragraph 1, was generally clear, the use of the word "validity" might give rise to doubts, in view of the many different aspects of the concept of validity. It might be better to say that the obligatory force of such agreements would not be prejudiced.

36. The CHAIRMAN, speaking as Special Rapporteur, summarized the views that had been expressed on article 1 and article 2, paragraphs 1 and 2.

37. The consensus of the Commission seemed to be that the code should apply only to international instruments in written form. Some differences of opinion had, however, arisen on the question whether or not to refer at all to international agreements not in written form. Although the question was primarily one of drafting, he believed that, if the article merely stated that the code related only to agreements in writing, the impression might be created that agreements not in writing were necessarily not valid. The drafting of the sentence might be improved later, but it was important to stress that the code would not affect the situation of unwritten agreements, dependent on general legal principles outside the scope of the code. He agreed with Mr. Amado that the word "validity" might be changed to "obligatory force".

38. In reply to Mr. Pal's question whether the code would apply to existing treaties or only to future treaties, he observed that the point was not peculiar to the subject of treaties. Whatever subject was taken up for codification, the rules codified might or might not apply to existing situations. In the present case, the Commission was concerned with codifying the existing law of treaties, on which treaties already concluded were supposed to be based. The subject was a general one and there was no intention of modifying the effect of the provisions of specific instruments.

39. He appreciated Mr. Scelle's difficulties with regard to nomenclature and had drawn attention to those complications in paragraph 10 of his introduction. It might be possible to change the title to "law of treaties and other international agreements"; that would be better than the words "treaties and international agreements" used in the Charter, which implied that a treaty was not an international agreement. But even if the title were changed, the difficulty of the words to be used in each article would remain, since the use of the whole new phrase would lead to drafting complications; a comprehensive term to cover different types of agreement was essential.

40. He agreed with the speakers who had pointed out that the word "treaty" had both a generic and a specific meaning, the generic meaning being understood to cover international agreements of all kinds. That was yet another reason why the concepts could not be separated. Mr. Scelle had pointed out that a treaty was a particular type of instrument, solemnly concluded and always subject to ratification; those formalities, however, applied only to the conclusion of a treaty, while in other respects, such as termination, operation and effects, certain legal forms applied indiscriminately to all international agreements. Since only in the matter of conclusion was there a clear-cut distinction between a treaty and another international agreement, it was desirable to deal comprehensively with the instruments concerned. The title might, however, be altered, provided it was made quite clear that the change would be for the sake of convenience only. The last sentence of article 2, paragraph 2, moreover, had been included expressly in order to introduce a distinction between treaties properly so called and other agreements.

41. Mr. Scelle had also suggested that article 1 and article 2, paragraphs 1 and 2, might be combined. That could be done, provided that the technical distinction between the scope of the code and the definition of "treaty" was recognized and maintained. He would redraft those paragraphs along the lines suggested and would submit them to the Commission for further discussion in the near future. In that connexion, he drew attention to article 2, paragraph 4, which made it clear that the question whether or not an instrument ranked as a treaty under international law did not affect its status for the purposes of constitutional law. In other words, the fact that the code dealt with instruments which were not actually called treaties did not mean that instruments such as executive agreements should become treaties for national purposes; such agreements were governed entirely by national law. Only international legal principles were dealt with in the code.

42. Referring to article 2, paragraph 3, and to the relevant commentary, he observed that he had felt it desirable to include the paragraph because confusion had sometimes arisen between a treaty and a unilateral declaration which gave rise to an international obligation. The latter, if truly unilateral, could not be considered a treaty or international agreement because the very idea of a treaty implied two or more parties. He had considered it advisable to bring out the distinction in the code, of course without prejudice to the international effect of the unilateral declaration. That, he recalled, had also been the position of Sir Hersch Lauterpacht.

43. Mr. AMADO considered article 2, paragraph 3, somewhat redundant in view of the definition contained in paragraphs 1 and 2, which referred to instruments made between "entities", the plural word clearly excluding a unilateral instrument or declaration.

44. Mr. LIANG, Secretary to the Commission, pointed out the connexion between the present discussion and the declaration accepting jurisdiction mentioned in Article 36 of the Statute of the International Court of Justice. Some writers tended to classify that declaration as an agreement while others viewed it as a form of accession to an existing agreement or treaty rather than as a new agreement.

45. Mr. BARTOŠ observed that there were different kinds of unilateral declarations. There were declarations *urbi et orbi,* and there were declarations addressed to particular States containing an offer accepted by the beneficiaries, for example, declarations made by former suzerain States on the occasion of the accession to independence of dependent territories. Whether such a declaration constituted an international agreement was still controversial and it was a question which the Commission might wish to discuss without necessarily referring to it in the code.

46. Mr. PAL expressed the view that a treaty itself might contain an open offer which, when accepted, would constitute a distinct treaty. The acceptance would in form be unilateral, but it would not be so in substance. He felt that the members of the Commission were agreed in principle and that the difficulty was essentially a matter of drafting.

47. Mr. EL-KHOURI did not think that the International Court of Justice would consider a unilateral declaration binding unless it was accepted by the party to which it had been addressed. As an example, he cited the Joint Declaration by the United States, the United Kingdom and France regarding the frontiers of countries in the Middle East (25 May 1950). He did not think that any international obligation had arisen from that declaration in the absence of a response from the parties in the region concerned.

48. Mr. TUNKIN considered that a unilateral declaration or instrument gave rise to international obligations if there was an express or tacit agreement to which the declaration referred. However, the subject had many ramifications which would be difficult to deal with in a brief paragraph. As the scope of the code was already sufficiently defined in article 1, paragraphs 1 and 2, he did not consider it indispensable to mention unilateral instruments and declarations, especially as the code was to be limited to express agreements. Accordingly, he agreed with Mr. Amado that article 2, paragraph 3, could be omitted.

49. Mr. ALFARO said that he agreed with the substance of the first sentence of paragraph 3, which would cover not only an exchange of notes but also a form of agreement resulting from separate unilateral declarations.

50. He recalled that in 1904 a dispute had arisen between the Governments of Panama and the United States of America regarding the interpretation of the Convention for the Construction of a Ship Canal of 1903. The United States Secretary of War, Mr. Taft, had then proceeded to negotiate an agreement with the Government of Panama, which took the form of an executive order issued by the President of the United States and a decree issued by the Government of Panama. In that case the two instruments, representing a concurrence of wills, had formed the "integral whole" referred to in the first sentence of paragraph 3.

51. The example he had cited showed that a unilateral instrument was capable of constituting a treaty, and therefore it seemed to him that the second sentence of paragraph 3 might be amended to read:

"A unilateral instrument, declaration or affirmation may be binding internationally and may be equivalent to a treaty if it amounts to, or constitutes, an adherence to a treaty or acceptance of a treaty or other international obligation."

52. Mr. AMADO disagreed. There might have been a concurrence of wills in the case cited by Mr. Alfaro, but there had been no treaty in the sense of the single formal instrument described in article 2, paragraph 1.

53. Mr. HSU considered the second sentence of paragraph 3 somewhat contradictory. It seemed to him that an instrument, declaration or affirmation which was binding internationally had to be considered a treaty, even if it was unilateral, though possibly the Special Rapporteur had intended the word "binding" to mean morally binding. The question could not be excluded from a codification of the law of treaties simply because it was difficult. At least some reference to it would have to be made.

54. The CHAIRMAN, speaking as Special Rapporteur, agreed that there were unilateral declarations which, if taken in conjunction with other declarations, created international obligations. That was the case in the examples cited by Mr. Liang, Mr. Bartoš and Mr. Alfaro. The first sentence of paragraph 3 had been drafted with a view to covering such cases, but there might be room for improvement in the drafting.

55. The case he had had in mind in drafting the second sentence of paragraph 3 was that of a purely unilateral declaration, which, although without response, might be deemed internationally binding. If State A made a unilateral statement of its intentions, and States B and C, without formally accepting or recognizing the statement, subsequently acted in a way in which they would not have acted but for the statement of State A, it might be found that State A had assumed certain obligations. It was that case that he had sought to exclude in the second sentence of paragraph 3.

56. He agreed with Mr. Pal that there was agreement in principle, and indicated that he would prepare a new draft in the light of the discussion, either making certain drafting changes in article 2, paragraph 3, or possibly, so amending paragraph 1, as to permit the omission of paragraph 3.

57. Mr. SANDSTRÖM said that a unilateral declaration could not be internationally binding unless it presented an offer to assume obligations towards other States; it could not be binding simply because other States thought that it was binding. The same applied to the acts or announcements of a Government directed to its own citizens.

58. The CHAIRMAN, speaking as Special Rapporteur, said that the word "binding" in paragraph 3 denoted a legal obligation. Treaties were not the only source of international obligations.

59. Mr. TUNKIN observed that the Commission could hardly expect States to accept theoretical formulations of what constituted international obligations. He failed to see the need after positively defining a treaty for specifying what was not a treaty.

The meeting rose at 1.5 p.m.

481st MEETING

Wednesday, 22 April 1959, at 9.45 a.m.

Chairman: Sir Gerald FITZMAURICE

Welcoming statement on behalf of the Director-General of the International Labour Office

1. The CHAIRMAN said that, as members of the Commission were aware, arrangements had been made for the Commission to meet for the remainder of the eleventh session at the International Labour Office in order to facilitate the holding of the Foreign Ministers' Conference at the Palais des Nations.

2. Mr. JENKS, Deputy Director-General of the International Labour Office, welcoming the Commission on behalf of the Director-General, said the International Labour Organisation (ILO) was happy to extend the hospitality of its premises to the Commission firstly because in doing so it would be facilitating arrangements for the Foreign Ministers' Conference on the outcome of which the future of peace and of law in the years immediately ahead might in a significant measure depend, secondly because of the long-standing arrangements whereby in times of stress the United Nations and the International Labour Office pooled their conference facilities at Geneva for the common good, thirdly because of the presence in the Commission of so many old friends of the ILO, and finally because of the International Law Commission's special mandate from the General Assembly to promote the progressive development of international law and its codification.

3. Those who worked for the International Labour Organisation took a certain pride in having made a distinctive contribution to the progressive development of international law. The ILO administered a body of treaty obligations which was perhaps unparalleled in scope and complexity, comprising 111 conventions, 92 of them already in force, which had received 1,892 ratifications and 1,382 declarations of application in respect of non-metropolitan territories, covering 76 countries and 94 territories. It was not too much to say that that body of obligations had had in the course of a generation an impact on the social legislation and social policy of the world which, if it proved to be enduring as the ILO believed it would, would in time be regarded as comparable to that of Justinian's codification on the development of civil law.

4. The ILO had followed with the closest interest the work of the International Law Commission in its bearing of its deliberations on the activities of the ILO. In a number of connexions it had found the Commission's conclusions, notably with respect to reservations to conventions and certain aspects of the law of the sea, of substantial value in its own work. It had every confidence that in future work on such matters as the law of treaties and problems relating to the legal status of international organizations the Commission would keep the special problems of the ILO in mind. For its part, the ILO would be happy to supply any information which might facilitate the Commission's task.

5. The ILO hoped that its facilities would contribute to the success of the session and had no doubt that the Commission's deliberations would constitute a contribution of lasting value to the development of international law.

6. The CHAIRMAN asked Mr. Jenks to convey the Commission's gratitude to the Director-General of the International Labour Office, and thanked him for his interesting statement on the contribution of the ILO to international law, in particular the law of treaties. By coincidence, the law of treaties was at present the subject of the Commission's substantive discussion. The Commission would be happy in due course to bear in mind the points to which Mr. Jenks had alluded.

7. Mr. LIANG, Secretary to the Commission, speaking on behalf of the Secretary-General of the United Nations, asked Mr. Jenks to convey a message of thanks to the Director-General of the International Labour Office.

Law of treaties (A/CN.4/101) (*continued*)

[Agenda item 3]

ARTICLE 2 (*continued*)

8. Mr. YOKOTA said that the views expressed by some members at the end of the last meeting compelled him to make a contribution to the discussion on unilateral declarations, to which reference was made in article 2, paragraph 3, of the draft code prepared by the Special Rapporteur.

9. At the 480th meeting, the Special Rapporteur had suggested (para. 54) that the examples of unilateral declarations cited by Mr. Liang, Mr. Bartoš and Mr. Alfaro were treaties in the sense of the draft code. Mr. Yokota was not quite satisfied with that position. While he was inclined to accept the view of many writers who considered a declaration under Article 36 of the Statute of the International Court of Justice, in conjunction with other similar declarations, as an international agreement, it should not be forgotten that there were some scholars who did not share that opinion.

10. As to the example cited by Mr. Alfaro at the 480th meeting (para. 50), it was doubtful in his view whether the Executive Order and the Decree issued by the United States of America and the Republic of Panama respectively constituted a treaty. All that could be said was that there had been an agreement between the two States—an agreement that could not be qualified as a treaty in the sense of the draft code because it had not been embodied in written form—and that the Executive Order and Decree had been issued in pursuance of that agreement. However, they were not themselves elements of the agreement. What was beyond doubt was that neither the Executive Order of the United States nor the Decree of Panama was governed by international law. On the contrary, each was governed by the municipal law of the respective States, and that was the most convincing evidence that neither was part of a treaty. The fact that the rescinding of the Executive Order by the United States Government had given rise to an international controversy changed nothing, for the controversy, from the strictly legal point of view, was due not to the rescinding of the Order but to non-compliance with the agreement which had given rise to the Order The situation was comparable to that which would exist if a State party to a treaty repealed legislation or regulations enacted in pursuance of a treaty. The State in question would be responsible, not for having repealed its own enactments, but for having failed to comply with the terms of the treaty.

11. However, he did not wish to insist on the question of unilateral declarations, a question which was complex and controversial and which remained to be decided in further practice. He suggested that the Commission should refrain from formulating any provision on the subject and agreed with Mr. Amado (480th meeting, para. 43) and Mr. Tunkin (*ibid.*, para. 48) that paragraph 3, or at least the second sentence of that paragraph, could be omitted.

12. Mr. BARTOŠ said that his remarks at the previous meeting concerning unilateral declarations or instruments had been made in order that the official record might show that the Commission had discussed a question on which international legal opinion was still divided and which for that reason could not be codified. In view of the discussion that had since taken place, he had some further remarks to make on the question, again not with a view to its inclusion in the code.

13. Among the different kinds of unilateral declarations and instruments was the unilateral declaration which constituted an additional agreement to a basic treaty. Such was the case of a declaration accepting the jurisdiction of the International Court of Justice, to which reference had been made by the Secretary of the Commission. The Statute of the Court was the basic treaty and declarations under article 36 of the Statute constituted acceptance of that treaty under certain conditions. There had even been a case in which the Court itself had held that a combination of such declarations, by the Governments of Norway and France in the case concerned, had created a contractual relationship in respect of the Court's jurisdiction.

14. On the contrary, there were unilateral declarations independent from the existing agreements. In his lectures and writings he had always taken the view, based on a careful study of the practice, that, if a unilateral declaration was followed by certain international negotiations designed to give effect to the offer made and if the declaration was referred to in the international agreement arrived at, then the declaration constituted an international contractual obligation by reason of the fulfilment of obligations under the agreement. It was equally true that a unilateral declaration made by one government to another government with a view to acceptance by the latter for the purpose of regulating their international relations certainly would contain contractual elements if the declaration was accepted.

15. He was bound to say that neither theory nor practice offered a clear-cut solution to cases of the kind alluded to by Mr. Yokota. Opinions varied as to whether in such cases making a declaration or issuing a decree or revocation were wholly matters of domestic jurisdiction or whether there had been a clear contractual obligation. Practice had shown that in most cases the relationship could be considered a mixture of a *modus vivendi* and a contractual relationship.

16. The whole question was not so much a question of legal doctrine, a question that could be regulated in a general way, but a practical question that called for separate examination in each particular case. Since it was a problem which had not found a universal solution and which had to be left to be further developed by practice, the Commission could in good conscience not attempt to codify it.

17. The Commission must be careful not to view unilateral declarations, even those specifically addressed to other governments, as a matter of protecting *droits acquis* or as a matter of stipulations which could be invoked by others, because stipulations were made not in unilateral declarations but in agreement actually concluded *inter alios*. Above all, the Commission should

do nothing that recognized the contractual character of unilateral declarations and instruments. That was a matter which had to be decided in each particular case.

18. Mr. EL-KHOURI said that, if the second sentence of paragraph 3 was retained, it would be necessary to make clear that where a unilateral instrument or declaration concerned, or was addressed to, more than one State it could not be binding unless accepted by all the States concerned and not just by one of them.

19. Mr. EDMONDS said that he would favour the retention of the second sentence of paragraph 3 because it explained why unilateral instruments and declarations were omitted from the code. All it said was that a unilateral declaration or instrument might or might not be binding, depending upon the particular conditions of the case.

20. Mr. AMADO recalled that it was he who had originally suggested (480th meeting, para. 43) the omission of paragraph 3. He had done so on the ground of economy in drafting. Paragraph 1 defined a treaty of the classical type, while paragraph 2 alluded to other forms of international agreement equivalent to treaties. The second sentence of paragraph 3 was a kind of observation, a reflection, which really had no place in a code.

21. Mr. SANDSTRÖM saw no reason for retaining even the first sentence of paragraph 3. It did not say anything that was not already included in paragraphs 1 and 2.

22. Mr. ALFARO suggested that, before continuing the discussion of article 2, the Commission might wish to hear what the Special Rapporteur had to say concerning his plans for redrafting the article.

23. The CHAIRMAN, speaking as Special Rapporteur, said he still felt that there was not too much difference among the members of the Commission on the substance of the question and that the problem was really a matter of finding the right words. The remarks of his colleagues had been very interesting and he would like to think about the problem a little longer before submitting a new draft for article 2.

ARTICLE 1 (*continued*)

24. Mr. YOKOTA asked for an explanation of the status of article 1, paragraph 3. At the 480th meeting, the Special Rapporteur had explained (para. 9) that the Commission had decided not to consider treaties between international organizations or between them and States, but the commentary on that paragraph (A/CN.4/101) gave the impression that the Commission had decided to include such a clause, albeit provisionally. He himself was in favour of restricting the code for the time being to relations between States.

25. The CHAIRMAN, speaking as Special Rapporteur, said that in the commentary he had based his view on what he believed to have been the decision taken by the Commission some years previously. The Commission had initially decided to include international organizations on a provisional basis, but later had felt that, without ruling out international organizations, it should begin by restricting the code to treaties between States and then see what additions or alterations might be necessary to cover international organizations as well.

26. Mr. LIANG, Secretary to the Commission, said that a summary of the Commission's initial views on the subject appeared in the Commission's report for 1950.[1] The last time the Commission had discussed the matter had been in 1956, when the present Special Rapporteur's summary of the Commission's views had been confirmed by the Chairman.

27. The CHAIRMAN, speaking as Special Rapporteur, said that he was certainly under the impression that, at one stage, a few articles containing references to international organizations had been adopted on a preliminary basis. In 1956, at any rate, the Commission had entertained no doubts that international organizations such as the United Nations possessed treaty-making capacity, an advisory opinion which had been confirmed by the International Court of Justice in the case concerning the reparation for injuries suffered in the service of the United Nations[2] and had agreed that they should be covered by the code. Complications would, however, be introduced if an attempt were made to deal simultaneously both with treaties between States and with treaties between international organizations. It had therefore been thought preferable that the code should be drafted in the first place to cover treaties between States and that subsequently the Commission might see whether the code would apply, with some modifications, to international organizations or whether they must be dealt with in a separate section. Article 2, paragraph 1 as it stood would cover both matters, since the reference to the State had been deliberately omitted, though many articles might not readily cover both cases in the form of words.

28. Mr. TUNKIN, supported by Mr. YOKOTA, proposed that the Commission decide first to deal with treaties among States and then to examine to what extent the articles were applicable to treaties concluded between international organizations and between them and States.

It was so agreed.

ARTICLES 3 TO 9

29. The CHAIRMAN, speaking as Special Rapporteur and referring to article 3 (*Certain related definitions*), said that when he had drafted his first report it had occurred to him that it might be useful to include a definition of the State, but he had since concluded that that was not really necessary and that indeed, it might be unwise to spend time trying to attempt such a definition. The concept was not peculiar to treaty law but was common to the whole field. There was, however, one aspect which concerned treaty law, namely, treaty-making capacity, which must be dealt with in the code. The proper stage to do so would, however, be in connexion with essential validity, the subject of his third report. Article 3 might therefore be left in abeyance for the moment.

30. Article 4 (*Ex consensu advenit vinculum*) and article 5 (*Pacta sunt servanda*) might also be left in abeyance. They concerned fundamental principles of treaty law, but as he had stated in the commentary on articles 4 to 9 he had some doubts whether they were appropriate in that place. The question whether they should be included at that point in the code or further on had led to some discussion in 1956 and the Commission had felt it might be better if they were inserted where they strictly belonged, in the section on the effects of treaties. They had therefore been

[1] *Official Records of the General Assembly, Fifth Session, Supplement No. 12*, para. 162.

[2] *I.C.J. Reports 1949*, p. 174.

treated very much more fully in his fourth report (A/CN.4/120). The Commission would eventually have to decide the order of the articles when it had completed the code.

31. The same was true of article 6 (*Res inter alios acta*), which was a very complex question and with which he hoped to deal in his next report.

32. Article 7 (*The law governing treaties*) might be considered at the present session, including the question whether it should be inserted at all; as might article 8 (*Classification of treaties*), which might not be essential but bulked prominently in legal textbooks.

33. Article 9 (*The exercise of the treaty-making power*) might be rather more appropriate in the section on essential validity. What was involved was the reality of the consent given by States. It might be said that, in some cases, that consent was not real because the necessary constitutional processes had not been carried out. He suggested that the Commission discuss the substance of articles 7 and 8 and the allied question whether to include articles on those subjects in the code and, if so, where they should be placed.

34. Mr. SCELLE, referring to the Special Rapporteur's suggestion that consideration of article 3 be deferred, said it should be stated as early as possible in the code that States were responsible for treaties. The definition in article 3 (*a*) (i) of the term "State" as "an entity consisting of a people inhabiting a defined territory" was very interesting, since the people was the essential element in the personality of a State. Some authors foolishly suggested that a State was the government, but there could be no government if there were no people. Since the Charter of the United Nations had recognized the right of peoples to self-determination, the concept of the people participating in the conclusion of treaties had gained ground. More important, however, was to state at the outset that treaties were concluded by States, whatever their components. A definition of the State need not necessarily be included in the draft code, but there should be a statement that the State was the personality responsible for the ratification and execution of treaties.

35. Another point to which the Commission should revert, perhaps in connexion with the fourth report, was the problem how far a treaty, whether constitutional or non-constitutional, was valid or not. In his opinion, a treaty could modify constitutional law. Admittedly, that was a controversial point and need not be settled in the early articles.

36. Article 4 was essential. The foundation of the treaty obligation was consent. That should be stated at the very beginning of the code. A treaty was an obligation assumed, not by one, but by two or more peoples and was an essential beginning of federalism and, hence, of an international community.

37. Article 5 might be left in abeyance, since some treaties were *servanda* whereas others need not be, since they could not be valid indefinitely. Article 6 might also be deferred.

38. Mr. TUNKIN supported the Special Rapporteur's suggestions. The definition of the State in article 3 might reasonably be omitted, on the principle *omnis definitio periculosa est*. It was not that the Commission should shirk complicated subjects, but definitions were not always essential in such instruments, especially if they were to be accepted by States. No definition or concept which purported to be a scientific definition rather than a norm of conduct should be inserted in any draft code. There was no reason to expect that States would agree on certain concepts of a scientific nature. Furthermore, he agreed that the consideration of articles 4, 5, 6 and 9 might be deferred until the fourth report was discussed. Such a decision would not involve any question of the placing of the articles, which could be discussed when the Commission saw all the articles before it.

39. Mr. YOKOTA agreed that article 3 might be omitted. The definition of a State was not peculiar to treaty law. The pertinent question was the capacity of a State to assume rights and duties. To include a definition of the State in every code would be otiose. When the Commission had discussed diplomatic intercourse and immunities at its previous session and the question had arisen what States had the right to establish diplomatic intercourse, the Commission had merely stated its view in the commentary on the relevant article. In connexion with the law of treaties it might also be preferable to use the term "State" without defining it and, if necessary, place a similar explanation in the commentary. The discussion on articles 4 to 9 might well be deferred, but as they dealt with fundamental principles of treaty law, he agreed with Mr. Scelle that they should be placed at the beginning of the code.

40. Mr. EL-KHOURI observed that the first sentence in article 3 (*a*) (i) was very important but might be better discussed in connexion with the capacity to conclude treaties and undertake international obligations. That topic would include the question of superintendent States and subordinate States. A State might create a government for a small portion of its territory and then set up treaty relations with the government established by itself. In his opinion, a superintendent State should not be permitted to conclude a treaty with a subordinate government, such as one under trust or mandate, nor to impose international obligations on such a government *vis-à-vis* itself. That point, which raised very difficult problems, should preferably be discussed separately.

41. Mr. BARTOŠ supported the Special Rapporteur's suggestions. He agreed that *omnis definitio periculosa est*, but treaties did sometimes require certain explanations, which were rather definitions for the purpose of execution than scientific definitions, and such definitions, by virtue of their use and extension, did in practice affect scientific definitions. There was danger, however, in linking the personality of a State as a subject of international law too closely with its treaty-making capacity, since two separate questions were involved.

42. Although he accepted the suggestion that the discussion of certain articles be deferred, he must say with regard to article 5, paragraph 7, that the point of view on *rebus sic stantibus* hardly squared with his view of juridical science. The question arose what was in law a profound change in conditions. If it was a new state of fact and law, it would be for the State concerned to request the revision or extinction of the treaty, since no person could be judge in his own cause. If revision brought no satisfaction, extinction might have to be granted. There is a controversy in the doctrine whether a State would be obliged to carry out the obligation until the end of such procedure and until the changed conditions had been established as a legal fact or whether the change in conditions gave *ipso facto* the right to modifications the existence of which would only be established by an assertive decision

of arbitration. He entirely agreed with the Special Rapporteur's basic assumption that a State could not unilaterally declare that it was not bound to comply with a treaty. It must take legal steps, such as arbitration, and request the recognition of the fact that conditions had changed. A State could put forward a plea, but could not claim a right, to avail itself of changed conditions. The latter part of the sentence in article 5, paragraph 7, might be changed to embody the concept that only in exceptional circumstances could *rebus sic stantibus* give rise to a situation which might determine the revision or extinction of a treaty.

43. Mr. MATINE-DAFTARY wished to make some general remarks on the spirit in which the articles concerned had been drafted. In his opinion, they were unduly rigid. They had been drafted on the basis of work done by eminent British jurists; it should be borne in mind, however, that the United Kingdom had a well-established Parliamentary and constitutional system, while many new States had no such tradition and were subject to *coups d'état* and the emergence of *de facto* governments. The situation of such States must be taken into account, particularly in respect of article 3, paragraphs (*a*) (i) and (ii); if the government was constitutionally established, the provision would stand, but exceptional circumstances should be taken into consideration.

44. Mr. Bartoš's argument concerning *rebus sic stantibus* seemed to be cogent and Article 14 of the United Nations Charter should also be borne in mind. It was difficult to state absolutely that a treaty was an administrative act. He therefore appealed to the Special Rapporteur to take into account the need for flexibility, in view of the difficulties that such rigid provisions might create for certain States.

45. Mr. PAL thought the Commission was not discussing the merits of the articles, but only the question whether they should be omitted or retained. He agreed that article 3, with its definition of the State, and articles 4 to 6 should be omitted for the time being. If in definition there really lay danger, there lay greater danger in an attempt to define the State in the case at issue, especially since the Statute of the International Court of Justice and the United Nations Charter referred to States without any definition. Everyone was aware of the meaning of the word and a definition in a specific case might unwittingly limit or widen the general concept of that entity as already adopted in the basic Charter. As regards articles 4 to 6, he still held to his views expressed in 1956 and believed that the formulation of these fundamental principles of treaty law was not out of place and would not in any way detract from the utility or the elegance of presentation of that law if placed early in the draft. He, however, agreed to the postponement of their discussion for the time being.

46. Mr. HSU thought that the general opinion favoured the omission of article 3, despite Mr. Scelle's attempt to retain it. That omission had been a foregone conclusion, since international legal bodies had consistently failed to approve a satisfactory article on the definition of the State.

47. On the other hand, it would be wise to state somewhere in the code who would represent States entering into treaty relations.

48. The CHAIRMAN, speaking as Special Rapporteur, agreed with Mr. Hsu that the general opinion favoured the omission of article 3. While the Commission seemed to agree with Mr. Scelle on what the definition should be, it considered it inappropriate to provide such a definition only in one branch of international law, since it affected all aspects. As Mr. Pal had said, there was some danger that a definition might affect the status of certain entities regarded as States and even the status of international organizations. The Commission could, however, give effect to Mr. Scelle's suggestion by including a reference to the State as a treaty-making entity in the revised draft of article 2.

49. He had proposed that consideration of articles 4, 5 and 6 should be deferred; there had been no objection to that course, but Mr. Scelle had said that article 4 should be placed near the beginning of any code on treaties. The substance of article 4 was dealt with in greater detail in his fourth report; when the Commission came to study that report, it might also consider where to place article 4, but its examination should be deferred for the time being.

50. He believed that article 9, paragraph 1, although somewhat controversial, would meet the point just made by Mr. Hsu, and agreed that the code should include some reference to the treaty-making power and constitutional processes. Article 9 might have to be considerably revised in the light of Mr. Matine-Daftary's remarks, but he did not think that it should be omitted. The point related less to formal validity than to the reality of consent, in the light of the question whether, when a government purported to give its consent, the necessary constitutional processes had been carried out and, if those processes had not been carried out, what the international effect would be and whether or not true consent could be assumed. The question was dealt with in detail in his third report, on essential validity.

51. That left the Commission with articles 7 and 8, which were essentially preliminary and, if retained, should be placed at the beginning of the code.

52. In connexion with article 7, he drew attention to paragraph 17 of his commentary on the articles, to the effect that the article was possibly redundant, or even slightly inconsistent, but that something of the kind seemed desirable. It might be asked whether a treaty could be governed by anything else than international law and even whether it was wise to suggest such a possibility. Of course, the way in which a State dealt with treaties was governed by municipal law, but on the international plane the matter must be governed by international law. In some cases, international law would have regard to situations existing under municipal law, but that effect in itself derived from a principle of international law, and not because any municipal law had a direct effect on an international instrument. In view of that argument, it might be desirable to include a provision on the lines of article 7, but the Commission might feel that the whole question was so self-evident that it was unnecessary to set it forth.

53. Mr. SCELLE agreed with the Special Rapporteur's interpretation, but pointed out that the competent national treaty-making authorities must respect the constitution of the contracting State; otherwise, it might be argued that the treaty was null and void. The reason for that, however, was that international law provided that the representatives of States must respect their constitution, since it was that constitution which authorized them to conclude the treaty. Thus, national treaty-making agents acted in a double capacity, under both international and municipal law.

54. Article 7 was accurate in a sense, but it should be specified that from a certain point of view all questions relating to treaty-making were also governed to some extent by constitutional law, because the delegation of international law to national representatives meant that treaties must be made in accordance with the constitutional law of the contracting State. Thus, the last phrase of the article, stating that all questions relating to the conclusion, application and execution of a treaty were governed by international law, might lead to some confusion. It would be wise to be more explicit and to state that, although representatives acted under international law, the rules of that law delegated to the constitution of a State competence to instruct certain organs and representatives to conclude and execute treaties.

55. Mr. BARTOŠ pointed out that, under international law, no rule of municipal law should prevent the execution of a treaty. Mr. Scelle had apparently raised the question of the capacity of the representatives to conclude treaties and, hence, the consequent validity of the treaty. But even after the treaty had been concluded under valid conditions, from the point of view of the capacity of the State representatives, there still might be cases where international law would have regard to situations existing under municipal law. He agreed with the Special Rapporteur's interpretation and thought that such cases would be covered by the words "will be governed by international law". Thus, the question that Mr. Scelle had raised, which seemed to apply to the capacity of State representatives to make treaties, was no longer involved once the treaty had been concluded under valid conditions. If limited to the acceptance of obligations, the argument was sound, but it could not be applied to changing obligations, including cases where constitutional law ran counter to international law.

56. Mr. TUNKIN said he was in favour of the Special Rapporteur's alternative suggestion. The article seemed to be redundant, since it was self-evident that problems relating to treaties between States were governed by international law.

57. Moreover, the wording of the article was not quite accurate, since some questions on the domestic plane were governed by the municipal law of States.

58. The code should not lay down the monistic or any other point of view as valid; it would be enough to state the undeniable fact that treaties between States were governed by international law. The Commission should not complicate an already very complicated task; it should not include in the code any provisions which were not absolutely indispensable and should lay down rules of conduct, although some definitions might be required.

59. Mr. SCELLE said that, in principle, a treaty was applicable in a given country in accordance with the law of that country, unless specific provisions were made to the contrary. The point to be borne in mind, however, was that, if it proved impossible to apply the provisions of the treaty in accordance with municipal law, the treaty took precedence and the law had to be modified. That was the hierarchy between the rules of international law and those of municipal law. Accordingly, the list of questions relating to treaty-making in article 7 was too broad; when necessary, those functions were governed by international law, but when States were capable of executing treaties in accordance with their municipal law, there was no need to allude to international law.

60. Mr. MATINE-DAFTARY considered that a distinction should be made between constitutional and ordinary law, under the general heading of municipal law, especially in the case of States with new constitutions. A treaty had priority over municipal law, but the national constitution was the basis of all treaty-making capacity. Accordingly, it might be advisable to state that international law must take into account the constitutions of contracting States, especially in the matter of concluding treaties.

61. Mr. SCELLE said that he could not agree with that thesis. A treaty, when constitutionally concluded, could oblige a State to change its constitution.

62. Mr. BARTOŠ fully agreed with Mr. Scelle. For example, some States failed to execute their international obligations, invoking separation of powers and asserting that their courts were bound by their constitution, and not by international treaties. Municipal law could never be invoked to prevent the application of international law.

The meeting rose at 1.5 p.m.

482nd MEETING

Thursday, 23 April 1959, at 9.45 a.m.

Chairman: Sir Gerald FITZMAURICE

Law of treaties (A/CN.4/101) (*continued*)

[Agenda item 3]

ARTICLE 7 (*continued*)

1. Mr. MATINE-DAFTARY pointed out, with reference to the debate at the end of the previous meeting, that there had been some misunderstanding concerning his position. He had merely wished to make it clear that all treaties must conform with the provisions of the constitutions of the contracting States in force at the time of their conclusion.

2. Mr. PAL agreed with Mr. Tunkin—though for different reasons—that the article as it now stood should be omitted. All the questions relating to treaty-making enumerated in article 7 were already dealt with in the Special Rapporteur's reports. Thus, conclusion was dealt with in the first report (A/CN.4/101), validity in the second (A/CN.4/107) and the third (A/CN.4/115), force in the first report, effect in the fourth report (A/CN.4/120), application, execution and interpretation in the third and fourth reports and termination in the second and fourth reports. The provision in article 7 was to the effect that those questions would be governed by international law. But the relevant provisions of the said international law should be embodied in whatever final draft the Commission prepared concerning the law of treaties; the article as it stood might convey the mistaken impression that the international law governing those questions might be found elsewhere. The proper way of expressing the intent of that article perhaps would be to refer to those subsequent provisions of the draft as the governing rules.

3. Furthermore, the "unless" clause at the beginning of article 7 was not strictly accurate, for at least some of the provisions to be prepared by the Commission would certainly be applicable in all circumstances. Accordingly,

he considered that the article should be omitted for the time being; the Commission would be in a position to decide only after it had considered all the relevant articles, what questions would be subject to agreement between the parties.

4. Mr. AMADO considered that the article was far too broad. He agreed with previous speakers that neither the monistic nor dualistic doctrine of international law should be reflected in the code. The constitutions of some countries required legislation to give a treaty the force of law while in others ratification was sufficient.

5. Furthermore, with regard to constitutions which required that the international rules expressed in treaties should be transformed into international law in order to be put into force under internal law, it should be noted that non-compliance with that requirement did not release the State concerned from its international obligation and that the enactment of a national law contrary to the international obligation did not annul the latter and might entail international consequences for that State. The view that international law formed part of the law of the land had been affirmed by the English courts; it found express recognition in the Constitution of the United States of America and in the French Constitution of 1946; and it had been upheld by learned bodies of jurists. The monist-dualist controversy had become much less acute in recent years.

6. In his opinion, the terms of article 7 were too sweeping. Certain of the questions it enumerated might well not be governed by international but by municipal law; for example, if funds had to be appropriated for the purpose of giving effect to a treaty, the application would, to that extent, be governed by municipal law.

7. If a vote were taken on article 7, he would either vote for its omission, or for a much more concise and accurate text.

8. Mr. YOKOTA considered that the principle underlying article 7 was both self-evident and sound and that some provision along those lines should be included in the code, although not necessarily in that wording. Cases in which States disputed the validity of a treaty on the pretext of incompatibility with constitutional or other domestic law had occurred and would occur in the future; it was therefore desirable to maintain the provision. It had been objected that the wording of the article was too categorical and in particular that the words "all questions" were open to misinterpretation. However, the real intention was to specify that "all questions" meant all questions between States which might affect the legal relationship between them. The objection would disappear if the passage were amended to read "... all questions between States relating to its conclusion ..." or "... all questions relating to ... will be governed by international law so far as the legal relationship between States is concerned". If that idea were acceptable, the Special Rapporteur could no doubt find more suitable wording.

9. Mr. ALFARO said he was in favour of establishing the principle that all questions relating to treaty-making were governed by international law. He believed, however, that the first ("unless") clause might give rise to some confusion and that the article should begin with the words "all questions relating to its conclusion...". In that way, considerations relating to ratification, which clearly fell under domestic law, would be excluded. A paragraph might be added to define the extent to which domestic law was applicable.

10. It should be borne in mind that declarations by national authorities concerning the effect of international law as part of the law of the land fell exclusively under internal law. Some constitutions included such provisions, while others did not, but the Commission must consecrate the principle that international law was supreme and that internal law could not be invoked as a pretext for the non-observance of a treaty.

11. Mr. HSU considered that it would be desirable to provide expressly that a State could not evade its international obligations merely by invoking its internal legislation.

12. Mr. TUNKIN, stating his position of principle, said it was undeniable that States should fulfill their obligations under international law and that no reference to internal law could release them from those obligations. Neverthelesss, the manner in which a State fulfilled its international obligations was a question to be decided by that State alone.

13. Everyone would agree that on the international plane all questions relating to treaties between States were governed by international law, but it was obvious that on the domestic plane internal legislation had to play some role. It would therefore be inaccurate to state that "all questions" relating to treaty-making and application of treaties would be governed by international law. It would be wrong for the code to accept even by implication the so-called monistic conception of the supremacy of international law.

14. While he agreed with Mr. Pal's suggestion that it might be better to deal with article 7 at a later stage, after the various aspects of treaty-making had been discussed more thoroughly, he believed that it might be possible, as a matter of convenience, to try now to find wording to reflect the real state of affairs more accurately.

15. Mr. PAL observed that all the questions relating to the topics enumerated might not have been dealt with exhaustively and that there would probably still be some residual questions which would be governed by international law. It was impossible to decide at that stage to what extent the Commission's draft would be imperative and to what extent certain questions might be subject to the intention of the parties. He therefore did not consider it advisable to retain the article in its present form.

16. The CHAIRMAN, speaking as Special Rapporteur, said that the discussion had raised issues which he had not expected to emerge at that stage. His inclination, in the light of the statements made by Mr. Pal, Mr. Tunkin and Mr. Amado, was to omit the article for the time being.

17. When he had drafted the text, he had not known exactly how he would deal with later reports, in which, as Mr. Pal had pointed out, practically all the issues referred to in the article were commented on in detail. A further report would deal in greater detail with the question of interpretation, and the matter raised by Mr. Hsu was dealt with in the fourth report, as an important aspect of operation and effect. As Mr. Amado and Mr. Pal had pointed out, it would be difficult to approve article 7 so long as the later reports had not been discussed.

18. With regard to Mr. Yokota's remarks, he said that, in drafting article 7, he had indeed had in mind throughout all questions between States. Furthermore, he agreed with Mr. Amado that much of the heat had gone out of the monist-dualist controversy; in any case, that divergence of views had always seemed unreal to him, since two different planes, the international and the domestic, were involved. On the international plane, such questions

must be regulated by international law, but it had been argued that, under the rules of international law, certain questions were regulated by domestic law; it seemed unnecessary to go further into that question.

19. Mr. EL-KHOURI said that such an important provision as article 7 should not be omitted altogether. The fact remained that treaties fell within the scope of international law. Nevertheless, they were not governed by international law only, but by other branches, such as commercial law, and in the case of commercial treaties, it would be necessary to resort to other practice for interpretation. The Commission should therefore include a clause stressing the important relationship between international law and treaties.

20. The CHAIRMAN pointed out that, in suggesting the omission of the article, members had not implied that the matter should not be dealt with, but only that other more detailed provisions should be included at later stages. That course would be wiser, since a very elaborate article would be inappropriate in that part of the code.

21. Mr. SCELLE could not agree that article 7 or article 4 should be omitted from the preliminary articles. Rules of international law always affected provisions of internal law, either ordinary or constitutional; it might therefore be appropriate to include the word "ultimately" before "be governed by international law" at the end of article 7. The hierarchical rule of the supremacy of international law over all types of internal law would thus be stated. Article 4 set forth the basic principle that no treaty obligation could exist without consent, and article 7 stated that no principle of internal law could supersede a validly concluded treaty. He urged that those two fundamental provisions should be retained in the preliminary articles.

22. The CHAIRMAN, speaking as Special Rapporteur, suggested that articles 4 and 7 might be omitted at the present stage and after the Commission had examined the specific aspects of the law it might consider whether there were some general principles which should be introduced in an early part of the code.

It was so agreed.

ARTICLE 8

23. The CHAIRMAN, speaking as Special Rapporteur, said that, when he had drafted article 8, he had believed it to be substantially correct, but had encountered some difficulties in connexion with two aspects of the subject, termination and operation. Distinctions between the various types of treaties were given in textbooks, but a clear legal distinction between them was seldom made. It had struck him then that distinctions were somewhat unreal; whether a treaty was multilateral, contractual or "normative", the main point was the agreement of the parties entering into the treaty. When he had come to deal with the termination and effect of treaties, however, he had observed a real distinction between the contractual type of multilateral treaty and certain "normative" treaties. The latter were the modern "sociological" treaties, such as conventions on human rights, labour conditions and safety measures, whereby the contracting parties acquired no rights, but only assumed obligations and undertook to conduct themselves in a manner which would benefit mankind in general. Accordingly, the beneficiaries of such treaties were individuals, rather than States. The real distinction between the "normative" and the contractual treaty lay in the fact that certain consequences of termination or non-observance would not materialize in the case of the former. In the case of ordinary multilateral treaties which provided for mutual benefits, if one party failed to extend the benefit to others, the consequence was to relieve the other parties of the duty to accord benefits to the delinquent State, in keeping with the principle of reciprocity. That principle, however, did not apply to sociological or humanitarian conventions.

24. There was yet another, slightly different distinction in the consequences of the non-observance of a multilateral convention. In ordinary contractual conventions, the obligations of each party were not necessarily dependent upon the observance of the treaty by the other parties. In respect of commercial benefits, for example, one State might violate the convention and the other parties would reciprocally withdraw their benefits, but their obligations to non-delinquent States would remain unaffected. In the case of e.g. a disarmament convention, however, the same would not be true, for, if only one party failed to carry out its obligations, all the other parties might well automatically be released from their undertakings; in order to reciprocate non-observance, the States concerned would have to rearm, and it was impossible to rearm *vis-à-vis* one contracting State and not all the others.

25. He had tried to provide for the distinction in respect of termination in his second report and for distinctions in respect of effect in the fourth report. Accordingly, the desirability of retaining article 8 was doubtful. In the light of the distinctions he had cited, it might be somewhat misleading to suggest that there was no substantial juridical difference between any of the classes of treaties mentioned.

26. Mr. SCELLE observed that article 8 was merely an enumeration, which, moreover, did not conform with certain other traditional classifications. It was very difficult to state the exact difference between plurilateral and multilateral treaties, for example, and the whole subject was so vague that the article might well be omitted.

27. Mr. LIANG, Secretary to the Commission, observed that articles 4 to 8 presented, as it were, the quintessence of principles and practice and did not lend themselves as much to detailed analysis as the subsequent articles which dealt with the specific aspects of treaty law. Indeed, as the Special Rapporteur had indicated, the introductory articles were not absolutely necessary. While the comments of the members were very useful, the precise reformulation of those articles should be left to their author because they were in the nature of a treatise, and a treatise, though susceptible of analysis and comment, was not susceptible of being rewritten by another. The most practical procedure would be for members to make their comments and the Special Rapporteur could then rewrite the section in his own way in the light of those comments.

28. With reference to article 8, he wished to draw attention to a type similar to what the Chairman termed the humanitarian or sociological treaty; he had in mind treaties of an institutional nature. For example, there was the Convention on Privileges and Immunities concluded under the auspices of the United Nations in pursuance of Article 105 of the Charter.[1] Nevertheless, there were States Members of the United Nations which were not parties to the Convention. If a United Nations body held a session in the territory of a State party to the Convention, that State could not deny the right of another State, Member of the United Nations but not party to the Convention, to send its representatives to the session being held in its territory. Ac-

[1] United Nations, *Treaty Series*, Vol. I (1946-1947), No. 4.

cordingly, the second State, while not a party, nevertheless enjoyed the benefits of the Convention.

29. That kind of treaty was not in the nature of a *traité-contrat* and should be taken into account in any classification included in the code.

30. Mr. PAL agreed with the Special Rapporteur that a general article on the classification of treaties should not appear in the introductory part of the code. Article 1 said in effect that the code related to treaties and other international agreements in general. It did not say that the code would apply to one class of treaties and not to another, and therefore an article on classification was not needed in the introduction.

31. In his subsequent reports, the Special Rapporteur had referred to classification where it was relevant to the particular topics dealt with. That, it seemed to him, was all that was required.

32. Mr. EL-KHOURI also supported the omission of article 8. He drew an analogy with civil codes. A civil code dealt with the different kinds of contracts but did not contain an introductory article on the classification of contracts.

33. The CHAIRMAN, speaking as Special Rapporteur, said with reference to the Secretary's observations, that he had always conceived the codification of the law of treaties as taking the form not so much of a convention, but of a code dealing with a particular subject. In the countries where formulation of the law rested to a considerable extent on codes, the codes would be found to contain statements of principle as well as more specific guides to conduct.

34. Mr. YOKOTA said, with reference to the principle of article 8, that he was not sure that he could agree with the categorical formulation of the second sentence. Article 103 of the Charter of the United Nations appeared to differentiate between international instruments in the matter of their effect. He was not sure that that Article conflicted with the terms of article 8, but wished to point out that care had to be exercised in the use of such general language.

It was agreed that article 8 could be omitted.

35. Mr. MATINE-DAFTARY observed that one solution for dealing with the provisions under discussion, which related primarily to doctrine, would be to omit them from the code itself and to refer to them in the commentary.

ARTICLE 9

36. The CHAIRMAN, speaking as Special Rapporteur, observed that article 9 could likewise be omitted for the reasons the Commission had already considered. When writing the report, he had included the article because there sometimes appeared to be confusion between the respective roles of the executive authority and the legislative authority. On the international plane, it was the executive authority that exercised the treaty-making power. Even in the case of the United States of America, a treaty ratified by the Senate was still not ratified in the international sense until the President deposited the instrument of ratification with the depository Government or the international organization. The ratification by the Senate was a domestic process which required completion by some international act, and, on the international plane, that act had to be carried out by the executive authority, which was really the only authority having the capacity to represent the State internationally.

37. However, that question came up again in connexion with treaty-making capacity, which was dealt with in this third report, and therefore he did not consider the article essential in the introduction.

38. Finally, he pointed out that in paragraph 1 the word "they", appearing near the end of the second sentence, referred to "executive acts".

39. Mr. EDMONDS asked for clarification of the meaning of that sentence.

40. Mr. TUNKIN said that he was under the impression that the Commission had decided to postpone discussion of article 9. If he was mistaken, he invited the Special Rapporteur to explain the purpose of the article, for, surely, every State had the undisputed right to determine for itself what authority was empowered to represent it in such matters as the conclusion of treaties, the depositing of certain instruments and so forth.

41. Mr. MATINE-DAFTARY said that he too had some difficulty with the second sentence of paragraph 1. He asked whether the word "authentic" was used in the sense of "valid" or in that of "genuine". Articles like article 9 were of particular importance from the point of view of countries in which constitutional government was as yet not firmly established. In those countries a minister would sometimes exceed his constitutional powers and commit his country by signing a treaty which neither parliament nor public opinion accepted favourably.

42. Mr. PAL said that it was his recollection that the Commission had decided that article 9 should be omitted. He too desired some clarification concerning the second sentence of paragraph 1. The example of the United States of America had been cited. Did the sentence in question mean that, if the President ratified without the consent of the Senate, the ratification would nevertheless be valid or authentic on the international plane?

43. Mr. ALFARO said that he was about to raise the same question. Although the President of the United States signed the instrument of ratification, in his proclamation he specified that he did so with the consent and advice of the Senate. He suggested that paragraph 2 (*a*) should indicate that the object of the constitutional processes was to give effect to the treaty both on the domestic and on the international plane.

44. Mr. SCELLE considered that article 9 should be deferred to a later stage of the Commission's work. As to the question of the process of ratification, he said that many writers held that, when the executive authority deposited an instrument of ratification, the other parties to the treaty had to accept it even if they were convinced that the constitutional requirements had not been observed. He did not share that view at all. The other signatories were by no means bound to accept as gospel what the executive authority said and if any question of a treaty's validity arose, they should have the right to bring it before a competent jurisdiction.

45. He had no doubt that it was the Special Rapporteur's intention not to deal with that aspect of the problem in article 9—it would certainly be fully dealt with in the code at a later stage—but merely to say that the executive authority was the formal treaty-making authority. However, the drafting was quite

ambiguous and if any article was to be omitted, it should certainly be article 9 in its present wording.

46. Mr. EL-KHOURI hoped that the Commission would find some way of dealing fully with the treaty-making power, since it was a question over which there was much controversy and even bloodshed. In the Middle East, the people of certain districts revolted against local chiefs who had granted concessions to the Great Powers in the form of treaties. The right to conclude treaties had to be carefully defined and the question of the exercise of the treaty-making power was the more important as the Commission had decided not to define a State.

47. The CHAIRMAN, speaking as Special Rapporteur, reiterated that the question of treaty-making capacity was dealt with very fully in his third report. With respect to the questions concerning the meaning of the second sentence of paragraph 1, he pointed out that, in article 9, he had not attempted to prejudge the question of what would happen if the president of a country ratified a treaty without having gone through the prescribed domestic processes. That was a question which concerned the validity of the treaty and, as he had said, was fully discussed in his third report. All he had wished to say in article 9—and admittedly the drafting was not very good—was that whatever domestic processes might be necessary, they were not enough in themselves; they had to be completed by some action on the part of the authority entitled to represent the State internationally, the executive authority. In that sense, only the acts of the executive authority were "authentic" on the international plane.

48. He was not sure whether the Commission had actually decided to omit article 9, but he agreed that it was not necessary and would be content to omit it.

It was agreed to omit article 9.

The meeting was suspended at 11.30 a.m. and resumed at 12 noon.

ARTICLES 10 TO 12

49. The CHAIRMAN, speaking as Special Rapporteur, said that he would appreciate the Commission's views on the general scheme on which he had based all his reports so far. There were two possible ways of envisaging the law of treaties. One was to take a treaty through the process in time: its conclusion, its entry into force, its effects and operation, its interpretation and, finally its termination. The second way, and the one he had chosen, was to deal with the three broad aspects: validity, effect and interpretation. The validity of treaties might be broken down into formal validity, which was another name for the conclusion of treaties and covered such matters as authenticity and ratification; essential validity, which was largely concerned with the reality of consent, since a formally valid treaty might be vitiated by failure of constitutional process, fraud, error or lack of capacity; and temporal validity.

50. That scheme would necessitate a first section on validity, a second section, with which he had dealt in his fourth report (A/CN.4/120), on operation and effect, first, as between parties and, second, as relating to non-parties and dealing with circumstances in which third States might acquire rights or even certain obligations under treaties between other States, and a third section on interpretation. Some authors held that interpretation was a part of the topic of effect, but he thought that it covered wider ground, because interpretation was required in order to judge a treaty's validity.

51. If the subject was envisaged as a process in time, the sections would be: conclusion, interpretation, operation as between the parties, the position of third States and termination.

52. The Commission might well decide to continue to discuss the specific articles and settle their order later. A decision on the method should be taken at that stage because article 10 (*Definition of validity*) and article 11 (*General conditions of the operative effect of a treaty considered in itself*) had been based on the scheme which he had adopted. If a different scheme was agreed upon, those articles might have to be redrafted.

53. Mr. EDMONDS and Mr. SCELLE proposed that the Special Rapporteur should continue with the method he had chosen; if rearrangement was subsequently required, little redrafting would probably be needed.

It was so agreed.

54. The CHAIRMAN, speaking as Special Rapporteur, explained that article 10 was largely an attempt to set out formally what was covered by the idea of the validity of a treaty. Paragraph 2 would apply especially to a multilateral treaty, in a case where the treaty itself might remain valid but might not be valid for some particular party, because that party might have failed to deposit its ratification in due form. Paragraph 3 divided the general term into its component parts, and paragraph 4 defined the terms. The double aspect again emerged. A treaty might remain in force in itself, but not for a particular party, which might have exercised a right of denunciation. He did not think that there was anything controversial in substance in article 10, which was merely an introduction of the subject, although there might be differences of opinion as to the wording.

55. Mr. TUNKIN asked for an explanation of the term "contractual jurisprudence" in paragraph 4.

56. The CHAIRMAN, speaking as Special Rapporteur, explained that he had been trying to find some general phrase to describe the type of condition which governed the substantive validity of any contract under private law, namely, the factors which must be present; that, for example, the parties must have contractual capacity. A contract, even if formally correct, might be vitiated by certain errors. He had dealt with the subject more fully in his third report (A/CN.4/115). Admittedly, the term might be obscure, but it would be difficult to find anything to convey the idea briefly. It would, of course, be possible to delete the phrase "having regard to the requirements of contractual jurisprudence".

57. Mr. BARTOŠ agreed with Mr. Tunkin on the difficulty caused by the phrase. It was certainly out of place in a code of the law of treaties. There was no such thing as a general contractual jurisprudence. It was not clear whether it might mean the jurisprudence on contracts or jurisprudence created by contracts. The term was not intelligible to continental lawyers. A term might be found valid in international law, but the Statute of the International Court of Justice implied that jurisprudence had no general validity in international law.

58. Mr. PAL observed that formal, essential and temporal validity would be dealt with fully in subsequent articles of the code. It might, therefore, be better to abandon the definitions in article 10, paragraph 4 and simply to refer to the requirements set forth in the articles dealing with the conditions of validity.

59. Mr. MATINE-DAFTARY pointed out that the term "jurisprudence" did not have the same connotation on the Continent as it did in the Anglo-Saxon countries. It might be better to use the term *"le droit matériel"*, which covered the treaty-making capacity.

60. The CHAIRMAN, speaking as Special Rapporteur, replied that it would be hard to find an exact English equivalent for the term suggested by Mr. Matine-Daftary. Mr. Pal's suggestion was greatly preferable. The terms in paragraph 4 might be qualified by some such phrase as "as provided in article . . . to article . . . of the present code".

61. Mr. TUNKIN and Mr. ALFARO supported that suggestion.

62. The CHAIRMAN, speaking as Special Rapporteur, said that he would submit a redraft of article 10, paragraph 4.

63. Turning to article 11 (*General conditions of the operative effect of a treaty considered in itself*) and article 12 (*General conditions of the operative effect of a treaty for any particular State*), he explained that he had attempted to break up and deal individually with the conditions for the validity of a treaty considered in itself and its validity not in itself, but *vis-à-vis* States parties to it, a question which arose mainly with multilateral instruments. The articles were mainly analytical and might not be absolutely essential at that place. He would be perfectly prepared to draft a much briefer treatment of the subject, but he did believe that it would be useful to draw the distinction and to include a clause to the effect that a treaty must be valid in itself and also for the particular party whose participation was in question.

64. Mr. BARTOŠ, referring to article 12, paragraph 2, pointed out that there was a third alternative; a State's capacity might be limited by a general rule recognized in international law or its competence to enter into specific types of treaty might be limited by contractual obligations assumed by the State in question towards other States. A State might be limited by a peace treaty, for example, to concluding only certain types of treaty with certain States. In such a case, the treaty-making capacity was, in his opinion, not limited by a general rule of international law but by a specific limitation. The question of the limitation by certain treaties of the treaty-making capacity in relations between certain States might, however, be left in abeyance for the time being.

65. He had some doubts about article 12, paragraph 3 (*a*). The practice in Nazi Germany had been to specify that a treaty came into force, without ratification and without formalities under national constitutional law, immediately upon signature. If the phrase "as may be prescribed by the treaty itself" was accepted, that would mean acceptance on behalf of a State would be valid in such cases, whereas the intention was to state that the capacity for conclusion, or the representation of the will of the State on its behalf, derived from the constitutional order and the capacity of agents of the State to act in accordance with constitutional competence. That would exclude every other question, including the capacity of agents acting on behalf of a State. He was sure that the Special Rapporteur had not intended that conclusion.

66. The CHAIRMAN, speaking as Special Rapporteur, agreed with Mr. Bartoš to some extent. The case in which a State not lacking inherent treaty-making capacity had undertaken by treaty not to enter into certain types of engagement was dealt with in article 8 of the third report (A/CN.4/115) and in the commentary. He agreed with Mr. Bartoš that the question might be left in abeyance until the Commission discussed that report. In reply to Mr. Bartoš' second remark, he explained that, if a treaty prescribed a particular mode of acceptance, the terms of the treaty would certainly prevail, but there were many cases in which an agreement failed to specify when and how it was to come into force. Rules of international law, however, existed to remedy such defects, as was made clear in later articles of the code.

67. Mr. BARTOŠ replied that he was sure that he and the Special Rapporteur agreed on the substance and that the difference merely lay in the manner of expressing it. A reference might be inserted in the commentary to show the difference between the treaty-making capacity and the communication of final acceptance in accordance with the rules embodied in the treaty itself.

68. The CHAIRMAN, speaking as Special Rapporteur, said that he would submit to the Commission revised versions of articles 1 and 2 and a shortened and simplified version of articles 11 and 12. It had been agreed that the further consideration of articles 3 to 9 be deferred. He would redraft article 10, paragraph 4, the remainder of the article having been accepted by the Commission.

It was so agreed.

The meeting rose at 1 p.m.

483rd MEETING

Friday, 24 April 1959, at 9.45 a.m.

Chairman: Sir Gerald FITZMAURICE

Law of treaties (A/CN.4/101) (*continued*)

[Agenda item 3]

ARTICLE 13

1. The CHAIRMAN, speaking as Special Rapporteur, explained that article 13 (*Definitions*) embodied definitions of terms constantly used in connexion with the conclusion of treaties. It was a moot point how far definitions were necessary or desirable, and certain of the definitions in article 13 might appear to be tautologous. The definitions might be considered after the substantive articles, but his own view was that the meaning of a number of technical terms should preferably be established at the outset in order to avoid defining them or repeating the definitions in later articles.

2. Mr. TUNKIN observed that definitions were usually placed at the beginning of a code, but for the

purposes of study, they could be established only after the substance had been settled. The discussion of the definitions should, he thought, be deferred until the substantive articles had been dealt with, a procedure which had been adopted at the previous session with regard to diplomatic intercourse and immunities.

3. Mr. MATINE-DAFTARY supported Mr. Tunkin's view.

4. Mr. PAL said that the definitions article should be placed at the beginning of the code, but the definitions themselves should be discussed at the end.

5. Mr. SCELLE did not agree with Mr. Tunkin. The Commission should have a general discussion of the definitions, because it should be aware what precisely the Special Rapporteur meant by the various terms. The definitions might, of course, require slight alterations in the light of the discussion of the substantive articles.

6. Mr. EDMONDS agreed with Mr. Scelle. The Commission could hardly deal with the substantive articles until it had defined the terms.

7. Mr. BARTOŠ said that he realized that the Commission was responsible for establishing definitions. Members certainly differed on certain concepts, since the terminology of international public law was far more controversial than that of international private law. The meanings of terms should be defined, so that States should not be able to attach to the terms any interpretation they chose. If the terminology was established, future disputes about the terms used in the code would be avoided. Obviously, to give a fixed meaning to the terms would be too conservative in the field of the development of the law, but the practical question was how to reduce the differences existing in international law, which was in fact the purpose of codification itself.

8. Mr. FRANÇOIS supported Mr. Tunkin's view. As jurists, all members of the Commission knew what the terms meant, but the meanings were very difficult to formulate precisely. To try to do so at that stage would be to waste time and there would be little prospect of success. The Special Rapporteur's definitions of "ratification" and "accession" seemed tautologous and not very useful, and the definition in article 13 (*l*) raised the whole vexed question of reservations. The discussion of the definitions should therefore be deferred.

9. Mr. EL-KHOURI thought there would be no harm in including a special article on definitions, but that would not save the Commission from repeating the same arguments when the substantive articles were studied. The terms would have to be explained in the substantive articles in any case. As they stood, the definitions seemed to be those generally accepted and not to embody special meanings for the purposes of the code.

10. Mr. AMADO agreed with Mr. François. Some of the definitions were tautologous and those which, like that of "reservations", related to substance were likely to be controversial, for it was well known that in Latin America reservations were a very vexed question. A reservation could hardly be defined in a single paragraph. The Special Rapporteur's study was analytical rather than practical. To discuss and include in the code a definitions article would be unwise.

11. Mr. HSU felt that there would be no harm in giving article 13 a preliminary examination to see whether all the members of the Commission agreed on the terms.

12. Mr. ALFARO agreed that definitions were always difficult and dangerous, but good definitions could be very useful. He could accept most of the definitions in article 13, but he agreed with Mr. Pal that it might be preferable to discuss the definitions article after the substantive articles.

13. Mr. YOKOTA said he had no objection to postponing the discussion of the definitions, but wished for an explanation of the phrase in paragraph (*i*) "in certain circumstances". In paragraph (*j*) the phrase used was "where the treaty provides for this procedure".

14. The CHAIRMAN, speaking as Special Rapporteur, explained that the definitions were not so simple as they appeared. The definition of "ratification" contained two elements. It was often stated that a State ratified a treaty, but it actually ratified the signature to a treaty and could do so only when the treaty had been signed, unless it became a party by some such procedure as accession. The definition of "accession" embodied the controversial view that accession was confined to countries which were not signatories. One school of thought held that a country might accede even though it had signed, whereas, in his view, a signatory could become a party by ratification only.

15. The question asked by Mr. Yokota was partly answered by the text of article 34, paragraph 2. Accession was possible not only by the terms of a treaty, but also by other means. In certain cases, a treaty did not provide for accession, and it might subsequently be found that countries whose participation was desirable had been excluded by their inability to sign by the date appointed for signature. In such cases, the parties made provision by a special ancillary agreement to permit accession. Acceptance was a somewhat unusual procedure which had been used in certain cases immediately after the Second World War, but appeared to have fallen into disuse. It could be employed only where the treaty provided for that procedure. That was why different phrases had been used in paragraphs (*i*) and (*j*).

16. Reservations were certainly a very controversial matter and the definition given might perhaps prejudge the substance to some extent. On the other hand, it might be useful to remove a considerable stumbling block by means of a definition. A reservation was essentially a unilateral derogation from a treaty. Governments often attached to their signature declarations and explanations of their interpretation of a particular article, which were not in fact derogations, although they might sometimes conceal reservations. Such declarations were often wrongly called reservations; they might be eliminated by establishing a definition.

17. Speaking as the Chairman, he observed that a considerable majority favoured deferring the discussion of article 13, and some members were doubtful whether a definitions article should be included in the code at all. He proposed, therefore, that the discussion be deferred, on the understanding that when the substantive articles had been discussed, the Commission would again consider whether the article on definitions was required.

18. Mr. SCELLE thanked the Special Rapporteur for his explanations. The main point was not whether the definitions were in conformity with the views of all members, but whether the members understood precisely

what the Special Rapporteur had in mind, particularly when they came to discuss the substantive articles.

The Chairman's proposal was adopted.

ARTICLE 14

19. The CHAIRMAN, speaking as Special Rapporteur, explained that article 14 (*The treaty considered as text and as legal transaction*) was mainly analytical and might not be essential to the code. In it he had tried to make clear a point which had some importance and had caused difficulties in the consideration of treaty law. Some learned authors did not deal with it at all, whereas others treated it at some length. Every treaty had two aspects: first, simply as an instrument which, as such, had an existence, even if it was not in force; and, second, when it came into force, as an international transaction. A treaty might produce effects even before it entered into force. The point might perhaps be somewhat metaphysical, but it would be helpful always to bear in mind the double aspect, as explained more fully in paragraph 24 of the commentary.

20. He would be inclined to retain an article making the distinction, but in a considerably abbreviated and simplified form. The analysis was a valid one, although somewhat complicated and although sometimes blurred because two or more of the stages might be telescoped. In the first stage, the parties drew up a text, and the only authority they needed for that purpose was the authority to negotiate; they were not committed in any way by the act of drawing up the text. The text was then authenticated in some way, as by inclusion in a final act. Even if the instrument did not receive a single signature, it was an authentic text, which could not be altered without further negotiation. The next stage was that of signature. The signatory adopted the text of the treaty as authentic, although it would not normally agree to be finally bound by it. In the third stage, the country bound itself by ratification or accession. The fourth stage was the entry into force, which might have to await a stipulated number of ratifications.

21. Mr. SCELLE thought that article 14 might be improved, but should be retained in the code, since the stages of treaty-making should be described. He did not consider, however, that the words *opération juridique* (legal transaction) conveyed the exact meaning intended. In French doctrine, *opérations de procédure* and *opérations de fond* were both juridical operations, but the term *opération juridique* was generally applied only to *opérations de fond*. Accordingly, the term *opération de procédure* should be used in the particular context.

22. Mr. ALFARO asked the Special Rapporteur to explain the term "transaction" in the title of the article and in paragraph 1. As he saw it, the essence of a treaty lay in agreement and he therefore doubted the usefulness of introducing the concept of transaction.

23. Mr. MATINE-DAFTARY asked Mr. Scelle whether, in his opinion, the word *accord* (agreement) should be regarded as an *opération de fond* or as an *opération de procédure*.

24. Mr. SCELLE replied that it would be an *opération de fond*.

25. Mr. BARTOŠ observed that, in his understanding, a transaction was a material act or the negotiation of commercial matters. Apart from that criticism, he considered that article 14 was useful and should be retained.

26. The CHAIRMAN, speaking as Special Rapporteur, agreed with Mr. Scelle and Mr. Alfaro. He would redraft article 14, using the term "legal agreement" (*accord juridique*).

27. Mr. TUNKIN stated, with regard to paragraph 1, that an instrument considered merely as a set of articles was not yet a treaty within the meaning of the definition in article 2. That definition of a treaty as an international agreement embodied in a formal instrument seemed to be correct in that it referred both to substance and form. He did not think, therefore, that the statement that a treaty evidenced but did not constitute the agreement was quite accurate. If the instrument merely evidenced the agreement, that agreement existed outside the instrument; but he agreed wtih Mr. Alfaro that the essence of a treaty lay in agreement. No substance could exist without form, so that agreement could exist only in some specific form. In any case, he doubted the need for entering into the well-known controversy on the subject. The Commission was not dealing with theoretical problems, but had to prepare a practical code. Since the practical purpose of paragraph 1 was questionable, it might be better to include it in the commentary.

28. With regard to paragraph 4 (*b*), he doubted whether it was accurate to say that consent was usually given by signature. Consent thus given might not be final, since a State might not ratify a treaty that had been signed by its plenipotentiaries. Alternatively, if paragraph 4 (*b*) meant that conclusion was effected by signature, he ventured to doubt that statement.

29. Mr. AMADO thought that it might be best to limit paragraph 1 to the statement that a treaty was both a legal agreement and the document which embodied it, the reference to a transaction being eliminated.

30. The CHAIRMAN, speaking as Special Rapporteur, said that he saw no difficulty in deleting the word "transaction", although it was commonly used in English legal parlance.

31. He would also not object to omitting the second sentence of paragraph 1, as Mr. Tunkin had suggested. The issue was, however, very controversial. Mr. Tunkin had argued that agreement was bound up with the treaty itself. That was correct, in the sense that any person who wished to know what was the subject of an agreement would have to refer to the treaty to find out, but the actual agreement—the intention of the parties, the signature of certain acts, and the deposit of instruments of ratification—fell outside the treaty proper, which in that sense must be regarded merely as a document. Mr. Tunkin's view was admissible, but the opposite thesis was also widely held. Nevertheless, he did not wish to insist on any theoretical doctrine and would redraft article 14 without the second sentence of paragraph 1.

32. With regard to Mr. Tunkin's second point, he thought that the difficulty lay in the fact that the four stages of treaty-making were frequently telescoped and became hard to distinguish. It might be said that signature was usually not binding, but that was not always the case. For example, exchanges of notes came into effect on signature, and the same was true of some single instruments. With regard to the ambiguity of the term "conclusion", he observed that it was always controversial whether a treaty could be said to have

been concluded at the point of signature, ratification, or entry into force. Personally, he regarded conclusion as separate from and antecedent to entry into force. The difficulty might be purely terminological. The important point, however, was to set forth the four stages, firstly, the establishment and authentication of the text, secondly, signature by a number of countries, which was a step beyond mere participation in drawing up the text and might be regarded as provisional adoption, thirdly, final assumption of binding obligations through ratification and, fourthly, entry into force, which might in some cases be simultaneous with the third stage. In redrafting the article, he would try to remedy the ambiguity in paragraph 4 (*b*) to which Mr. Tunkin had referred.

33. Mr. YOKOTA thought that paragraph 1 seemed to be open to misunderstanding. Mr. Tunkin had rightly pointed out that the definition of a treaty in article 2 was correct; agreement and the instrument were essential elements of a treaty and agreement outside the instrument could not constitute a treaty. Paragraph 1, however, semed to convey the opposite idea. The real meaning of the paragraph seemed to be that the term "treaty" might be used to signify agreement and, at the same time, the document embodying such an agreement. If it were made clear that the word was used in that double sense, Mr. Tunkin's objection would be answered.

34. The CHAIRMAN, speaking as Special Rapporteur, observed that, in referring to the treaty considered as a text, he meant an instrument which had not yet been finally agreed upon, or at a stage when its provisions were not yet binding on anyone.

35. Mr. TUNKIN said that he would prefer to adhere to the definition of a treaty in article 2. It could not be said that, for example, a convention drafted by the United Nations General Assembly was a treaty *stricto sensu* before it had been acceded to or ratified. It would be confusing to depart from the definition in article 2, which set forth everything that had to be said on the subject.

36. Mr. SCELLE thought that the divergences of opinion had arisen from the fact that the point of view of the report had shifted. It was not only being stated that the terms "treaty" and "agreement" were interchangeable, but a distinction was being drawn between the formal operation and the contents of a treaty. If it were borne in mind, however, that a treaty properly so-called and a legal agreement might be different, article 14 might remain in its present form.

The meeting was suspended at 11.25 a.m. and resumed at 12 noon.

37. Mr. BARTOŠ did not consider that there was any contradiction between article 2 and article 14. The main point was that the substance of a treaty—agreement and consent—was constituted by the material elements, while the treaty as a document constituted proof of the existence of those elements. Article 1, paragraph 1, stated that a treaty within the meaning of the code must be established in a written instrument and that the code did not apply to agreements not in written form. Accordingly, a treaty within the meaning of the code must be concluded in the form of a document; that was not the form *ad solemnitatem*, but the form *ad probandum*. Thus, there was a definite need to stress the two distinct elements which, in practice, formed an entity.

38. Mr. PAL said he was inclined to the view that the proper place for article 14 was in the commentary. If, however, the article were redrafted and retained in the code, it would be advisable to make it clear that a treaty consisted of two parts, a legal transaction and a document: those parts might sometimes be loosely called treaties; it must also be made clear that the word "treaty" was not being used in the same sense in article 14 as in articles 1 and 2. For the purposes of the code as a whole, the definition of a treaty in article 2 would stand, but in article 14 the term was being loosely used to designate the parts, namely the agreement as well as the document embodying it.

39. Mr. AMADO said that, although he agreed with Mr. Pal to some extent, the valuable enumeration in the article should be included in the code itself, and not in the commentary.

40. Mr. SCELLE agreed with Mr. Amado that, although the article might be altered, the Commission should retain in the code a description of the stages of the process of treaty-making.

ARTICLE 15

41. The CHAIRMAN, speaking as Special Rapporteur, introduced article 15. He said that the main object of the first sentence was to point out that meetings of delegates in the case of bilateral treaties, and international conferences in the case of multilateral treaties, were by no means essential for the process of negotiation. Treaty engagements could, and very often were, negotiated by correspondence or diplomatic interchanges and consultations. In paragraph 25 of his commentary he had drawn attention to the manner in which the Treaty of Peace with Japan of 1951 had been negotiated. For approximately two years the proposed texts had been circulated among the prospective parties so that the Japanese Peace Conference held at San Francisco had been a signature ceremony concerned with an agreed text.

42. The second sentence of paragraph 1 brought out that the delegates engaged in negotiating a treaty had to be duly authorized to conduct the negotiations, except in the case of Heads of States, ministers or ambassadors, who were deemed to have an inherent right to negotiate. It was necessary to distinguish between authority to negotiate and authority to conclude and sign a treaty. For signature, full powers were necessary.

43. Paragraph 2 of article 15 dealt with the manner in which agreement on the text was reached. In bilateral negotiations, of course, there had to be unanimity, and the same principle applied to multilateral negotiations unless at a conference the rule adopted by common consent provided for agreement on the text to be reached by a majority decision. There were moreover cases in which the procedure was governed by antecedent rules, as when the manner in which the provisions of a convention were to be adopted was specified by the body which convoked the conference.

44. Mr. FRANÇOIS thought that paragraph 1 did not make it clear that the inherent authority of ambassadors, and of course ministers plenipotentiary, to negotiate extended only to bilateral negotiations with the countries to which they were accredited. An Ambassador representing his country at a multilateral conference would require express authority to negotiate.

45. With reference to paragraph 2, he cautioned against the inclusion in the code of any wording which would imply that decisions regarding voting procedure at international conferences had to be adopted unanimously. Such an approach would expose every great international conference to the danger of being frustrated by the wilfulness of one State.

46. Mr. MATINE-DAFTARY agreed with Mr. François concerning the position of ambassadors and suggested that the point could be dealt with by having separate paragraphs on bilateral and multilateral negotiations at international conferences. To deal with both of them in one single paragraph would inevitably lead to confusion, as was evidenced by the text of the report before the Commission.

47. Mr. BARTOŠ observed that the reference to ambassadors in the second sentence of paragraph 1 had no doubt been intended not as a reference to the rank of ambassadors but to ambassadors *in sede*, acting in their capacity as accredited representatives. The practice was that they did not need authority to negotiate but needed full powers to sign, except when signing *ad referendum*. The final clause of paragraph 1 would therefore have to be modified.

48. Mr. AMADO pointed out that article 15 should be read in conjunction with articles 21 and 22. The problems raised by article 15 were covered by the phrase *ad referendum*, appearing in the articles he had mentioned.

49. The CHAIRMAN, speaking as Special Rapporteur, agreed with Mr. François's point concerning the position of ambassadors. He had, of course, not intended to exclude ministers plenipotentiary. In redrafting the article, he could use a more general term such as "Heads of Mission" and make it clear that the reference was to heads of mission engaged in bilateral negotiations with the authorities of the country to which they were accredited.

50. Mr. LIANG, Secretary to the Commission, agreed with Mr. Matine-Daftary that separate rules would be required for different situations. In the case of bilateral negotiations, an ambassador of one party accredited to the other party usually did not require special authorization to negotiate. Ordinarily he received instructions to negotiate a treaty or agreement and, towards the end of negotiations, he was given full powers to sign the treaty.

51. A second situation, which differed from bilateral negotiations in many respects, was that of the international conference. There the representatives had to be duly authorized to negotiate.

52. A third situation was that of a convention drawn up by a United Nations organ, for example, the Convention on the Prevention and Punishment of the Crime of Genocide adopted by General Assembly resolution 260 (III) in 1948. In that case, representatives did not require special authority to discuss or negotiate the text of the convention, although, of course, they had to have full powers to sign it.

53. In that connexion, he considered the final clause of paragraph 1 ambiguous. It might be understood to mean that delegates did not require full powers for the purpose of concluding a treaty, a meaning which, as the last sentence of paragraph 26 of the Special Rapporteur's commentary clearly indicated, had not been intended.

54. Referring to paragraph 2 of article 15, he said that unanimity was the rule in bilateral negotiations and in plurilateral negotiations, which involved a relatively small number of States, and some plurilateral conferences had broken down over that question. Again, in the case of all League of Nations conferences, unanimity had been required for agreement on the text.

55. However, he did not think that unanimity had been recognized as a rule in any multilateral negotiations held since the end of the Second World War. From the United Nations Conference on International Organization, held at San Francisco in 1945, at all the conferences sponsored by the United Nations up to and including the 1958 United Nations Conference on the Law of the Sea and the United Nations Conference on the Elimination or Reduction of Future Statelessness of 1959, the majority required for agreement on the text of provisions had been determined by the rules of procedure established by each conference.

56. Mr. PAL said he took it that the final clause of paragraph 1 should read "but for the purposes of negotiation they need not be in possession of full powers to conclude the treaty".

57. The CHAIRMAN, speaking as Special Rapporteur, confirmed Mr. Pal's interpretation. He agreed that article 15 required more elaboration and said that he would redraft it, perhaps in consultation with the Secretary.

58. As to the meaning of the expression "common consent", in paragraph 2, he said he had used those words because he thought that they would cover the various situations. It had been pointed out that at a conference the rules governing agreement on provisions were made by the conference itself. But how were the rules of procedure adopted? If they were adopted by a simple majority, those who had voted against them would, by continuing to participate in the conference, have tacitly consented to the procedure that had prevailed, and that acquiescence could be considered as "common consent". However, he was not opposed to including a more detailed rule in paragraph 2 if it could be formulated.

59. Mr. BARTOŠ supported the Chairman's view. The general rule governing agreement was unanimity, except in cases in which the participants agreed expressly or tacitly to a different procedure, either by approving the procedure or by continuing to participate in the conference after the procedure was adopted. Consequently, there was, in reality, no derogation from the rule of unanimity. In the final analysis, States which did not support what had been agreed to by the conference could refuse to sign the treaty or convention and could even conclude among themselves a different convention in keeping with their views.

60. Mr. FRANÇOIS observed that it would nevertheless be very dangerous to include in the code any allusion to unanimity which might be exploited for the purpose of paralysing international conferences attempting to draft treaties or conventions.

61. Mr. LIANG, Secretary to the Commission, said that the last case he could recall in which a serious controversy had arisen regarding the need for unanimity at a multilateral conference was that concerned with the Treaty of Peace with Italy, 1947.[1] Since then, the procedure of agreement on provisions by some kind of

[1] United Nations, *Treaty Series*, vol. 49 (1950), No. 747.

majority had not been seriously challenged at international conferences, including those called under the auspices of the United Nations for which the Secretary-General prepared provisional rules of procedure.

62. He would venture to say that the rule of unanimity had been consecrated as a fiction, or at least had not been confirmed by practice, and in his personal opinion it was coming more and more to be regarded as obsolete.

63. The CHAIRMAN suggested that the discussion of article 15 should be continued at the next meeting.

It was so agreed.

The meeting rose at 1.5 p.m.

484th MEETING

Monday, 27 April 1959, at 3 p.m.

Chairman: Sir Gerald FITZMAURICE

Law of treaties (A/CN.4/101) (*continued*)

[Agenda item 3]

ARTICLE 15 (*continued*)

1. The CHAIRMAN welcomed Mr. Ago, Mr. Padilla Nervo and Mr. Verdross, and for their benefit reviewed the activity of the Commission during the first week of the session. At its previous meeting, the Commission had reached article 15 in its consideration of the draft code of the law of treaties.

2. Speaking as Special Rapporteur, he said that he would submit a redraft of paragraph 1 which would take into account the different situations arising in the case of bilateral, plurilateral and multilateral negotiations. However, he was still in need of guidance from the Commission with respect to paragraph 2. Under that paragraph, the unanimity rule would apply in the case of a multilateral conference unless the conference decided, by common consent, to adopt texts by a majority vote. It seemed that a certain practice had evolved at international treaty-making conferences whereby the proceedings began with the adoption of rules of procedure which almost invariably contained a rule providing for agreement on texts by some kind of majority vote. The question now was: What rule governed the adoption of that rule of procedure? It might be adopted without a formal vote being taken; for example, the president might announce that he took it the rules were adopted. Or else, the rule might be voted upon and adopted with abstentions, but without opposition. Lastly, it might be adopted with opposition being expressed in form of negative votes, but, as Mr. Bartoš and other speakers had pointed out, if the minority in opposition continued to participate after the president had announced the adoption of the rule, that participation amounted to an expression of common consent.

3. The fact remained, however, that the unanimity rule in a formal sense was no longer applied at multilateral conferences, and the question before the Commission was whether it should give expression in the code to that development.

4. Mr. YOKOTA admitted that, when a decision for the adoption of texts by a majority vote was taken by a majority vote at an international conference, it could be argued that there was tacit common consent of the participants on that point. That view was in keeping with the traditional theory of State sovereignty, under which a sovereign State was not subject to any obligation at all unless it consented thereto of its own will. Therefore, from the point of view of that theory, it was only by assuming the existence of the tacit common consent of all the participants that it was possible to explain the existing practice at some conferences of adopting by a majority vote a rule providing that texts were to be adopted by a majority vote.

5. However, it seemed to him that that assumption was not a reality but a fiction. The reality was that the decision to adopt the text of the convention by majority vote was taken by a majority vote of the participants, usually without any conscious reflexion as to whether or not that was done by common consent of the participants. Although he did not object to the use of fictions altogether in the science of law, it would be far better if recourse to fictions could be avoided. If the Commission wished to be realistic, it might omit the words "by common consent of the participants" from paragraph 2.

6. There was another reason in favour of omitting those words. The world was in a period of transition, from a world of absolutely independent and sovereign States to a world of international co-operation and integration. One of the most conspicuous proofs of that transition was the growing tendency to accept the principle of adopting by a majority vote the rule that matters should be settled by a majority vote. That tendency was conducive to the development of international co-operation, and the Commission should do nothing that might hamper that development. To lay down explicitly that a decision for the adoption of texts by majority vote must be taken "by common consent of the participants" might have an adverse effect on the development of international co-operation and friendly relations between States. In that respect he was in complete agreement with the view of Mr. François, and for the two reasons mentioned, he suggested simply to lay down "Agreement on any text or part thereof must be unanimous, unless a decision has been taken for the adoption of texts by a majority vote".

7. Mr. TUNKIN was of the opinion that the question dealt with in paragraph 2 was outside the scope of the draft code. Article 18 of the Special Rapporteur's draft described the various ways in which the establishment of the text and its authentication were effected. That was sufficient for the purposes of the code and there was no need to discuss the rules of international conferences. If paragraph 2 was omitted, no one would be able to say that anything was lacking.

8. Mr. SCELLE said that he was in complete agreement with Mr. François (483rd meeting) that it would be dangerous to say that agreement on texts must be unanimous in principle.

9. He agreed with Mr. Yokota that the world was in a process of international integration, but he was surprised at Mr. Yokota's solution. As international integration was in contradiction with absolute State sovereignty, and as it was the majority and not the unanimity rule that was now applied at multilateral conferences, he was in favour of a total revision of paragraph 2; it should provide that, except in the case of a bilateral treaty or a treaty among a very small number of parties, the majority rule was applicable. If that revision should not be acceptable to the Commission, he would be in favour of Mr. Tunkin's suggestion that paragraph 2 should be omitted.

10. Mr. BARTOŠ drew a distinction between the two different stages of the treaty-making process: the establishment of the text and the final acceptance of that text by the States. For the purpose of the establishment of the text, the fundamental rule was still unanimity although, in practice, States voluntarily waived the unanimity rule at international conferences either by virtue of their acceptance of the rules of the organization under whose auspices the conference was held, or by agreeing to participate under rules of procedure proposed in advance or to continue to participate after rules of procedure which they opposed were adopted. That was "consent", although the States were willing to waive the unanimity rule only in the sure knowledge that they were free not to accept the text finally drafted. Thus, in the case of the International Labour Conferences, where States were obliged to consider conventions approved by the majority as having been adopted by the Conference, Governments were required to inform the International Labour Organisation if their legislatures did not wish to accept the text that had been established. However, it was the World Health Organization which had gone furthest in the process of making decisions adopted by a majority binding on all the members of the Organization. But even in that case States could explain the reasons why they found it impossible to apply a convention adopted by majority vote, and the Organization was then bound to review the matter raised by the objecting States. Only if the decision was reaffirmed did it become absolutely binding, and, in that case, States which refused to accept it were free to withdraw from the Organization. The conclusion was therefore inescapable that, by agreeing to be a member, a State consented to the binding nature of decisions adopted by majority vote.

11. While he, personally, was in favour of the further development of international co-operation, he considered the task of the Commission was not to create ideal rules but to codify the rules that were applied in the modern world. There was no rule in practice that the acceptance of a treaty or the definition of a State's obligations was effected by any kind of majority. While it was conceded in practice that a text could be established by a majority, in the final analysis it was for each State to say whether or not it accepted the established text. That international practice had not evolved beyond that stage was well illustrated by what had happened in the recent case of the most important of treaties on European integration, the European Defence Community Treaty of 1952; the text established had been rejected by France. Obviously, States were as yet not bound to accept obligations approved by the majority.

12. Of course, there were situations in which a State was under moral pressure to conform to the decision of the majority. For example, the rules contained in Conventions of the International Civil Aviation Organization (ICAO) had in practice become the standard rules governing international civil air traffic. Whether or not a State was a member of the Organization, it had to observe the ICAO rules if it wished to participate in international aviation. However, it did so not for juridical reasons but for practical reasons. Yugoslavia was not legally a member of ICAO because its reservation to article 5 of the Convention on International Civil Aviation of 1944[1] was not accepted. However, it conformed to the rules laid down in the Convention in order to be able to enjoy the facilities of foreign airfields and other benefits of the Convention, which were not denied to it by ICAO by reason of its non-membership. While Yugoslavia did not deny that all of the rules of ICAO were approved by the majority, it was not juridically bound to accept them for that reason, because at the present stage of international law, States were sovereign as to acceptance or non-acceptance of obligations.

13. In connexion with Mr. François's concern over the danger to future international conferences, he could only say that neither the Charter nor practice had introduced international legislation by any majority whatever, in other words, legislation that could be applied to States without their consent. That was the existing reality, and the Special Rapporteur's draft article 15, paragraph 2, was simply realistic. If there was objection, the reference to the unanimity rule could be omitted but a reference to a majority rule would be in contradiction with theory and practice.

14. Mr. LIANG, Secretary to the Commission, thought that the discussion had been complicated by the introduction of the concept of the imposition or assumption of obligations. A great deal of the discussion bearing upon the importance of the integration of the international community had to do with the extent to which the majority could make the minority accept decisions of a substantive nature. However, that was certainly not a question involved in article 15 and it had certainly not been the intention of the Special Rapporteur to resolve it in connexion with that article.

15. The problem was how to describe the current practice observed in negotiations relating to the adoption of texts. The establishment and authentication of texts, mentioned in article 18, were different stages in the adoption of texts. The adoption of texts was a simpler matter than the larger issue of the imposition or assumption of obligations, and he agreed with the view that the Commission would be straying from the topic of the law of treaties if it discussed the question whether decisions by international organs or conferences had to be adopted by unanimity or by majority.

16. He recalled that the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 had been drawn up under a majority rule in accordance with the General Assembly's rules of procedure but the adoption of the text of the Convention by the General Assembly had not imposed obligations on the Member States unless they became parties to the multilateral treaty that had been negotiated in the General Assembly. It was true that there might be certain political repercussions arising from the adoption of a text and, in that connexion, he recalled the heated discussion that had taken place on certain articles during the United Nations Conference on the Law of the Sea in 1958. However, the fact that the article adopted by the majority might constitute a certain pressure on a minority to join the majority was, again, outside the scope of the law of treaties.

17. He also recalled that, when the League of Nations had tried to codify international law, one of the subjects was the procedure of international conferences. It was under such a heading that the question of the imposition of obligations by virtue of a unanimity or a majority rule might be discussed, not in connexion with the law of treaties.

18. Mr. AGO said that, so far as multilateral treaties were concerned, treaty-making involved three distinct stages: first, the establishment of the text; secondly, its

[1] United Nations, *Treaty Series*, vol. 15 (1948), No. 102.

entry into force from the general point of view, a stage which normally required a specified number of ratifications; and thirdly, its entry into force in respect of a particular State, with the resulting obligations, which could only occur upon its ratification by the State concerned. The question whether or not to apply the majority rule only affected the first. He had felt somewhat doubtful about the Special Rapporteur's text of article 15, paragraph 2, because it appeared to cover without differentiation both bilateral and multilateral treaties, while, in fact, it related only to the latter. As the Secretary had rightly pointed out, the proceedings of international organizations were already governed by precise rules, and other international conferences adopted their own. To the best of his knowledge, unanimity had never been required at a diplomatic conference, and he questioned whether it was judicious to insert a rule suggesting that it was necessary in every case where there was no previous agreement to the contrary. To demand unanimity in the establishment of the text would also be somewhat inconsistent with the fact that a conference was not normally asked to establish a text designed to be ratified by all the participants.

19. For those reasons he considered that article 15, paragraph 2, should be omitted.

20. Mr. FRANÇOIS said that many of the points he had wished to stress had already been made by the Secretary and Mr. Ago. He would point out, however, in reply to Mr. Bartoš that there was no question of the majority imposing obligations on the minority, since the formulation of texts could not in itself entail any obligation. The unanimity rule would be excessive, since it would enable one single State to frustrate the establishment of texts, which were the only means of advancing international legislation. He therefore opposed the Special Rapporteur's draft of paragraph 2. If, as would appear, the Special Rapporteur held that unanimity was indispensable, it was time to state in the interests of the progressive development of law that texts could be adopted by the majority.

21. The CHAIRMAN, speaking as Special Rapporteur, emphasized that his aim was to provide a residual rule for guidance as to how the rules of procedure themselves were to be adopted. For example, it could be stipulated that, in the absence of other provisions, they should be adopted by a simple majority: a course that would meet Mr. François's point.

22. Mr. HSU observed that it might be more in harmony with the trend of development to require only a majority vote rather than the unanimity originally proposed by the Special Rapporteur.

23. Mr. PAL said that, although his initial doubts about paragraph 2 had largely been dispelled by the discussion, he was still of the opinion that it should be deleted, as it was somewhat out of place in the present draft. The present study did not call for rules of procedure governing conferences of nations. Though the paragraph only dealt with the question of establishing the draft of the text which, when established, would amount to a final proposal for acceptance and would be binding only when accepted and only on those who would accept it, yet it seemed that even the final draft might produce some serious consequence, as could be seen from provisions like the one contained in article 18 (1) (*d*) of the draft.

24. If, however, the paragraph were retained, it would be impossible to avoid the unanimity rule. Undoubtedly, when an organization became a body empowered to act as one body, the majority rule would apply subject only to any special provision relating to the functioning of that body. The United Nations was such a body and therefore its recommendations as far as conferences were concerned would be decided upon by majority rule; but the conference of Member States convened in accordance with those recommendations would not itself be functioning as one such body and, consequently, no binding decision would be possible without the unanimity of its members. The world was perhaps in transition towards integration, but it certainly was not yet integrated.

25. Moreover, he was not agreeable to the view that the continued participation in the conference by a dissenting member, after a majority decision had been taken, should imply his consent to such a decision. He felt that any dissenting member might be inclined to withdraw from the conference, and that would jeopardize any possibility of an ultimate agreement.

26. Mr. PADILLA NERVO, observing that article 15 apparently related both to bilateral treaties (where unanimity was indispensable) and to multilateral conventions, thought that paragraph 2 was hardly necessary. In the case of multilateral conventions, the rules of procedure were always adopted as a preliminary to the discussions and had no bearing upon the ratification, or entry into force of the final instrument. Different bodies were governed by different rules of procedure, of course; he referred to Article 18 of the Charter concerning the voting in the General Assembly, and to Articles 108 and 109 concerning amendments to the Charter. In general, however, the rules of procedure governing the establishment of a text had nothing to do with its entry into force or the obligations it would involve for States ratifying it through their normal constitutional processes. Of late, a number of conventions had been adopted at conferences of the Latin American countries but had not entered into force for lack of sufficient ratifications.

27. In view of those considerations, he thought there was little point in laying down any but the most general stipulations about the procedure for the adoption of texts at international conferences.

28. The CHAIRMAN, speaking as Special Rapporteur, pointed out, in reply to the previous speaker, that nevertheless some antecedent principle was needed because any individual conference could not itself decide upon the rule governing the adoption of its own rules of procedure. He did not agree with the view that the matter could be left aside altogether.

29. Mr. BARTOŠ said that States were not obliged to participate in any international conference even of a quasi-legislative nature, but once the rules of procedure had been agreed upon the participants were bound to respect them. It was prudent for any conference to frame its rules of procedure concerning the establishment of the text and he had never denied that, although in theory the rule for adoption should be unanimity, the more usual practice was to follow the majority rule.

30. Mr. EL-KHOURI said there would be no harm in including in the code a clause providing that final drafts should be adopted by a majority vote. Such a rule would be particularly important in respect of treaties that had general application, for example, a convention concerning the law of the sea.

31. Mr. VERDROSS, pointing out that, according to the more general practice, the rules of procedure of a conference were adopted by a majority vote, said that any participating State was free not to accept them and to withdraw from the conference before the actual proceedings began. He therefore favoured Mr. Yokota's view that it should be laid down that any agreement must be unanimous unless the conference decided otherwise.

32. Mr. ALFARO observed that the Commission seemed to have two main questions before it. Should paragraph 2 be omitted altogether or should some such provision be retained and, if so, should the unanimity or the majority rule apply?

33. He considered it advisable to retain a rule laying down principles to be followed at international conferences and thought that the Commission's text should combine the principle of the simple majority with the idea suggested by Mr. Padillo Nervo. Thus, the code should provide that the text of the treaty should be established by a majority vote in a manner determined by the conference itself by a majority vote. He preferred the majority rule to unanimity because, as Mr. François pointed out, the unanimity rule would make it possible for any one State to frustrate a conference.

34. Mr. AGO thought that the main point at issue was the vote by which the rules of procedure of the conference were to be established. The international organization convening the conference might have pre-established rules; but in the contrary case, it was for the conference itself to adopt its own rules of procedure. For that adoption, in his opinion, the generally accepted rule in modern times was that of the simple majority, unless otherwise decided. The Commission might therefore state that, unless there were pre-established rules, the conference should adopt its rules of procedure by a simple majority.

35. Mr. TUNKIN considered that the principle of unanimity meant that no one State or group of States was in a position to bind other States and that the consent of each State was required for the purpose of the adoption of the rules of procedure. It meant that once a conference had begun and the rules of procedure had been adopted by a majority, a State which continued to participate in the conference, although it had voted against the rules, finally acquiesced. In practice, paragraph 2 dealt with the rules of international conferences and organizations, but did not relate to the law of treaties properly so called. It would therefore be inadvisable to include the provision in the code, since it might be regarded as an encroachment on the rules adopted by international conferences. He therefore formally proposed the omission of paragraph 2.

36. Mr. YOKOTA thought that the question raised in paragraph 2 might be solved in three ways. The first solution was that offered by the Special Rapporteur's text of the paragraph, which reflected a situation that had prevailed in the nineteenth century and the early decades of the twentieth century. The second solution, advocated by Mr. François and Mr. Scelle, was that agreement on any text must be unanimous unless a decision had been taken by a majority vote for the adoption of texts by a majority vote. He believed that that would be the situation at some time in the future, but that the solution was too advanced at the moment. While it was true that, at many recent conferences, the majority rule had been adopted by a majority vote, it could hardly be said that that practice had become established in international law. He therefore advanced a third solution, which was to leave the question open in the draft and simply to say that agreement on any text must be unanimous unless a decision was taken for the adoption of the text by a majority vote. While he did not categorically oppose the omission of the paragraph, he thought it would be better to include a provision along the lines he had described.

37. The CHAIRMAN, speaking as Special Rapporteur, did not consider that paragraph 2 should be omitted. Those who advocated its omission argued that it did not deal with a matter forming part of the law of treaties proper; if that were so, a great many essential provisions should be omitted from the draft as a whole. Certain matters relating to the conclusion of a treaty constituted a part of the law of treaties and it was practically impossible to draw a sharp line of demarcation. For example, if the argument were followed to its logical conclusion, article 15, paragraph 1, and article 18 might also be omitted. It seemed to be essential, however, to decide how a text was to be established and by what vote the rule of procedure concerned should be adopted; the point could scarcely be neglected in the code. In many cases, no difficulty would arise, but the controversy as to how the rules for the adoption of texts should be established would always remain in the background.

38. With the exception of those in favour of omitting the clause, the members of the Commission seemed to be agreed on the need to deal with multilateral negotiations at international conferences which established texts. In a certain sense, moreover, it was agreed that the rule of unanimity prevailed, for even if a conference decided by a majority vote to adopt a majority voting procedure, then, if the States which voted against the rule did not withdraw from the conference but participated in the drafting, their acquiescence, or common consent, was implied. It was undesirable, however, to leave the matter on that basis. The majority rule was so usual that it was better to set it forth explicitly, to avoid ambiguous conclusions. He therefore agreed with Mr. Alfaro that, except as otherwise decided, the adoption of a text would be governed by the simple majority rule and that the decision to observe that rule should itself be taken by a simple majority, unless the procedure was already governed by the practice or rules of an international organization. It should be borne in mind that such practice and rules did not always obtain; for example, conferences convened by the United Nations did not automatically follow the rules of procedure of the General Assembly. The United Nations Conference on the Law of the Sea, 1958, had adopted its own rules and, although they were similar to the voting procedure of the General Assembly, they might in theory have been quite different.

39. He said he would redraft paragraph 2 in the light of the discussion and asked Mr. Tunkin whether he wanted a vote to be taken on his proposal to omit the paragraph.

40. Mr. TUNKIN said he would not insist on a vote on his proposal.

41. Mr. AMADO asked whether the Commission's provision would have any importance if every conference was free to establish its own procedure. He believed that the Special Rapporteur's approach was somewhat impractical, in that his draft attempted to follow all aspects of treaty-making in all their developments. That had led him into difficulties in connexion with the hypothesis of unanimity. It was self-evident, however, that

all conferences must make their own rules, since the States which attended them were sovereign. He was therefore in favour of the omission of the paragraph.

42. Mr. FRANÇOIS said that, although it was true that conferences established their own rules, it was important to decide whether they settled their rules by unanimity or by a simple majority. It might be better to wait for a revised text before taking a decision on the omission of the paragraph.

43. Mr. SCELLE thought that paragraph 2 might be retained, provided that a specific procedure of conclusion was provided for all cases where international organizations were involved, since the practice and rules of those organizations must have an effect on the rules of procedure of the conference.

44. Mr. TUNKIN agreed that the matter should be taken up again when a revised draft was available. If any provision were retained, he would favour some such text as that suggested by Mr. Yokota.

45. Mr. BARTOŠ said that under the provisional rules of procedure usually prepared by the Secretariat for conferences convened by the United Nations it was commonly provided that texts should be adopted by a two-thirds majority unless the conference decided otherwise. In view of that customary rule, the question raised in paragraph 2 was a practical one. The two-thirds majority rule had never been abolished in United Nations practice and was followed by all United Nations conferences. Although he did not insist that the two-thirds majority should be required by the code, he felt it his duty to stress that the Commission should lay down no definite and compulsory rule on the matter; and he further categorically opposed any provision stating in absolute terms that decisions should be reached by a simple majority, since that was not an existing rule of international law. The whole question lay outside the scope of technical experts and jurists and was still subject to considerations of political balance. Accordingly, such an absolute rule might deter some States from participating in conferences, since they might hesitate to place themselves in a position in which they would have to bow to the majority rule.

The meeting rose at 6 p.m.

485th MEETING

Tuesday, 28 April 1959, at 10 a.m.

Chairman: Sir Gerald FITZMAURICE

Law of treaties (A/CN.4/101) (*continued*)

[Agenda item 3]

ARTICLES 1 AND 2* (*continued*)

1. The CHAIRMAN, speaking as Special Rapporteur, introduced his redraft of articles 1 and 2 which read as follows:

"Article 1. Scope of the present Code

"1. The present Code applies to all international agreements comprised by the definition given in article 2, irrespective of their particular form or designation or of whether they are expressed in a single instrument or in two or more related instruments.

"2. Although normally denoting an international agreement embodied in a single formal instrument, the term "treaty" is deemed for the purposes of the present Code to include any type of international agreement to which the Code applies, without prejudice however to the status or character of any particular international agreement, as being or not being a treaty for the purposes of the domestic constitutional processes of any of the Parties.

"3. By reason of the provisions of article 2, the present Code does not, as such, apply to international agreements not in written form; nor does it apply to unilateral declarations or other statements or instruments of a unilateral character, except where these form an integral part of a group of instruments which, considered as a whole, constitute an international agreement, or have otherwise been expressed or accepted in such a way as to amount to or form part of such an agreement.

"4. The mere fact that, by reason of the provisions of the preceding paragraph, the present Code does not apply to agreements not in written form, or to certain kinds of unilateral instruments, does not in any way prejudice such obligatory force as any agreement or instrument of this kind may possess according to general principles of international law.

"Article 2. Definition of an international agreement

"For the purposes of the present Code, an international agreement (irrespective of its name, style, or designation) means an agreement embodied either

(*a*) in a single formal instrument (treaty, convention, protocol etc.), or

(*b*) in two or more related instruments constituting an integral whole (exchange of notes, letters, memoranda, mutual declarations, etc.);

provided that the agreement is between two or more States, or other entities, subjects of international law and possessed of international personality and treaty-making capacity, and that the agreement is intended to create rights and obligations, or to establish relationships, governed by international law."

2. It had been suggested that articles 1 and 2 should be combined, but he had found it more convenient merely to transpose certain clauses from article 2 to article 1 and to change the title of article 2 to "Definition of an international agreement". The original method —that of defining the word "treaty" and then explaining that a treaty, for the purposes of the code, meant any international agreement in written form—had led to confusion and he hoped that the Commission would consider the redraft more logical.

3. The new article 1, paragraph 1, reproduced most of the first sentence of the former paragraph 1 and most of the former paragraph 2. The second sentence of the former article 1, paragraph 1, combined with the former article 2, paragraph 3, now constituted article 1, paragraph 3. The new article 1, paragraph 2, embodied the contents of the former article 2, paragraph 4. Article 2 was now substantially confined to the contents of the former article 2, paragraphs 1 and 2.

4. In article 1, paragraph 3, he had tried to take into account the argument that certain unilateral declarations might constitute part of an international agreement, either because they were related to other unilateral instruments forming part of such an agreement or through acceptance. Paragraph 4 qualified paragraph 3

* Resumed from the 480th and 481st meetings.

by stating that, though oral agreements and certain unilateral declarations were not treaties or international agreements for the purposes of the code, that fact did not affect their obligatory force.

5. Article 2 of the redraft was a simplified version of the original article 2, paragraphs 1 and 2. It should be borne in mind that the definition was only for the purposes of the code. The proviso at the end of the article was the only part that had not been fully discussed in the Commission. The wording of the proviso had been largely taken from the works of Professor Brierly and Sir Hersch Lauterpacht and the reasons for it were very fully explained in the latter's report (A/CN.4/63 and A/CN.4/87). He drew attention to paragraph 7 of his commentary on the articles (A/CN.4/101) and also to paragraph 10, which explained why he had not adopted Sir Hersch Lauterpacht's suggestion that registration with the Secretariat of the United Nations should be the test of whether an instrument was indeed a treaty or international agreement. Article 102 of the Charter provided that every treaty and every international agreement entered into by any Member of the United Nations should be registered with the Secretariat; accordingly, definition must antecede registration.

6. Mr. ALFARO thought that the Special Rapporteur's redraft provided some excellent solutions for the Commission's problems, but suggested that the second clause of article 1, paragraph 2, was not quite clear in relation to the first clause.

7. The CHAIRMAN, speaking as Special Rapporteur, said that, under some State laws and constitutions, the term "treaty" had a special significance. Accordingly, if an international agreement was deemed to be a "treaty", some countries, such as the United States, might require senatorial ratification, which would be unnecessary in the case of an executive agreement. The purpose of the provision was to make it clear that, whether or not ratification was required, the fact that an instrument was deemed to be a treaty at the international level did not prejudice its status for the purposes of the constitutional process of any party to it.

8. Mr. AGO agreed that certain difficulties might arise at the constitutional level, but believed that they were likely to arise at the international level also. The word "treaty" had a specific meaning, and to use it in the same code, sometimes in that meaning and sometimes in a more generic one, might be dangerous. It might perhaps be more prudent to refer to "international agreements" throughout, particularly in order to avoid the danger of misinterpretation of the term "treaty" under constitutional law.

9. The CHAIRMAN, speaking as Special Rapporteur, pointed out that the subject before the Commission was "the law of treaties", and that the term "treaties" had been used globally for many years. If the word were deleted from the whole code, the drafting would be considerably encumbered. An "international agreement" was now defined as covering a number of instruments, but he had included the provisions of article 2 in order to preserve the generic use of the word "treaty".

10. Mr. PADILLA NERVO said he had understood article 1, paragraph 3, to mean that, if a certain constitutional procedure, such as senate approval, were established by a State for the ratification of treaties, whereas international agreements such as exchanges of notes were not subject to such approval, that fact did not mean that the provisions of the code would not apply to exchanges of notes merely because they were not regarded as treaties under the domestic law of a Party. For the purposes of the code, the terms "treaty" and "international agreement" might be regarded as synonymous.

11. Mr. AMADO disagreed with Mr. Ago. Indeed, the term "treaty" could apply to instruments not requiring ratification.

12. Mr. LIANG, Secretary to the Commission, pointed out that the word "agreement" could also be used in a concrete and an abstract sense; he preferred the use of the word "treaty" both in its generic and in its particular sense.

13. With regard to article 1, paragraph 2, he found that the first clause was somewhat too restrictive, for international agreements were not even normally embodied in single formal instruments; it might be more accurate to say ". . . although denoting in the formal sense an international agreement embodied in a single instrument".

14. In any case, the use of the word "treaty" to denote any kind of international agreement was so well established that the Commission should have no compunction in confirming that general usage.

15. Mr. YOKOTA suggested that, since many international instruments were entitled "agreement", that word should be inserted before the word "protocol" among the examples in article 2, sub-paragraph (*a*).

16. The CHAIRMAN, speaking as Special Rapporteur, said he would have no objection to including the word "agreement", which was quite clear in that context.

17. Mr. EDMONDS did not consider that references to treaties in the code necessarily meant that the instruments concerned were treaties for all purposes under domestic law. He would therefore not object to the omission of the first phrase of article 1, paragraph 2 ("Although normally denoting an international agreement embodied in a single formal instrument, . . ."). The fact that all types of international agreement came under the law of "treaties" in the generic sense would not, in his opinion, cause any inconvenience to the parties or bring specific instruments under other branches of law, such as constitutional processes. With the exception of the first phrase, the redraft seemed to be a great improvement.

18. The CHAIRMAN, speaking as Special Rapporteur, agreed with Mr. Edmonds' interpretation, but thought that a provision along the lines of the first phrase was necessary in order to qualify the generic use of the word "treaty". Otherwise, it might be argued in some countries that, for example, an executive agreement should be regarded as a treaty because the country concerned had subscribed to the code. A distinction must be established between international and domestic phraseology.

19. Mr. MATINE-DAFTARY requested further explanation of the purpose of the second clause of article 1, paragraph 2. He added that he would have preferred the word *"capacité"* to the word *"pouvoir"* as the French translation of the word "capacity" in article 2.

20. Mr. SCELLE said that, in the system of law that prevailed on the European continent (and also on other

continents) the word "treaty" did not have two meanings, but was used only in a specific sense. He therefore preferred the formula "treaties and other international agreements", both in the text of the code and in its title. Otherwise, the redraft of article 1 was acceptable. In the French translation of article 2 he would prefer the word *"entités"* to the word *"collectivités"* as the French translation of the word "entities". An international organization could not be described as a *collectivité*.

21. Mr. HSU said that he would have preferred the use of the word "treaties" as a generic term. He would not object to the use of the expression "treaties and other international agreements" if it did not result in cumbersome wording in practically every provision of the code. Since that expression implied that a treaty was a form of international agreement, it would be just as well to use the shorter form, "international agreement", throughout. While the world might not yet be accustomed to that usage, he did not think that it would cause confusion among international lawyers. The expression used in the Charter, "treaties and international agreements", was, of course, ruled out because it implied that treaties were not international agreements.

22. Mr. PAL foresaw some difficulty in the use of the word "treaties" in its broad sense. If "treaties" included "other international agreements" a problem would arise when, in connexion with such questions as ratification, the code had to make a distinction between treaties, in the narrow sense, and other kinds of international agreement. There the term would again require splitting up. It would therefore be better to defer a decision on the question of terminology until the problems that might arise in connexion with other parts of the code had been examined.

23. Mr. EL-KHOURI considered the Special Rapporteur's redraft acceptable. He did not think that the terms used would cause any difficulty when translated into other languages.

24. Mr. VERDROSS favoured Mr. Scelle's suggestion. The expression "treaties and other international agreements" was supported by Article 102 of the Charter.

25. He suggested that the latter part of article 2 could be simplified by omitting the reference to "entities" and amending it to read: "provided that the agreement is between two or more States, or other subjects of international law . . ."

26. Mr. AGO said that, after listening to the discussion, he would not press his suggestion that the word "treaties" should not be used. However, he still thought that it should not be used in different senses, for confusion would result if one provision used the word in the broad sense, and another used it in the narrow sense. He, therefore, proposed to use it always in the strict and proper sense of the term, and supported the use of the expression "treaties and other international agreements" in the text, although the title "Law of Treaties" might be retained.

27. He agreed with Mr. Verdross' suggestion regarding article 2, but would go a little further. It seemed to him that all subjects of international law were possessed of international personality and that the clause in question could consequently be further simplified by amending it to read: "provided that the agreement is between two or more States or other subjects of international law possessed of treaty-making capacity . . ."

28. The CHAIRMAN, speaking as Special Rapporteur, explained that he had used the word "entities" because there was a strong school of thought which held that an individual could be a subject of international law. It was in order to make it quite clear that individuals were not included that he had inserted the word "entities". As to the apparent tautology in the inclusion of the words "and possessed of international personality", there again his purpose had been to exclude individuals, who, even if regarded as subjects of international law, could not be claimed to possess international personality.

29. Mr. AMADO agreed with Mr. Scelle regarding the title. The expressions "subjects of international law" and "possessed of international personality" related to the same thing and one or the other could be omitted. Finally, he noted that it was now intended to use the word "agreement" in both a broad and a narrow sense, for the Special Rapporteur had accepted Mr. Yokota's suggestion that the word "agreement" be inserted in article 2 (*a*). Thus, the word "agreement" was to be used in the heading and in the first part of article 2 in a broad sense, and in sub-paragraph (*a*), in the narrow sense of a certain type of formal instrument. He suggested that such confusion should be avoided.

30. Mr. YOKOTA recalled that it had been decided that the Commission should begin by preparing a code limited to treaties between States and that, after completing the draft, it should consider whether to include articles relating to treaties with international organizations. He therefore questioned the wisdom, at the present stage of the Commission's work, of including in the definition references to subjects of international law other than States.

31. The CHAIRMAN, speaking as Special Rapporteur, said that, apart from other reasons, the definition should not be restricted to agreements between States, because there were entities, subjects of international law and possessed of treaty-making capacity, which were neither States nor international organizations. For example, the Vatican, between the time of the old Papal State and the conclusions of the Lateran Treaty in 1929, had had the capacity to conclude international agreements.

32. Mr. ALFARO agreed with the Special Rapporteur that it would be better to retain the word "entities" in order to ensure the exclusion of individuals. However, he suggested that the clause in question could be simplified by amending it to read: "provided that the agreement is between two or more States, or other entities possessed of international personality and treaty-making capacity . . .". If an entity was possessed of international personality, it was *ipso facto* a subject of international law.

33. Mr. BARTOŠ congratulated the Special Rapporteur on the redraft he had prepared. He was sure that no member of the Commission disagreed with the substance of articles 1 and 2 and that any criticism of the redraft was motivated by a desire to find the most suitable wording.

34. Although he was of the opinion that the word "treaty" could be used in both the broad and the narrow sense, he had no objection to the use of the words "treaties and other international agreements" if that expression was preferred by other members.

35. As to the specification of different types of instruments in article 2, he pointed out that any attempt to make a hierarchical classification *in abstracto* was bound to fail because there were cases in which the protocol to a treaty was more important than the treaty itself.

36. He favoured the retention of the word "entities" because under such instruments as the Convention on Genocide, individuals had international responsibility and were therefore subjects of international law and not objects in the classical sense. However, he would not oppose the omission of the word, since individuals were still excluded by the fact that the "subjects of international law" were limited to those "possessed of treaty-making capacity".

37. Another question that had occurred to him was the compatibility of the first clause of article 1, paragraph 3, which limited the scope of the code to international agreements "in written form", with international usage regarding such questions as the registration of treaties. There, reference was frequently made to agreements recorded in writing. He therefore suggested that the commentary should make it clear that the written form referred to was *ad probandum* and not *ad solemnitatem*.

38. Finally, he thought the new draft of article 1, paragraph 4, took the various views expressed concerning unilateral instruments into account.

39. Mr. VERDROSS agreed with Mr. Ago's suggestion that the proviso in article 2 should read "provided that the agreement is between two or more States or other subjects of international law possessed of treaty-making capacity". It was undeniable that, if individuals were recognized as subjects of international law, they also possessed international personality; but that did not mean that a private individual had the same capacity as a State, since he possessed personality in a very narrow sense and obviously did not have treaty-making capacity. The wording he had suggested would definitely exclude individuals and thereby overcome any difficulties of interpretation.

40. Mr. LIANG, Secretary to the Commission, suggested that it might be sufficient to say: "States or international entities possessed of treaty-making capacity". Very few international lawyers agreed on the subjects of international law. Unless a very exhaustive commentary was appended, the words would not mean a great deal in a code. A similar objection might be made to the phrase "possessed of international personality". Misgivings had always been expressed about the application of that phrase to international organizations and proposals to include it in the United Nations Charter had been rejected at San Francisco, for various reasons. The fact that no reference to the international personality of the United Nations was made in the Charter did not, of course, imply that it had no such personality; such a reference was in fact made in the constitutions of certain of the specialized agencies. Some international entities, such as alliances, did not possess and did not claim treaty-making capacity, and international entities other than States could only conclude treaties through States. A company with international affiliations obviously lacked the treaty-making capacity.

41. Mr. PADILLA NERVO said that article 1 referred to the scope of the code. An examination of all the articles would show that there were some general provisions, those on validity, for example, which certainly referred to all forms of international agreement, but there were many provisions relating solely to treaties in the narrower sense. The word "applies" in article 1, paragraph 1, of the redraft would therefore seem to be unsuitable; and the word "relates", in the original draft, would be preferable.

42. The CHAIRMAN, speaking as the Special Rapporteur, agreed with Mr. Padilla Nervo. He would willingly restore the word "relates". He had not intended the use of the word "applies" to mean that every article of the code applied to every type of international instrument, but merely that the code itself was concerned with all international agreements.

43. Mr. AGO said that he preferred Mr. Verdross' formulation for the passage in article 2 to that suggested by the Secretary, since it was the classic formulation and was quite clear, although there was no great difference in substance. There was not a real difference indeed between the expression "international entities" and the expression "other subjects of international law" when the one or the other of those two expressions were coupled with the qualification "possessed of treaty-making capacity", which was the key to the question. He would not strongly object, however, if the Secretary's formulation was adopted.

44. Reverting to article 1, paragraph 2, he recognized that although the phrase "treaties and other international agreements" was more accurate, it could be extremely cumbersome if used in every article and even several times over in some articles. He would therefore be inclined to accept the use of the term "treaty" alone in the code, but with an explanation that it had been used only as an expedient for the sake of brevity.

45. He therefore suggested the insertion in article 1, paragraph 2, of words to the effect that whenever the term "treaty" was employed in the code, it should be understood to include not only treaties in the strict sense of the term, but also any other form of international agreement to which the code related; it should also be stipulated, however, that that should not prejudice any definition of an international agreement which might be adopted for the purposes of the domestic constitutional processes of any of the parties.

46. Mr. EDMONDS had some difficulty with the word "prejudice". It would be better to state that the meaning attached to the term "treaty" did not imply that any particular instrument would be a treaty within the meaning of the domestic law of any of the parties.

47. Mr. ALFARO observed that the purpose of the article should not be to safeguard domestic constitutional processes, but, on the contrary, to safeguard the rules of international law. It should be understood that the code referred not only to treaties in the strict sense, but to all international agreements, whatever the status given them by any of the parties under their constitutional law. The second part of Mr. Ago's amendment was not very clear. It should be stipulated that the code applied, irrespective of whether the domestic law of any country gave a particular status to any particular international agreement.

48. The CHAIRMAN, speaking as Special Rapporteur, replied that the object of the article was, precisely, to make it clear that whether a particular agreement was or was not a treaty for international purposes did not affect its status under the constitutional law of any of the parties. Mr. Alfaro apparently believed that the question whether an instrument was or was not called a treaty for constitutional purposes should not affect

its international status. Both views were undoubtedly justified, but no suggestion had been made that the position under constitutional law could affect the international status of an agreement. The danger lay rather in the other direction. The article had been framed in those particular terms in order to preserve the constitutional position, which was what was really necessary. If a treaty was defined as something that might be understood as including other forms of international agreement, it would have to be made quite clear that that did not prejudice the right of any of the Parties, for its own constitutional purposes, to regard that agreement as being a treaty or not being a treaty. That had certainly been clear in the original draft and was no less clear in Mr. Ago's amendment, which the Special Rapporteur was prepared to accept.

49. Mr. AMADO said that Mr. Ago's amendment was precisely what he himself would have suggested, and fully met the points raised by Mr. Edmonds and Mr. Alfaro.

50. Mr. YOKOTA thought that the words proposed by Mr. Ago, "whenever the term 'treaty' was employed in the code", went too far, since the term was sometimes used in the narrow sense as, for example, in article 2. That objection might be removed easily enough by inserting some such proviso as "unless the text otherwise requires".

Subject to drafting changes, Mr. Yokota's amendment was accepted.

51. The CHAIRMAN, reverting to the question of the title of the code, said that the phrase "law of treaties and other international agreements" had been proposed, but Mr. Ago had given cogent reasons for using the term "treaty" above in the text. Although the full phrase would be too cumbersome to use throughout the text, it might well be set out in the title. However, the law of treaties had become generally accepted, at any rate by international lawyers, as a term of art and would be construed as covering not only treaties, but also other international agreements.

52. Mr. MATINE-DAFTARY pointed out that, if Mr. Ago's amendment was adopted, the title might perfectly well remain "Law of Treaties", without any addition.

53. The CHAIRMAN observed that the sense of the meeting seemed to be that the title should remain unchanged, that the word "relates" should be substituted for the word "applies" in article 1, paragraph 1, of the redraft and that the word "two" should be substituted for "one" in the same paragraph; and that Mr. Ago's amendment to article 1, paragraph 2 be adopted, with Mr. Yokota's sub-amendment, subject to drafting changes. A redraft of article 1, paragraph 2, would be submitted to the Commission at a subsequent meeting.

It was so agreed.

The meeting rose at 1 p.m.

486th MEETING

Friday, 1 May 1959, at 9.45 a.m.

Chairman: Sir Gerald FITZMAURICE

Law of treaties (A/CN.4/101) (*continued*)

[Agenda item 3]

ARTICLE 1 (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the redraft of article 1 as submitted at the previous meeting and of Mr. Ago's amendment to paragraph 2 (485th meeting, para. 45) in the following terms:

> "Unless the context otherwise requires, the term 'treaty' shall, wherever it occurs in this code, be construed to mean not only treaties proper but also any other form of international agreement to which the code relates. The foregoing provision shall be without prejudice to the definition of an international agreement for the purposes of the constitutional processes of any of the parties."

2. Speaking as Special Rapporteur, he said the first sentence of the amendment was acceptable, but doubted whether the second sentence of the amendment was as clear as the second part of paragraph 2 in the original text.

3. Mr. ALFARO said he did not regard Mr. Ago's text as an improvement and was opposed to the reference to "treaties proper", since the object of the provision was to establish the strict meaning of the term "treaty" as had been done by the Special Rapporteur in his redraft of article 2.

4. The CHAIRMAN pointed out that Mr. Ago's amendment referred solely to article 1, paragraph 2.

5. Mr. ALFARO, maintaining his objection to the amendment, said that the expression "single formal instrument" was clearer than the expression "treaties proper" and would be consistent with article 2.

6. Furthermore, he did not think that the "without prejudice" clause in Mr. Ago's amendment accurately reflected the intention of the corresponding provision in the Special Rapporteur's own redraft.

7. Mr. PAL said that as the Special Rapporteur's definition in article 1, paragraph 2, was intended to be an inclusive one, Mr. Ago's amendment might have been shortened and improved by the substitution of the words "include any type" for the words "be construed to mean . . . any other form" in the first sentence.

8. The second sentence of the amendment should refer to a treaty as well as any other international agreement because the term "treaty" was also used in national constitutions and in a different sense. The word "definition" should be avoided as the constitutions might not contain definitions of those terms.

9. Mr. MATINE-DAFTARY asked what was the reason for the addition of the somewhat confusing opening clause "Unless the context otherwise requires" in Mr. Ago's amendment.

10. The CHAIRMAN, speaking as Special Rapporteur, observed that the clause had been inserted at Mr. Yokota's suggestion (485th meting, para. 50), on the grounds that some articles in the code, as for example those concerning ratification, applied only to treaties in the strict sense.

11. Mr. TUNKIN said that the difficulties raised by the two texts were somewhat intricate and would perhaps require more time to elucidate than could be devoted to the subject.

12. He favoured Mr. Pal's suggestion concerning the first sentence in the amendment.

13. However, he preferred the Special Rapporteur's version for the second part of paragraph 2 which, in his view, was concerned not with the definition of a treaty but with the status of certain international agreements in municipal law.

14. Mr. PAL said, in reply to Mr. Matine-Daftary, that the opening proviso in Mr. Ago's amendment was perfectly appropriate and would in any case be assumed even if omitted.

15. Mr. YOKOTA said the phrase "treaties proper", which might lead to misunderstanding, should be replaced either by "single instruments" or by "instruments entitled treaty".

16. He endorsed Mr. Pal's views concerning the second sentence of Mr. Ago's amendment.

17. Mr. LIANG, Secretary to the Commission, referring to the second sentence of the amendment, agreed with Mr. Tunkin that it should be concerned with the status or character, not with the definition, of the international agreement: he therefore found the Special Rapporteur's text preferable.

18. Mr. EDMONDS pointed out that some authorities were of the opinion that there were no parties to an agreement until it had been accepted or signed. For that reason, he was not in favour of the reference to "the constitutional processes of any of the parties" and thought the second part of the Special Rapporteur's text should read: "but that title shall not fix the status or character of any particular international agreement".

19. Mr. EL-KHOURI was opposed to the expression "treaties proper", which might suggest that they were in a different category to international agreements. It should be plainly stated that paragraph 2 referred to any form of international agreement to which the code related.

20. Mr. PADILLA NERVO agreed with the previous speaker and suggested that the second sentence of the amendment should be redrafted on the lines of article 2, paragraph 4, of the Special Rapporteur's text both for greater clarity and so as to meet Mr. Edmonds' point.

21. Mr. AGO, saying that he would not attempt to reply to all the comments, some of which were contradictory, explained to Mr. Matine-Daftary that he had accepted the insertion of the opening "unless" clause in deference to the view of Mr. Bartoš and Mr. Yokota that in some cases the code would refer to treaties proper.

22. He considered Mr. El-Khouri's suggestion unacceptable, for without a reference to the proper meaning of the word "treaties" the provision might lead to confusion. Article 2, after all, specified that an international agreement could be a single instrument and mentioned treaties as one of the examples. He was unable to understand the objections to a term which had a perfectly precise meaning both in international and constitutional law.

23. He disagreed with those who held that the second sentence of the amendment dealt with the "status" of an agreement, but he would be prepared to redraft the sentence on the following lines: "This does not in any way imply that an international agreement must be characterized as a treaty for the purposes of the constitutional processes of one of the parties".

24. Mr. BARTOŠ said there was no real divergence of view on the substance of article 1, paragraph 2. He had not proposed the inclusion of the opening "unless" clause in the amendment but had simply supported Mr. Yokota's view that different situations should be taken into account. The inherent similarity of all international agreements could be reflected in the text. He agreed with Mr. Ago that the second sentence in the amendment did not refer to the status of international agreements.

25. Mr. PADILLA NERVO considered the reference to "treaties proper" unnecessary in paragraph 2. The meaning of the term "treaties" in the strict sense was defined in the broader definition in article 2, sub-paragraph (*a*), as redrafted by the Special Rapporteur.

26. With regard to the second sentence, he considered that Mr. Ago's wording reflected the real purpose of the provision, which was most clearly stated in article 2, paragraph 4, of the original text (A/CN.4/101). The question was how to express that purpose in more precise wording.

27. Mr. ALFARO considered that, in order to make a legal text as precise as it should be, it was essential that the connexion of an article with the preceding and following articles should be express, and not implicit. His objection to Mr. Ago's amendment was that it referred to "treaties proper", instead of stating clearly that the treaties contained "in a single formal instrument" mentioned in article 2, sub-paragraph (*a*), were meant. It was the vagueness of the words "treaties proper" which had provoked the discussion.

28. With regard to the second sentence of Mr. Ago's draft, he maintained his original objection, namely, that the real purpose of the sentence should be to make it absolutely clear that the provision of the first sentence should be without prejudice to the status or character of the international agreement concerned.

29. The CHAIRMAN, speaking as Special Rapporteur, summed up the debate on article 1, paragraph 2.

30. He agreed with Mr. Bartoš that there was little disagreement on the substance of the paragraph and that most of the points raised had related to style and drafting. The paragraph could be referred to the drafting committee when it was set up; alternatively, the Commission might agree on some of the points, which he would incorporate in a new redraft.

31. The main difficulty with regard to the first sentence was whether to retain Mr. Ago's reference to "treaties proper" or whether to say that the term "treaty" should be construed to mean all forms of international agreement to which the code related. A third possibility, which he gathered Mr. Alfaro preferred, was that the sentence should read: ". . . not only treaties contained in a single formal instrument but also any other form of international agreement . . .".

32. Mr. AGO agreed that the Commission was concerned with drafting details, which should be referred to the drafting committee. The main stumbling block seemed to be the word "proper"; it might be possible to say "not only treaties but also all other forms of international agreement . . .".

33. Mr. SCELLE agreed that the main difficulty related to the word "proper". It might be better to refer to "treaties *stricto sensu*", in order to indicate that the term could also be used in a wider sense as including all forms of international agreement. Mr. Alfaro's point could be met by including the words "see article 2" in parentheses after the words *"stricto sensu"*.

34. Mr. EL-KHOURI thought the best formulation would be ". . . the term 'treaty' means all forms of international agreement. . .".

35. Mr. PAL hoped that the whole question would be referred to the drafting committee. He would not object to the term "treaties *stricto sensu*", but pointed

out that article 1, paragraph 1, referred to "all international agreements", without mentioning "treaties"; it would be more logical, therefore, to keep paragraph 2 in the shortened form as already suggested and making it clear that the term "treaty" was being used to cover all types of international agreements as already defined.

36. The CHAIRMAN suggested that article 1, paragraph 2, should be referred to the drafting committee.

It was so agreed.

37. The CHAIRMAN invited the Commission to consider article 1, paragraph 3, as redrafted.

38. Mr. TUNKIN suggested that the second clause of the paragraph should be transferred to the commentary.

39. Mr. EDMONDS suggested the omission of the introductory phrase, "by reason of the provisions of article 2", which was neither strictly accurate nor necessary.

40. The CHAIRMAN, speaking as Special Rapporteur, agreed with Mr. Edmonds's suggestion.

41. With regard to Mr. Tunkin's suggestion, he said that the second clause could hardly be relegated to the commentary, since it referred to two types of instrument which were not covered by the code. Mr. Bartoš and Mr. Alfaro had attached importance to those substantive provisions and the clause had been inserted with a view to taking their arguments into account.

42. Mr. YOKOTA was in favour of retaining the clause, which accurately reflected the views of the majority of the Commission.

43. Mr. TUNKIN said he would not press his suggestion.

44. The CHAIRMAN suggested that paragraph 3 should be approved, subject to drafting changes.

It was so agreed.

45. The CHAIRMAN invited the Commission to consider article 1, paragraph 4.

46. Mr. PAL suggested that the drafting committee might consider inserting the word "otherwise" after the word "may" in the last line.

47. The CHAIRMAN suggested that paragraph 4 should be referred to the drafting committee, and that the Commission might adopt the article when the drafting committee submitted its revised version.

It was so agreed.

ARTICLE 2 (*continued*)

48. The CHAIRMAN, speaking as Special Rapporteur, referred to his redraft of article 2. He recalled Mr. Yokota's suggestion that the word "agreement" should be inserted before the word "protocol" in sub-paragraph (*a*) (485th meeting, para. 15), and Mr. Amado's criticism of that suggestion (485th meeting, para. 29).

49. Mr. YOKOTA said that he had two reasons for making the suggestion. In the first place, many international instruments entitled "agreement" were much more important than protocols. For example, the Anglo-Japanese Agreement of Alliance, 1905, had constituted the basis of Japanese foreign policy for over twenty years. Secondly, it should be clearly stated that the term "agreement" was used in a double sense in the code, as was the term "treaty". He had been in favour of retaining a reference to "treaties *stricto sensu*" in article 1, paragraph 2, and thought it would be logical to apply the same treatment to the term "agreement".

50. Mr. ALFARO agreed in substance with Mr. Yokota. In Spanish, the word *"convenio"* indicated an international agreement which was not quite as formal as a treaty and which corresponded roughly to the English word "agreement". It would be inconvenient, however, to repeat the word "agreement" in article 2; moreover, the enumeration in parentheses in sub-paragraph (*a*) was not exhaustive, as was shown by the use of "etc.". It might therefore be wiser to indicate in the commentary that agreements proper were included in the definition.

51. Mr. HSU thought that Mr. Yokota's suggestion raised a formal difficulty. If the word "agreement" were included in sub-paragraph (*a*), it should also be inserted in sub-paragraph (*b*), since some exchanges of notes were entitled "agreement". In any case, it seemed unnecessary to add to the enumerations.

52. Mr. SCELLE agreed that there was no reason to add to the words in parentheses. Furthermore, no reference was made to covenants or charters, whereas the Covenant of the League of Nations and the Charter of the United Nations were among the most important international instruments in existence.

53. Mr. AMADO said the term "agreement" should not be included in the enumeration of types of instruments presented in the draft.

54. Mr. YOKOTA said he would not press his suggestion, but would be satisfied if a reference to it were made in the commentary.

55. The CHAIRMAN, speaking as Special Rapporteur, observed that one solution would be to delete all the words in parentheses and to refer to them in the commentary. Personally, he would prefer to retain the words and to follow Mr. Alfaro's suggestion; other examples of instruments might also be mentioned in the commentary. The whole question should, he thought, be referred to the drafting committee.

56. No objection had been raised to the wording of sub-paragraph (*b*) but there had been contradictory suggestions concerning the concluding part of article 2, beginning with the words "provided that". However, there had been general agreement that it was essential to retain the words "possessed of treaty-making capacity". In the end, Mr. Liang had suggested the formula "provided that the agreement is between two or more States or international entities possessed of treaty-making capacity" (485th meeting, para. 40). That seemed to be the best formula since it omitted the references both to "subjects of international law" and "international personality", which themselves were difficult to define. At the same time, it excluded individuals or private corporations, even if they were international entities, by requiring the international entities to be possessed of treaty-making capacity.

57. However, a really complete definition would require the definition of the term "treaty-making capacity". As it stood, the formula was more in the nature of a description using terms whose meaning was well understood.

58. Mr. LIANG, Secretary to the Commission, said that since the previous meeting he had had an opportunity to consult the records of the San Francisco Conference. His opinion concerning the non-acceptance

of the proposal to include a reference to the international personality of the United Nations was borne out by the report of Sub-Committee A of Commission IV of Committee 2, which stated *inter alia*:

> "As regards the question of international juridical personality, the Sub-Committee has considered it superfluous to make this the subject of a text. In effect, it will be determined implicitly from the provisions of the Charter taken as a whole."[1]

59. The same technique, with respect to the international personality of the United Nations, had been used by the International Court of Justice in its Advisory Opinion of 11 April 1949 concerning Reparation for Injuries Suffered in the Service of the United Nations. The Court had enumerated the Charter provisions concerning the capacity, functions and powers of the United Nations, including its treaty-making capacity, and had then concluded from all those provisions and from the fact of the existence of the Convention on the Privileges and Immunities of the United Nations of 1946 that:

> "It is difficult to see how such a convention could operate except upon the international plane and as between parties possessing international personality."[2]

60. Thus, the international personality of the United Nations had been taken for granted by the process of inductive reasoning and it seemed to him that the same type of reasoning would apply in the present case, that if an entity had treaty-making power it had international personality, and it would be idle in the present context to attempt to make a distinction between the two concepts.

61. As to the Special Rapporteur's concern regarding the definition of "treaty-making capacity", he observed that in order to determine the treaty-making capacity of an international entity, it would be essential to examine the constitutional provisions of the entity concerned.

62. Mr. PAL said that after listening to the Secretary's remarks, he agreed that an international entity would necessarily have international personality but might not have treaty-making capacity. It would therefore suffice to say "international entity with treaty-making capacity".

63. The CHAIRMAN, speaking as Special Rapporteur, said that that was also his view and it had been strengthened by Mr. Liang's statement. He suggested that the word "other" should be retained in the passage under discussion, and that it should read "two or more States, or other international entities, possessed of treaty-making capacity", in order to make it clear that States too must be possessed of treaty-making capacity, for there were States which did not have that power.

64. Mr. AGO agreed with the Chairman that the word "other" was essential for the reason he had stated. However, if the words "international entities" were used, the word "other" would have the effect of describing States as international entities. Although a State was an entity in international law, he did not think that it could be termed an inter-national or inter-State entity.

65. Mr. LIANG, Secretary to the Commission, said that in a private discussion with Mr. Scelle, he had agreed that it would be better to say "international organizations" instead of "international entities", because he did not think that any international entity other than an international organization had treaty-making capacity.

66. Mr. VERDROSS pointed out that the Holy See had treaty-making capacity but was neither a State nor an international organization. He felt that the clearest and simplest solution would be his own formula as amended by Mr. Ago, namely: "provided that the agreement is between two or more States or other subjects of international law possessed of treaty-making capacity . . ." (485th meeting, para. 27.)

67. Mr. TUNKIN supported that formula.

68. Mr. SCELLE said that he had no doubt that the "other international entities" or "other subjects of international law" were essentially international organizations and it would be better to say so plainly. However, since individuals would be excluded by the reference to treaty-making capacity in the formula read out by Mr. Verdross, he was prepared to accept it.

69. Mr. PAL also supported the wording read out by Mr. Verdross. The word "other" before "international entities" would be misplaced as States, though always entities, were not international entities.

70. Mr. AMADO said he could not recall ever having encountered the word "entities" in international law literature. It had metaphysical overtones and he felt that it should be avoided.

71. Mr. AGO pointed out that the expression "States and other subjects of international law possessed of treaty-making capacity" made it clear that States too had to have treaty-making capacity in order to conclude agreements covered by the code.

72. Mr. TUNKIN recalled that the Commission had decided to limit the code for the time being to States. The present drafting problem might be avoided by omitting the whole clause beginning with the words "provided that" and amending the beginning of the article to read:

> "For the purposes of the present Code, an international agreement (irrespective of its name, style or designation) means an agreement between two or more States embodied either (*a*) . . ."

73. The CHAIRMAN, speaking as Special Rapporteur, said that he was prepared to accept the formula read out by Mr. Verdross.

74. Referring to Mr. Tunkin's formula, he pointed out that it would still be necessary to retain the clause "provided that the agreement is intended to create rights and obligations, or to establish relationships, governed by international law", for there might be agreements between States concerning commercial matters which did not create rights and obligations or establish relationships governed by international law. For example, an agreement for the purchase by one State of property in another State would probably be governed by the domestic law of the site of the property. He also recalled that what the Commission had decided was not to include international organizations for the time being. However, there were entities, such as the Holy See, which were neither States nor international organizations and which should be covered by the definitions because they had treaty-making capacity.

75. Mr. PADILLA NERVO also supported the formula read out by Mr. Verdross. He pointed out, however, that the clause beginning with the words "provided that" was the essential part of the definition and it was illogical

[1] United Nations Conference on International Organization, IV/2/A/7, vol. 13, p. 819.

[2] *I.C.J. Reports 1949*, p. 179.

to place it at the end of the definition in a qualifying clause. He would therefore ask that, when the final draft was prepared, the material passage to which he had referred should be placed in the principle clause at the beginning of the definition, which would then read: "For the purposes of the present Code, an international agreement . . . means an agreement between two or more States or other subjects. . .".

76. The CHAIRMAN said that that was a very interesting suggestion and that discussion on article 2 would continue at the next meeting.

Filling of casual vacancy in the Commission

(*article 11 of the Statute*)

[Agenda item 1]

77. The CHAIRMAN announced that, at a private meeting, the Commission had elected Mr. Nihat Erim of Turkey, by a majority of votes, to fill the casual vacancy caused by the resignation of Mr. Abdullah El-Erian.

The meeting rose at 12.55 p.m.

487th MEETING

Monday, 4 May 1959, at 3 p.m.

Chairman: Sir Gerald FITZMAURICE

Law of treaties (A/CN.4/101) (*continued*)

[Agenda item 3]

ARTICLE 2 (*continued*)

1. The CHAIRMAN recalled that at the previous meeting (486th meeting, para. 75) Mr. Padilla Nervo had suggested that the order of the clauses of the redraft of article 2 (485th meeting, para. 1) should be inverted, so that the passage now in the proviso at the end of the draft article would appear as an independent sentence at the beginning, and the references to the form of agreements in sub-paragraphs (*a*) and (*b*) would be recast into a second sentence.

2. Speaking as Special Rapporteur, he said that he found the recommendation attractive, since it might be more logical in an article containing a definition to place the emphasis on the substance of the definition, and then deal in a second sentence with the form which an international agreement might take. He suggested that the drafting committee should be asked to follow Mr. Padilla Nervo's recommendation.

It was so agreed.

3. The CHAIRMAN invited discussion of the passage "intended to create rights and obligations, or to establish relationships, governed by international law".

4. Mr. AGO had two observations to make. First, there was a danger of some tautology because the assumption of rights and obligations by parties meant the establishment of relationship between them. Secondly, the words "intended to create rights and obligations" might not cover all agreements. There were agreements between States which were intended to establish rules more than to create directly rights and obligations, and there were agreements which dealt with the settlement of a particular dispute, or simply with the interpretation of a previous treaty. The specification of one class of agreement might be interpreted as excluding others. It would be better to find a concise but more general formula or, if necessary, to omit the passage altogether.

5. Mr. FRANÇOIS did not consider it advisable to omit the passage, for without it the definition would be applicable to some agreements between States which were not governed by international law and which should not be covered by the code. It would be necessary to find a suitable formula.

6. Mr. ALFARO pointed out that there were agreements which amended, regulated or terminated rights and obligations created by previous agreements. It might be better to be more specific and say "intended to create, modify, regulate or terminate rights and obligations".

7. The CHAIRMAN, speaking as Special Rapporteur, agreed with the points made by the previous speakers. In preparing the draft his main idea had been to limit the definition to agreements governed by international law, and to exclude agreements between States which were governed by municipal law, such as agreements dealing with certain commercial matters, certain purchase of property, or certain matters in the sphere of private international law.

8. He had been quite aware that the words "intended to create rights and obligations" were not sufficient and he had therefore added the words "or to establish relationships" with a view to covering the other possibilities mentioned. That explained the apparent tautology.

9. He agreed that the text should be modified in order to avoid misunderstanding, either by making it more general, as suggested by Mr. Ago, or by making it more specific, as suggested by Mr. Alfaro. Perhaps the problem might be solved by the following wording: "the provisions of which are intended to be governed by international law".

10. Mr. TUNKIN said that unless a better formula could be found, he would favour Mr. Ago's suggestion that the passage should be omitted.

11. The CHAIRMAN, speaking as Special Rapporteur, suggested as an alternative the insertion of the words "or to produce effects" after the word "relationships".

12. Mr. AGO felt that it might be sufficient to replace the whole of the passage under discussion by the words "intended to produce effects governed by international law".

13. He did not think that the definition should exclude all agreements relating to matters in the sphere of private international law. An agreement between two States to regulate their private international law still created for the States the obligation to enact laws in that field, and such obligation was international and governed by international law.

14. Mr. ALFARO agreed with Mr. Ago's last observation.

15. The CHAIRMAN, speaking as Special Rapporteur, also agreed. His references to matters in the sphere of private international law applied to agreements whose interpretation and application would be wholly regulated by private international law. It was a nice point and one that the drafting committee might be asked to take into account.

16. Mr. PADILLA NERVO said that what characterized all international agreements was that they were intended to regulate the conduct of the parties in respect of the subject-matter of the agreement. A formula along those lines might solve the difficulty.

17. The CHAIRMAN suggested that article 2 should be referred to the drafting committee for redrafting in the light of the comments and suggestions that had been made.

It was so agreed.

ARTICLES 10 TO 12*

18. The CHAIRMAN, speaking as Special Rapporteur, recalled that the Commission had decided, at its 482nd meeting, to defer articles 3 to 9 for the time being. He had redrafted articles 10 to 12 in the light of the discussion at that meeting. Article 10 would now appear as the new article 3. The alterations in paragraphs 1 and 2 of the article affected only the English text. The words "operative force" were replaced by the words "obligatory force", and in the English text of paragraph 2 the word "being" was inserted before the words "in itself valid". Paragraph 3 remained unchanged.

19. There had been objection to the word "jurisprudence" in paragraph 4 and Mr. Pal had suggested that reference should be made where appropriate to later articles of the code. He had complied with that suggestion but at the same time had felt that it would be useful to give some indication of the meaning of the terms used. He read out the following redraft of paragraph 4:

"4. The terms mentioned in the preceding paragraph are to be understood as follows:

"(*a*) A treaty is said to possess 'formal validity' if it fulfils the conditions regarding negotiation, conclusion and entry into force, set out in part I of the present chapter (articles . . . of the Code).

"(*b*) 'Essential validity' is a term used to describe those intrinsic qualities relating to the treaty-making capacity of the parties, to the reality of the consent given by them, and to the nature of the object of the treaty, which are set out in part II of the present chapter (articles . . . of the Code), and which a treaty must possess (in addition to its formal regularity) in order to have obligatory force.

"(*c*) 'Temporal validity' denotes the requirement that the treaty, having duly entered into force, should still be in force, and should not have been lawfully terminated in one of the ways set out in part III of the present chapter (articles . . . of the Code)."

20. He then read out the following redraft of articles 11 and 12, which were combined into a single article, the new article 4:

"Article 4. General conditions of obligatory force

"1. A treaty has obligatory force only if, at the material time, it combines all the conditions of validity described in the preceding article.

"2. In the case of multilateral treaties, obligatory force for any particular State exists only if the treaty, in addition to being valid in itself, in accordance with the provisions of the preceding paragraph, has been regularly accepted by the State concerned, and if the acceptance of that State is still in force."

21. Mr. AGO pointed out that the meaning of the first two paragraphs of article 10 was obscured by the use of the word *"formalités"* in the French text for the English word "requirements" in paragraph 1, and of the word *"inversement"* for the English word "correspondingly" at the beginning of paragraph 2.

22. The CHAIRMAN, speaking as Special Rapporteur, agreed that the French text would have to be revised.

23. Mr. VERDROSS suggested that the word *"conditions"*, which appeared in paragraph 2, might be substituted for the word *"formalités"* in paragraph 1.

24. Mr. AGO, referring to the new article 3, paragraph 4 (*c*), called attention to the fact that a treaty subject to a suspensive condition was nonetheless valid.

25. Mr. SCELLE said there was no need to state that the validity of a treaty was not affected by suspension since that was self-evident.

26. The CHAIRMAN, speaking as Special Rapporteur, observed that if the text were open to the contrary interpretation it should be revised.

27. Mr. SCELLE said that the text of the original article 11, paragraph 3, was preferable since it was quite unambiguous.

28. Mr. AMADO agreed with Mr. Scelle.

29. The CHAIRMAN, speaking as Special Rapporteur, pointed out that the new article 3 sought to define the meaning of certain terms to be used in the rest of the code.

30. He had drafted the new article 4 in response to those members who, during previous discussions, had expressed the view that articles 11 and 12 should be simplified. Personally, he would not have been averse to retaining at least certain elements from the former texts.

31. Mr. TUNKIN, pointing out that article 36 dealt with "Acceptance" and articles 34 and 35 with "Accession", presumed that the word "accepted" in the new article 4, paragraph 2, was being used in a different sense and was intended to cover all cases of a State becoming party to a treaty, by whatever process. If he were correct, there was surely some terminological inconsistency that would have to be removed.

32. The CHAIRMAN, speaking as Special Rapporteur, confirmed that he had used the word "accepted" in the new article 4 to cover the different ways in which States could become party to a treaty and agreed that there might be some inconsistency with the language of article 36. It was purely a drafting matter which could be referred to the drafting committee.

33. Mr. EDMONDS considered that a treaty was either valid or not valid and that it was only necessary to enumerate the conditions which had to be fulfilled to make it valid. The present text appeared to suggest, incorrectly in his opinion, that for certain purposes a treaty lacking some essential qualifications could be partially valid.

34. The CHAIRMAN, speaking as Special Rapporteur, said that the distinctions he had sought to bring out in the new article 3 were well known in international law and in most systems of contract law. While he agreed that all the elements enumerated were necessary for the validity of a treaty, they did fall into different categories. For instance, the test of formal validity was not the same as the test of the reality of consent.

* Resumed from the 482nd meeting.

Since the various elements had to be dealt with in different sections of the draft, he had thought it useful to describe each one of them. He thought that the new article 4 fully met Mr. Edmonds's point.

35. Mr. SCELLE asked whether the phrase "at the material time" in the new article 4, paragraph 1, was intended to refer to the moment when the validity of a treaty was questioned.

36. The CHAIRMAN, speaking as Special Rapporteur, explained that the phrase referred to the time during which the treaty had obligatory force. However, he would have no objection to deleting those words if they were likely to cause difficulty.

37. Mr. BARTOŠ, without insisting on the point being covered in the draft, said that some consideration should be given to the growing practice, particularly in commercial agreements, of inserting a clause concerning the provisional entry into force of an agreement pending ratification. He wondered what the juridical status of such agreements would be if one of the parties failed to ratify.

38. The CHAIRMAN, speaking as Special Rapporteur, said that the point was covered in article 42, paragraph 1.

39. Mr. SCELLE considered that a treaty which had not been ratified could not be regarded as having been concluded or as having effect.

40. Mr. BARTOŠ observed that there were valid practical considerations for the inclusion of a clause concerning the provisional entry into force of treaties.

41. Mr. SCELLE said that, save in some very exceptional cases (e.g. customs agreements intended essentially for the immediate protection of a country's economy), the practice of providing for the provisional entry into force of a treaty was not advisable and was even at variance with correct international law procedure.

42. The CHAIRMAN, speaking as Special Rapporteur, observed that perhaps the new article 3 did not draw a clear enough distinction between validity and obligatory force. When the drafting committee revised the new articles 3 and 4 it should deal with validity in the former and with obligatory force in the latter.

43. Some members seemed to think that the words "at the material time" might be omitted. He thought it advisable to retain the phrase, since any dispute concerning the validity of a treaty must relate to its validity or obligatory force at a particular point in time.

44. Mr. PAL thought that the phrase might be unnecessary because the paragraph in which it occurred stipulated that "all the conditions of validity", including, consequently, the conditions of temporal validity, had to be fulfilled.

45. Mr. AGO was in favour of retaining the phrase, since it embodied an essential concept.

46. The CHAIRMAN suggested that the new articles 3 and 4 should be referred to the drafting committee.

It was so agreed.

NEW ARTICLE 5 (FORMERLY ARTICLE 14)*

47. The CHAIRMAN, speaking as Special Rapporteur, invited the Commission to consider his redraft of article 14 (see 483rd meeting, para. 26), which would become the new article 5, and read as follows:

"Article 5. The treaty considered as text and as a legal act

"1. Subject to the definitions contained in article 2 of the present Code, the term treaty may be used to denote both a legal act (an international agreement) and the instrument or instruments embodying that act.

"2. In order that the treaty may exist as an instrument, it is sufficient if its text has been duly drawn up, and established or authenticated, in the manner provided in section B below.

"3. In order to be or become a legal act (an international agreement), the text, so drawn up and established or authenticated, must be concluded as an agreed text, and must be subscribed to and enter into force, in the manner provided in section C below.

"4. The treaty-making process may consequently be envisaged as involving four stages (some of which may however, in certain cases, take place concurrently), namely (*a*) the establishment and authentication of the text, as a text; (*b*) provisional acceptance of the text as a potential basis of international agreement; (*c*) final acceptance of the text as constituting an international agreement; (*d*) entry into force of the treaty as such."

48. The term "legal transaction" in the original text (A/CN.4/101) had been criticized and he had therefore replaced it by "legal act". The differences between the new and the original version were mainly formal, rather than substantive. The Commission seemed to be agreed that the word "treaty" was used ambiguously to denote two different ideas, firstly, the abstract notion of international agreement and, secondly, the treaty considered purely as an instrument. The reason why he had included the article was that both meanings were valid. There was a time when a treaty existed only as a text, while it was not yet in force; but even at that time, its articles had some effect and the document had a significance and existence of its own. That was true, of course, of the provisions of the treaty which stated what steps were necessary to transform the text into a legal act.

49. In paragraph 1 of the new article 5, he had added a reference to article 2 because some members had thought that without such a reference confusion might arise between the description of a treaty in the article and the definition of an international agreement in article 2. In paragraph 2, he had left out the words "for evidential purposes" because some members had objected to the words "the treaty evidences but does not constitute the agreement" in the original paragraph 1. The amendments to paragraph 3 were purely stylistic. In paragraph 4 (*b*) of the former article 14, the reference to "conclusion—usually by signature" had been regarded as inaccurate by some members, as had the words "sometimes by signature, more usually by ratification or other means" in paragraph 4 (*c*). He had therefore omitted those references. He had also altered the beginning of the paragraph in order to stress that the four stages of treaty-making were sometimes telescoped; the third and fourth stages, in particular, were apt to be concurrent. On the other hand, entry into force might not take place until the requisite number of countries had deposited their instruments of ratification.

50. Mr. AGO said he had some doubt concerning the use of the word "instrument", which frequently denoted a treaty which had already been concluded and had entered into force. It might be better to use the

* Resumed from the 483rd meeting.

word "text" to denote the first stage of the treaty-making process.

51. Mr. SCELLE considered that the word "instrument" was perfectly suitable in the context, since it meant a physical document signifying a commitment.

52. Mr. TUNKIN said that he wished to raise the question of the philosophical background of the article. It seemed that the Special Rapporteur was trying to separate form from substance. In article 2 it was stated that a treaty was an agreement embodied in a written instrument. An instrument not embodying an agreement was not a treaty. In his opinion the definitions under discussion did not correspond to that basic definition of a "treaty". The Special Rapporteur had referred to the situation where a text was agreed upon, but not yet signed or ratified. Except at a final stage of the treaty-making process, it was impossible to state whether or not there existed a treaty. Since treaty-making was a process involving certain stages, it was completed only when all the requirements were fulfilled and when the treaty acquired validity. Accordingly, the fact that an agreement was embodied in the text was merely a step forward in the treaty-making process, which was, as yet, incomplete. He therefore suggested that the first three paragraphs should be omitted and that the article should be limited to a description of the stages of the treaty-making process.

53. The CHAIRMAN, speaking as Special Rapporteur, agreed that a treaty was not a legal act until it had entered into force. It was inaccurate, however, to say that the term could not be used until the whole process had been completed. For example, the conventions adopted by the United Nations Conference on the Law of the Sea, in 1958, were generally referred to as conventions and were regarded as having an existence, although they were not yet in force. Such situations could not be entirely ignored. Technically, such provisions as the clause specifying the number of ratifications required for an instrument to enter into force should be embodied in a separate protocol, which would enter into force immediately; but in practice that was seldom done and those technical provisions were usually embodied in the principal instrument. Accordingly, a certain inherent force must be ascribed to such instruments.

54. Mr. LIANG, Secretary to the Commission, referring to the statements by Mr. Ago and Mr. Scelle, thought that the word "instrument" was suitable in the context of the new article 5. The word "text" was a proper term as used in subsequent articles but it should be borne in mind that, for example, signatures did not form part of texts, but of instruments. One would speak of instruments of ratification but not of texts of ratification. A text was part of an instrument but not the instrument itself.

55. With regard to the second part of paragraph 1, he said it was not strictly accurate to refer to "the instrument or instruments embodying that act". "Embodying the agreement" would be a more acceptable phrase, since an instrument was evidence or the culmination of a legal act. Or it might be said that an instrument was part of the act itself.

The meeting rose at 6 p.m.

488th MEETING

Tuesday, 5 May 1959, at 9.50 a.m.

Chairman: Sir Gerald FITZMAURICE

Law of treaties (A/CN.4/101) (*continued*)

[Agenda item 3]

NEW ARTICLE 5 (FORMERLY ARTICLE 14) (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of article 14, now redrafted as the new article 5 (see 487th meeting, para. 47).

2. Mr. SCELLE, referring to the division between the formal and the substantive aspects of a treaty, pointed out that, upon signature, a treaty acquired something more than a purely material existence, and became to a certain extent a legal act, at least provisionally. That was not true of "provisional" signature, for in that case the State could retract; but a *final* signature created an ultimate obligation. The days when States could disavow the signatures of their plenipotentiaries had passed; those plenipotentiaries were no longer mere authorized agents. They now had special powers which committed the State to some extent, and the authorities competent to ratify the instrument were no longer free to act arbitrarily. If, acting through simple caprice or with ill intent, they delayed entry into force, a certain State responsibility was entailed. That observation applied to some extent to the special case of treaties that entered into force provisionally, to which Mr. Bartoš had referred at the preceding meeting (487th meeting, para. 37). In any case, the question would be discussed again when the Commission studied entry into force in more detail.

3. The CHAIRMAN, speaking as Special Rapporteur, said that the point was dealt with in his draft article 30. Mr. Scelle's remarks made it obvious that some provision should be made to describe as a treaty an instrument which was not yet in force.

4. Mr. AGO agreed with Mr. Scelle on the importance of the act of signature and on the need to consider its effects in different cases.

5. In expressing a preference, at the previous meeting (487th meeting, para. 50), for the word "text" rather than "instrument" in paragraph 1, of the new article 5, he had misunderstood the object of paragraph 1 as compared with that of paragraph 3. He now understood, from the explanations given by the Special Rapporteur, that the purpose of paragraph 1 was not to distinguish between the different stages of the treaty-making process, but to distinguish between the non-material fact of agreement—namely, consensus—and the material act to which that agreement gave rise. That being so, the word "instrument" was perfectly suitable in paragraph 1. He still had some doubts, however, in connexion with paragraph 2, which gave the impression that an instrument was only a provisional text, a draft treaty, whereas an instrument properly so called existed only when there was a final text, subscribed to and in force.

6. Mr. PAL agreed with Mr. Ago that there seemed to be some contradiction between paragraphs 1 and 2. The phrase "instrument or instruments embodying that act" implied a completed act, or an international agreement as defined in article 2, so that an instrument em-

bodying a completed agreement must constitute part of the legal act. In paragraph 2, however, the instrument embodied an incomplete act; it should therefore be stated more clearly that paragraph 2 referred to an earlier stage in the treaty-making process.

7. The CHAIRMAN, speaking as Special Rapporteur, thought that the difficulty might be obviated by referring to an instrument or instruments embodying or intended to embody the legal act.

8. Mr. ALFARO said that the term "legal act" meant specifically certain acts in civil law, by nature different from contracts. In any case, it seemed unnecessary to use two different terms, "legal act" and "international agreement" if they had the same meaning. At the previous meeting the Secretary to the Commission had suggested (487th meeting, para. 55) that the word "agreement" should be used instead of "act" at the end of paragraph 1; he agreed that that would be the wiser course and suggested that the paragraph should be so amended.

9. The CHAIRMAN, speaking as Special Rapporteur, accepted Mr. Alfaro's suggestion.

10. Mr. VERDROSS thought that the article might relate to two hypothetical cases. In the first case, two States might reach a verbal agreement, which might be transformed into a treaty and embodied in a text. In the second case, if a treaty were signed, but not yet ratified, agreement would exist on the text, but not on entry into force, because that would be dependent on ratification, which might never take place. He agreed with Mr. Ago that those matters should be clarified in the article under consideration.

11. The CHAIRMAN, speaking as Special Rapporteur, did not think that anything in the article conflicted with Mr. Verdross's views. Moreover, he thought that three hypothetical cases might be envisaged. Firstly, the agreement might antedate the text; secondly, agreement might be reached concurrently with the establishment of the text; and thirdly, the text might be drawn up first and entry into force would follow.

12. Mr. HSU did not think that the discussion was strictly necessary unless the theories expressed by Mr. Tunkin at the preceding meeting (487th meeting, para. 52) were accepted. There seemed to be two sets of meanings for the word "treaty", the first drawing the distinction between the generic and the specific use of the word and the second the distinction between the technical and the popular meaning. The first set of meanings had been disposed of by stating that the use of the word in the broad sense did not prejudice its use in the narrow sense. With regard to the technical and popular uses of the word, however, he thought that the article should be revised and was inclined to agree with Mr. Tunkin that the essential provisions of the article were in paragraph 4. A phrase might be added to the effect that the popular use of the term "treaty" as a text before the conclusion of the treaty-making process was not prejudiced by the enumeration.

13. The CHAIRMAN, speaking as Special Rapporteur, thought it was an over-simplification to say that the distinction between the treaty considered as a text and as an international agreement was the difference between the technical and the popular use of the word. After all, a treaty had an existence and certain juridical effects before it came into force. He drew attention to the references in paragraphs 2 and 3 to sections B and C; the fact remained that all the remaining articles of the code were based on the distinction between the treaty as a text and the treaty as an international agreement. Unless that method were to be abandoned entirely, an introductory article establishing the distinction was essential.

14. Mr. HSU felt that the article in its present form was contradictory. Even if co-ordination with subsequent articles were required, it would be better to draw the necessary distinctions in the definition in the new article 4. In any case, the questions dealt with in paragraphs 1, 2 and 3 would arise in connexion with validity and were out of place in article 5.

15. Mr. BARTOŠ agreed with Mr. Scelle and Mr. Ago. Multilateral agreements usually contained provisions concerning entry into force, which were preliminary legal acts setting forth certain conditions. Bilateral agreements likewise were often accompanied by subsidiary agreements setting forth the conditions under which the main agreement would enter into force. For example, in 1947, an agreement had been drawn up between Yugoslavia and Bulgaria with a view to establishing a kind of confederation of the two countries. That agreement had never been ratified, but a series of arrangements had been concluded for the execution of the agreement, containing all the necessary formalities and stating the intentions of each party in the preamble to each arrangement. The establishment of such binding provisions could not be neglected altogether in the case of bilateral or collective agreements.

16. Mr. AMADO said he was aware that the article under discussion constituted an introduction to sections B and C. He would have preferred a simpler definition of a treaty in the two senses proposed, for example, a provision stating that a treaty was an international agreement embodied in an instrument or instruments, but he would not make a formal proposal to that effect. He was grateful to Mr. Alfaro for at least clarifying the text to the extent that the words "international agreement" would be used instead of the term "legal act".

17. Mr. EDMONDS observed that the majority of the Commission seemed to be in favour of using the term "treaty" to mean agreements which had not yet been signed or authenticated. In an attempt to clarify the distinction between the existence of a treaty as a legal document and its existence as an international agreement he proposed that paragraphs 1, 2 and 3 should be amended to read:

> "1. Subject to the definitions contained in article 2 of the present Code, the term treaty may be used to denote either a legal document stating the terms of an international agreement or that agreement as it has been executed and delivered by parties to it.
>
> "2. In order that the treaty may exist as a legal document, it is sufficient if its text has been duly drawn up, and established or authenticated, in the manner provided in section B below.
>
> "3. In order to be or become an international agreement, the text, which has been drawn up in the form of a proposed agreement, must be subscribed to in the manner provided in section C below."

18. Mr. YOKOTA thought that the term "treaty" had three meanings, first, an international agreement, secondly, the instrument or instruments embodying that agreement, and, thirdly, an instrument or instruments embodying an uncompleted international agreement. Paragraph 2 seemed to denote a treaty in the third

sense, but the wording was confusing and had led to misunderstandings. He therefore suggested that the first part of paragraph 2 might be amended to read: "The term 'treaty' may also be used to denote an instrument or instruments intended to embody a future international agreement. In this sense, it is sufficient . . ." In that way the ambiguity of the first phrase would be avoided. The drafting committee might consider that suggestion together with Mr. Edmonds's amendment.

19. Mr. TUNKIN thought that the provisions of paragraphs 2 and 3 were purely theoretical. Mathematically speaking, according to the definition of article 2, a treaty was an agreement between States, plus an instrument. A treaty constituted the tangible manifestation (written form) of agreement. He agreed with Mr. Amado that that was the only correct definition of the word treaty, since, as he had pointed out before, substance and form could not be separated. Agreements might exist otherwise than in written form, but treaties could only exist in writing. Thus, if under article 2 a treaty was both an agreement and an instrument, it was incorrect to say in the new article 5, paragraph 2, that an instrument was a treaty and in paragraph 3 that an agreement was a treaty.

20. The CHAIRMAN, speaking as Special Rapporteur, could not agree that paragraphs 2 and 3 were entirely theoretical. They set forth a conceptual distinction, which had certain definite and practical results. Accordingly, it was essential to qualify the original definition.

21. Mr. PADILLA NERVO observed that since the code was to be limited to international agreements in written form a distinction had to be made between "treaty" in the sense of agreement and "treaty" in the sense of a document embodying agreement. In the latter sense "treaty" might refer to various stages in the process of reaching agreement. In that case it was intended for evidential purposes and if it was to serve those purposes it had to pass through a series of formalities described in section B.

22. In comparing the Special Rapporteur's original draft and redraft of the article, he found that certain concepts had been abandoned. While paragraph 1 of the new text was adequate, it seemed to him that paragraph 2 was less clear than its predecessor. He did not know why the reference to "evidential purposes" had disappeared, but in his view paragraphs 1 and 2 of the original draft would meet many of the objections raised and would be closer to the proposal of Mr. Edmonds.

23. Mr. LIANG, Secretary to the Commission, said that he was in general agreement with the Special Rapporteur's approach and that there was great utility in making a distinction between "treaty" as a legal transaction—and he saw no objection to the use of the term "legal transaction", which was well established in legal usage, in English at least—and "treaty" as an instrument embodying the transaction. To Mr. Alfaro's objection to the use of the term "legal act", he (Mr. Liang) would add that the term was correct when applied to an act of one party, for example one State's acceptance or denunciation of a treaty, but might be inadequate to denote the consensus or joint action of two or more States in the conclusion of a treaty.

24. He had greater misgivings over the wording of paragraph 2, which Mr. Ago had criticized. He thought the word "instrument" in the normal case indicated a treaty after it had entered into effect. For example in Article 36, paragraph 2 (*a*), of the Statute of the International Court of Justice, the words "the interpretation of a treaty" certainly meant interpretation of an instrument having acquired legal force and not interpretation of an inchoate treaty. Only in a small number of cases was the word treaty used in the sense of an inchoate treaty, in other words, a treaty on the way to acquiring legal force.

25. Therefore, while paragraph 2 was impeccable in a limited sense, the reference to sufficiency might tend to obscure the normal and very general use of the term "instrument" in the sense of an instrument already possessing legal force. That might be a matter of drafting but it was an important point that should be taken into account by the drafting committee.

26. Mr. EL-KHOURI said that the more he listened to the discussion, the more he was convinced that it was not necessary in the code to enter into elaborate definitions; to do so would only complicate matters. The term "treaty" had a counterpart in every language; it was used constantly and there was never any doubt about its meaning.

27. He added, incidentally, that the term "obligatory force", which was used in the Special Rapporteur's redraft of new articles 3 and 4, was open to the objection that the word "obligatory" implied the imposition of an obligation, whereas sovereign States accepted obligations voluntarily. It would be better to use the word "binding" or "operative".

28. Of the various versions of the article before the Commission, he preferred that proposed by Mr. Edmonds.

29. The CHAIRMAN, speaking as Special Rapporteur, thought that Mr. Ago's doubts concerning the use of the word "instrument" probably related to a drafting point that might be met by using Mr. Edmonds's draft or by replacing it with a word like "project".

30. With reference to Mr. Liang's statement, he said that a treaty which had come into force was incontestably an instrument, but he had felt that it was also appropriate to speak of a treaty as an instrument even at an earlier stage. However, he agreed that there might be a stage when a treaty was still only a project and when it might be inappropriate to call it an instrument. In any case, if the word "instrument" was replaced by "text" or "draft", it seemed to him that paragraph 2 of his redraft would be perfectly accurate.

31. Mr. SCELLE said that he had been struck by Mr. Padilla Nervo's remarks regarding the absence of any reference to "evidential purposes" in the redraft. That was regrettable since such a reference would serve to distinguish "treaty" in the sense of agreement from "treaty" in the sense of instrument, for the primary purpose of an instrument was to prove the existence of agreement. He took it that the distinction would have to be made when the code dealt with the interpretation of treaties, and he wished to know why it had disappeared from the article under consideration.

32. The CHAIRMAN, speaking as Special Rapporteur, said that he too preferred his original draft. The draft represented an attempt at simplification and an effort to meet the views that had been expressed by various members.

33. Mr. LIANG, Secretary to the Commission, said that he had not suggested in his previous statement

that the new draft of paragraph 2 was erroneous. In the 1920's, there had been a famous draft treaty of mutual assistance which had never gone into effect. It could probably be said, quite correctly, to have existed as an instrument even though it had never achieved the full status of a treaty.

34. Nevertheless, in his view the wording of paragraph 2 in the Special Rapporteur's redraft was too broad owing to the use of the word "instrument" in conjunction with the clause beginning with the words "it is sufficient". The original draft had used the word "text", not "instrument", and he had no quarrel with the old wording "for evidential purposes the text alone is sufficient . . .". In that connexion he pointed out that even in the few cases in which the word "instrument" could be applied to a treaty that had not acquired legal force, such as the draft treaty he had cited, the original formula would not be inappropriate since the draft treaty constituted evidence of some preliminary agreement having been reached. Therefore, he would suggest that the original wording "for evidential purposes" should be retained and that the word "instrument" should be replaced by the word "draft" as the Special Rapporteur had just suggested.

35. Mr. TUNKIN suggested that when the Drafting Committee considered the article, it should avoid taking any sides in the theoretical discussion as to whether an instrument was only evidence of an agreement or was the agreement itself. He did not think that it was necessary to resolve that controversy for the purposes of the code.

36. The CHAIRMAN said that Mr. Tunkin's recommendation would certainly go to the Drafting Committee.

37. Speaking as Special Rapporteur, he did not agree that there was a controversy. There were two aspects of the same thing and they produced practical effects.

38. Mr. TUNKIN said that no one would contest the proposition that an instrument might be used as evidence, but if that was the only role of an instrument, the problem was limited.

39. The CHAIRMAN, speaking as Special Rapporteur, said that that was not its only role and the problem was to elucidate the two different roles.

40. Mr. YOKOTA observed with reference to paragraph 4 of the Special Rapporteur's redraft that, after the establishment and authentication of the text, the next stage of the treaty-making process could be described as either the acceptance of the text as a potential basis of international agreement or the provisional acceptance of the text as constituting an international agreement. However, sub-paragraph (*b*), which spoke of the "provisional acceptance of the text as a potential basis of international agreement" was redundant and even misleading, for it implied that the final acceptance of the text as a potential basis of international agreement was reserved. That was not the case, and he suggested that the word "provisional" should be omitted.

41. The CHAIRMAN, speaking as Special Rapporteur, agreed with Mr. Yokota's observation and suggested that it should be taken into account by the drafting committee.

42. Mr. AGO pointed out that the wording of paragraph 4 (*c*), "final acceptance of the text as constituting an international agreement", was liable to misinterpretation owing to the different meanings of the word "agreement". In some cases it meant the fact of *consensus;* in others, it meant an aggregate of rules established by consent; and finally it was used elsewhere in the code as equivalent to "treaty" in its wider sense. It might therefore be advisable to omit the words "as constituting an international agreement".

43. The CHAIRMAN, speaking as Special Rapporteur, said that he did not think that readers of the code would be seriously misled. However, he saw Mr. Ago's point and asked whether it might not be met by replacing the words "an international agreement" by the words "a treaty".

44. Mr. PADILLA NERVO supported Mr. Ago's objection. He felt that the best solution would be to revert to the Special Rapporteur's original draft of sub-paragraphs (*b*) and (*c*). That would also meet the point made by Mr. Yokota.

45. The CHAIRMAN suggested that the best course would be to refer both the original draft and the redraft of article 14 to the Drafting Committee together with the various proposals that had been made. When the drafting committee submitted a new text, the Commission could decide whether or not to keep the article, or at any rate its first three paragraphs.

It was so agreed.

NEW ARTICLE 6 (FORMERLY ARTICLE 15)*

46. The CHAIRMAN, speaking as Special Rapporteur, read the new text of article 15, which would now appear as article 6:

"B. NEGOTIATION, DRAWING UP AND ESTABLISHMENT (AUTHENTICATION) OF THE TEXT

"Article 6. Drawing up of the text

"1. A treaty is drawn up by a process of negotiation which may take place either through the diplomatic or some other convenient administrative channel, or at meetings of delegates or representatives or at an international conference. In the case of treaties negotiated under the auspices of an international organization, the treaty may be drawn up either at an international conference convened by the organization, or in some organ of the organization itself.

"2. Delegates or representatives must, subject to the provisions of articles 12 to 14 [previously articles 21 to 23] below, be duly authorized to carry out the negotiation, and, except in the cases mentioned in paragraph 3 below, must furnish or exhibit credentials to that effect. They need not, however, for the purposes of negotiation, be in possession of full powers to sign the treaty.

"3. Heads of States and Foreign Ministers having inherent authority, arising from the nature of their functions, to negotiate on behalf of their States, need not produce any specific authority to that effect. The same applies to the head of a diplomatic mission for the purpose of negotiating a bilateral treaty between his State and the State to which he is accredited.

"4. The adoption of the text takes place as follows:

"(i) In the case of bilateral treaties or treaties negotiated between a restricted group of States, by unanimity,

* Resumed from the 484th meeting.

unless the negotiating States decide by common consent to proceed in some other way.

"(ii) In the case of multilateral treaties negotiated at an international conference, and subject to sub-paragraph (iii) below, by a simple majority vote unless the conference, equally by a simple majority, decides to adopt another voting rule.

"(iii) In the case of treaties drawn up in or under the auspices of an international organization, according to such voting rule, if any, as may be specifically provided for by the constitution of the organization for the framing of treaties so drawn up.

"In no case does the mere adoption of a text by a majority vote imply of itself for any State, whether voting affirmatively or not, consent to be bound by the text as a treaty."

47. He explained that the changes he had made were primarily designed to meet the objection that his original draft had not taken sufficiently into account the different circumstances in which a text could be drawn up. The first paragraph of the redraft corresponded broadly to the first sentence of paragraph 1 of his original draft, except that he had added the reference to international organizations. The new paragraph 2 reflected part of the second sentence of the original paragraph 1, while the remainder of that sentence was redrafted as the new paragraph 3.

48. The new paragraph 4 was a redraft of the original text of paragraph 2 and took into account the different situations in the case of bilateral treaties, general multilateral treaties, and multilateral treaties drawn up in, or under the auspices of, an international organization. Sub-paragraph (ii) of the new paragraph 4 gave effect to the view expressed in the discussion that the majority voting rule prevailed at international conferences called for the purpose of negotiating treaties.

49. He pointed out, with reference to sub-paragraph (iii), that a distinction must be made between a multilateral treaty drawn up in, or under the auspices of, an international organization whose constitution provided a voting rule to be followed in the framing of the treaty, and a multilateral treaty drawn up at a conference called by an international organization which did not lay down any voting rule. Such a conference should be treated as a case coming under sub-paragraph (ii). For example, the United Nations Conference on the Law of the Sea, of 1958, had been free to adopt its own voting rule, a two-thirds majority for questions of substance, since there was no provision in the Charter which laid down a voting rule for conferences held under the auspices of the United Nations. On the other hand, there were international organizations which did have constitutional provisions concerning voting at conferences held under their auspices.

50. Finally, he had added a sentence at the end of the article which would reassure the members of the Commission who felt that a majority voting rule at a conference had some kind of binding effect. That, of course, was not the case, even for the participants who had approved the text of the treaty.

51. Mr. AGO said that the new text was an excellent one and covered almost every point raised in the discussion. His observations would mainly relate to minor matters. First, he wondered whether the expression *"voie administrative"* was an appropriate one in the French text of paragraph 1.

52. He thought that in paragraph 4, sub-paragraph (i), the hypothetical case relating to bilateral treaties should be separated from that relating to other treaties. It was incorrect to speak of unanimity in connexion with bilateral treaties. On the other hand, unanimity should of course be an essential requirement in treaty negotiations among a small number of States.

53. Referring to paragraph 4, sub-paragraph (iii), he said that there was yet another possibility: the international organization convening a conference might lay down in advance the conference's essential rules of procedure, and particularly the rules concerning the adoption of the text of treaties.

54. He had some doubts about the form of the last sentence of the article, because it might imply that the mere adoption of a text by unanimity as distinct from a majority decision would give it binding effect, which was of course not the case.

55. The CHAIRMAN, speaking as Special Rapporteur, said it was doubtful whether, for example, the United Nations, in the absence of any express provision in the Charter, was competent to lay down in advance obligatory voting rules for a conference which it convened. On the other hand it could perhaps be held with equal force that the United Nations was not bound to convene any conference and that, if it did so, it could lay down certain conditions for the conduct of the proceedings.

56. Mr. BARTOS said the Special Rapporteur had succeeded in meeting the views of the majority; he endorsed the points made by Mr. Ago.

57. Without proposing any amendment, he wished to reaffirm his strong opposition to paragraph 4, sub-paragraph (ii), for the legal and political reasons he had stated earlier (see 483rd meeting, para. 59, and 484th meeting, paras. 10-13 and 45).

58. Mr. TUNKIN said that paragraph 4, sub-paragraph (ii), represented a radical departure from the original text of article 15. If, as he thought, there was as yet no rule of international law on the subject of majority decisions at conferences, it was inadvisable to introduce one in the draft. Surely it was not fortuitous that in the past each conference had established its own voting rules, since the decision must largely be determined by the nature of the agreement to be negotiated.

59. If, however, the Commission did decide to suggest a rule, it should bear in mind that recent practice appeared to incline towards the two-thirds majority rule, which was supported by important considerations not of a legal character. Obviously, when suggesting new rules intended to regulate relations between States, the Commission must take into account political realities, and give thought to the possible influence of the rule it chose, for that rule was bound to have some persuasive authority. He feared that the simple majority rule would tend to encourage States to disregard the importance of elaborating an acceptable text; hence, if a rule must be inserted —and he would not welcome that course—the two-thirds majority was preferable.

60. Mr. VERDROSS, referring to paragraph 3, doubted whether the head of a diplomatic mission was empowered to conclude an international treaty without special authorization. Formerly, diplomatic envoys could only represent their Governments in routine matters. However, if modern practice was different he would have no objection to such a provision.

61. He shared Mr. Tunkin's views about paragraph 4, and did not consider that there was any rule of international law governing the adoption of the rules of procedure of a conference. If any such rule was to be created, he favoured that prescribing the two-thirds majority.

62. Mr. LIANG, Secretary to the Commission, suggested that the title of the new article 6 should be amended so as to indicate that it dealt with the "adoption" as well as with the "drawing up" of the text.

63. Referring to Mr. Ago's first point, he observed that the word "administrative" had a narrower meaning in French than in English: in French, it denoted more or less routine matters. As the text might convey the impression that the diplomatic channel was part of an administrative channel, the words "convenient administrative" should perhaps be deleted from paragraph 1.

64. The phrase "or under the auspices of", which was vague, might with advantage be omitted from paragraph 4, sub-paragraph (iii), and replaced by a clear indication that the provision referred to treaties negotiated within an international organization or one of its organs, or drawn up by an international conference convened by an international organization.

65. The Charter of the United Nations did not contain provisions concerning the voting rules applicable in conferences, nor did the constitutions of all the specialized agencies; accordingly, it would be advisable to stipulate in paragraph 4, sub-paragraph (iii), that in the absence of such provisions the rule in sub-paragraph (ii) above would apply. In practice the United Nations had always refrained from making rules about voting procedure and it was interesting to note that even the Council of the League of Nations, which had usually asserted more authority over its subordinate organs, had not attempted to lay down rules of procedure for The Hague Conference for the Codification of International Law of 1930. Perhaps one of the reasons for not doing so on that occasion had been that the Conference had been attended by States not Members of the League. In the United Nations General Assembly, of course, it was always open to any delegation to propose the adoption of a voting rule requiring a two-thirds majority for the adoption of the text of a particular convention, and perhaps that possibility might be covered in paragraph 4, sub-paragraph (ii).

66. Though Mr. Ago's point concerning the last sentence of the new article 6 was valid, the sentence was perhaps superfluous since only someone wholly unversed in law could associate the adoption of a text with the process of becoming a party to the treaty.

67. Mr. YOKOTA found the new article generally acceptable but had some doubts about paragraph 4, sub-paragraph (ii). Though at recent conferences the majority rule might have been adopted, he doubted whether that had yet become established practice. Accordingly, he would prefer the words "equally by a simple majority" to be omitted and the question to be left open. However, if the Special Rapporteur's intention was to bring about a progressive development of international law and if that found favour with the majority, he would not press his view provided that it was clearly stated in the commentary that the rule in question did not reflect present practice.

68. Mr. SCELLE said that the objections to the use of the word *"administrative"* in the French text could be met by the substitution of the word *"officielle"*.

69. He considered that it would be extremely difficult, if not impossible, for the United Nations or any other international organization to impose certain rules of procedure on a conference convened by it if non-member States were invited to participate. Paragraph 4, sub-paragraph (ii), was acceptable in its present form if some mention could be made of the growing popularity of the simple or two-thirds majority rule.

The meeting rose at 1 p.m.

489th MEETING

Wednesday, 6 May 1959, at 9.45 a.m.

Chairman: Sir Gerald FITZMAURICE

Law of treaties (A/CN.4/101) (*continued*)

[Agenda item 3]

NEW ARTICLE 6 (FORMERLY ARTICLE 15) (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the redraft of article 15, which had become article 6, submitted at the previous meeting (488th meeting, para. 46).

2. Mr. FRANÇOIS was opposed to making any definite stipulation concerning the voting rule to be observed at international conferences, because that was not a matter for the Commission to decide *a priori*, once and for all, but for each conference to fix for itself. On the other hand, it was essential to specify in the code by what majority conferences were to adopt their rules of procedure; in his opinion there could be no doubt that the practice of conferences was to adopt their rules by a simple majority.

3. At the previous meeting (488th meeting, para. 66) the Secretary to the Commission had rightly argued that the last sentence in the new article was superfluous. Nevertheless, a statement along the lines of that sentence might usefully appear in the commentary to rebut in advance any such theory as that put forward at the United Nations Conference on the Law of the Sea, held in 1958, when it had been suggested that States willing, in certain circumstances, to accept an extension of the territorial sea had, by voting in that sense, implicitly abandoned the three-mile rule.

4. Mr. PAL said that the discussion had served to confirm his original view, and he saw no reason why any conference should not itself adopt the voting rule governing the adoption of its own rules of procedure. In the absence of any decision to the contrary unanimity should be required. He could see no merit in a simple majority rule in that instance. Securing continued participation by the minority was of great potential consequence; there was always the further possibility of ultimate concurrence as a result of the conference. He did not see any compensatory advantage in keeping to the simple majority rule.

5. The last sentence of the new article was not altogether redundant, for it might reassure States participating in a conference which found themselves in the minority that they were not in any way bound by the text of the convention adopted by the mere fact that they had not withdrawn from the conference.

6. Mr. YOKOTA considered that the last sentence of the new article should be discussed in conjunction with article 17, paragraph 1, since it related to the legal consequences of drawing up the text.

7. Mr. TUNKIN could not agree with Mr. François that the simple majority rule for the adoption of rules of procedure constituted existing practice. Surely, no

majority of States represented at a conference could force a minority to accept a particular rule of procedure. If Mr. François were right, rules of procedure once adopted became *ipso facto* obligatory on all participants, which was patently absurd, since any delegation finding them unacceptable could leave the conference.

8. There was also some contradiction in Mr. François's argument that it was absolutely indispensable for the conduct of international conferences to insert a rule on the subject in the draft, and his contention that the rule already existed.

9. If any rule could be claimed to exist concerning the adoption of the rules of procedure it must be the unanimity rule. But at all events he did not believe there was any need for provision on the subject, which really belonged to a different topic, namely the conduct of international conferences. He therefore urged the omission of paragraph 4, sub-paragraph (ii).

10. He agreed with Mr. Yokota that the last sentence of the article was unsatisfactory and should be deleted, and the point should be taken up during the discussion of articles 17 and 18.

11. Mr. FRANÇOIS said, in reply to Mr. Tunkin, that the Commission had never felt bound to refrain from including a rule in any draft because it was a recognized rule of international law: one of its functions, after all, was codification. Even if no provision were included concerning the adoption of the rules of procedure, the present practice of adoption by simple majority would continue. If Mr. Tunkin's theory were put into practice any one State could force a conference to adopt the unanimity rule.

12. Mr. LIANG, Secretary to the Commission, said that the discussions had prompted him to examine United Nations practice and the views expressed in the General Assembly on the question.

13. The possibility—mentioned by Mr. Ago at the 488th meeting (para. 53)—of an international organ prescribing in advance rules of procedure for a conference convened by it, had been the subject of some discussion at the fourth session of the General Assembly in 1949 when the Assembly had considered the question of implementing Article 62, paragraph 4, of the United Nations Charter.

14. In view of the interest which the Economic and Social Council had shown in convening technical conferences, the General Assembly had asked the Secretary-General to prepare some draft rules for the calling of international conferences, and two schools of thought had emerged during the discussions on that draft in the Sixth Committee.[1] One held that since the Council was entitled to convene conferences it was also entitled to draw up their agenda and rules of procedure, a task for which it was better qualified than a body of experts. The other school contended that the Council could not impose its own views on a conference, but could for guidance provide a provisional agenda and rules of procedure. The second view had prevailed, and had been embodied in rule 7 of General Assembly resolution 366 (IV), entitled "Rules for the calling of international conferences of States". That method had worked fairly satisfactorily, as, for example, in the case of the Conference on the Law of the Sea.

15. In view of that practice and the difficulties mentioned by some members, it was questionable whether the Commission should recommend a general rule. He still believed that the Commission might be going too far in attempting to deal with a matter which properly related to the rules for the calling of conferences and their voting procedure: the issue was a crucial one as far as that subject was concerned, but not in a draft on the law of treaties. It might suffice in the present instance simply to state present practice.

16. Mr. AGO said that unless a conference could adopt its rules of procedure by a simple majority it might find itself in the position of being powerless to get to work at all. He strongly deplored the dangerous implication of the theory that, since the majority could not impose its will on the minority in respect of the rules of procedure, then, if the minority did not withdraw, unanimity must be assumed to have been reached. That theory would inevitably lead to the false proposition that unanimity was the rule, with the implication that one State could obstruct the adoption of the rules of procedure and stop all the work of the conference.

17. As far as the voting rule for the adoption of the text itself was concerned, he sympathized to some extent with the view expressed at the previous meeting by Mr. Tunkin (488th meeting, paras. 58 and 59). The Special Rapporteur's redraft seemed to imply that the trend was towards the simple majority rule, which was not the case. The Commission should endeavour to provide for all possible situations, and he thought that the most flexible formula would be to stipulate that any conference decided on its voting rules in accordance with the rules of procedure adopted by a majority vote.

18. Again he considered that all eventualities should be provided for in paragraph 4, sub-paragraph (iii). Clearly, in some cases, it was preferable for the conference to draw up its own rules of procedure, in others —and particularly when the conferences were of a technical nature—it was preferable for the rules of procedure to be prepared in advance by the convening organ.

19. The last sentence in paragraph 4 was self-evident and should be deleted.

20. Mr. PADILLA NERVO said that in practice the provision contained in paragraph 4, sub-paragraph (ii), would presumably be applied by analogy with Article 18 of the Charter, and the approval of the text of the treaty would undoubtedly be regarded invariably as an "important" question. That provision would not influence the voting procedure in the cases envisaged in paragraph 4, sub-paragraph (iii).

21. As for the question of the voting rule for the adoption of rules of procedure, he thought it would be difficult not to accept the simple majority rule, for otherwise the negotiations might never get started.

22. He agreed with Mr. Yokota about the last sentence in paragraph 4.

23. Mr. TUNKIN said that the Secretary's account of United Nations practice had confirmed his opinion that it would be unwise for the Commission to lay down any rule, whether for the adoption of the rules of procedure or for the adoption of the text of a treaty. No proof had yet been produced in support of the contention that there was a general rule of international law governing the adoption of the rules of procedure. The matter did not appear to have led to difficulties in

[1] See *Official Records of the General Assembly, Fourth Session, Sixth Committee*, 187th to 199th meetings. See also *Repertory of Practice of United Nations Organs*, vol. III, para. 69, pp. 315 and 316.

practice and should be dealt with in conjunction with the topic to which it properly belonged.

24. Mr. BARTOŠ said the crucial question was whether the Commission was engaged, in the present case, in codifying existing international law, or in developing the law. It had decided to embody the law of treaties in a code, rather than in a convention; accordingly, the Commission was codifying existing rules of international law, and not making new rules. If the Commission were engaged in developing international law, he would not oppose the introduction of a rule concerning the majority required for the adoption of the rules of procedure of a treaty-making conference; the fact was, however, that in existing international law there was as yet no rule establishing such a majority, though the unanimity rule was universally recognized.

25. If an international organization convened a conference, the participating States were free to accept or not to accept the rules proposed by that organization; and in any case it was open to the dissenting minority to withdraw from a conference which had approved rules by a majority decision. The text of a treaty approved by a conference by a majority could hardly be binding on States which had not participated in drawing up the text, even though the text might have a certain international or political importance, possibly even for the non-participating States. What was quite inadmissible, however, was a provision to the effect that a text having potentially "obligatory force" should in all cases be adopted by a simple majority. If the simple majority rule was inapplicable to the adoption of the rules of procedure, then *a fortiori* it was inapplicable to the adoption of the treaty.

26. If the Commission were concerned with developing the international law relating to treaty-making, he would accept the idea of recommending the two-thirds majority rule. Since it was, however, codifying the law, the alternatives before the Commission were the unanimity rule—on which he would not insist—and the provision that every conference was free to adopt its own rules of procedure. But the Commission should not lay down the simple majority rule, even if it were qualified by the provision that every organization's pre-established rules must be respected.

27. In that connexion, he was inclined to agree with Mr. Ago that the question of the majority was governed not only by the constitution of the convening organization but also by the rules applicable to the calling of a conference; in other words, the question was often governed by rules of conference law, rather than by constitutional provisions. It was a practice recognized in international law that the negotiators attending a conference had the right to propose or to accept in advance the conditions under which the conference would work; such rules were tacitly accepted by the participants. He was therefore opposed to laying down a new abstract rule to the effect that a text should always be adopted by a simple majority. Under the United Nations Charter, some relatively unimportant decisions were made by a simple majority of the General Assembly but matters of political consequence, enumerated in Article 18, paragraph 2, were decided by a two-thirds majority.

28. If in the present case the Commission was engaged on the progressive development of international law, it would be possible to include in the code a recommendation for a two-thirds majority rule or, better still, a provision along the lines suggested by Mr. Ago that it should be left for each conference to decide by what majority the voting rules would be settled. It should be borne in mind that the whole problem of majorities was approached in many different ways. For example, some technical conferences had their own peculiarities in that respect; thus, under the Constitution of the International Labour Organisation, it was recognized that certain social groups from each State voted separately on texts relating to important social matters. The procedure was also complicated in the case of certain political decisions. In some such cases, the Security Council had decided, in connexion with Chapter VI of the Charter, that nothing should be regarded as finally decided unless the State directly concerned accepted the decision. Moreover, certain questions which did not fall under Article 2, paragraph 7, since they could not be regarded as purely domestic, and which could not threaten international peace and security, nevertheless closely concerned the sovereignty of States. For example, it was a generally recognized rule of modern international law that every international organization could by a majority decide for itself where it should have its headquarters, but in practice the consent of the host State must be obtained. Accordingly, no absolute rule governing majorities could be formulated but, in order to facilitate the work of conferences, some elastic recommendation might be made, to the effect that the conference should decide upon the majority according to voting rules determined by it and, failing such decision, by a two-thirds majority.

29. Mr. PAL said that the facts cited by the Secretary to the Commission (see para. 12 above) had confirmed his view that the code should not contain any provision concerning the voting rules of conferences.

30. He did not think that Article 18 of the Charter, which had been cited by Mr. Padilla Nervo (see para. 20 above), was relevant to the Commission's purposes, since that Article related only to the functioning of the United Nations as a body, and not to the work of conferences. The only relevance of Article 18 lay in the fact that, although the simple majority rule normally prevailed in General Assembly practice, even the Assembly observed the two-thirds majority rule for certain special purposes. If the Commission were to be guided by that provision, then, logically, the question by what majority a treaty-making conference should adopt its voting rules should itself be regarded as an important question and hence should be decided by at least a two-thirds majority. Any special majority rule prescribed for the adoption of the treaty text would be reduced to nothing if it were made subject to modification by a simple majority. He insisted that in prescribing the rules the Commission must not overlook the possibility of harnessing the constructive energy even of the minority group. In the affairs of nations, as in the affairs of humans, there was hardly any course absolutely and demonstrably right to follow among the many combinations that were possible in any complex situation.

31. He would oppose the only proposal actually before the Commission, which was to establish the simple majority rule, but if that proposal were modified by provision for the application of the two-thirds majority rule, he might be able to support it.

32. Mr. VERDROSS said that he could not agree with Mr. Ago, who had stated (see para. 16 above) that juridical logic led to the principle that the rules

of procedure of an international conference might in all cases be adopted by a simple majority. In his opinion, that logic led, on the contrary, to the principle of unanimity. Any international conference which was not governed by the constitution of an international organization could be convened only by agreement among *all* the participating States. Logically, therefore, the rules of procedure of such a conference would also require the agreement of *all* the participating States.

33. Mr. François had raised the separate question whether international practice had already established a positive rule whereby rules of procedure might be adopted by a simple majority. Although he doubted the existence of such a rule, he would not object to its acceptance, since the Commission's task was not only to codify international law, but also to promote its progressive development.

34. With regard to the question of the majority by which an international conference should adopt a text, he shared Mr. Ago's view that the question should be left for each conference to decide for itself.

35. Mr. TUNKIN suggested that, in the light of the views expressed during the debate, paragraph 4 (ii) should be amended to read:

> "(ii) In the case of multilateral treaties negotiated at an international conference, and subject to sub-paragraph (iii) below, by a two-thirds majority vote unless the conference decides to adopt another voting rule."

36. The Commission could thus omit any reference to the adoption of rules of procedure, which, in his opinion, fell outside the scope of the code.

37. Mr. AMADO thought that the Commission should concern itself with the adoption of texts, rather than with the rules of procedure of international conferences. A text embodied in written form the settlement of certain problems between States; in order that the text might become an instrument, it must be drafted through negotiation and some rule must be established for the procedure of its adoption. It was self-evident that, in the case of bilateral treaties or treaties negotiated by a small group of States, unanimity had to prevail. In the case of multilateral treaties, however, there was as yet no rule of international law. In order to eliminate the divergences of views concerning the majorities by which such texts should be adopted, he suggested the following simplified version of paragraph 4 (ii):

> "(ii) In the case of multilateral treaties, by agreement between States in accordance with the rules established by the international organization under whose auspices the conference is convened or by the conference itself in accordance with the rules which it has itself established."

38. All reference to majorities or unanimity would thus be eliminated and the idea that States must agree in principle would be established.

39. Mr. HSU observed that the first question before the Commission was whether the code should contain a provision concerning the rules of procedure of conferences. He considered that such a provision should be included, since the subject fell within the scope of a code on the law of treaties.

40. The next question to be settled was what kind of rule should be established. In his opinion, that rule should be neither out of date nor unrealistic. He could not agree with the view that unanimity was a generally accepted rule of international law; the question of sovereignty raised in that connexion was misplaced, since States were free to make reservations to treaties and even not to accede to them even though they had participated in their preparation. It would therefore seem that some majority rule was the practical solution. The Commission might follow the example of the United Nations General Assembly, in which under the Charter the two-thirds majority rule applied in important questions and the simple majority rule in subsidiary matters; in the Assembly, the question whether a matter was important or not was decided by a simple majority. A conference might decide for itself to follow the unanimity rule in adopting a text, but the General Assembly's method of establishing the rules of procedure seemed to be sound. It should be borne in mind, moreover, that the United Nations was a practically universal organization and that the precedents it laid down approximated to rules of international law.

41. Mr. ALFARO agreed with the speakers who considered it impossible to apply the unanimity rule to the adoption of the rules of procedure at international conferences.

42. In his view one rule would be applicable to both of the two classes of international conferences referred to in sub-paragraphs (ii) and (iii), and therefore they could be dealt with in a single sub-paragraph, along the following lines:

> "In the case of multilateral treaties negotiated at an international conference and in the case of treaties negotiated in an international organization or at a conference convened by an international organization, by the voting rule determined by the conference."

43. He made that suggestion irrespective of whether it was decided to retain or omit the reference to a simple majority.

44. Mr. YOKOTA said, with respect to paragraph 4, sub-paragraph (ii), that he was opposed to the suggestion that no reference should be made in the code to the voting rule observable at international conferences. The manner in which the text of a treaty was established, whether in bilateral or multilateral negotiations, was properly a part of the law of treaties. Therefore, the Commission had to try to arrive at an acceptable rule.

45. The question whether there was an established practice at international conferences for the adoption of the rules governing voting procedure was debatable. Some members had said that there was a majority rule, some had insisted that there was in effect a unanimity rule and some had claimed that there was no established rule. In the circumstances, the Commission could not enunciate a voting rule that would govern the adoption of a conference's rules of procedure.

46. He recalled the suggestion he had made at the previous meeting (488th meeting, para. 67) to omit the words "equally by a simple majority", and noted that it had been acccepted by Mr. Tunkin. For his own part, he was prepared to accept Mr. Tunkin's formula providing for the adoption of texts by a two-thirds majority unless the conference decided otherwise.

47. Mr. SANDSTRÖM said he found it difficult to take a position after listening to the arguments developed in the debate. He suggested that sub-paragraph (ii) should provide simply that in the case of a multilateral treaty negotiated at an international conference, the adoption of the text took place in accordance with the rules

decided on by the conference. All the various positions could then be fully set out in the commentary.

48. Mr. EDMONDS said that a code on the law of treaties would not be complete without a statement on the voting rule by which the text of a treaty was adopted and, by implication, on the vote by which that voting rule was adopted. That was what the Special Rapporteur had tried to do and he had selected the appropriate place to do it.

49. In that connexion he recalled that the famous American jurist Oliver Wendell Holmes had once said that the structure of any law must be such "as to allow some play at the joints", in other words, should permit of practical application. Thus, the rule to be arrived at by the Commission had to be a workable rule. No one could object to the unanimity rule in the case of bilateral treaties or treaties negotiated by a small group of States. Again, in the case of a multilateral treaty drawn up at a conference held under the auspices of an international organization, he saw no reason why the voting rules of the sponsoring organization should not apply.

50. As to independent international conferences, it was simply and utterly impractical to suggest the unanimity rule. Some majority rule must be applied and he could equally agree to the suggestions for a simple majority and a two-thirds majority. He also agreed that a conference must be free to depart from the general rule. What he could not understand, however, was how the Commission could avoid saying by what majority a conference could decide on a different voting rule. Thus, if the Commission decided in favour of the two-thirds majority rule for the adoption of the text of a treaty, it would have to specify "unless the conference by a simple majority (or "equally by a two-thirds majority") decides to adopt another voting rule".

51. The final sentence of paragraph 4, which was completely acceptable to him, was in the nature of an "escape clause", which safeguarded the position of those who feared that obligations might be imposed on States by a majority vote.

52. Mr. KHOMAN said that the question before the Commission was not so much that of the adoption of the rules of procedure but that of the adoption of the text of the treaty, as the introductory clause of paragraph 4 plainly stated. Therefore, the question of the rules of procedure could be set aside and left to the decision of each international conference, on the principle that every independent organ was master of its own procedure. That was implicit in the Special Rapporteur's redraft, for sub-paragraph (ii) stated ". . . unless the conference . . . decides to adopt another voting rule".

53. Accordingly, he did not see the purpose of specifying any particular majority. It would be enough to conclude sub-paragraph (ii) with the words "by a majority to be decided by the conference".

54. At the same time, he would suggest the inclusion of an additional passage, either in the article or in the commentary, indicating that there were three categories of voting rules—unanimity, a simple majority and a qualified majority—and that present practice seemed to favour the two-thirds majority rule. He included unanimity as a possibility, because it had been the rule in the case of certain treaties sponsored by the League of Nations and it was conceivable that special circumstances might be in favour of the unanimity rule at a future conference.

55. However, any rule for voting on texts mentioned by the Commission would have to be in the nature of a suggestion.

56. Mr. SCELLE observed that since the Commission was drafting a code, and not a convention, its text would not be subject to discussion at a conference of States and it therefore enjoyed greater freedom of action. It was enough to say that the purpose of a code was generally to make *tabula rasa* of some customs. That had been the case with the Napoleonic Code and most other codes. The Commission should therefore not permit itself to be influenced by pre-existing rules which were not in keeping with the present state of international society.

57. As to the question of sovereignty, he pointed out that the number of independent States in the world was constantly growing. Was it desired that all those States should form a kind of archipelago of units separated by unbridgeable gulfs? That was the deeper meaning of "sovereignty". Or was it desired to have an international society of peoples who could produce results worthy of codification? In that respect he was completely in accord with Mr. François. It was unavoidable that the Commission should take a decision on the rules of international conferences. Moreover, paragraph 4 very adequately provided in its final sentence for the protection of sovereignty.

58. It was important to include a provision concerning the voting rule governing the adoption of texts. He was in favour of a simple majority but, if necessary, would be prepared to accept the two-thirds majority rule. On the other hand, he would delete the phrase "unless the conference . . . decides to adopt another voting rule", for it was unnecessary to bring those references to the principle of sovereignty at every stage.

59. It was the duty of the Commission to record rules which corresponded to present day reality, and that reality was an international society progressively moving along the road to integration.

60. Mr. FRANÇOIS pointed out that he did not go so far as Mr. Scelle. He would not prohibit a conference from deciding, by a simple majority vote, in favour of the unanimity rule for the adoption of the text of the treaty, if it wished to do so.

61. He had taken note of Mr. Tunkin's new suggestion (see para. 35 above) and he would like to ask by what vote, under that suggestion, a conference would decide to adopt a voting rule other than the two-thirds majority rule.

62. Mr. TUNKIN replied that that was a question which in practice was always resolved in one way or another. From the theoretical point of view, it was admittedly a difficult problem, but it was a problem that related to the organization of international conferences and not to the law of treaties. It might be argued that something had to be included in a code on the law of treaties concerning the voting of the text at international conferences, but that was as far as one could go.

63. The question was similar to that of reconciling the principle of the *Grundnorm* with the principle of *pacta sunt servanda*. That problem, too, was resolved in actual life in spite of a theoretical antithesis.

64. Mr. PADILLA NERVO agreed with Mr. Scelle that the Commission could not ignore in its code the question of how texts were adopted at multilateral conferences. While such conferences would always retain the power to settle their procedure, the Commission had to deal with the question of voting and had to express an opinion concerning what was desirable and practical. He

could not agree with those members who had suggested that the code should be wholly silent on the matter. The Commission had to express a judgment and not leave the question in the air.

65. He recalled that he favoured a wording based on the two-thirds majority rule. In that connexion he pointed out, with reference to Mr. Pal's statement, that he had cited the provisions of Article 18 of the Charter and the General Assembly's rules of procedure as an example and not for the purpose of showing that a conference would necessarily be bound by those provisions.

66. Mr. EL-KHOURI asked why it was necessary to debate the question of voting at international conferences at such length. The fact that a text had been adopted by a simple majority or a qualified majority or unanimously would not affect the right of any State to refuse to ratify or accede to the treaty. He would prefer to leave sub-paragraph (ii) as it stood.

The meeting rose at 1 p.m.

490th MEETING

Friday, 8 May 1959, at 9.45 a.m.

Chairman: Sir Gerald FITZMAURICE

Law of treaties (A/CN.4/101) (*continued*)

[Agenda item 3]

NEW ARTICLE 6 (FORMERLY ARTICLE 15) (*continued*)

1. The CHAIRMAN, speaking as Special Rapporteur, reviewed the Commission's discussion of article 15, which had been redrafted and would appear as the new article 6 (see 488th meeting, para. 46).

2. While most of the discussion had related to the drawing up of the text of a treaty at international conferences, he would first dispose of certain other points that had been made. The Secretary to the Commission had suggested (488th meeting, para. 62) that the title of the article should be amended to read "Drawing up and adoption of the text". He agreed with the suggestion, which should be referred to the Drafting Committee. There had been criticism of the word "administrative", in paragraph 1. He agreed that it was not the best word but explained that he had used it in order to indicate that the process of negotiation was a function of the executive, and not of the legislative, branch of government. He could accept Mr. Scelle's suggestion (488th meeting, para. 68) that the word *"officielle"* should be used in the French text.

3. There had been no special observations with reference to paragraph 2. As to paragraph 3, Mr. Verdross had questioned whether the head of a diplomatic mission possessed inherent authority to negotiate a bilateral treaty between his State and the State to which he was accredited (488th meeting, para. 60). Actually, the head of mission surely had such authority under his diplomatic credentials, which gave him the power to "treat" with the Government of the State to which he was accredited, though admittedly not inherent authority to sign the treaty or to represent his country at a multilateral conference which happened to be held in the territory of that State.

4. In paragraph 4, some members of the Commission had suggested the omission of the final sentence, as self-evident. Others had considered the sentence important as a safeguard against any possible misunderstanding concerning the legal effects of the adoption of a text. Mr. Yokota had called attention to the fact that that point was covered by article 17, paragraph 1 (see 489th meeting, para. 6). He (the Special Rapporteur) was in favour of retaining such a provision in the code, because even international jurists sometimes became confused about the legal consequences of the adoption of a text. If the Commission should decide not to keep it in article 17, the provision should at least appear in the article under discussion.

5. With regard to paragraph 4, sub-paragraph (i), some members had thought it unnecessary to mention that texts of bilateral treaties were adopted by unanimity, and Mr. Ago had suggested (488th meeting, para. 52) that sub-paragraph (i) should be limited to the case of treaties "negotiated between a restricted group of States". He agreed with that suggestion in principle but thought that the drafting committee might mention the case of bilateral treaties parenthetically, so to speak, by a phrase such as "in addition to the case of bilateral treaties".

6. The remaining and major part of the discussion, and most of the suggestions, had dealt with sub-paragraphs (ii) and (iii). He would not review every suggestion but would attempt to group them into categories. One suggestion—he was not sure whether it was still maintained—had been to the effect that it was not necessary to deal with the voting rule at international conferences at all, because that was a question of conference procedure and not strictly part of the law of treaties. In his opinion, to accept that view would be to say that nothing was part of the law of treaties unless it had reference to a completed treaty actually in force. He did not believe that anyone wished to go so far, and all members of the Commission would probably agree that the question of the method whereby the text of a treaty was adopted was certainly a part of the law of treaties and a very important part. If that was agreed to, he could not see how the question could be excluded from the code.

7. In connexion with that question various suggestions had been made. It had been proposed that it should be provided simply that it was for each conference to decide on the method by which it would adopt the text of a convention. While he did not consider that proposal incorrect, he thought that it was inadequate, for it left open the very important question how a conference was to proceed to take that decision, a decision without which it could not adopt any text at all. It was therefore essential for the Commission to go a step further.

8. There again different suggestions had been made. While everyone had agreed that the international conferences referred to in sub-paragraph (ii) would always have the right to adopt whatever voting rule they preferred, many members of the Commission had expressed themselves in favour of mentioning a voting rule, and most of those had suggested a two-thirds-majority rule. After that, there had been a division of opinion as to whether the article should specify the manner in which a different rule would be adopted, some favouring the use of a vague formula, such as "unless the conference decides otherwise", while others

urged that the code should be specific about the majority by which the decision on a different rule was to be adopted. The issue had been clearly stated in the exchange between Mr. François and Mr. Tunkin (see 489th meeting, paras. 2-3 and 7-8).

9. Mr. Tunkin had argued that it was not necessary to say how a conference was to adopt its voting rule because the question was a matter of conference organization and in any case it was always solved in practice. He did not agree with Mr. Tunkin that it was not necessary to be specific. While it was true that very few conferences had dispersed because they had been unable to adopt a voting rule, there had been many conferences at which that question had caused considerable difficulty and delay. That fact alone would appear to indicate that it was desirable to include some provision regarding the adoption of substantive voting rules.

10. If such a provision was favoured by the majority of the Commission, the question would then arise whether or not a substantive voting rule should be included; in other words, one solution would be to add at the end of sub-paragraph (ii) a provision such as "by a two-thirds majority vote unless, acting by a simple majority, the conference decides otherwise", while the other solution would be to indicate that the voting rule at the conference would be such as the conference, acting by a simple majority, decided. In the second case, it might be desirable to point out in the commentary to the code that although the Commission had not included any proposal for a substantive voting rule in the article, it felt that the best rule to adopt was that of the two-thirds majority. The commentary might then give some reasons for that view: for example, that it was not very useful for conferences to adopt conventions unless those conventions commanded a considerable measure of agreement; that otherwise, the adopted convention was ratified only by a comparatively small number of States and remained more or less a dead letter; and that it was better to have conventions adopted by such a majority as they would then have a better chance of being eventually ratified by most of the participants, even if as a consequence of the two-thirds majority rule fewer conventions would be drafted. It seemed to him that such a statement could be included in the commentary whether or not it was decided to indicate a substantive voting rule in the article itself.

11. He agreed with Mr. Padilla Nervo (see 489th meeting, para. 64) that the manner in which an international conference adopted the text of a convention was a matter with which the Commission had to deal in one way or another. There would be a serious defect in the Commission's work if, on such an important matter, it put forward no view at all either in the code itself or in the commentary. Even if nothing were said about a substantive voting rule, it was indispensable to say how the conference would proceed to adopt its own rule for the adoption of the text.

12. He had formed the conclusion, after listening to the discussion, that for the purpose of adopting that rule of procedure a simple majority vote was the only practical solution. It might, theoretically, be provided that the conference should settle the substantive voting rule by a two-thirds majority. However, it was by no means easy to adopt a decision by a two-thirds majority. Indeed, one of the chief reasons for applying the two-thirds majority voting rule to the adoption of the text of conventions was to make it rather difficult to adopt the text, for the corollary was that the texts adopted by that majority had a wide measure of support. However, while the two-thirds majority rule might be justified for the substantive work of a conference, it could not be defended in the case of procedural matters, which were in practice always dealt with by a simple majority vote. If the Commission suggested a two-thirds majority rule for the adoption of rules of procedure, a conference, instead of being able to adopt them easily and quickly, might have to spend quite a long time in arriving at acceptable rules.

13. With regard to sub-paragraph (iii), he agreed with the point made by the Secretary to the Commission concerning the vagueness of the words "or under the auspices of" (see 488th meeting, para. 64). Perhaps the beginning of sub-paragraph (iii) might be revised to read "In the case of treaties drawn up in an international organization or at an international conference convened by an international organization . . .". Otherwise, there had been no objection to sub-paragraph (iii). The constitutional instruments of some international organizations—the United Nations, for example—specified no voting rule for conferences convened by them. Other international organizations, like the International Labour Organisation, had constitutional provisions on the subject.

14. Mr. Ago had referred (488th meeting, para. 53) to the possibility that an international organization—whose constitution did not contain such a provision—might convene a particular conference on the understanding that the text of the convention would be adopted by a certain voting rule. The Secretary to the Commission had pointed out (489th meeting, para. 14), on the basis of a discussion by the General Assembly of United Nations practice in connexion with Article 62 of the Charter, that so far as the United Nations was concerned, whether or not it had the power to lay down an *a priori* rule for conferences convened by it, it had deliberately chosen, so to speak, not to exercise that power and, in the light of the discussion held in the Sixth Committee in 1949,[1] the invariable practice had been to leave the matter to the decision of the conference itself. Of course, provisional rules of procedure were drawn up by the Secretariat, but it was for each conference to decide whether to adopt them as they stood or to modify them.

15. However, in Mr. Ago's view, the existence of United Nations practice in the matter did not rule out the possibility that some other international organization might convene a conference, of a technical nature perhaps, for which it specified a particular voting rule. He (the Special Rapporteur) agreed that such a situation was conceivable and suggested that it might be provided for by adding a fourth sub-paragraph to the effect that in those cases in which an international organization possessed the power to convene a conference and to prescribe the voting rule for the conference, and exercised that power in any given case, the voting rule would be the rule so prescribed. Such a flexible formula would not prejudice the position of organizations like the United Nations which did not exercise its power to prescribe a voting rule.

[1] See *Official Records of the General Assembly, Fourth Session, Sixth Committee*, 187th to 199th meetings.

16. He had not dealt with the specific formulae that had been put forward. They could conveniently be examined by the Drafting Committee, provided that the Commission first took a decision on the questions of principle. He invited suggestions concerning the procedure the Commission should follow in arriving at that decision.

17. Mr. AGO said he had been giving careful thought to the problem raised by sub-paragraph (ii) and had come to the conclusion that the Commission might find it easier to reach agreement if it adopted the suggestion first put forward in specific terms by Mr. Sandström (489th meeting, para. 47) and did not mention any majority in the text of the code with regard to the adoption of the text of treaties but dealt with the matter in the commentary. It should be remembered that not all international conferences were convened by the United Nations, and that conferences were held for the purpose of adopting conventions that dealt with the most diverse matters. While a certain tendency might be noticeable in the case of certain conferences, that did not mean that it should be reflected in all conferences. Even in the case of United Nations conferences, different rules had been applied. For example, the two-thirds majority rule had been adopted by the Conference on the Law of the Sea, in 1958, whereas the simple majority rule had been followed by the United Nations Conference on the Elimination or Reduction of Future Statelessness, held in March and April 1959. He had no doubt that the subject-matter of those conferences had had a lot to do with their decisions concerning the substantive voting rule, and it was not inconceivable that at a future conference on another question, the best rule might be that of a three-fourths majority or even the unanimity rule. Accordingly, the problem in sub-paragraph (ii) might best be dealt with by using the words "by the rules established by the conference".

18. The commentary could certainly explain that there was a tendency, in the case of subjects, to adopt the two-thirds majority rule, and might cite examples. However, he did not think it would be wise to indicate any general rule as having preference.

19. As to the question how the voting rules were established by a conference, he considered it a general principle of law that such rules were adopted by a simple majority. He would prefer the text of the code to say so expressly, but there too he was prepared to accept the solution of stating in the commentary that the tendency was to adopt rules of procedure by a simple majority of the conference.

20. With reference to the last point dealt with by the Special Rapporteur, he reiterated that the Commission should not be governed exclusively by United Nations practice and should bear in mind that a technical international organization such as the International Telecommunication Union might call an international conference on the basis of a pre-established voting rule, although the constitution of the organization was silent on the matter. He did not object to the Special Rapporteur's suggestion, but a simpler solution would be to add at the end of sub-paragraph (iii) the words "or in a decision taken by its competent organs".

21. Mr. TUNKIN pointed out that the most far-reaching proposal before the Commission was that the text of a treaty was to be adopted by the voting rule decided upon by the conference. That proposal—and he accepted Mr. Ago's formulation—excluded all others and, if the Commission was to vote on the various proposals, it should be voted upon first.

22. He did not agree with Mr. Ago that the article should be silent on the substantive voting rule while providing a rule for the adoption of that rule. If the Commission mentioned any rule at all in the code, it should be the rule governing the adoption of the text of the treaty and not the adoption of the rules of procedure. A rule of procedure came within the scope of the organization of international conferences, and that was a subject that the Commission had not studied. He still did not think that the code should, almost incidentally, touch on one isolated aspect of that subject.

23. If in its first vote the Commission decided that some substantive voting rule should be laid down in the code, he suggested that it should vote next on the proposal that the code should provide for the adoption of texts by a two-thirds majority unless the conference decided to adopt another voting rule.

24. Mr. ALFARO suggested that the Commission should decide the questions before it in the following order: it should settle first the question whether or not the code should mention in sub-paragraph (ii) and (iii) the manner in which a conference adopted the text of a treaty. If that question was decided in the affirmative, it would then have to settle the question whether the text was adopted by a two-thirds majority, a simple majority or by a rule decided upon by the conference itself. Finally, the Commission should decide whether the code should mention the majority by which a conference adopted its substantive voting rule. Once the Commission had decided those questions of principle, it would be easy to discuss the various formulae that had been put forward.

25. Mr. YOKOTA said that the decisions the Commission was about to take were of very great importance. He suggested that it might be better first to ask the drafting committee to draw up a single text of sub-paragraph (ii) if possible, or carefully worded alternative texts embodying the different solutions that had been proposed. It seemed to him that the Commission would then be in a better position to take its decisions.

26. Mr. PAL considered that it would be meaningless to stipulate a two-thirds majority for the adoption of a text without at the same time stipulating that that rule could not be amended except by at least the same majority.

27. Mr. BARTOŠ supported Mr. Alfaro's proposal in the belief that the issue was of great importance and must be settled by the Commission itself.

28. The CHAIRMAN, speaking as Special Rapporteur, said that although the Commission sometimes referred points which were not strictly drafting points to its Drafting Committee, he doubted whether Mr. Yokota's suggestion should be adopted: in the case in point it was clear that the Commission must first take a decision of principle.

29. Mr. FRANÇOIS said Mr. Yokota's suggestion might be helpful; the drafting committee might well be asked to formulate alternative clauses.

30. Mr. ALFARO said that in the absence of real agreement in the Commission itself the procedure suggested by Mr. Yokota would be a waste of time.

31. Mr. KHOMAN agreed with Mr. Alfaro and suggested that the Commission should decide forthwith whether or not to insert a provision concerning the adoption of the text of a treaty. If that were decided in the affirmative, some mention should be made in

the commentary of the growing practice of applying the two-thirds majority rule.

32. Mr. EDMONDS said the Commission would not escape its difficulties by referring paragraph 4 to the drafting committee; it should come to a decision now on the substantive issues raised in the discussion. He did not agree with the view that the code should not contain a provision concerning the procedure to be followed at international conferences.

33. Mr. AMADO said that a suggestion he had made earlier had now been taken up by Mr. Alfaro and seemed to have been supported by Mr. Sandström and Mr. Ago.

34. He did not share the view that the Commission could not impose a rule. The Assembly of the League of Nations had applied the unanimity rule, except in so far as the Covenant expressly provided others (e.g. rules observable in the election of non-permanent members of the Council and the judges of the Permanent Court of International Justice). In the committees however decisions had always been taken by simple majority by virtue of a practice which had been followed from the outset and which in 1924 the Netherlands delegation had sought to incorporate in the rules of procedure. Delegations finding themselves in the minority had usually abstained from voting in plenary meeting so that the budget, for example, had always been adopted unanimously.

35. Since there was no consensus in the Commission he believed that the question of the voting rule should be left for each conference to decide.

36. Mr. PADILLA NERVO thought it should be possible for the Commission to agree whether or not the code should lay down the rule governing the majority required for the adoption of the text of a treaty by a conference. If such a provision was inserted in the code, it could either state that the conference itself decided the majority, or else specify the majority, or, lastly, lay down a rule subject to the proviso that the conference could decide otherwise. In his opinion, the code should either lay down the two-thirds majority rule or else it should leave each conference to settle its own rule.

37. He saw no objection to the unanimity rule in paragraph 4, sub-paragraph (i).

38. Once the Commission had reached a decision, the Drafting Committee could prepare the text and the various points of view put forward in the discussion could be enumerated in the commentary.

39. Mr. AGO formally proposed that the words "by a simple majority vote unless the conference, equally by a simple majority, decides to adopt another voting rule" in paragraph 4, sub-paragraph (ii), should be replaced by the words "according to the rules adopted by the conference itself". He also proposed that a statement should be inserted in the commentary to the effect that there was a definite trend at conferences towards the two-thirds majority rule for the adoption of texts and towards the simple majority rule for the adoption of rules of procedure.

40. Mr. TUNKIN supported Mr. Ago's proposal.

41. The CHAIRMAN said that Mr. Ago's proposal represented an excellent solution if a decision in that sense were adopted by the Commission, but the preliminary stages for reaching agreement could still not be avoided. As he saw it, the Commission must settle the following questions: first, whether a definite voting rule should be laid down and, if not, whether it should be stated that the conference adopted its own rules; secondly, if the first question were decided in the affirmative, what majority should be required; thirdly, whether any provision should be included concerning the voting rule for the adoption of the rules of procedure themselves, and if so, by what majority the conference would adopt its rules of procedure.

42. Mr. TUNKIN, while agreeing with the Chairman as to the issues that had to be decided, asked that the Commission should first decide whether the code should contain a provision concerning the adoption of the rules of procedure, since that decision would influence the others.

43. Mr. LIANG, Secretary to the Commission, referring to the contention that *a priori* the two-thirds-majority rule was the only logical one, said that many recent conferences convened to conclude international conventions had adopted the simple-majority rule. They included: the United Nations Maritime Conference, 1948; the United Nations Conference on Freedom of Information, 1948; the United Nations Conference on Road and Motor Transport, 1949; the United Nations Conference on Declaration of Death of Missing Persons, 1950; the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 1951; the United Nations Conference on Status of Stateless Persons, 1954; the International Conference on Conservation of Living Resources of the Sea, 1955; the United Nations Conference on Maintenance Obligations, 1956; and the United Nations Conference of Plenipotentiaries on a Supplementary Convention on the Abolition of Slavery, 1956. Nor had it been specifically suggested that the two-thirds majority rule should apply when the General Assembly itself had prepared the Convention on the Prevention and Punishment of the Crime of Genocide, 1948, and the Convention on the Nationality of Married Women, 1957.

44. At the conference which had drafted the Statute of the International Atomic Energy Agency, decisions to amend the provisions of an existing draft had been taken by a two-thirds majority and, unless otherwise provided for, all others by simple majority.

45. He did not share the view that the code should not mention the subject; some provision to the effect that the text of a treaty was adopted by a simple majority or a two-thirds majority, as decided by the conference, might be inserted in paragraph 4, sub-paragraph (ii).

46. Mr. PAL said that clearly any conference could decide to follow the majority rule but the problem was by what procedure it adopted that decision. He asked whether it was necessary to deal with that question on the present occasion.

47. Mr. VERDROSS thought it self-evident that no one State could prevent a conference from adopting the rules of procedure by a simple majority. The States in the minority had the choice between accepting the majority decision and withdrawing from the conference. That view did not conflict with the general principle of unanimity to which he had referred at the preceding meeting (489th meeting, para. 32), since any of the minority States which continued to participate in the conference would tacitly accept the rules of procedure adopted by the majority. In no case was the minority bound by the majority in such matters.

48. Mr. YOKOTA considered that, if any provision on the procedure of adopting a text was to be included in the code, that provision must have some meaning. But it was meaningless to say that, in the case of multilateral treaties negotiated at an international conference, the text should be adopted by whatever procedure the conference approved. The Commission should at least indicate a voting rule that ought to be followed unless the conference decided otherwise. The Secretary's remarks (see paras. 43-45 above) led him to support a provision indicating that the simple majority rule would apply unless the conference decided to adopt some other voting rule.

49. Mr. HSU said that, subject to certain exceptions, any conference was, of course, free to adopt a two-thirds majority rule, or even a unanimity rule. He believed, however, that in the code the only proper course was to provide the simple majority rule for the adoption of the text; the rule would, naturally, itself be capable of being modified by a simple majority.

50. Mr. TUNKIN pointed out that the conferences enumerated by the Secretary to the Commission differed considerably *inter se* in composition and character. For example, between thirty and forty States had participated in the United Nations Conference on the Elimination or Reduction of Future Statelessness, 1959, while the United Nations Conference on the Law of the Sea, 1958, had been attended by representatives of eighty-six States.

51. Mr. LIANG, Secretary to the Commission, said that the purpose of his previous intervention had not been to impress upon the Commission the merits of the simple majority rule, but to demonstrate that there were precedents for both voting rules. It went without saying that the Secretary-General, in preparing provisional rules of procedure for any conference, always took into account the nature of the subject and the number of participating States. In the case of the Conference on the Law of the Sea, for example, he had had no hesitation in suggesting the two-thirds majority rule, and his suggestion had been accepted by the consultative group of experts who had helped the Secretary-General to plan the preparatory work of the Conference.

52. No difficulty had been encountered at any recent conference over the adoption of the rules of procedure.

53. The CHAIRMAN called for a vote on the question whether the code should contain an indication of a substantive voting rule for the adoption of texts by international conferences.

It was decided by 8 votes to 6, with 1 abstention, not to include in the code any indication of a substantive voting rule.

54. The CHAIRMAN observed that in view of the decision just taken it was unnecessary to vote on the content of such a substantive voting rule.

55. He invited the Commission to vote on the question whether a voting rule for the adoption of rules of procedure should be indicated in the code.

It was decided by 9 votes to 3, with 2 abstentions, to include in the code an indication of a voting rule for the adoption of rules of procedure.

56. Mr. EL-KHOURI thought the only rule that the code should indicate was the simple majority rule.

57. Mr. AGO observed that there had been no proposal for a qualified procedural voting rule; in any case, such a rule would be most impracticable, for it might even keep the conference from beginning its work. Accordingly, the only possible course was to indicate the simple majority rule for the purpose of adopting the procedure.

58. Mr. PADILLA NERVO pointed out that, under Article 18 of the United Nations Charter, the General Assembly's decision as to whether a question was important or not was made by a simple majority. He thought the provision in the Charter left the Commission with no choice and therefore a vote on that particular point could be dispensed with.

59. Mr. KHOMAN was not convinced that the Commission had no choice. He asked whether there were any precedents in League of Nations or United Nations practice for the adoption of rules of procedure by a two-thirds majority.

60. Mr. LIANG, Secretary to the Commission, said that he had no knowledge of recent experience of the application of the two-thirds majority rule in procedural matters. However, the provisions of a procedural nature contained in the Covenant of the League of Nations had, by implication, been adopted unanimously because the Covenant constituted a network of the 1919 Peace Treaties, the voting rules of which were based on unanimity. Of course, that was an exceptional case.

61. Mr. TUNKIN also doubted whether the only course open to the Commission was to recommend the simple majority rule for the adoption of the rules of procedure of a conference; an alternative was indicated in article 15, paragraph 2, of the Special Rapporteur's original draft (A/CN.4/101).

62. The CHAIRMAN, speaking as Special Rapporteur, pointed out that his original text had been generally regarded as impracticable and that a new proposal was before the Commission. If most members felt that the application of the simple majority rule was self-evident for the purpose of the adoption of rules of procedure, there was no need to vote on the question.

63. Mr. ALFARO agreed with the members of the Commission who had pointed out that the simple majority rule was the only one that could be applied. That point might not, however, be quite so obvious to the lay reader; he therefore suggested that an express provision should be inserted in the code.

64. The CHAIRMAN thought the consensus was that the simple majority rule was the only practicable one. Unless a vote was requested, the Drafting Committee would be asked to draft the provision.

65. Mr. TUNKIN said that, although he could not agree with the majority view, he would not ask for a vote.

66. Mr. YOKOTA said he had no objection to the procedure outlined by the Chairman, but recalled his statement (488th meeting, para. 67) that the simple majority rule was not yet established in international law, and to enunciate it would constitute progressive development of international law. He hoped that his views would be fully reflected in the commentary.

67. The CHAIRMAN said that the Drafting Committee would be requested to take Mr. Yokota's views into account. The commentary should also sum up the debate on the relative merits of the two-thirds and the simple majority, and summarize the information given by the Secretary.

The meeting rose at 12.50 p.m.

491st MEETING

Monday, 11 May 1959, at 3.10 p.m.

Chairman: Sir Gerald FITZMAURICE

Programme of work

1. The CHAIRMAN announced that he had received a telegram from Mr. Erim, thanking the Commission for the honour it had done him in electing him as a member (see 486th meeting, para. 77) and expressing regret that a previous engagement prevented him from coming to Geneva before the early part of June.

2. He announced further that Mr. Zourek, the Special Rapporteur on item 2 (*Consular intercourse and immunities*), had been detained by his duties at the International Court of Justice. Accordingly, it became necessary for the Commission to consider how to plan the work of its present session, and he invited comments.

3. After a procedural discussion, Mr. LIANG, Secretary to the Commission, said he did not consider that the Commission could disregard the necessity of completing its work on consular intercourse and immunities at the current session. If Mr. Zourek could be expected to arrive by 19 May, the Commission would undoubtedly make every effort to complete its work on the subject. It was quite likely that Mr. Zourek would respond to an urgent message from the Commission, but in the contrary case he believed that the Commission should begin its work on the subject on 18 May.

4. He drew attention to chapter V of the Commission's report on its tenth session,[1] in which it had not only undertaken to complete the preliminary draft on the subject of consular intercourse and immunities, but had established a schedule of work. It was stated in paragraph 64 of the report that members should come to the session prepared to put their principal amendments in writing within a week, or at most ten days, of the opening of the session. Of course, Mr. Zourek's absence had somewhat changed the situation.

5. After further discussion, the CHAIRMAN, summing up, observed that the subject of consular intercourse and immunities held no great theoretical difficulties and that it was fairly familiar to the Commission, in view of its affinity to the subject of diplomatic intercourse and immunities. He was therefore inclined to think that a useful discussion of the matter could be held even in the absence of the Special Rapporteur. Accordingly, he thought it advisable that a telegram should be sent to Mr. Zourek stating that the Commission considered it important to start its debate on the subject on 18 May if the first draft to be submitted to Governments were to be completed during the current session; that it hoped that Mr. Zourek would be able to come to Geneva before then, even if he were obliged to return to The Hague for a few days; and that, in any case, the Commission would be grateful if he would indicate the points which he would like to be reserved until he could be present.

6. He suggested that he should be authorized to draft a telegram to Mr. Zourek along those lines.

It was so agreed.

[1] *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9*, p. 29.

Appointment of a drafting committee

7. The CHAIRMAN proposed that the Commission's Drafting Committee should have the following membership: Mr. Hsu as Chairman, Mr. Alfaro as Vice-Chairman, Mr. François, Mr. Ago, Mr. Tunkin, Mr. Yokota, and each of the Special Rapporteurs when his subject was under consideration by the Drafting Committee. In addition, though not a member of the Committee, he would be prepared to go through the English text purely for questions of style and form. He also proposed that if a member of the Drafting Committee could not attend a particular meeting, he should be replaced by an alternate of the same language or from the same geographical region.

It was so agreed.

8. The CHAIRMAN announced that the Drafting Committee would hold its first meeting on Thursday, 14 May 1959.

Law of treaties (A/CN.4/101) (*continued*)

[Agenda item 3]

NEW ARTICLE 6 (FORMERLY ARTICLE 15) (*continued*)*

9. The CHAIRMAN recalled that while the Commission had taken a decision with respect to paragraph 4, sub-paragraph (ii), of the redraft of article 15 (new article 6) it had not formulated any final instruction for the Drafting Committee regarding sub-paragraphs (i) and (iii).

10. Mr. AGO recalled his observation regarding sub-paragraph (i) (see 488th meeting, para. 52). He recommended that the Drafting Committee should be asked to divide sub-paragraph (i) into two sentences, separating the case of bilateral treaties from that of treaties negotiated "between a restricted group of States". In the former case, the text should speak of "mutual consent", and in the latter, of "unanimity".

It was so agreed.

11. The CHAIRMAN recalled, with reference to sub-paragraph (iii), the suggestion put forward (490th meeting, para. 15) that provision should be made for the case in which an international organization prescribed in advance the voting rule by which a multilateral conference convened by it was to adopt the text of a convention. He suggested that the Drafting Committee should be asked to prepare a provision along the lines he had indicated at the previous meeting.

It was so agreed.

12. In reply to a question from Mr. Khoman, the CHAIRMAN suggested that the final sentence of paragraph 4 should be omitted unless the Commission decided not to retain article 17, paragraph 1 (see 490th meeting, para. 4).

It was so agreed.

ARTICLE 16

13. The CHAIRMAN, speaking as Special Rapporteur, introduced article 16 (*Certain essentials of the text*). He observed that the content of a treaty could not be governed by precise rules of law, apart from those rules which related to the possibility or legality of the object of the treaty; in other words, a treaty could not require the performance of an act which was incapable of performance or which was contrary to the

* Resumed from the 490th meeting.

rules of international law. Apart from those limitations, the parties were free to adopt any text they pleased, and that remark applied even to the formal clauses relating to duration, termination and so forth.

14. Nevertheless, the text had to contain certain elements, elements that were essential to formal validity. Again, there were elements which, although not essential to formal validity, should be included in order to avoid future difficulties. For example, the fact that a treaty was silent on the question of its duration did not deprive it of formal validity. The Commission might consider it advisable to provide certain residual rules for such cases.

15. Under paragraph 2 it was essential to the formal validity of a treaty that it should indicate the States on whose behalf the treaty was initially drawn up. Patently, without such an indication, the treaty would be incomplete. The word "initially" had reference to multilateral treaties, in other words, treaties to which States other than the original parties might subsequently accede. The original parties could be indicated by one or more of the three ways described in the second sentence of paragraph 2. While it was now comparatively rare to find treaties in which the parties were indicated only by the nationality of their signers, there were many historical examples of that practice.

16. Paragraph 3 was still necessary in spite of the fact that more and more territories were attaining independence. It might be that the provision did not go far enough and that it should require that both the State making the treaty and the dependent territory, or protected or semi-sovereign State on whose behalf it was made, should be indicated.

17. He suggested that the beginning of paragraph 4 should be amended to read "It is not essential to the formal validity of a treaty, but it is desirable that it should provide . . .". In his opinion, a treaty was not invalidated by the absence of any mention of the date on which it was to come into force; that date could be decided by a separate arrangement between the States parties, or it could be inferred from the text of the treaty. For example, if the treaty stated that it was subject to ratification, then, in the absence of any other indication, the date of entry into force would be the date of the last ratification. If the text did not refer to ratification and contained no other provision from which an inference could be drawn, then the date of entry into force would have to be presumed to be the date of signature.

18. Paragraph 5 contained the residual rule to be applied in cases, especially with regard to entry into force, where no special provision was made in a treaty. The paragraph might not be strictly necessary, as the same point arose again in later articles. If the treaty itself was silent about entry into force and no inference could be drawn from its terms, it seemed impossible to infer any date for entry into force other than the date of signature when the treaty would *ipso facto* become binding on the signatory States. A contrary inference might, however, be possible. If a treaty was expressly stated to be subject to ratification, it might well be inferred that it would not come into force with respect to any particular party until that party had ratified it and might not come into force with respect to the parties as a whole until they had all ratified it.

19. Another question covered in paragraph 5 was participation by other States. It was a rule of international law that the parties which drew up a treaty were alone competent to decide what other States might participate in it; non-signatories had no general right to become parties to any particular treaty. They must be authorized to become parties or must belong to a category of States which were so authorized. In multilateral conventions, at least, it was almost invariably specified either that they were open to accession by States in a certain category, or by any State, or else nothing was said. In the many cases in which multilateral treaties failed to provide for accession, the inevitable inference was that the parties had not intended that any other State should be a participant in an agreement where such participation might upset the intended balance. The inference was in fact that if other States had been meant to participate, the initial parties would have inserted an accession clause, which they could in any case always add by a separate instrument.

20. With regard to duration and termination, the residual rule would necessarily be very rarely invoked, as the vast majority of treaties provided for specific or indefinite duration, but almost always with a provision entitling the parties to give notice of termination. If a treaty made no mention whatever of termination and allowed for no reasonable inference concerning termination, the only possible conclusion was that the parties had intended indefinite duration and termination by mutual consent. The only exception occurred in the case of treaties where a contrary inference was possible; for example, commercial treaties, which could not be regarded as of indefinite duration. Most commercial treaties, however, made express provision for termination, but even in the absence of such provision, termination might be inferred on reasonable notification.

21. Paragraph 6 dealt largely with mechanics, rather than with obligations, and might be included in a code, although it would be out of place in a convention. A group of countries might sometimes conclude a treaty and state that it was subject to ratification, but give no indication how the process was to be carried out or what was to be done with the instrument of ratification. Such treaties could not, of course, be regarded as lacking formal validity, but it would be very much more convenient if they indicated precisely what steps were to be taken. Usually, there was provision for a depositary and an obligation on the part of the depositary to notify the parties that instruments of ratification had been received and, ultimately, that the treaty had entered into force. The last sentence of paragraph 6 attempted to provide a residual rule.

22. Mr. VERDROSS thought that it would hardly be possible to enumerate in paragraph 1 all the particulars which were not essential to the validity of a treaty; a negative approach was relatively unnecessary, and paragraph 1 might accordingly be deleted. So far as he knew, no one had ever argued that a preamble was a juridical requirement of a treaty. With regard to paragraph 3, he said it was true that the United Nations Charter referred to Trust Territories; in fact, however, the Administering Authority acted not on behalf of territories but on behalf of the people of the territories. He proposed further to speak of *"Etats protégés"* and not of *"protectorats"*, since a *"protectorat"* was not a State, but a relation between two States.

23. Mr. SANDSTRÖM thought that article 16 should be rearranged, and doubted whether paragraphs 5 and 6 should be placed at that point in the

code at all, since they concerned interpretation rather than validity. The Drafting Committee might be asked to look into that question. Paragraph 1 might better be placed at the end of the article, an arrangement which might perhaps meet the point raised by Mr. Verdross.

24. Mr. EL-KHOURI, referring to paragraph 3, thought that it would be desirable to mention in the treaty itself the authority by virtue of which a State claimed to be competent to conclude a treaty on behalf of a protected or semi-sovereign State or territory, such as a mandated territory; in the latter case, the international organization from which the mandate was held should be named. In the case of a protected State, it should be specified whether the representation was arbitrary or by agreement between the protecting and the protected State. In order that a treaty made by the protecting State on behalf of the protected State should be binding on the latter, it was necessary that evidence of the authority by virtue of which the protecting State claimed to be acting should be given.

25. Mr. SCELLE thought that, if paragraph 1 was retained, it might be better to say that the presence of a preamble or conclusion might or might not have juridical importance, but that that depended on the interpretation, which should be dealt with elsewhere in the code. A conclusion, if it summarized the purpose of the agreement, might have a great and precise juridical validity, whereas often a preamble might not.

26. Mr. ALFARO said that article 16 would have to be discussed in great detail. On the whole, the article was well-conceived and a good introduction to the remainder of the code. He had, however, some doubts about the reference to preambles in paragraph 1. They were not usually a juridical requirement, but there was an important precedent in the United Nations Charter, which should not be disregarded. When the original chapters 1 and 2 of the Dumbarton Oaks Proposals had been discussed, some delegations had suggested that the principle *pact sunt servanda* should be incorporated in the body of the Charter itself, but the five permanent members of the Security Council had opposed the idea, and it had been finally agreed that the principle should be incorporated in the Preamble. At the United Nations Conference on International Organization, held at San Francisco in 1945, the committee responsible for drafting Chapter I of the Charter had approved a text, later adopted in plenary session,[2] to the effect that the Preamble would have the same juridical validity as the Articles themselves.

27. Mr. AGO said that he would have several comments to make when the article was discussed in detail. In principle, it might perhaps be better to begin the article with a reference to the requirements which were really conditions of validity of a treaty, and to refer later to those elements which were frequently inserted in a treaty but were not conditions for its validity.

28. Mr. AMADO said that the contents of article 16 were not fully in keeping with its title, "Certain essentials of the text"; matters which were admittedly not essential appeared in some of the paragraphs, particularly paragraph 5. The article in general seemed somewhat premature. The provisions concerning entry into force were elaborated in article 41 and so might be unnecessary in article 16. It would probably be preferable to deal with the various questions in their proper context in the code rather than in a preliminary article.

The meeting rose at 6 p.m.

[2] *United Nations Conference on International Organization, Ninth Plenary Session*, 25 June 1945, vol. 1, p. 614.

492nd MEETING

Tuesday, 12 May 1959, at 9.45 a.m.

Chairman: Sir Gerald FITZMAURICE

Law of treaties (A/CN.4/101) (*continued*)

[Agenda item 3]

ARTICLE 16 (*continued*)

1. The CHAIRMAN invited the Commission to continue its debate on article 16 (*Certain essentials of the text*).

2. Mr. PAL said he could not agree with the remark made by Mr. Verdross (491st meeting, para. 22) that the negative approach in article 16, paragraph 1, was relatively unnecessary. From the trend of the observations made by some members it appeared that there was some misapprehension as to the purport of the paragraph. The paragraph was not intended to assess the value of a preamble and did not in the least minimize its value should one be provided. It only stated that a preamble was not a "juridical requirement" in the sense that its absence would not be a fatal formal shortcoming. The confusion might have arisen from the difference between the French phrase *"une condition requise du point de vue juridique"* and the English "juridical requirement". He had some doubts, however, about the article as a whole; in particular, he was not sure that the term "essential" was used consistently in the same sense throughout the article. In some cases the word appeared to mean a requirement affecting validity, but in others it apparently did not have that sense. The requirement of paragraph 2, for example, would affect the very foundation of the treaty, while the requirement of a ratification clause envisaged in paragraph 6 would not mean that its absence would affect the validity of a treaty. The term "essential" might have to be modified and some provision might have to be added concerning performance and non-performance dealt with in the Special Rapporteur's fourth report (A/CN.4/120).

3. Mr. KHOMAN said that, although the content of article 16 was fairly comprehensive, if the title "Certain essentials of the text" were construed strictly, it would be seen that only paragraphs 2 and 3 referred to essential matters, whereas the remainder related to discretionary clauses (*clauses facultatives*). He found some difficulty about paragraph 1, because, while that provision stated that a preamble was not a juridical requirement, the reference in paragraph 2 to "a preambular recital" implied that it might become so, inasmuch as it might indicate the States on whose behalf a treaty was initially drawn up. The title might be reworded to conform with the essentials set out in paragraphs 2 and 3; he suggested "Essential and non-essential clauses of the text". Alternatively, paragraphs 4, 5 and 6 might be placed in a separate article under the heading of "Discretionary clauses", and paragraphs 1, 2 and 3 might bear the title "Compulsory clauses". He had no objection to paragraph 1; indeed, it might be just as well to begin with the negative form.

4. Mr. HSU thought that most of the criticism was directed against the form rather than against the substance of the article, partly because it was more in the nature of an extract from a textbook or advisory opinion than an article in a code. It would seem that the traditional way of setting out the clauses in a code was to state what was necessary rather than what was unnecessary. The substance of the article might be readily accepted and the difficulties overcome by redrafting.

5. Mr. YOKOTA agreed with the basic idea underlying article 16. Paragraphs 1 and 2 stated the essentials and paragraphs 4 and 6 what was desirable. Those four paragraphs might therefore be retained in that order, although the separation into two articles suggested by Mr. Khoman might be preferable. Paragraph 5, however, stated neither what was essential nor what was desirable. The passage concerning entry into force on signature was not concerned with the essential or the desirable, but with the legal effect of signature, which was more clearly stated in article 29, paragraph 2. The passage concerning continuance in force was likewise misplaced, for it bore in fact on the temporal validity of treaties. The substance of paragraph 5 should therefore be redistributed in more suitable contexts elsewhere in the code. Paragraph 1 had some significance as an introductory clause and was certainly harmless, but as it resembled a textbook description, it might be better placed in the commentary than in the text of the code itself.

6. Mr. LIANG, Secretary of the Commission, said that article 16 might more properly be regarded as a commentary on article 15 than as an article in its own right. The term "essential" was a difficult one, because it covered three different concepts, all of which appeared in the various paragraphs of the article. It might be construed to mean "essential for the validity of a treaty", or "essential for the discharge of the obligations involved", or "essential for the more effective operation of the treaty". For the first concept, that of formal validity, only one provision might be conceived as being essential, the statement of the rights and obligations of the parties. The question might be asked whether a statement of the identity of the parties concerned was essential, and hence whether that did not also apply to a preamble. When the term "text" had been discussed, he had expressed the view (487th meeting, para. 54) that signatures did not form part of texts, so that a statement of the names of the parties as well as a statement of the rights and obligations was an essential minimum for validity. All the other provisions in article 16 dealt with the other two constructions of the term "essential" and those clauses might be set out in their proper place when the issues to which they referred were covered. To collect all the general principles in the context of article 16 might cause congestion.

7. Mr. TUNKIN agreed with Mr. Verdross that paragraph 1 was unnecessary, since it would be quite impossible ever to enumerate in the code all the particulars which were not essentially required in the text of a treaty. Such an enumeration might perhaps be of some value in the commentary for the use of students, but everyone actually concerned with making treaties knew what juridical requirements they should or should not contain.

8. Paragraph 2 was the only one which indicated the essential parts of a text, whereas all the other paragraphs related to discretionary clauses. According to that paragraph it was essential to indicate the States on whose behalf the treaty was initially drawn up. However, some texts adopted by international organizations, notably the international labour conventions, were not signed at all; they were accepted by the International Labour Conference and the instruments of ratification were deposited with the International Labour Office. The texts of those conventions, therefore, did not bear any signatures from which the identity of the States parties could be inferred. It was open to question, therefore, whether an indication of the parties was really essential in the text of a treaty.

9. Paragraph 3 hardly came within the scope of article 16 and was not entirely acceptable in principle, as it might conceivably be interpreted as a legalization of colonial dependency, which, in his opinion, was incompatible with the spirit of the United Nations Charter.

10. He agreed with Mr. Sandström, who had said (491st meeting, para. 23) that paragraphs 5 and 6 were not relevant where they stood; their proper context was the articles dealing with entry into force, ratification, accession and so forth. It was doubtful, moreover, whether the provisions of paragraph 6 were a correct statement of prevailing practice. It was certainly not the practice to specify the ratifying authority in a treaty; it was usually stipulated that ratification should be carried out in accordance with constitutional processes. Paragraph 6 was therefore unnecessary and probably unacceptable; some of its provisions, if suitably amended, might well be placed in the commentary.

11. Mr SCELLE pointed out that the French and English texts of paragraph 4 did not correspond and that the French text was contradictory internally, inasmuch as it stated that matters described as *de rigueur* were not essential; that, however, was merely a drafting matter.

12. Paragraph 5 was rather confusing, especially if read in the light of article 17, paragraph 1. It appeared to state that a treaty might enter into force on signature. Such a notion could not be accepted, since most treaties in the strict sense of the word entered into force only when ratified, although certain agreements which were not formal treaties might enter into force on signature. Signature, as article 17 implied, was simply evidence of the will to agree and did not commit the constitutional organs, but only the plenipotentiaries. At the very least paragraph 5 would have to be redrafted.

13. Mr. AMADO said that, in keeping with prevailing practice, if a treaty was to come into force on signature an express declaration to that effect was necessary: in the absence of such a declaration, the treaty entered into force only after ratification. That being so, the process described in paragraph 5 was the precise reverse of the ordinary practice. Entry into force and ratification were correlative terms. Entry into force on signature was exceptional, save in Anglo-Saxon law. The rule was entry into force after ratification.

14. Mr. BARTOŠ said that, if paragraph 3 were adopted as it stood, it might hamper the attainment of independence by territories or countries in the class referred to in the paragraph. It seemed to imply that treaties entered into on behalf of such territories by the administering Power would continue to be binding on those territories after they attained independence. He agreed that where the administering Power indicated that it made a treaty on behalf of a particular territory, the latter would be bound so long as the power relationship remained unchanged. The General Assembly had discussed at length whether international treaties embodying concessions and international obligations which imposed burdens on colonial territories

should continue to be binding after the territories attained independence. In Latin America, at any rate, the theory had long been held that such treaties ceased to be valid at that stage. Admittedly, that was a separate question, which had not been and should not be dealt with by the Special Rapporteur; but paragraph 3 as it stood created the possibility of arriving at conclusions which conflicted with the majority opinion in the Assembly. The paragraph should at least be amended to show that such treaties might be valid, like international obligations, only for the States which concluded them.

15. With regard to paragraph 5, he said that the practice on the continent of Europe and in Latin America was that, unless otherwise expressly provided, a treaty entered into force on ratification. Paragraph 5 said precisely the reverse. Furthermore, in many European States, there was sometimes an internal struggle between the legislature and those executive organs which were eager to bring treaties into force as soon as possible. Hence, opinion in those States might hesitate to accept the proposition that a treaty entered into force on signature. On that point he agreed with Mr. Scelle.

16. With regard to paragraph 6, he entirely agreed with Mr. Tunkin. It was not for the plenipotentiary who participated in the preparation of the treaty to indicate the competent organ, which would, in fact, be indicated by the constitution. The paragraph would have to be amended.

17. Mr. FRANÇOIS observed that it was true that a treaty in the strict sense could not be deemed to enter into force on signature. Nevertheless, the only difference between an obligation which was not a treaty and a treaty in the strict sense was often the ratification clause. If the instrument contained no ratification clause, it was impossible to say whether it was a treaty or some other obligation. The formula in paragraph 5 was correct to that extent; for example, the Barcelona Declaration of 1921 recognizing the right to a flag of States having no sea-coast[1] had been regarded as a treaty by some States, and ratified by them as such, whereas others had held it to be an agreement not needing ratification. Accordingly, it was true to say that, in the absence of any indication to the contrary in an agreement or treaty, it might be deemed to be in force on signature, since it was impossible to say whether an instrument lacking a ratification clause was or was not a treaty.

18. The continuance in force of a treaty until terminated by the mutual consent of all the parties should preferably not be dealt with in paragraph 5. He was definitely opposed to the idea of treaties of indeterminate duration which could not be terminated save by mutual agreement. Such arrangements were no longer generally accepted in domestic law; it was generally recognized that, if the circumstances in which a treaty had been made changed materially, the parties had the right to free themselves from the obligation. Naturally, the great difference between domestic and international law was that no such unilateral declaration could be made in domestic contract law; a private party wishing to be released of its contractual obligations had to apply to a court of law—if the contract was not terminated by consent—whereas in international law such recourse to a judicial authority was not always possible. Nevertheless, it should not be stated that, in the absence of a denunciations clause, a treaty remained in force until all parties agreed that it had lapsed. Undoubtedly there was some risk to the principle *pacta sunt servanda,* but practice and the development of the law of nations no longer adhered strictly to the theory that termination must always be effected by consent.

19. Mr. PADILLA NERVO agreed with the speakers who had pointed out that the general structure of article 16 was hardly suitable to the subject. The essentials mentioned in the article related to formal validity only; the heading of the article was therefore incomplete. It would be wiser to refer only to all the prerequisites of a text which had to be present for the purpose of formal validity. References to matters which were merely conducive to formal validity, such as those made in paragraph 4, were unnecessary. He also agreed with Mr. Scelle's and Mr. Amado's comments on paragraph 5. Furthermore, he pointed out that some of the provisions of article 16 would more properly be discussed in connexion with the interpretation of treaties.

20. The CHAIRMAN, speaking as Special Rapporteur, summarized the debate on article 16.

21. There seemed to have been some misunderstanding with regard to the intention of paragraph 6. That paragraph was meant to relate not to the constitutional processes of ratification but only to the way in which instruments of ratification were deposited. Naturally, no treaty could specify the ratifying authority. The misunderstanding could be removed by redrafting, but it was important that a treaty should indicate the mode of depositing ratifications.

22. There seemed to be a general feeling that paragraph 5 was unnecessary, since it anticipated matters dealt with in subsequent articles of the code. If the paragraph were retained, however, it might simply refer to the parts of the code dealing with the entry into force and continuance in force of treaties. Mr. François had referred to the case of treaties containing no clause concerning duration or termination; in reply, he said that his fourth report (A/CN.4/120) dealt fully with the *clausula rebus sic stantibus*. Perhaps the pertinent passage in paragraph 5 was too terse, and it might be wise either to omit the passage ("or necessarily . . .") or to refer to other, fuller provisions in the code.

23. With regard to the question of entry into force on signature, he agreed with Mr. François and thought that Mr. Scelle and Mr. Amado had failed to take sufficiently into account how heavily paragraph 5 was qualified. The paragraph laid down a residual rule which was applicable only if there was no other way in which the contrary could be inferred. One of the Commission's greatest difficulties in dealing with the law of treaties was to draft clauses covering the many different kinds of existing treaties and international agreements. The provision had to apply, not only to formal treaties, which were subject to ratification, but also to such instruments as exchanges of notes, which entered into force on signature or on exchange. Accordingly, since ratification was not a condition applicable to all international agreements, it could not be referred to in a residual rule.

24. Some speakers had criticized the title of the article because it extended to matters not indicated in the

[1] League of Nations, *Treaty Series,* vol. VII, 1921-1922, No. 174.

text, while others had criticized the article because it did not conform to the title. It might be possible to redraft the title so that it covered all the contents; the underlying thought, however, had been that it was essential for a text to contain certain indications, and very desirable for it to contain others for the proper functioning of the treaty. If the Commission was substantially agreed on that point, it would be easy to amend the title.

25. Some members who had criticized paragraphs 1 and 3 had not apparently realized that the provisions in no way prejudged the interpretation of any special clause. There was no intention in paragraph 1 of stating how a preamble should be interpreted; it was intended to answer the question whether it was essential for a treaty to contain a preamble or any other special clauses. The purpose of the paragraph was to show that, with a few exceptions, no specific clause was absolutely essential to a treaty's validity, precisely because the parties were free to draft the treaty in any way they chose.

26. Similarly, paragraph 3 did not purport to lay down a particular form for treaties binding on dependent territories or States; the question of the continuance of treaty obligations after such territories became independent was governed by the international law relating to State succession. Nevertheless, it was desirable to indicate the international responsibility for the execution of a treaty made on behalf of a dependent territory. There was no question of the Commission indicating in the code approval or disapproval of the conclusion of treaties on behalf of dependent territories or protected or semi-sovereign States; but the fact remained that such territories and States still existed and that treaties had been and would continue to be made on their behalf. Some reference to the Commission's approval or disapproval of that type of treaty-making might perhaps be included in the commentary. He could not agree, however, with Mr. Tunkin's assertion that paragraph 3 was inconsistent with the Charter, since that document contained two chapters dealing with dependent territories. With regard to Mr. El-Khouri's observation that it might be necessary to indicate the credentials of the authority of the State negotiating a treaty on behalf of a dependent territory or State, he pointed out that as yet international law did not make any such requirement and that it was not customary for such details to be included in a treaty. Of course, it was always possible to challenge the validity of a treaty on the grounds of the capacity of the negotiators, but that point fell outside the topic of formal validity and was covered by other rules of law. He referred to the part of his third report (A/CN.4/115) relating to treaty-making capacity (article 8).

27. He agreed with the members of the Commission who thought that the article should distinguish more clearly between essentials and desiderata. The Secretary had rightly pointed out (see para. 6 above) that one of the essentials was that contracting States had certain rights and obligations, since without those no treaty could exist. He had omitted those particulars from the article because they seemed to be self-evident, as did the indication of the identity of the parties. If the Commission wished him to include those obvious particulars, he would do so. Mr. Tunkin had further drawn attention to certain exceptional treaties, such as international labour conventions, which did not contain any indication of identity; such cases might be cited as exceptions in which the practice governing identity was established *ab extra*.

28. Mr. AGO said that article 16 should consist mainly of provisions specifying the conditions considered to be necessary for the formal validity of a treaty. Inasmuch as the Special Rapporteur had drawn a distinction in article 10 between "formal validity", "essential validity" and "temporal validity", the reader should be made aware by the very title of article 16 that the article dealt with the conditions of formal validity.

29. International law was the least formal of legal systems, and that was why there was a certain difficulty in the formulation of such conditions. He thought that they were, in essence, three. The first condition was that it should clearly indicate who were the parties to the treaty. The second condition was that the "object" of the treaty, that is the matter on which the consent of the parties had formed, should appear from the context of the treaty itself. He preferred to speak of the "object" of the treaty and not of the rights and obligations created by the treaty, for as he had pointed out earlier (see 487th meeting, para. 4) there were treaties which did not create rights and obligations. Finally, the third condition was that the persons who had negotiated the treaty should have been possessed of the necessary authority. Otherwise the treaty might later be considered as not valid because it had been negotiated between persons not duly authorized.

30. In his view, those were the only conditions for the formal validity of a treaty concluded under normal circumstances, in other words, a treaty which was negotiated and concluded by the parties with the intention of producing effects among themselves. In paragraph 3, the Special Rapporteur dealt with certain exceptional cases, and he (Mr. Ago) agreed that in such cases it was indispensable to indicate the facts which from a certain point of view constituted an anomaly. However, he did not think that paragraph 3 was sufficiently broad. In addition to the cases indicated, there were some other instances of treaties concluded by States on behalf of other States, there being a relationship of representation but no status of dependency of any kind. For example, Belgium could act on behalf of Luxembourg by virtue of the Belgium-Luxembourg monetary union, and there were of course the many cases in which an independent State had to be represented by another State owing to the existence of a state of war or the severance of diplomatic relations.

31. That was all that was needed in article 16 from the point of view of conditions of formal validity. However, he would not object to an additional paragraph pointing out that there were certain provisions which were usually found in a treaty, such as a preamble, clauses relating to date of entry into force, duration, manner of participation of the parties, and so forth, but it should be made quite clear that such elements were not conditions for formal validity in the sense that the treaty would not be valid from the formal point of view if they were absent. Since they could not affect formal validity in any way, he agreed with the Special Rapporteur, who had pointed out (see 491st meeting, para. 17) that it was wrong to say, in paragraph 4, that such elements were "conducive" to formal validity.

32. As to the other matters dealt with in article 16, it seemed to him that they did not relate strictly to con-

ditions of formal validity and should be treated in the articles of the code to which they were relevant.

33. Mr. BARTOŠ said he could not agree that the question at issue in article 16 was simply that of the conditions affecting the formal, rather than the essential validity of a treaty. It was essential to indicate the parties to a treaty; but the statement that a party was bound by the treaty was a substantive statement. Even the so-called non-essential provisions in paragraph 4, such as the references to the period of duration and the date of entry into force, were matters relating to time limits and, consequently, were substantive rather than formal. With regard to identification of the parties he said that, if the States concerned were not directly indicated, it was an essential juridical requirement to refer to the plenipotentiaries of the States which concluded the treaty. If an intermediary negotiated the treaty, as in the case of a treaty between States having no diplomatic relations with each other, the clause in the treaty indicating the intermediary was not formal, but substantive. Mr. Ago had raised the question in a somewhat different manner and had distinguished between formal and essential validity; however, the very inclusion of the non-essential clauses made them a part of the consent of the parties and showed that they were necessary in order to produce certain effects. Those additional or subsidiary clauses were therefore juridical provisions properly so-called. The distinction between formal validity and juridical requirement must be made according to whether a contractual or a formal provision was involved.

34. He urged the Commission to reflect on the proposition that both the essential and the additional elements of a treaty represented questions of juridical value.

35. Mr. PAL said that, in view of the Chairman's invitation to discuss article 16 as a whole, he had not intended to deal with the merits of individual paragraphs. In spite of the limited invitation, however, the various learned participants, by penetrating analysis, had laboured to improve and refine the texts of the several paragraphs. The interesting and enlightening discussion which had taken place prompted him to make some observations on paragraph 3. There, it should be made clear whether the treaty-making party was the participating State or the State on whose behalf the treaty was made.

36. Article 2 said that the code was confined to treaties between parties having treaty-making capacity. Obviously, the dependent or semi-sovereign States referred to in article 16, paragraph 3, did not have that capacity. Municipal law dealt with a similar situation in different ways. If a person lacked capacity or had defective capacity, his capacity could be supplemented by the capacity of another person, a guardian for example, and that was how a person without capacity could become a party to an agreement. Another solution was that the person not *capax juris* did not enter into the agreement at all but another person having capacity entered into the agreement for the benefit of the person without capacity.

37. If, in paragraph 3, the position was that the State making the treaty was the party to the treaty, then the protected or semi-sovereign State figured in the treaty only as the beneficiary of the treaty. If that was the position, he thought that it should be made clear either in the commentary or in the article itself, for it might be argued from the text as it stood that the dependent or semi-sovereign State was becoming a party to the treaty and that the treaty was therefore binding on it. That, perhaps, was not the position the Commission was contemplating in paragraph 3.

38. Mr. VERDROSS agreed with Mr. Ago that a clear distinction should be drawn between the essential conditions and the desirable elements.

39. With reference to paragraph 2, he observed that not only was no mention made of the names of the parties in treaties approved by the International Labour Conference, but neither were they mentioned in a number of treaties approved by the General Assembly of the United Nations, such as the Convention on the Privileges and Immunities of the United Nations, 1946. The point might be covered by a formula that made an exception for texts adopted under the auspices of an international organization.

40. He felt that some provision along the lines of paragraph 3 would have to be retained. While he agreed with Mr. Tunkin and Mr. Bartoš that protectorate relationships were obsolete and would gradually disappear, he supported the Special Rapporteur's statement that two Chapters of the Charter dealt with non-independent territories and he pointed out that an Administering Authority could certainly conclude treaties on behalf of its Trust Territory.

41. He also supported Mr. Ago's statement (see para. 30 above) concerning treaties concluded by a State on behalf of another, non-dependent State which it could represent in international relations. For example, the Principality of Liechtenstein was not a part of Switzerland and was not dependent on Switzerland, but had a customs union with Switzerland, and Switzerland could conclude certain treaties on behalf of the Principality. He suggested that in paragraph 3, after the words "on behalf of", some such words as "another State, dependent population, population of a Trust Territory" should be used.

42. His most serious objection, however, was to the wording of the first part of paragraph 5. In his view, a treaty could not come into force on signature unless the plenipotentiaries had authority to sign with such effect. That authority might exist by virtue of special full powers not only to sign but to conclude the treaty, or by virtue of a constitutional provision. The Austrian Constitution, for example, provided that ministers had the right to conclude certain treaties, in other words, to sign treaties that entered into force upon signature. He could not agree that, in the absence either of special full powers or of a constitutional provision, a treaty which was silent as to the date of entry into force could be considered *ipso facto* as coming into force from the date of signature.

43. The CHAIRMAN, speaking as Special Rapporteur, accepted the scheme of article 16 suggested by Mr. Ago (see para. 29 above): First, the object of the treaty must be stated; secondly, the parties to the treaty must be indicated, except in cases where other means existed of ascertaining the parties; and thirdly, there must be some mention of the fact that those signing the treaty were authorized to do so. While the third point certainly applied to a signature which was final, he was not quite sure that it could be extended to the initialling of a treaty or to signature *ad referendum*. In his view such acts did not of themselves commit a Government.

44. A number of members of the Commission had referred to paragraph 3. He thought that everyone agreed that a State could by arrangement conclude a treaty on behalf of another independent State (e.g. Switzerland on behalf of Liechtenstein or France on behalf of Monaco and, in time of war, the protecting Power on behalf of a belligerent). While it would probably be sufficient for the purposes of article 16 to use a general formula that would cover all the cases in which a State acted on behalf of a dependent territory, protected or semi-sovereign State, or another independent State, it should be borne in mind that the legal effects were not the same in the different cases. It was clear that a State was responsible for seeing that a treaty it concluded on behalf of a dependent territory or protected State was carried out, but that was not necessarily true in the case of a semi-sovereign State, and was certainly not true where one State acted as the agent of another, independent State. In the last case, he did not think that the State which concluded the treaty could be held responsible if the State on whose behalf it had acted failed to carry out obligations under the treaty.

45. Accordingly, he suggested that the Drafting Committee should prepare an article on the following lines: A first paragraph which would redraft the substance of paragraph 2 in the way indicated by Mr. Ago and which would also deal with all cases of treaties signed on behalf of another State or a dependent territory; a second paragraph corresponding to paragraph 1 of the present text which would state that apart from the conditions set forth in the first paragraph there was no provision that was essential to the formal validity of a treaty; and a third paragraph which would refer to other elements that it was desirable to include in the text of a treaty (existing paragraph 4).

46. The present paragraph 5 should be redrafted and either placed in the commentary or included in the article in terms providing that if the elements referred to as desirable in paragraph 3 of the new article were not contained in the treaty, the resulting situation would have to be considered in the light of other provisions of the draft code, to which the reader could be referred. Paragraph 6 could be dealt with in the commentary.

47. Mr. SANDSTRÖM agreed with the views expressed by Mr. Ago and with the Special Rapporteur's suggestions. However, he desired clarification on one point. It had been implied during the discussion that it was not enough that a person signing a treaty should have the authority to do so but that such authority had to be indicated in the text of the treaty. He did not think that such an indication was essential.

48. Mr. YOKOTA agreed with the Special Rapporteur's suggestions regarding paragraphs 1, 2, 3 and 4. However, if it was decided to retain the provisions of paragraph 4, those of paragraph 6 should also be retained, since that paragraph too referred to elements which it was desirable to include in a treaty even if not essential.

49. As he had said before (see para. 5 above), paragraph 5 dealt with the legal effects of signature and "temporal validity" and therefore should not be included in the article. If necessary, the substance of paragraph 5 could be dealt with in the commentary to the code.

50. Mr. AGO said in reply to Mr. Sandström that while the conditions for formal validity had to be fulfilled, it was not essential that they should be fulfilled by the text of the treaty. As to the naming of the parties, he thought Mr. Tunkin had been quite correct in saying (see para. 8 above) that it would suffice if it were clear in one way or another who were the parties to a treaty. Similarly, the essential condition with regard to signature was that those who negotiated the treaty possessed authority to sign. That did not necessarily mean that the text had to contain an indication to that effect. What was essential was that the plenipotentiaries should be duly authorized, and that was a matter which often depended on circumstances. For example, in war-time, military commanders had authority to conclude certain agreements which they would not have under normal conditions.

51. That principle also applied to the ratification of the treaty. A treaty might not be formally valid because it had been ratified by an organ not competent to do so.

52. He agreed with the Chairman's suggestion that any reference to the question of responsibility for performance or non-performance should be omitted from article 16. Accordingly, in connexion with the subject-matter of paragraph 3, it should be indicated only that a party could act on behalf of another. The article should not enter into the question of responsibility for a violation of the terms of the treaty. In that connexion, he would only observe that, if a State concluded a treaty on behalf of a dependent territory, it was not always certain that that State bore such responsibility. The capacity to conclude a treaty did not necessarily coincide with what might be termed delictual capacity, which was the basis of responsibility.

53. He had one observation to make regarding the use of the word "desirable". It was not the case that certain things were always desirable in the text. An indication of the duration of a treaty was desirable in certain cases but some treaties by their nature excluded such an indication, for example, treaties concluded for the execution of a certain act or arrangement, treaties regarding the disposition of territories, and treaties of peace. Clearly, an indication of duration would, if anything, be undesirable in treaties which were conceived *sub specie aeternitatis*. It would be more prudent to refer to elements which were frequently found in treaties than to elements which were desirable.

54. Finally, he hoped that some of the important points in the latter paragraphs of article 16 would be dealt with in other articles and not simply mentioned in the commentary.

55. The CHAIRMAN, speaking as Special Rapporteur, said that those points were treated in other parts of the code and that there was no question of eliminating them entirely. His suggestion had been to include in article 16 references to the places in the code where they could be found. He fully accepted Mr. Ago's criticism concerning the word "desirable", and he was disposed to accept Mr. Yokota's view (see para. 48 above) that some of the matters mentioned in paragraph 6 should be included among the elements frequently found in the text of a treaty.

56. The only point that remained in doubt was that raised by Mr. Sandström (see para. 47 above). If a plenipotentiary was authorized to sign—and that was essential—was it necessary or not that the text of the treaty should contain a recital of that fact? That was a minor point of substance that might be examined by the Drafting Committee.

57. He suggested that article 16 should be referred to the Drafting Committee on the basis he had indicated.

It was so agreed.

The meeting rose at 1 p.m.

493rd MEETING

Wednesday, 13 May 1959, at 9.50 a.m.

Chairman: Sir Gerald FITZMAURICE

Programme of work

1. The CHAIRMAN read out Mr. Zourek's reply to the telegram which the Commission sent him on 11 May 1959 (see 491st meeting, paras. 5 and 6). Mr. Mr. Zourek indicated that he hoped to arrive in Geneva not later than 19 May.

2. He further announced that he had received a message from Mr. García Amador, Special Rapporteur on item 4 (*State responsibility*), who expected to arrive in Geneva on 18 May.

Law of treaties (A/CN.4/101) (*continued*)

[Agenda item 3]

ARTICLE 17

3. The CHAIRMAN, speaking as Special Rapporteur, said that article 17 applied to the situation that existed when a text had been drawn up but had not yet been signed or initialled. Paragraph 1, which covered the point contained in the final provision of his redraft of article 15 (see 488th meeting, para. 46), referred to the obligations, if any, and paragraph 2 to the rights, arising from the drawing up of the text. He recalled that it had been agreed that if it was decided to omit paragraph 1, the subject matter of that provision would be maintained in the Drafting Committee's version of article 15 (see 491st meeting, para. 12).

4. Commenting on article 17, he said that on reflection he thought he should not have used, in paragraph 2, the example of the right to be consulted about proposed reservations. It might not be desirable at that stage to raise the question of reservations, which was fully dealt with in later articles. However, what he had had in mind was that it was frequently the practice of States which wished to make reservations to make some announcement to that effect during the negotiations, and in that sense it could be said that participation in negotiations might confer, even on States which had not yet signed a treaty, a right to be consulted about the reservations which other States might be contemplating.

5. Mr. SCELLE pointed out that in the French text of paragraph 2 the word "*inversement*" should be replaced by "*de même*".

6. Mr. YOKOTA said that he did not fully understand what was meant by the phrase "a right to be consulted about any proposed reservations" in paragraph 2. Did it mean that a State intending to make a reservation had a duty to consult, before signature or ratification, all the other States participating in the negotiations? That was not necessarily the practice. States participating in negotiations had at most the right to be informed of reservations made by other States and to comment upon or protest against such reservations, unless reservations were expressly admissible under the text of the treaty or in the light of the circumstances. In his view, the phrase in question should be amended.

7. The CHAIRMAN, speaking as Special Rapporteur, pointed out that he proposed to omit the whole of the second sentence of paragraph 2. Mr. Yokota's point could be discussed later in connexion with the articles dealing with reservations.

8. Mr. BARTOŠ asked for some clarification concerning the "ancillary or inchoate rights" mentioned in paragraph 2. He could find no reference to the subject in the commentary or in Lauterpacht's first report (A/CN.4/63), to which reference was made in paragraph 59 of the commentary. Were they rights specified in the text of the treaty or some other rights, not so specified, deriving from participation in the negotiations?

9. The CHAIRMAN, speaking as Special Rapporteur, explained that the sentence in question—which, he reiterated, he was prepared to omit—had been drafted in tentative terms; he had used the word "may". His sole purpose had been to provide for cases in which rights might result from participation in the negotiation of a treaty.

10. Mr. BARTOŠ said that he had no comment to make but only wished to justify the position he had taken during the discussion on the question of whether a treaty, once drawn up, was a text or an instrument (see 488th meeting, para. 15). Certain legal consequences flowed from provisions concerning formalities which constituted obligations for the parties that had drawn up the text and for other States that might wish to accede. That was why he had been in favour of the term "instrument". It could now be seen that there were obligations arising from the text and that the question had not been purely theoretical but practical.

11. Mr. LIANG, Secretary to the Commission, observed that there was a great difference between the technique of concluding bilateral treaties and that of concluding multilateral treaties, particularly multilateral treaties negotiated in an organ of an international organization. The inconvenience of dealing simultaneously in the code with both types of treaties had been mentioned before but, as that was the practice, he felt that it should be made clear when an article applied principally to multilateral treaties.

12. That was the case of article 17. He failed to see what legal consequences could flow from the drawing up of a bilateral treaty, for if the two parties did not sign the treaty, did not consummate the act of drawing up the treaty, the treaty was abortive and no treaty existed.

13. His second observation was of a substantive nature and related to the case of a text negotiated in an organ of an international organization. For example, a convention drawn up in the General Assembly of the United Nations was embodied in a resolution. While no one would contend that the States which voted for the resolution containing the text of the convention thereby became parties to the convention, a theoretical, a juridical problem arose in connexion with the question of the binding force of such a resolution. It could of course be argued that, under the Charter, General Assembly resolutions were recommendations and therefore not binding. However, the matter was not so

simple. It could be contended that a State Member of the United Nations which had voted for the text of a convention contained in a resolution had undertaken certain obligations towards that resolution, not as a party to a convention, but as a Member of the Organization.

14. In the 1920's the Assembly of the League of Nations had sponsored a number of conventions, such as the Treaty of Mutual Assistance, 1923, and the well-known Geneva Protocol of 1924 for the Pacific Settlement of International Disputes, which had been of an abortive nature because they had never become operative. Later, after the Second World War, the Nürnberg Tribunal in its Judgment on the Major German War Criminals had cited those conventions in support of its view that aggressive war was an international crime and that that was the true interpretation of the Treaty of Paris, 1928,[1] more generally known as the Kellogg-Briand Pact. It had been argued in the Judgment that the treaties in question, although they had never become operative, had represented a consolidation of juridical opinion and had therefore become part of customary international law.

15. The question was also relevant in cases like that of the Convention on the Prevention and Punishment of the Crime of Genocide, of 1948. Certain States had not become parties to the Convention. But as the Convention was embodied in a resolution adopted by the General Assembly (resolution 260 (III)) it could be contended that the content of the Convention, while not binding, did produce certain legal consequences which a Member of the United Nations could not refrain from recognizing.

16. It was a difficult problem and he thought that the Commission might wish to examine the point in order to shed more light upon it. In any case, it was an aspect which might be taken into account in a code which tried to deal with both bilateral and multilateral treaties.

17. The CHAIRMAN, speaking as Special Rapporteur, said that while it was probably true that article 17 applied mainly to multilateral treaties, he did not think it was entirely irrelevant to bilateral treaties. Surely paragraph 1 applied to any treaty. It quite often happened that those negotiating a bilateral treaty drew up the text but did not have authority to sign at that stage; they might be required to report the text to their Governments. Clearly at that stage the text could not involve for the two States concerned any obligation. He would therefore not like to confine article 17 to the case of multilateral treaties, although a phrase such as "particularly in the case of multilateral treaties" might be inserted.

18. The second question raised by the Secretary to the Commission related more to the law, or practice, of international organizations than to the law of treaties. The mere fact that the text of a treaty was adopted by an international organization in the form of a resolution did not create obligations in respect of the treaty itself, not even on the part of the States which voted for the resolution, though the latter might, by reason of their membership in the organization, be morally bound to promote the objects or not to contravene the spirit of the treaty in question.

19. The case was different from that of the legal effects of signature, dealt with in article 30 of the code. He doubted whether those legal effects could exist at the earlier moment when a treaty had been drawn up but had not been signed, even if the treaty was embodied in a resolution of an international organization. Alternatively, if any effects were produced by its being embodied in a resolution, they were produced not by any inherent necessities of the law of treaties but solely by virtue of the constitution, or the traditions and practices of the international organization concerned.

20. Mr. AGO asked some questions in order to clarify the scope of article 17. In the case of two States engaged in negotiating a treaty regarding ownership of property, did the State which was in possession of the property have only a moral obligation not to alter or destroy the property, or was its obligation more than moral? He asked that question in view of the rather broad generalization in paragraph 1 that "participation in a negotiation . . . does not involve any obligation to . . . refrain from performing any act in relation to the subject matter of the text".

21. Commenting on paragraph 2, he said he would prefer the words "faculty to sign" to the words "right to sign", because he agreed with those who did not like to speak of rights unless there were corresponding obligations. He questioned whether the right or faculty to sign was a legal consequence of participation in the negotiations. In his view it derived from the agreement reached between the parties.

22. Finally, he observed that the title of article 17 might have to be amended in the light of the replies to his first question. If the reply to that question was that there were no legal obligations arising from the fact that negotiations were in progress, then there would not be any rights deriving from participation in the drawing up of the text either. The contrary would be true if the reply was a different one.

23. The CHAIRMAN, speaking as Special Rapporteur, agreed that the word "faculty" would be a better word than "right". However, he did not agree that signature was a part of the general right to conclude a treaty. A State had a general right to become a party to treaties, but the right to become a party to a particular treaty was always limited to the States which had negotiated the treaty or to such other States as they invited in the text of the treaty to become parties. No State could demand, as of right, the privilege of signing a treaty in the negotiation of which it had not participated or which it had not been invited to sign. That applied equally to bilateral and multilateral treaties.

24. Mr. Ago's first question, on the other hand, called for careful consideration by the Commission. Where States were negotiating the disposition of a piece of property or territory and had come as far as preparing a text which they had not yet signed, surely they had some kind of obligation, evidently not deriving from the treaty but from some other source, not to take any action which would frustrate the purpose of the treaty.

25. Mr. YOKOTA drew attention to some minor drafting points. In paragraph 1, it was clear from the context and from the discussion on article 15 that the word "decisions" referred to decisions for the adoption of the text of the treaty and not to procedural decisions. He thought that the words "for the adoption of a text" should be inserted. Again, the words "the text as finally agreed" might imply acceptance of the draft treaty. He suggested that the words in question should

[1] *General Treaty for Renunciation of War as an Instrument of National Policy*, signed at Paris on 27 August 1928. See League of Nations, *Treaty Series*, vol. XCIV, 1929, No. 2137.

be replaced by the expression "the text as finally established".

26. Mr. BARTOŠ said that Mr. Ago had brought up a very practical question, viz. whether a State, having participated in the establishment of a text and hesitating to sign or accede, might alter the situation existing at the time when the text was established. Such an act might, in the case of a cession of territory, worsen the situation for the succeeding sovereign over that territory.

27. If there was not an abuse in law, the question of whether a supervening change of circumstances not foreseen in the intention of the parties at the time of negotiation could be involved was not entirely settled in international law. Writers on the law of war had discussed after the Second World War the question of whether it might be legal to destroy certain objects the destruction of which had been prohibited by an armistice or whether the existing state of affairs must be maintained until the peace treaty came into force. The same question arose with regard to conventions proper, or law-making treaties, where a State in a more favourable position than others might make certain promises and then change the situation on the pretext, for example, of a change in the world situation. In the light of those considerations it was desirable that in any code of the law of treaties the principle of *rebus sic stantibus* should be safeguarded.

28. In civil law, a promise validly made and accepted in good faith was enforceable. In international law, a comparable rule had not yet crystallized. Nevertheless, the element of good faith in the negotiation of treaties could not be disregarded, and he felt very strongly that the Commission could not say categorically that there was no obligation "to perform or refrain from performing any act" affecting the subject matter of the text of a treaty between the establishment of the text and its entry into force. He took the view that it was an abuse to negotiate a text when one state of affairs prevailed and to present another state of affairs when the obligation became operative.

29. Mr. LIANG, Secretary to the Commission, observed that, as paragraph 1 was now drafted, there was no alternative but to conclude that texts adopted by international conferences were the only ones covered, since the word "participation" was not suitable for bilateral treaties, as they were merely negotiated. He agreed with Mr. Ago's objection to the use of the word "unanimity" in regard to bilateral negotiations. The text would be improved if separate provision were made for bilateral and multilateral treaties.

30. A decision taken by an international organization as a result of the adoption of a text gave rise to obligations which, of course, differed from those arising from the conclusion of a treaty, but that question was connected with the law of treaties. He had originally advocated the view that the majority rule in decisions on the adoption of texts was part of the law regulating international conferences (see 490th meeting, paras. 43-45), but the Commission had taken the broader view that it was also part of the law of treaties. Since the decision taken concerning the redraft of article 15 (new article 6) (490th meeting, para. 53) he had somewhat changed his view. He could not conceive that when an international organization had adopted a text, and had voted for a draft instrument, it would be normal for a State to perform some act in relation to the subject matter of the text merely on the ground that it had not yet accepted the treaty. The situation was not exactly the same as that of a bilateral treaty in which no decision of an international organization was involved.

31. Mr. VERDROSS remarked that, if Mr. Ago was right that a State was obliged, between the establishment and entry into force of a text, to refrain from changing the state of affairs, such an obligation might derive from the principle of good faith. The obligation did not, however, derive from participation in a negotiation, because it already existed before the negotiations. The wording of paragraph 1 would, therefore, appear to be correct.

32. Mr. AGO thought that Mr. Verdross and he might be referring to different things. In some cases, a general rule laid down an obligation not to change the existing state of affairs independently of any negotiation, but that was irrelevant in the context. What he (Mr. Ago) had meant was that if a State opened negotiations relating to a property and continued those negotiations, it would be committing a wrong if it destroyed that property pending the negotiations. As it stood, paragraph 1 appeared to tolerate such an act, and that provision might be repugnant to the Commission, which was concerned not only with the codification of international law but also with its progressive development. If it was recognized that, in some cases at least, such an obligation existed, a change in the text would have to be made, and that would, correspondingly, confer a right on the aggrieved State.

33. In his reply, the Special Rapporteur had been correct insofar as he (Mr. Ago) had not meant that the faculty to sign was a general right. That faculty was derived from the agreement of the parties, who themselves might extend it to other States, rather than from mere participation in a negotiation.

34. Mr. PADILLA NERVO was sure that the Secretary was correct in his view about paragraph 1. The text gave the impression that it referred to multilateral treaties and would need redrafting or the insertion of a separate paragraph if bilateral treaties were also to be covered. In the discussion on the redraft of article 15, Mr. Ago had suggested (see 489th meeting, para. 19) the deletion of the final phrase in paragraph 4, but the Commission had decided, at Mr. Yokota's suggestion (see 489th meeting, para. 6), to reconsider the idea when it discussed article 17. It might be inappropriate at that stage to discuss in detail the obligations of international conferences in the matter of the adoption of agreements and the obligation to perform or refrain from performing certain acts.

35. The principle set out in paragraph 2 was consistent with the structure of the text of the article and with article 24, paragraph 1, whereas the principle governing the admission of States other than those participating in the negotiation was set out in article 24, paragraph 2. The signatory States had a corresponding obligation not to oppose the admission of other States which did not participate in the negotiations, even if the treaty did not specify that it was open to States which had not signed it.

36. The second sentence of paragraph 2 might be regarded as covered by the reference in article 39, paragraph 1 (*b*), to the circulation of reservations. The distinction between multilateral and other treaties should be made clear in paragraph 1 of article 17; the first

sentence of paragraph 2 should be retained; the second sentence should be deleted; and references to article 24, paragraph 1, and article 39, paragraph 1 (*b*), should be inserted.

37. The CHAIRMAN, speaking as Special Rapporteur, explained that the first sentence in paragraph 2 was not intended to suggest that *only* the States which participated in a negotiation could have a right to sign, but that at least *they* had such a right and it was the only right they derived from participation. The right of other States to sign was dealt with in article 24, and Mr. Ago was correct in stating (see para. 21 above) that that right arose from agreement rather than from participation. Participation, however, implied agreement. The paragraph might be redrafted, and Mr. Padilla Nervo's suggestions for the insertion of a reference to article 24 might well be adopted.

38. Mr. FRANÇOIS said that to lay down that a State was debarred from changing the state of affairs between the establishment and entry into force of a text might be equivalent to preventing it from changing its opinion. As the publication of the text of a treaty might raise certain apprehensions or bring out matters which the negotiators had overlooked, it should be possible for a State to perform acts which were not entirely consistent with the text as signed. Good faith implied that a State concerned must notify the other participants of any change, but that did not mean that the former was legally bound never to change the situation. In such a case, a certain time limit should at least be set. He did, however, object to the view that a legal obligation arose from the mere fact of signature.

39. Mr. AMADO said he could not see the need for mentioning all the complications to which Mr. François had alluded. The article had one virtue: it stated a self-evident truth.

40. Mr. ALFARO supported the text of article 17 in substance and Mr. François' view that the parties could not be legally or morally bound to perform or not to perform any act simply by reason of signature. That view was in keeping with the realities of international life.

41. The difficulty about drawing a distinction between bilateral and multilateral treaties might be overcome quite simply by starting paragraph 1 with some such words as "Negotiation of a bilateral treaty or participation in a negotiation. . .".

42. Paragraph 2 needed more precision, especially in its reference to certain ancillary or inchoate rights, and the example given might well be replaced by a reference to the provisions on reservations in article 37.

43. Mr. YOKOTA observed that, strictly speaking, mere participation in a negotiation did not involve any legal obligation, as Mr. Verdross had pointed out (see para. 31 above). The phrase "refrain from performing" was, however, too strong. It gave the impression that a State was entirely free to perform any act in relation to the subject on which the negotiation had taken place. That was not necessary in the context. What was necessary was the statement that participation in negotiation did not involve any obligation to accept the text as finally agreed. The remainder of paragraph 1, after "finally agreed", might well be deleted.

44. Mr. TUNKIN agreed with Mr. François about paragraph 1 and with Mr. Yokota's amendment.. He had objections to the second sentence in paragraph 2, but would not go into them since the Special Rapporteur appeared to have withdrawn it.

45. Mr. SANDSTRÖM said that the notion of an abuse of law had been raised in connexion with paragraph 1 in the case of a State which had entered negotiation and had then changed the existing situation. The notion was very vague and unknown to many legislative systems. He wondered whether it could be invoked in international law. In any case, he did not think that the fact that a State had entered into negotiations could give it the right to invoke that notion. With regard to paragraph 2, signature might not be a right, but the term "right" was used in article 24 in a similar context and might very well be retained in the paragraph under discussion.

46. Mr. SCELLE agreed with Mr. François that the main ideas embodied in article 17 were acceptable. Nevertheless, if, as seemed to be the case, the article related only to multilateral treaties, certain difficulties were raised by the use of the word "treaty" in the generic sense. The point raised by the Secretary to the Commission was material: did the article cover the conventions embodied in resolutions adopted by majority decisions by international organizations? Those conventions did not have the characteristics of treaties, but were really legislative acts, though not necessarily binding on all members of the organization concerned. They were not negotiated in the proper sense of that term and the parties were not bound by moral or legal obligations. For example, international labour conventions on trade-union freedoms had been voted upon by all the participants at International Labour Conferences, but the participants had not really "negotiated". Paragraph 2 was not, therefore, applicable to such conventions. It was not possible, in consequence, to impute bad faith to a State which restricted or even abrogated trade-union rights in its own territory after the convention had been concluded.

47. In his opinion, the code should draw a clear distinction between real treaties or international agreements, on the one hand, and legislative acts adopted by a majority vote in an international organization, on the other hand. Article 17 could not apply to conventions of the latter type unless specific provisions relating to them were included.

48. Mr. HSU felt that Mr. Yokota's suggestion (see para. 43 above) was a wise one. If the majority of the Commission did not feel inclined to support it, however, the alternative might be to maintain paragraph 1 in its present form and to introduce a phrase recalling the rule of international law on the good faith of parties to a treaty.

49. Mr. KHOMAN agreed with Mr. Scelle and Mr. Padilla Nervo that it was necessary to specify whether paragraph 1 related to bilateral or multilateral treaties or to international legislative acts. If the last phrase of the paragraph was retained in its present form, the effect of the latter category of texts might be considerably prejudiced.

50. The CHAIRMAN, speaking as Special Rapporteur, thought that the Commission seemed to be agreed upon several purely drafting matters. Thus, Mr. Yokota had suggested that the words "decisions have been taken" in paragraph 1 might be replaced by "a text has been adopted" and that the word "agreed" might be replaced by "established"; he thought those suggestions were acceptable and should be referred to the Drafting Committee. The Secretary to the Commission had rightly pointed out that, although paragraph 1 was intended to apply to both bilateral and multilateral negotiations, the wording suggested that only multilateral negotiations were involved. The Drafting Committee would therefore be asked to clarify that point. The consensus seemed to be in favour of omitting the second sentence of paragraph 2. With

regard to the first sentence of that paragraph, it had been suggested that the words "faculty to sign" were more appropriate than the words "right to sign". Mr. Sandström had said that he did not object to the word "rights" because it was referred to in the same sense in article 24, while Mr. Padilla Nervo had suggested that a reference to article 24 should be included in the text. Those matters would also be referred to the Drafting Committee.

51. Turning to more substantive matters, he stated in reply to Mr. Scelle that he had intended to use the word "text" in the sense of any international agreement. He could not agree that the generic use of the word "treaty" really led to such great difficulties as Mr. Scelle supposed. Occasions might occur when it must be made clear whether the term was used in the restrictive or in the broader sense, but it was generally possible to proceed on the basis that all the articles of the code applied to international agreements in general and that the word "text" in article 17 referred to that of an international agreement.

52. He agreed, however, that article 17 did not apply to *every* text; it did not apply, for example, to resolutions of international organs which embodied the texts of international agreements but were not *per se* international agreements. But if it were assumed that participation in the negotiation of a treaty or international agreement involved no obligation, that would apply *a fortiori* to texts which were not international agreements. Accordingly, the difficulty mentioned by Mr. Scelle did not arise in connexion with article 17.

53. The Secretary to the Commission had made the point that, although a treaty *per se* might involve no rights or obligations, resolutions of international organizations embodying agreement might, under the constitutions or practice of those organizations, result in obligations produced by the resolutions. He considered that the question was too remote from the law of treaties to be dealt with in the code and that it could not be regarded in the same light as the voting rules of conferences, for the very existence of treaties depended upon such voting rules. However, the question of the absence of legal effects arising from the mere drawing up of texts was a cardinal point which should be mentioned in the code.

54. Mr. Ago had raised a real difficulty. He thought there were three questions to be answered. In the first place, when States negotiated and drew up a text, were they committed to become parties to the treaty? Secondly, did participation in the negotiation and drawing up of a text commit a State to carrying out any provision of that text? The answer to both those questions was obviously in the negative. The third and more difficult question was whether any obligation arose, by reason of mere participation in drawing up a text, to refrain from acts which might frustrate the purpose of the negotiations. So long as the parties might still sign the treaty, they should refrain from prejudicing the possibility of the treaty being carried out. He would be inclined to say that such an obligation existed, particularly during a specific period while the text was likely to result in a treaty. Even if that were so, however, the Commission should ponder whether such an obligation stemmed from the general obligation of good faith under international law, or from the fact of having drawn up the text. In his opinion, either view was tenable. If it were considered that the rule of good faith applied, a provision along those lines might be inserted, or it might be stated simply that the mere negotiation and drawing up of the text did not *per se* produce any consequences (implying, however, that consequences might result *aliunde*).

55. Mr. Yokota had suggested that the phrase after the words "finally agreed" in paragraph 1 should be omitted altogether. If the Commission wanted to evade the issue, and to leave Mr. Ago's question unanswered, that would be the best course. In that case, the question whether negotiations or drawing up a text involved any obligation not to frustrate the purposes of negotiations would not arise, but nothing in the code would imply that a State could lawfully frustrate those purposes.

56. Mr. PADILLA NERVO said that he interpreted the last phrase of paragraph 1 not as freedom to perform acts capable of frustrating the effects of negotiations but rather as meaning that participation in negotiations presupposed the obligation not to modify the position which had existed before the negotiations had been started. That was different from giving States the freedom to perform new acts that could alter the effects of the negotiations.

57. The CHAIRMAN, speaking as Special Rapporteur, agreed with Mr. Padilla Nervo's interpretation, but recalled Mr. Ago's observation that the phrase might be interpreted differently. Moreover, the main question was whether the phrase did not temporarily impose a negative obligation.

58. Mr. LIANG, Secretary to the Commission, agreed with Mr. Yokota's suggestion to omit the last phrase of paragraph 1. He said that he had not intended to suggest that the question relating to texts embodied in resolutions of international organizations should be formulated in a rule. But he wished to make it clear that the phrase somewhat prejudiced the question whether treaty texts embodied in resolutions of the General Assembly of the United Nations produced or did not produce certain legal consequences. The omission of the phrase would meet both his own point and Mr. Scelle's. Moreover, the questions of good faith and of an implicit obligation to maintain the *status quo* went beyond the stage of actual negotiations. The last phrase of paragraph 1 postulated the completion of negotiation and the adoption of a text. The question of the parties' obligations after the text had been adopted were sufficiently covered by the first phrase.

59. Mr. AGO did not consider that the point remaining at issue was whether any obligations were involved when a treaty had been negotiated and signed. Nor could he agree with Mr. Amado (see para. 39 above) that the question was a theoretical one; on the contrary, the answer could have very important practical implications. The Commission had to decide whether it was admissible, for example, for a State to negotiate on such a matter as the sovereignty of a territory and to conduct itself in such a manner that the entire process would be stultified.

60. Although he considered Mr. Yokota's suggestion (see para. 43 above) preferable to leaving the text in its present form, he did not regard that procedure as quite satisfactory. The records would show that the matter had been discussed and also that the Commission had gone into such details as the voting rules of conferences; the question at issue was not so unimportant that it could be left aside. There was room for further discussion and the Commission should try to agree on a generally satisfactory text.

61. Mr. VERDROSS said he was in favour of Mr. Yokota's suggestion. The problem raised by Mr. Ago and Mr. Bartoš was very important, but a decision

on it was as yet premature. Accordingly, the only alternatives were either to delete the last phrase of paragraph 1 or else to leave the matter open on the understanding that it would be considered later.

62. Mr. TUNKIN also supported Mr. Yokota's suggestion. In his opinion, the answer to Mr. Ago's question (see para. 59 above) hinged on whether or not there was a rule of international law obliging the parties negotiating a treaty not to take any step which might change the existing situation in any respect. He did not believe there was any such rule. For example, when the United Nations Conference on the Law of the Sea, 1958, had discussed the breadth of the territorial sea, it had been proposed that a resolution be adopted that, as from the beginning of the Conference, no participating State should extend the breadth of its territorial sea. There was, however, strong objection to that proposal. After the Conference a number of States had extended their territorial seas, but it could not be asserted that, even if they had done so during the Conference itself, they would have violated rules of international law. The performance of an act affecting the subject matter of a text might conflict with some other rules of international law, but States were under no specific obligation not to change the *status quo* at such time.

63. Mr. BARTOŠ thought that Mr. Yokota's suggestion was acceptable as a transitory solution, although it was not entirely satisfactory. He would not insist on any other course, however, since there was as yet no precise rule of international law on the question raised by Mr. Ago. However, even if Mr. Verdross's thesis concerning the existence of the good faith rule were accepted, participants in the negotiations were naturally aware whether or not they were acting in bad faith, particularly where law-making treaties were concerned. The Commission could not lay down any rule which was contrary to the established good faith rule.

64. He did not think that the example cited by Mr. Tunkin (see para. 62 above) was apposite, since no text on the breadth of the territorial sea had been adopted at the Conference on the Law of the Sea held in 1958. Accordingly, the subsequent actions of the States concerned merely supported his own and Mr. Ago's views.

65. Since no rule other than that of good faith existed as yet on the subject, the Commission might consider formulating a text to meet the requirements of article 17, pending further developments in international law, which might result in the establishment of a rule.

The meeting rose at 1 p.m.

494th MEETING

Thursday, 14 May 1959, at 9.55 a.m.

Chairman: Sir Gerald FITZMAURICE

Law of treaties (A/CN.4/101) (*continued*)

[Agenda item 3]

ARTICLE 17 (*continued*)

1. The CHAIRMAN invited the Commission to continue its discussion of article 17 of the draft code.

2. Mr. SANDSTRÖM said that, by simply agreeing to negotiate on a particular subject, a State was not committing itself to continue the negotiations until they produced a result. The State could withdraw from the negotiations at any time and would thereupon regain the freedom of action it had previously had. That being so, it could hardly be said that the State's responsibility would be involved if it changed the *de facto* situation during the negotiations. Of course, such action might be discourteous; it might mean the breaking off of the negotiations and provoke a reaction. But it could hardly produce legal effects by reason merely of having occurred during the negotiations and without notice of discontinuance of the negotiations. It might have such effects as an unlawful act, and it was also conceivable that the negotiations had been undertaken in pursuance of a special agreement excluding any change in the *de facto* situation during the negotiations; but that was quite a different situation and immaterial to the rule that negotiations *per se* did not create any obligation to do or not do anything with respect to the subject matter of the negotiations. Accordingly, he found paragraph 1 acceptable in its present form. The last phrase did not seem to be absolutely necessary, however, especially if it might be interpreted as encouraging undesirable action, and he would therefore agree to its omission.

3. Mr. HSU thought that both a substantive and a formal question were involved in paragraph 1. The last phrase of the paragraph would have to be amended. It had been suggested that the provision might be clarified by a reference to the principle of good faith, but some members had objected to that course on the ground that no such rule existed in international law. He considered that the principle applied to all treaty law, but that it was quite admissible to introduce it as a qualification of the situation dealt with in paragraph 1, if the Commission wished to retain the whole sentence. The analogy with the situation at the time of the United Nations Conference on the Law of the Sea, in 1958, which Mr. Tunkin had cited at the previous meeting (see 493rd meeting, para. 62), was a false one, for paragraph 1 dealt essentially with texts already established, whereas at that Conference no final texts had been drawn up concerning the breadth of the territorial sea. When States agreed upon a text, however, they were naturally bound not to alter the fundamental situation to which that agreement related.

4. With regard to the formal question before the Commission, he believed that there were two ways of formulating a code. The first, followed by Professor Brierly in his report on the law of treaties (A/CN.4/23), was to enumerate the principal questions and to leave detail aside, while the second, followed by Sir Hersch Lauterpacht (A/CN.4/63 and A/CN.4/87) and the present Special Rapporteur, was to cover as many situations as possible. He had no personal preference for either of those methods, but thought that the Commission should decide on one of them.

5. Mr. SCELLE said that he would be prepared to go even further than Mr. Ago and to state that the theory of the obligation of States participating in negotiations on specific issues not to frustrate or alter the purposes of the negotiations was founded on a legal principle, and not only on moral principles and good faith. It was important for the Commission, whose task was not only to codify international law but also to promote its progressive development, to establish as a

matter of principle that participants in negotiations had no right to frustrate the purposes of those negotiations.

6. Under the old rule of absolute sovereignty, States were free to settle an issue in any manner they wished—even by force—and were not under any duty to resort to judicial or other pacific means of settlement. By virtue of the Covenant of the League of Nations that rule had been modified, in that States had undertaken not to resort to the use or threat of force for the purpose of settling differences, but even that restriction left considerable possibilities for the exercise of pressure. The modern position was that a State, though bound not to resort to force, was not bound to "negotiate" with another. Article 33 of the Charter referred to "any dispute the continuance of which is likely to endanger the maintenance of . . . peace", but the parties at issue were always free to leave things as they were and not to endanger peace. Every State was the absolute judge of whether a particular issue was susceptible of settlement. The corollary was that, by the mere fact of entering into negotiations, a State surrendered a portion of its sovereignty in that, by no longer claiming to be the sole judge, it conceded to the other party or parties a role in the settlement of the issue. That thesis applied equally to bilateral and to multilateral treaties and was based on the principle *ad huc sub judice lis est.* When an issue was submitted to the *juridiction* of two parties whose agreement was to become law if the treaty was effectively concluded, the legal obligation involved was of exactly the same nature as that imposed by an internal judicial authority, namely, that no action could be taken to prejudice the purposes of the agreement (provisional measures). The Commission had established that principle indirectly in the last draft on arbitral procedure, by admitting that a *jugement d'accord* ratifying the agreement or the *compromis* of the parties was a regular act of *juridiction* and binding on all concerned.

7. The Commission should therefore state a rule of law, and should also include an indication of the extremely delicate question, which did not derive from the notion of sovereignty itself, of the duration of the obligation. The principle *ad huc sub judice lis est* might be interpreted either as an indefinite or as a finite obligation. He believed that the decisive criterion of the solution was whether or not the treaty was signed. There could be no doubt that the obligation continued so long as the text was not signed and the negotiations continued; while a State was in regular possession of the subject matter concerning which it was negotiating with another State, that subject matter could not be affected in any way until the purposes of the negotiation had been achieved. But once a treaty had been signed, the situation became more complex. Although signature involved no definite obligation, it could be said that the beginnings of an obligation had been laid down. After that point, the State in possession of the subject matter had even less right to nullify, so to speak, the signature of its plenipotentiaries. That obligation could not continue indefinitely, however, and he believed, in the light of recent experience, that the question whether or not signature became definitive irrespective of ratification should be made the subject of a rule of international law. In the practice of some countries, ratification was delayed for years, and it might be said that the obligation not to change the subject matter subsisted during that period. While it was perfectly admissible to ponder the consequences of a text for a reasonable period, it was undesirable to allow for the voluntary and gradual modification of the subject matter until it became completely different from that about which the parties had originally negotiated and signed the relevant instrument. A rule which should result from the code was that ratification could not be postponed indefinitely, since that was dangerous both for State policy and for the interests of peace. It should be said therein that, within a reasonable time limit, a State should be deemed to have officially or unofficially declared the issue as no longer susceptible of settlement, and to have regained its sovereignty in the matter, within the limits prescribed by the United Nations Charter.

8. Mr. PAL said that he had found the Special Rapporteur's text of paragraph 1 quite satisfactory, both in its immediate context and in the context of the draft as a whole. With regard to paragraph 2, however, he thought that the omission of the second sentence and the addition of a reference to article 24 would improve the text.

9. He raised a drafting point in connexion with the phrase "does not involve any obligation to accept the text as finally agreed" in paragraph 1. It was not clear whether stress was laid on finality or on the obligation of acceptance. Once a text had been adopted by a certain majority, its finality was established and, after acceptance, no one could say that the text was not final. The wording should be changed in order to emphasize the absence of any obligation to accept the final text; the situation might be clarified by a reference to article 6.

10. He did not share the views of those who had objected to the last phrase of paragraph 1, particularly as the Special Rapporteur had dealt with the effects of error and lack of *consensus ad idem* in his third report (A/CN.4/115); merely to perform or refrain from performing any act in relation to the subject matter of a text involved no legal consequence, but performing an act which affected the *consensus ad idem,* in accordance with articles 9, 11 and 12 of the third report, certainly would have some grave consequences. Pendency of negotiation for a treaty did not by itself at any stage produce any *interim* legal consequence. At least existing international law did not prescribe any such *interim* consequences. The last phrase of paragraph 1 was therefore quite clear in the context; he would not object if it were omitted, but thought it unnecessary to do so.

11. Mr. TUNKIN said it had been asserted that the example he had cited from the Conference on the Law of the Sea to deny the existence of a rule of international law governing the situation between the establishment of a text and its entry into force was irrelevant, because no text on the breadth of the territorial sea had been adopted. He pointed out, however, that article 17 related to participation in negotiations. It could not be denied that the provisions of a treaty became binding only when the process of treaty-making was completed; the question to be answered was whether the negotiators were under any obligation before the treaty was in force. The problem raised by Mr. Ago (see 493rd meeting, para. 32) was real and a complicated one. If a State entered into negotiations with another for the purpose of concluding a treaty and if that treaty were signed but not yet ratified, the expression of the will of a State was there, but as yet no legal obligation existed, nor indeed could it exist until the treaty-making process had been completed. On the other hand, if a State performed an act which would make any treaty on the

subject useless, the result, in his opinion, would be a deficiency of will on the part of the State concerned. In that event, he agreed with Mr. Sandström that the situation would be equivalent to a breaking off of negotiations, or, if the treaty had been signed, to a refusal to ratify. Such an act was not, however, *per se* a violation of international law, since under international law no State was obliged to ratify a treaty and could halt the treaty-making process at any stage. The international responsibility of the State depended on substantive rules of international law; accordingly, any responsibility of the State did not derive from entry into negotiations, but from whatever substantive rules of international law might be violated by such action.

12. The majority of the Commission seemed to be in favour of omitting the last phrase of paragraph 1; personally, he had no strong feelings on the matter.

13. The CHAIRMAN, speaking as Special Rapporteur, said that Mr. Pal's suggestion would be referred to the Drafting Committee.

14. In reply to Mr. Tunkin, he pointed out that the main difficulty did not lie in the failure of a State to carry out a treaty before or after it had been concluded. The hypothetical danger was that a treaty might be carried out literally, but that its effects might be nullified, as, for example, if land were ceded under a treaty, but certain elements which rendered it valuable were removed or destroyed. Some provision to cover those cases should be inserted in the code. It was extremely difficult, however, to formulate a positive rule. He suggested that the word "agreed" might be replaced by "established", that the last phrase of paragraph 1 might be replaced by the words "or to carry out its provisions" and that a new paragraph might be inserted after paragraph 1, along the following lines:

> "This does not however affect such obligations as any participant in the negotiation may possess according to general principles of international law to refrain for the time being from taking any action that might frustrate or adversely affect the purpose of the negotiation or prevent the treaty from producing its intended effect if and when it comes into force."

15. Mr. BARTOŠ agreed with Mr. Scelle that it was a rule of good conduct that a State must not do anything during negotiations that was capable of frustrating the purposes of a treaty, but he could not infer that the negotiations *per se* created obligations. He considered that the rule calling for good faith was no doubt a rule of international law generally, even if it was not strictly a rule of the law of treaties. Within certain limits, therefore, it should apply also to the law of treaties, and the idea should be incorporated in the text of the rules governing the conclusion of treaties. While he did not deny that it was for States to decide whether they would accede to or ratify a text that had been established, he considered it a legal rule that, pending ratification and before declaring its non-acceptance of a treaty, a State which had participated in the negotiation of the treaty was not free to alter the purposes of the treaty. If a State refused to ratify, it was free to act as it chose, since the text would no longer be binding upon it, but pending ratification, it was essential to be able to rely on the good faith of the negotiators. It was difficult to say that the negotiating States were not under an obligation to refrain from taking action contrary to a text provisionally adopted. Furthermore, if the text contained a provision stipulating that no State should, so to speak, aggravate the situation and a State performed such an act pending ratification, that act would be contrary to the intentions of the parties. If a State availed itself of the right to refuse to ratify a text, it could lawfully act as if that text did not exist, but until it had exercised that right, it could not break its promise. The obligation, therefore, was not only moral, but legal. He considered that the good faith rule was a rule of international law; it might not be a rule of the law of treaties, but could be applied to certain aspects of that law.

16. Mr. AGO agreed with the substance of the Special Rapporteur's proposal. It appeared to meet all of the views that had been put forward during the discussion.

17. Mr. LIANG, Secretary to the Commission, pointed out that the Commission was discussing a hierarchy of obligations: first, obligations during participation in the drawing up of the text or during the negotiation of the treaty; secondly, obligations after the establishment of the text but before signature (dealt with in article 17); thirdly, obligations after the signature of the treaty (dealt with in article 30, paragraph 1 (*c*); and fourthly, obligations after ratification.

18. It seemed to him that the Special Rapporteur's latest proposal had to be read in the light of article 30, paragraph 1 (*c*), and might serve as a formulation of the obligations dealt with in article 17, provided that the distinction was clearly made between the second and third stages.

19. Mr. YOKOTA said that he had been about to make the same point. He appreciated the motives that had led the Special Rapporteur to propose his modifications. Apparently the Special Rapporteur had wished to find a formula which would satisfy all the members of the Commission. However, it seemed to him that the clause "or to carry out its provisions" was self-evident from the first part of paragraph 1. Obviously, if participation in a negotiation did not involve any obligation to accept the text as finally established, there would be no obligation to carry out any of the provisions of the text. Again, he saw no need for declaring that a State might have some obligations under the general principles of international law. That was always true and there was no special reason to mention it expressly in article 17.

20. He did not think that those two points were relevant to the stage of the treaty-making process under discussion. They arose after signature and should be dealt with in article 30. He agreed with the Secretary that a clear distinction should be made between the stage before signature and that after signature.

21. The question was whether a State had any obligations to accept the established text before signature. That question was answered by the beginning of paragraph 1 as far as the words "does not involve any obligation to accept the text as finally agreed" or better, "established". He suggested that the remainder of the paragraph as redrafted should be omitted.

22. Mr. SCELLE said that he was convinced that the Special Rapporteur's latest suggestions represented definite progress. They should be referred to the Drafting Committee and later re-examined by the Commission.

23. He reiterated his view that during the negotiations and before the stage of signature, obligations arose which had a bearing on the question whether the subject matter of negotiations could or could not be modified.

That view had now been admitted as correct by Mr. Bartoš, confirmed by the Secretary and duly taken into account in the Special Rapporteur's amendments.

24. Mr. TUNKIN supported the suggestion that the Special Rapporteur's formula should be referred to the Drafting Committee.

25. Mr. ALFARO agreed with the formula read out by the Special Rapporteur. However, he felt that before referring it to the Drafting Committee the Commission should decide on Mr. Yokota's suggestion to omit the clause "or to carry out its provisions".

26. The Chairman, speaking as Special Rapporteur, pointed out that his proposal had been to stop at the words "to accept the text as finally established, or to carry out its provisions". The additional paragraph would follow immediately thereafter. He suggested that article 17 should be referred to the Drafting Committee on that basis.

It was so agreed.

ARTICLE 18

27. The CHAIRMAN, speaking as Special Rapporteur, introduced article 18. He observed that in part I, section B, of the draft code he had tried to follow a certain sequence which he hoped was not only logical but natural in that it conformed to the various stages of the treaty-making process in their natural order.

28. Articles 15 and 16 dealt with the drawing up of the text and article 17, with certain implications of that first stage. After the parties had drawn up a text it was still possible, before the text was authenticated, to propose and consider changes. In article 18 the stage was reached where no further changes in the text could be made.

29. He had drawn attention, in paragraph 33 of his commentary, to the fact that paragraph 1 of the article was the same, with slight verbal changes, as that adopted by the Commission at its third session.[1] Of course, the fact that the article had been adopted in 1951 did not preclude its modification at the present session.

30. The four sub-paragraphs of paragraph 1 described the different ways in which authentication could take place. Sub-paragraph (*a*) applied mainly to bilateral treaties but could also apply to multilateral treaties. Sub-paragraph (*b*) was obviously limited to multilateral treaties. In connexion with sub-paragraph (*c*), he pointed out that the incorporation of a text in a resolution of an organ of an international organization gave the text a status not as a treaty but as a text that was final. Sub-paragraph (*d*) was a kind of omnibus clause that allowed for other possibilities.

31. Paragraph 2 was new. He had added it because some treaties still used the formula concerning the affixing of seals although no seals were actually affixed.

32. Mr. TUNKIN, referring to the title of article 18, asked whether "establishment" and "authentication" of the text were or were not synonymous. The title of section B contained the word "authentication" in parentheses after the word "establishment" whereas the beginning of paragraph 1 of article 18 seemed to imply that the two words were not synonymous.

33. He also suggested that the term *ne varietur*, appearing in paragraph 1, related to the effects of authentication and should preferably be reserved for article 19, paragraph 2.

34. The CHAIRMAN, speaking as Special Rapporteur, agreed that there seemed to be some inconsistency in the use of the words "establishment" and "authentication". The two words had slightly different meanings. He suggested that the question might be considered by the Drafting Committee.

35. He also agreed that the substantive aspect of the term *ne varietur* was dealt with in article 19, paragraph 2. It was a traditional term and he had only used it as a convenient means of identifying the stage of the treaty-making process reached in article 18.

36. Mr. AGO suggested that in paragraph 1, sub-paragraph (*d*), it might be advisable to specify that the "formal means" referred to were formalities relating to the authentication of the text. Otherwise, it might be inferred that the process of authentication included other formalities often prescribed in the text of a treaty, such as those concerned with the exchange of instruments of ratification or with some other subsequent stage of the treaty-making process.

37. The CHAIRMAN, speaking as Special Rapporteur, accepted the suggestion, although he thought that the context was clear.

38. Mr. LIANG, Secretary to the Commission, pointed out that in article 18 and some subsequent articles initialling seemed to have been equated with signature. Signature was an established act in the treaty-making process and might have legal effect in the case of treaties where the text permitted ratification to be dispensed with. In the technical process initialling represented a stage prior to signature and applied to a preliminary draft (*avant-projet*), whereas the signature was affixed to a final text. If the technical distinction was to be retained, initialling should not be given the same status as signature. The simplified procedure of initialling was exceptional, and initialling *ad referendum*, referred to in article 21, paragraph 2, was also rare.

39. The CHAIRMAN, speaking as Special Rapporteur, replied that the Secretary's comment might be relevant to article 20 and succeeding articles, but was not relevant to article 18. Furthermore, he could not agree with the substance of that comment. Initialling and signature were not equated, except with regard to the authentication of the text; in other respects they differed. Initialling was not confined to *avant-projets*, since final texts were frequently initialled and the initials of Heads of States ranked as signatures. Whether a document was an *avant-projet* or not depended on its nature and the intentions of the parties, who would indicate in the document that it was a preliminary draft, and not on whether it was signed or initialled. It would, indeed, be dangerous to regard initialling as the distinguishing mark of an *avant-projet*.

40. Mr. LIANG, Secretary to the Commission, declared himself satisfied by the Special Rapporteur's explanation and withdrew his suggestion, so far as it concerned article 18.

41. Mr. PAL asked whether the reference to signature in article 18, sub-paragraph (*a*), implied that the treaty had been finalized within the meaning of articles 25 and 29.

42. The CHAIRMAN, speaking as Special Rapporteur, replied that the text would have been completely authenticated at that stage, but the other aspects

[1] See *Official Records of the General Assembly, Sixth Session, Supplement No. 9*, and documents A/CN.4/L.28 and A/CN.4/L.55.

of signature were dealt with in the later articles. Signature had a double aspect: in treaties subject to ratification it merely finalized the text of the treaty, but in documents such as protocols, it might both finalize the text and bring the treaty into effect. Legally, the two aspects were always separate, even where the effects were simultaneous.

43. Mr. SANDSTRÖM observed that the point had been brought out clearly in the titles of sections B and C.

44. Mr. KHOMAN questioned the use of the words "is effected" in paragraph 1. With regard to paragraph 2, he agreed that sealing was virtually obsolete, but in any case it authenticated the signature, not the text.

45. The CHAIRMAN, speaking as Special Rapporteur, replied that the words "may be" might well be substituted for the word "is". Sealing had probably by extension come to be associated with authentication. Paragraph 2 might therefore be omitted, or its substance might be placed in the commentary.

46. Mr. ALFARO suggested that paragraph 2 should be retained, as sealing was traditional and was still in current practice in many cases. Mr. Khoman was correct in saying that sealing was the personal authentication of the plenipotentiary, but it did confer another element of authentication on the text. The omission of a reference to it might give rise to questions.

47. The CHAIRMAN, speaking as Special Rapporteur, explained that his only purpose in referring to the traditional formula of sealing had been to show that it was not a necessary element of authentication or formal validity.

48. He suggested that article 18 should be referred to the Drafting Committee with the comments made during the discussion.

It was so agreed.

ARTICLE 19

49. The CHAIRMAN, speaking as Special Rapporteur, introduced article 19 and explained that it was consequential on article 18. He referred to paragraph 34 of his commentary.

50. He realized that some redrafting would be needed. In paragraph 1 the first sentence might end after the word "shown", and the next sentence begin: "This is a necessary condition . . .". Any further steps prior to signature or some other process such as the adoption of a resolution by an international organization must relate to the authenticated text. Paragraph 2 merely carried further the concept that the established text was the text *ne varietur*. He was not sure that any part of paragraph 2 after the phrase "prior to entry into force" should be retained, because it was obvious that a treaty the text of which had been established for signature or embodied in a final act or resolution could not be changed save by a new conference and because the final phrases touched on matters which were dealt with in later articles and further reports on the circumstances in which a treaty might be modified.

51. Mr. PAL said that the Special Rapporteur's amendment to paragraph 2 would certainly improve the text. He wondered whether the phrase in paragraph 1 "unless any flaw in the procedure adopted can be shown" was not too strong, since it was doubtful whether any flaw of whatever nature was necessarily fatal.

52. The CHAIRMAN, speaking as Special Rapporteur, explained that, for example, the flaw to which he referred might be a miscalculation in the vote required for the adoption of a resolution.

53. Mr. TUNKIN had some doubts about the phrase "formal validity . . . as a text" in paragraph 1. It was hardly possible to speak of formal validity when the treaty was not yet in existence. It would not be correct to separate the form of a treaty from its substance. The paragraph seemed to imply that the authentication and establishment of a text had legal effects, but in fact the only consequence was establishment of the text *ne varietur*.

54. Mr. AGO agreed with Mr. Tunkin since the text at the stage to which the article related was still only a draft, whereas only a final text could be said to have formal validity. He agreed that the latter part of paragraph 2 should be deleted, the more so as article 19 dealt only with legal effects of the establishment and authentication of the text, not with the effects of its entry into force. Some observation might, however, be placed in the commentary, since the parties could in fact change an established text, provided that it was recognized, however, that the altered text would, in fact, be a new one.

55. Mr. SANDSTRÖM thought that paragraph 1 might also be deleted since it added little to the statement in paragraph 2 that the text, once established, was final.

56. The CHAIRMAN, speaking as Special Rapporteur, suggested that the statement that authentication of the text was a necessary condition of any further steps in connexion with a treaty should be retained. The article might, however, be redrafted.

57. Mr. YOKOTA agreed in substance with Mr. Ago, but thought that at least the phrase "except by the mutual consent of all the parties" should be retained in paragraph 2.

58. The CHAIRMAN, speaking as Special Rapporteur, did not think that it was possible to speak of mutual consent if any change was desired in a text adopted by vote at a conference and embodied in a resolution or final act. The text as such could not be varied, but the parties might refuse to put it into effect and might establish a new text. The phrase should therefore be omitted.

59. Mr. BARTOŠ observed that, even if all the parties agreed to amend the text, the amended text would be a new text, superseding the earlier text.

60. The CHAIRMAN, speaking as Special Rapporteur, suggested that article 19 be referred to the Drafting Committee with the following recommendations: that some substitute be found for the phrase "formal validity" in paragraph 1, that the words "any flaw" be qualified by some such term as "fundamental" and that the idea that authentication was a necessary condition of any further steps to convert the text into a treaty be retained; and that in paragraph 2 everything after the phrase "prior to entry into force" be deleted, but a passage be included in the commentary explaining the position if proposals for altering the text were made after its authentication.

It was so agreed.

The meeting rose at 1 p.m.

495th MEETING

Friday, 15 May 1959, at 9.45 a.m.

Chairman: Sir Gerald FITZMAURICE

Law of treaties (A/CN.4/101) (*continued*)

[Agenda item 3]

ARTICLES 20 AND 21

1. The CHAIRMAN, speaking as Special Rapporteur, introduced article 20 (*Signature and initialling (status)*), which was closely linked with article 21 (*Initialling and signature* ad referendum *as acts of authentication of the text*). Article 20 dealt with initialling and signature *ad referendum*. It referred to the double aspect of full signature and distinguished between, on the one hand, initialling and signature *ad referendum* and, on the other, full signature.

2. Mr. LIANG, Secretary to the Commission, stated that at the previous meeting (see 494th meeting, paras. 39 and 40) the Special Rapporteur had cleared up some of the points he had raised, but reflection on articles 20 and 21 in the light of article 18 suggested that further clarity would be desirable.

3. The use of both the terms "establishment" and "authentication" together was undesirable, unless authentication was clearly distinguished from establishment. It might be argued that "establishment" was the same as drawing up a text. "Establishment" was not a term of art in the treaty-making process. In the title of section B of part I of the draft code the use of the term "authentication" in brackets might imply either that it meant the same as "establishment" or that it might be a subsidiary act. An explanation should be given, at least in the commentary.

4. Further doubt was caused by the meaning attaching to the term "signature" in article 20, especially in the title. The word "status", though perhaps unacceptable to jurists on the continent of Europe, was acceptable to him. Article 20 should precede article 18, as it threw light on the meanings of the term "signature", and in article 18, paragraph 1 (*a*), the following phrase might be used: "Initialling or signing (in the sense of the authentication of the text)", showing that in that context signature could not be understood as the act of consent referred to in article 20, paragraph 3.

5. He also had some doubts about the use of the term "signature *ad referendum*" in regard to the authentication of the text. It was a customary term, but referred generally to signature subject to the ratification of the substance of a treaty. Logically, of course, nothing precluded it from also covering the establishment of the text, but it might be preferable to call such a text a draft text, which plenipotentiaries signed subject to the approval of the Foreign Minister or Head of State.

6. Another element of confusion was the use of the term "signature" in two senses in paragraph 3 and in a third sense in which signature operated as an agreement to be bound in cases where ratification was dispensed with.

7. One solution might be to insert a special sub-heading for articles 20 to 24, which were articles dealing with signature as an act of consent, but not as an act authenticating the text. The authenticating act should properly be dealt with in the section relating to the drawing up of the text. Rule 163 of the rules of procedure of the General Assembly laid down that the description of the rules in the table of contents and the notes in italics should be disregarded in the interpretation of the rules; but if headings were to be included in the code, they should, so far as possible, correspond to the substance of the articles.

8. The CHAIRMAN, speaking as Special Rapporteur, said that he would have no objection to inserting a reference to authentication in article 18, paragraph 1(*a*), but he was dubious about using the phrase suggested by the Secretary, because, while signature always authenticated the text, it also always meant something more, namely provisional consent to an eventual treaty. Every signature necessarily had those two aspects.

9. Signature *ad referendum* (or initialling with equivalent effect) was far more frequent than the Secretary seemed to believe, as was illustrated by the cases described in article 21, paragraph 2.

10. The Secretary's suggestion for introducing subheadings was not wholly acceptable, since article 21 and the succeeding articles applied by no means only to full signature as an act of provisional consent. For example, article 22, concerning authority to sign, implied that a signature authenticating the text would not be valid unless the representative signing did so under a full-power. Unless he possessed a full-power, he would have to initial or sign *ad referendum*. Perhaps the Drafting Committee might be asked to consider the suggestion.

11. Mr. TUNKIN suggested that the Secretary's comments on article 18 should be referred to the Drafting Committee to avoid reopening the discussion.

12. Commenting on article 20, paragraph 2, he said it was probably not strictly accurate to say that initialling and signature *ad referendum* had in general the same effect. That was true only so far as the establishment and authentication of the text were concerned, but article 20 appeared to be attaching a broader meaning to signature. If it meant that they had the same effect only with regard to the "establishment and authentication" of the text—and he would prefer a single term—the point was completely covered by article 18, and consequently article 20, paragraph 2, was unnecessary and might be misleading.

13. With regard to the phrase "personal approval of the treaty" in the same paragraph, he said the code should not deal with the personal feelings of agents of the State, which were wholly irrelevant in international law. Unless the person signing or initialling the text were a representative of his State, he would not be empowered to participate in the treaty-making process.

14. Articles 18, 29 and 30 might be regarded as interrelated and thus covered consent to the text and authentication of the text, and the third aspect of signature mentioned in article 20, paragraph 3, was also embodied in article 29. Repetition in article 20 might be misleading, since a condensed statement in one article might not give the same impression as a much fuller statement in another.

15. The CHAIRMAN, speaking as Special Rapporteur, explained that article 20, paragraph 2, did not deal with full signature, but with signature *ad referendum*. There was no substantive difference in legal

effect between initialling and signature *ad referendum*, whereas full signature produced additional effects.

16. Mr. TUNKIN replied that, if that was the intended meaning, he could not accept paragraph 2, because in law signature *ad referendum* and initialling could not be equated. For the purpose of the validity of a treaty, initialling usually required subsequent signature, whereas signature *ad referendum* required only approval.

17. Mr. YOKOTA agreed with the Special Rapporteur that the intention in article 20 was to set forth the general status and significance of signature in one article; references to various aspects of signature might be repeated in other articles.

18. He agreed that paragraph 3 might be redrafted in some respects, in particular the phrase "though not necessarily agreement to be bound by it". The true meaning of the passage was that signature was an act implying the acceptance of a text as a potential basis of agreement (*cf.* article 14, paragraph 4).

19. Full signature did not necessarily have the same status in multilateral as in bilateral treaties. In the case of bilateral treaties it might be either an act which both authenticated the text and indicated consent to it as a potential basis of agreement or an act authenticating the text and constituting a final agreement to be bound by it. Authentication of the text was, of course, always implicit in the signature of a bilateral agreement, but not always in that of a multilateral agreement, especially one drawn up at an international conference and incorporated in a final act which was afterwards signed.

20. Accordingly, if paragraph 3 was meant to apply both to multilateral and to bilateral treaties full signature was: (*a*) an act both authenticating the text and indicating the consent to a potential basis of agreement; (*b*) an authentication and an agreement to be bound by the text; (*c*) consent to a potential basis of agreement; (*d*) an act indicating that the signatory was bound by the text. Paragraph 3 contained the substance of all those notions, but he suggested that it might be redrafted on the lines he had indicated.

21. The CHAIRMAN, speaking as Special Rapporteur, accepted Mr. Yokota's suggested redraft, but thought that provision should be made for cases where signature might have only a single aspect (i.e. "Full signature may be . . .").

22. Mr. PAL said that the observations made by the Secretary had indicated where the difficulty lay. It would seem that in the law of treaties "signature" was a term of art with special meaning and with special legal significance, whereas signature simply for the authentication of a text, as used in articles 20 and 21, did not have that status. In the ordinary sense, initialling too was tantamount to signature. But the real difficulty was that the processes of authentication of the text and of signing the treaty were not always distinct. Signature might be given with the immediate object and effect of authentication of the text and, at the same time, of signing the treaty either conditionally or unconditionally. The difficulty would thus ultimately resolve into one of drafting and its solution could be safely entrusted to the Drafting Committee.

23. Signature *ad referendum*, as mentioned in article 20, paragraph 2, again had a double aspect. Signature for the purpose of authentication needed no reference back to a higher authority, since the person signing was fully authorized to do so, but signature indicating consent to the treaty might require reference for approbation. The reference to "personal approval" should be deleted, as it had already been stated that the person signing must be authorized to do so by the State and must therefore be taken as acting on behalf of the State.

24. Mr. VERDROSS agreed with Mr. Tunkin that the phrase "personal approval" was undesirable in paragraph 2.

25. The idea embodied in paragraph 3 was acceptable, but the wording should be changed, since there was some conflict between the "double status" and the "third aspect". The provision should state in what cases final signature only authenticated the text and in what cases it was tantamount to consent. The main problem was whether signature was normally merely a method of authenticating and accepting a text or whether it normally indicated consent. In his view it normally constituted authentication and acceptance of the text and only in the exceptional cases in which the person signing was in possession of full powers did it indicate consent.

26. The first sentence should, therefore, be deleted and paragraph 3 revised to read:

> "Full signature is normally an act of authentication of the text and an act implying consent to the text as such. In exceptional cases, full signature also operates as acceptance of the treaty if the person signing possesses full powers to conclude a binding treaty."

27. Mr. AGO said that whereas the expression "signature *ad referendum*" meant that the consent of a higher authority had to be obtained, so that the signature appeared as an act whose effects were under suspensive conditions, the term *"signature différée"* (used in the French version of article 20), denoting a mere chronological sequence, failed to convey that notion.

28. Secondly, he could not agree that signature *ad referendum* and initialling had the same effect. Initialling was a complete act in itself—it was therefore incorrect to say that it was always *ad referendum*—and was followed later by signature. Moreover, the effect of initialling could only be that of authentication, while signature, whether *ad referendum* or full, had the effect of approval, whether conditional or not. And in the case of a signature *ad referendum*, the subsequent expression of consent by the higher authority clearly had a retroactive effect.

29. The CHAIRMAN, speaking as Special Rapporteur, observed that the notion of *signature différée* appeared only in the French text.

30. With regard to Mr. Ago's second point, he said he had intended the text to convey the idea that, both in the case of initialling and in that of signature *ad referendum*, neither action in itself had any effect other than that of authenticating the text. It was true that approval of the text by full signature was retroactive to the moment of signature *ad referendum;* but at the time of initialling or signature *ad referendum*, those acts had the same effect.

31. Mr. BARTOŠ said that, from the point of view of authentication, the distinction between signature *ad referendum* and full signature was not as clear-cut as article 20 seemed to imply. The classical practice was to sign the text without prior signature *ad referendum* or to sign the original or amended text after definitive approval. Another current practice was to cover the signature *ad referendum* with a *note verbale* in which

the parties notified each other of their Governments' approval of that signature.

32. With regard to the second sentence of paragraph 2, he said it was not correct to speak of the "personal approval" of agents of Governments. Indeed, the personal opinion of such agents might be different from their official attitude as laid down in Government instructions.

33. The CHAIRMAN, speaking as Special Rapporteur, agreed to the omission of the provision concerning personal approval, especially since the point was raised again in article 21, paragraph 4. It might be mentioned in the commentary that, when a text was initialled or signed *ad referendum,* there might be an understanding among the negotiators that such acts would constitute a recommendation of the text to the Government concerned. Of course, the Government might not accept such a recommendation, but normally, in cases where they had not been able to refer to their Governments, negotiators would not initial or sign *ad referendum* a text which did not meet with their personal approval. However, he agreed that there was no need to refer to that point in article 20, paragraph 2.

34. Mr. PAL observed, in connexion with Mr. Ago's remarks, that signature *ad referendum* was conditional only when appraised from the viewpoint of the purpose for which reference was possible, namely, where the consent of higher authority had to be obtained. In order to authenticate the text, however, no reference would be needed and the signature would become operative immediately. At that stage, initialling and signature *ad referendum* might well be placed on the same footing.

35. However, he believed that article 21, paragraph 2, raised some difficulties. While the effect of initialling and signature *ad referendum* might be held to be authentication, he could not see why, in the case referred to in that paragraph, initialling should be equivalent to signature *ad referendum*. That theory would apply if the new idea of recommendation by the signing authority prior to consent were introduced, but he did not consider that such a new thesis had any place in the code. The next stage after the establishment of the text was its completion as a treaty, and there was no intermediate stage.

36. The CHAIRMAN, speaking as Special Rapporteur, observed that, in the case referred to in article 21, paragraph 1, initialling would have an effect other than that of authentication, and might, in fact, be equivalent to full signature.

37. Mr. AMADO thought the discussion had shown the difficulty of making clear distinctions between the various methods of establishing and authenticating texts. In his opinion, the Special Rapporteur's attempts to establish such distinctions had risked complicating the issue even further. Moreover, article 20 seemed to be out of place in part I, sections A and B of the draft code. The last sentence of paragraph 3, in particular, seemed to imply a trend towards making signature a final act, denoting entry into force; but that whole subject was dealt with in article 41 (*Entry into force (modalities)*).

38. The CHAIRMAN, speaking as Special Rapporteur, observed that in article 20, paragraph 3, he had merely intended to explain the possibilities of full signature, but not to prejudge the circumstances in which signature might or might not bring about entry into force. The paragraph explained the circumstances of authentication when consent was implied, although not finally given.

39. Mr. AMADO thought that, since section B related to the establishment and authentication of the text, the paragraph prematurely anticipated a stage in the treaty-making process and was therefore out of place in the general framework of the draft code.

40. Mr. LIANG, Secretary to the Commission, considered that the substance of article 20 was intended more to define and illustrate the process of signature from the point of view of theory. Articles 15 to 22 contained descriptions of techniques, but article 20, which explained the status and implication of signature, was a discussion of theory and indeed gave rise to the element of anticipation to which Mr. Amado had referred. It might be advisable to relegate the substance of article 20 to the commentary on the article in which the term "signature" occurred for the first time.

41. He did not entirely share the views of members who had objected to the second sentence of paragraph 2. Under international law, an individual acting as a plenipotentiary was not acting in his personal capacity; rather as an agent of his Government, he performed an international function. Those who advocated the rights of the individual under international law would uphold the status of individuals representing their Governments at international conferences and in other such capacities. The question was not one of the personal sentiments of the individual involved, but of his action in a capacity of an international character.

42. Mr. TUNKIN said that he was generally in favour of Mr. Verdross's amendment (see para. 26 above), but could not agree with the use of the words "normally" and "in exceptional cases". He was not sure that that distinction was confirmed by international practice. Mr. Verdross had possibly been misled by the sense in which the word "treaty" was to be used. It should be borne in mind that the Commission had decided to use that word in the generic sense; accordingly, it could hardly be said that it was exceptional for all international agreements to come into force upon signature. In fact, the majority of international agreements did not require ratification.

43. With regard to the last phrase of the amendment —"if the person signing possesses full powers to conclude a binding treaty"—he did not consider that there were two kinds of full powers, one kind authorizing signature of a treaty coming into force on signature, and the other authorizing signature of a treaty requiring ratification. In the practice of his own country and others, the full powers might in both cases be identical, or they might be different. The answer to the question whether the treaty came into force on signature or required ratification depended upon provisions contained in the treaty itself.

44. Mr. YOKOTA agreed with Mr. Tunkin's criticism of the use of the terms "normally" and "in exceptional cases" in Mr. Verdross's amendment. If the members of the Commission had in mind not only treaties and conventions, but also an exchange of notes and declarations forming part of an international agreement, there were certainly a large number of international agreements which entered into force by signature. Of the first thousand international agreements registered with the Secretariat of the League of Nations, no more than 507 contained a provision for ratification. Moreover, there was probably a large but un-

known quantity of minor financial and military agreements which were not presented for registration and the vast majority of which were never ratified.[1] Accordingly, one could not say that *exceptionally,* full signature operated as acceptance of the treaty.

45. Mr. ALFARO thought that the doubts expressed concerning the reference to "personal approval of the treaty on the part of the individual person signing or initialling" might be dispelled by rewording the second sentence of paragraph 2 to read: "They are acts of authentication, not of consent, though both may imply provisional approval of the treaty". The official status of the negotiators would thus be stressed and the provision would be brought into line with the current practice.

46. Mr. VERDROSS considered that Mr. Tunkin's first objection to his amendment was valid and thought it could be met by deleting the words "normally" and "in exceptional cases". With regard to the second objection, however, he said he was not aware of the practice to which Mr. Tunkin had referred; if the majority of the Commission thought that that practice was established, the last phrase of the amendment might be altered to read "if the text of the treaty so provides".

47. The CHAIRMAN, speaking as Special Rapporteur, agreed with Mr. Tunkin that there were not different kinds of full-powers granted to plenipotentiaries. The question whether a treaty came into force on signature or on ratification was not determined by the authority to sign. Although that might depend on the provisions of the actual text, however, it might also depend on the nature of the instrument, as in the case of exchanges of notes, which contained no specific provisions on the matter. Accordingly, Mr. Verdross's amendment of his text was not quite correct. It might be best to omit any provision which might prejudge the circumstances in which a treaty might come into force on signature. All that was necessary in article 20 was to state the *possible* effects of signature, particularly in contradistinction to those of initialling or signature *ad referendum.* He agreed with Mr. Yokota's opinion that the opening sentence of paragraph 3 was too categorical and that full signature did not always have a double status, since authentication might be effected in other ways. Accordingly, the best solution might be to include the simple statement that full signature might have one of three effects and, perhaps, to refer to subsequent articles.

48. Referring to article 21, he pointed out that paragraph 1 applied to a special case and might perhaps be better placed in article 20. He thought that it was correct to say that initialling by the highest officers of the executive branch of government was equivalent to signature as an act of authentication of the text of the treaty, and that there had even been some cases in which treaties had entered into force upon such initialling.

49. Mr. Ago had questioned whether it was correct to say that in the cases referred to in paragraph 2 initialling was, *ipso facto, ad referendum.* Perhaps it would have been better to say that it was, *ipso facto,* a provisional signature. Mr. Ago's other point, regarding the difference between initialling and signature *ad referendum* so far as the date from which signature was deemed to be effective, could be taken into account either in article 21, paragraph 2, or in some paragraph of article 20.

50. He now considered the beginning of the second sentence of article 21, paragraph 2, as too rigid. It might be enough to say "Initialling is normally used in the following circumstances", and to make a consequential modification in paragraph 3.

51. Mr. Alfaro's remark concerning article 20, paragraph 2, applied equally to article 21, paragraph 4. The first sentence was repetitious and might be omitted. However, he felt that the second part of paragraph 4 should be retained in a modified form. If the Commission was satisfied that it was the practice, in the case of initialling, subsequently to affix a full signature, whereas in the case of signature *ad referendum* a second signature was not affixed, but the change in the status of the signature *ad referendum* was indicated by some notification, paragraph 4 could be amended accordingly.

52. Mr. SANDSTRÖM observed that the enumeration of the circumstances in the four sub-paragraphs of article 21, paragraph 2, was probably not exhaustive. It seemed to him that it would be better to omit part of article 21, from the second sentence of paragraph 2 as far as the second sentence of paragraph 4. The subject of the provisions could be dealt with in the commentary.

53. The CHAIRMAN, speaking as Special Rapporteur, hoped that the provisions would not be omitted entirely, for they contained a useful description of practice.

54. Mr. TUNKIN observed that, while admittedly in certain instances initialling had been treated as equivalent to a full signature, it would be better to replace the first words of paragraph 1 by the words "Initialling may be equivalent", because whether initialling was equivalent to signature—in the case of a conference of Heads of State for example—would depend on the understanding of the participants in each particular case.

55. He agreed with the Special Rapporteur that article 21, paragraph 2, was too rigid and would have to be amended. He saw no reason why the will of the parties should be limited by legal rules and why they should not be permitted to agree among themselves, in any circumstances, to the procedure of initialling or signature *ad referendum.* He therefore supported Mr. Sandström's suggestion (see para. 52 above).

56. Mr. AGO agreed with Mr. Tunkin on the need for flexibility and with Mr. Amado, who had shown that it was very difficult to generalize. However, he thought that the code should mention certain differences between initialling and signature *ad referendum.* Signature *ad referendum* was used in cases where a negotiator lacked or had not yet received authority to sign, whereas initialling was often used by a negotiator who, while in possession of full powers to sign, wished to have more time to reflect upon the implications of the text as established.

57. The CHAIRMAN observed that what Mr. Ago was saying was that sub-paragraphs (*a*) and (*b*) of paragraph 2 applied to signature *ad referendum* and sub-paragraph (*c*) to initialling.

58. He announced that the Commission would continue its examination of articles 20 and 21 at the next meeting, unless it decided, owing to the arrival of Mr.

[1] Francis O. Wilcox, *The Ratification of International Conventions* (London, George Allen & Unwin Ltd., 1935), p. 232.

Zourek or Mr. García Amador, to begin the consideration of one of the other items of the agenda.

The meeting rose at 12.45 p.m.

496th MEETING

Tuesday, 19 May 1959, at 3.10 p.m.

Chairman: Sir Gerald FITZMAURICE

Programme of work

1. The CHAIRMAN welcomed Mr. García-Amador and Mr. Zourek, the Special Rapporteurs on item 4 (*State responsibility*) and item 2 (*Consular intercourse and immunities*), respectively. He recalled that the Commission had decided to take up item 3 (*Law of treaties*) owing to the absence of the Special Rapporteurs on the other items. Now that they had arrived the Commission would have to decide on its programme of work for the remaining six weeks of its session, one of which would have to be devoted to the preparation of its report.

2. The Commission's decision would depend primarily on what it considered to be the chances of completing work on Mr. Zourek's report. He recalled that at its previous session the Commission had decided that Governments would be allowed two years within which to submit comments.[1] If the Commission did not succeed in completing the draft on consular intercourse and immunities at the current session, it would not be able to submit the draft to the General Assembly before 1962, whereas it was most desirable that the draft should be discussed at the same Assembly session as the draft on diplomatic intercourse and immunities.[2]

3. If the Commission considered that it would be able to complete its work on item 2 (*Consular intercourse and immunities*) at the current session, it should take up the item at once. In that case he doubted that the Commission would have time for dealing with any other topic.

4. Mr. LIANG, Secretary to the Commission, recalled that at the thirteenth session of the General Assembly the Sixth Committee had expressed the hope that the Commission would be able to complete its work on consular intercourse and immunities at its 1959 session. Nevertheless, the Commission had been confronted with an unexpected situation owing to the unavoidable absence of Mr. Zourek. At the beginning of the present session he (Mr. Liang) had felt that the Commission would probably be able to complete its work on item 2. Now, only five weeks of the session remained for substantive work and the hypotheses assumed at the beginning of the session were no longer valid.

5. At the previous session Mr. Zourek had made an important contribution to the discussion of the Commission's methods of work, and the Commission had adopted some of his suggestions, particularly with regard to the procedure for dealing with the question of consular intercourse and immunities. In that connexion he recalled that at its tenth session the Commission had approved Mr. Zourek's proposal for discussion in a sub-commission,[3] but not that part of the proposal calling for the provision of simultaneous interpretation and summary records. Accordingly, if a sub-commission were now appointed, it would not be possible to provide it with those facilities. Furthermore, a sub-commission as envisaged by Mr. Zourek would contain only ten of the Commission's members.

6. While the Secretariat considered the proposal quite acceptable in principle, it might require a period of trial in order to operate satisfactorily. If Mr. Zourek's system had been instituted at the beginning of the session and had not worked satisfactorily, the Commission would have been able to revert to the practice of considering the Special Rapporteur's draft in plenary meetings, but he doubted whether that was possible at the present stage.

7. Mr. ZOUREK thanked the Chairman for his welcome and regretted that he had missed the beginning of the session, having been detained by his duties as a judge *ad hoc* of the International Court of Justice. He particularly regretted that he had missed the debate on part of the draft code on the law of treaties.

8. In his view the Commission could, by holding a few additional meetings, complete its examination of his report on consular intercourse and immunities in the remaining five weeks of the present session if it applied the system which it had decided upon at the preceding session and to which the Secretary had referred. He had not quite understood from the Secretary's statement why it would be more difficult to institute the system of a sub-commission during the latter half than during the first half of the session, since a period of five weeks would still be available for the discussion of the draft, as decided at the last session.

9. Of course, the Commission would not be able to complete its examination at the present session if it decided to deal with every detail *in extenso* in plenary meetings. However, if the "summary" procedure decided upon at the last session was applied, the remaining five weeks would be sufficient, and he recalled that the Commission had required only six or seven weeks to deal with the more complex question of diplomatic intercourse and immunities. In any case, the effort should be made in view of the desire expressed at the last two sessions of the General Assembly for a report on consular intercourse and immunities as soon as possible after that on diplomatic intercourse and immunities.

10. Mr. SANDSTRÖM proposed that the Commission should begin its work on Mr. Zourek's report at once and should re-examine the situation in two weeks' time, when it would be in a better position to decide whether or not it could complete its work on agenda item 2. He further proposed that the item should be discussed in plenary meetings of the Commission and that as much use as possible should be made of the Drafting Committee for questions of form.

11. Mr. SCELLE and Mr. ALFARO supported the proposal.

12. The CHAIRMAN observed that, on the basis of the Commission's normal rate of progress, it was very doubtful that it would be able to complete work on Mr. Zourek's draft at the current session. However, he agreed that the Commission should take up item 2 at once, discuss the draft articles in plenary meetings and then refer them to the Drafting Committee of which Mr. Zourek would be a member in his capacity as Special Rapporteur.

[1] See *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9*, chap. V, para. 61.

[2] *Ibid.*, chap. III.

[3] *Ibid.*, chap. V, para. 64.

13. Mr. TUNKIN also supported Mr. Sandström's proposal. As to the pace of the Commission's work, he suggested that each member should try to limit his statement to five minutes.

Mr. Sandström's proposal was adopted.

Law of treaties (A/CN.4/101) *(continued)*

[Agenda item 3]

ARTICLES 20 AND 21 (*continued*)

14. The CHAIRMAN said he took it that the discussion of articles 20 and 21 had been more or less exhausted at the previous meeting. He suggested that they should be referred to the Drafting Committee in the light of that discussion.

It was so agreed.

Consular intercourse and immunities (A/CN.4/108, A/CN.4/L.79, A/CN.4/L.80, A/CN.4/L.82)

[Agenda item 2]

15. The CHAIRMAN asked the Commission to consider the report by Mr. Zourek, the Special Rapporteur on consular intercourse and immunities (A/CN.4/108). A general discussion had been held at the Commission's tenth session on the introduction and article 1.[4]

DRAFT PROVISIONAL ARTICLES ON CONSULAR INTERCOURSE AND IMMUNITIES (A/CN.4/108, PART II)

ARTICLE 1

16. Mr. ZOUREK, Special Rapporteur, said that the Commission had completed its general debate and had discussed article 1 (*Establishment of consular relations*) fairly fully at the tenth session and it might save time if he summed up the position then reached.

17. There had been several objections to article 1, paragraph 1, and, on reflection, he thought the paragraph should be amended, so as to also to include the amendment submitted by Mr. Verdross (A/CN.4/L.79), to read: "Every sovereign State is free to establish consular relations with foreign States". If that version failed to find approval, he would reluctantly drop the paragraph altogether.

18. Paragraph 2 had received wide support. Some of the objections to it had been based on a misinterpretation of the rule laid down therein. Fears had been expressed that the rule might be interpreted as permitting consulates to be set up without the consent of the State of residence. Such an interpretation would be in obvious contradiction with the text of article 2 and hence invalid. Other objections had been based on too narrow an interpretation of the term "consular relations". Lastly, some objections seemed to have resulted from an obsolete view of consular functions. It had been stated that the consular function was essentially the protection of the interests of the nationals of the sending State. That was no longer true. Consular officials were also representatives of the national community and were organs of the State, and hence their functions and immunities were regulated by international law. Certainly, consuls still protected the interests of nationals, but they also protected the interests of their State, naturally only within the scope of their consular functions. Nevertheless, unlike diplomatic agents, they did not represent the State in all its international relations; their functions were more limited. Moreover, in most cases those functions were exercised only in part of the territory of the State of residence.

19. It had also been stated that consular relations between two countries were established only when those two countries had exchanged consuls, or at least when one of the countries had decided to receive a consul. Such a definition would unduly narrow the draft and leave a great part of the consular activity unregulated, namely, the consular function exercised by diplomatic missions.

20. In modern times, consular functions were exercised either by consulates or by the diplomatic missions as part of their normal duties. In the latter case, consular relations existed and were governed by international law as soon as diplomatic relations were established. That was the ordinary practice. All diplomatic missions performed consular functions, if no consulate was established, without need for any special agreement between the sending and the receiving State. In many cases, a special consular section was set up within the diplomatic mission, but that was an internal question for each mission.

21. Obviously, the procedure differed according to whether the consular function was exercised by a diplomatic mission or by a consular office. When consular functions were performed by diplomatic missions, they were (unless otherwise agreed) carried on through the Ministry of Foreign Affairs, whereas when consulates were established by mutual agreement, their relations with the authorities of the State of residence were governed either by the law of the State of residence or by local custom. The criterion of ability to enter into relations with the local authorities could not be accepted, except where a consular office had been established and such procedure prevailed in the State of residence. Where the consular function was exercised by a diplomatic mission, it would be exercised in conformity with the rules governing diplomatic missions. Hence in practice a diplomatic mission would as a rule be unable to engage in activities requiring direct contact with the local authorities. For that reason, some consular conventions contained express authorizations to that effect.

22. The establishment of consular relations as part of diplomatic relations did not, however, confer the right to appoint a consul without the consent of the State of residence. That was where the misunderstanding had arisen at the tenth session. The mere fact of establishing diplomatic relations did not confer the right to establish consular offices. If a State wished to do so, it would be bound to engage in negotiations and conclude a special agreement on the subject, as provided in article 2.

23. There had been no opposition of principle to article 1, paragraph 3, at the tenth session. Various proposals had, however, been advanced. He could accept Mr. Scelle's suggested insertion, in paragraph 2, of the word "normally" before the word "includes" (A/CN.4/L.82). Of the two additional texts suggested by Mr. Scelle, he could accept the idea embodied in the text to be added at the end of paragraph 2, although it might be better to dissociate the idea of

[4] *Yearbook of the International Law Commission, 1958*, vol. I (United Nations publication, Sales No.: 58.V.1, vol. I), 468th to 470th meetings.

recognition of the consul, since that was dealt with in articles 7 to 9. He would have no difficulty in accepting the new paragraph 4 proposed by Mr. Scelle if it referred to consuls *de carrière*, but not if it was meant to relate to honorary consuls.

24. Mr. ALFARO said that the general feeling at the tenth session had been that the establishment of consular relations was not a right of States, but required the consent of the other party concerned. He therefore proposed that article 1, paragraph 1, be worded similarly to article 2 of the draft articles on diplomatic intercourse and immunities.[5] That view was strengthened by the use of the word "agreement" in article 2, paragraph 1, of Mr. Zourek's draft. He was in general opposed to invoking the "right of legation". The point was pertinent to the insertion of the word "sovereign", which was controversial, inasmuch as it brought up the distinction between sovereign and semi-sovereign States. If the formula he suggested was used, that controversy would be avoided.

25. The CHAIRMAN observed that the Commission should bear in mind that consular intercourse and immunities should not be accorded more favourable status than diplomatic intercourse and immunities. In article 2 of the draft articles on diplomatic intercourse and immunities the reference was to "mutual consent", not to "right".

26. Mr. SCELLE remarked that the insertion of the word "sovereign" seemed unnecessary, since nearly all States, except a few semi-sovereign States which would probably soon disappear, were sovereign. He would prefer in paragraph 1 some such wording as: "Every State has the right to establish consular relations with foreign States if they are in agreement that such consular relations shall be effected" and even: "and have the duty to maintain consular relations".

27. He fully subscribed to the Special Rapporteur's excellent historical introduction and to the idea that consular relations had changed in nature since ancient times. It was impossible to say that in modern times consuls normally represented the countries sending them.

28. His greatest interest, however, in article 1 lay in the fact that the consular function was one of the typical examples of the organization of international law. International trade was the foundation of international law. Some authors had even held that if a State voluntarily shut itself off from international trade, it thereby deprived itself of all its rights under international law. Although cases of State trading existed, international trade was on the whole conducted directly or indirectly on the initiative of private individuals, and it was the function of the consul especially to protect the interests of nationals of the sending State. It was in that respect that the consular function differed from the diplomatic function: the diplomatic agent represented the Government. As long as trade relations subsisted, and the interests of nationals of the sending State continued to need protection, even if diplomatic relations were severed, consular relations should continue despite the severance of diplomatic relations, for it was precisely in that event that the nationals of the sending State needed the consular protection most. There were numerous examples of the continuance of consular relations under those circumstances, and in that connexion he recalled the case of Manchukuo, *inter alia*. Furthermore, consular relations should be established with a sovereign or semi-sovereign State, even if in the absence of diplomatic relations. Hence, the question of the establishment of consular relations was wholly irrelevant to the question of recognition.

29. Mr. YOKOTA pointed out that the Commission had fully discussed in connexion with diplomatic intercourse and immunities, the questions whether a State had a right to establish diplomatic relations and whether it was strictly a right or merely a faculty enjoyed with the agreement of the other State concerned. The Commission had concluded that the matter was so controversial that it could not draft any article on the subject. The Special Rapporteur had stated that, although he still maintained the thesis embodied in article 1, paragraph 1, he would not press the point in view of the many criticisms directed against it and would be prepared to withdraw it. The Commission might now decide to delete paragraph 1 and pass to the discussion of paragraph 2.

30. Mr. PAL agreed with Mr. Yokota. The questions involved had been discussed at the tenth session. In the light of that discussion, as also of the discussion which had already taken place at the present session, he was inclined to suggest that paragraph 1 should be deleted, that paragraph 3 should be drafted in terms similar to those of article 2 in the draft articles on diplomatic intercourse and immunities, and that only paragraph 2 needed further discussion. Retention of paragraph 1 would mean reverting to the capitulary system of olden days. As formulated, paragraph 2 hardly expressed the existing law. At the tenth session some members had thought the wording of that paragraph too broad. The Special Rapporteur had explained that he had meant that the diplomatic function included the consular function. If so, such a provision would be more appropriately placed in article 3 of the draft on diplomatic intercourse and immunities. He (Mr. Pal) was, therefore, in favour of deleting paragraph 2 also. The only occasion for such a provision in the article under discussion might be the removal of any possible apprehension lest the statement that consular relations were to be established by agreement should be interpreted as implying that such agreement was not necessary for the establishment of diplomatic relations. If there were any such implication, the apprehension might be adequately dealt with in the commentary on article 1 or on articles 2, 13 or 14.

31. Mr. AGO thought that the Commission was faced with a double task, which was, however, sometimes contradictory. It had rightly been pointed out that members should always bear in mind the draft on diplomatic intercourse and immunities and in some cases should adjust the draft on consular intercourse and immunities to that text, in order to maintain a parallel between the two. On the other hand, Mr. Scelle had quite rightly drawn attention to the sharp distinction between the diplomatic and consular functions.

32. He appreciated the Special Rapporteur's conciliatory spirit in agreeing not to refer to the general "right" to establish consular relations; indeed, no such right had ever been recognized. However, Mr. Zourek now seemed to be prepared to revise paragraph 1 to read "Every sovereign State is free to establish consular relations with foreign States." He (Mr. Ago) could

[5] See *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9*, chap. III.

not agree to the inclusion of the word "sovereign", in the first place, because it seemed to be unnecessary and, secondly, because it was not quite accurate, since some non-sovereign entities at particular stages of dependence might entertain consular relations. With regard to the clause "every State is free to establish consular relations", he pointed out that, if the meaning of such clause was that every State was free to enter into agreements with other States in order to set up consular relations, then the clause was too obvious to be necessary. On the other hand, the wording might suggest that the State had a general right to establish consular relations, and the words "is free to" in that connexion might be even more extreme than "has the right to". He therefore agreed with members who had suggested that the paragraph should be omitted.

33. With regard to paragraph 2, he observed that diplomatic relations were not necessarily accompanied by consular relations, and *vice versa*. No automatic inference could be drawn from the existence of diplomatic relations and it would be best to omit that paragraph also.

34. The problem in connexion with paragraph 3 seemed to be mainly one of finding satisfactory wording, and he agreed with members who had suggested that it should be based as far as possible on article 2 of the draft on diplomatic intercourse and immunities.

35. He had some doubts concerning the accuracy of the expression "consular relations", which conveyed an idea of reciprocity; however, it might be possible to use it for the sake of simplicity and by analogy with the draft on diplomatic intercourse and immunities. He could not, however, agree to the use of the term "consular representatives". Since diplomatic agents—who, surely much more so than consular officials, were representatives of their Governments—were referred to as "agents" in the draft on that subject, leaving aside any other consideration, consular officers should, *a fortiori*, be so described.

36. Mr. MATINE-DAFTARY supported the principles expounded by Mr. Scelle concerning the difference between the diplomatic and the consular functions. While diplomatic relations existed between States, the object of consular relations was to protect the interests of persons. On the other hand, the omission of paragraph 1 did not provide a solution; the Commission should try to find a formula corresponding to modern realities.

37. In his opinion, as soon as commercial relations were entered into between the nationals of two countries, consular relations became indispensable. In its discussion of the draft, the Commission's most important task was to define the functions of a consul. The fact that some consuls had exceeded their proper functions of protecting commercial and individual interests and had engaged in political activities, had caused some countries to refuse to accept consuls appointed to them. If the Commission succeeded in drafting a satisfactory definition of consular functions in article 13, stating both the positive and negative aspects of those functions, the problem would be clarified and a satisfactory formula might be found for paragraph 1. It was important to state in the draft whether or not a State could refuse to maintain consular relations; in his opinion, although any State could refuse to maintain diplomatic relations with another, it could not refuse to engage in consular relations with any country with which it had commercial ties.

38. Mr. SANDSTRÖM agreed with previous speakers that paragraph 1 should be omitted.

39. With regard to paragraph 2, he said that even if the statement it contained were held to be correct, it should be included in the draft on diplomatic intercourse and immunities, rather than in the text under discussion. Moreover, the draft on diplomatic intercourse and immunities already contained a somewhat similar provision. He therefore thought it would be best to omit paragraph 2 and to redraft paragraph 3 along the lines of article 2 of the draft on diplomatic intercourse and immunities.

40. Mr. AMADO said he did not approve of the Special Rapporteur's wording of paragraph 1 and opposed the insertion of the word "sovereign". If that word were added, it would be only logical to alter all existing treaties and agreements so as to include that adjective. He also thought that paragraph 2 should be omitted, since it did not correspond to the existing facts. It would therefore be wise to leave only paragraph 3, amended to correspond with article 2 of the draft on diplomatic intercourse and immunities.

41. Mr. Ago had rightly pointed out (see para. 35 above) that the term "consular relations" was perhaps inappropriate and that it was quite inaccurate to speak of "consular representatives". Consular functions had indeeded developed considerably in modern times, but the difference between diplomatic and consular functions was so obvious and so formally consecrated by practice, that it was inadmissible to imply that consuls were representatives of States. The Special Rapporteur himself had stated in paragraph 69 of the introduction to his report (A/CN.4/108) that the appointment of consuls was governed not by international but by municipal law. Consuls were administrative officials or official agents, without any diplomatic or representative character, appointed by a State to serve in the towns or ports of other States with a view to defending commercial interests, rendering assistance and protection and so forth.

42. Mr. TUNKIN thought it unnecessary for the Commission to go into the details of the many complex theoretical problems involved in article 1. In his opinion, consular relations were relations between States. When the State disappeared as a social entity—which he believed could only happen when social classes were eliminated—the situation would undoubtedly be different. But it was unnecessary and even undesirable to discuss such theoretical problems. The Commission should confine itself to formulating rules of international law.

43. The question whether a consular official was or was not a representative was one on which opinions were divided and it might not be important for the Commission to formulate a specific provision on the subject, particularly since the question was a theoretical one. Personally, he considered that consular officers to some degree acted as representatives of Governments and that Governments were responsible for the activities of consuls; accordingly, they had a certain representative character, which differed from that of diplomatic officials, but nevertheless existed.

44. The debate at the Commission's tenth session had clearly shown that the majority of the Commission was in favour of omitting paragraph 1. He had no strong feelings on the subject and agreed with the suggestion

that paragraph 3 should be redrafted along the lines of article 2 of the draft on diplomatic intercourse and immunities. The revised paragraph might become paragraph 1 and paragraph 2 should be retained in its present form. The provision of the existing paragraph 2 seemed to be correct because diplomatic missions often fulfilled certain consular functions and because it was the practice of States in concluding consular treaties or conventions not to refer to the establishment but to the regulation of consular relations, which implied that consular relations had already been established at the same time as diplomatic relations. Furthermore, the provision could not be regarded as dangerous; the actual exchange of consular representatives took place by mutual agreement, since a State could not establish consulates on the territory of another without the express consent of the latter.

45. Mr. BARTOŠ did not consider that it would be accurate to say that every sovereign State had the right to establish consular relations, since there were cases in past and present practice where non-sovereign entities had been allowed to set up consulates. In any case, the general trend towards the exercise of the right of self-determination led to the assumption that more sovereign States would be created in the near future.

46. He agreed with members who had criticized the use of the term "consular representatives". It was possible for a State to appoint consuls to a country with which it had no diplomatic relations. For example, Yugoslavia had no such relations with Australia, New Zealand or the Union of South Africa; its consular agents in those countries were not authorized to represent the State, but only—by way of exception—to act as intermediaries for communications of a diplomatic nature.

47. He also agreed with Mr. Ago that the term "consular relations" was not quite accurate. Consuls exercised their functions under international public law, since they were appointed by one State and accepted by the other according to the rules of international law, and sometimes no reciprocity was involved. Moreover, it was possible for a State to have diplomatic relations with another State where it had no consulates; thus, Yugoslavia and the USSR maintained diplomatic relations and the USSR had consulates in Yugoslavia, but there were no Yugoslav consulates in the Soviet Union.

48. He agreed with Mr. Scelle (see para. 28 above) that the question of diplomatic relations and of the establishment of consulates were quite separate. To illustrate the point, he observed that when diplomatic relations between the Federal Republic of Germany and Yugoslavia had been severed, it had been specifically provided that consulates should continue to function. Accordingly, while diplomatic functions were exercised through intermediaries, consular functions were in no way affected.

49. In that connexion he noted that the Special Rapporteur had stressed, in the commentary on article 1 (see A/CN.4/108), the trend since the First World War towards the merger of the diplomatic and consular functions, which had resulted in the closure of consulates and the emergence of consular sections of embassies. He (Mr. Bartoš) thought, therefore, that the Commission could usefully examine different cases in which the diplomatic missions assumed consular functions and the practice of various countries in the matter.

The meeting rose at 6.5 p.m.

497th MEETING

Wednesday, 20 May 1959, at 9.50 a.m.

Chairman: Sir Gerald FITZMAURICE

Consular intercourse and immunities (A/CN.4/108, A/CN.4/L.79, A/CN.4/L.80, A/CN.4/L.82) (*continued*)

[Agenda item 2]

DRAFT PROVISIONAL ARTICLES ON CONSULAR INTERCOURSE AND IMMUNITIES (A/CN.4/108, PART II) (*continued*)

ARTICLE 1 (*continued*)

1. The CHAIRMAN invited the Commission to continue its discussion of article 1 of the Special Rapporteur's draft.

2. Mr. GARCIA AMADOR noted that, in discussing article 1, members of the Commission were not referring exclusively to the establishment of consular relations, but were also commenting on consular functions, which were more specifically the subject of article 13. It was not clear whether those who referred to consular functions considered that the nature of those functions was settled in international law or that the terms of article 1 should be drafted in the light of the later definition of the consular functions. In the latter case, provisions concerning the establishment of consular relations could not be approved unless the real nature and scope of consular functions was known. His personal view was that it should be possible to approve article 1 forthwith, particularly as it had been sufficiently debated at the tenth session.

3. Mr. HSU thought that it would have been advisable to begin the draft with a definition of consular relations, with particular reference to their connexion with diplomatic relations. Such a definition might state that consular relations were that part of diplomatic relations in which public officers, in co-operation with foreign States, looked after the interest of their nationals in the foreign States concerned.

4. He thought the terms "intercourse", "relations" and "consular representatives" confusing; the title of the draft should have been "Consular functions and immunities" and the term "consular officers" should be used throughout.

5. Referring to article 1, he considered that paragraph 1 should be omitted and that paragraph 3 should be redrafted along the lines of the corresponding provision of the draft on diplomatic intercourse and immunities.[1] With regard to paragraph 2, he supported Mr. Scelle's amendment (A/CN.4/L.82) proposing the insertion of the word "normally".

6. Mr. LIANG, Secretary to the Commission, read out the new text of article 1 proposed by the Special Rapporteur:

> "1. The establishment of consular relations and the opening of consulates shall be effected by an agreement between the States concerned.
>
> "2. The establishment of diplomatic relations includes the establishment of consular relations."

[1] See *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9*, chap. III, para. 53.

7. He thought that the Special Rapporteur's draft of paragraph 2 had perhaps been unduly criticized. It was a fact of international life that the establishment of diplomatic relations was normally followed by consular relations, but the establishment of consular relations implied a much more detailed process than did that of diplomatic relations. For example, the Treaty of Friendship, Commerce and Consular Rights between the United States of America and Germany concluded at Washington on 8 December 1923[2] contained some extremely detailed provisions. Furthermore, diplomatic relations were governed by customary law, while consular matters were covered by more complex systems which had to be agreed upon by the States concerned; it was therefore logical that the establishment of diplomatic relations was not necessarily followed by consular relations. He was inclined to agree with those who believed that the question should not be dealt with in article 1 and that the question of the situation when consular functions were performed by diplomatic agents should be dealt with in another part of the draft.

8. He was not sure that the word "includes" in paragraph 2 was entirely correct. Although in fact consular relations normally followed diplomatic relations, the use of the word *"comporte"* in the French text might be taken to imply an obligation, and that point of view might not be acceptable to all members. Furthermore, the Special Rapporteur had agreed (see 496th meeting, para. 17) not to refer to the "right" to establish consular relations, which had appeared in the original paragraph 1 of his draft.

9. Mr. EDMONDS introduced his redraft of article 1:

"1. The establishment of consular relations between States takes place by mutual consent.

"2. The establishment of diplomatic relations includes the establishment of consular relations in the absence of an explicit statement by the State of residence to the contrary."

10. The purpose of the new paragraph 2 was to make it quite clear that in existing international practice the dividing line between the functions of diplomatic missions and those of consulates was becoming blurred.

11. Mr. YOKOTA introduced his redraft of article 1:

"1. The establishment of consular relations between States takes place by mutual consent.

"2. In case consular officers have not been exchanged or admitted, diplomatic agents may perform functions which are usually carried out by consular officers, unless the receiving State objects to such performance."

12. Clearly, most members did not consider that the establishment of diplomatic relations necessarily included that of consular relations, but they agreed that mutual consent was required for the establishment of consular relations. He had accordingly drafted his paragraph 1 much along the lines of the corresponding provision in article 2 of the draft on diplomatic intercourse and immunities.

13. With regard to paragraph 2, he said the Special Rapporteur's view that the establishment of diplomatic relations included the establishment of consular relations and that diplomatic agents might perform consular functions even if consulates were established in the receiving State was not acceptable; functions which were usually carried out by consular officers might be performed by diplomatic agents when no consular officers had been exchanged or admitted. The performance of such functions was the result of diplomatic relations, but he could not agree that in that case the functions performed by diplomatic agents were consular functions properly so-called; they were not performed by the diplomatic agent on behalf of or in the capacity of a consular officer, but in his own capacity, and one could not speak of consular relations in the strict sense of the term. Since that distinction might be too subtle for the purpose of the draft, he did not insist on it, and was ready to meet the Special Rapporteur's argument by referring to the performance of consular functions by diplomatic agents only in those cases in which no consular officers had been exchanged or admitted. Moreover, his draft of paragraph 2 contained no mention of consular relations, which were quite controversial, as he had already said, and it merely stated that diplomatic agents might perform consular functions unless the receiving State objected.

14. Mr. TUNKIN observed that paragraph 1 of all three new texts proposed for article 1 was based on article 2 of the draft on diplomatic intercourse and immunities. He preferred the Special Rapporteur's formulation of that paragraph, because it was more elaborate and more accurate. In any case, the paragraph could be accepted by the Commission and referred to the Drafting Committee.

15. Paragraph 2 of Mr. Yokota's text did not conform with the general practice. Every diplomatic mission performed certain consular functions. For example, in the Consular Treaty between the USSR and Austria of January 1959, the provisions relating to the rights and duties of consuls also applied to members of diplomatic missions who performed consular functions. Similarly, in January 1958 the United States Government had addressed a note to all diplomatic missions in Washington stating that the United Sttaes Government would recognize the double capacity of members of diplomatic missions who performed consular functions, and that note had not encountered any objections. Indeed, it was an urgent necessity for a diplomatic mission to be able to deal with consular functions as soon as it was established. According to Mr. Yokota, however, diplomatic missions could perform consular functions only in those cases in which the sending State had no consulates in the territory of the receiving State. That view did not correspond to existing practice.

16. In view of those considerations he thought the Special Rapporteur's wording of paragraph 2 should be approved. The argument that the severance of diplomatic relations did not necessarily end consular relations was not valid, since special provision could be made for the maintenance of consular relations in that eventuality. It had been suggested that the cases where diplomatic missions performed consular functions should form the subject of a separate provision, but that suggestion was likewise not in keeping with general practice. In his opinion, the Special Rapporteur's formula was sound. It did not imply that the establishment of diplomatic relations was automatically followed by the establishment of consulates.

17. Mr. VERDROSS thought that there was no longer any great difference of opinion on the wording of the new paragraph 1. With regard to paragraph 2, he drew attention to a proposal he had made during

[2] Extracts reprinted in *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. 433ff.

the tenth session,[3] to the effect that paragraph 2 should be prefaced by the words "Without prejudice to the functions which are governed by the internal law of the State of residence". The Special Rapporteur had not objected to the substance of the proposal of the time; but Mr. Tunkin's statement implied that practice had changed and that diplomatic missions had developed certain consular functions. He had made his proposal because he doubted whether a diplomatic agent had the right—which the consul possessed—to defend the rights of his country's nationals before the courts or administrative authorities of the receiving State. If the practice had changed to the extent implied by Mr. Tunkin, however, he would be prepared to withdraw his proposal.

18. Mr. SCELLE agreed with the Secretary that the word *"comporte"* in the French text of the Special Rapporteur's version of paragraph 2 was inappropriate, in view of the many cases in which the establishment of diplomatic relations was not accompanied by that of consular relations and *vice versa*. He also agreed with Mr. Verdross that the powers of diplomatic agents to perform specific consular functions were open to discussion. He drew attention to article 14 of the Special Rapporteur's draft, which raised the important and delicate point of relations between two Governments. That article seemed to suggest that consuls could in certain circumstances replace diplomatic agents. Actually, however, such a change of functions required the mutual consent of the States concerned. Paragraph 1 as now drafted was acceptable, but it should be made clear that it was the duty of the receiving State to agree to consular relations. A State could not arbitrarily refuse to enter into consular relations. The Special Rapporteur's version of paragraph 2 did not, he thought, correspond to existing practice.

19. Mr. ALFARO observed that the situation contemplated in the Special Rapporteur's and Mr. Edmonds' versions of paragraph 2 was quite different from that covered by Mr. Yokota's draft. In his opinion, the principle that States which agreed to establish diplomatic relations also agreed to establish consular relations was acceptable. Nevertheless, the case referred to in Mr. Yokota's amendment (performance of consular functions by diplomatic agents where no consulate existed) should also be taken into account. All the proposals could therefore be combined.

20. Mr. MATINE-DAFTARY observed, in connexion with Mr. Tunkin's remarks, that the modern world was roughly divided into two groups of States: those which engaged in State trading and those in which trade was in private hands. Since consular functions were concerned mainly with trade, countries such as the Soviet Union and Czechoslovakia, which carried on their commercial relations through trade delegations with diplomatic privileges and immunities, could dispense with institutions performing the classical consular functions. By contrast, his country had no consuls in those countries and its diplomatic agents in Moscow had to look after the interests of its nationals throughout the territory of the Soviet Union. The economic systems of various countries could not be changed, but the draft should take the realities into account. The Commission should find a formula which corresponded to the systems of different countries; however, the Special Rapporteur's version of paragraph 2 only took into account the position of countries carrying on State trading.

21. Mr. PADILLA NERVO considered paragraph 1 of the Special Rapporteur's new text of article 1 acceptable. In paragraph 2, there was a danger of confusion between consular functions as such and functions that could be exercised by diplomatic representatives. To some extent, Mr. Yokota's amendment to that paragraph was at variance with existing practice, for the majority of the functions described in draft article 13 could as a matter of course be exercised by diplomatic missions. Therefore, it was unnecessary to limit the performance of consular functions by diplomatic agents to cases in which consular officers had not been exchanged or admitted.

22. Paragraph 2 of the Special Rapporteur's text, if it meant anything at all, meant that once two States had agreed to establish diplomatic relations, there was no basic disagreement between them over the exchange of consular officers. While admittedly a State which established diplomatic relations with another State was in general terms agreeable to the establishment of consular relations, the wording of paragraph 2 might imply that a State had some obligation to accept the establishment of consulates on its territory. The fact was that a State was free at all times to agree or not to agree to the establishment of consulates, a point dealt with in draft article 2.

23. The retention of paragraph 2 might therefore give rise to certain difficulties, and furthermore the clause was unnecessary. All the purposes of the draft would be served by the Special Rapporteur's new paragraph 1, read in conjunction with article 2, paragraph 1. However, if the Commission decided to retain a provision along the lines of article 1, paragraph 2, of the new text, it should include an explanation, at least in the commentary, regarding the scope and implications of the provision, in particular as to the existence of any obligation to accept or exchange consular officers.

24. Mr. AMADO observed that both Mr. Yokota's amendment and Mr. Tunkin's argument overlooked the fact that whereas diplomatic relations concerned a country as a whole, consular relations concerned particular parts of a country. Consuls were assigned to a particular district, to a certain port and for the exercise of limited functions. That was an essential difference which would be brought out in article 2. While recognizing that there was now a tendency for diplomatic missions to exercise certain consular functions, he felt that any attempt to formulate a provision to that effect would lead to confusion between the two types of relations.

25. Paragraph 1 of the Special Rapporteur's new text was acceptable to him. On the other hand, paragraph 2 was not, for it was not true that the establishment of diplomatic relations included the establishment of consular relations. Diplomatic relations might, but did not invariably, lead to consular relations.

26. Mr. LIANG, Secretary to the Commission, observed, with reference to the remarks of Mr. Yokota, Mr. Tunkin and the Special Rapporteur, that whereas paragraph 2 of the Special Rapporteur's original and new drafts treated of a general principle, paragraph 2 of Mr. Yokota's amendment contemplated a specific situation. It was not logical to treat the fact that a diplomatic officer could exercise consular functions as

[3] *Yearbook of the International Law Commission 1958*, vol. I (United Nations publication, Sales No.: 58.V.1, vol. I), 470th meeting, para. 60.

an illustration of the principle that the establishment of diplomatic relations included the establishment of consular relations. As he had said before, the one normally followed the other, but there was no obligation or necessary consequence involved.

27. The case dealt with by Mr. Yokota and Mr. Tunkin was a common practice but did not affect the question of principle. The first part of Mr. Yokota's paragraph 2 was subject to amendment because it envisaged the general problem whereas the second part dealt with a certain practice.

28. Moreover, the practice referred to was subject to the prior consent of the State of residence and not the other way round, as paragraph 2 suggested. While it might not be necessary for a diplomatic officer to obtain an exequatur in order to perform certain consular functions, he had to obtain permission from the State of residence beforehand in case consular officers had not been admitted or had been withdrawn.

29. Mr. ZOUREK, Special Rapporteur, dealt with the various points that had been raised during the discussion. For the reasons stated in chapter VI of part I of his report (A/CN.4/108), he still thought that the term "consular representatives" would be the best in the circumstances. He agreed with Mr. Tunkin that the difference between diplomatic and consular officers as representatives was a difference of degree rather than of quality. Nevertheless, in order to satisfy the members of the Commission who had raised objections to the term "consular representatives", he would be prepared to replace it by "consuls" or "consular officers", even though a consular officer was a representative of his State within his consular district, which in some cases extended to the whole territory of the State of residence.

30. He had heard no objections in principle to his new paragraph 1 (see para. 6 above), which tried to take into account the comments made at the previous meeting while conforming as close as possible to the corresponding provision of the draft articles on diplomatic intercourse and immunities. He wished to emphasize that the conclusion of the agreement referred to in paragraph 1 was a condition not only of the establishment of consular relations but also of the opening of consular offices.

31. There had been a great deal of misunderstanding concerning paragraph 2. Several members had said that while the establishment of diplomatic relations was normally followed by the establishment of consular relations, the one did not necessarily include the other. If that implied a dissociation of the two types of relations, he was forced to say that the implication was not borne out by current practice, as Mr. Tunkin had demonstrated.

32. The tendency in the amendment submitted by Mr. Yokota and Mr. Edmonds to recognize the possibility of consular relations being excluded at the time of establishing diplomatic relations was completely contrary to practice. He did not know of a single case in which a diplomatic mission had been completely dissociated from consular functions. Once a diplomatic mission was admitted, it was inconceivable that it should not be able to exercise the essential functions of consular officers as described in draft article 13. It seemed to him that the misunderstanding of some members was due to the idea that one could speak of consular relations only where consular functions were exercised by an office independent of the diplomatic mission.

33. As to Mr. Padilla Nervo's doubts concerning the scope of paragraph 2, he did not think that the paragraph could be interpreted as implying a right to demand the establishment of a consular office. That question was touched upon in the commentary and a more explicit reference could be added, if necessary, in the article itself, although paragraph 1 already provided that "the opening of consulates shall be effected by an agreement between the States concerned".

34. It had been suggested that paragraph 2 might be omitted. If that were done, the article would be incomplete, for it would mean that consular relations did not exist in the absence of a specific agreement concerning the opening of consulates. The article would then fail to cover the great majority of cases of consular relations being conducted by diplomatic missions, which in very many cases had special officers for the purpose or consular departments. He would suggest that the Commission should not be too hesitant in accepting the paragraph in question at the present stage because Governments would be able to comment on the article and would undoubtedly say whether or not paragraph 2 corresponded to practice. The Commission would have an opportunity to re-examine the provision in the light of those comments.

35. He wished to correct the impression of Mr. Matine-Daftary that States having a planned economy of the socialist type were not as interested in consular offices as other States because they preferred to use commercial missions. Commercial missions were interested only in trade but consular relations covered a much wider field. His country, for example, maintained many consulates abroad. Consulates, precisely because they permitted daily contact between States of different economic and social systems, were institutions of a general character which served the interests of all States.

36. Mr. Verdross had recalled (see para. 17 above) his suggestion at the tenth session to insert, at the beginning of paragraph 2, the words "Without prejudice . . . State of residence". If that amendment referred to consular intercourse with local authorities, the idea could be accepted in one form or another. However, the formulation must not be too broad, for it might imply that the powers of consuls were always subordinate to the internal law, and that of course was not the case.

37. Mr. Verdross had also suggested that one of the characteristics of a consul was that he was entitled to make representation directly to local authorities. In his (the Special Rapporteur's) view that was an aspect of the question which related not to the essential characteristics of a consul but rather to the manner in which he exercised his functions. However, it was a point that could be treated more appropriately in connexion with a later article.

38. Mr. Amado had very rightly pointed out that consular functions were limited to particular districts. However, there were cases in which such districts coincided with the whole territory of the State of residence, and he felt that the article should be drafted in a way that would cover all possibilities.

39. Finally, Mr. Scelle had suggested that the cessation of diplomatic relations did not *ipso facto* mean the cessation of consular relations; he (Mr. Zourek) agreed

but thought that that was a point which should be considered in connexion with article 19 (*Breaking-off of consular relations*).

40. Mr. MATINE-DAFTARY asked the Special Rapporteur whether in fact countries with a socialist organization, such as Czechoslovakia, still maintained consulates in countries in which they did not have diplomatic representation. He would also be interested to know whether they maintained separate consulates in countries in which they had diplomatic missions, and whether they granted exequaturs to consuls of other countries in similar circumstances.

41. Mr. YOKOTA observed that his amendment had been misunderstood by some members. It might perhaps not have been drafted clearly enough. In paragraph 2 he had not meant that diplomatic agents might perform what were usually consular functions only in those cases where consular officers had not been exchanged or admitted. The situation he had intended to cover was that in which diplomatic relations had been established, but no agreement had yet been reached on the opening of consulates. At that period the question arose whether consular relations had or had not yet been established. The Special Rapporteur believed that they had been established, but several members, including himself, did not think so. The question might be regarded as somewhat theoretical, and he thought the Commission should avoid laying down a provision regarding that controversial matter. He had purposely refrained from speaking of consular relations. As to his amendment, in order to avoid a possible misunderstanding it might be improved by adding the word "even" before "in case" at the beginning of paragraph 2.

42. Mr. AGO said that, subject to possible drafting changes, he was fully satisfied with the new text proposed by the Special Rapporteur for paragraph 1, and preferred it to those submitted by Mr. Edmonds and Mr. Yokota, which were identical.

43. The discussion had strengthened his conviction that paragraph 2 should be deleted. The Secretary had observed that all that the Commission could do was to record the fact that the establishment of diplomatic relations was normally accompanied by the establishment of consular relations. That was frequently true, and indeed more frequently than the reverse situation; but it was no use merely to record a fact. The Commission was called upon to state whether or not in law the establishment of diplomatic relations necessarily included the establishment of consular relations. On that crucial point he could not agree with the Special Rapporteur.

44. It might be argued that the greater included the less, and that, if States agreed to establish diplomatic relations, they agreed at the same time to establish consular relations. But that was not so. It was true that both diplomatic and consular functions had grown and that the original distinction between them had become somewhat blurred; but the basic distinction remained. The diplomatic mission represented the sending State in its international relations with another State, whereas the consul was concerned with the domestic situation of nationals of his State on foreign territory. Despite marginal cases, that basic distinction meant that a State might agree to establish consular relations, even if it did not wish to establish diplomatic relations and *vice versa*; but concurrent establishment was not automatic.

45. The Special Rapporteur and Mr. Tunkin had argued that paragraph 2 dealt only with consular relations, and not with the actual establishment of consulates, which, they recognized, required the agreement of the other State. But even with regard to the mere exercise of consular functions by diplomatic missions, the cases cited by Mr. Tunkin, interesting though they were, could also be construed in exactly the opposite sense, namely that the tacit consent of the receiving State was required before consular functions could be exercised. Moreover, some of the so-called consular functions that were exercised by embassies were evidence not of consular relations but of a particular form of diplomatic relations.

46. Mr. EL-KHOURI said that paragraph 2 should deal solely with the exercise of consular functions by diplomatic missions and should not cover the establishment of consular relations, which should be dealt with in paragraph 3.

47. Consular services were very important and the appropriate rules should make full provision for their continued existence in time of peace, since they were essential for the safeguarding of the nationals of the sending State. The Special Rapporteur and the Drafting Committee might see to it that that principle was preserved.

48. Mr. BARTOŠ said that, like Mr. Ago, he had certain theoretical objections to the way in which article 1 approached the question of consular relations, but he was willing to bow to the will of the majority, without, however, abandoning his convictions.

49. The main question was whether the establishment of diplomatic relations included the establishment of consular relations. In certain cases diplomatic and consular relations were undoubtedly merged; one of the functions of a diplomatic mission was to protect the interests of the sending State, and consequently those of its nationals, against breaches of international law. Hence, not every kind of protection was necessarily a form of consular protection.

50. Describing what happened in practice, he said that after the First World War, consulates had been closed in most capitals and replaced by consular departments in diplomatic missions. All States of residence did not, however, hold the same concept of the function of such consular departments. Even if the substance of protection was the same, the process of exercising it was not. Some States made no distinction between consuls and diplomatic officials serving in consular departments of missions, but other States held that all interventions by officials of consular departments must pass through the normal diplomatic channel, the ministry of foreign affairs, whereas consuls might deal with local authorities and appear before the courts. Some States required the heads of consular departments and their deputies to be furnished with letters patent issued by the sending State and an exequatur from the country in which they were serving as members of the diplomatic mission. Thus, in such cases what were called consular relations were established by acts performed by the mututal consent of the States concerned. In other cases, the consular department of diplomatic missions had few functions. In Europe, Belgium, France and the Netherlands made no distinction between consuls proper and consular departments in diplomatic missions, whereas in Italy a diplomatic mission had to submit the names of its members performing consular

functions. The Ministry of Foreign Affairs had to notify the authorities of the area in which they were interested so far as the performance of consular functions was concerned and such notification had to be confirmed to the local authorities.

51. In the United Kingdom officials of consular departments were recommended to obtain letters patent and an exequatur. Local authorities accepted the intervention of such officials even without letters patent and an exequatur, but the reply came through the Foreign Office, even if the original intervention had been with the Home Office or the local authorities. The United Kingdom courts did not accept the intervention of diplomatic agents unless they had the exequatur.

52. Officials of diplomatic missions had to be able to perform consular functions in cases where no normal consular office existed. Thus, even *de lege ferenda,* once diplomatic relations had been established, there would be no great difficulty in developing consular relations. He could not, however, wholly agree with Mr. Scelle that States had a duty to establish consular relations. The idea was reasonable, but did not yet exist in international law.

53. With regard to the question of competence, he said that trade was not the exclusive concern of consuls, although the conclusion of specific private law contracts was normally part of the consular function. On the other hand, trade policy, the conclusion of trade treaties and even protests against violations of trade treaties remained matters dealt with at the diplomatic level; consuls might, in the case of private individuals, make representations to protect their interests. A further distinction between the diplomatic agent and the consular officer was that, whereas the latter could not properly be denied the right to proceed to a particular place in his district for the purpose of protecting the interests of a national of the sending State, the former might have to obtain the express permission of the receiving State for a like purpose.

54. If in the draft on consular intercourse and immunities, the Commission wished to promote the progressive development of international law, he could accept the Special Rapporteur's text of article 1, perhaps by amending it, with certain reservations, as proposed by Mr. Yokota and Mr. Edmonds, since it was the current practice to accord States equal treatment in the opening of consular offices. If, however, the Commission was engaged in codification, that text would not be wholly suitable.

55. Mr. TUNKIN observed that the Commission was trying to form rules of international law, whether *de lege lata* or *de lege ferenda.* Undoubtedly it must take into account existing practice, if that was beneficial to international relations and world peace; nobody could, of course, contest that even if the general practice did not yet exist, the rule might well be drafted *de lege ferenda.* The universal practice was, however, that every diplomatic mission might perform some consular functions. That was not an exception, as Mr. Ago had suggested. No one had ever contested that right regardless of whether consulates existed on the territory concerned. The main question was whether the practice was beneficial to international relations, and that it was so could not be denied. The fewest obstacles should therefore be placed in its way. The words "includes the establishment of consular relations" in the Special Rapporteur's revised text of paragraph 2 gave rise to some doubts and might be deleted and the paragraph redrafted. The main objective was to see to it that the possibility for diplomatic missions to exercise consular functions was not excluded. The Drafting Committee could no doubt find some method of stating that in every case diplomatic missions might perform consular functions.

The meeting rose at 12.55 p.m.

498th MEETING

Thursday, 21 May 1959, at 9.45 a.m.

Chairman: Sir Gerald FITZMAURICE

Consular intercourse and immunities (A/CN.4/108, A/CN.4/L.79, A/CN.4/L.80, A/CN.4/L.82) (*continued*)

[Agenda item 2]

DRAFT PROVISIONAL ARTICLES ON CONSULAR INTERCOURSE AND IMMUNITIES (A/CN.4/108, PART II) (*continued*)

ARTICLE 1 (*continued*)

1. The CHAIRMAN asked the Commission to continue the debate on the Special Rapporteur's new article 1 (see 497th meting, para. 6).

2. Mr. HSU observed that the new text proposed by the Special Rapporteur seemed to be self-contradictory. If the establishment of diplomatic relations included the establishment of consular relations, the opening of consulates would not be effected by agreement, while, if consulates were opened by agreement, the establishment of diplomatic relations did not include the establishment of consular relations. It had been stated that paragraph 2 implied a liberalization in the establishment of consular relations. That idea should be welcomed, but it should be presented logically, and the phrase referring to the opening of consulates in paragraph 1 should be amended. Whereas it was relatively immaterial whether consular functions were exercised by a consulate or by the consular section of an embassy, the opening of a consulate involved other material considerations. Preferably, therefore, the phrase "and the opening of consulates" should be placed in a different context and elaborated, but without the qualification that the opening of consulates was subject to agreement.

3. The CHAIRMAN, speaking as a member of the Commission, observed that the Special Rapporteur's text dealing with the connexion between the establishment of diplomatic relations and the exercise of consular functions was preferable to the texts suggested by Mr. Yokota and Mr. Edmonds (see 497th meeting, paras. 11 and 9) because it embodied the ideas both of establishing consular relations and of opening consulates. He doubted, however, whether "consular relations" was the correct term. One could, of course, speak of diplomatic relations, but instead of "consular relations" he would prefer some such phrase as "the reception of consular officers" or "the carrying out of consular functions", though he would not necessarily press that suggestion.

4. There was some doubt about the meaning of the term "consular functions". Many functions were carried out by consuls which were not specifically consular

functions and might be carried out by a diplomatic mission, in cases where no consulate existed, as part of its ordinary diplomatic duties. To argue that those were necessarily consular functions or that the establishment of diplomatic relations implied the exercise of consular functions would be incorrect. The true position was masked by the fact that many functions might be carried out either by diplomatic missions or by consulates; but those were not specifically consular functions. The functions enumerated in article 13, paragraphs 8 and 10, and especially the maritime functions in paragraph 3, were specifically consular and were never carried out by diplomatic missions, unless they had attached to them a consular section, explicitly or tacitly authorized by the Government of the receiving State. In such cases, the consular section was in effect a consulate, even though it was housed in the premises of the diplomatic mission. It was most unusual for a consular section to be set up without the agreement of the receiving Government, and the specifically consular functions could not be performed without an exequatur.

5. The existing international law on the subject was not quite clear. True, consular functions were being increasingly exercised by diplomatic missions or by consular sections of such missions, but that was no reason for postulating as an actual rule of international law that the establishment of diplomatic relations *ipso facto* involved the establishment of consular relations. The practice was comparatively new, dating in the main from shortly after the First World War, and was bound up with the modern trend towards amalgamating the diplomatic and consular services. Furthermore, since it was generally agreed that the severance of diplomatic relations did not automatically entail the severance of consular relations, it must be equally true that the establishment of diplomatic relations did not necessarily entail the establishment of consular relations.

6. The Commission might therefore simply record its view that the practice whereby certain consular functions were performed by diplomatic missions was unobjectionable, provided that the receiving Government gave its consent; the substance of paragraph 2 might be discussed in the commentary; and the Governments might then be asked whether they would approve the insertion in article 1 of a provision along the lines suggested by the Special Rapporteur. Alternatively, the Commission might agree to take no final decision at that stage and to revert to the subject after it had considered the articles on consular functions; or it might ask the Drafting Committee to submit an alternative text, recognizing the practice, but not inferring an automatic rule of law implying that a receiving Government could not prevent an embassy from performing consular functions.

7. Mr. ZOUREK, Special Rapporteur, replying to the question asked by Mr. Matine-Daftary at the previous meeting (497th meeting, para. 40), said that the Czechoslovak Government had frequently appointed consuls-general where diplomatic missions also existed; for example, Czechoslovakia at present maintained consulates in Bombay, Montreal, Shanghai, Salzburg, Damascus, Zürich, Istanbul, Zagreb and Szczecin. It had also sent consuls to countries in which there was no Czechoslovak diplomatic mission, and it had admitted consuls from States which had diplomatic missions in Czechoslovakia.

8. The exchange of views on article 1 had been very useful. The main point at issue was whether a diplomatic mission must have special permission to exercise consular functions and whether it might exercise all or only some of those functions. The arguments adduced against paragraph 2 had not convinced him. He had found no examples of diplomatic missions being debarred from exercising consular functions. It had always been agreed that diplomatic missions could protect the interests of the nationals of the sending State, but such missions had always also exercised, and should exercise, even the most typical consular functions, such as some of those enumerated in article 13. Every diplomatic mission exercised such functions, not by virtue of express permission, but in the course of its ordinary duties. It did not usually exercise the maritime functions set out in article 13, paragraph 3, only because, as a general rule, its seat was not at a seaport; but it was a practical, not a legal, obstacle which precluded it from doing so.

9. It was true that sometimes States required the head of the consular section in an embassy to hold letters patent and to request an exequatur, but those documents were not a prerequisite for engaging in consular activities; they were required merely when the consular section wished to have direct access to local authorities. Otherwise all intercourse of that kind was conducted through the Ministry of Foreign Affairs, as in the case of diplomatic intercourse.

10. The Commission should see the position clearly, because he would have to revert to it when dealing with subsequent articles. If it did not accept the proposition that diplomatic relations included consular relations, it would find it difficult, in theory at least, to maintain that consular relations might continue after the severance of diplomatic relations, except when a state of war had been declared between the sending State and the State of residence. Such, however, was the view of the vast majority of authors, and on it he had based article 19, paragraph 3.

11. The term "consular relations" had been criticized; but as it was consecrated by usage and had been chosen by the General Assembly, the Commission was virtually bound to use it, the more so because, at times, consular relations existed in the absence of diplomatic relations. Moreover, that term was completely justified in theory also. If a State sent a consul to another State, that led to relations between the two States which were governed by international law, and to certain rights and obligations on the part of the two States in question.

12. With regard to the Chairman's suggestions concerning procedure, he had come to the conclusion that the wisest course would be to adopt paragraph 1 and leave paragraph 2 in abeyance until the Commission had studied the whole draft, and in particular articles 13 and 19. It would be quite possible to redraft paragraph 2 in language using some other phrase instead of the term "consular relations".

13. The CHAIRMAN suggested that the Commission might, before adopting the Special Rapporteur's suggestion, reflect that article 1 appeared almost flatly to contradict the insistence on agreement in article 2 and the statement in paragraph 10 of the commentary on article 1 (A/CN.4/108, part II) that no State was bound to establish consular relations unless it had covenanted to do so under an earlier international agreement. The reference intended in article 1, paragraph 2, was really, in his view, to consular posts rather than to consular relations. The substance of article 1, para-

graph 2, might therefore be transferred to article 2, since the position would be much clearer if all those points were dealt with in a single article.

Article 1, paragraph 1, as redrafted, was adopted, subject to further drafting.

Further consideration of article 1, paragraph 2, was deferred.

ARTICLE 2

14. The CHAIRMAN invited the Committee to consider article 2 (*Agreement concerning the consular district*), to which Mr. Edmonds had submitted the following amendments:

"(i) In paragraph 1 replace 'shall' by 'should';

"(ii) Replace paragraph 2 by the following:

" 'In the absence of specific agreement or notification by the State of residence to the contrary, a State may have a consul at any port, city or place within the territory of the State of residence where any other State is permitted to have such an officer.'

"(iii) Amend paragraph 4 to read:

" 'Except as may otherwise be specified by agreement, a consul may exercise his functions outside his district only with the express permission of the State of residence.' "

15. Mr. ZOUREK, Special Rapporteur, introducing article 2, said that the principle of agreement laid down in article 1, paragraph 2, as redrafted, certainly governed article 2, although there were cases in which consular relations were for the time being unilateral, as when a State admitted a consul without requesting permission to send one in return.

16. The seat and the district of the consular mission were not the only points specified in consular conventions, but they were the essentials that must be fixed in order to avoid any controversies between the States concerned.

17. To lay down a rule regarding subsequent changes in the consular district would be logical. Various formulas appeared in the consular conventions, including the possibility of agreement to a change in district by a notification against which no objection was raised. Those were matters of detail; the principle should be maintained.

18. The rule laid down in paragraph 3 was also essential, but the wording might now be revised in line with the revision of article 1, paragraph 1, already adopted. Some such paragraph was, however, required in order to avoid any misunderstandings between the sending State and the State of residence.

19. Paragraph 4 dealt with the essence of the consular relation. If consular representatives wished to exercise their functions outside their district, they must obtain the express permission of the State of residence.

20. The change suggested for paragraph 1 in Mr. Edmonds's amendments seemed to be no improvement, since the seat and district were the minimum requirements to be agreed on.

21. The text suggested by Mr. Edmonds for paragraph 2 differed entirely from the idea on which his own paragraph 2 had been based and, if it were accepted, should be incorporated elsewhere. He would, however, welcome further explanation and the views of the Commission before taking a definite stand on that amendment.

22. He would have no basic objection to the amendment to paragraph 4, if the Commission accepted it. He recommended, however, a formula which would embody both the introductory phrase of the present text and Mr. Edmonds's amendment.

23. Mr. EDMONDS explained that his amendment to paragraph 1 was merely a drafting change; he had thought the mandatory "shall" too strong.

24. The Special Rapporteur's paragraph 2 was unnecessary and redundant. It might be as well to introduce at that point the most-favoured-nation clause, which he had taken directly from the Harvard draft.[1] The provision was not unduly rigid, since it was qualified by the phrase "In the absence of specific agreement or notification by the State of residence to the contrary".

25. He could accept paragraph 3 as submitted by the Special Rapporteur, but paragraph 4 imposed a restriction which the Commission should reject. The consul's exercise of his functions outside his district should be governed by an agreement between the States concerned, not by the provisions of the articles.

26. Mr. SCELLE said that article 2 was open to criticism. The duty of a State to establish consular offices was not mentioned either in article 1 or in article 2, but that duty existed wherever circumstances, such as a concentration of foreign nationals in a particular State, required it. The consulate must have a seat, but when a diplomatic mission was performing consular functions, the mission's premises could not be called the seat of a consulate. The wording of article 2, paragraph 1, was thus inconsistent with the ideas advanced by the Special Rapporteur in support of his redraft of article 1, paragraph 2.

27. There was much to be said concerning paragraph 2, and he would give his full reasons in connexion with subsequent articles. The paragraph should, however, be completed by the insertion of the words "either directly or indirectly" after the word "made", since comments on subsequent articles would show that a prior agreement concerning the exchange and admission of consular representatives might in fact be modified by a systematic refusal to grant the exequatur or by an equally systematic withdrawal of it. In recent relations between Tunisia and France, the exequaturs of five or six consuls had been systematically withdrawn, not because of any professional misconduct by any consuls, but for political reasons, and the previous consular agreement had thus been completely modified.

28. He could not understand the intention in paragraph 3. Either the statement was so self-evident that it was not worth making or it was incompatible with the previously adopted principle of agreement. The paragraph should be deleted, because it said either too little or too much.

29. He would revert to the substance of paragraph 4 in connexion with later articles, but he would not in principle object to its retention.

30. Mr. VERDROSS agreed in principle with the substance of article 2 of the Special Rapporteur's draft, but considered that it should be made clear whether the idea contained in paragraph 3 was the same as that in the new article 1, paragraph 1. The matter might be regarded as a drafting point, but he thought that

[1] Harvard Law School, *Research in International Law, II. The Legal Position and Functions of Consuls* (Cambridge, Mass., 1932), pp. 389-392.

it should be suggested to the Drafting Committee that the words "opening of consulates" in article 1, paragraph 1, should be omitted, so that the establishment of relations would be dealt with in article 1 and the opening of consulates in article 2.

31. Mr. YOKOTA observed that paragraph 2 related only to changes in the consular district and not to changes in the seat of the consular mission. Since such changes might occur and should also be made by agreement between the two States concerned, it would be advisable to insert the words "or seat" after "consular district".

32. Turning to paragraph 4, he suggested that the word "express" should be deleted. There seemed to be no good reason for prohibiting consular officers from exercising their functions outside their district, unless the State of residence objected. If, however, express permission was always required, they might be prevented from exercising necessary functions, especially in urgent cases. Moreover, the practice in that respect was not simple and the districts of consular officers were not always known to the State of residence. For example, some States, including the United States, which were very careful in specifying consular districts, made known the districts of their consulates to the Government of Japan, but certain South American and Asian countries did not specify the districts of their officers, but only the seats of consular missions. In those circumstances, it was technically difficult and sometimes even impossible for the State to give express permission, and it was inadvisable to lay down such a rigid and obligatory rule.

33. He thought Mr. Edmonds's version of paragraph 2 dealt with a problem different from that referred to in the Special Rapporteur's paragraph 2. Both provisions were useful and both should be retained.

34. Mr. AMADO said, in connexion with article 2, paragraph 2, that he could not see what changes could be made in consular districts. The provision should be made more precise.

35. He did not approve of the use of the term "consular representatives" in paragraph 1. If the majority decided to retain the phrase, he would not object, but he preferred the term "consular officers".

36. Mr. SCELLE said, in reply to Mr. Amado, that one far-reaching change in a consular district would be its abolition for such reasons as suspicion of espionage or difficulties with the local population. Of course, such action would constitute a partial annulment of the agreement.

37. He could not agree with Mr. Edmonds's version of paragraph 2, which seemed to imply a somewhat artificial equality of consular representation. The opening of a consulate was obviously governed by the needs of the sending State, rather than by the possible action of a third State.

38. Mr. SANDSTRÖM proposed certain amendments to article 2. He was against the use of the terms "consular representatives" and "consular mission", which unduly assimilated consular relations to diplomatic relations. He therefore proposed that in paragraph 1 the words "exchange and admission of consular representatives" should be replaced by "establishment of consulates". In any case, the question of terminology would have to be discussed in connexion with article 4 (*Acquisition of consular status*).

39. He agreed with Mr. Scelle that paragraph 3 was superfluous and proposed its deletion. Finally, he considered that the statement in paragraph 4 of the commentary on article 2 (A/CN.4/108, part II) should be included in the article itself. He therefore proposed the addition of a new paragraph, based on article 5 of the draft on diplomatic intercourse and immunities:[2]

> "The consent of the State of residence is also required if it is intended to appoint a consul in this State to be at the same time a consul in another State."

40. Mr. TUNKIN said he was in general agreement with the Special Rapporteur's text of article 2 and thought that paragraph 1 was acceptable, subject to drafting changes.

41. Referring to paragraph 2, he said the paragraph in fact meant that no change of a consular district might be made without the consent of the sending State; but it seemed to be going too far to provide that the receiving State could make no changes in the consular districts in its own territory. He had no specific proposal to make, but hoped that the Commission would take his comment into account.

42. He agreed with Mr. Scelle and Mr. Sandström that paragraph 3 was superfluous and could be omitted.

43. Turning to Mr. Edmonds's amendments, he thought that the proposed paragraph 2 was likely to lead to practical inconveniences if it were accepted. Any receiving State which did not wish to be bound by any such obligation as Mr. Edmonds's text implied would have to give special notice, on the opening of the first consulate of a sending State in a particular town or port, announcing that the same rights were not accorded to other States. That might give rise to disputes about the validity of such a notification and to other unnecessary complications. On the other hand, he considered that Mr. Edmonds's version of paragraph 4 was preferable to the Special Rapporteur's draft.

44. Mr. PAL considered that the difficulties with regard to article 2 related to wording rather than to substance. He agreed with the speakers who had pointed out the redundancy of paragraph 3, particularly in view of the new provisions of article 1, paragraph 1, read together with article 2, paragraph 1. He thought it was clear that the words "consular district" in article 2, paragraphs 1 and 2, meant the territory where the functions of a consulate were to be performed. There might be changes either in the location of the consulate or its offices or in the territorial extent of the consular function. In that connexion, he drew attention to article 11 of the draft on diplomatic intercourse and immunities.[3]

45. He did not think that the opening phrase of paragraph 4 was correct, since there was no other article in the draft relating to the subject matter of article 2. He therefore preferred Mr. Edmonds's version of the paragraph in that respect.

46. He drew attention to the statement in the last sentence of paragraph 6 of the commentary on article 2. Nothing in article 2 itself supported that statement. On the other hand it had been considered necessary to include article 19 in the draft on diplomatic intercourse and immunities, because that provision did not

[2] See *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9*, chap. III, para. 53.

[3] *Ibid.*

derive *ipso jure* from the establishment of diplomatic relations.

47. Mr. BARTOŠ said that he approved in principle of the Special Rapporteur's draft of article 2. Mr. Zourek himself had agreed that the word "representatives" should be replaced by some other term; that was a question for the Drafting Committee.

48. Paragraph 2 raised the theoretical question whether authorization to open a consulate was a contractual or a sovereign act. He believed that, once authorization had been given, a kind of convention, though not a formal one, was arrived at. Accordingly, the basis of paragraph 2 was correct. Nevertheless, cases of unilateral changes of situations in the State of residence should be taken into account; those changes were usually connected with political or economic considerations. For example, if a unitary State became a federal State, it might be considered advisable to change the consular districts. In such cases, it was quite justifiable for the State of residence to ask the sending State to make the change. Similarly, a change in the international status of a territory would almost certainly necessitate a change in the extent of consular districts. It could hardly be advisable or courteous for sending States to disregard requests for a change in such cases, and yet in certain cases the Yugoslav Government had met with a stubborn refusal on the part of certain sending States to heed such a request. An example of the economic considerations which might lead to changes of consular districts was that of the transfer of international trade from a Yugoslav port to a new post. Some sending States had retained their consulates in the old port; the question was whether the existence of the consular office in the old port was justified in view of the abolition of the old port for purposes of international trade. A State could not force a sending State to transfer its consulate to a town which might be more convenient for the State of residence; the main point, however, was whether or not the latter State was entitled to ask for such a transfer.

49. Although he had no objection in principle to Mr. Scelle's proposal, he pointed out that in practice the insertion of the words "either directly or indirectly" in paragraph 2 might enable States acting in bad faith to hamper consular officers in the performance of their functions.

50. With regard to paragraph 4, he agreed with Mr. Yokota that the word "express" should be deleted. In theory, express permission should be given to enable consular officers to exercise their functions outside their district; however, "express" permission must come from a competent organ and implied a formal authorization, while in practice such permission often had to be given urgently, and hence informally.

51. With regard to Mr. Edmonds's amendment to paragraph 2, he observed that the special most-favoured-nation clause concerning the right to open consulates in certain cities or ports had found a place in the consular conventions concluded between certain States. His country was a party to some of those conventions but always subject to certain conditions. In the first place, most-favoured-nation treatment was accorded only on the basis of reciprocity. Secondly, an exception was made for the case of so-called "frontier consulates". Yugoslavia consented to the establishment of a frontier consulate by a State which obviously required such a consulate and did not consider that any inequality was involved if it denied a similar right to other non-frontier States. For example, in view of the heavy frontier traffic between Italy and Yugoslavia, it had authorized the opening of an Italian consulate at Kopar (Capo d'Istria). On the other hand, there was no justification for other States to have consulates at that small provincial frontier town. The same principle had applied in the past in the case of a Yugoslav consulate-general authorized by Italy at Zara, where no other States had maintained consulates.

52. Subject to those reservations he had no objection to Mr. Edmonds's principle of putting all States on a footing of equality, and would vote for it if a vote was taken. In general, he was in favour of the text of article 2 prepared by the Special Rapporteur, as amended by Mr. Edmonds.

53. Mr. LIANG, Secretary to the Commission, announced that the Secretariat would reproduce and distribute the Harvard draft convention for the information of the Commission.

54. He had examined the most-favoured-nation provision of the Harvard draft, to which Mr. Edmonds had referred, and had found the following statement in the commentary of the Reporter: "The duty of a State to permit the establishment of consuls in parts of its territory open to the most favoured nation is a very common treaty provision".[4] However, not much material citing treaty provisions was indicated to bear out that assertion. On the other hand, the Reporter cited such authors as Vattel, Oppenheim, Fiore and Bluntschli to the effect that most-favoured-nation treatment was not required and went on to say that "occasionally treaties have not provided for most-favoured-nation treatment".[5]

55. In his opinion the position was rather that occasionally treaties had provided for most-favoured-nation treatment but that in the majority of bilateral treaties the provision did not appear. Of course, there had been peculiar circumstances in which the principle had been inserted in treaties. For example, some of the so-called "unequal treaties" had imposed on China the obligation to extend to one of the Western Powers the same treatment in respect of the establishment of consulates as it extended to other Powers. However, such treaties were a matter of the past and under present conditions the most-favoured-nation clause could be incorporated into treaties only on the basis of reciprocity, as Mr. Bartoš had indicated.

56. Therefore, he was of the opinion that the most-favoured-nation treatment in establishing consulates was not a matter of general practice, and that it was doubtful whether it could be recommended as a principle to be inserted in the draft.

57. Mr. AGO said, with regard to paragraph 1, that he agreed with Mr. Sandström that a precise term like "consulate" or "consular office" should be used. He agreed with Mr. Amado that the expression "consular representatives" should be avoided and he noted that the Special Rapporteur had expressed willingness to consider a modification of the terminology (see 497th meeting, para. 29). Similarly, the term "consular mis-

[4] Harvard Law School, *Research in International Law, II. The Legal Position and Functions of Consuls* (Cambridge, Mass., 1932), p. 229.

[5] *Ibid.*, p. 230.

sion" should be avoided. Moreover, paragraph 1 should be brought into conformity with the Special Rapporteur's new text of article 1, paragraph 1, and he suggested the following wording:

"The agreement concerning the establishment of consular relations shall specify the places at which consulates will be opened and their respective districts."

58. As to the case in which an agreement did not provide for the opening of consulates but simply for the creation of a consular department at the diplomatic mission, he suggested that it could be provided for by a second sentence along the following lines:

"If the agreement does not provide for the establishment of consulates but simply for the opening of a consular department at the seat of the diplomatic mission of the sending State, the agreement shall indicate the district of the said department."

59. If his suggestion was adopted, paragraph 3 would become superfluous and could be omitted.

60. He had been impressed by the arguments put forward by Mr. Scelle and Mr. Tunkin in connexion with paragraph 2, and suggested that a more flexible formula might be worked out which would enable the State of residence, if necessary, to take some action in the case of activities prejudicial to its interests or to good relations between it and the sending State.

61. As to paragraph 4, he considered Mr. Edmonds's amendment clearer than the Special Rapporteur's draft, although there was no substantive difference between them.

62. Mr. EDMONDS drew attention, in connexion with the Harvard draft on which his amendment to paragraph 2 was based, to a passage in Oppenheim's *International Law*:

"Commercial and consular treaties stipulate, as a rule, that the contracting States shall have the right to appoint consuls in all those parts of each other's country in which consuls of third States are already or may in future be admitted. Consequently a State cannot refuse admittance to a consul of one State for a certain district if it admits a consul of another State."[6]

63. Thus, while most-favoured-nation treatment could not be claimed as of right, and the Harvard draft did not contend that it could, it might be useful to stress that, in the absence of any specific agreement or notification to the contrary, one State could have a consul at any place where another State had been accorded that privilege.

64. Mr. MATINE-DAFTARY thought that article 2 should be limited strictly to the consular district. In his view the principle of agreement to establish consular relations was covered by article 1. It would be enough to entitle the article "Consular district" and paragraph 1 might simply provide that the seat of the consulate and the consular districts were governed by the agreement establishing consular relations or the agreement making subsequent amendments thereto. Paragraph 3 was superfluous and could be omitted. As to paragraph 2, the Special Rapporteur's version was acceptable as it stood. In his opinion, consular activities did not lend themselves to most-favoured-nation treatment and he failed to see why a country should be allowed to open a consulate in an area in which it had no nationals or substantial commercial interests. He was therefore opposed to Mr. Edmonds's amendment to paragraph 2, particularly in the codification of international law or in a multilateral convention.

65. Mr. PADILLA NERVO pointed out that if paragraph 1 referred to the agreement mentioned in article 1, paragraph 1, and was amended along the lines suggested by Mr. Ago, paragraph 3 might have to be retained in order to cover the case of the establishment of new consular offices not specified in the original agreement. Very often the consular districts provided for in an old consular treaty had to be adjusted to changing conditions and it was a common practice to open new consulates where necessary.

66. It might be considered that the case of new consular offices was covered by article 1, paragraph 1. If that was so, it should be made clear in the commentary. However, such a solution would raise another question: In what form would the agreement to the opening of new consular offices be signified? The consular commission of the sending State in conjunction with the exequatur of the State of residence might be deemed to constitute agreement; in other words, consent to the opening of a new consulate and to the determination of the seat and district of the consulate, and *agrément* in respect of the person of the consul might be considered as having been given at one and the same time. In his view, such an approach would be inconvenient because there might be cases in which the State of residence was agreeable to a new consulate and to the seat and district proposed but not to the person of the consul, and would therefore withhold its exequatur. Preferably, therefore, the question of new consulates should be dealt with in article 2, paragraph 3.

67. He agreed with the Secretary's remarks concerning Mr. Edmonds's amendment to paragraph 2. Moreover, the cases in which there was no specific agreement or notification by the State of residence concerning proposed consulates were comparatively rare. While it might be true that the most-favoured-nation clause appeared in some treaties, the more usual formula in bilateral treaties was to the effect that each of the two contracting parties would be permitted to establish consular offices in the ports, towns or other places within the territory of the other party. Where it appeared in a plurilateral treaty, it usually concerned only the States parties to the treaty, as in the case of the Agreement of 18 July 1911 between Bolivia, Colombia, Ecuador, Peru and Venezuela.[7]

68. In his view, it would be less objectionable not to include a most-favoured-nation clause and to leave it to States to decide the matter for themselves. He supported Mr. Edmonds's amendment to paragraph 4 because it was clearer than the Special Rapporteur's version.

The meeting rose at 12.55 p.m.

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[6] L. Oppenheim, *International Law: A Treatise*, 8th ed., H. Lauterpacht (ed.) (London, Longmans, Green and Co., 1955, vol. I, para. 425.

[7] See *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No.: 58. V.3). p. 417.

499th MEETING

Friday, 22 May 1959, at 9.55 a.m.

Chairman: Sir Gerald FITZMAURICE

Consular intercourse and immunities (A/CN.4/108, A/CN.4/L.79, A/CN.4/L.80, A/CN.4/L.82) *(continued)*

[Agenda item 2]

DRAFT PROVISIONAL ARTICLES ON CONSULAR INTERCOURSE AND IMMUNITIES (A/CN.4/108, PART II) (*continued*)

ARTICLE 2 (*continued*)

1. The CHAIRMAN, speaking as a member of the Commission, said that his opinion on article 2 was similar to that of Mr. Ago (see 498th meeting, paras. 57-61): article 2 as a whole should be closely linked to article 1, paragraph 1, if necessary by a rearrangement of the provisions concerned, and article 2, paragraph 1, should be amended in such a way that it would apply to the consular section of a diplomatic mission. Unless the paragraph was so amended the implication of article 1, paragraph 2, of the Special Rapporteur's text would be that a diplomatic mission was automatically entitled to exercise consular functions over the entire territory of the receiving State. In his view, whatever kinds of tacit understanding might exist in practice, very few countries would accept that proposition without qualification. Accordingly, he could agree to the text of paragraph 1 subject to an amendment along the lines he had indicated.

2. Paragraph 2 as it stood could apply either to changes desired by the sending State or to changes desired by the receiving State. It was certainly correct to say that changes desired by the sending State could not be effected without the consent of the State of residence, and that rule was reflected both in paragraph 4 of the article and in paragraph 4 of the commentary on the article.

3. Conversely, under paragraph 2 as it stood, the agreement of the sending State would be required whenever the receiving State wished to make some change. It seemed to him that that was not at all the Special Rapporteur's intention. Normally, there would of course be consultation in such cases, but it would certainly be going too far to lay down categorically that the receiving State could never alter a consular district without the sending State's concurrence. He suggested that paragraph 2 should be so amended as to enable a receiving State to have the power, in the last resort, to effect such changes even without the consent of the sending State, provided that the power was exercised exceptionally only, never arbitrarily and always after adequate consultation with the Government of the sending State.

4. Some members had suggested the omission of paragraph 3, but he agreed with Mr. Padilla Nervo (498th meeting, para. 66) that paragraph 3, although not explicit, would cover the case in which a sending State wished to open additional consulates. The point could be brought out more clearly by the Drafting Committee.

5. He had no objection to paragraph 4 of the Special Rapporteur's text.

6. He agreed with Mr. Yokota (see 498th meeting, para. 33) that Mr. Edmonds's amendment to paragraph 2 (498th meeting, para. 14) did not deal with the same question as paragraph 2 and should be considered an additional point. Of course, an automatic most-favoured-nation provision could not be included. The probability was that at a place where a number of consular posts existed, many countries would have a legitimate interest in establishing consular posts of their own, but there were certain cases in which a country had no interests at all in the area concerned and in such a case the receiving State should have the right to refuse. However, the principle of most-favoured-nation treatment was a correct principle and could be included in article 2, subject to the right of the receiving State to refuse the application of the sending State. Accordingly, he favoured Mr. Yokota's approach.

7. He supported Mr. Sandström's amendment to paragraph 1 and his proposal that the statement in paragraph 4 of the commentary on article 2 should be included in the article itself (see 498th meeting, paras. 38 and 39).

8. Finally, he drew attention to paragraph 6 of the Special Rapporteur's commentary on article 2. He recalled that after considerable discussion of the right to acquire property for the use of diplomatic missions, a provision on the question had been included in the draft articles on diplomatic intercourse and immunities.[1] It seemed to him that the position of consular posts was analogous, and he suggested that the provision regarding the property of diplomatic missions should be included, *mutatis mutandis*.

9. Mr. MATINE-DAFTARY recalled his statement at the previous meeting (498th meeting, para. 64) and introduced the following redraft of article 2:

"(i) Change the title to read: 'Consular seat and district';

"(ii) Replace paragraph 1 by the following text:

" 'The seat and the district of consulates shall be specified in an agreement between the sending State and the receiving State (or in the agreement making subsequent amendments thereto).'

"(iii) Delete paragraph 3."

10. Mr. TUNKIN thought that Mr. Matine-Daftary's redraft was too rigid in that it presupposed that the agreement on the establishment of consular relations always provided for the opening of consulates. That, however, was not the case. For example, a recent agreement between the Soviet Union and the Federal Republic of Germany was intended in the first instance to regulate consular functions exercised by a section of the diplomatic mission and said nothing about consular districts except that future agreements on the opening of consulates would specify the consular district in each case. Both the case envisaged by Mr. Matine-Daftary and that just described by him would be covered by amending the redraft of paragraph 1 to read: "The seat and district of consulates shall be specified by agreement between the sending and the receiving State".

11. Mr. MATINE-DAFTARY said that he had no objection to Mr. Tunkin's amendment, but observed that the point was covered by the words "or in the agreement making subsequent amendments thereto".

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[1] See *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9*, chap. III, para. 53.

12. Mr. SCELLE supported Mr. Matine-Daftary's amendment to paragraph 1. Before considering such questions as most-favoured-nation treatment, the Commission should be concerned about establishing equality of rights between large and small States and, in the matter of consular relations, between the States which were parties to a consular convention. Paragraph 1 should clearly provide for an agreement specifying the places at which consulates were to be established. In that connexion, he felt somewhat uneasy about the wording of paragraph 3, which gave the impression that, even after an agreement had been entered into, it was for the State of residence to decide whether or not a consulate would be established. He opposed any tendency, of which he had noticed more evidence in the debate, to place the State of residence *qua* territorial sovereign in a privileged position in consular relations.

13. Mr. ZOUREK, Special Rapporteur, said he would not deal with the terminological problems that had been raised except to say that it might after all be better, in order to satisfy those who objected to the term "consular representatives", to use instead the word "consuls" and, in an appropriate article, to define the term "consuls" in its generic sense.

14. It had been suggested that paragraph 1 of article 2 should be linked to article 1, paragraph 1. But article 2 was wider in scope than article 1, paragraph 1. While it was true that consulates might be established at the time when consular relations were established, there were other cases in which consulates were not established at the same time, or were opened later, after the establishment of consular relations, and there were also the cases in which new consulates were established in addition to the one already existing.

15. After listening to the discussion on paragraph 2, he agreed that it would be wiser to limit the scope of that paragraph, as had been suggested by the Chairman, to the case of changes proposed by the sending State. It would be enough to say:

> "Subsequent changes in the consular district by the sending State may not be made without the consent of the State of residence."

16. In reply to Mr. Amado's question concerning what changes could be made in consular districts (498th meeting, para. 34), he said that the *size* of a consular district might be altered, or the territory of a third State or of part of that State might be included in a consular district; the latter case had now been covered by Mr. Sandström's amendment (498th meeting, para. 39), which was acceptable to him.

17. Mr. Scelle had suggested the insertion of the words "either directly or indirectly" (498th meeting, para. 27). However, the inclusion of the word "indirectly" seemed to refer to cases where the consul of the sending State might try to exercise consular functions outside the limits of his consular district without any change in those limits. Such cases, however, were covered by the prohibition contained in paragraph 4 of article 2. If, on the other hand, Mr. Scelle was concerned about the refusal to grant, or the withdrawal of, the exequatur, that case was dealt with in later articles. Consequently, he was not sure that Mr. Scelle's amendment would be desirable in paragraph 2.

18. He had no objection to Mr. Yokota's amendment inserting the words "or seat" in paragraph 2 (see 498th meeting, para. 31).

19. Several members had said that paragraph 3 was superfluous, on the grounds, apparently, that agreement on the opening of consulates should be simultaneous with agreement on establishing consular relations; but as he had pointed out, in many cases that did not occur. Perhaps it would be best to follow Mr. Verdross's suggestion (498th meeting, para. 30) and make a clear distinction between two ideas, limiting article 1 to the establishment of consular relations and devoting article 2 to the opening of consulates. That would exclude any misunderstanding and permit paragraph 3 of article 2 to perform a real function.

20. It had been suggested that paragraph 4 was too rigid and that the word "express" should be omitted. He had no objection to that amendment. Mr. Edmonds's amendment to paragraph 4 (498th meeting, para. 14) seemed to him to be sound; he pointed out, however, that later articles, for example articles 14 and 16, dealt with circumstances in which a consul might find it necessary to carry on certain activities outside his consular district. For that reason it might be better to use a formula that would cover all possibilities, for example, by beginning the paragraph with the words "except as otherwise agreed", and continuing with the Special Rapporteur's draft.

21. He understood that Mr. Edmonds was not pressing for the adoption of his amendment to paragraph 1. Referring to Mr. Edmonds's amendment to paragraph 2, he conceded that a most-favoured-nation clause worded as Mr. Edmonds proposed was found in certain consular conventions. However, it was used mostly in bilateral conventions which took into account certain specific relationships. It would be less acceptable in a multilateral convention and the objection might furthermore be made that it did not take into account another rule encountered in consular conventions, namely the rule of reciprocity.

22. He had no objection to Mr. Sandström's amendment to paragraph 1 or to his proposal to insert an additional paragraph (see 498th meeting, paras. 38 and 39).

23. As to Mr. Matine-Daftary's amendment (see para. 9 above), he said he could accept the proposed title if the French text read: *"Siège de consulat et circonscription consulaire"*. If, however, his (the Special Rapporteur's) proposal that article 2 should deal with the opening of consulates were adopted, the heading of that article would have to be "Agreement on the establishment of consulates". Mr. Matine-Daftary's amendment to paragraph 1 failed to cover all the possibilities, as he had already pointed out.

24. Mr. Pal and the Chairman had raised the question whether an article should not be inserted in the draft whereby the State of residence would be bound to ensure that accommodation was provided for the consulate, and had referred to the draft articles on diplomatic intercourse and immunities (article 19). He had some doubt whether in that respect a consular post should be put on the same footing as a diplomatic mission, for they were intrinsically different; the inclusion of a similar obligation in the law relating to consuls would in fact place a much heavier burden on States, since consular functions were often carried out by several consulates. However, he was prepared to include such a provision as the Chairman had suggested if the Commission desired it.

25. He suggested that the authors of the amendments to paragraph 2 should confer with him with a view to working out an agreed text.

26. Mr. YOKOTA said that he could support the retention of paragraph 3 if it was slightly amended to cover the case in which a consulate might wish to establish a branch office in a town other than the seat of the consulate. A request to that effect would certainly require the permission of the State of residence. He suggested that the words "no consulate" should be replaced by the words "no consular office".

27. Mr. ZOUREK, Special Rapporteur, accepted the amendment.

28. Mr. SANDSTRÖM said that he would not object to the retention of paragraph 3 if it was modified to take into account the point mentioned by Mr. Padilla Nervo (498th meeting, paras. 65 and 66).

29. The CHAIRMAN thought that the Commission should deal with some further points before it referred article 2 to the Drafting Committee. He suggested the insertion in paragraph 1 of the phrase "including the opening of consular sections of diplomatic missions" after the words "consular representatives".

30. The new wording suggested by the Special Rapporteur for paragraph 2 (see para. 15 above) completely changed the original and was tantamount to replacing it by paragraph 5 of the commentary. Whereas Mr. Scelle had referred to the case in which the State of residence might wish to change or even abolish the seat of the consular mission, the Special Rapporteur's revised version of paragraph 2 implied that the sending State might change the seat with the consent of the State of residence. Recognition should be given to the special position of the State of residence, which must have a residual right in certain circumstances to alter the arrangements unilaterally; the Commission should recognize but qualify that right. Paragraph 2 might, therefore, be retained, with the addition of some such phrase as:

> "Exceptionally, however, the State of residence may change the consular district in view of special circumstances and after consultation with the sending State."

The Commission should decide whether to accept the principle involved before referring the paragraph to the Drafting Committee.

31. Since the Special Rapporteur had explained the need for the inclusion of paragraph 3, no further divergence persisted, and it could be regarded as accepted, subject to further drafting and the inclusion of Mr. Yokota's amendment.

32. No agreement had, however, yet been reached on the insertion of the most-favoured-nation principle suggested by Mr. Edmonds. The Commission might accept the principle, so long as the receiving State retained a residual right to refuse to agree that a consulate be opened solely on the grounds of the most-favoured-nation principle.

33. Mr. TUNKIN said he could not agree with the Chairman's amendment to paragraph 1. The legal consequences would be to require a specific agreement in each particular case to the formation of a consular section in a diplomatic mission. That would be a complete innovation, out of keeping with generally accepted international practice. As Mr. Bartoš had explained (497th meeting, para. 51), in United Kingdom practice the Foreign Office asked that heads of consular sections of diplomatic missions should hold the consular commission and apply for the exequatur if they desired to be able to appear before courts. But it was not considered as a foundation for a diplomatic mission's ability to exercise consular functions not usually exercised by diplomatic missions. In general, when a member of a diplomatic mission was appointed head of a consular section of a diplomatic mission, the sole requirement was a notification to the ministry of foreign affairs. As the Chairman himself had stated at the previous meeting (498th meeting, para. 4), consular functions performed by a diplomatic mission might be regarded as part of its ordinary diplomatic duties.

34. Mr. BARTOŠ explained that the United Kingdom Government merely recommended but did not require that the exequatur be applied for. A diplomatic mission in the United Kingdom could perform consular functions through the diplomatic channel without the exequatur, but, if it was granted the exequatur, it had direct access to local authorities.

35. The CHAIRMAN thought that the purpose of the intention was to stipulate that some agreement his amendment had been misunderstood by Mr. Tunkin; should be concluded concerning the consular district in cases where a diplomatic mission performed consular functions. The Special Rapporteur still differed from some other members of the Commission. It was generally agreed that in all circumstances consular functions could be exercised only with the agreement of the State of residence, but the Commission had not decided whether a special agreement was required or whether such agreement arose automatically from the agreement to establish diplomatic relations. The Commission had agreed at the previous meeting to defer the consideration of the general question, but, in any case, it would be just as necessary to specify the district covered by a consular section in a diplomatic mission as to specify the consular district.

36. The real difficulty did not lie in the argument that certain consular functions might be performed equally by a consulate and by a consular section in a diplomatic mission, but in the fact that those functions did not include all the typical consular functions.

37. Mr. Bartoš had correctly described the practice in the United Kingdom, but that practice implied that the Government of the State of residence had the right to object to the performance of specific consular functions by the consular section of a diplomatic mission, even though that right might never be exercised. The Special Rapporteur, however, held that that Government had no right to object to the opening of a consular section in a diplomatic mission.

38. Mr. SCELLE agreed with the Chairman that the State of residence could not debar a diplomatic mission from exercising consular functions, but those functions were not technically exercised in the same way as they would be by a consulate. A special agreement would therefore be necessary, especially for contact between the diplomatic mission and local authorities.

39. He criticized the use of the word "permission" (*autorisation*) in paragraph 3. Its use seemed to give the State of residence a discretionary power which was incompatible with the equality of the rights of the sending State and the State of residence. The word "agreement" (*accord*) should therefore be substituted. The sending State had an absolute right, and indeed virtually

a duty, to open a consulate when the circumstances so required, and any State of residence which arbitrarily objected would be in breach of international law. The Commission should have introduced that principle into the draft at the outset, but it would still have a chance to do so when it reverted to the final drafting of article 1.

40. Mr. AGO associated himself with the Chairman's remarks concerning paragraph 1.

41. Article 2 dealt specifically with the consular district. It would seem that if the same functions were to be recognized equally to a consulate and to a consular section in a diplomatic mission, without defining the district of the latter, such district would be coextensive with the district covered by the diplomatic mission; and that would be a manifest absurdity.

42. Mr. AMADO, referring to the same point, said that, if the district of a consular section in a diplomatic mission really covered the whole territory, the provisions concerning the movement of consuls and subsequent changes in the consular district would be meaningless.

43. With reference to Mr. Scelle's criticism of the word "permission," he suggested that the word "consent" should be used instead.

44. Mr. HSU supported the Chairman's amendment to paragraph 1. As consular sections in diplomatic missions were something of an innovation, the point was not covered by most of the textbooks. It had been said that consular functions were part of ordinary diplomatic functions, but it must be recognized that they differed in certain respects. If a consular section was set up within a diplomatic mission, certain arrangements would have to be made, and although an agreement would undoubtedly have to be concluded, it was the arrangements rather than the agreement that constituted the main point.

45. A provision dealing with the consular district was certainly necessary because a great many purely material arrangements had to be made and also because consular relations might be established long before diplomatic relations. It was deplorable that there had been instances of such arrangements being exploited in such a way as to influence the establishment of consulates and that certain politcal considerations had been involved. Those practices should be deplored, since they did nothing to promote good international relations.

46. The suggested provision concerning consular sections of diplomatic missions should not be so rigid as the rules concerning consular districts had been in the past. The inclusion of such provisions might affect the provisions relating to consular districts themselves and show that they too should not be unduly rigid. Consular sections were set up to perform certain specific functions. It would be unwise to make the relevant provisions so rigid that they could be exploited as an instrument of policy.

47. Mr. BARTOŠ said that one substantive question, which should be decided upon by the Commission as a whole and which could not be answered by a mere drafting change, was whether the permission given by the State of residence was a sovereign act or a contractual act.

48. Mr. PAL said he could not support the Chairman's amendment to paragraph 1 of article 2. The proposed amendment would once again take the Commission back to article 1, paragraph 2, on which no decision had yet been reached. Even the meaning of article 1, paragraph 2, as suggested by the Special Rapporteur, that certain consular functions were included in diplomatic functions, would not obviate the difficulty. The question would still remain whether the so-called "consular functions" would constitute part of the diplomatic functions so as to entitle a diplomatic agent to take them up as part of his own functions or whether the diplomatic agent, while taking them up, would himself be functioning as a consular agent. If the former were the case, then such a provision belonged properly to article 3 of the draft on diplomatic intercourse and immunities, not to the draft now before the Commission. The second alternative was not in accordance with international law: if diplomatic agents could exercise certain consular functions, they did so in their capacity as diplomatic agents and because diplomatic relations had been established, and not because consular relations had been established. The so-called consular section, therefore, would only be a diplomatic office, and the establishment of a consular section of a diplomatic mission should be dealt with in article 11 of the draft on diplomatic intercourse and immunities and not in the present draft.

49. He reminded the Commission that no decision had yet been reached on article 1, paragraph 2. The statement that the establishment of diplomatic relations included the establishment of consular relations did not accurately express the international law. The establishment of diplomatic relations would not *ipso jure* establish consular relations, though it might satisfy the requirement of such relations: nor would the establishment of diplomatic relations entitle the diplomatic agents to assume the consular functions as such. The diplomatic agents as such might have functions largely covering the consular field; but such functions, when performed by the diplomatic agents, would be diplomatic functions. Further diplomatic functions would not cover the entire consular field. Accordingly, a decision must first be taken on the consular functions that diplomatic missions could exercise; but even in that case, any reference to consular sections of diplomatic missions would be out of place in the article under consideration and the appropriate place for it would be in the draft on diplomatic intercourse and immunities.

50. Mr. PADILLA NERVO said that one source of confusion was the use of the same adjective to qualify certain functions which might legitimately be exercised by diplomatic missions and by consulates. If in both cases the Commission described the functions as "consular", it would be ignoring the fact that consular functions proper were closely linked with the powers of consular officers to act in certain specified districts.

51. The Special Rapporteur's draft of article 1, paragraph 2, might be interpreted to mean either that there should be mutual agreement between States on the establishment of diplomatic relations and that that agreement implied acceptance of consular relations, or else that the establishment of diplomatic relations normally implied willingness to accept certain consular functions as a normal attribute of diplomatic missions.

52. He considered that some difficulties might be created by referring to consular sections of diplomatic missions in article 2. Normally, an ambassador attributed to certain officials, who were not necessarily consular officers, consular functions such as issuing passports and visas. Moreover, certain conventions, such as the Havana Convention regarding consular

agents of 20 February 1928,[2] provided that the same person could combine diplomatic representation and the consular function, with the consent of the State of residence. By virtue of the exequatur, consular officers exercised their functions in specific districts, but some functions which might be termed consular were regarded as part of the functions of a diplomatic mission and could be exercised without express consent. If it were considered necessary, therefore, to include a reference to those functions, the proper context would be article 1, paragraph 2, and not article 2. He thought that such a provision should state that the establishment of diplomatic relations normally implied agreement to the exercise by diplomatic missions of certain functions which were their own, but which were closely related to consular functions proper. In that way it would be clear that the functions in question could be exercised without specific agreement and without the establishment of a special consular section.

53. Mr. SANDSTRÖM considered that an element of confusion had been introduced by the treatment of consular functions as though they were intrinsically different from diplomatic functions. Actually, nearly all the functions performed by consuls could be performed by diplomatic missions, and the difference was merely one of procedure. A consul could apply to local authorities while a diplomatic agent could not do so, but if it was out of order for the consular section of a diplomatic mission to approach local authorities, it should not be assimilated to a consulate. The establishment of a consulate required the consent of the State of residence because it involved the opening of an office of a foreign State in the territory of the receiving State. Such consent, however, was not essential for the opening of a consular section, unless that section wished to deal with local authorities. Accordingly, the amendment suggested by the Chairman seemed to be unnecessary.

54. Mr. AMADO considered that the terms of article 13 of the Havana Convention of 20 February 1928 were perfectly satisfactory and there was no need for the Commission to discuss the matter at greater length.

55. Mr. AGO thought that the Commission's difficulties arose from the confusion of two somewhat different questions. In saying that the consent of the State of residence was required for the establishment of consular sections of diplomatic missions, members were envisaging the performance of full consular functions by such sections, in which case the consular district had to be specified. In cases, however, where such sections performed narrower consular functions not involving contact with local authorities, there was no need to obtain the specific consent of the State of residence. That case seemed to be covered by the draft on diplomatic intercourse and immunities.

56. The CHAIRMAN, speaking as a member of the Commission, thought that a common point of view was emerging. Nevertheless, he felt that Mr. Sandström had gone too far in saying that all the functions of consulates could be exercised by an embassy and that the question was one of procedure only. Even if that were so, that procedural question was so vital as to affect the functions concerned. It was obvious that diplomatic agents could deal only with the ministry of foreign affairs of the State of residence, while consular officers dealt with many different local authorities and with the courts of that State. In any case, since the question was closely bound up with the nature of specific consular functions, it might be deferred until article 13 had been considered. Moreover, the Commission's decision on article 1, paragraph 2, would affect both the wording and the arrangement of articles 1 and 2.

57. Mr. ALFARO endorsed Mr. Padilla Nervo's view that article 1, paragraph 2, as drafted by the Special Rapporteur was open to two different interpretations. In the first place, it might be interpreted to mean that agreement between two States to establish diplomatic relations presupposed agreement to establish consular relations. On the other hand, it might be held to mean that diplomatic functions could be transformed into consular functions. On the basis of the second interpretation the Chairman's amendment to article 2, paragraph 1, would imply that the same consent on the part of the State of residence would be required for the establishment of a consular section of a diplomatic mission as was required for the establishment of a consulate.

58. Mr. ZOUREK, Special Rapporteur, thought that Mr. Padilla Nervo had quite rightly raised the point of two possible interpretations. He was prepared to dissociate the two concepts contained in article 1 and to devote article 1 to the establishment of consular relations and article 2 to the opening of consulates, irrespective of the time and the circumstances, either before or after the establishment of consular relations or before or after the establishment of diplomatic relations. That procedure should eliminate any ambiguity.

59. Turning to the points raised by the Chairman, he agreed with the members who did not consider it opportune to refer to consular sections of diplomatic missions. Like Mr. Sandström and Mr. Tunkin, he would emphasize that under existing practice diplomatic missions could exercise the functions of consular officers and that the difference between the two types of function was essentially one of procedure. Of course, differences in the scope of those functions could be caused by *de facto* situations, but there were no legal obstacles to the performance of consular functions by diplomatic agents. That statement, however, should be qualified. In the absence of a convention, diplomatic missions could only exercise normal consular functions without the permission of the State of residence. In other, more important cases, the sending State could not act without permission.

60. Some members had rightly pointed out that it was difficult to speak of consular districts in connexion with diplomatic missions, since only a consulate had a "consular district". That matter, moreover, was linked with article 1, paragraph 2, which the Commission had deferred, and might be set aside for the time being. It was obvious that opinions on the question were drawing closer together. Thus, all members seemed now to agree that diplomatic missions might exercise consular functions, but that the permission of the State of residence was required to enable the diplomatic mission to enter into direct contact with local authorities.

61. With regard to the Chairman's suggestion to extend the scope of paragraph 2, and to take into account certain practical cases in which changes might take place without consent, he would point out that

[2] See *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No.: 58.V.3), p. 422 (especially article 13).

agreements on consular districts might, like any other international agreement, be modified for reasons other than mutual consent. The Chairman's point might be met by providing simply that a consular district could not be changed by the sending State without the consent of the State of residence. Such a wording would not affect the powers of the State of residence, but it would not be possible to infer from it that the State of residence was able to oblige the sending State to introduce changes into a consular district. He preferred that formula to the alternative of adding the Chairman's suggested reference to exceptional cases.

62. Mr. Edmonds and the Chairman had referred to the most-favoured-nation clause in connexion with article 2. That clause played a greater part in securing parity of consular privileges and immunities on the one hand and consular functions on the other hand, and it was above all for that reason that it was included in many treaties. If the majority of the Commission wished to include such a provision, it should cover all cases in which the most-favoured-nation clause was applicable, and not merely the right to establish consultates; it should be inserted *in extenso* in the appropriate place.

63. Finally, with regard to the question of premises, he said he would be prepared to draft a provision if the Commission wished him to do so. However, that would be a provision *de lege ferenda* and not a provision codifying existing law. Moreover, he was not sure whether Governments would be prepared to accept such a provision, which would impose obligations considerably exceeding those of the corresponding provisions of the draft on diplomatic intercourse and immunities.

64. Mr. BARTOŠ pointed out that the Special Rapporteur had referred to the most-favoured-nation clause in its general sense. The case of the opening of consulates was a special one and special most-favoured-nation clauses in that respect were often included in consular treaties.

65. Mr. LIANG, Secretary to the Commission, observed that the important question of consular functions had been commented on in the Special Rapporteur's introduction to his report (A/CN.4/108, part I). In paragraph 67, the Special Rapporteur pointed out that consuls were State agents whose competence was limited *ratione materiae*, and very often *ratione loci* as well. Furthermore, it was stated in paragraph 69 that the appointment of consuls was covered not by international but by municipal law. He thought that the question of the performance of consular functions by diplomatic missions went much further than that of whether those missions could or could not deal with local authorities; the functions themselves should be studied in relation to their performance by the two kinds of agents.

66. The essential point was that consuls were allowed by the State of residence to execute acts which, in the ordinary way, would amount to a derogation from the territorial sovereignty of that State. The enumeration of consular functions in article 13 showed that consuls were authorized to carry out certain sovereign acts of the sending State, particularly in respect of the nationals of that State who were engaged in trade. Those functions were not exercised *ratione materiae* by diplomatic agents, but by consular officers, either under consular conventions or by virtue of the regulations of the State of residence. They could not possibly be exercised by diplomatic agents unless the latter assumed consular functions, with the consent of the State of residence. As examples of acts which were not, properly speaking, diplomatic functions, he cited those referred to in article 13, paragraphs 9, 10 and 11. Certain functions, such as the furthering of commercial and economic relations and issuing passports and visas, were not such acts. It could not be contended that all diplomatic and consular functions were identical. Accordingly, when diplomatic agents performed functions which were exclusively consular, they assumed the status of consular officers and had to obtain the consent of the State of residence to do so.

The meeting rose at 1.5 p.m.

500th MEETING

Monday, 25 May 1959, at 3.5 p.m.

Chairman: Sir Gerald FITZMAURICE

Date and place of the twelfth session

[Agenda item 6]

1. Mr. LIANG, Secretary to the Commission, observed that, since the General Assembly had decided the place of the Commission's sessions, the only question to be settled was that of dates. According to General Assembly resolution 694 (VII) of 20 December 1952, the Commission's session should not overlap with the Economic and Social Council's summer session. The Economic and Social Council would begin its session on 5 July; accordingly, the Commission's twelfth session could be held from 25 April to 1 July.

2. The CHAIRMAN suggested that the Commission should approve the dates mentioned by the Secretary.

It was so agreed.

Representation of the Commission at the Fourteenth session of the General Assembly

3. Mr. LIANG, Secretary to the Commission, said it was the Commission's practice to ask its Chairman to represent it at the sessions of the General Assembly.

4. Mr. ALFARO, Second Vice-Chairman, suggested that the Chairman should be requested to represent the Commission at the fourteenth session of the General Assembly.

It was so agreed.

5. Mr. GARCIA AMADOR suggested that the Chairman might informally approach the Secretariat and, perhaps, the delegations with a view to scheduling the Commission's sessions for a more convenient time of the year.

6. The CHAIRMAN said he would act on that suggestion.

General Assembly resolution 1272 (XIII) on control and limitation of documentation

[Agenda item 8]

7. Mr. LIANG, Secretary to the Commission, observed that item 8 arose out of the General Assembly's annual review of United Nations documentation.

8. The CHAIRMAN suggested that the Commission should take note of General Assembly resolution 1272 (XIII) of 14 November 1958.

It was so agreed.

Co-operation with the Inter-American Council of Jurists

9. Mr. LIANG, Secretary to the Commission, recalled that, at its tenth session, the Commission had renewed its request to the Secretary-General of the United Nations to authorize him, as Secretary to the Commission, to attend the fourth meeting of the Inter-American Council of Jurists, to be held at Santiago, Chile, in 1959.[1] It had now been decided to hold the meeting from 24 August to 12 September and he had received an official invitation from the Government acting as host to the meeting. The Secretary-General had authorized him to attend and to report to the Commission on matters dealt with by the Inter-American Council of Jurists which were of interest to it.

10. The CHAIRMAN suggested that the Commission should take note of the Secretary's statement.

It was so agreed.

Programme of work

11. The CHAIRMAN observed that, in view of the absence of Mr. Zourek, Special Rapporteur on consular intercourse and immunities, the Commission could either examine the relatively non-controversial articles in chapter II of Mr. Zourek's draft (A/CN.4/108, part II), or else proceed with its work on the law of treaties (A/CN.4/101).

12. After a procedural debate, the CHAIRMAN called for a vote on whether the Commission should proceed with its work on the law of treaties until the Special Rapporteur on consular intercourse and immunities could again attend its meetings.

By 10 votes to 1, with 4 abstentions, the Commission decided to resume its consideration of the draft on the law of treaties.

Law of treaties (A/CN.4/101) (*continued*)*

[Agenda item 3]

ARTICLE 22

13. Mr. YOKOTA asked whether it had been decided to retain or to omit the passages in articles 20 and 21 relating to the personal approval or recommendation of the individual signing or initialling the text.

14. The CHAIRMAN said it was his recollection, subject to confirmation by reference to the summary records, that the majority of the Commission was against the retention of those passages.

15. Speaking as Special Rapporteur, he introduced article 22.

16. The article dealt largely with routine matters. It was self-evident that in order to be valid the signature to a treaty had to be made under adequate and specific authority. It was suggested in article 22 that the necessity for authority applied only to full signature. In many cases, a text was simply initialled or signed *ad referendum*, either because the representative concerned was not in a position of authority to sign or because the Government was not ready to proceed to full signature or to issue authorization for that purpose. For the purpose of full signature, however, authority was essential and paragraph 1 specified the three possible cases in which signature could be effected. In the first case, if the representative concerned was an ordinary delegate, he clearly needed an *ad hoc* full-power to be enabled to sign a treaty. In the second case, the representative might be the ambassador or a diplomatic envoy accredited to the other country concerned in the negotiation, or the minister of foreign affairs, who had standing full-powers to sign treaties. Ministers of foreign affairs often had standing full-powers, and he believed there were cases in which ambassadors had not only diplomatic credentials, but standing full-powers to sign treaties. If that belief was incorrect, the word "Ambassador" should be deleted from paragraph 1. The third case was that of persons, such as Heads of State, prime ministers and, sometimes, ministers of foreign affairs, who had inherent power by virtue of their office to affix their signature to a treaty. That was obvious in the case of Heads of State, who were the authorities empowered to grant full-powers enabling their nationals to sign treaties; accordingly, it was illogical to expect them to issue full-powers to themselves.

17. Paragraph 2 dealt with points of detail. The first part made it clear that the person authorized to sign a treaty might not be the person who had negotiated the treaty. An obvious situation where that would be the case was that of a treaty not signed immediately, but opened for signature. The point might, if the Commission preferred, be mentioned in the commentary, but should not be ignored. The second part of the paragraph might be regarded as redundant, for it stated the obvious truth that authority to negotiate was not equivalent to authority to sign. In any case, the paragraph should be redrafted to take into account cases of standing full-powers or of inherent capacity to sign by virtue of office.

18. Paragraph 3 related to more or less mechanical points. The first sentence stated that full-powers should be communicated—to the officers of the conference in multilateral negotiation—or exhibited—to the other party in bilateral negotiation—and verified, usually by a credentials committee, in the case of an international conference. The second sentence related to the proper form of the full-powers. The answer to the question whether the powers should emanate from the Head of State or from the Government depended largely on the nature of the treaty. The last sentence applied to cases, which were becoming frequent in practice, where delegations might not be in possession of the actual full-power to sign upon the conclusion of a treaty. It had recently become usual to allow such representatives to sign on the basis of a telegram or letter of authorization from their Government, provided that the full-powers were eventually received.

19. The provision in paragraph 4 overlapped to some extent with article 16 (*Certain essentials of the text*) and the Commission might decide that it would be sufficient to embody it in only one article. Nevertheless, a statement or recital of authority to sign was a desirable ingredient of a treaty, with the exception of exchanges of notes or letters. That exception applied only to bilateral negotiations, however, and the authority to sign of the

[1] See *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9*, chap. V. sect. III.

* Resumed from the 496th meeting.

persons concerned was implicit in the exchange. Otherwise, the normal practice was to include the statement or recital either after the preamble to the treaty or before the signatures at the end of the treaty.

20. Mr. MATINE-DAFTARY said that the Special Rapporteur's introduction had elucidated article 22 but he felt that the clarification should be introduced either into the text or into the commentary. It was not evident from paragraph 1 (*b*) that the officials mentioned derived their capacity to bind the State from the constitutional law of the State concerned. Accordingly, paragraph 1 (*b*) should refer to persons deemed to have the constitutional right to bind the State by virtue of their position or office.

21. Moreover, it seemed to him that clauses (*a*) and (*b*) overlapped to a considerable extent and it might be possible to combine them into a single, shorter provision.

22. The CHAIRMAN, speaking as Special Rapporteur, explained that the difference between the two clauses was that no full-power, in the sense of a document, existed in the case of clause (*b*), whereas there was always such a document in the case of clause (*a*), whether an *an hoc* document issued specially for a particular occasion, or a standing full-power, issued in some countries to a minister of foreign affairs when he took office, empowering him to sign treaties during his term of office. Cases in which such a standing full-power was not issued as a document, the foreign minister being empowered to sign by virtue of his office, would fall under clause (*b*).

23. Mr. AGO said that he was in general agreement with the principle set out by the Special Rapporteur in article 22, but he had some observations to make on certain details. In paragraph 1, it seemed to him that the order of (*a*) and (*b*) should be reversed. While the cases mentioned under (*a*) were more frequent, they dealt with persons not having inherent capacity, whereas clause (*b*) dealt with persons of higher rank having inherent capacity, and should logically come first. As to clause (*b*), he said that in some States the organ having inherent capacity to bind the State was, under constitutional law, not an individual person but a body. Again, in addition to the officials specified, a military commander might, under certain conditions, have such inherent capacity. He suggested that the clause should be amended to take account of those circumstances.

24. In paragraph 2, he suggested that the words "is not equivalent to" should be replaced by the words "does not include", because the authority to negotiate and the authority to sign were quite distinct and could never be conceived of as equivalent.

25. There would have to be a consequential change in the second sentence of paragraph 3, in the light of the amendment to paragraph 1.

26. He had a point of substance to make with regard to paragraph 4. The paragraph implied that, in the absence of a statement or of some other indication to the effect that the representatives of the signatory States had authority to sign the text of the treaty, the treaty might not be formally valid. That was not the case and paragraph 4 should be amended accordingly.

27. Mr. SANDSTRÖM agreed with Mr. Ago's observation concerning paragraph 4. He asked whether it was necessary in paragraph 1 (*a*) to elaborate the possible situations. He thought the provision would be simplified if Mr. Ago's observations were taken into account.

28. Mr. TUNKIN said that paragraph 2 was far too descriptive and, like other provisions in the draft code, reminiscent of the language of a textbook.

29. He agreed with Mr. Ago's observations concerning paragraph 1 and, in addition, pointed out that the words "which is the act of the State" were unnecessary, since every stage of the treaty-making process was an act of the State.

30. In paragraph 3, the first clause was a platitude: if full powers were necessary, they had to be communicated or exhibited. As to the second clause of the first sentence, he suggested making it more flexible as, in practice, full powers did not always need verification, and certainly not in bilateral negotiations, where there was no doubt about their authenticity. The second sentence of paragraph 3 was not sufficiently flexible. In many cases the signer was in possession of a document signed by the foreign minister simply testifying that full-powers had been issued. In addition, there were inter-ministry agreements signed on behalf of the ministry and not on behalf of the Government. Some agreements were signed by individuals without any specification of their authority to sign and sometimes even without any indication that the signature was affixed on behalf of the Government. He agreed with Mr. Ago that paragraph 3 would have to be changed in keeping with an amended text of paragraph 1.

31. Mr. BARTOŠ said that article 21 was closely interrelated with article 22. In his opinion, borne out by practice, even initialling by Heads of State, prime ministers or foreign ministers had not *ipso jure* the same effect as signature. On the contrary, in practice initialling by Heads of State even of the most important treaties merely signified agreement in principle, while the competent ministers were left to establish the final text. Initialling had always been considered to show prior agreement and the commitment arose only from signature. He could not accept the idea that initialling, even by Heads of State, was equivalent to signature unless a contrary intention was proved (cf. article 21, para. 1). He would go so far as to say that signature was not binding unless circumstances showed that the intention was to consider it as a final signature. On the other hand, it was true that initialling sometimes signified consent and actual signature was reserved for a solemn ceremony.

32. With regard to article 21, paragraph 2, he agreed with Mr. Tunkin that action taken by a representative on his own initiative could not be equated with negotiation by States; on occasion, a representative might act in a negotiation without the Government's specific authority; but, even then, initialling could not be regarded as signifying the formalization of the results of a negotiation. In any case, such procedures were not suited to modern diplomacy and personal initiatives could not now be regarded as on a par with official negotiations. At various stages in the history of diplomacy negotiation on personal initiative had resulted in the conclusion of a treaty, but in such negotiations the person concerned had certainly not been representing the State. If well conducted and within the general framework of international law, such negotiations might be unobjectionable, but they should find no place in a code drafted by the Commission.

33. The Special Rapporteur had called initialling a form of deferred signature. There were, however, many cases in which representatives did not wish to use their full-power to sign an agreement and left it to the Government

to object or to refuse to ratify the treaty. Governments frequently used the device of initialling to enable them to request that negotiations be reopened on certain points in the text, without prejudice to the treaty as a whole. That technique caused less political difficulty than the rejection of a text signed *ad referendum*. That was a practical point to which the Drafting Committee might give some attention.

34. He had already expressed his objection (495th meeting, para. 32) to the idea of personal recommendation embodied in article 21, paragraph 4, and the Special Rapporteur himself had now admitted that it found little favour with the majority of the Commission.

35. With regard to article 22, paragraph 1, he questioned whether an ambassador had the authority to sign international instruments committing a State generally by virtue of his office, but he fully endorsed the statement that the Head of State, prime minister or foreign minister had inherent capacity to bind the State by virtue of his position or office, as was shown by the rules of procedure of the Security Council and by the Greenland Case (1933),[2] in which the Permanent Court of International Justice had ruled that foreign ministers had such an inherent capacity. Clause (*b*) might therefore precede clause (*a*) and further thought might be given to the standing of ambassadors in that context.

36. He agreed that full-powers must be communicated or exhibited and must be verified by such means as were convenient, but thought that paragraph 4 should be drafted in more flexible terms in order to allow for cases in which the authority to sign was indicated in other ways.

37. It was, however, extremely dubious whether the statement by the plenipotentiary himself that authority to sign existed was equivalent to the existence of such authority. A plenipotentiary might well be in possession of full-powers, but might, deliberately or involuntarily, exceed their limits. The situation might be regularized by subsequent ratification; but the opposite situation might arise, where the full-powers might be exercised by a person, although he was a genuine plenipotentiary, in a manner contrary to the intention of his Government. A striking case in point had been that of the Yugoslav Ministers who had signed a treaty of alliance with Hitler and Mussolini, having exhibited full-powers. They had violated the constitutional prescription that any international agreement involving the passage of troops across Yugoslav territory must have the prior consent of the National Assembly. Like all treaties signed with Hitler, that treaty had come into force at the time of signature. At the end of the Second World War the Ministers had been brought to trial and severely punished. The Special Rapporteur had not meant his text to be construed in any way that might give a pretext for such conduct, but the Commission should exercise the greatest caution in that respect, even though reasonable safeguards had been embodied in article 23.

38. Mr. YOKOTA doubted whether a form of general or standing full-power (article 22, para. 1) was commonly used. Full-powers were always issued, in his experience, on a particular occasion and for a particular purpose. An ambassador might negotiate and even sign a treaty by virtue of his office, but when a full-power was issued for the purpose of signature, it was always specially issued for the particular occasion, and not generally for empowering him to sign any and all treaties. The same was true of a foreign minister. He doubted that a standing full-power was ever issued to empower a foreign minister or an ambassador to sign any and all treaties.

39. Paragraph 3 had been described as redundant or self-evident; but surely the communication or exhibition of full-powers was part of the law of treaties. The paragraph should be retained, but the phrase "by such means as are convenient" was not very apposite, for it had little if any, significance as a text of law. Either the means should be specified or else the phrase should be omitted.

40. Mr. TUNKIN observed that an example of the position mentioned in article 21, paragraph 1, was the Memorandum agreed by the USSR and Austria in April 1955, which had initiated Austrian neutrality. That document had not been signed, but only initialled by the Ministers of Foreign Affairs.

41. Mr. AMADO recalled, in connexion with the comments on article 21, that the so-called Locarno Pact[3] had been initialled in October and subsequently signed in London in December 1925. Again, the Treaty of Peace with Japan had been initialled at Washington in July and signed at San Francisco in September 1951. In practice, the interval between initialling and signing rarely exceeded a period of a few weeks.

42. The clause in article 20, paragraph 2, of the draft code concerning personal approval of the treaty on the part of the person signing or initialling gave rise to difficulty when read in conjunction with the provisions of article 21, for example, paragraph 2 of which said that "In all other cases, initialling is equivalent to a signature *ad referendum* and is itself, *ipso facto, ad referendum* . . .". It was not correct to confuse initialling with signature *ad referendum*: they were quite different things. Again, it was difficult to conceive of the case described in article 21, paragraph 2 (*a*), where a representative acted on his own initiative and without specific authority from his Government.

43. As to article 22, he said he did not know of any so-called standing full-powers to sign a treaty. The officials referred to at the end of paragraph 1 (*a*) might have a general authority to negotiate, but for the purpose of signature—the "act of the State"—specific full-powers were necessary.

44. In connexion with paragraph 4 and with the references made by several speakers to various types of agreements, he said that he could not conceive of any international agreement in which signature was not given on behalf of the State.

45. The CHAIRMAN said that evidently there was a desire for further discussion on article 21. He suggested that the article should be reopened for discussion when the Commission had completed its consideration of article 25, the last article of section B.

It was so agreed.

The meeting rose at 6 p.m.

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[2] Publications of the Permanent Court of International Justice, *Judgments, Orders and Advisory Opinions*, series A/B, No. 53.

[3] Treaty of Mutual Guarantee, signed at Locarno on 16 October 1925. See League of Nations, *Treaty Series*, vol. LIV, 1926-1927, No. 1292.

501st MEETING

Tuesday, 26 May 1959, at 9.50 a.m.

Chairman: Sir Gerald FITZMAURICE

Law of treaties (A/CN.4/101) (*continued*)

[Agenda item 3]

ARTICLE 22 *(continued)*

1. The CHAIRMAN asked the Commission to continue its consideration of article 22 (*Authority to sign*).

2. Mr. YOKOTA observed that it might be inferred from the phrase "which is the act of the State" in article 22, paragraph 1, that signature *ad referendum* was not the act of the State but the act of a private person. That surely could not be so. The person signing *ad referendum* was the representative of the State when engaged in a particular negotiation and in signing. If negotiation by a representative of a State was the act of the State and not of a private individual, signature *ad referendum* was even more certainly an act of the State, even if it did not imply final consent by the State, but only provisional assent to the text prior to full signature. Even full signature was provisional if ratification was required. Thus signature *ad referendum* was a first stage, full signature a second and ratification a third in the conclusion of a treaty. The phrase in question was open to misinterpretation.

3. Mr. Amado's remarks at the previous meeting (500th meeting, para. 43) had confirmed his own view that standing full-powers were rare. The standing full-powers of a minister of foreign affairs were probably not so much full-powers on the international plane as authorization on the domestic plane. The Special Rapporteur had explained that in the United Kingdom the standing full-power was kept at the Foreign Office and was exhibited on occasion, but full-powers, if they were those on the international plane, must certainly be exhibited whenever the foreign minister signed a treaty, as the Special Rapporteur himself had laid down in article 22, paragraph 3.

4. The CHAIRMAN, speaking as Special Rapporteur, explained that in paragraph 1 the word "signature" meant signature of any kind. The object of the "except" clause at the beginning of the paragraph was to state that for the purpose of signature *ad referendum* a full-power was not necessary. He might be prepared to omit the phrase criticized by Mr. Yokota—"which is the act of the State"—but not for the reason given by the latter. He fully agreed that signature *ad referendum* was an act of the State, but it was also an exception to the rule that signature required the exhibition of a full-power.

5. With respect to the question of standing full-powers, he said that in the United Kingdom, and probably in many other countries, the Minister of Foreign Affairs had a standing full-power which he could produce at international conferences, but which he did not necessarily have to produce as he possessed in addition full-powers as an inherent part of his functions. The Foreign Minister did not need a specific full-power to sign a treaty.

6. Mr. YOKOTA still thought that the impression given in paragraph 1 was that full signature could be effected only under the conditions set out in clauses (*a*) and (*b*), and that signature *ad referendum* could be effected without a full-power because it was not an act of the State. The phrase he had referred to should be omitted for the sake of clarity.

7. Mr. EDMONDS asked what the phrase "verified by such means as are convenient" signified in paragraph 3. The full-power was a formal instrument, usually executed by the Head of State and ordinarily carrying its own authority on its face. Verification seemed to imply some sort of reference to the issuing authority.

8. The CHAIRMAN, speaking as Special Rapporteur, replied that according to almost invariable practice delegations to international conferences were asked to submit their full-powers to the officers of the conference, to the secretariat or to a credentials committee for scrutiny. The practice might not be common in the conclusion of bilateral treaties, but even there the full-powers were exchanged. Perhaps some explanatory remarks might be added in the commentary.

9. Mr. HSU observed that the fact that the full-power was issued in some countries to the minister of foreign affairs for use for all purposes would seem to indicate that at one time the minister had not possessed the full-power by virtue of his office. With the spread of democratic institutions, ministers had apparently been given wider powers and the issuing of the full-power had become a formality. It might be interesting to find out how far the practice extended; in some countries the foreign minister probably did not have a standing full-power and embarrassing questions might be raised at small conferences.

10. The CHAIRMAN replied that Governments might be asked to describe their practice.

11. Mr. AMADO thought that the doubts expressed about the status of signature might have arisen from the fact that the Commission was forgetting that it was discussing section B (*Negotiation, drawing up and establishment (authentication) of the text*) where signature was alway an act of the State. In a sense, however, signature even of a final text was signature *ad referendum*, the text being subject to approval by the sovereign organs of the State. Signature in the present context was simply signature to authenticate the text, but countries under one particular system of law regarded signature as a decisive act of the State committing the State to the conclusion of a treaty.

12. Mr. SANDSTRÖM thought the section concerning the negotiation, drawing up and authentication of the text was not the proper place for rules which referred rather to signature as consent to the text. Certain articles might be better placed in section C (*Conclusion of and participation in the treaty*). Mr. Amado's point was well taken; the confusion had arisen from the fact that signature was being used in article 22 in a sense differing from that used generally in section B.

13. Mr. PAL said that in so far as "signature" functioned as authenticating the text, it was dealt with in articles 15 and 18. In article 22 "signature" appeared to mean signature producing the effect more fully dealt with in article 29 in section C. Obviously the requirement of "full-power" was intended to relate to signature not for authenticating the text but for concluding the treaty. In that sense article 22 was misplaced in section B and was likely to create some confusion.

14. The CHAIRMAN, speaking as Special Rapporteur, explained that the double aspect of signature had caused the difficulty. Article 22 had been placed in section B because the full-power was still required even when signature was only an act of authentication, and

some provision on the subject must be embodied in that section because it was the first in which the question of signature appeared.

15. Mr. LIANG, Secretary to the Commission, suggested the insertion, even before section B, of some explanation of the three uses of the term "signature": the somewhat less common use of "signature" as authenticating the text; the most common use of "signature" as signature of a potential basis of international agreement, most instruments requiring ratification; and "signature" signifying final consent, a less frequent procedure, although treaties existed providing for entry into force by signature alone.

16. A fourth concept, that of signature *ad referendum*, had been introduced. He could not agree with the Special Rapporteur that it was confined merely to authenticating the text, since in many cases it related to the potential basis of an agreement.

17. At the United Nations Conference on the Law of the Sea, 1958, the Credentials Committee, with the aid of the Secretariat, had scrutinized the representatives' credentials and had verified whether each had full-powers to sign. It had been understood that full-powers to sign were required even for the purpose of signing *ad referendum*. No representative had stated that he was signing *ad referendum* simply to authenticate the text, although many had signed *ad referendum*. The effect appeared to be that their signature was subject to the constitutional processes of their State. If the provisions defining the various meanings of the term "signature" were inserted before section B, the subsequent articles should contain, where relevant, a reference back to those definitions.

18. Mr. Sandström's suggestion that the substance of article 22 belonged more logically to section C, particularly in the light of article 26, paragraph 2, had some merit, but it would still be necessary to indicate whether "signature" implied a provisional basis of agreement or the acceptance of an obligation by a State. More than a drafting question was involved. The Special Rapporteur might deal with the issue involved before the article was finally referred to the Drafting Committee.

19. Mr. AGO said that clearly the Commission was not yet agreed on article 21. During the earlier discussion on that article (see 495th and 496th meetings), the Commission had agreed on the need to distinguish between certain acts and their effects. It had agreed that initialling was merely an act of authentication, not involving consent even to the text. The Secretary had correctly stated the different possible interpretations of the term "signature". In a few extreme cases signature was equivalent to the final acceptance of an obligation, but in most cases it was only a provisional approval of the text or a provisional acceptance of the text as a potential basis of international agreement, subject to ratification.

20. The notion of signature *ad referendum* as equivalent to initialling was a novel concept. Actually, signature *ad referendum* differed totally from initialling. Such signature was signature by a person not in possession of the full-power at the time and was therefore provisional. It became final, or full, signature upon ratification, by retroactive effect. Before ratification, signature *ad referendum* simply authenticated the text provisionally. Those principles had been virtually agreed and the Drafting Committee should have little trouble in setting them out clearly.

21. The provisions concerning the purposes served by signature and those concerning the organs authorized to sign should be kept separate. Whatever those organs were, a full-power would be required, and he considered that the provision to that effect should be embodied in a separate clause.

22. Mr. PAL thought that the difficulty which had arisen over article 22 might be obviated if the article was transferred to section C (*Conclusion of and participation in the treaty*), and a reference to that section was inserted in section B. Alternatively, the Commission might follow the Secretary's suggestion and explain the several functions and use of "signature" before section B.

23. The CHAIRMAN, speaking as Special Rapporteur, considered that some provision concerning authority to sign should be included in section B. Such authority was required for signature at all stages, and signature was referred to for the first time in section B. If the provision were transferred to section C, the implication would be that authority to sign was immaterial for the purpose of authenticating the text by the signature. However, Mr. Pal's suggestion to include a reference to the matter in section B might be considered. He did not believe, however, that it would be feasible to include the provision before section B.

24. Mr. YOKOTA could not agree that signature was principally an act of consent to the text, either as a potential basis for agreement, or as a final agreement. It was also an act of authentication, especially where bilateral treaties were concerned. Whether consent was provisional or final, signature was also an act of authentication and a provision concerning authority to sign should therefore also appear in section B.

25. Mr. SANDSTRÖM recalled his original suggestion that some of the articles in section B should be transferred to section C, since there seemed to be a lack of concordance between the title of section B and those articles, especially article 22. He therefore endorsed Mr. Pal's suggestion.

26. Mr. ALFARO thought that the opinions expressed on article 22 could be reconciled by the Drafting Committee. Before referring the article to that Committee, however, the Commission should agree on paragraph 1. The phrase "which is the act of the State" was open to misinterpretation. According to the Special Rapporteur, signature was the act of the State, but it had also been argued that it was subject to approval by higher authority. Indeed, as Mr. Amado had observed, the signature of all treaties must be regarded as *ad referendum* since it was subject to ratification by means of the constitutional processes. The simplest way out of the difficulty was to delete the phrase in question. He agreed with Mr. Ago (see 500th meeting, para. 23) that the order of clauses (*a*) and (*b*) of paragraph 1 should be reversed.

27. Turning to the second sentence of paragraph 3, he observed that the English text was somewhat confusing and should be amended. It should be made clear that full-powers in appropriate form were conferred by Heads of State, or by ministers of foreign affairs in certain cases.

28. He considered that the provision in paragraph 4 was a necessary one, since the inclusion of a clause to the effect that plenipotentiaries had authority to sign was standard international practice, even if a treaty was signed by a minister of foreign affairs. Such a phrase was included in the preamble to the United Nations Charter. He also endorsed Mr. Ago's suggested amendment providing that the absence of such a statement or

of some other indication did not affect the validity of a treaty (see 500th meeting, para. 26); however, the Commission might decide to indicate the point in the commentary.

29. Mr. LIANG, Secretary to the Commission, agreed with the Special Rapporteur that it might be inconvenient to insert the substance of article 22 immediately before section B. He suggested, however, that article 13, in section A, might be amended to include certain definitions with regard to signature. It might be made clear in that article when signature was used for authentication and when it constituted an act of provisional acceptance.

30. With regard to article 22, paragraph 1, he said he could not agree with the Special Rapporteur that a representative could sign a treaty *ad referendum* without submitting full-powers. As he had said, it was the practice at international conferences to submit full-powers before signature; except in the cases referred to in article 21, paragraph 1, any signature without possession of full-powers was not generally acceptable.

31. The CHAIRMAN, speaking as Special Rapporteur, said that he could not agree with the Secretary's views. The main purpose of signature *ad referendum* was to provide a method whereby a representative without full-powers could affix his signature to a treaty. The whole question was considered in detail in article 21, paragraph 2. The fact that article 21, paragraph 2 (*c*), mentioned the case where a Government issued full-powers but was unwilling to be committed to a full signature should not obscure the fact that a representative who had no full-powers could still sign a text *ad referendum*.

32. Mr. MATINE-DAFTARY observed that a representative who had full-powers to sign a text might nevertheless have some doubts concerning full signature and might sign *ad referendum* if he had no time to consult his Government. A way out of the difficulty over article 22, paragraph 1, might be to delete the phrase "except where made *ad referendum*", which implied that there was no need for full-powers in any case of signature *ad referendum*, even in the case referred to in article 21, paragraph 2 (*c*).

33. Mr. TUNKIN endorsed the Secretary's view that full-powers were required equally for full signature and for signature *ad referendum*. He could not wholly agree that, until the moment of confirmation, signature *ad referendum* was equivalent to initialling. For example, in the case of the United Nations Conference on the Law of the Sea, 1958, there had been no need to authenticate the text, since authentication had been effected by including the conventions in the Final Act of the Conference.[1] Signature *ad referendum*, therefore, seemed to be closer to full signature and might be regarded as a provisional signature, pending government approval. As such, it could not be regarded as equivalent initialling.

34. Mr. AMADO said that signature *ad referendum* could not be equated with provisional signature or initialling. In the practice of his country, all treaties were signed *ad referendum;* signature was an act of the State, subject to the approval of the constitutional authorities.

35. The CHAIRMAN, speaking as Special Rapporteur, agreed with Mr. Ago that signature *ad referendum* could not be regarded as full signature until confirmed by the Government. During the intervening period, pending confirmation, it could be regarded only as an act of authentication. Accordingly, signature *ad referendum* could be made without full-powers; if it were held to require the same full-powers as full signature, signature *ad referendum* lost all its point. It had been designed to avoid situations in which representatives were unable to sign because they could not communicate with their Governments. Although such cases might be less frequent than in the past, owing to modern methods of communication, the essential character of signature *ad referendum* had not changed.

36. Referring to criticism of the arrangement of the articles on signature in section B, he observed that he had included those provisions in that section, and inserted further articles on signature in section C, in order to express the double aspect of signature. He had some doubt about transferring articles 22 and 23 to section C, since that might give rise to misinterpretation. It might be possible to insert a new section after section B, comprising articles 20 to 25, dealing with methods of signature. In any case, he would consider the matter further.

37. The debate on article 22 had become general and had extended to the nature of full signature, initialling and signature *ad referendum*. In connexion with articles 20 and 21, it had been agreed that many of the clauses needed redrafting. Although the position was somewhat confusing, he thought that the nature of those three acts could be generally established. The Commission would agree that initialling was solely an act of authentication, except in the cases referred to in article 21, paragraph 1. With regard to full signature, it had been decided to expand article 20, paragraph 3, to indicate all the different aspects of signature. That paragraph would meet the Secretary's main point. Apart from the cases where signature brought a treaty into force, it was generally agreed that signature always operated as provisional acceptance of the text. Additionally and simultaneously, it might operate as authentication of the text, but that was not always the case, because the text might have been authenticated in some other way, for instance, by a resolution or a final act of an international conference.

38. With regard to signature *ad referendum*, although there was a difference of opinion concerning the full-powers required, the Commission was agreed on the nature of the signature. There could be no doubt that if and when signature *ad referendum* was confirmed, it operated retroactively as full signature from the moment that it had been appended. Meanwhile, its only effect was that of authentication of the text. The Commission had agreed to redraft article 21, paragraph 2, to make it clear that initialling could never be regarded as signature.

39. The Commission had agreed to rearrange the order of sub-paragraphs (*a*), (*b*) and (*c*) of article 21, paragraph 2, and to replace the words "only justified" in that paragraph by a less categorical term. Article 21, paragraph 3, would be rearranged to correspond with paragraph 2. With regard to Mr. Yokota's question concerning references to the personal recommendations or approval of the individual signing the text (see 500th meeting, para. 13), he said the Commission had decided to omit the reference from article 20, paragraph 2, but had not reached the same conclusion with regard to article 21, paragraph 4. He would be inclined to retain the first sentence of that paragraph, redrafted in the light of other

[1] *United Nations Conference on the Law of the Sea, Official Records, Volume II: Plenary Meetings* (United Nations publication, Sales No.: 58.V.4, Vol. II), annexes, documents A/CONF.13/L.52, A/CONF.13/L.53, A/CONF.13/L.54 and A/CONF.13/L.55.

changes, but to omit the last sentence and to refer to the question in the commentary.

40. After pointing out that any remarks made henceforth on articles 22 to 25 would be without prejudice to the question of the arrangement of their provisions in the draft code, he summarized the discussion on article 22. He agreed that in paragraph 1 the words "which is the act of the State" might be open to misunderstanding and could be omitted. He also agreed to the inversion of clauses (*a*) and (*b*). He was prepared to accept the suggestion that the word "Ambassador" should be omitted from clause (*a*) but agreed with Mr. Hsu that it would be worth asking Governments to furnish information on their practice: he had the impression that many States did issue standing full-powers to their ambassadors. However, he thought that the words "Minister of Foreign Affairs" should be retained.

41. The question had been raised in connexion with paragraph 1 whether full-powers were necessary in order to sign *ad referendum*. Historically, that was not the case, for one of the main reasons for signature *ad referendum* was that the signer was not in possession of full-powers to sign. The rule was that signature *ad referendum* only authenticated the text and did not signify provisional acceptance, which was signified when the signature *ad referendum* was by subsequent ratification converted into a full signature retrospectively. He had been surprised by the Secretary's statement concerning the present practice at conferences held under the auspices of international organizations. The practice of requiring full-powers for signatures *ad referendum* was not in keeping with doctrine. If that practice had developed at international conferences, and Governments were prepared to issue full-powers for signature *ad referendum*, that was probably due to their desire for time for reflection before committing themselves to the extent of a full signature. As a solution, he would prefer to keep the general rule stated in paragraph 1 and add an exception to the effect that at international conferences full-powers to sign *ad referendum* were needed. Without such a formula, the basic utility of signature *ad referendum*, namely, for the case in which the signer did not have full-powers to sign, would be destroyed. The commentary might explain why an exception was made, to some extent set out the two schools of thought in the Commission concerning the exact effect of a signature *ad referendum*, draw the attention of Governments to the point, and ask for their comments.

42. He was prepared to omit the whole of paragraph 2. The first half of the paragraph might be included in the commentary, and the second half was redundant.

43. The first sentence of paragraph 3 could also be transferred to the commentary, although it was not entirely out of place in the text of the article. In addition, the commentary might mention the practice at international conferences of verifying full-powers. He suggested that the second sentence of paragraph 3 should be retained, subject to the drafting changes suggested by Mr. Alfaro (see para. 27 above). The remainder of paragraph 3 had not been objected to.

44. Some members had suggested the omission of paragraph 4, and he could not agree. Admittedly, there were many cases in which a statement or recital to the effect that the representative of the signatory State had authority to sign was not required, but those cases all fell within the exceptions mentioned at the beginning of the paragraph. In other cases, if such a recital was omitted from the preamble of the treaty and no statement of authority to sign appeared in the part of the treaty immediately before or after the signatures, the authority was indicated in another way, sometimes simply by the use of the word "Plenipotentiaries", as in the formula "In faith whereof the undersigned Plenipotentiaries have signed this treaty". He felt that paragraph 4 should be retained even if regarded *de lege ferenda*. It would be useful to promote the practice of including a statement of authority to sign in the treaty in order to make the validity of the signatures incontestable.

45. Mr. LIANG, Secretary to the Commission, wished to endorse the Special Rapporteur's view that paragraph 4 would be useful, particularly in the case of bilateral treaties. The practice of including a statement of authority to sign in multilateral treaties was not very often followed.

46. He wished to draw attention to two minor points. First, in the case of multilateral treaties negotiated under the auspices of an international organization, credentials indicating only that a representative had been appointed as "Plenipotentiary" to the conference would be insufficient for the purpose of signature. The credentials would have to specify that he had been authorized to sign, for the word "Plenipotentiary" might refer only to full-powers to negotiate, or simply to attend or observe the conference. Secondly, he failed to grasp the significance of the words "or other cases where authority is implied by the act of signature". The other exceptions indicated at the beginning of paragraph 4 referred to the office of the person signing, which would make a recital of authority to sign superfluous, or to certain types of instruments which by their nature precluded the inclusion of such a recital. The words in question might be omitted.

47. Mr. AGO said that he agreed with the Special Rapporteur's summary and suggestions regarding article 22. He wished to point out, however, that in a previous statement (see 500th meeting, para. 26) he had not suggested the deletion of paragraph 4 and had not opposed the idea of including a kind of recommendation in that paragraph. His concern had been that a formula should not be used which would place in doubt the validity of a treaty in which a statement of authority to sign happened to have been omitted, although the plenipotentiaries, in fact, possessed that authority. The paragraph should be drafted in terms of the verb "should" rather than the verb "must".

48. In connexion with the Special Rapporteur's suggestion regarding a redistribution of the provisions in various articles, he observed that it would help to clarify the situation if the new version could be presented as soon as possible. The Special Rapporteur had chosen to deal with the various aspects of the treaty-making process in the logical order of the different stages. He (Mr. Ago) approved of that choice. Nevertheless, whatever system was adopted, it would not be possible to avoid dealing with certain established practices, such as signature, in connexion with more than one stage in the treaty-making process; he hoped, however, that the Special Rapporteur would do his best to avoid references to signature in the new section on authentication, reserving them for the new section on provisional acceptance. Initialling and signature had quite different implications and should be treated separately as much as possible.

49. The CHAIRMAN, speaking as Special Rapporteur, said that he would prepare a rearranged draft as soon as he could. He suggested that article 22 should be referred to the Drafting Committee on the basis he had

indicated and on the further understanding, in view of the observations just made, that in paragraph 4 a clause or sentence would be inserted to the effect that the absence of a statement of authority to sign would not affect the validity of the treaty if the necessary full powers to sign had in fact existed, that the words "is implied by the act of signature, or" would be omitted, and that the paragraph would be amended to take into account the Secretary's comment on the word "Plenipotentiaries".

It was so agreed.

The meeting rose at 1 p.m.

502nd MEETING

Wednesday, 27 May 1959, at 9.50 a.m.

Chairman: Sir Gerald FITZMAURICE

Law of treaties (A/CN.4/101) (*continued*)

[Agenda item 3]

ARTICLE 23

1. The CHAIRMAN, speaking as Special Rapporteur, introduced article 23 and said that its principal application would be to a signature or initialling executed by a representative without the authorization of, and perhaps without communication with, his Government. It might be argued that the article was not strictly necessary if the earlier provisions regarding the validation of initialling and signature were retained.

2. Mr. FRANÇOIS thought that it might be useful to specify whether *ex post facto* validation dated from confirmation or was retroactive to the date of the unauthorized act.

3. The CHAIRMAN, speaking as Special Rapporteur, said that the operative date would depend on the nature of the unauthorized act that was validated. In the case of initialling it would be the date of full signature, and in the case of unauthorized signature, in effect a signature *ad referendum*, the validation would be retroactive to the date of the unauthorized signature.

4. Mr. PAL said that subsequent validation of an unauthorized act could not produce an effect greater than that which would have resulted if the act had been authorized. In his view the article was necessary in the code.

5. Mr. SANDSTRÖM also felt that the article was necessary. He failed to see the need for specifying from what date the validation became operative, since the unauthorized acts themselves produced no effect between the parties.

6. Mr. TUNKIN questioned the utility of article 23 in view of the Commission's decision to omit from articles 20 and 21 the references to personal approval and personal recommendation of the treaty on the part of the individual person signing or initialling.

7. The CHAIRMAN, speaking as Special Rapporteur, explained that article 23 related to acts performed by a representative without the knowledge or authorization of his Government, perhaps in an emergency; the representative's personal approval or recommendation was immaterial in the context.

8. Mr. TUNKIN said the Special Rapporteur's explanation had not convinced him. It was self-evident that a Government could decide to sign an agreement negotiated by an agent without its authorization or even negotiated by an unofficial organ.

9. Mr. LIANG, Secretary to the Commission, agreed that it might be useful to include an article such as article 23. It rested on a principal of the law of agency which, he thought, had common elements in the legal systems of all civilized States.

10. He suggested, however, that the words "The provisions of articles 15 to 22 above" were too general and that the relevance of article 23 to specific aspects of the treaty-making process should be made more evident.

11. The CHAIRMAN, speaking as Special Rapporteur, saw no objection to the Secretary's suggestion and subject thereto he suggested that article 23 should be referred to the Drafting Committee.

It was so agreed.

ARTICLE 24

12. The CHAIRMAN, speaking as Special Rapporteur, introduced article 24. There was no need for comment on paragraph 1, which might be improved through minor drafting changes.

13. The principle in paragraph 2 became more obvious, the smaller the number of States participating in the negotiations, and was most clear, of course, in the case of bilateral treaties. On the other hand, it tended to become obscured in the case of large international conferences and there it might be thought that any State could subsequently sign the treaty. In his view, unless the treaty contained a provision admitting other States to signature, signature of the treaty would be limited to the negotiating States unless they decided by another agreement to open the treaty to other States. In the case of a treaty that had been signed or where the period for signature by the negotiating States had expired, the expression "signatory States" would denote not the original negotiating States but the parties to the agreement opening the treaty to other States.

14. Mr. LIANG, Secretary to the Commission, considered article 24 a useful article that should be included in the code. He said that the discussion on the articles immediately preceding article 24 had emphasized that signature was evidence not only of authentication but also of provisional acceptance. He suggested that the second part of paragraph 1 should be deleted.

15. He had no quarrel with the principle in paragraph 2, which, in his view, was recognized in practice. However, he considered the wording insufficiently flexible. If there was a stipulation in the treaty concerning the right of signature by States other than those which had participated in the negotiations, the matter was settled satisfactorily. In the absence of such a provision, the matter was subject to agreement by the negotiating States and not the signatory States, for a negotiating State might agree that States could sign without itself being able to sign. He suggested that paragraph 2 after the word "provides" might be amended to read: "or if it is agreed by all the negotiating States that other States may sign either at the time of signature provided for in the treaty, or during the period the treaty remains open for signature".

16. The CHAIRMAN, speaking as Special Rapporteur, agreed that it might be better to omit from paragraph 1 the words "in all cases where signature is the method of authentication adopted", and he also agreed

that the words "or if this is agreed" in paragraph 2 were not quite adequate because they referred to an agreement outside the scope of the treaty. Furthermore, the words "if it so provides" should be amended because some treaties, instead of specifying the non-negotiating States eligible to sign the treaty, specified a category of States as entitled to become parties.

17. As to the Secretary's other point, he thought that it was covered by the words "or (where the treaty remains open for signature) negotiating States".

18. Mr. TUNKIN said that if the code contained an article on the right to sign, it would also have to contain articles on the right to initial, the right to ratify, the right to deposit instruments of ratification and so forth. Article 24 raised the serious problem of the right to participate in a treaty; if that could be settled, the right to participate in the various stages of treaty-making would probably not have to be dealt with separately.

19. The first question was whether one group of States had the right to exclude all other States from participating in a treaty which dealt with a problem of general interest. One of the fundamental principles of modern international law was that of the equality of States, from which it followed that all States had equal rights to participate in settling problems which were of general interest. That principle should be embodied in the code.

20. The CHAIRMAN, speaking as Special Rapporteur, said that without commenting on the merits of a general article on the right to participate, he did not think that such an article could adequately deal with the right to sign, the right to ratify and the right to accede, since each of those rights was exercised under different conditions. In that connexion, he drew attention to articles 31 and 34.

21. Mr. YOKOTA said he could accept article 24 in principle and had no objection to paragraph 1. He pointed out that whereas paragraph 1 related to signature as a method of authentication, paragraph 2 dealt with signature as a method of provisional acceptance.

22. The words "in principle" in paragraph 2 were vague. The expression might mean that the right of signature was confined to the States participating in the negotiation, subject to the exception specified in the paragraph. On the other hand, it might mean that there were some exceptions, not specified, to the rule that States participating in the negotiations had the right to sign. If the first meaning was intended, it would be better to omit the words "in principle".

23. He doubted whether all the States participating in the negotiation of a treaty had an absolute right to sign. Treaties adopted at international conferences usually provided for signature by a certain date or within a certain period, and if a negotiating State failed to sign within the time specified, it did not thereafter have the right to sign. Perhaps it might be advisable to insert the words "except where the treaty otherwise provides".

24. The CHAIRMAN, speaking as Special Rapporteur, agreed to the omission of the words "in principle". Commenting on Mr. Yokota's second point, he said that all the negotiating States had the right to sign but any of them might choose not to exercise it. The point was dealt with in article 25.

25. Mr. AGO said that he would not discuss the substance of the very interesting question raised by Mr. Tunkin. The Commission might continue with its first reading and then consider whether a separate section of the code should deal with the right of participation of States in certain types of treaties.

26. As in the case of a previous article, he suggested that the words "faculty to sign" might be better than "the right to sign" in article 24.

27. With regard to paragraph 2, he had some doubts concerning the words "or if this is agreed to by all the original signatory or . . . negotiating States", and specially concerning the word "all". If a treaty was negotiated at an international conference, surely the participants in the conference could decide, by the same majority by which the treaty had been adopted, to permit other States which had not participated in the conference to sign the treaty; similarly, in the case of a conference called by an international organization the latter could surely make a like decision by a majority.

28. Mr. FRANÇOIS thought article 24 should contain a provision on the right of new States to sign a treaty even if the treaty was silent on the question. The code should regulate the manner in which States which had not been in existence at the time of the negotiation of a treaty could participate.

29. In that connexion, he asked whether the agreement of all the original signatory or negotiating States, as the case might be, was always necessary for the admission of new signatories. He had in mind treaties of long standing such as some of the Hague Conventions, which some of the original signatory States had not ratified after many years. He understood it was the practice of the Netherlands Government, as depositary of certain of those treaties, which contained no accession clause, to ask the consent of all the *parties*, in other words of all States which had *ratified* the treaty, when new States signified a desire to accede.

30. The CHAIRMAN, speaking as Special Rapporteur, said that a problem arose only where there was no accession clause in a treaty. He agreed, however, that the word "all" in paragraph 2 was too categorical and that the paragraph should be amended in the light of the remarks of Mr. Ago and Mr. François.

31. Mr. BARTOŠ observed that a striking example of the way in which a conference in which a large number of States participated might leave it to certain States to draw up the final draft of a treaty was the meeting of Foreign Ministers in Paris and New York in 1946 to draw up the Peace Treaties. The four great Powers and not the States which had been directly concerned had taken their own decisions and had drafted the text, and the other participants had subsequently signed it. That example raised the question whether the right to sign for the purpose of authenticating a text might be confined to the States which drew up the final text or whether all participants had that right. The occasion he had mentioned had been, in a sense, a derogation from the principle of the equal sovereignty of States, but the participants had accepted it. He endorsed, however, the principle embodied in article 24, paragraph 1, and would not suggest any amendment, but he suggested that the contrary example he had given should be mentioned in the commentary.

32. While agreeing with the principle of paragraph 2, he was doubtful if States which had not participated in the negotiations were eligible to sign for the purpose of authenticating the text. A clause dealing with cases where the original signatories had the exclusive right to authenticate the text and to participate in the treaty might be inserted in section C of the code. Paragraph 2

might require some redrafting, but the principle was sound.

33. Mr. PAL pointed out that the important question to be settled was what States had a right to participate in a treaty, and by what method. The method was dealt with in article 27, but the right to participate was nowhere stated, although the right to sign was in fact simply a consequence of that right. States which had not participated in the negotiations obviously had no right to sign for the purpose of authenticating the text. A clause dealing with the right to participate in a treaty, taken in conjunction with the article on the methods of participation, would logically determine what States had the right to sign.

34. The CHAIRMAN, speaking as Special Rapporteur, replied that it would certainly be possible to include a general article on the right to participate in a treaty, although that would not dispense with the need for separate clauses concerning the right of signature, the right of participation and the right of accession, since there were only three methods of participating in a treaty—signature, signature and ratification, and accession. That was why he had dealt with the matter under separate headings.

35. The Paris Peace Treaties of 1946 referred to by Mr. Bartoš had been very exceptional and the instance was unlikely to recur. Even for them, however, article 24 was strictly correct, since the negotiating States had been only the four Powers which had drawn up the text. The other States had been convened in conference, but, under the conference rules, they had had the right only to recommend or suggest changes in the basic draft, and it had been open to the Foreign Ministers of the four Powers either to accept or to reject those changes. The final text had been opened for signature in Paris.

36. Mr. Bartoš seemed to have misunderstood paragraph 2. It was improbable that there could be any case in which a signature only authenticated the text without also signifying provisional consent to it as a potential basis of agreement. Signature would always confer the right to ratify and so to participate in the treaty. It would, therefore, be impossible to permit States other than the original States to sign solely for the purpose of authenticating a text, and, in any case, authentication was essentially an act of those States which had participated in the negotiations, since they alone knew how the text had been established.

37. Mr. BARTOŠ agreed with the Special Rapporteur's remarks concerning paragraph 1. Only States participating in the final drafting could in fact be considered as participants in the negotiations. He had simply recalled a notable exception, which, he agreed, was unlikely to recur.

38. He agreed that he had misinterpreted paragraph 2, but thought the misunderstanding was due to the drafting; and if the drafting had confused a member of the Commission, it would be even more likely to confuse a jurist outside it.

39. The CHAIRMAN, speaking as Special Rapporteur, agreed with Mr. Bartoš that paragraph 2 needed redrafting. It was clear too, that the reference to authentication in paragraph 1 should be omitted.

40. Mr. TUNKIN said that the discussion had shown that the real problem was that of the right to participate in the treaty. Mr. Pal had correctly stated that signature should be considered as one specific mode of exercising the right to participate.

41. Paragraph 1 as drafted dealt only with signature as a mode of authentication and was thus logically placed in section B; but if the reference to authentication was omitted, the substance would be changed and signature would be regarded as a mode of participation in the treaty. Such a provision, however, would go beyond the framework of section B and the article would have to be moved. Logically, it would be far preferable to deal with the right of participation in a single article or section.

42. The CHAIRMAN, speaking as Special Rapporteur, said that Mr. Tunkin's point would be met if—as he was proposing to do—articles 20 to 25 were removed from section B and placed either in a separate section or in section C.

43. There seemed to be general agreement on the right, or absence of right, to participate in a treaty. That could be dealt with either by an article on participation as such or separately, in connexion with signature, ratification and accession, as in the present draft.

44. He accepted Mr. François's argument that there was no unilateral right to participate and that there must be some control over participation, and agreed with his main concern with the method of exercising the control and his view that it would go too far to require the consent of all the original signatories to the admission of new signatories. That point could, however, be met simply by drafting suitable clauses.

45. Mr. Tunkin's point was far more fundamental; he contended that any State had a unilateral right to participate in a treaty of general interest, whether it had participated in the negotiations or not and regardless whether it fell into the class of States envisaged by the treaty. That point required further discussion.

46. Mr. LIANG, Secretary to the Commission, drew attention to Mr. Ago's important point that if a State which had not participated in the negotiation wished to participate in a treaty, it might not be necessary to require all the original signatories to agree to permit it to sign the instrument. A conference might decide by a majority vote to invite a State which had not participated in the negotiations to sign the text. If that was done by resolution, then patently the vote did not have to be unanimous.

47. Article 24, paragraph 2, should be supplemented to cover the practice growing up in conventions concluded under the auspices of the United Nations. For example, article 26 of the Convention on the Territorial Sea and the Contiguous Zone[1] provided that States Members of the United Nations or of any of the specialized agencies might sign, and delegated authority to the General Assembly to invite any other State to become a party, although it might not have participated in the Conference. That was not the first occasion on which a conference held under United Nations auspices had adopted such a practice. The Commission's text might take that new procedural development in the United Nations into account.

48. Mr. BARTOŠ said that, as Mr. François had pointed out, there was a distinction in international practice between original signatories and subsequent

[1] *United Nations Conference on the Law of the Sea, Official Records, Vol. II: Plenary Meetings* (United Nations publication, Sales No.: 58.V.4, Vol. II), annexes, document A/CONF.13/L.52, pp. 132-135.

adherents to a treaty. Nevertheless, a new practice—described by the Secretary—had been evolved by United Nations conferences whereby conventions opened for signature might be signed by States which had not participated in the negotiations; under that practice, non-member States of the United Nations might participate in the signature of authentication, thus becoming original parties to the treaty adopted by such a conference. Accordingly, the distinction between phases of participation made by the Special Rapporteur was not as clear now as it had been in traditional practice, and the points raised by Mr. François, Mr. Pal, Mr. Tunkin and Mr. Ago should be taken into account. Theoretically, the principle as drafted by the Special Rapporteur was correct, but it did not conform with modern practice. The new development in international law should be reflected, either in article 24 or in the subsequent articles on participation in section C.

49. Mr. YOKOTA considered that the right to participate in the negotiation of a treaty and in the treaty itself should be distinguished from the faculty to participate. Every State with treaty-making capacity had the faculty to participate in the negotiation of a treaty that was of a general character and so affected the interests of all members of the international community. Nevertheless, it could not be said that every State had a right to become a party to such a treaty; the right *stricto sensu* was confined to the States which participated in the negotiations or were admitted to participation in the treaty by a provision in the treaty itself or by the consent of the original signatory or ratifying States. Similarly, so far as participation in negotiations or in a treaty-making conference was concerned the States which initiated the negotiations or conference could decide what States should be invited. An analogy might be drawn with the right or faculty to establish diplomatic or consular relations. Every State had the faculty to establish such relations by mutual consent, but it could not be asserted that a right in the matter existed, since no State could demand the consent of the other State.

50. Mr. HSU did not think that the Special Rapporteur would be able to draft a satisfactory rule to meet the points raised by Mr. François and Mr. Tunkin. In any case, he did not think that the absence of such a rule would have any adverse effects. The situation envisaged by Mr. François was unlikely to last for very long and would arise in the case of very few treaties. With regard to Mr. Tunkin's point, he said that treaties dealing with questions of general interest to the community of nations were so far-reaching that the question whether or not certain countries could become parties to them would be immaterial; acceptance by a large proportion of the countries of the world would ensure that no country would be penalized by non-participation. In his opinion, the principle set forth in article 24, paragraph 2, was sound, and would ensure that in future provisions concerning the participation of non-negotiating States in treaties of a general character would be inserted in the treaties themselves.

51. Mr. SANDSTRÖM said that—if he had understood him correctly—Mr. Ago had asked whether, in the case of a request by a country to accede to a treaty after signature, the majority rule would still apply if the treaty contained no accession clause or if, in the case of a treaty containing such a clause, the time limit for accession had expired. He believed that, in that case, the negotiations should be deemed to be exhausted and the contractual relations fixed; the situation could not therefore be changed without the consent of all the parties. That was the solution provided for in the Special Rapporteur's draft, and he wholly endorsed it.

52. Mr. FRANÇOIS observed that his point could be met simply by stipulating that, in the case of treaties already in force, the consent of the States which had ratified the treaty would be required for the participation of new States, while in the case of treaties not yet in force, the consent of the signatories must be obtained.

53. While he understood Mr. Tunkin's point of view, he doubted whether it was possible to prohibit sovereign States from concluding a treaty restricted to participants in the negotiations. True, Mr. Tunkin had spoken of treaties of a general character; but it was not always clear whether a treaty was "general" or not. States must have the right to conclude regional treaties and also to restrict the circle of the participants in other cases. A rule such as that envisaged by Mr. Tunkin would be very difficult to formulate. Did Mr. Tunkin mean that restriction of participation should never be allowed? Or did he mean that, if a treaty contained no restrictive participation clause, it should be assumed that all States could accede to it? In any case, if such a rule were formulated in the code it might be applicable to future treaties, but scarcely to existing ones.

54. Mr. LIANG, Secretary to the Commission, replying to Mr. Sandström's remarks, said that he had not understood Mr. Ago to go so far as to say that new States could be invited by a majority of the negotiating States to participate in a treaty after the time limit for signature or accession had expired. He thought that Mr. Ago had referred to a situation where the negotiating States at a conference might decide by a majority to invite specific States which had not participated in the negotiations to sign the treaty. In that case, the conference voting rules would be applicable, but after the treaty had been finally concluded, the conference procedure could no longer be applied.

55. He also drew attention to the case of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948. Many countries had signed the Convention at the time of its adoption, and in accordance with a provision in the Convention the General Assembly had invited States which had not participated in the negotiations to sign the Convention. That procedure was implicity covered by the words "other States may be admitted to sign the treaty if it so provides" in the Special Rapporteur's draft of article 24, paragraph 2. As he had stated, a similar provision was made in article 26 of the Convention on the Territorial Sea and the Contiguous Zone.

56. He agreed with Mr. François that in the case of existing treaties it might be necessary to consult all the parties to a treaty, with a view to obtaining their consent to new accessions.

57. The CHAIRMAN, speaking as Special Rapporteur, said that in the light of the discussions he had prepared draft provisions which, he suggested, should be inserted in article 24:

> "1. Where the treaty specifies the States or categories of States which are entitled to participate in it, then only those States or categories of States can so participate. Where the treaty specifies the method or methods whereby the participation of other

States can take place, then such participation can only take place through those methods.

"2. Where the treaty does not so specify and contains no general accession clause, then the participation of other States can take place by the consent of the parties to it, if the treaty is in force, or, if the treaty is not in force, by consent of the signatory States."

58. A possible variation of that text would be to provide for some majority in the last phrase.

59. He agreed with Mr. Sandström that, if a treaty specified the parties, the contractual relationship had become fixed and the question of the admission of additional parties could not be reopened. Fresh negotiations would be necessary concerning the admission of newly-created States. In the case of certain old treaties which contained no accession clause, the problem of admitting new parties was subject to the consent of the parties, if the treaty was in force, or of the signatories if it was not in force.

60. Mr. BARTOŠ considered the Special Rapporteur's draft clauses satisfactory, because they took into account the United Nations practice of determining the States which could sign treaties although they had not participated in the negotiations. Despite the general trend towards universal co-operation, States did not have the absolute right to participate in all treaties. The States Members of the United Nations and members of the specialized agencies had the right to participate in treaties concluded under the auspices of those organizations, but they had not yet lost the capacity to enter into treaties outside the organizations, even treaties of general interest, with whatever States they chose.

61. Mr. TUNKIN, replying to Mr .François, said that the problem he had raised for the Commission's consideration was important and very complicated; it should not therefore be over-simplified and merely reduced to the question whether or not States had an absolute right to participate in every treaty. It was obvious that that right was absent in the case of bilateral treaties. In the case of multilateral treaties, however, it was questionable whether any State or group of States had the right to settle by treaty problems which were of interest to certain other States and to exclude them from participation or negotiation. While he would not press for a decision now, he wished to draw the Special Rapporteur's attention to the question, since it would inevitably arise in connexion with subsequent articles.

62. Mr. GARCIA AMADOR thought that the question was one of fundamental rights and that it was scarcely possible to draw up an acceptable article within the context of the law of treaties. The concept of an inherent right of every State to participate in treaties of "general interest" was extremely vague. Although some interests could be regarded as undeniably general —for example the law of the sea—it was not always easy to decide at what point an interest ceased to be "general" and become particular. For example, certain American regional treaties dealt with matters of general interest to the States of the region, but others touched on matters of more than purely regional interest. In such cases, it was difficult to say categorically what States were entitled to participate.

63. Mr. EL-KHOURI agreed with Mr. Tunkin that the question referred to in article 24 was an extremely complicated one. The Special Rapporteur had found it difficult to solve the problem of the right of States to sign treaties; it would be even more difficult, however, to draft a provision which took into account the duties of States in that respect, since it would touch on State sovereignty. Yet, surely there was no right without a corresponding duty.

The meeting rose at 1 p.m.

503rd MEETING

Thursday, 28 May 1959, at 10 a.m.

Chairman: Sir Gerald FITZMAURICE

Law of treaties (A/CN.4/101) (*continued*)

[Agenda item 3]

ARTICLE 24 (*continued*)

1. Mr. ALFARO considered that the new draft provisions suggested by the Special Rapporteur at the previous meeting (502nd meeting, para. 57) provided a good solution for the problem mentioned by Mr. François, concerning accession to existing treaties. He was sure, however, that the Commission could not envisage drafting an article on the purported right to participate in certain treaties, since no right to participate in a treaty could exist. There was no right without a corresponding obligation, and in international law there was no rule making it the duty of a State or group of States to accept another State as a party to a specific treaty. If a group of States wished to conclude a treaty affecting the interest of a State that was not invited to participate, the only course open to the latter was to declare that the treaty, if concluded, would be *res inter alios acta* and hence incapable of affecting that State in any way. Mr. Yokota had drawn an analogy with the "right" to establish diplomatic relations; the Commission had agreed that no such "right" existed, since the establishment of such relations was subject to mutual consent.

2. The CHAIRMAN, speaking as Special Rapporteur, thought that the first part of article 24, paragraph 1, should be retained and that the provisions he had suggested at the preceding meeting should replace paragraph 2. The Commission might decide to send the article to the Drafting Committee.

3. The only point that remained to be settled was whether the idea of consent by a majority of the existing parties to the admission of a new party should be introduced. Theoretically, if the unanimous consent of the existing parties was required, two or three parties could exclude a new State by withholding their consent. He thought that if a majority of three-quarters or two-thirds were established, that would be enough to ensure general approval, but would prevent any one State from exercising a veto. That idea might be referred to the Drafting Committee.

4. Mr. TUNKIN thought that in paragraph 2 the passage "The right . . . but" should be omitted and that the paragraph should begin with the words "Other States may be admitted to sign . . .". It would be more progressive to lay down no specific rule concerning the right of signature but to leave the matter to the parties concerned. The problem of unanimous or majority consent raised some doubts, in cases where

treaties contained no accession clause. In any case, most modern multilateral treaties contained such a clause.

5. The CHAIRMAN, speaking as Special Rapporteur, observed that his new draft provisions related only to treaties containing no accession clause. If such a clause existed, there was no need to seek the consent of the parties. He thought that his suggested substitution for paragraph 2 would meet Mr. Tunkin's point.

6. Mr. LIANG, Secretary to the Commission, thought that, with regard to the Hague Conventions cited by Mr. François (502nd meeting, para. 29), the procedure of consent by a two-thirds majority was sound in principle. The only obstacle to that procedure lay in the fact that the nature of the original treaties would then undergo a change as far as the parties were concerned. An analogy in municipal law was that, when the parties to a contract changed, a new contract came into existence, and that was the institution of "novation" in Anglo-American law. The question in relation to treaties concluded under the auspices of international organizations was somewhat simpler. For example, the General Act of Geneva, of 26 September 1928, had been revised at the third session by the United Nations General Assembly, which had—by its resolution 268 A (III)—prepared a new instrument, to which additional States could become parties. He did not see on what basis a new procedure in regard to the Hague Conventions was justified, except *de lege ferenda*. So far as positive law was concerned, the procedure adopted by the Netherlands Government in the case of the Hague Conventions was the only possible one.

7. Mr. FRANÇOIS said that the Special Rapporteur's new draft fully met the point that he had raised. He had again consulted the Hague Conventions and had found that only the Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes contained no accession clause, since the agreement, provided for in articles 60 and 94, respectively,[1] had not been concluded.

8. Mr. SCELLE considered that article 24 as originally drafted stated a rule of classical law which had in practice been exceeded. Paragraph 2, in particular, related to the sovereign right of States to conclude treaties and to exclude any other States from participation. That procedure was a doubtful one under international law, since it implied ill-will against the State debarred from participating. But so long as the principle of absolute sovereignty was accepted there was no remedy against the practice. Some progress was, however, being made in the case of multilateral treaties and paragraph 2 therefore referred to a state of affairs which was gradually disappearing.

9. It was true that, in principle, participation in treaties—in the generic sense—was confined to the States participating in the negotiation. Nevertheless, law-making treaties creating rules of international law, which related to matters of general interest, usually contained accession clauses. He agreed with Mr. Tunkin that the opening passage of paragraph 2 was not correct so far as multilateral treaties of general interest were concerned. While the statements in paragraph 2 were correct in principle, they had become obsolete in view of the emergence of international organizations and, in practice, if a State could not send representatives to a treaty-making conference, that circumstance should not prevent it from acceding to and ratifying the treaty.

10. Mr. SANDSTRÖM agreed with Mr. Scelle's views. Certain treaties by their very nature required universal agreement. If such treaties contained no accession clause, it could be assumed that new States would be admitted to sign. However, the formal question whether a new State was recognized as such might arise, and in that case it was for the parties to decide whether such a State could accede to the treaty.

11. The CHAIRMAN, speaking as Special Rapporteur, said he hoped that his redraft of article 24 would meet the point raised by Mr. Scelle and Mr. Sandström.

12. Mr. AGO suggested that the automatic right or faculty to sign should be extended to all States originally invited to participate in the negotiations. It might happen that a State invited to a conference decided not to attend, but subsequently found that it could sign the resulting treaty. The fact that it had been invited seemed to imply the consent of the parties to the signature of that State.

13. He fully understood Mr. Scelle's difficulty. On the one hand, it was essential for the largest possible number of States to be able to accede to universal conventions. On the other hand, it was impossible to foresee all the possible reasons for the exclusion of certain States. Accordingly, a provision to the effect that any State could accede to a treaty which was general in character might raise very serious difficulties.

14. Mr. SCELLE agreed in principle with Mr. Ago, but thought that his suggestion did not eliminate the difficulty. As international organizations were being set up, their authority was gradually replacing the absolute sovereignty of nations. The condition of unanimous consent laid down in paragraph 2 was, in effect, a statement of the principle of absolute sovereignty, which was a source of anarchy in international relations.

15. Mr. ALFARO thought that Mr. Ago's suggestion was logical. By being invited to participate in negotiations a State had an implied right to sign the treaty. In his opinion, the suggestion was applicable to the case of multilateral treaties negotiated under the auspices of international organizations. In those cases, it was quite natural that, as members of the international community, States, even if they had not participated in the negotiations, should be able to sign treaties relating to universal questions on the same footing as the participants in the negotiations.

16. Mr. YOKOTA considered that the question of the admittance of new States to sign was complex, in the absence of an accession clause. The Special Rapporteur had suggested that the consent of two-thirds of the parties might be sufficient for such admittance. Difficulties might arise, however, in the case of a newly-created State which had not yet been recognized by certain other States. The two-thirds of the parties which had recognized that State might agree to admit it to sign the treaty, but the remaining one-third which had not recognized that State would object to it. Under the circumstances, it would be highly doubtful whether that one-third should be obliged to admit the new State as a party to the treaty. The Commission should exercise great caution in formulating a provision which would in fact constitute a new rule of international law.

[1] See *The Hague Conventions and Declarations of 1899 and 1907*, James Brown Scott (ed.) (New York, Oxford University Press, 1918), p. 79.

17. Mr. FRANÇOIS thought that Mr. Ago's suggestion was quite acceptable and corresponded to a practice dating back to the time of the Second Peace Conference at The Hague, of 1907, as shown by article 94 of the Convention for the Pacific Settlement of International Disputes.

18. Mr. Yokota had raised a difficult question with regard to recognition. There was a school of thought which held that participation in a multilateral convention more or less implied recognition of all the other parties; although that thesis had been contested, it was nevertheless generally admitted that joint participation in a treaty established a relationship which was not compatible with strict non-recognition. It was therefore hard to admit the participation of a State which was not recognized by a large number of other States. It would be difficult to include in the code a provision stating that conventions on matters of general interest should be open to all entities which claimed to be States and wished to participate.

19. Mr. TUNKIN thought that Mr. Ago's suggestion (see para. 12 above) was acceptable.

20. He agreed with Mr. Scelle and Mr. Alfaro that under modern international practice the right of signature was no longer confined to the participants in the negotiation. So far as universal treaties were concerned the modern rule was that every State was capable of participating. Universal treaties were intended to create rules of international law which might be accepted by, and be binding upon, all States; it was therefore only logical that all States should have the right to participate in such treaties. He considered it advisable, in order to maintain the principle of the equality of States, to mention universal treaties specifically in the code and to provide that all States could participate in them.

21. Mr. Yokota's views on recognition seemed to be based on the theory that a subject of international law existed only if recognized. That theory was obsolete. Recognition did not create a subject of international law, but was merely declaratory. There was no connexion between recognition and the right to participate in treaties.

22. Mr. SCELLE did not believe that recognition had no influence on the right to participate in treaties. He noted, however, that "recognition" was being referred to by some members as though it was an absolute and indivisible concept and as though there was no difference between *de facto* and *de jure* recognition. It was perhaps fashionable in modern times to confuse the two; in his opinion, however, the view that *de facto* recognition was equivalent to *de jure* recognition was inadmissible, for it meant that any State or Government, however dubious its origins, must be recognized on the principle that it could not be excluded from relations between nations. The only valid form of recognition was *de jure* recognition, for *de facto* recognition might be withdrawn in certain circumstances, since it was prompted only by necessity or, perhaps, expediency. For instance, the temporary sovereignty of Italy over Ethiopia had been recognized by some States, which had subsequently withdrawn that recognition. In that case, the correct act, obviously, had been the withdrawal, and not the recognition. *De facto* recognition was an act of mere expediency. He hoped that the Drafting Committee would take his remarks into account.

23. Mr. BARTOŠ agreed in principle with Mr. Ago's suggestion. The accession of new States to existing treaties was not a simple question. There were no precise rules in practice, not even in the practice of the United Nations. Inasmuch as the Secretary-General did not have the right to decide, on its merits, the question of accepting a subsequent signature or ratification, the practice of automatically notifying all communications concerning such matters was widely followed. Those obliged to study the effects of that practice could see that the situations encountered were very different. In the case of India, for example, the former sovereign State and the newly-created State had settled between themselves the question of the effects of pre-existing treaties by declaring that all such treaties continued in force, without asking the other parties to those treaties whether or not they accepted.

24. On the other hand, there were cases of new signatures, new accessions, on the part of the newly-created State, and in the case of Malaya, the new State had reaffirmed the actions of the former sovereign State. According to certain jurists of the new Asian and African States, that method constituted not only a new signature or accession, but also a confirmation of an existing position, it being asserted that the change of sovereignty had caused no change from the point of view of the situation of the territories concerned—formerly possessions and now States—in the system of treaties. Other jurists, on the other hand, found that a new contractual bond was involved and that the former obligation no longer existed, but that a new obligation had been created. He noted that it was not universally agreed among jurists that a newly sovereign State could be deemed to have been a party to a pre-existing treaty.

25. Referring to the question of the recognition of States, he said that he was not firmly convinced that a State became a subject of international law through recognition. He was an advocate of the declaratory theory of recognition and not of the constitutive theory. But it was the generally accepted view that one of the conditions to be fulfilled by the new political entity was that it must be willing to respect the fundamental principles of international law, in spite of the fact that it had not participated in the creation of those principles. How could a State show its approval of certain rules of international law established in the contractual form and contained in treaties? The only possibility was to declare its acceptance of the obligations resulting from such treaties. If all agreed that a newly-created State had to accept the existing system of international law, how could it signify such acceptance if it was denied the means of doing so?

26. That was the crux of the question raised in Mr. Scelle's statement concerning the admission of certain States to the international community by means of recognition and their exclusion by non-recognition. The problem was whether one could eliminate them from the international community and then hold them responsible for the non-application of the rules of international law.

27. The most obvious example was that of China. Two Governments claimed the exclusive right to govern China, and adherents of those Governments supported those claims politically and diplomatically. However, in his opinion there existed, in fact, two Governments and two States. In that connexion, he noted that the Geneva Conventions of 1949 for the protection of war victims had been signed by both Governments of China, and so had the World Postal Convention, although the

United Nations Secretariat took the view that that Convention concerned territories and not States.

28. He had raised only some of the difficulties encountered in the complex problem of the relationship of recognition to the law of treaties. It was a problem that the Commission could not ignore and on which it could not decide without a very thorough study. It might be possible to avoid it in connexion with section B, but it would have to be dealt with in detail when section C was examined.

29. The CHAIRMAN urged members not to stray too far from the subject. The question of the devolution of treaty rights and obligations, for example, was more properly connected with the law of State succession than with the law of treaties. He saw no reason why the Commission could not agree on a text which would not prejudice any question of recognition or State succession.

30. Mr. AGO said that, in connexion with Mr. François's point (see para. 18 above), the problem had been raised whether or not a decision that all States would have the possibility of automatically acceding to certain types of treaties would give rise to difficulties owing to the question of recognition of States. He was happy to find himself and Mr. Tunkin holding the same view, namely that recognition had nothing to do with the international personality of a State, that a State existed on bases other than recognition. However, he wished to point out to Mr. Tunkin that, so far as treaties were concerned, the effect of their common view of recognition would be exactly opposite to that suggested by Mr. Tunkin.

31. If a State, in spite of its not being recognized, was automatically entitled to sign certain treaties, it would thereby enter into treaty relations with the non-recognizing States, which by refusing to recognize it had signified their intention not to enter into any relations with it other than those required by the general and customary rules of international law, in other words, not to enter into treaty relations. The suggested rule of automatic participation would thus conflict with the very essence of non-recognition.

32. On the contrary, no problem existed for those who accepted the theory that recognition was constitutive of the rights and duties of statehood: in that case, an unrecognized State could not sign because it did not exist as a subject of international law unless it was recognized.

33. Apart from the difficulties caused by the question of the recognition of States, there were problems arising from the question of the recognition of Governments. Whatever the reasons, good or bad, for which an international organization recognized one of two Governments as the Government of a particular State, it would be an obvious contradiction to require that international organization to accept the signature of the other Government, which it did not recognize, to a convention negotiated at a conference convened by the organization.

34. Again, there was the question of the effect of measures ordered under Article 41 of the Charter: Would a State with which Members of the United Nations had broken all relations on orders of the Security Council be entitled to sign a convention negotiated at a conference organized by the United Nations?

35. Those were only some of the problems that occurred to him. While it was quite correct to attempt to open treaties to the largest number of members of the international community, circumstances, as Mr. Yokota had said, imposed upon the Commission a certain rule of prudence in the pursuit of that aim.

36. Mr. PADILLA NERVO thought that it would be very difficult to devise a general rule concerning the accession of new States that would adequately cover the cases of bilateral, plurilateral and multilateral treaties. He asked the Special Rapporteur whether it would not be possible to redraft article 24 in such a way as to deal with the three cases separately. In the case of bilateral treaties there was no problem. Plurilateral treaties, negotiated for a specific purpose by a restricted number of States called together by the invitation of one or more States, could not be acceded to by new States except with the consent of the parties to the treaty. Finally, in the case of mutilateral treaties negotiated at a conference called by an international organization he thought that the rule should be that all members of the international organization had the faculty to sign the treaty.

37. The CHAIRMAN, speaking as Special Rapporteur, agreed that Mr. Padilla Nervo's suggestion might go far towards solving the difficulty.

38. Mr. LIANG, Secretary to the Commission, said that ever since the establishment of the United Nations provision had been made, either explicitly or implicitly, for other States to become parties to multilateral treaties concluded under its auspices. Though the Charter did not contain a specific article dealing with the matter, Article 4 dealt with it implicitly: any new Members became parties to the Charter by the very act of admission.

39. The United Nations had adopted many conventions universal in character; they would be unenforceable if not generally accepted. The Convention on the Prevention and Punishment of the Crime of Genocide had been adopted in 1948 (General Assembly resolution 260 (III)) and had been signed by many Governments soon after its adoption. Article XI provided that the Convention might be signed on behalf of any Member of the United Nations and of any non-member State invited to sign by the General Assembly. That clause provided a procedure for the admission of new parties. The General Assembly, in resolution 368 (IV), implementing article XI of the Genocide Convention, had requested the Secretary-General to dispatch invitations to each non-member State which was or thereafter became an active member of one or more of the specialized agencies of the United Nations, or which was or thereafter became a party to the Statute of the International Court of Justice.

40. Similar provisions had been included in all subsequent multilateral treaties. By General Assembly resolution 268 A (III), dealing with the restoration to the General Act of 26 September 1928 of its original efficacy, a series of amendments had been made to that Act, one of which provided for the addition of a new provision under which the General Act "shall be open to accession by the Members of the United Nations, by the non-member States which shall have become parties to the Statute of the International Court of Justice or to which the General Assembly of the United Nations shall have communicated a copy for this purpose". The most recent example[1] was article 26 of the

[1] *United Nations Conference on the Law of the Sea, Official Records, Vol. II: Plenary Meetings* (United Nations publication, Sales No.: 58.V.4, Vol. II), annexes, document A/CONF.13/L.52, pp. 132-135.

Convention on the Territorial Sea and the Contiguous Zone. Thus, for all practical purposes, it was inconceivable that any convention concluded under United Nations auspices would lack a provision enabling non-participants to sign it or accede to it. The general question might be theoretical, but in practice no problem arose in connexion with multilateral treaties concluded under United Nations auspices. He therefore agreed with Mr. Padilla Nervo that such treaties should be placed in a separate category. In his opinion, there was no difficulty with regard to the practice of international organizations, which, though not absolutely uniform, was very general.

41. The pattern was varied in the case of conventions concluded outside the United Nations. Article 139 of the Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War,[2] provided that the Convention should be open for accession on entry into force by any Power in whose name the Convention had not been signed. That provision emphasized the importance of universality of participation.

42. The United Nations system was not, therefore, as broad as that of the Geneva Convention of 1949, since conventions concluded under United Nations auspices provided that the General Assembly should be the organ determining what States were to be invited to accede. The criteria used by the General Assembly had, of course, been accepted by a majority of the Member States.

43. He was inclined to support the principle that separate treatment should be accorded to the so-called "conventions of a universal character". That would be no innovation in international jurisprudence. In its advisory opinion on reservations to the Genocide Convetion, the International Court of Justice had stressed the "universal character" and "scope" of the Convention in question[3] and had thus recognized the existence of universal treaties.

44. The difficulty mentioned by Mr. François with regard to old conventions which contained no article providing for accession still remained, however, and he agreed with Mr. Yokota that the Commission should be cautious in approaching them.

45. With regard to recognition, he said it was abundantly clear that recognition depended on the specific intention to recognize. For example, in the case of the Treaty of Paris of 27 August 1928, more generally known as the Briand-Kellogg Pact, the United States of America had explicitly stated that its signature did not imply recognition of any State which it had not already recognized, by virtue of the mere fact that the United States and such a State were co-signatories of the Pact.

46. In drafting the clause suggested by Mr. Padilla Nervo to deal with multilateral treaties, especially those concluded under United Nations auspices, the present practice should be borne in mind. It should be confirmed rather than changed to cover remote contingencies.

47. Mr. YOKOTA said that the question of the relative merits of the "declaratory" and "constitutive" theories of recognition was extremely interesting but too academic for the Commission to discuss fully at that stage. In any case, there was no need to go into the question at all, because the difficulty he had raised persisted whichever theory was accepted. If a new State was admitted to a treaty by the agreement of a majority of two-thirds of the signatories, and some State which had not recognized the new State objected to such admission, the non-recognizing State, if it ratified the treaty, would be bound by treaty *vis-à-vis* the new State and automatically had rights and duties *vis-à-vis* that State. Those rights and duties might be new ones which had not previously existed in international law, since every treaty, even codifying treaties, contained some rules *de lege ferenda*. The Commission had assumed that its draft of the treaty on the régime of the high seas,[4] for example, was a treaty containing general provisions embodying the existing rules of law, but at the United Nations Conference on the Law of the Sea, 1958, some delegations had regarded some of the provisions as new.

48. Mr. Ago had well explained the difficult situation in which States which had participated in a negotiation and had signed the text, but had not yet recognized a new State, would find themselves. If they ratified, they would have rights and duties *vis-à-vis* the new State, but if they did not wish to assume such rights and duties, they would be precluded from ratifying. It seemed unfair that a State which had participated in the negotiation should be precluded from ratifying simply because a new State, which might not even have been in existence at the time of the conclusion of the treaty, had subsequently been admitted. The Commission should approach such a complex question with extreme caution.

49. Mr. ZOUREK said that he agreed with those who argued that every State should have the right to participate in the negotiation of a multilateral treaty of a universal character or to sign it. The question was being unnecessarily complicated by the introduction of the problem of recognition. The large majority of authors acknowledged that the ratification of or accession to a multilateral treaty did not imply recognition of an unrecognized State either by a State which ratified or by a State which subsequently acceded to it. Thus, if a State which was not recognized by one of the parties itself became a party, the question of recognition was in no way affected. The Commission should resolutely disregard an argument that tended to invalidate the right of all States to participate in a universal treaty.

50. The argument that to admit a State which had not been recognized by another State to sign a universal treaty would impose on the latter State unjustified duties *vis-à-vis* the former could not really be considered as tenable. Even if a State was not recognized, it was a subject of international law and its international relations were governed by the general rules, and particularly the customary rules, of international law. The constitutive theory of recognition, whereby the existence of the State as a subject of international law was made to depend on its recognition, had no scientific foundation, since it took no account of reality. It amounted to a transposition into international law of the institution of "civil death" formerly known to feudal law.

51. If the customary rules of international law governed any State's relations with other States, how could it be held that, if such rules were codified in the form of a treaty, a State already bound by the same customary rules as those forming the subject of the treaty had no right to sign it? Any such argument rested on purely

[2] United Nations, *Treaty Series*, vol. 75 (1950), No. 972, p. 240.

[3] *I.C.J. Reports 1951*, p. 23.

[4] *Official Records of the General Assembly, Eleventh Session, Supplement No. 9* chap. II.

political considerations, which the Commission, as a body of jurists, should eschew.

52. The principle that every State, whether or not it had been recognized, was entitled to take part in negotiations concerning multilateral treaties of a universal nature flowed from the principle of the sovereign equality of States and from the special nature of international law, which was a law as *between States*, based on their collective will. That principle must be considered as a part of the law of nations; it was therefore out of the question that any one category of States should be excluded from its application, so far as universal treaties were concerned. In the case of bilateral and regional treaties, the question of participation was far simpler, as Mr. Padilla Nervo had pointed out.

53. He could therefore accept Mr. Padilla Nervo's suggestion (see para. 36 above) that the three types of situation should be dealt with separately, as well as Mr. Tunkin's views with regard to treaties of a universal character.

54. Mr. TUNKIN entirely agreed with Mr. Zourek. Mr. Ago's attempt to solve the difficulty pointed out by Mr. Yokota had been inconclusive. His remarks concerning the link between recognition and participation in universal treaties were not consistent with established practice, as Mr. Zourek had shown. Even in the case of the admission of new Members to the United Nations, it had frequently happened that States had voted for the admission of new States although they had not yet recognized those new States at the time of the vote.

55. There could be no doubt that States were subjects of international law, regardless of their recognition, and were equals under that law. How, therefore, could any State be precluded from participating in a multilateral treaty of a universal character?

56. A treaty could be universal in character, either because its object was one of universal interest, or because it created rules intended to be universally accepted. In modern times, many rules of international law were created by treaty, no longer solely by custom. Hence, it was not only illogical, but also illegal, to exclude any State from participating in treaties which dealt with matters of general interest and concerned the rights of all States.

57. He therefore proposed that the following new paragraph be added to article 24:

> "Each State has a capacity to participate in a multilateral treaty which by its nature is of a universal character."

58. With regard to the practice observed in the admission of States to the conferences convened under the auspices of the United Nations referred to by the Secretary, he agreed with Mr. Zourek that any discrimination in that respect was due to purely political reasons. It might even be said that the non-admission of the People's Republic of China to participation in many multilateral treaties—contrary to what was chiefly intended by that practice—was the direct result of the so-called Cold War. If the Commission countenanced and consecrated that practice, it would be failing in its duty as a body of jurists desirous of making a contribution to the maintenance of international peace.

59. Mr. GARCIA AMADOR said that in Mr. Tunkin's amendment the word "capacity" was technically inappropriate, since it was generally used to denote the contractual capacity of political entities, some of which were not necessarily States. The phrase "has the right" or "is entitled" might be preferable.

60. Mr. Tunkin and other members had argued that the participation of all States in universal treaties was a more important question than that of recognition, which was eminently political and therefore unsuited to discussion by the Commission. From the legal point of view, however, there was an even more important question: If the right of all States to participate in universal treaties was admitted, was it not implied that all States were bound by universal treaties, even by those in which they had not participated?

61. The question was very complex, because although some members would argue that all States had the right to participate in universal treaties, not all would be equally ready to accept the implicit idea that all States were bound by them. It was true that the word "universal" was relative in the context, since some regional treaties had certain universal aspects, but those aspects would not confer on all States the right to participate. The formulation suggested by Mr. Tunkin was hardly acceptable.

62. The CHAIRMAN said that he wished to make some comments as Special Rapporteur at the next meeting and suggested that the discussion be continued and that a vote might possibly be taken on certain issues.

It was so agreed.

The meeting rose at 12.55 p.m.

504th MEETING

Friday, 29 May 1959, at 9.50 a.m.

Chairman: Sir Gerald FITZMAURICE

Law of treaties (A/CN.4/101) (*continued*)

[Agenda item 3]

ARTICLE 24 (*continued*)

1. The CHAIRMAN, speaking as Special Rapporteur, thought that Mr. Padilla Nervo's suggestion (503rd meeting, para. 36) for dividing article 24 into sections dealing respectively with bilateral treaties, treaties restricted to certain classes of States, and general multilateral treaties was generally acceptable. There was no problem in the case of bilateral treaties, and no real problem in that of regional treaties or treaties restricted to a particular group or class of States, since participation in a regional or "restricted" treaty by a State outside the region or group required the consent of the parties.

2. The main problem arose in the case of general multilateral treaties. The Secretary to the Commission had explained the practice of United Nations conferences and the practice in the General Assembly (see 503rd meeting, paras. 38 ff.) There was no essential difference, so far as participation was concerned, between a general multilateral treaty negotiated under the auspices of an international organization and a multilateral treaty not so negotiated. Either the treaty regulated participition—in which case no problem arose—or it was silent on the matter, and then the question did arise. It was, however, very unusual in modern times to find a treaty which did not regulate the participation of States which had not attended the conference. Thus, the problem was confined mainly to older treaties. Nevertheless, some general rule would have to be provided in a code, since

modern practice could not be wholly relied on and it was conceivable that even a modern treaty might lack an accession clause.

3. It was generally agreed that a State which attended a conference and participated in the negotiations had an undoubted right—and it was a right rather than a faculty—to participate in the treaty. In addition, as Mr. Ago had said (503rd meeting, para. 12), States which had been invited to a conference and had failed for some reason to attend had a similar right, though it should be noted that the right was subject to compliance with the formalities laid down by those which had participated in the negotiation.

4. Referring to the argument that every State had a right to participate in general treaties and to Mr. Tunkin's proposed paragraph expressing that view (see 503rd meeting, para. 57), he said that in practice the paragraph would have little scope. Most multilateral instruments contained an accession clause prescribing the conditions to be fulfilled by additional participants, and such a clause would naturally prevail. In theory, Mr. Tunkin's proposal was attractive, but in reality the conditions governing participation in multilateral treaties were based on political considerations—which could hardly be set aside by a provision in the code.

5. A few treaties contained no provision regulating participation but contained a general accession clause; a good example was the Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War, which the Secretary had cited (503rd meeting, para. 41). No problem arose in that case, since any country was entitled to sign. Lastly, in the case of the very few multilateral treaties which contained neither a provision regulating participation nor a general accession clause, it could not be inferred from the absence of such a provision or clause that additional States could claim to participate as of right. The best way of regulating participation by additional States in those treaties would probably be to provide in the code that the consent of a majority of the parties was required, if the treaty was in force, or of a majority of the signatories, if it was not.

6. It was in those cases that the question of recognition became relevant. On the one hand, it would be difficult to make a rule under which a State not recognized by the great majority of the participants could be admitted to participation; on the other hand, it would be wrong to require the unanimous consent of all the parties, for then any one of them would have a veto. What was needed, therefore, was a majority rule.

7. It might be argued that an obligation to enter into treaty relations should not be imposed on a minority which did not recognize a certain State. In modern practice, no recognition was involved by the mere fact that a State was a party, along with others, to the same multilateral treaty. Besides, most of the conventions in connexion with which the question arose were not contractual in nature, but rather established norms of conduct and could hardly be said to impose any form of relationship between the participants.

8. Mr. TUNKIN said that the Commission should be guided only by the generally accepted rules of international law. The problem of the participation of additional States arose not only when no provision was made for accession or participation in a general treaty but even when such provision was made; for some provisions concerning accession might be incompatible with international law.

9. Mr. García Amador had stated (503rd meeting, para. 60) that his (Mr. Tunkin's) proposed paragraph might imply that all States would be bound by a universal treaty even if they had not participated in the negotiation. That was not the intention of the proposed paragraph, and if it was open to such an interpretation he would be prepared to amend the wording. Mr. Garcia had added (*ibid.*, para. 61) that some regional treaties had a universal aspect. But the proposed paragraph was not intended to refer to regional treaties; it spoke of treaties of "a universal character". It was generally agreed that it was desirable that all States should participate in such treaties, regardless of political considerations. His proposal corresponded to a trend in the development of international law and would promote that development.

10. Mr. EDMONDS said that he had agreed with the Special Rapporteur's original draft as it stated the accepted rule, and he now also agreed with the amendments accepted by the Special Rapporteur, especially the suggestion that paragraph 2 should be redrafted to take account of different possible situations (see 502nd meeting, para. 57).

11. In most cases, the question of the participation of additional States would be settled by provisions in the particular treaty, especially if concluded under the auspices of an international organization. In other cases, the rule should be as the Special Rapporteur had stated it. In the matter of participation in multilateral treaties already in force which made no provision for accession, the code should not contain any rule which might cast doubt on existing practice. The practice of the Netherlands Government as described by Mr. François (502nd meeting, para. 29) would seem to be the best solution.

12. The debate had strayed from the real issue to political questions. Article 24 related to the narrow legal and essentially simple and procedural question of signature. A great deal of the discussion would have been more appropriate in connexion with article 34 (*Accession (legal character and modalities)*).

13. Under the existing rules of international law, the States which negotiated the treaty determined what other States might accede. The Commission should adhere to that rule without limitation or qualification. There was no good reason why the discussion should become involved with the question of the recognition of States, either *de jure* or *de facto;* the real problems did not turn on the legal attributes which flowed from recognition. The Commission's task was to codify the existing practice as concisely and correctly as possible.

14. He could not support Mr. Tunkin's proposal. The principle was unacceptable, the use of the word "capacity" was not readily intelligible, and the phrase "treaty . . . of a universal character" was extremely vague. If any such provision was included in the code, it would be a questionable departure from the existing rules.

15. Mr. YOKOTA said that he did not grasp the purport of the phrase "a capacity to participate" in Mr. Tunkin's proposed paragraph. At the 502nd meeting Mr. Tunkin had raised the question of the right to participate in treaties (502nd meeting, para. 40) and he (Mr. Yokota) had argued that the right to participate should be distinguished from the faculty to participate (*ibid.*, para. 49). Every State had the capacity to participate in every multilateral treaty, but not necessarily a right, because if it had that right, it could

oblige other States to accept its participation. If Mr. Tunkin used the term "capacity" in the sense of a faculty—as distinct from a right—the proposed paragraph would be self-defeating, inasmuch as a State having a mere faculty to participate could not oblige other States to accept its participation. He drew an analogy with the establishment of diplomatic relations: every State had the capacity to establish such relations but in fact they were established by mutual consent. A similar question arose in connexion with participation in negotiations or in a conference for the conclusion of a multilateral treaty. If there were a right or capacity to participate in a treaty, the Commission would also have to discuss the right or capacity to participate in a negotiation.

16. As a matter *de lege ferenda* he agreed with the Special Rapporteur's proposal that new States should be admitted to participation in existing treaties by a majority decision of the parties.

17. Mr. TUNKIN said that the word "capacity" in his proposed paragraph should be changed to "right", since it had been shown that "capacity" was not the proper term.

18. He did not think that the analogy between the right to participate in a treaty and the right to establish diplomatic relations was sound. For example, if a group of States called a conference to draft a treaty concerning the régime of the high seas, other States could hardly be debarred from participating, for the high seas were *res communis omnium*. By contrast, the establishment of diplomatic relations was a matter between two States.

19. Mr. HSU considered that the problem of participation in general treaties exceeded the scope of article 24 and, if any provision relating thereto were adopted, it should be inserted elsewhere in the code. He thought that Mr. Tunkin's idea of changing the word "capacity" into "right" was a happy one, since the amended text implied the noble idea that the society of nations was a real family, whose members all had obligations towards each other and, if their interests did not happen to be identical, would be prepared to discuss their differences amicably. That had been the trend of international law for two or three decades and, although the ultimate goal might not yet have been reached, the Commission should promote that trend.

20. However, he considered Mr. Tunkin's text incomplete. If each State had a right to participate in a multilateral treaty, it also had the duty to observe the conditions of that treaty. He therefore suggested that the words "as well as the duty to observe" should be added before the words "a multilateral treaty". The text, if so amended, would automatically dispose of the problem of recognition, for any State which failed to comply with universal treaties would be, so to speak, placed beyond the pale of civilization and, consequently, would have no chance of recognition.

21. Mr. AGO said that, while he sympathized with the moral considerations expressed by Mr. Hsu, the Commission's task was to codify existing international law and to take modern realities into account. From the strictly juridical point of view, if Mr. Tunkin's text were accepted, every State would have the legal right to become a party to a treaty of a universal character. It was doubtful, however, whether such a provision corresponded to existing realities. In the case of treaty-making conferences convened by international organizations, the competent organ decided by a vote to invite some States and not others. If an international organization could by a majority vote debar certain States from participating in a conference, how could it be said that those same States could become parties to the resulting treaty by signing it?

22. Furthermore, the most universal of existing agreements—the United Nations Charter—provided a complicated procedure for the accession of a State to the Charter. The basic instruments of the various specialized agencies had similar provisions. If Mr. Tunkin's view were correct, however, any State could become a party to those instruments by mere signature—which was patently not the case.

23. Mr. ZOUREK said the question was whether the code should contain a general rule governing participation to be applied in the absence of a contrary provision in a treaty. Some members might say that such a rule was not necessary inasmuch as in most cases the matter was governed by practice, particularly that followed by the United Nations. Actually, however, the practice was by no means uniform; indeed, sometimes it was governed by the political background of the treaty-making conference concerned. Moreover, a perusal of the Handbook of Final Clauses (ST/LEG/6) prepared by the United Nations Secretariat showed that many different procedures were used. Even if the question was governed by practice, it was still necessary to know whether a given practice was in conformity with general international law.

24. In his opinion, where treaties of universal scope were concerned, international law did not contain a rule whereby States forming part of the international community could be excluded from participation. The phrase "treaty . . . of a universal character" had been criticized as vague. Possibly the term should be defined in the commentary, but it clearly meant a treaty containing rules applicable to relations among all States, such as a treaty concerning the régime of the high seas, as Mr. Tunkin had indicated.

25. The principle laid down in the paragraph which Mr. Tunkin proposed to add to article 24 (see 503rd meeting, para. 57) manifestly did not apply to instruments establishing international organizations, since in those instruments the admission of new members was regulated by special provisions.

26. It had been said that if a new State wished to participate in a treaty some of the parties to which did not recognize the new State, those non-recognizing States would be in an awkward position. Such an argument could not be sustained, for the appearance of States as co-signatories or contracting parties to the same multilateral treaty did not in any way constitute mutual recognition. To argue that participation in a treaty by a State which had not been recognized involved new obligations which the States not recognizing that State were unprepared to accept was tantamount to asking for the right to exclude States not recognized by all members of the international community from the application of *general* law and even to making it impossible for multilateral conventions of a universal nature to apply as between the States concerned and those States which had recognized them. Such a claim was wholly inconsistent with the fundamental principles governing international law. Besides, any party to the treaty was free to formulate reservations concerning its relations with other parties.

27. Mr. LIANG, Secretary to the Commission, said that the Handbook of Final Clauses to which Mr. Zourek had referred, was a collection of possible forms for final clauses and did not contain exclusively provisions supported by citations of actual texts. He believed that his statement at the previous meeting was an accurate description of United Nations practice. He agreed that political considerations entered into decisions of the General Assembly whether or not to invite specific States to participate in treaties. However, such decisions were, of course, taken by a majority vote and the sources of the General Assembly's power to decide which States to invite were provided for in the treaty itself. That aspect of the question was covered by the words "if it so provides" in article 24, paragraph 2. Without entering into the question of the political desirability of that procedure, he pointed out that the relevant clauses in treaties on the participation of new parties were as integral a part of the treaties as other provisions.

28. Mr. TUNKIN though that Mr. Ago's interpretation of his (Mr. Tunkin's) proposed paragraph was based on a *reductio ad absurdum*. It was obvious that the proposition that each State had the right to participate in any multilateral treaty whatsoever did not correspond with reality. He pointed out that the proposed paragraph made no such sweeping assertion.

29. Mr. Hsu's brief amendment (see para. 20 above) might have extremely far-reaching results. If that wording were adopted, a group of States concluding a multilateral treaty would automatically make that treaty binding on all other States. That dream of a world State, however, was utopian and unrealistic in the present-day situation.

30. Some members had expressed the view that the principle stated in his proposed paragraph was too general to be inserted in section B, relating to the negotiation, drawing up and establishment of the text. Since the matter was such a complex one, he thought it might be better to postpone its discussion to a later stage of the consideration of the law of treaties.

31. Mr. SCELLE thought that the question raised by Mr. Hsu's amendment was *de lege ferenda* since it could not as yet be said that all States had the right to participate in universal treaties. However, the situation referred to by Mr. Hsu seemed to be envisaged to a certain extent in Article 2, paragraph 6, of the United Nations Charter. Since the maintenance of international peace and security was the principal purpose of the United Nations, that provision implied, in effect, that States not Members of the United Nations should act in accordance with the principles of the Organization. Accordingly, Mr. Hsu was right in saying that, when a State considered that a multilateral treaty contained general rules applicable to all States, it had a "moral" obligation to observe such a treaty. But on the other hand, Mr. Ago had rightly pointed out that a moral obligation was not a legal duty.

32. Mr. Tunkin's proposed paragraph also raised a question *de lege ferenda*. When once a State had become a member of the community of nations by participation in a treaty of universal character, it would be bound by that treaty and, hence, by the clauses relating to its duration. That was a principle of international law; a State was not obliged to accede to a treaty, but, having acceded, it must comply with the provisions of the instrument.

33. In a sense, Mr. Tunkin's proposal might be held to be too narrow, since universal principles were not stated only in multilateral treaties. Certain principles of universal international law (apart from custom) might be stated in unilateral declarations, bilateral treaties or multilateral treaties concluded by a small number of States. Accordingly, the phrase "treaty . . . of a universal character" in Mr. Tunkin's text was too vague. It seemed to imply a majority of the international community, but did not specify what that majority should be. The practice in the matter in international law was quite different from that of domestic law. If a national parliament enacted a law, and particularly one involving universal principles, the minority which voted against the bill was still bound by the law; in international law the dissenting minority was not bound by a multilateral treaty. Mr. Tunkin's text would perhaps become pertiment when the international legislative system evolved to the point reached by municipal systems. It was to be hoped that that state of affairs would eventually materialize, but for the moment one had to recognize that even the provision of Article 2, paragraph 6, of the Charter was neutralized, if not contradicted, by Article 27, paragraph 3, which provided for the unanimity rule in the Security Council.

34. Mr. PADILLA NERVO considered that the Commission should decide whether it wished to confine article 24 to the right to sign or to extend it to the right of participation. In the latter case, provision would have to be made for ratification and accession.

35. It had been argued that participation in certain "general" treaties was linked with the right of all States to participate in conferences convened by the United Nations. With regard to the words "of a universal character", he thought that the Charter contained a clue to their meaning. For example, all Members of the United Nations were bound by the Charter to take the necessary measures to achieve the purposes enumerated in Article 55, on international economic and social cooperation. The obligations flowing from those provisions clearly implied a right to participate in negotiating treaties having the object of promoting the purposes of Article 55. If it were possible to make it absolutely clear what treaties were of a universal character and to decide that the obligations mentioned implied the right to participate in international conferences on those subjects, the Commission might indicate in the code that it was possible for any State to sign such treaties, on the conditions laid down in them. That would apply, of course, to treaties made at conferences convened by the United Nations or the specialized agencies; different rules would govern treaties concluded by regional groups.

36. The CHAIRMAN agreed with Mr. Padillo Nervo that it was difficult to continue the debate without deciding whether the code should contain a general article on participation or separate articles on the right to sign, ratify and accede.

37. He noted that Mr. Tunkin, without withdrawing his proposed paragraph, had suggested that discussion thereon should be postponed until the question of accession was considered. He called upon the Commission to decide on Mr. Tunkin's suggestion. If the Commission adopted it, that would mean giving up the idea of a general article on participation and dealing separately with the right to sign, ratify and accede.

Mr. Tunkin's suggestion was agreed to.

38. The CHAIRMAN, speaking as Special Rapporteur, said that article 24 would accordingly be dealt

with on its original basis, namely that of the right to sign.

39. In paragraph 1 he was prepared to accept the suggestion to omit the final phrase "in all cases where signature is the method of authentication adopted" so that paragraph 1 would read: "Every State invited to participate in the negotiation of a treaty has the right to sign it". That was a statement of the general principle but it had been pointed out that the right to sign was not an absolute right since the treaty might no longer be open for signature. It might be necessary to add a phrase such as "in those cases where the treaty remains open for signature".

40. Mr. ALFARO thought that preferably the general rule should be stated without qualification. He preferred as a statement of the general rule the Special Rapporteur's original wording without the final phrase "in all cases where . . . adopted". That could be followed by a statement of the exceptions to the rule, in other words, a description of the cases in which States which had not participated in the negotiation of a treaty could sign it. Such exceptions would be: first, the case in which the text of the treaty contained a provision to that effect; secondly, the case in which the negotiating States agreed that a non-negotiating State could sign; thirdly, the case suggested by Mr. Ago, namely, that in which a State had been invited to participate in the negotiation but had not in fact participated; and finally, a fourth exception might be added to cover the case of Members of the United Nations or members of other international organizations, which should have the right to sign a treaty negotiated at a conference convened by the General Assembly of the United Nations or by the other international organization concerned.

41. The CHAIRMAN, speaking as Special Rapporteur, said that he could accept Mr. Alfaro's suggestion. However, he was a little uncertain about Mr. Alfaro's fourth exception: it might be trespassing on the rights and functions of international organizations. It was conceivable that an international organization might convene a conference for the purpose of negotiating a treaty of interest to some of its members only.

42. Mr. ALFARO said that he had included the fourth exception because it had been mentioned by Mr. Ago. He agreed with the Special Rapporteur that it could be omitted.

43. Mr. TUNKIN observed that it would be difficult to enumerate all the exceptions and suggested that it might be enough to say that other States might sign in accordance with the provisions of the treaty.

44. The CHAIRMAN, speaking as Special Rapporteur, thought that, in view of the decision not to include a general article on participation, it would be necessary to deal fully with the rights to sign, ratify and accede. Provision had to be made for the way in which a State which had not participated in the negotiation could sign a treaty which contained no provision for such signature.

45. The only point in connexion with article 24 that remained to be decided was whether the consent of the States concerned had to be unanimous or not. He drew attention to the various possibilities: (1) if the treaty had entered into force, the States concerned would be the parties to the treaty; (2) if the treaty had been signed and there was no provision for a period during which it was open for signature, in his view the States concerned would be the signatories; and (3) if the treaty was still open for signature, the States concerned would be the negotiating States. His own view would be that consent should be at least by a two-thirds, and perhaps by a three-fourths, majority.

46. Mr. LIANG, Secretary to the Commission, said with reference to the first possibility mentioned by the Special Rapporteur, that it was difficult to envisage any problem of signature in connexion with old treaties such as the two Hague Conventions of 1899 and 1907. New States became parties to old conventions by acceeding to them and there was no way in which they could sign them, signature being over and done with. In the case of the Charter of the United Nations, new States were admitted to membership in the United Nations, thereby becoming parties to the Charter as a treaty but they could not any longer sign the Charter. He suggested that the question of participation in such treaties might be dealt with in connexion with the articles on accession.

47. The CHAIRMAN, speaking as Special Rapporteur, agreed that the Secretary's suggestion was sound. On reflection, it was equally difficult to see how a non-negotiating State could sign a treaty which had already been signed and was not, or was no longer, open for signature even by negotiating States. There again, the non-negotiating State would have to become a party by some other means, such as accession.

48. It was plain, therefore, that article 24 would have to be limited to the case in which a treaty was still open for signature.

49. Mr. SANDSTRÖM pointed out that article 24 could scarcely apply to bilateral treaties.

50. The CHAIRMAN, speaking as Special Rapporteur, said that as Mr. Padilla Nervo had pointed out, a problem would arise only in the case of general multilateral conventions. In the case of bilateral treaties and of treaties negotiated in a small group of States, it was clearly the negotiating States concerned which decided, either by the inclusion of a provision in the treaty itself or by a separate agreement, whether to permit a State which had not participated in the negotiation to sign the treaty.

51. He took it that there was no objection to a clause providing for consent by not less than two-thirds of the negotiating States, although possibly such a rule was not desirable in the case of, for example, economic conventions. The best solution might be to include the two-thirds majority rule in article 24, point out to Governments that the rule was not final and invite their comments concerning the desirability of applying it to all categories of general multilateral conventions.

52. He suggested that article 24 should be referred to the Drafting Committee on that basis, namely, that it would be limited to the case of general multilateral conventions still open for signature, and that with the consent of two-thirds of the negatiating States such conventions could be signed by a State which had not participated in the negotiation.

It was so agreed.

ARTICLE 25

53. The CHAIRMAN, speaking as Special Rapporteur, introduced article 25 (*Time and place of signature*). He pointed out that in substance the first sentence of paragraph 1 was repeated in paragraph 2. The second sentence of paragraph 1 dealt with a practice that had become very common. He suggested that article 25 should be referred to the Drafting Committee.

It was so agreed.

The meeting rose at 12.55 p.m.

505th MEETING

Monday, 1 June 1959, at 3.10 p. m.

Chairman: Sir Gerald FITZMAURICE

Welcome to Mr. Erim

1. The CHAIRMAN officially welcomed Mr. Erim, the new member of the Commission.

2. Mr. ERIM thanked the Chairman for his words of welcome and assured the members of the Commission that he would do his best to justify the confidence they had shown in him by electing him as a member.

Programme of work for the remainder of the session

3. The CHAIRMAN suggested that, of the remaining four weeks of the session, two should be used for substantive work on the draft concerning consular intercourse and immunities and the last two for the preparation of the report on the two principal topics discussed at the session and miscellaneous matters. The topic of State responsibility should form the subject of one meeting, at which representatives of the Harvard Law School who were in Geneva might present their draft on State responsibility.[1]

The Chairman's suggestions were adopted.

Consular intercourse and immunities (A/CN.4/108, A/CN.4/L.79, A/CN.4/L.80, A/CN.4/L.82) (*continued*)

[Agenda item 2]

DRAFT PROVISIONAL ARTICLES ON CONSULAR INTERCOURSE AND IMMUNITIES (A/CN.4/108, PART II) (*continued*)

ARTICLE 2 (*continued*)*

4. The CHAIRMAN reviewed the discussion that had taken place on article 2 (see 498th and 499th meetings).

5. With regard to paragraph 1, he said it had been agreed to postpone the final wording until the Commission had considered in more detail the exact nature of consular relations. In that connexion, the Special Rapporteur had offered to deal with the establishment of consular relations and with the opening of consulates in separate articles (see 499th meeting, para. 58).

6. After a full discussion of paragraph 2, the Special Rapporteur had suggested that that paragraph should be redrafted along the lines of paragraph 5 of his commentary. He (the Chairman) had suggested an additional clause providing that, exceptionally, the State of residence could change the consular district in view of special circumstances and after consultation with the sending State (499th meeting, para. 30).

7. There had been general agreement, as a result of the discussion, that paragraph 3 should be retained subject to drafting changes, and Mr. Edmonds's amendment to paragraph 4 (498th meeting, para. 14) had found general support.

8. Two additional provisions had been suggested for article 2: the most-favoured-nation clause originally suggested by Mr. Edmonds as a substitute for paragraph 2, and a provision concerning the acquisition of property for the use of consulates, to which reference was made in paragraph 6 of the Special Rapporteur's Commentary on article 2 (A/CN. 4/108, part II), along the lines of the corresponding article in the draft articles on diplomatic intercourse and immunities.[2]

9. There had also been considerable discussion concerning the exercise of consular functions by a diplomatic mission. He believed it was virtually agreed that consular functions which required dealings with local authorities of the State of residence could only be performed by consuls recognized as such by that State, whereas other consular functions could be exercised equally by consuls and diplomatic officers, in other words, by the consular section of a diplomatic mission.

10. Mr. ZOUREK, Special Rapporteur, observed that diplomatic missions could also exercise consular functions which required dealings with local authorities, in so far as such functions could be performed through the ministry of foreign affairs. in the light of the discussion on article 2 he had prepared the following revised version of the article:

"1. No consulate may be established on the territory of the State of residene without that State's consent.

"2. The agreement concerning the establishment of a consulate shall specify, *inter alia,* the seat of the consulate and the consular district.

"3. Subsequent changes in the seat of the consulate or in the consular district may not be made by the sending State except with the consent of the State of residence.

"4. Save as othewise agreed, a consul may exercise his functions outside his district only with the consent of the State of residence.

"5. The consent of the State of residence shall also be required if the consulate is at the same time to exercise consular functions in another State."

11. He had included only provisions on which there had been general agreement. The most-favoured-nation clause referring to the special case which formed the subject of Mr. Edmonds's amendment, would be more suitable in bilateral than in multilateral treaties and, what was more, if the Commission decided to include it, a provision would have to be drafted concerning the effects of the most-favoured-nation clause on all aspects of consular relations, including the prerogatives of consuls and their functions. In any case, he thought that the majority of the Commission had not supported Mr. Edmonds's suggestion. Again—for reasons he had already stated—he had not included a provision on obtaining property for consular purposes, but if the Commission desired such a provision, he would prepare one for examination by the Drafting Committee. He suggested, however, that the question might form the subject of a later article.

The Special Rapporteur's suggestion was agreed to.

12. Mr. ZOUREK, Special Rapporteur, explained that his revised version of article 2 was based on the assump-

[1] For the association of Harvard Law School with the Commission's work on State responsibility, see *Yearbook of the International Law Commission, 1956,* Vol. II (United Nations publication, Sales No.: 1956.V.3, Vol. II), document A/CN. 4/96, paras. 13 and 14.

* Resumed from the 499th meeting.

[2] See *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9,* chap. III.

tion that article 1 would deal solely with the establishment of consular relations and would not mention the opening of consulates, the two being quite distinct matters.

13. In the new paragraph 1, the word "consulate" was a generic term and meant any consular office.

14. The new paragraph 2 was a simplified version of the former paragraph 1.

15. The new paragraph 3 narrowed the scope of the old paragraph 2 to the sole case of subsequent changes in a consular district proposed by the sending State. With regard to the clause that had been suggested by the Chairman (see para. 6 above), he thought it best not to mention subsequent changes desired by the State of residence, for in that way the powers of the State of residence to make such changes would remain unaffected. However, if the Commission desired a provision along the lines suggested by the Chairman, he would include it.

16. The new paragraph 4 took account of Mr. Edmonds's amendment to the old paragraph 4.

17. Finally, the new paragraph 5 embodied Mr. Sandström's suggestion that paragraph 5 of the Special Rapporteur's commentary on article 2 should be included in the text of the article.

18. The CHAIRMAN suggested that if there was no objection to the new paragraph 1, it should be referred to the Drafting Committee subject to possible re-examination in the light of the Commission's decisions concerning the text of article 1.

It was so agreed.

19. Mr. EL-KHOURI asked what were the implications of the words "consular district" in the new paragraph 2. Did they mean, for example, that a consul could not issue visas to persons who came from outside his district?

20. Mr. ZOUREK, Special Rapporteur, said that the consul's competence was limited to his consular district in the case of matters localized in the territory of the State of residence or in the case of appearance before the authorities of that State. That did not mean that a person passing through the district could not avail himself of the consul's services. However, the consul could not exercise his powers outside his district without the consent of the State of residence.

21. Mr. MATINE-DAFTARY observed that, like courts, consulates had their jurisdiction *ratione personae, ratione loci* and *ratione materiae*. That might mean that in relation to a particular matter a person might be directed to apply to another consulate.

22. Mr. TUNKIN did not think that the jurisdiction of consulates was so clearly delimited in practice. For example, a citizen of State A, living in State B where State A had no consulate, could go to State C where State A had a consulate, in order to have his passport renewed.

23. Mr. MATINE-DAFTARY agreed, but observed that the matter would be within the jurisdiction of the consulate in State C *ratione personae*.

24. Mr. PADILLA NERVO pointed out that there were two types of consular functions; those which involved dealings with local authorities and those which did not. The first category of functions could not be exercised outside a consul's district without the consent of the State of residence. The second category of functions, which included the case cited by Mr. Tunkin, did not require such consent.

25. He inquired whether the word "agreement" in the new paragraph 2 referred to the customary type of consular convention, to a special agreement concerning the opening of a particular consulate, or to the agreement constituted by the acceptance of a consul's commission and the issuing of the exequatur. He asked the question because very often a consular convention, while providing for the establishment of consulates, did not specify the particular places in which consulates were to be established or the consular districts.

26. Mr. ZOUREK, Special Rapporteur, replying to Mr. Matine-Daftary, said that he did not think that the jurisdiction of consuls was fixed as rigidly as that of the courts. Generally speaking, a consul's relations with the State of residence were confined to the local authorities situated within his consular district, but he could freely exercise consular functions as regards persons not resident in his district if no relations with the authorities of the State of residence outside his consular district were involved.

27. In reply to Mr. Padilla Nervo's question, he drew attention to draft article 38. If a consular convention or other agreement between the sending State and the State of residence specified the seats of the consulates and the consular districts, the requirements of paragraph 2 would have been satisfied. On the other hand, if the agreement in question merely provided for the establishment of consulates without specifying seats and districts, the question would have to be settled by some form of subsequent agreement. In other words, there would have to be an agreement on both matters, unless they had been regulated by a pre-existing agreement. He did not think that a consul could arrive in the State of residence with a commission specifying a consular district or the seat of a consulate, to the establishment of which the State of residence had not previously given its consent.

28. The CHAIRMAN drew attention, in that connexion, to paragraph 85 of part I of the Special Rapporteur's report.

29. Mr. LIANG, Secretary to the Commission, said that on a previous occasion (499th meeting, para. 66) he had drawn attention to the importance of separating functions which were exclusively consular from those which were not so. Those which belonged to the former category could not be exercised outside the consular district without the consent of the State of residence. Functions which belonged to the latter category, such as the issue of passports to nationals of the sending State, were those with respect to which the question of consular district was not important.

30. As an example of functions that were exclusively consular, he cited those described in articles XXVI and XXVIII of the Treaty of Friendship, Commerce and Consular Rights between the United States of America and Germany, 8 December 1923, as amended, which provided, *inter alia*, that "a consular officer of either High Contracting Party shall have the right to inspect within the ports of the other High Contracting Party within his consular district, the private vessels of any flag destined or about to clear for ports of the country appointing him in order to observe the sanitary conditions and measures taken on board such vessels . . . " and that "all proceedings relative to the salvage of vessels of either High Contracting Party wrecked upon the coasts of the other shall be directed by the consular officer of the country to which the vessels belong and within whose district the wreck may have

occurred . . . ".[3] It was inconceivable that a foreign consul whose consular district was around New Orleans could exercise his functions in the area around San Francisco in regard to the matters covered by the two articles cited.

31. On the other hand, the promotion of commercial relations and the issuing of passports, for example, were not exclusively consular functions and could equally be performed by diplomatic officers. For functions of that kind the question of consular district did not arise and consuls in all consular districts were entitled to perform them.

32. Mr. ALFARO said that it was clear from the discussion that the word "agreement" in paragraph 2 of the revised article 2 could only be interpreted respectively, in the sense of an agreement regarding a particular consular seat and district, and the words "consular district" meant the area within which the consul could exercise his functions, not the place of residence of persons who solicited the services of the consul.

33. Mr. PADILLA NERVO suggested that a cross-reference to article 38 might be added in the commentary on article 2.

34. Mr. TUNKIN agreed with Mr. Padilla Nervo that, so long as no dealings with the local authorities of the State of residence were involved, the consul could perform services for his countrymen who were outside his consular district and even outside the State of residence.

35. He felt that the difficulty about the words "the agreement" in paragraph 2 was due to the absence of any reference to an agreement in paragraph 1. He suggested the following text for paragraph 2:

> "The seat of the consulate and the consular district shall be determined by agreement between the sending State and the State of residence."

36. That formula would cover all the possible situations: specification of the consular districts in the original consular convention, a special agreement on the consular district, or agreement constituted by acceptance of a consul's commission specifying a particular consular district and the issuing of an exequatur.

37. Mr. MATINE-DAFTARY thought the competence of consulates should be defined in a separate article.

38. Mr. ZOUREK, Special Rapporteur, said that such a definition was included in article 13 (*Second variant*) on consular functions.

39. The CHAIRMAN thought that paragraph 2 could be referred to the Drafting Committee.

40. Referring to the new paragraph 3, he noted that it differed fundamentally from the original paragraph 2. He suggested that a phrase should be added to the effect that the sending State might make changes in consular districts, but only if the change was necessary for some special reason and only with the consent of the authorities of the State of residence. Such a provision would be a counterpart of a provision, suggested by Mr. Scelle (see 499th meeting, para. 12), to the effect that the State of residence could not make changes in consular districts without the consent of the sending State. It might also be advisable to mention the special case he had alluded to earlier (see para. 6 above).

41. Mr. PADILLA NERVO thought that any change in the seat of a consulate would, in effect, be the establishment of a new seat and hence require the consent of the State of residence. A change in the district, however, might require consultation only.

42. The CHAIRMAN said it was generally agreed that changes desired by the sending State required the consent of the State of residence. The difficulty arose in cases where the State of residence wished to make a change in a consular district. The Special Rapporteur's new draft article 2 placed no limits on the capacity of the State of residence to make such changes. In practice, great inconvenience might be caused to the sending State if such changes were made suddenly. On the other hand, it would be readily seen that the State of residence might, in cases of emergency, see fit to change consular districts.

43. Mr. PADILLA NERVO said that even in cases of emergency it was arguable that the State of residence would require the consent of the sending State to the formal procedure of altering letters patent or exequaturs.

44. Mr. PAL said that he did not quite understand whether Mr. Padilla Nervo had meant that consultation with the sending State or the consent of that State would be necessary in case of change. After all, a change would mean amendment of the original agreement concerning the consular district and as such would require another agreement.

45. The CHAIRMAN, speaking as a member of the Commission, thought that Mr. Padilla Nervo had raised a very pertinent point. The seat of the consulate and the extent of the consular district were specified in an agreement, and they could not be changed by the State of residence without the sending State's consent. That case was not dealt with in the Special Rapporteur's new draft of paragraph 3. He thought that Mr. Padilla Nervo meant that the State of residence could not change a consular district without at least consulting the sending State. The question before the Commission was whether the State of residence had any unilateral powers, despite the original agreement with the sending State, and how those powers, if any, should be limited.

46. Mr. PAL thought that when Mr. Padilla Nervo had said "consultation" he had in fact meant "consent". In any case, it might be best to accept paragraph 3 in its present form and to add a new paragraph relating to the case mentioned by the Chairman.

47. Mr. PADILLA NERVO said that he had used the word "consultation" to denote the absolute minimum that was necessary. However, the consultation might result either in a new agreement or in disagreement between the parties. Any limitation of the consular district called for consultations, inasmuch as it varied the agreement constituted by the acceptance of consular relations.

48. Mr. SANDSTRÖM considered that the main problem was what would happen if consultation did not lead to agreement. There might be cases where the State of residence should have the right to change the seat of a consulate; if it were decided to establish a defence area, for example, it could be held that, by virtue of its sovereignty, the State of residence had an implied right to change the seat of a consulate without the consent of a sending State. In such a case, the important or urgent reasons for the change should be stated.

49. Mr. FRANÇOIS saw great difficulties of principle in giving any State the unilateral right to alter an agree-

[3] See *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. 436-437.

ment. It was absolutely impossible to empower the State of residence to change a consular district or to establish a new consular seat unilaterally, in the absence of a new agreement on the subject. If no such agreement was reached, the State of residence must be deemed to have denounced the original agreement.

50. Mr. YOKOTA asked whether, in actual practice, there had been any cases where the State of residence had unilaterally changed a consular district or seat despite the disagreement of the sending State.

51. He thought that the Chairman's suggestion was but one of two possible solutions. Another solution would be that adopted by the Commission in article 20 (*Inviolability of the mission premises*) of the draft on diplomatic intercourse and immunities. He referred to paragraph 7 of the commentary on that article, which stated that although the premises of the diplomatic mission were inviolable, the sending State should co-operate in every way in the implementation of plans for public works which the receiving State might be contemplating. It had been decided not to include that provision in the text of article 20; the Commission might similarly decide to embody in the commentary a passage to the effect that while the State of residence had a right to change a consular district or seat, it should make every effort to get the consent of the sending State to such change and the latter should co-operate in every way in the realization of the said change.

52. Mr. AMADO said that the State of residence was also a sending State. Because the relationship was reciprocal, the consent of the sending State was indispensable, but the last word must rest with the State of residence. Accordingly, he could see no objection to the Special Rapporteur's text of paragraph 3.

53. Mr. BARTOŠ thought that the Commission must decide whether the initial agreement was or was not a source of contractual relations. There were only two possible views on the matter; either the opening of a consulate was effected by the authorization of a sovereign State, or it was effected by agreement between two States. He agreed with Mr. François that, so long as an agreement existed, both parties to it were obliged to respect the agreement. On the other hand, in certain situations the receiving State would be obliged to request agreement to certain changes, although it could not impose such changes. In such cases, if the objective of the agreement changed, the situation would be governed by the implied *clausula rebus sic stantibus*. If the sending State did not agree to the change, the matter must be regulated as in other cases under international law. But the State of residence had no absolute or sovereign power to impose changes of consular districts or seats, except where the change was dictated by national defence or by a state of war; and in such contingencies consular relations would in any case be suspended. Mr. Pal had rightly said that consent, rather than consultation, was needed. Consent implied a contractual bond, from which the necessary practical conclusions must be drawn.

54. Mr. TUNKIN considered that, irrespective of which of the alternative views of Mr. Bartoš the Commission accepted, it could deal with the question practically along the lines suggested by the Chairman. In his opinion, it was inevitable to introduce some kind of reservation, even if it were accepted that contractual relations existed between the States concerned. There was no rule without an exception, and the exception to the rule should be stated. He was therefore in favour of the Chairman's suggestion, because specific cases could be cited where the State of residence exercised sovereign powers for certain important reasons. It was only logical to allow circumstances in which it was indispensable for the State of residence to change consular districts and seats.

55. Mr. EL-KHOURI thought that a clearer definition of consular districts and seats would go far to eliminating the difficulty before the Commission.

56. Mr. ERIM thought that the difficulty lay in the drafting of new paragraphs 2 and 3. Inasmuch as paragraph 2 stipulated agreement, paragraph 3 might be superfluous. Under paragraph 3, and if no mention was made of the point raised by the Chairman, the State of residence remained legally free to change consular districts and seats unilaterally. If, on the other hand, paragraph 3 were deleted, no changes could be made without mutual consent. The drafting of paragraph 3 had introduced an element of uncertainty; he asked the Special Rapporteur to explain.

57. Mr. ZOUREK, Special Rapporteur, observed that the original paragraph 2 had stipulated that changes could be made only by agreement between the sending State and the State of residence. Such a provision took into account the contractual nature of the agreement regarding the establishment of a consulate. During the discussion, however, some members had pointed out that that wording was not quite correct when read in conjunction with paragraph 1, and that the position of the State of residence was not identical with that of the sending State, since the fact that the latter exercised certain functions in the territory of the State of residence to some extent limited the sovereignty of that State. He had accordingly prepared a new text for that paragraph, in which no reference was made to the powers of the State of residence: it merely stated that the sending State could not change the seat of a consulate or its consular district without the consent of the State of residence. Some members, however, had interpreted that provision to mean that it gave the State of residence the right to change, unilaterally and at any time, the seat of a consulate and the district attached to it. Such an interpretation failed to take into account paragraph 1 of the article and was not tenable. In view of the wording of paragraph 1, the intention of the provision was certainly not to empower the State of residence at any time to change a consular district or seat unilaterally. On the other hand, when an agreement was entered into by two States, it could not be said that the State of residence could never bring about a change in a consular district or seat. In the first place, the agreement regarding the seat of a consulate and its district could cease to exist for a variety of reasons and not only by mutual consent. Secondly, provision had to be made for the fact that the State of residence might be compelled by exceptional circumstances to ask the sending State to change the seat of the consulate or to alter the consular district. Accordingly, the authorities of the State of residence might find it necessary to take steps of the kind to which he had referred in order to protect the interests of the State, without infringing the rules of international law.

58. He wondered whether, in view of such divergent interpretations, the solution of the problem might not be to retain the original paragraph 2 and to add a clause reserving the right of the State of residence to make changes in exceptional circumstances.

59. The CHAIRMAN shared the Special Rapporteur's view that the agreement referred to in the original paragraph 2 must be subject to the reservation of certain powers exercisable by the State of residence. The sentence to be added to the original paragraph 2 might be drafted along the following lines: "In exceptional cases, the State of residence may, after consultation and for urgent reasons, make unilateral changes in the consular district or seat."

60. Mr. TUNKIN endorsed the Special Rapporteur's suggestion.

61. Mr. FRANÇOIS thought that the Drafting Committee should be extremely cautious in drafting the suggested additional clause. In his opinion, it was impossible for the State of residence to fix a consular district or seat. That State could not impose its will on the sending State, but could at most propose a change; if the proposal was not accepted, there would be no agreement and the consular district or seat could not be established. He therefore thought that it would be unsatisfactory merely to say that the State of residence could change a consular district or seat in exceptional cases.

62. The CHAIRMAN agreed with Mr. François that the State of residence could not impose its will on the sending State; in the case of inability to reach agreement, however, consular relations would come to an end in respect of the district or seat concerned.

63. On that understanding, he suggested that the Drafting Committee should be requested to prepare the provision in question.

It was so agreed.

The meeting rose at 6 p.m.

506th MEETING

Tuesday, 2 June 1959, at 9.55 a.m.

Chairman: Sir Gerald FITZMAURICE

Consular intercourse and immunities (A/CN.4/108, A/CN.4/L.79, A/CN.4/L.80, A/CN.4/L.82) (*continued*)

[Agenda item 2]

DRAFT PROVISIONAL ARTICLES ON CONSULAR INTERCOURSE AND IMMUNITIES (A/CN.4/108, PART II) (*continued*)

ARTICLE 2 (*continued*)

1. The CHAIRMAN noted that agreement had been reached on the substance of paragraphs 1 to 3 of the redraft of article 2 (see 505th meeting, para. 10). Paragraph 4 was consequential on paragraph 3 and not controversial. He therefore suggested that paragraphs 1 to 4 should be referred to the Drafting Committee.

It was so agreed.

2. Mr. SANDSTRÖM thought that the Drafting Committee should be recommended to insert a reference to a consul, as well as to consulate, in paragraph 5.

3. The CHAIRMAN agreed with Mr. Sandström. He asked Mr. Edmonds whether he wished to maintain his proposal for a most-favoured-nation clause in article 2 (see 498th meeting, para. 14 (ii)).

4. Mr. EDMONDS though that the clause would be useful. However, since some members had pointed out that the question of most-favoured-nation treatment arose in connexion with other articles of the draft, he would have no objection to including the clause elsewhere.

5. The CHAIRMAN suggested that article 2 as a whole should be referred to the Drafting Committee, on the understanding that the Special Rapporteur would draft a paragraph, or perhaps a new article, on the right of consulates to acquire premises and would also draft a definition of consular districts and seats.

It was so agreed.

ARTICLE 3

6. The CHAIRMAN invited the Special Rapporteur to introduce article 3 of his draft.

7. He drew attention to the following amendment submitted by Mr. Sandström:

"(i) Replace the first sentence of paragraph 2 by the following.

'Heads of consulates shall take precedence in their respective classes in the order of the date of the granting of the exequatur.'

"(ii) Place the amended paragraph as a new article after article 8."

8. Mr. ZOUREK, Special Rapporteur, introducing article 3, said that the main purpose of the article was to codify the existing practice of classifying consular officers who were heads of posts. The intention was to draw up a codification relating to consuls which would be similar to that established for diplomatists more than 140 years previously by the Congresses of Vienna and Aix-la-Chapelle. He referred to his commentary on article 3. The four classes mentioned were enumerated in the legislation of many countries and in many international conventions, both old and recent. In particular, as would be seen from paragraph 6 of the commentary, many recent consular conventions specified those four classes of heads of consular offices. While the legislation of some countries did not include all the four classes, the proposed codification would probably meet with general approval. The codification would not mean that all States would be obliged to introduce four classes into their consular practice. For example, those States whose laws did not mention consular agents would not be obliged to introduce legislation referring to them.

9. He stressed that the four classes related only to "heads of consular offices" and that those words should replace "consular representatives" at the beginning of paragraph 1. He referred to the discussion of terminology in chapter VI of part I of his report. As explained there, the term "consular agents" had been used in the past in a generic sense to mean all consular officers; in article 3 it had a technical sense (see commentary, para. 7). He could not accept the suggestion that consular agents should form the subject of a separate article. It was true that consular agents were sometimes appointed by consuls-general or consuls and that they held full powers which were not known as commissions but as *"patentes"*, *"licences"* or *"brevets"*, as the case might be. But it was equally true that, in the case of many States, consular agents were appointed by the central government in the same way as heads of posts belonging to the other categories of consul. He conceded that, under the laws of some countries, consular agents had more limited powers than did consuls-general or consuls, for example. But that was

an internal matter for the States concerned and it could not be said to affect the legal status of such a consular official. The argument that the legal status of consular agents might be affected by the fact that they were appointed in a different way was difficult to sustain, once it was admitted that that was a question which each State had the exclusive right to decide. It was equally difficult to maintain that any limitations placed on the activities of a consular agent by the internal legislation of the sending State could be used as an argument against including such consular officials in the proposed classification, since that same classification was also to apply to honorary consuls, whose powers were almost always more limited than those of career consuls. Moreover, the same objection might be made with regard to those vice-consuls who, under the laws of some countries, were appointed by consuls-general or consuls and had more limited powers than those appointing them; yet no one had challenged the right of such vice-consuls to be included in the proposed classification. Accordingly, consular agents should continue to be mentioned in the article dealing with the heads of consular posts, and they should, at any rate provisionally, be placed on the same footing as other heads of posts. It was nevertheless desirable to draw the attention of Governments to the existence of heads of posts in that category and to ask them for detailed information; that would enable the Commission to have a solid basis for its final decision on the point when the time came to take it.

10. Furthermore, article 3 referred only to titular heads of posts; there was no intention of restricting the power of each State to decide what rank should be given to consular officials and employees attached to the head of the post and working under his orders and responsibility.

11. He could accept Mr. Sandström's amendments to paragraph 2, which dealt with questions of precedence. Mr. Sandström's proposal that the paragraph should constitute a separate article seemed to be reasonable. In any case, he thought that the Commission's debate should concentrate on the question whether codification of the four classes was desirable and whether all four classes should be maintained. Matters of detail could be left to the Drafting Committee.

12. The CHAIRMAN thought that, in addition, some general questions should also be discussed in connexion with article 3. With regard to the use of the term "consular representatives", the Special Rapporteur had explained in chapter VI of his report the reasons why he had felt it inadvisable to use the words "consul" and "consular agent"; he had not, however, given any reasons for not using the term "consular officer". The earlier discussion had shown that the admissibility of the words "consular representative" depended on the view taken of the nature of consular relations.

13. In chapter IV of his report the Special Rapporteur explained his reasons for omitting reference to honorary consuls from chapter I. The Commission would have to decide whether so important and widespread an institution could be altogether neglected in the draft.

14. Finally, he pointed out that the exequatur was mentioned for the first time in paragraph 2. It might be advisable to include a brief definition of the exequatur in article 2. However, that might be merely a drafting point.

15. Mr. ZOUREK, Special Rapporteur, said that some members had considered the term "consular representatives" unduly pretentious and had pointed out that the word "representative" had not been used in the draft articles on diplomatic intercourse and immunities. Although he believed that the term "representative" would be the most accurate term in both drafts, he was prepared to meet the objections raised by using the word "consul" in the generic sense and explaining in the commentary that it referred to the four classes enumerated in paragraph 1. The word was commonly used in that sense and authority for its use with that meaning was contained in a large number of international conventions as well as in textbooks.

16. He pointed out that, in his draft, honorary consuls were referred to under chapter III of part II; the privileges and status of honoray consuls formed the subject of draft articles 35, 36 and 37. He had had to bear in mind the fact that States which granted certain privileges and immunities to career consuls were not prepared to extend them to honorary consuls. Honorary consuls had a hierarchy similar to that of career consuls, but belonged to a different *category* and did not form a class of consul. The institution of honorary consuls was very important to some States and should accordingly have a place in the draft; nevertheless, it would be better not to discuss the matter in connexion with article 3, since all the provisions relating to honorary consuls had been brought together in chapter III of the draft articles and would be discussed when the Commission came to consider that chapter.

17. Mr. VERDROSS proposed that the class of consular agents should be omitted; he had made that proposal (A/CN.4/L.79) because no such class was included in Austrian legislation. However, in view of the Special Rapporteur's statement that the codification would not affect domestic legislation, he was prepared to withdraw his amendment, if the majority of the Commission wished to retain the reference to consular agents.

18. He agreed with the Special Rapporteur's view that honorary consuls could in fact belong to any of the classes mentioned and that no reference to them should be inserted in article 3.

19. Mr. GARCIA AMADOR said he doubted whether it was appropriate to introduce such a rigid classification into article 3. The Special Rapporteur had drawn an analogy between that classification and the enumeration in article 13 of the draft articles on diplomatic intercourse and immunities; there was a great difference between the two, however, and very few multilateral treaties on consular matters attempted to make a complete classification. The reason was that countries had to modify their domestic legislation to conform with the provisions of such treaties; that difficulty always arose when categories were established. His doubts had been further increased by the Special Rapporteur's assertion that States accepting the classification would not be committed to adhering to the system. In that case, the classification seemed to be useless. He would make no concrete proposal on the subject, but wished to draw attention to article 2 of the Havana Convention of 20 February 1928 regarding consular agents[1], which provided that the form and requirements for appointment, the classes and the rank of consuls should be regulated by the domestic laws of the respective States. That implied that codification was valid only if domestic law was not at variance with it. The Commission should

[1] See *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. 422 *et seq.*

ponder the usefulness of establishing uniform rules. It might be better to draft a flexible text, in order to enable all States to use the code to the best advantage.

20. Mr. LIANG, Secretary to the Commission, endorsed Mr. García Amador's remarks. He thought an effort should be made to achieve correspondence with the classification of diplomatic agents. Article 1 of the draft on diplomatic intercourse and immunities defined the term "diplomatic agent" as the head of the mission or a member of the diplomatic staff of the mission; the juxtaposition of the two drafts would show a striking difference in that the term "diplomatic agents" was used in a generic sense, while "consular agent" would be used to denote a specific class of official. In that connexion, he drew attention to paragraph 7 of the commentary on article 3.

21. In many conventions, particularly in bilateral conventions, provision was made for consular agents, but there was a tendency in some of those instruments and in the writings of jurists not to observe the distinction between the generic and the technical use of the term. In practice, it might be said that the first three classes represented a frequent phenomenon of consular accreditation, while the system of appointing consular agents was becoming obsolete. The term was sometimes also used to describe honorary consuls or to mean commercial agents, as in article 4 of the 1928 Havana Convention which referred to a commercial agent appointed by the respective consul. Furthermore, the Convention of Friendship and Consular Relations between Denmark and Paraguay, signed at Paris on 18 July 1903,[2] provided in article VII that provisional consular agents might be appointed by consuls-general or consuls. He doubted, therefore, whether the existing practice justified placing consular agents in the technical sense in one of the four classes. The best course might be to ask Governments to furnish information on whether consular agents existed in their systems; the Commission might then decide whether the class should be maintained, or whether a reference to consular agents should be made in a separate paragraph.

22. Mr. YOKOTA was glad that the Special Rapporteur had decided to amend his original text so that paragraph 1 related only to heads of consular offices. He also endorsed Mr. Sandström's amendment to the first sentence of paragraph 2 (see para. 7 above).

23. He thought, however, that it might be wise to delete the last sentence of that paragraph, which seemed to raise questions of unnecessary detail. The draft articles on diplomatic intercourse and immunities contained no provision concerning the precedence of members of the staff of diplomatic missions, but only provisions concerning precedence among the heads of such missions. The same course should be followed in the draft on consular intercourse and immunities. Moreover, the provision raised some complicated questions, such as the precedence of consular officials of different classes. It would therefore be wiser to eliminate all difficulties by deleting the sentence.

24. Mr. MATINE-DAFTARY considered that, with the substitution of the words "heads of consular offices" for "consular representatives", paragraph 1 would not correspond to all situations arising in practice. Under the new wording, the classification would be comparable to that in article 13 (*Classes of heads of mission*) of the draft on diplomatic intercourse and immunities. However, in consular practice the question of territorial distribution also arose. He thought the expression "consular officers" would be preferable.

25. He agreed with members who considered the fourth class of the enumeration to be superfluous. Consular agencies were becoming increasingly rare; the term was reminiscent of the capitulations system. Moreover, a consular agent could hardly be the head of a consular office. In practice, such agents had formerly been sent out by consuls or vice-consuls to remote parts of the country of residence as their representatives, but under modern conditions such cases were unlikely to arise often.

26. With regard to paragraph 2, he did not think it accurate to make the ranking of the four classes dependent on the date of the granting of the exequatur; it might be better to model the provision on article 12 (*Commencement of the functions of the head of the mission*) of the draft on diplomatic intercourse and immunities. Finally, he said he did not fully understand the *raison d'être* of the last sentence of paragraph 2, and asked for an explanation.

27. The CHAIRMAN thought that there had been some misunderstanding concerning the last sentence of paragraph 2. It did not deal with precedence among the members of the same consular office. If, for example, the consulate of one of two sending States was headed by a consul-general who had consuls under him, and the consulate of the other State was headed by a consul, the consul who was the head of the office would take precedence over the consul of the other country, because the latter had a consul-general as the head of the mission.

28. Mr. YOKOTA observed that the Chairman's example covered only one aspect of the difficulty. The sentence did not cover the question of precedence between consular officers of different classes, for instance, between a vice-consul who was the head of the office of one State and a consul who was not the head of the office in the same country of residence. Many similar difficulties would arise if such a detailed provision were retained.

29. Mr. EDMONDS thought that the article was both unnecessary and undesirable. Paragraph 1 stated categorically that consular representatives should be divided into four classes. But who would make the division, and to what purpose? As the Special Rapporteur had said, the Commission's draft would not affect national legislation and, moreover, the classification was inconsistent with the legislation of certain countries. The mandatory form in which the article was drafted was therefore inappropriate. At most, the article should state that the title of a consular representative should be determined by the sending State and that the two States concerned should agree on the class to which each representative belonged. To say more than that would be trespassing on the province of domestic legislation.

30. Mr. ZOUREK, Special Rapporteur, said that none of the arguments had convinced him that the article was unnecessary or undesirable. Mr. Edmonds seemed to have misunderstood his statements. The enumeration in no way imposed acceptance of all the four classes. All that States would be undertaking by agreeing to the text proposed in article 3 would be to place the heads of their consular posts abroad in one or the other of the categories referred to in article 3; moreover, many

[2] *Ibid.*, pp. 430 *et seq.*

recent consular treaties and conventions referred to all four. Indeed, the United States of America had concluded a consular convention with the United Kingdom on 6 June 1951,[3] article 3 of which provided that it should be within the discretion of the sending State to determine whether the consulate should be a consulate-general, consulate, vice-consulate or consular agency. There was no danger or disadvantage in stating the existing practice in the matter. No sending State had ever used a different nomenclature. Any State was free to choose whichever of the four classes was best suited to its purposes.

31. The Chairman had correctly interpreted the meaning of the last sentence of paragraph 2. The sentence served a useful purpose, since the paragraph did not constitute a separate article. In addition to heads of posts, a consular corps in the wider sense could also contain consuls to whom an exequatur had been granted but who were not the heads of consular posts.

32. The CHAIRMAN thought that Mr. Edmond's objection might be met if, in paragraph 1, the words "shall be divided into" were replaced by "may consist of". The intention was not to compel countries to appoint officers in the four classes, but to standardize the terminology. In the absence of such a provision, any country might appoint a consular officer with a totally unfamiliar designation.

33. Mr. TUNKIN thought that the misunderstanding over the last sentence of paragraph 2 would be dispelled if it were borne in mind that the precedence in question was that among the consular corps in a particular place or district. The sentence did not relate to precedence as between heads of consular offices throughout a whole country.

34. Some members had criticized the classification in paragraph 1 as too rigid. The Special Rapporteur had pointed out that there were no other classes of heads of consular offices in international practice. Accordingly, the classification was perfectly adequate. Nor was the provision too rigid from the point of view of domestic legislation. The Special Rapporteur and the Chairman had rightly said that no State was obliged to appoint officers of all the four classes. Every State was entirely free to decide for itself.

35. He could not agree with Mr. Matine-Daftary that it was inconceivable for a consular agent to be the head of a consular office. His own country had no consular agents at the present time, but it had appointed such officials several years previously and, earlier still, had had a consular agency in Iran. He recalled the debate in the Commission on the second class of diplomatic heads of mission, in article 13 of the draft on diplomatic intercourse and immunities; it had been argued that envoys were seldom accredited at the present time, but it had been decided not to eliminate the class, because it existed in actual practice. Although the Commission was aware that the class was gradually disappearing, the fact that such officials did exist made it necessary to mention them.

36. The Secretary had said that the generic and specific use of the term "consular agent" might cause confusion. He thought that the problem was one of terminology and might be easily solved by using the word "consul" in a generic sense, to cover all classes of heads of consular offices.

37. Finally, he observed that the question of precedence had not given rise to difficulties during the consideration of the draft on diplomatic intercourse and immunities. The interpretations of the sentence given by the Special Rapporteur and the Chairman were quite clear, but the provision might be inserted in a separate article.

38. Mr. BARTOŠ said that he did not agree with Mr. Matine-Daftary that consular agents were a vestige of the system of capitulations, for they were appointed by many States which had never applied the system. In connexion with the remarks of the Secretary, he said that some countries had recently returned to, or expanded, the system of consular agencies. For example, the United Kingdom, after a study of its consular services, had eliminated, mainly for reasons of economy, a large number of consulates and replaced them in certain cases by consular agencies. Consular agencies were not so expensive to maintain as consulates and were suitable for areas in which the interests of the sending State were not too important. Even in Switzerland there were consular agencies in some of the smaller towns in which certain States had special interests.

39. States which had consular agents wanted them to be represented in the consular corps, and the question of their position *vis-à-vis* other heads of consular offices often gave rise to difficulties in practice. They usually objected if they were not invited to functions of the consular corps, and in practice they were generally ranked after consuls-general, consuls and vice-consuls.

40. In his view the Special Rapporteur had done well to include consular agents as heads of consular offices. It was, of course, for the sending State to decide whether the head of a particular office was to have the rank of consul-general, consul, vice-consul or consular agent, but so far as the State of residence was concerned, the head of a consular agency was a head of office.

41. He therefore agreed with Mr. Tunkin that the question of consular agents should be regulated in the codification because the system of consular agents did exist in practice, even if all countries did not use that institution. Moreover, the Commission had, in its corresponding article on diplomatic intercourse and immunities, included *chargés d'affaires en pied* as heads of diplomatic missions, even though some States did not have that category in their diplomatic service.

42. There were certain fundamental differences between consular agents and the other classes of consular officers. Principally, the mode of accreditation differed. Furthermore, sometimes a consul had the right to appoint consular agents. However, such differences between consular agents and other consular officers were not germane to article 3, except in so far as the references in paragraph 2 to the exequatur were concerned, and would have to be dealt with in a later article.

43. He agreed that the words "consular representatives" should not be used, and considered article 3 acceptable subject to amendments to paragraph 2 in line with existing practice.

44. Mr. FRANÇOIS agreed in principle with the remarks of Mr. Tunkin and Mr. Bartoš. The classes of diplomatic officers had been regulated by the Congress of Vienna, and he thought that the Commission would

[3] Convention between the United States of America and the United Kingdom of Great Britain and Northern Ireland relating to consular officers, United Nations, *Treaty Series*, vol. 165 (1953), No. 2174.

make a useful contribution by introducing some uniformity in the nomenclature of consular officers. He did not agree with Mr. García Amador and Mr. Edmonds that the matter could be adequately dealt with by domestic legislation. Consular relations and also the question of precedence were a subject-matter of international law, and he saw no reason why the Commission could not establish certain categories while leaving it for States which had a different nomenclature to decide to which category their consular officers should be assimilated.

45. He supported the Special Rapporteur's suggestion that the words "consular representatives" in paragraph 1 should be replaced by "heads of consular offices". If that change was adopted, the last sentence of paragraph 2 would be superfluous. In that connexion, he pointed out that the corresponding article on diplomatic intercourse and immunities did not contain such a sentence.

46. As to the question whether a consul who was the acting head of a consulate-general should take precedence over a consul who was the permanent head of a consulate, he thought it might be advisable, in view of the varying practice, to ask Governments for their views and to formulate a provision on the matter when the final draft of the articles was prepared.

47. Finally, he agreed with the Special Rapporteur's remarks concerning honorary consuls. His country made wide use of honorary consuls, and there was no reason to classify them in a fifth category, since honorary consuls could be appointed in any of the four classes already specified in article 3.

48. Mr. SCELLE felt strongly that the term "consul" should not be used in both a generic and a specific sense. He agreed that the best solution would be to use the expression "consular officers" (*fonctionnaires consulaires*) as the generic term. If further classification was necessary, the words "in charge of a consular office" or "heads of posts" (*chefs de poste*) might be added.

49. There was a tendency to confuse the classes of consular officers which a sending State was free to decide upon and the order in which consular officers ranked in the State of residence. It was in the latter connexion that the classes of consular officers were of international interest.

50. There were two types of consular officers which gave rise to difficulties: honorary consular officers and consular agents. In his view, a consular agent was, in principle, in the position of an "acting" consul without being the head of a consular office. Honorary consular officers might be appointed as consuls-general, consuls or vice-consuls, and in the consular corps they enjoyed the same order of precedence, depending on their class, as career officers, even if they were nationals of the State of residence.

51. In his view, if consular agents were included in the classification, honorary consular officers should also be included. While the Special Rapporteur had suggested that honorary consuls should be dealt with in another article, that should not prevent their being mentioned in article 3, where the absence of any reference to honorary consuls would be puzzling.

52. Mr. ALFARO supported Mr. Scelle's view that the word "consuls" should not be used in two meanings and agreed that the best general term would be "consular officers".

53. It was the practice of States to divide their consular officers into different categories. While the classification of the members of a consular service was a matter of domestic law, the existence of categories was, as Mr. Scelle had pointed out, a matter of international interest, and he agreed with the view that States would always be free to organize their consular services as they saw fit within the frame work of certain general categories established by international law.

54. Perhaps some of the difficulty with article 3 was due to the mandatory formulation of the introductory sentence of paragraph 1. The difficulty might be avoided if that sentence were amended to read: "The classes in which consular officers may be accredited are the following:".

55. He agreed that, since the article would be limited to heads of consular offices, the last sentence of paragraph 2 could be omitted.

56. The position of honorary consular officers *vis-à-vis* career officers would have to be considered in connexion either with article 3 or with a subsequent article.

57. As to the question of including consular agents, he pointed out that various countries continued to accredit them. For example, the United States of America had maintained consular agencies at two small towns in Panama where there were relatively small numbers of United States citizens who, however, were in need of consular services.

58. Mr. AMADO recalled his earlier objection (496th meeting, para. 41) to the term "consular representatives".

59. Although Brazil did not have consular agents, he would not object to a reference to such officials in paragraph 1 if the term "consular agents" were not widely used in different senses. It was sometimes used in the generic sense of all consular officers, and paragraph 7 of the Special Rapporteur's commentary to article 3 drew attention to certain specific uses in the legislation of various States. Moreover, article 4 of the Havana Convention of 1928 used the term "commercial agent" to designate a consular agent in the technical sense. While it was true that the term "consular agents" might be included in order to enable Governments to describe their practice in the matter, he thought that it would be best to avoid the terminological confusion if possible.

60. Mr. PADILLA NERVO agreed that the Commission would make a useful contribution by regulating the relative positions of consular officers. It seemed to him that the only way of avoiding the problem of terminology was to insert an introductory definitions article, as in the draft on diplomatic intercourse.

61. There were consular officers who, as career officers, were wholly under the discipline of the sending State and others, honorary officers, who were under such discipline to a limited extent only; in many cases more privileges were accorded to career officers. Again, if a consul engaged in outside gainful activities he was often treated by the State of residence in a different way from full-time officers. On the other hand, in some respects the legal position of both honorary and career officers in the State of residence was the same. The question of honorary consuls was complex but he agreed with the Special Rapporteur that it could be dealt with in a separate article.

62. Referring to paragraph 7 of the Special Rapporteur's commentary on article 3, he expressed some doubt concerning the wisdom of attempting to use the

term "consular agent" in a sense that differed from its generally accepted meaning, and he pointed out that, if consular agents were included as the lowest class of consular officers, certain difficulties would arise in subsequent articles. For example, article 6 would not apply to such consular agents because they were in many cases appointed not by the sending State but by its consul and did not require the exequatur. In his view the best solution would be to omit consular agents from the text of article 3, and include a description of their position and functions in the commentary or in a separate article.

63. He favoured the use of the term "consular officers" in the generic sense with a suitable explanation in the commentary. He agreed with Mr. Scelle that article 3 should contain some reference to honorary consular officers and he also agreed with the speakers who had suggested the omission of the final sentence of paragraph 2.

64. Accordingly, he suggested that: (*a*) an article on definitions should be inserted; (*b*) the term "consular officer" should be used in its generic sense; (*c*) class 4 should be omitted in paragraph 1 and consular agents should be referred to in the commentary or in a separate article; and (*d*) honorary consular officers should be mentioned in article 3.

65. Mr. VERDROSS pointed out that article 3 made no distinction between honorary and career officers, and the precedence of the four classes mentioned would not be affected by the fact that an officer had been appointed in an honorary capacity. If Mr. Scelle insisted on his point, it might be made clear in the commentary that article 3 applied equally to honorary officers.

66. Mr. SANDSTRÖM agreed with Mr. Scelle that the use of the same term in two senses should be avoided and that the best generic term would be "consular officers". He also agreed that honorary consular officers should be mentioned in article 3; however, they should not be listed as a fifth class. A sentence might be added after the enumeration to the effect that consular officers might be career officers or honorary officers. He had thought that the question of rank had been adequately settled in practice, but Mr. François had convinced him that it might be useful to retain paragraph 2 in order that Governments could comment on the question.

The meeting rose at 1 p.m.

507th MEETING

Wednesday, 3 June 1959, at 9.50 a.m.

Chairman: Sir Gerald FITZMAURICE

Consular intercourse and immunities (A/CN.4/108, A/CN.4/L.79, A/CN.4/L.80, A/CN.4/L.82) (*continued*)

[Agenda item 2]

DRAFT PROVISIONAL ARTICLES ON CONSULAR INTERCOURSE AND IMMUNITIES (A/CN.4/108, PART II) (*continued*)

ARTICLE 3 (*continued*)

1. Mr. PAL recalled that the Special Rapporteur had at the very beginning of the discussion of his draft withdrawn the term "consular representatives" (see 497th meeting, para. 29), and it seemed to him that the Commission might have been spared the discussion that had taken place on terminology. For his part, had the Special Rapporteur not withdrawn the term, he could have defended it in view of the changing field of State activities and the increasing importance of the State in consular relations.

2. He supported the amendment of the title to read: "Classes of heads of consular offices" (see 506th meeting, para. 9) and had no objection to Mr. Sandström's amendment, which had been accepted by the Special Rapporteur (*ibid.*, para. 11).

3. Paragraph 1 set out four classes of heads of consular offices. He had listened to the discussion carefully but no one had questioned that the classes specified were the actual categories used to represent the heads of consular offices, or had maintained that any other classes existed. While there had been objection to the inclusion of consular agents, it had been shown that consular agencies were established by some countries, and the Commission's codification could not ignore that fact. Again, it had been argued that the term "consular agents" was unsatisfactory because, being used in a technical sense, it did not correspond to the term "diplomatic agents" which had been used in a generic sense in the draft on diplomatic intercourse and immunities. That was true, but in the latter draft the term had been defined that way only to cover what was dealt with there under that name, whereas in the present draft the term "consular agents" was being used to indicate a particular category of consular officers, actually so designated in practice, and the Commission could not but take account of that practice.

4. He invited the Drafting Committee to bear in mind article 13, paragraph 2, and articles 14 and 15 of the draft on diplomatic intercourse and immunities with a view possibly to include corresponding provisions in relation to article 3.

5. As to the question of mentioning honorary consuls, he supported the Special Rapporteur's solution of dealing with them in a separate article, since honorary consuls were not an additional class of heads of consular offices, but could be placed in any one of the four classes specified in article 3.

6. Mr. YOKOTA pointed out that there had already been considerable debate on the generic term for consular officials. The question would arise repeatedly in connexion with subsequent articles. Nearly all members of the Commission were prepared to accept the term "consular officers" and he suggested that it would save time if the Commission could take a formal decision to that effect as soon as possible.

7. Mr. ZOUREK, Special Rapporteur, announced that he had prepared an article on definitions which would probably be distributed at the next meeting, and thought that it would be best to take up Mr. Yokota's suggestion in connexion with that article. For the present, he would only point out that article 3 dealt exclusively with heads of consular offices whereas in other articles it would be necessary to deal with members of the consular staff. He pointed out that the term "consular officers" should be reserved for all persons, including the heads of consular offices, who, appointed from among the officials of the consular service of a State, exercised their consular functions at a consulate on the territory of the State of residence. Such persons were, apart from the heads of consular offices, consuls and any vice-consuls assisting them, attachés and consular secretaries, consular assistants (*élèves-consuls*), etc. If there was any objection to

using the term "consular representative", the only other possibility was the word "consul" used in its generic sense. That use of the word was, moreover, to be found in many conventions.

8. Mr. SCELLE recalled his statement at the previous meeting (506th meeting, paras. 48-51) and observed that from the international point of view there were only three classes of heads of consular offices: consuls-general, consuls, and vice-consuls. It was rare that a consular agent was appointed by a consul as the head of a consular office. In order to exercise that function he would have to be granted the exequatur. He submitted for the consideration of the Drafting Committee the following redraft of article 3, paragraph 1:

"Consular officers who are heads of office shall be divided into three classes: (1) Consuls-general; (2) Consuls; (3) Vice-consuls.

"In case of absence or inability to act of the above-mentioned consuls, consular agents or honorary consuls may deputize for or replace them."

9. Mr. BARTOŠ recalled that the draft on diplomatic intercourse and immunities used the terms "heads of diplomatic missions" and "diplomatic officers". He suggested that in the present draft the corresponding terms should be "heads of consular offices" and "consular officers".

10. It had been said that the question of honorary consuls could be dealt with in a separate article. He agreed, but pointed out that article 37 (*Legal status of honorary consuls and similar officers*) contained no reference to article 3. It would, therefore, be necessary either to insert such a reference or to mention honorary consuls in the text of article 3.

11. In that connexion he could not agree with Mr. Scelle's solution of equating consular agents with honorary consuls; the former were a special category of consular officers whereas the latter could be appointed as consuls-general, consuls, vice-consuls or consular agents.

12. He recalled his statement at the previous meeting concerning consular agents (see 506th meeting, paras. 38-43) and added that there were two kinds of consular agents, those who worked independently and were appointed directly by the sending State and those who worked for, and had been appointed by, the head of a consular office. They were not clerks but *consules missi* or *electi* and, if career officers, might be high functionaries having the internal rank of consuls-general, and, if honorary officers, were usually appointed from among resident notables. If it were desired to limit the enumeration in paragraph 1 to the first three classes, the correct solution would be to add a sentence to the effect that there were also consular agents, with an appropriate description of their functions.

13. Mr. EL-KHOURI said that in his view the classification proposed by the Special Rapporteur appeared to be adequate and that for Arabic-speaking countries the best generic term would be "consular officers". Perhaps the term "proconsul", fairly common in former times, might be revived in the draft to describe an officer who served as the acting head of a consular office, corresponding to the *chargé d'affaires* in diplomatic practice.

14. Mr. LIANG, Secretary to the Commission, stated that after the discussion at the last meeting his attention had been drawn to the French Decree of 14 September 1946 relating to consular agents,[1] which contained twenty-two articles on the subject. He read out the text of a number of the articles and concluded that consular agents were without doubt consular officers. There was no doubt either that, so far as French consular agents were concerned, they were not heads of consular offices.

15. On the other hand, according to an official Swiss list, there were nine French consular agencies and one Cuban consular agency in Switzerland.

16. The sources he had cited confirmed the opinion he had expressed at the previous meeting (506th meeting, para. 21) that Governments should be asked to describe their practice in the matter of recognizing consular agents, and he thought that part of the functions of a consular agent could be to supplement the work of the head of a consular office.

17. In connexion with the introductory sentence of article 3, paragraph 1, he pointed out that the French text was descriptive, not mandatory.

18. Mr. AMADO recalled his observations concerning consular agents at the previous meeting (506th meeting, para. 59). Article 3 posed the serious question of the classification of consular officers for the purposes of international law. There was no controversy concerning consuls-general, consuls and vice-consuls, but, as he had pointed out before, on the subject of consular agents the sources were not unanimous. That being so, was the Commission justified in establishing consular agents as an international category? Surely it should first obtain more information from Governments. Accordingly, he agreed with Mr. Scelle that paragraph 1 should be limited to the three classes concerning which there was no dispute.

19. Mr. MATINE-DAFTARY said that his comments at the previous meeting on the functions of consular agents (506th meeting, para. 25) had been borne out by the provisions describing the French practice cited by the Secretary. He pointed out that he had only mentioned in passing the role of consular agents in the capitulations system and had not said that all consular agencies were a vestige of that system.

20. It had been suggested that Governments should be invited to describe their practice. In his own country's practice, consular agents were sometimes employed as functionaries in a consular office headed by a consul-general, consul or vice-consul. In other cases a consular district might be divided into sub-districts, each in charge of a consul-general, consul or vice-consul. Or again, a consular district might be divided into sub-districts headed, according to their degree of importance, by a vice-consul or a consular agent answerable to the titular head of the post for the whole district. Such sub-districts were becoming increasingly rare, since modern means of transport made it possible for nationals to visit the office of the head of the post. However, he could not conceive of a case in which a consular district could be entrusted permanently—and in an exclusive capacity—to a consular agent.

21. In connexion with the first sentence of paragraph 2, he asked why it provided that the rank of consular representatives would be determined according to the date of the exequatur, whereas under the corresponding provision in article 15 of the draft on diplomatic intercourse and immunities precedence depended either on the date of the official notification of the arrival of the head of mission or on the date of the presentation of letters of credence. Conceivably, there might be considerable delay in the granting of the exequatur, and a consul of sending

[1] *Journal officiel*, 17 September 1946.

State A who had presented his commission before the consul of sending State B might receive his exequatur after the consul of State B. Moreover, it often happened that the headquarters staff of a consulate-general consisted of a consul-general, who was the head of the post, and of one or more consuls or vice-consuls. What precedence would the latter take in a consular corps?

22. Mr. TUNKIN said that the problems arising out of article 3 hardly warranted such a lengthy discussion. Any terminological difficulties could be held over until the article on definitions had been circulated. The question of honorary consuls was quite distinct and would be dealt with in a subsequent chapter.

23. The only controversial point was whether consular agents should be included in article 3, and he believed that for the time being they should be included for they undoubtedly existed. The commentary should state that there was some doubt about the precise legal status of consular agents, and Governments should be asked to describe their practice with respect to consular agents.

24. Mr. YOKOTA said that in Japan there were three consular agents who were heads of independent consular offices, and thirty-two honorary as compared to thirty-six career consuls who were heads of offices. Thus, the use of honorary consuls was perhaps more widespread than was realized. However, he had no objection to that category being dealt with in a separate chapter of the draft.

25. Some thought would have to be given to the precedence as between honorary and career consuls who were heads of consulates.

26. Mr. ERIM said that the fourth category in article 3, paragraph 1, would be out of place if the word "representatives" were replaced by the word "officers" (*fonctionnaires*) because in the legislation of some countries the latter term meant a special category of government agents. The expression "consular representatives" in the title on the other hand could be retained if Mr. Scelle's text were adopted.

27. There seemed general agreement that the first three classes were genuine career officials, and the only doubts related to consular agents who, having a status in some countries similar to that of honorary consuls, should (it was said) be dealt with in chapter III of the draft. Yet, though not consular officers *stricto sensu*, consular agents were nevertheless consular representatives in the general sense, and if article 3 was to reflect the existing practice they, as well as honorary consuls, should be mentioned in that article.

28. Mr. PADILLA NERVO referred to the suggestions he had made at the previous meeting (506th meeting, para. 64).

29. With reference to the consular convention between the United States of America and the United Kingdom, 1951, cited by the Special Rapporteur (*ibid.*, para. 30), he said that though the convention mentioned consular agencies, he did not think they were necessarily under the direction of an agent. The information provided by the Secretary to the Commission confirmed that it would be at variance with existing practice to include class (4) in article 3; accordingly, it was for the Special Rapporteur to decide whether it would be appropriate to include it as a provision *de lege ferenda*.

30. Referring to the second paragraph in Mr. Scelle's amendment (see para. 8 above), he said it was not the practice to appoint honorary consuls during the absence of career officials.

31. Mr. SCELLE explained that in the context the words "in case of absence" were intended to mean either that no officer belonging to one of the three classes enumerated existed or the temporary absence of such an official.

32. The French decree cited by the Secretary (see para. 14 above) was concerned almost exclusively with the internal organization of the French consular service and threw virtually no light on the problems of international law. A State could use a consular agent or honorary consul instead of a consul-general or consul, but in either case an exequatur would be indispensable, particularly if the person in question was the head of the office. On that point the decree was silent.

33. Mr. FRANÇOIS was grateful to Mr. Scelle for his explanation of the words "in case of absence". Large countries often failed to understand the acute need of small countries, particularly those with great maritime and commercial interests, to appoint numerous honorary consuls who were neither temporary nor inferior in status. Citing his own country as an example, he said that the Netherlands had thirty or forty posts for career consuls and some 600 or 700 honorary consuls so that it would be quite erroneous to describe the latter simply as substitutes.

34. He did not think that honorary consuls should be referred to in article 3, if only because such a reference in that context might destroy the structure of the Special Rapporteur's draft. A separate chapter would be preferable.

35. Mr. GARCIA AMADOR said he was inclined to support Mr. Scelle's amendment for it overcame a number of the difficulties under discussion. The Special Rapporteur's draft seemed to refer to career consuls, though in practice it might also be applicable to consular agents and other classes of consular representative. In Cuban law, the status of consular agents was that of honorary consuls, whether they were Cuban nationals or nationals of the State of residence.

36. As the problem of classification was a thorny one he suggested that it might be left in abeyance until the Commission had more information to decide whether or not it should confine itself to codifying existing practice.

37. Mr. HSU said that, as there was considerable uncertainty about the status and functions of honorary consuls and consular agents, the Commission should postpone taking a decision until the Special Rapporteur, perhaps with the Secretariat's help, had ascertained what was the general practice.

38. Mr. SANDSTRÖM saw no force in Mr. François's objections to honorary consuls being mentioned in article 3; after all, chapter I of the draft contained general provisions that were applicable to them.

39. If class (4) were retained in article 3, paragraph 1, the opening sentence in Mr. Scelle's amendment was more appropriate because it conformed with practice. Though Sweden did not use consular agents it had concluded a consular convention with the United Kingdom, signed at Stockholm on 14 March 1952, in which the term "consular agency" was mentioned.[2] The Special Rapporteur had given convincing reasons for the inclusion of consular agents, pointing out that they were

[2] See *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No.: 58.V.3), p. 467.

referred to not only in the municipal legislation of various countries but also in international conventions. It was not a matter of great moment and he would have thought that class (4) could be retained in the article, particularly as it was not yet definitive and it was the intention to draw the attention of Governments to that question.

40. Mr. ALFARO observed that, although the custom of accrediting consular agents was gradually disappearing, there was evidence that some countries appointed such agents, not only as officers under the authority of superiors, but as heads of consular offices at places where few facilities were available for the nationals of the sending State. Accordingly, that class should be retained in the enumeration until it could be proved that the practice had lapsed. In the draft on diplomatic intercourse and immunities the class of *chargés d'affaires* as heads of mission, although an obsolescent institution, had been retained. Similarly in the draft now under discussion, the class of consular agents should be mentioned.

41. With regard to Mr. Scelle's amendment, he thought that it was inaccurate to place honorary consuls on the footing of temporary substitutes. Honorary consuls were distinguished from career consuls not by the exercise of their functions, but by the nature of their remuneration by the sending State. Their functions were the same as those of career consuls. He therefore thought that honorary consuls might be mentioned in article 3, but only stating that they could be accredited in the same classes as career consuls and that they enjoyed the privileges and immunities accorded to them under chapter III.

42. The CHAIRMAN agreed with the Special Rapporteur that honorary consuls should be dealt with mainly in chapter III of the draft. He saw no reason, however, why some mention of them should not be made in article 3. The article could, for example, begin with a sentence reading "Consular officers may be career consuls or honorary consuls", and the next sentence might read "Consular officers who are heads of office, whether career or honorary, might be divided into three (or four) classes". The privileges and immunities of honorary consuls would thus not be prejudged, but it would be made clear that they could be divided into the same classes as career consuls.

43. With regard to the question of including consular agents in the classification, he thought there was much to be said for the argument that it would be difficult to prepare the final text of article 3 without submitting the question to Governments. Two points seemed to have emerged from the discussion. In the first place, consular agents as a class existed and, secondly, they could be heads of consular offices. It had been said that in some cases an office designated as a consular agency might be headed by a vice-consul or a consul; that was true, but there were still cases where such offices were headed by an officer described as a consular agent. In some cases, for example where consular relations were being opened between countries or if the country of residence was not fully sovereign, the preliminary step in establishing consular relations was an exchange of consular agents. He therefore saw no reason why the class of consular agents should not be mentioned in the enumeration. If it were decided not to do so, he thought that the Special Rapporteur might add a new paragraph, stating that, in addition to the first three classes, there was also the class of consular agents, whose functions would be described in a separate article.

44. Mr. ZOUREK, Special Rapporteur, referring to the doubts expressed concerning the inclusion of the class of consular agents in the enumeration, reiterated that that class existed in practice and could not be omitted from a codification.

45. The principal misunderstanding had arisen from the assumption that, if the class were included, the States which appointed no consular agents would have to change their legislation. Nevertheless, all States would be free to arrange their consular hierarchy as they wished. The inclusion of the class of *chargés d'affaires* as heads of mission in the classification of diplomatic agents had entailed no obligation to change legislation, and the two cases were similar.

46. A further misunderstanding seemed to arise from the belief that all consular officers must be heads of mission; but that was patently not the case. The fact that consular officers other than heads of office were appointed in different ways and had different functions could not be advanced as an argument against the inclusion of consular agents in the classification of heads of consular offices. Of course, the term "consular agents" was used in a special sense in some legislation; for example, in French legislation, it was used to denote an official delegated by the consul for limited purposes. In those cases, however, the consular agent was not the head of an office, since a new office could not be created in a district merely by delegation; the consent of the State of residence would also be required. Thus, there was a clear difference between, on the one hand, consular agents who might be the only consular representatives in a foreign country and, consequently, were heads of office, and, on the other, consular agents appointed by the district consul or vice-consul, with the consent of the State of residence, to work under his direct jurisdiction. Those cases might be assimilated to the exercise of certain functions by a vice-consul in a large consular district, under the direction of the consul-general or consul. The fact that national legislation on the subject varied was no reason for excluding the class of consular agents, but made it the more necessary to clarify the situation and to achieve uniformity of nomenclature. Consular agents should be included in the classification, an explanation should be added in the commentary and Governments should be invited to describe their practice with regard to the denomination and appointment of consular agents. The Commission would then have a solid basis for its final decision on the matter during its second reading of the draft.

47. Turning to Mr. Scelle's amendment, he said he could accept the introductory phrase, but he maintained that four classes should be mentioned. However, he could not accept Mr. Scelle's second paragraph for two reasons. In the first place, it was inaccurate to state that consular agents and honorary consuls acted as substitutes for heads of consular offices; in that connexion he referred the Commission to article 11 of his draft (Ad interim *functions*). Secondly, the system of honorary consuls was used concurrently with that of career consuls. It might possibly be said that honorary consuls acted in the absence of career consuls in the sense that they might do so if there was no career consul in the country of residence, but the case might also arise where a consul-general might be the head of the consular office in the capital of the country of residence, while an honorary consul exercised his func-

tions in, say, another post in the same country. Accordingly, the paragraph did not describe the existing practice in the matter and could not be accepted.

48. In reply to members who had suggested that honorary consuls should be mentioned in some way in article 3, he observed that the draft had been so constructed as to restrict chapters I and II to career consuls and chapter III to honorary consuls and similar officers. Moreover, article 35 referred back to article 3. He agreed with Mr. François that it would be better to concentrate all the provisions relating to honorary consuls in chapter III. The commentary to article 3 might say that the article related to honorary as well as to career consuls.

49. The generic term to be used to describe consular officers would be discussed in connexion with the article on definitions. However, he wished to clarify the situation that would arise if, in accordance with the suggestion of some members, that generic term were used instead of "heads of consular offices" in the introductory phrase of article 3. The draft could not aspire to classifying all consular officers; it should leave States free to organize their consular hierarchy as they wished.

50. Turning to paragraph 2 of his draft, he said he could accept Mr. Sandström's amendments. In reply to Mr. Matine-Daftary's question (see para. 21 above), he said the date mentioned was the easiest to establish, since it was mentioned in official gazettes and it was the date when a consular officer usually began to exercise his functions. The date of the communication of the consular commission was much more difficult to establish, as the Commission would find when it came to consider article 6. That date could be used only in the very unlikely case where the exequatur was granted in the same place and on the same date to two consular officers. With regard to the point raised by the Chairman (506th meeting, para. 14) concerning the exequatur, he thought that the difficulty might be obviated either by a reference to the article on definitions or, if Mr. Sandström's suggestion to make paragraph 2 a separate article were followed, by inserting that new article after article 11. In any case, the problem could be solved by the Drafting Committee. Finally, some members had suggested that the last sentence of paragraph 2 should be deleted. He had no objection to that suggestion in principle; nevertheless, he still believed, for the reasons he had already given, that the sentence had some value.

51. The CHAIRMAN suggested that, in view of the complexity of the discussion, the Special Rapporteur should be asked to redraft article 3 on the basis of his summing up.

It was so agreed.

The meeting rose at 1 p.m.

508th MEETING

Thursday, 4 June 1959, at 9.55 a.m.

Chairman: Sir Gerald FITZMAURICE

Consular intercourse and immunities (A/CN.4/108, A/CN.4/L.79, A/CN.4/L.80, A/CN.4/L.82) (*continued*)

[Agenda item 2]

DRAFT PROVISIONAL ARTICLES ON CONSULAR INTERCOURSE AND IMMUNITIES (A/CN.4/108, PART II) (*continued*)

1. The CHAIRMAN invited the Commission to consider article 4 of the draft on consular intercourse and immunities, pending the preparation of the Special Rapporteur's redraft of article 3.

ARTICLE 4

2. Mr. ZOUREK, Special Rapporteur, introducing article 4, said that it stated a fundamental and generally recognized principle. He referred to the commentary on the article. He stressed that the statement of principle in the article constituted an introduction to subsequent articles concerning the procedure and form of the recognition of consuls, and pointed out that such a provision was also necessary in order to emphasize the fact that the draft before the Commission referred solely to those consular officers whose status was likewise governed by international law.

3. Mr. FRANÇOIS said that, since article 3 would be limited to heads of consular offices, the words "to a post in one of the four classes listed in article 3" should be omitted in article 4, since certain consular officers who were not heads of posts might also come within the provisions of article 4.

4. Mr. ZOUREK, Special Rapporteur, thought that the question raised by Mr. François related mainly to the drafting of article 4. The Commission should above all decide whether it agreed on the principles stated in that article.

5. The CHAIRMAN thought that if in article 3 the enumeration of the four classes were omitted, article 4 would become almost pointless. In effect, it would merely reiterate in different language the principle laid down earlier in the draft that the receiving State's consent was necessary for the admission of consuls.

6. Mr. SANDSTRÖM said that Mr. François's point was confirmed by paragraph 10 of the commentary on article 7. He thought that article 4 should be drafted in the form of a rule, not in the form of a definition.

7. Mr. EDMONDS expressed some doubt concerning article 4, in the light of the wording that seemed to have been agreed upon for article 3. He agreed with Mr. Sandström that the principle should be stated in terms of functions, rather than in terms of title. He preferred the corresponding provision of the Harvard Law School draft (article 3)[1] that a person became a consul through his appointment by a sending State to exercise consular functions and his admission to the exercise of such functions by the receiving State.

8. Mr. LIANG, Secretary to the Commission, said that the Commission had not as yet decided to replace the term "consular representative" by "consular officer". In the context of article 4, the term "consular officer" would be somewhat inappropriate, for it meant an official under domestic law. For example, in the legislation of Ireland the term "consular representative" was used. In the particular context, the latter term would be more suitable.

9. Turning to the point made by Mr. François, he considered that some distinction should be made be-

[1] Harvard Law School, *Research in International Law*, II. *The Legal Position and Functions of Consuls* (Cambridge, Mass., 1932), p. 231.

tween the recognition of heads of office and that of consular staff. The Special Rapporteur apparently wished to limit article 4 to the acquisition of consular status by heads of office. In that case, too, he was not happy about the term "heads of consular offices", which also carried a connotation of municipal law. The term "heads of consular districts" might be more suitable, since it had more significance in international law.

10. Apart from those points, he did not think that the Commission should have much trouble with article 4 in its present form. Difficulties might arise if the article were redrafted to cover consular staff who were not heads of offices or districts. Moreover, the draft on diplomatic intercourse and immunities separated the provisions on the accreditation of heads of mission from those concerning the staff of missions.

11. Mr. MATINE-DAFTARY drew attention to the words "an official appointed by a State". In some countries, the word "official" meant specifically a government servant. Actually, however, in some cases consuls were not government officials. In particular, honorary consuls were not "officers appointed or paid by the State" (see A/CN.4/108, part II, article 35). He therefore suggested that in article 4 the word "person" might be used instead of "official".

12. Mr. EL-KHOURI said that Mr. Matine-Daftary's statement further confirmed his view that the provisions on honorary consuls should be quite separate from the articles on career consuls.

13. Mr. YOKOTA agreed in principle with the general purport of the article. The only difficulty lay in the drafting. It should be remembered that article 4 and the subsequent articles dealt in principle with heads of consular offices. By analogy with the draft on diplomatic intercourse and immunities, in which the provisions relating to heads of mission and those relating to staff of missions had been separated, it might be advisable to make a similar distinction in the draft now before the Commission. He therefore suggested that the words "A 'consular representative' " at the beginning of article 4 should be replaced by "The head of a consular office".

14. Mr. ERIM thought that pending the redrafting of article 3 the consideration of article 4 should be postponed. If article 3 were amended, article 4 would have to be adjusted accordingly. Personally, for example, he hoped that article 3 would refer to all persons exercising consular functions, including honorary consuls and consular agents; however, article 4 in its present form excluded honorary consuls.

15. Mr. PADILLA NERVO agreed that it would be difficult to discuss article 4 so long as the terminology was not settled. With reference to the title of the article, he said that staff members of consular offices who were not heads of office had a consular status of their own; that point should be taken into account. Furthermore, it was not entirely clear whether the article was meant to relate to the commencement of the functions of consular officers or to the legal status of every consular official.

16. Mr. ZOUREK, Special Rapporteur, agreed that it might be difficult to discuss articles 4 and 5 so long as the terminology was not settled. He therefore suggested that the remainder of the discussion on articles 4 and 5 should be postponed until the Commission had dealt with the text of the article on definitions and had come to a decision regarding article 3.

17. Mr. SCELLE likewise thought that debate on articles 4 and 5 should be postponed. Besides, the acquisition of consular status should not, he thought, form the subject of a special article. The sending State appointed a consular officer, to whom an exequatur was subsequently granted by the receiving State; however, the official did not become a consul until he received the exequatur. An official might be appointed without the receiving State ever knowing of the appointment. Persons who were appointed to the consular service but never sent abroad might have the title of consular officer in the national hierarchy. The status of the officials referred to in article 4 was regulated by the national legislation of the sending State, and in his opinion article 4 was unnecessary if it did not contain a reference to the granting of the exequatur, which, in any case, was dealt with in article 7.

18. Mr. BARTOŠ, supported by Mr. Sandström, could not agree with Mr. Scelle that article 4 was unnecessary. Within the structure of the draft, it seemed advisable to state the general principle of the recognition of consuls in article 4 and the principle of the competence of the sending State to appoint consuls in article 5.

19. The CHAIRMAN suggested that the Commission should postpone its discussion of articles 4 and 5 until the texts of article 3 and the article on definitions had been discussed.

It was so agreed.

ARTICLE 6

20. Mr. ZOUREK, Special Rapporteur, introduced article 6. Paragraph 1, which described the consular commission, seemed to be an indispensable provision, since the commission in consular practice occupied a position similar to that of credentials in diplomatic practice. He drew attention to the commentary on the article, which described some of the forms used by certain States in wording such commissions.

21. Paragraphs 2 and 3 endeavoured to codify the procedure for communicating the consular commission to the authorities of the State of residence. The legislation of many countries, and a large number of international conventions, notably the Havana Convention of 20 February 1928 regarding consular agents (article 4),[2] provided that that should be done through the diplomatic channel. Paragraph 3 dealt with the specific case where the sending State had no diplomatic mission in the State of residence. The text reflected general practice and hence should be acceptable.

22. One question that would have to be settled was whether the draft should also refer specifically to the nomenclature used for the letters of appointment issued to vice-consuls and consular agents, or whether a single document should be referred to throughout the draft. He believed that, in view of the fact that article 3 laid down and standardized the nomenclature to be used for the various categories of heads of posts, it would be best to use only the word "commission" in article 6 to describe the official documents of heads of consular posts of all categories and to refer in the commentary to the various terms used in national legislation, particularly in connexion with vice-consuls and consular

[2] See *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. 422 *et seq.*

agents. However, if the majority of the Commission wished to include other terms in the article itself, the addition could be made.

23. He drew special attention to corresponding provisions of the Havana Convention of 1928 regarding consular agents, which might be used as a guide in the matter.

24. Mr. GARCIA AMADOR thought that the last phrase of paragraph 2 was somewhat confusing, in the light of the text that the Commission had accepted for article 1, paragraph 1 (see 497th meeting, para. 6), where the agreement of the sending State and the receiving State was required for the establishment of consular relations. On the other hand, article 7, concerning the exequatur, provided that the assent of the Government of the receiving State must be given before heads of consular offices could take up their duties. The last phrase of article 6, paragraph 2, might apply to either of these two cases; he thought it should be either deleted or replaced by a clearer provision.

25. Mr. BARTOŠ approved in principle the Special Rapporteur's attempt in article 6 to formulate a rule that would both generalize existing practice and promote uniformity. He wished to draw attention to some desirable practices which might be mentioned in the commentary.

26. The practice of the United States of America and some other States, as reflected in consular commissions addressed to the Yugoslav authorities, was to indicate in the commission as the consular district the port or town that was to be the seat of the consulate and the "surrounding region". Details concerning the district, except the future place of residence of the consular officer designated by the consular commission, were then worked out jointly between the Yugoslav authorities and the embassy of the sending State concerned.

27. A problem arose in connexion with the *brevet* of a vice-consul, or *licence* of a consular agent, if the vice-consul or consular agent were appointed by a consul or a consul-general. The *brevet* or *licence* was submitted not to the Ministry of Foreign Affairs but to the authorities with whom the appointed officer normally communicated. Such documents should probably not be treated as on a par with a consular commission, which was usually signed by the head of the sending State.

28. Referring to paragraph 3, he pointed out that in cases where the two States concerned had no diplomatic relations with each other, the means used for transmitting the consular commission was usually the existing channel for diplomatic communications. For example, the commissions of consuls of the Federal Republic of Germany were transmitted to Yugoslavia through the French Embassy at Belgrade and those of Yugoslav consuls to the Federal Republic of Germany through the Swedish diplomatic mission at Bonn. In the case of the British Dominions with which Yugoslavia had no diplomatic relations, consular commissions were transmitted through the High Commission of the Dominion concerned in London and inversely through the British Embassy at Belgrade.

29. Mr. VERDROSS said that article 6 was acceptable to him in principle. He suggested that in paragraph 1 the words "in the form of a commission" should be replaced by the words "in the form of an official document", in view of the many different titles given to the letters patent of consular officers. While he agreed that a consular commission did not always contain the elements specified in paragraph 1, he considered that they should be retained in the text in the interests of the progressive development of international law.

30. On the other hand, paragraph 3 was too rigid, since in the absence of diplomatic relations between the two States concerned a consular commission could always be transmitted through a third Power. He added that some different expression should replace "consular mission", which was a term that did not correspond to existing international practice.

31. Mr. ALFARO pointed out, with reference to paragraph 1, that it was limited to the case of heads of consular offices. He felt that it should be amended to cover also the case of a consul or vice-consul having a consular commission who was to serve in a consulate-general as a deputy or assistant. He asked for an explanation of the words "consular category and class", which were synonymous. Finally, he said it might be difficult for a Government to say definitely, at the time of issuing a consular commission, where a consular officer would reside.

32. Mr. EDMONDS considered article 6 unduly complex and burdened with details with which international law should not be concerned. It would be enough if article 6 simply provided that there should be official accreditation. It was immaterial how a consular officer was accredited so long as he was accepted by the State of residence. Moreover, he saw no reason why paragraph 2 should require the consular commission to be communicated through the diplomatic channel. Why should not a consular officer be able to present his credentials personally?

33. Mr. SCELLE did not think that the term "full powers", in paragraph 1, was quite correct in connexion with consular officers. It was borrowed from diplomatic usage, but diplomats were representatives of their States and had general freedom of action. Consuls, on the other hand, were functionaries with the limited powers specified in consular conventions. It seemed to him that the word "powers" would be sufficient.

34. Mr. TUNKIN agreed with the previous speakers, especially Mr. Edmonds, who had expressed the view that article 6 should be more flexible. The article should simply provide, first, that there should be an official document testifying to the consul's appointment, and secondly, that the document should be communicated to the competent authorities of the State of residence. The form of the official document and the channel of communication were not important.

35. There had been in recent years some cases in USSR practice in which neither a consular commission nor an exequatur had been granted. For example, in regard to the Soviet consul-general at Istanbul the practice was that the Soviet Embassy at Ankara simply notified the Turkish Ministry of Foreign Affairs that a certain person had been appointed as USSR consul-general at Istanbul, with the request that the necessary instructions should be given to local authorities to recognize him in that capacity. Inversely, the same procedure had been followed in the case of a Turkish consul stationed at Batum.

36. Generally, there was a tendency in practice to simplify certain formalities whose origins went back to the days of inadequate communications.

37. Mr. YOKOTA agreed with Mr. Edmonds and Mr. Tunkin that article 6, and in particular paragraph 1,

was too rigid. He pointed out that some consular commissions addressed to Japan indicated the seat of the consulate but not the consular district and that such commissions were accepted by Japan.

38. He asked the Special Rapporteur whether the words "the representative's future place of residence" did not refer to the seat of the consulate.

39. Finally, he said the words "shall be furnished", in paragraph 1, might imply that a consular commission which did not contain all of the elements specified might not be valid.

40. Mr. SANDSTRÖM said that the points made by Mr. Bartoš might be taken into account by omitting paragraph 3 and amending the beginning of paragraph 2 to read "The State appointing . . . shall communicate the commission through the diplomatic or other appropriate channel . . .".

41. Mr. PADILLA NERVO pointed out that article 6 consisted of two elements: a definition of the consular commission, and a substantive provision to the effect that the commission should be communicated to the State of residence. It might be advisable to separate the two elements by placing the first in the article on definitions.

42. In connexion with paragraph 3 he asked for clarification of the reference to the absence of diplomatic relations. Did paragraph 3 refer to the case of non-recognition or to the absence of diplomatic relations between States which recognized each other? The question was important inasmuch as article 12 provided that the granting of an exequatur or a request for the issue of an exequatur implied recognition of the State or Government concerned.

43. Mr. LIANG, Secretary to the Commission, said the view had been expressed that the rather diversified practice in the matter of consular commissions might indicate that a simple notification would suffice. In his opinion, that would not be as desirable as it might seem. The exequatur was a formal document and there was consequently a case for recommending that the consular officer's "powers", as Mr. Scelle had suggested (see para. 33 above), should be communicated in the form of a formal document on the basis of which the exequatur was to be issued.

44. He noted that in paragraph 5 of the commentary to article 6 the Special Rapporteur said that "in addition to these regular documents" States accepted "irregular" documents—presumably "informal" documents were meant—such as a notification concerning the appointment of the consular officer. In one of the conventions cited in that connexion by the Special Rapporteur, the Consular Convention of 14 March 1952 between the United Kingdom and Sweden, article 4, paragraph (2), provided that the exequatur or other authorization was to be granted "on presentation of the consular officer's commission or other notification of appointment".[3] Thus, even in that Convention the wording indicated a preference for the consular commission.

45. Mr. ZOUREK, Special Rapporteur, observed that there seemed to be general agreement on the substance of article 6. In reply to Mr. Padilla Nervo's general remark, he said he still thought it preferable not to transpose part of article 6 to the article on definitions, because the commission was the essential document where the acquisition of consular status was concerned; besides, article 6 was closely linked with the succeeding articles.

46. Replying to the criticism that paragraph 1 was too rigid, he said that his aim had been to mention the essential particulars to be supplied to the State of residence at the time when a consul was appointed. However, as there were occasions when it might be difficult to specify the consul's future place of residence, in other words the seat of the consulate, he was prepared to qualify the last phrase of paragraph 1 by some such phrase as "if possible".

47. He had no objection in principle to the deletion of the word "full" in paragraph 1, as suggested by Mr. Scelle, but he did not see in what way the expression "full powers" was open to criticism.

48. It had been rightly pointed out, and indeed the practice was mentioned in the commentary to article 6, that in some cases Governments merely notified the State of residence of a consul's appointment, and he was willing to take the practice into account, either by substituting a general term for the word "commission" or by expressly stating that the commission could be replaced by an intimation from the sending State to the State of residence, provided that such a procedure was acceptable to the latter.

49. It had furthermore been argued that paragraph 2 should be drafted in more flexible terms. Although the text as it stood reflected practice, he could accept Mr. Sandström's suggestion, which would cover all contingencies.

50. Mr. García Amador had expressed doubt about the last phrase in paragraph 2. He did not think that the passage in question could be construed to mean that some additional form of consent was required other than that mentioned in the succeeding articles to which, if necessary, direct reference could be made. In any case, it was a question of drafting, which should be referred to the Drafting Committee.

51. In reply to Mr. Padilla Nervo's question concerning the opening phrase in paragraph 3, he explained that the passage was meant to cover the cases where diplomatic relations had not yet been established as well as those where they had been temporarily broken off. Though it might not be a general practice to transmit the commission through the consular mission, such a possibility was envisaged in some legislations and he thought it was a reasonable method in the circumstances contemplated in paragraph 3, since it would thereby be made clear that, except in that particular case, no other channel could be used.

52. Paragraph 3 could be deleted as suggested by Mr. Sandström provided that the words "or any other" were inserted in paragraph 2 after the word "diplomatic". Nevertheless he would prefer to retain paragraph 3.

53. The CHAIRMAN said that while he agreed on the need to avoid excessive rigidity some element of formality was desirable, particularly in the case of consular officers appointed to posts remote from the capital, because despite the ease of modern communications it might take a long while for the notification to reach the local authorities. In those cases the consular officer should possess a formal document.

[3] *Ibid.*, p. 469.

54. He suggested that article 6 might be referred to the Drafting Committee for examination in the light of the discussion.

It was so agreed.

ARTICLE 7

55. Mr. ZOUREK, Special Rapporteur, introducing article 7, said that its object was to codify existing practice. The exequatur was the document whereby the State of residence granted formal recognition to a person sent to that State as a consul. The form of the exequatur was regulated entirely by the legislation of the State of residence. The forms in which it could be granted were described in the commentary. He emphasized the fact that, in the article, the term "exequatur" was used to describe any kind of formal permission to exercise consular functions in the territory of the State of residence granted by that State to a foreign consul. Since provisional recognition could be accorded to the consul pending the delivery in due form of the exequatur and since consular functions could also be exercised *ad interim*, the article opened with a reference to articles 9 and 11, which dealt, respectively, with provisional recognition and *ad interim* functions. He drew attention to paragraph 2 of the commentary on article 10 adding that the granting of an exequatur was usually published in official gazettes.

56. In conclusion, he said that the expression "consular representatives" should be replaced by the word "consuls".

57. Mr. VERDROSS said that article 7 seemed to be at variance with the Special Rapporteur's fundamental thesis that the establishment of diplomatic relations implied the establishment of consular relations. If a diplomatic mission could include a consular department, the latter could clearly carry out such normal functions as the issuing of visas, which were governed by the domestic legislation of the sending State, without an exequatur. The exequatur was only required for specifically consular activities, such as the protection of nationals by appearing before the local authorities, or the exercise of some administrative and judicial functions that were governed by the legislation of the State of residence.

58. Mr. SANDSTRÖM said he had no objection to the substance of article 7, but considered that it should take into account the fact that an exequatur could take a different form, as in the case of the provision contained in the Consular Convention of 1952 between the United Kingdom and Sweden.

59. Commenting on the form of the article, he considered that it would be more consistent with the Special Rapporteur's intention, and clearer, to give pride of place to the second sentence, which should be followed—in a second paragraph—by the content of article 10. The remainder of article 7 could then form a third paragraph or a separate article.

60. Mr. ZOUREK, Special Rapporteur, replying to Mr. Verdross, said that article 7 was not open to misconstruction because it clearly related solely to heads of consular offices, and an exequatur was obviously not required in cases where consular functions were performed by a section of a diplomatic mission. Even where, in exceptional cases, the sending State asked for exequaturs for one or more of its officials in charge of consular matters within a diplomatic mission, its object in so doing was to ensure that its consular representatives would have the right to enter into direct relations with the local authorities or to exercise activities which would necessarily involve dealings with the local authorities.

61. Mr. AMADO said that the query had not been fully answered. For example, it was Brazil's practice to apply for an exequatur when an official in a diplomatic mission exercised consular functions which were entirely different from normal diplomatic work.

62. Mr. ZOUREK, Special Rapporteur, thought that, if discussion of that point was still considered necessary, it should take place in connexion with article 1, paragraph 2, which had been deferred. He again emphasized the fact that diplomatic missions required no permission to exercise normal consular functions, unless they wished to make direct contact with the local authorities of the State to which they were accredited. So far as it was known, international usage did not require the head of the consular section of a diplomatic mission to obtain an exequatur before entering upon his duties; he continued to be a member of the diplomatic mission and worked under the orders and responsibility of the head of the mission. The grant of an exequatur to such an official, in the very few cases in which it had been accorded or requested, meant that the person concerned was authorized to enter into direct relations with the local authorities in the manner determined by the State of residence; but it could in no way be held to be a pre-condition for the exercise of consular functions by a diplomatic mission. The distinction was an important one, and it would be valuable to obtain information on present practice from Governments.

63. Mr. MATINE-DAFTARY said that the Special Rapporteur had not answered the question raised by Mr. Verdross whether, for the purpose of functions governed solely by the domestic legislation of the sending State, such as the issue of visas, the officer concerned, if serving in the diplomatic mission, needed an exequatur.

The meeting rose at 1 p.m.

509th MEETING

Friday, 5 June 1959, at 9.45 a.m.

Chairman: Sir Gerald FITZMAURICE

Consular intercourse and immunities (A/CN.4/108, A/CN.4/L.79, A/CN.4/L.80, A/CN.4/L.82) (*continued*)

[Agenda item 2]

DRAFT PROVISIONAL ARTICLES ON CONSULAR INTERCOURSE AND IMMUNITIES (A/CN.4/108, PART II) (*continued*)

1. The CHAIRMAN suggested that before resuming discussion on article 7, the Commission might wish to give some thought to the general question of the relationship between the draft on consular intercourse and immunities and the draft on diplomatic intercourse and immunities adopted at the tenth session. The former text had been prepared by the Special Rapporteur before the adoption of the latter, and certain differences of presentation were largely fortuitous.

2. He thought it would be desirable to harmonize the texts where the subject matter was substantially similar and to explain in the commentary in what respects and for what reasons seemingly comparable pro-

visions differed. For example, article 8 of the draft on consular intercourse provided that a State did not have to give reasons for refusing an exequatur, whereas article 8 of the other draft contained no such provision.

3. Mr. ZOUREK, Special Rapporteur, agreed that, in so far as the status of diplomatic and consular missions was substantially the same, the two texts should be as close to each other as possible. Where the status and functions differed, the provisions would differ, of course; the divergences could be explained in the commentary. The parallel must not, however, be carried too far. Whenever the Commission decided that the solution proposed in the draft on diplomatic intercourse and immunities could be further improved, it must not hesitate to adopt such improvement in its draft articles on consular intercourse and immunities. His second report would, moreover, contain some supplementary articles corresponding to the provisions in the draft on diplomatic intercourse.

4. In reply to a question by Mr. FRANÇOIS, the CHAIRMAN said that, as the General Assembly had not reached a decision on the final form of the draft on diplomatic intercourse, there would still be an opportunity to suggest improvements to that draft.

5. Mr. PADILLA NERVO, referring to the example mentioned by the Chairman, said that article 8 in the two drafts related to entirely different situations: that the text on diplomatic intercourse concerned the declaration as *persona non grata* of a person already accepted, whereas the other related to the refusal of the exequatur before the admission of the person concerned.

6. The CHAIRMAN said that nevertheless some commentary was necessary to explain why even article 4 of the draft on diplomatic intercourse and immunities was silent on the question whether the receiving State had to give reasons for refusing its *agrément*.

ARTICLE 7 (*continued*)*

7. Mr. EDMONDS said that article 7 should not be so detailed as to become excessively rigid and difficult to apply. The Special Rapporteur's apparent intention that only heads of consular offices should need the exequatur seemed inconsistent with his original text of article 4.

8. Referring to the Special Rapporteur's commentary on the form of the exequatur, he said it was for the Government of the State of residence to decide what form the "assent" should take, and on that point the Harvard Law School draft, which had been cited at the previous meeting (see 508th meeting, para. 7), seemed admirably clear and free of ambiguity.

9. Mr. YOKOTA said that, despite the assurance in the commentary that the term "exequatur" as used in article 7 covered any document whereby the State of residence authorized the exercise of consular functions, the article as it stood was open to a narrower interpretation. To forestall such an interpretation, he suggested the words "or other forms of authorization" at the end of the second sentence.

10. He said that in Japan the practice was that a formal exequatur was granted by the Emperor in cases where the consular commission had been issued by the head of the sending State. In cases where the commission had been issued by the Minister of Foreign Affairs of the sending State, the authorization took the form of a formal letter of authorization signed by the Japanese Minister of Foreign Affairs.

11. Mr. MATINE-DAFTARY urged the Commission not to split hairs. The exequatur was a classical institution which must be preserved since the exercise of consular functions in some degree touched upon the sovereignty of the State of residence.

12. Mr. TUNKIN found article 7 generally acceptable but agreed that, although the term "exequatur" should be maintained, some flexibility was necessary in the second sentence because there were other forms of expressing consent. He suggested that the word "normally" should be inserted after the words "Such assent is".

13. Mr. PAL supported Mr. Tunkin's amendment.

14. Mr. LIANG, Secretary to the Commission, said that articles 9 and 11 were supplementary to article 7; they neither derogated from it nor constituted any means of recognizing foreign consuls, as the Special Rapporteur stated in paragraph 8 of the commentary. He therefore thought it might be advisable to omit the opening phrase "Without prejudice to the provisions of articles 9 and 11".

15. Mr. ALFARO said the substance of article 7 was acceptable except for the qualifying phrase stating that it related to persons "appointed heads of consular offices", a phrase which apparently excluded subordinate consular officers. The passage might be misconstrued to mean that subordinate consular officers could exercise consular functions without the consent of the State of residence.

16. The CHAIRMAN suggested that, as a precaution against such a possible misinterpretation, the first sentence of paragraph 10 of the commentary might with advantage be transferred to the article itself.

17. Mr. SANDSTRÖM said he was not convinced that paragraph 10 of the commentary in fact reflected existing practice. It appeared, for instance, from the Consular Convention signed between the United Kingdom and Sweden in 1952, which had already been cited, that an exequatur was required in respect of any consular officer, not only heads of consular offices.

18. Mr. YOKOTA said that in Japan an exequatur issued to the person appointed head of a consular office did not automatically cover his subordinate officers; the appointment of the latter had to be reported to the Ministry of Foreign Affairs so that it could send an official letter authorizing them to perform their functions.

19. Mr. PAL drew attention to a fundamental difference between the two drafts in dealing with the question of appointment of heads of posts and other officers. Article 6 of the draft on diplomatic intercourse and immunities did not stipulate that the *agrément* of the receiving State was required for the appointment of members of a diplomatic mission as distinct from its head. He thought it would be desirable to insert in the draft on consular intercourse also a separate article concerning subordinate members of consular offices along the lines indicated in article 6 of the draft on diplomatic intercourse and immunities.

20. Mr. ZOUREK, Special Rapporteur, replying to the comments made, said that the rigidity for which article 7 had been criticized was more apparent than real. The interpretation depended on the meaning attached to the term "exequatur", and the commentary stated explicitly that as used in the article it covered all forms of authorization by the State of residence. The Drafting Committee should be able to devise an acceptable formula; he thought Mr. Tunkin's amendment (see para. 12 above) perfectly satisfactory. If

* Resumed from the 508th meeting.

the article was amended as suggested by Mr. Tunkin and if a clear explanation was given in the commentary, nobody could doubt that the form of the exequatur was entirely a matter to be regulated by the State of residence.

21. Article 7 as it stood did not preclude the State of residence from requiring consular officers other than heads of offices to obtain an exequatur for the purpose of exercising their functions. However, he agreed with Mr. Pal that it would be desirable to insert a special article concerning subordinate staff analogous to article 6 in the draft on diplomatic intercourse and immunities. With reference to the Chairman's suggestion (see para. 16 above) he said he would prefer the substance of the first sentence in paragraph 10 of the commentary to appear in a separate article rather than in article 7. In reply to Mr. Sandström, who had questioned the generality of the practice described in that sentence, he said that it was somewhat difficult to obtain information concerning the practice of States on a given point. He hoped that the observations of Governments would provide fuller particulars. As far as he could judge at the moment, it was the exception rather than the rule to require an exequatur for the assistants of the head of a consular office.

22. He had not included a definition of the exequatur in the belief that it was a familiar institution, but he had no objection to including a definition.

23. He could not accept the Secretary's suggestion because something should be said in article 7 to indicate that the grant of the exequatur did not constitute the only means of conferring on a foreign consul the recognition required in all cases for the exercise of consular functions.

24. In conclusion he said that the Drafting Committee should find it quite easy to prepare a generally acceptable text of article 7. He emphasized that he would prefer article 7 to apply solely to persons appointed heads of consular offices; a separate article should deal with their assistants and staff.

25. The CHAIRMAN added that a further reason in favour of separating the provisions concerning heads of consular offices from those concerning consular staff was that in the draft on diplomatic intercourse the provisions concerning heads of diplomatic missions were separated from those concerning mission staff.

26. Mr. PADILLA NERVO agreed that there should be a separate article on consular staff. However, the problem of the definition of consular staff would arise and he thought that a distinction between different types of staff should be drawn in the article on definitions. He referred to the definitions clause, in particular article 2, paragraphs (6) and (7), of the Consular Convention between the United Kingdom and Sweden, 1952. Those provisions seemed to indicate that the generic term "consular staff" was insufficient and that a distinction should be made between various members of that staff.

27. The CHAIRMAN suggested that article 7 should be referred to the Drafting Committee, which would take into account the comments made in debate.

It was so agreed.

ARTICLE 8

28. The CHAIRMAN drew attention to Mr. Scelle's amendment (A/CN.4/L.82)—similar to Mr. Sandström's amendment—proposing the deletion of the words "without giving reasons for its refusal".

29. Mr. ZOUREK, Special Rapporteur, said that the article had been inserted in the draft because, unlike the case of diplomatic agents, there was not as a general rule any *agréation* procedure for consuls. It was a universally admitted rule of international law that every State had the right to refuse to admit as a consul a person whom it regarded as undesirable. That right flowed from the sovereignty of States and was confirmed by the practice of States cited in the commentary on the article. In his opinion, the only question arising out of the article which might be controversial was whether States should communicate their reasons for refusal of the exequatur. On that point he referred the members of the Commission to paragraph 3 of the commentary on the article. In view of the variations in practice in the matter of stating reasons for the refusal of the exequatur, the draft could not lay down an obligation to give reasons for the refusal. The conventions which required communication of the reasons for the refusal were an exception. Moreover, article 4 of the draft on diplomatic intercourse and immunities did not mention such an obligation.

30. With regard to Mr. Sandström's amendment, he thought that the phrase in question should be retained, because it corresponded to current international practice. But if the majority of the Commission so decided, the phrase could be deleted, since the diversity of practice was in any case explained in the commentary. He wished to point out, however, that the phrase he proposed did not prevent any State from giving reasons for its refusal if it so wished.

31. With regard to the "unless" clause in the article, he said that a receiving State which had given its *agrément* to a consul could hardly refuse the exequatur when the sending State subsequently asked for it for the person accepted. If any valid reasons arose later, it might declare the officer concerned *persona non grata;* however, such a situation would not come within the terms of article 8.

32. The CHAIRMAN asked whether the article applied only to heads of office or to all consular staff. In the latter case, the provision would be much more stringent for consular staff than was the corresponding provision for the staff of diplomatic missions.

33. Mr. ZOUREK, Special Rapporteur, said that the article related only to heads of office. He was prepared to draft a special article relating to consular staff and to state explicitly in article 8 that only heads of office were meant.

34. Mr. SANDSTRÖM thought that article 8 should be considered together with article 17 (*Withdrawal of the exequatur*), since the two articles dealt with very similar matters which it would be desirable to discuss at the same time.

35. Mr. ZOUREK, Special Rapporteur, thought that Mr. Sandström's suggestion had some merit. It should be borne in mind, however, that the articles related to two entirely different situations. Article 8 related to the original admission of a person to the exercise of consular functions, while article 17 covered the case of a consul who had received an exequatur, which was withdrawn later. The withdrawal was more serious than the simple refusal of the exequatur.

36. The CHAIRMAN thought that the two articles dealt with quite separate subjects and should preferably

not be discussed together. Moreover, article 17 established more favourable conditions for consular officers than those applied to diplomatic agents in the draft on diplomatic intercourse and immunities since, under article 8 (*Persons declared* persona non grata) of the latter draft, no limitations were placed on the rights of the receiving State, whereas article 17 of the draft on consular intercourse and immunities qualified that State's rights. However, members might if they wished refer to article 17 while discussing article 8.

37. Mr. EDMONDS thought that the title of article 8 might be changed to "Refusal to admit".

38. With regard to the "unless" clause, he believed that it was unusual to hold any negotiations in advance with regard to the appointment of consular officers. It might be inadvisable for the Commission to imply that such negotiations were desirable or necessary, particularly since the omission of the phrase would not mean that negotiations should never be held.

39. Mr. SCELLE considered that article 8 was unnecessary and that it contained an unacceptable provision. It was unnecessary because it merely expressed in negative terms the substance of article 7; the essential idea in the two articles was the same, since a State had the right both to grant and to refuse the exequatur.

40. The unacceptable provision of the article was the phrase "without giving reasons for its refusal". It was stated in paragraph 1 of the commentary that the right to refuse the exequatur was implicit in the sovereignty of the State. To state that thesis of absolute sovereignty in the Commission's draft would constitute a retrograde step in the evolution of international law. It might be admissible to say that a State might or might not give reasons for refusal, but to imply that it should not do so was clearly wrong. Moreover, it was not enough to argue that government consultations would take place before the decision was taken; it would be seen from paragraph 3 of the commentary that the practice in the matter varied widely. Even if the prevailing practice was not to give reasons for the refusal of the exequatur, the Commission's task was not merely to register practice, but also to advance the principles of international law.

41. Mr. YOKOTA noted that the Special Rapporteur was not wholly opposed to the idea of omitting the last phrase of article 8. He recalled that a similar question had arisen during the discussion of the corresponding provision of the draft on diplomatic intercourse and immunities and that the Commission had decided to omit such a phrase. It was obviously desirable in some cases to give reasons for the refusal of the exequatur, since, if those reasons were sound, the sending State would accept the refusal with good grace. The Special Rapporteur had said that the usual practice was not to give reasons; and yet in three out of the four cases referred to in paragraph 1 of the commentary, the receiving States had given reasons for the refusal. Although those examples were not exhaustive, they led to the assumption that in practice reasons were often given. Accordingly, he supported Mr. Sandström's amendment.

42. The Special Rapporteur had said that article 8 related only to the admission of heads of consular offices. Since the receiving State also had the right to refuse to admit other consular officers, that question should be dealt with somewhere in the draft, preferably in a separate article.

43. Mr. SANDSTRÖM said that he had submitted his amendment mainly because no such provision as "without giving reasons for its refusal" appeared in the draft on diplomatic intercourse and immunities. On further consideration, however, he had come to the same conclusion as Mr. Scelle, namely, that the article as a whole was unnecessary. The principal rule was already implied in article 7, of which article 8 was merely a negative form, and the restatement of the rule in different terms in a separate article was justified only by a possible exception to it. Such an exception was suggested in the "unless" clause, but he did not consider that the exception was a real one. Even if the *agrément* had been given in advance, the receiving State was entitled to withdraw it, just as it could take the still more drastic step of withdrawing an exequatur already given. Accordingly, the article did not reflect actual practice nor was it desirable as a contribution to the progressive development of international law. The proposition in the last phrase might have been another possible reason for the inclusion of the article, to show the difference from the proposition in article 17, paragraph 2. But the question was whether paragraph 2 of that article should be retained. He considered that it should be deleted, and, consequently, that article 8 had no *raison d'être*.

44. Mr. PAL said he could see no basis for retaining the final phrase, "without giving reasons for its refusal". He recalled that the question of giving reasons for declaring a diplomatic agent *persona non grata* had been discussed in connexion with article 8 of the draft articles on diplomatic intercourse and immunities, and that it had been decided not to mention the matter in the text of the article. However, the position had been made clear by the following statement in paragraph (6) of the commentary to that article: "The fact that the draft does not say whether or not the receiving State is obliged to give reasons for its decision to declare *persona non grata* a person proposed or appointed, should be interpreted as meaning that this question is left to the discretion of the receiving State."[1] There was no reason why in the present draft the question should not be dealt with in a similar manner.

45. The "unless" clause at the beginning of the article was difficult to understand. It might refer to various aspects of the possible situation in which a particular consul had been approved by a receiving State before being admitted to the exercise of consular functions on its territory. It seemed to him, however, that all possible situations were fully covered by articles 5, 6 and 7 in conjunction with article 17. Therefore, the clause in question was unnecessary.

46. What remained of article 8 after the elimination of the "unless" clause and of the final phrase would then be the statement that a State was entitled to refuse to admit a person appointed head of a consular office to the exercise of his functions on its territory; but article 7 already provided that such persons could not take up their duties until they had obtained the assent of the State of residence. Article 8 would serve some purpose only if it contained its final phrase. Without that phrase, it lost its significance.

47. Mr. VERDROSS said that article 8 had been correctly described as a negative formulation of article 7. Surely, the only way in which a State could express its refusal to admit a consular officer to the exercise of his functions was not to grant the exequatur. Article 8

[1] See *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9*, chap. III, p. 13.

should therefore be omitted and, if desired, some words might be added to article 7 which would make it clear that the intended State of residence had the right to withhold the exequatur.

48. With reference to the "unless" clause he said that consular relations rested not only on the mutual confidence of the States concerned, but on their continuing mutual confidence. If an *agrément* had been given in advance, it was not necessarily implied that the exequatur would be granted.

49. Mr. BARTOŠ agreed with Mr. Scelle's thesis as elaborated by Mr. Pal (see para. 44 above). He also agreed with Mr. Verdross, except that he would suggest that the reference to the right of a State to refuse the exequatur should be placed in the commentary.

50. Mr. ERIM observed that the *agrément* was mentioned in the draft for the first time in article 8. There had been no reference to it in article 7. He did not think that the case of the refusal of the exequatur to a consular officer in respect of whom no *agrément* had been given could be dealt with in the same way as the case in which there had been an *agrément*. He agreed with Mr. Verdross that the giving of an *agrément* did not necessarily mean that the exequatur would be granted, but if it was refused the reasons should be given. The *agrément* would have been given only after due investigation and, once it had been given, the refusal to grant the exequatur should be explained in the same manner as the withdrawal of the exequatur, as provided for in article 17, paragraph 2.

51. Mr. ZOUREK, Special Rapporteur, referring to Mr. Edmonds's statement (see paras. 37 and 38 above), said that the *agréation* procedure was not common but some consular conventions provided for that procedure. It was admittedly exceptional but it was a practice which, he felt, should be referred to in the text—perhaps with the use of some more general term than *agrément*—in order to enable Governments to comment upon it. However, he would be prepared, if necessary, to withdraw the "unless" clause and to deal with the question in the commentary.

52. On the other hand, he could not agree to the elimination from the text of a reference to the right of the State of residence to refuse to admit a person to the exercise of consular functions on its territory. It had been argued that that was a negative formulation of the rule in article 7. That might be true, but it was one of the most widely accepted formulations of the rule; many national laws and international conventions established the right to refuse the exequatur. A relevant provision should be included in the codification, if only by the amendment of article 7.

53. He agreed with Mr. Yokota (see para. 42 above) that there should be a provision concerning the rights of the State of residence with respect to consular staff other than the head of the consular office. There would be an article concerning the staff of the consular office and such a provision could be inserted in that article.

54. He agreed that the final phrase, "without giving reasons for its refusal", could be omitted.

55. Mr. AMADO said that he had not been convinced by the Special Rapporteur that the draft should contain a reference to the *agréation* procedure. He had never heard of the procedure being applied in the case of consuls and he noted that in paragraph 2 of the Special Rapporteur's commentary nothing specific was cited in support of the view that it existed. If, as the commentary implied, it had been imposed on the defeated States after the First World War, that was another reason why it should not find a place in the draft. It had been agreed that the final phrase concerning the giving of reasons should be omitted and he associated himself with Mr. Pal's view that without that phrase article 8 was unnecessary.

56. Mr. PAL said that after listening to the Special Rapporteur he was still of the opinion that article 8 would not serve any useful purpose. While it had had some meaning in the context of the Special Rapporteur's draft articles—article 1, paragraph 1, which had originally provided that every State had the right to establish consular relations with foreign States—it had lost its significance in view of the changes that had been introduced in the earlier articles, particularly since paragraph 1 of article 1 had been deleted.

57. The CHAIRMAN noted that there was general agreement that the final phrase of article 8 should be omitted and, in his personal view, the article would be pointless without it. Moreover, without that phrase, article 8 would in effect say that if a State had given its *agrément* in advance, it could not refuse to grant the exequatur. That was patently not true, although, admittedly, in such a case a State would not refuse the exequatur except for grave reasons. However, such a case would be so rare that he did not think that a special provision covering it was required in the text of the draft. He hoped that the Special Rapporteur could agree. The fact that the "unless" clause was omitted would not mean that States were not free to apply the *agréation* procedure, and the Special Rapporteur's point could be brought out in the commentary.

58. He also hoped that the Special Rapporteur could agree to the omission of article 8 as a whole. If he felt that a provision concerning the right of the State of residence to refuse the exequatur was essential, he (the Chairman) suggested it might suffice to add at the end of article 7 the sentence: "However, no State shall be bound to grant the exequatur."

59. Mr. ZOUREK, Special Rapporteur, said in reply to Mr. Amado that there were conventions which provided for the *agréation* procedure and there would probably be similar cases in the future. The practice should be encouraged. The case was exceptional, as he had said, and it was in order to take that exceptional case into account that he had included the "unless" clause. However, as it had caused such a division in the Commission, he was prepared to withdraw it, though Governments should be asked to comment on the point.

60. Accordingly, he was prepared to accept the Chairman's suggestion as the basis for referring article 8 to the Drafting Committee.

61. Mr. SANDSTRÖM thought that some members still considered it inadvisable to amend article 7 in the sense indicated. He could accept the Chairman's suggestion (see para. 58 above) on the understanding that the solution envisaged would be re-examined when the report of the Drafting Committee was considered.

The Chairman's suggestion was agreed to subject to the Special Rapporteur's and Mr. Sandström's reservations.

The meeting rose at 12.55 p.m.

510th MEETING

Monday, 8 June 1959, at 3.5 p.m.

Chairman: Sir Gerald FITZMAURICE

Consular intercourse and immunities (A/CN.4/108, A/CN.4/L.79, A/CN.4/L.80, A/CN.4/L.82) (*continued*)

[Agenda item 2]

DRAFT PROVISIONAL ARTICLES ON CONSULAR INTERCOURSE AND IMMUNITIES (A/CN.4/108, PART II) (*continued*)

1. The CHAIRMAN announced that, as agreed at an earlier meeting (see 505th meeting, para. 3), one meeting during the week would be devoted to the question of State responsibility.

ARTICLE 9

2. Mr. ZOUREK, Special Rapporteur, introducing article 9 (*Provisional recognition*), said that the procedure indicated in article 6 for the granting of the exequatur obviously took some time, and often the exercise of consular functions could not be suspended pending the receipt of the exequatur. The resulting problem had often been solved in practice by the method of provisional recognition. He pointed out that the provisional recognition referred to in article 9 had to be granted before the consul could take up his duties. Provisional recognition was mentioned in a number of treaties and also in national legislation, as stated in the commentary. While it had been impossible for him to ascertain whether the practice was general, he took the view that it was a useful expedient and would not be objected to if it was included in the draft. He suggested that, in keeping with the Commission's purpose of contributing to the progressive development of international law, article 9 should be considered for inclusion and then referred to the Drafting Committee for any necessary drafting changes. While it was true that some bilateral conventions provided that in the absence of objection by the State of residence a consul could begin to exercise his functions *ipso jure* before receiving the exequatur, Mr. Zourek considered that that practice was not yet sufficiently widespread to merit inclusion in the draft.

3. Mr. VERDROSS said he had no objection to article 9 but pointed out that its wording, or possibly its retention in the draft, would depend on the wording of article 7.

4. The CHAIRMAN observed that during the discussion of article 7 it had been agreed (see 509th meeting, paras. 12 and 20) that the final sentence would be amended to read "Such assent is normally given in the form of an exequatur". That amendment might call for a slight change in article 9.

5. Mr. ERIM drew attention to the connexion between article 9 and the definition of the term "exequatur" proposed by the Special Rapporteur in a new draft article on definitions. There the term "exequatur" was defined as "the authorization granted by the State of residence to a foreign consul to exercise consular functions on the territory of the State of residence, whatever the form of such authorization". It seemed to him that the "provisional recognition" described in article 9 would be covered by that broad definition of the term "exequatur".

6. Mr. ZOUREK, Special Rapporteur, pointed out that the term "exequatur" referred to final recognition, whereas article 9 referred to provisional recognition pending final recognition. A broad definition of the term "exequatur" was necessary owing to the fact that final recognition might take different forms, including also, *inter alia*, a simple communication through the diplomatic channel.

7. Mr. BARTOŠ said that article 9 was in accord with practice. He recalled the case of a Yugoslav consul-general at New York who had been given provisional recognition at a time when certain political questions had still been pending between the United States of America and Yugoslavia. Again, a Yugoslav consul-general at Zurich had been granted provisional recognition owing to an administrative delay in the grant of the exequatur.

8. There was one question, however, which he wished to put to the Special Rapporteur: where provisional recognition was granted, did the subsequent exequatur constitute the only recognition of the consul's commission or simply ratification of the earlier provisional recognition? The answer to the question would have a bearing on a consul's position so far as precedence was concerned. It would be for the Special Rapporteur to decide whether the matter should be dealt with in the text of the article or in the commentary.

9. Mr. YOKOTA said that he had no objection to article 9 but had some doubts concerning the use of the word "recognition". It might refer to the recognition of the consul's legal status, or again simply to authorization to carry out consular functions. If it referred to legal status, it might give rise to problems relating to precedence and the extent of privileges and immunities. It semed to him from the context of article 9 that the word "recognition" was limited in its scope to authorization to perform consular functions, and it might be better to amend the text accordingly.

10. Mr. EDMONDS said that in the light of the definition of the term "exequatur" suggested by the Special Rapporteur, article 9 was acceptable to him. However, he thought that the question of rank should also be dealt with in article 9. As he understood it, a consular officer granted provisional recognition was entitled for a reasonable period to the privileges and immunities of consular officers who had received the exequatur. That seemed to him a rather vague position and he felt that the Commission would make a useful contribution if it inserted a provision to the effect that a consular officer granted provisional recognition was entitled to all the rights and privileges of his office until the sending State was notified that provisional recognition had been withdrawn. Such a provision would cover both the right to exercise consular functions and the right to enjoy the privileges and immunities of consular officers.

11. Mr. TUNKIN agreed that the draft should contain an article on provisional recognition, which existed in practice. Provisional recognition became necessary when there was undue delay between the presentation of a consul's commission and the granting of the exequatur. He recalled the case of a Soviet consul-general in the Union of South Africa who had presented his commission in June and had not received his exequatur until November, owing to a procedural delay.

12. He agreed with Mr. Bartoš, Mr. Yokota and Mr. Edmonds that the question of the status of a consul who was provisionally recognized should be dealt with in article 9. He noted that article 9 referred to "recognition" while the definition of the term "exequatur" suggested by the Special Rapporteur spoke of "authorization". In his view the word should be "recognition" in both places. A provisionally recognized consul should, in general, have the same status as that of a consul who had received the exequatur and no difference in their status should be implied by a difference in terminology.

13. Lastly, he suggested that the Drafting Committee should examine articles 7 and 9 in conjunction with the suggested definition of the term "exequatur" with a view to bringing out more clearly the distinction between provisional and final recognition alluded to by the Special Rapporteur.

14. Mr. SANDSTRÖM said it was right that the draft should contain an article on provisional recognition. Any possible misunderstanding about its relationship to article 7 or to the proposed definition of "exequatur" could be easily obviated by stating clearly in the definition that the exequatur was the definitive authorization by the State of residence. Thus provisional recognition would not be confused with the exequatur.

15. Mr. MATINE-DAFTARY said that an article on provisional recognition was indispensable because there might be purely technical reasons, such as the temporary absence of the head of State, for a delay in the grant of the exequatur. He suggested that the words "if necessary" should be inserted after the word "may". Commenting on the relationship between provisional recognition and the exequatur, he said that an exequatur granted after earlier provisional recognition would have retroactive effect. He considered that the term "recognition" should be retained in preference to "authorization", in view of the wording of article 4.

16. Mr. PAL said that an article on provisional recognition should be included in the draft. Many of the points raised in the discussion were drafting points which could be easily settled, particularly after a decision had been reached on the text of article 3, paragraph 2.

17. Mr. PADILLA NERVO said that, before provisional recognition could be granted, all the requisite steps for obtaining an exequatur must have been taken, and it was generally held that the State of residence could not unreasonably delay the granting of an exequatur. The practice of Mexico, as reflected in article II of the Consular Convention between Mexico and Panama, signed at Mexico on 9 June 1928,[1] was that a consular officer who had received provisional recognition enjoyed the same privileges and immunities as those accorded to one who had been granted the exequatur. An express provision to that effect was certainly necessary in the draft.

18. The question whether it would be preferable to refer to "recognition" rather than to "authorization" could be left to the Drafting Committee.

19. Mr. ERIM, referring to the words "at the request of the State which appointed him", asked why the onus of requesting provisional recognition should be placed on the sending State; that State had already fulfilled its obligation in applying for an exequatur.

20. Mr. ZOUREK, Special Rapporteur, replying to the observations made, said that there seemed to be general agreement on the need for an article concerning provisional recognition, and he joined with other members in thinking that the provision should be amplified to cover the legal status of consular officials who had received provisional recognition. He had originally contemplated dealing with that point in the commentary, but had now come to the conclusion that it should be expressed in the text itself.

21. He could accept Mr. Matine-Daftary's suggestion (see para. 15 above) that the words "if necessary" should be inserted after the word "may". He also agreed that the exequatur would have retroactive effect from the date of provisional recognition.

22. The choice between the terms "authorization" and "recognition" was not purely a drafting matter. He had chosen "recognition" after careful reflection because it conveyed his meaning more explicitly. The substitution of the word "authorization" would have the very undesirable effect of drawing a distinction between consular officers who had received the exequatur and those who had received provisional recognition, which was surely not the Commission's intention. In fact, there should be no difference between them either with regard to the exercise of their functions or the enjoyment of consular privileges and immunities.

23. The task of ensuring consistency between the article on definition and articles 9 and 7 could be left to the Drafting Committee. The interrelationship of the last two could be further clarified in the comment.

24. In reply to Mr. Erim he said that, despite provisions to the contrary in certain conventions, it would be at variance with practice to depart from the rule that the initiative in asking for provisional recognition, either direct or through the person sent as consul, unavoidably lay with the sending State; the exercise of certain consular functions implied some derogation from the sovereignty of the State of residence and its prior consent had to be obtained.

25. If the Commission decided to insert a new paragraph covering the status of officials who had received provisional recognition, it might go some way towards solving the problem of precedence raised by Mr. Bartoš. He suggested that precedence should, in those cases, be governed by the date of the grant of provisional recognition.

26. Mr. LIANG, Secretary to the Commission, agreed with Mr. Erim that in cases where the State of residence took an unduly long time to grant the exequatur, it was unreasonable to require the accrediting State to ask for provisional recognition of a consular officer. Practice appeared to differ. The text of the Special Rapporteur was drafted somewhat along the lines of the Consular Convention between Mexico and Panama cited by Mr. Padilla Nervo (see para. 17 above), but there were provisions of a different kind in other consular conventions. Under the Convention between the United States of America and Costa Rica, signed in 1948[2]—especially article I, paragraph 3—it was left to the State of residence to judge whether provisional recognition would have to be given pending the issuance of an exequatur. According to the Consular Con-

[1] See *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No.: 58.V.3), p. 450.

[2] *Ibid.*, p. 452.

vention between the United Kingdom and Sweden of 1952[3]—especially article 4, paragraph (2)—the obligation lay clearly with the receiving State to accord provisional authorization in those cases in which the exequatur could not be granted in reasonable time. He preferred the provision contained in the last-mentioned Convention.

27. The CHAIRMAN, speaking as a member of the Commission, said that in the light of the provisions of the Consular Convention between the United Kingdom and Sweden, the balance of article 9 in the Special Rapporteur's text seemed to be wrong. It was self-evident that the receiving State could at any time accord provisional recognition before issuing the exequatur but the real point was that the responsibility for delay belonged to that State, and hence it should be under an obligation to act with reasonable speed or to accord provisional recognition so as to enable the official in question to take up his duties.

28. Mr. ERIM said that article 6 in the Havana Convention regarding consular agents, of 20 February 1928,[4] seemed to suggest that the request for provisional recognition was made when the official was appointed and not after there had been a delay in granting the exequatur.

29. Article 9 should be reconsidered and framed in a more logical way.

30. Mr. BARTOŠ said that the circumstances in which the sending State would normally ask for the provisional admission of a consular officer to the exercise of consular functions in the receiving State were those where a post had fallen vacant and it was urgently necessary that it be filled. At that stage, however, the consular commission of the officer designate would not yet have been formally presented.

31. Mr. MATINE-DAFTARY did not think it could be left entirely to the receiving State to decide in what circumstances it should grant provisional recognition. If the sending State was anxious to fill a consular post promptly, it was for that State to ask for the provisional recognition of a consular officer.

32. The CHAIRMAN said that the real question was whether, when provisional recognition was asked for, the receiving State was obliged to accede.

33. Mr. TUNKIN said he was likewise doubtful whether the words at the end of article 9—"at the request of the State which appointed him"—should stand. In practice, provisional recognition was not always granted at the request of the sending State. The receiving State might spontaneously grant provisional recognition, pending the grant of an exequatur, in order not to put a consul into an awkward position. The suggestion that the phrase should be omitted might be referred to the Drafting Committee.

34. He did not think that the question of an obligation to grant definitive or provisional recognition should be covered by any specific rule in the Commission's draft. A similar problem had arisen in connexion with article 12 of the draft on diplomatic intercourse and immunities, and had been left open. The interim status of a consular officer who had not yet obtained the exequatur should be settled, either in an addition to article 9 or in a special article.

35. Mr. ZOUREK, Special Rapporteur, said that the phrase "at the request of the [sending] State", or an equivalent phrase, occurred in a number of international conventions, including the Havana Convention of 1928. It had apparently not been interpreted as excluding a situation in which the State requested to grant the exequatur might grant provisional recognition on its own initiative. In any case, the question was one of drafting an appropriate formula to cover all possible eventualities.

36. He thought that the question whether or not a State was under an obligation to grant provisional recognition to a consular officer designate exceeded the scope of article 9 and that it was unnecessary to settle it at the present stage of the Commission's work. Moreover, it would be difficult to say that the State of residence could not refuse provisional recognition when it was agreed that it could refuse final recognition, in other words, the exequatur. The article could be sent to the Drafting Committee.

37. Mr. SANDSTRÖM said, with reference to Mr. Tunkin's remarks (see para. 34 above), that in the case of diplomatic agents the *agrément* was issued in advance, and article 12 of the draft on diplomatic intercourse and immunities did not operate until after the *agrément* had been given. Nevertheless, he agreed that the phrase "at the request of the State which appointed him" could be omitted.

38. The CHAIRMAN thought that there was one more substantive point to be settled before the article was referred to the Drafting Committee. In order to avoid any implication of compulsion on the receiving State, but to indicate that a receiving State should not refuse to grant provisional recognition unless it was not prepared to receive a particular consular officer, the article might be reworded along the following lines:

> "In the event of delay in the delivery in due form of his exequatur, a consular officer may be granted provisional recognition by the State of residence. Such grant shall not normally be refused if the receiving State is in principle prepared to receive the consular officer."

39. Mr. BARTOŠ considered that two very different sets of circumstances might give rise to provisional recognition. On the one hand, such recognition might be granted pending a detailed examination of the candidature of a consular office, which implied a reservation on the part of the receiving State. On the other hand, however, some technical difficulty might prevent the immediate grant of the exequatur; in that case the promise of definitive recognition would be implied. It was therefore extremely difficult to deal with both cases in a single general rule. The Drafting Committee should be asked to mention those two different cases in the commentary.

40. The CHAIRMAN, summing up the debate on article 9, said that the Special Rapporteur would draft an article on the interim status of consular officers recognized provisionally and that the Drafting Committee would decide whether that provision should be added to article 9 or included in the chapter on immunities. The Drafting Committee would also consider the question of the relationship of article 9 with article 7 and with the definition of the term "exequatur" proposed in the article on definitions. The Special Rapporteur had also agreed that the granting of the exequatur would be retroactive to the granting of provisional re-

[3] *Ibid.*, p. 467.

[4] *Ibid.*, p. 422.

cognition to the consular officer concerned. He suggested that article 9 could be referred to the Drafting Committee for redrafting in the light of the debate.

It was so agreed.

ARTICLE 10

41. Mr. ZOUREK, Special Rapporteur, introducing article 10 (*Obligation to notify the authorities of the consular district*), observed that the provision was consequential upon articles 7 and 9. Once a consul had been recognized, it was incumbent upon the State of residence to notify the competent authorities of the consular district, since such notification was essential to enable the consul to exercise his functions. The provision was consistent with general practice, for it was usual in most States to publish the granting of the exequatur in official gazettes and to instruct the competent authorities to give the consul the necessary co-operation. He referred to the commentary of the article. He thought that the Commission should limit its discussion to the principle involved in the article, without going into too much detail with regard to drafting.

42. Mr. YOKOTA supported the principle set forth in the article. However, inasmuch as the exact moment when the head of a consular office was *de jure* in a position to take up his duties was the time of the granting of the exequatur, he suggested that the first part of the article might be amended to read: "The Government of the State of residence shall immediately notify the competent authorities of the consular district that authorization has been given to the consular representative (or officer) to take office".

43. Mr. SCELLE thought that the most important point in the article was the double obligation involved, as stated in the commentary. What would happen if the Government of the State of residence neglected to notify the authorities concerned? Would the consular officer concerned have to acquiesce in such a gesture of ill-will, or would he have to invoke his exequatur and the consular treaty between the two countries before he could begin to exercise his functions? Under the French Constitution, a treaty prevailed over municipal law and the French Government was legally bound to carry out the provisions of treaties. He asked the Special Rapporteur whether he considered that, if a consular officer could prove his claims to be well founded, he could demand that the consular treaty should be carried out. If that were not so, there would be no need to state the double obligation in the article. That point was, in his opinion, extremely important from the purely juridical point of view.

44. Mr. MATINE-DAFTARY said that he had been inclined to regard article 10 as superfluous, since it referred only to routine matters of carrying out agreements. He had since come to the conclusion, however, that the provision was useful in the case of federal States, where the federal authority over the component parts of the State might vary in different cases. He also endorsed Mr. Scelle's arguments.

45. Mr. SANDSTRÖM considered that, since under article 4 it was a condition of the acquisition of consular status that a consular officer should have been recognized in that capacity by the receiving State, the commencement of his consular functions should date from the time of the granting of the exequatur. Moreover, he interpreted the provisions of article 7 as conveying the same idea. He considered that article 10 should end immediately after the words "has taken office" and that the idea expressed in the remainder of the article should be relegated to the commentary. As it stood, the article did not make it clear at what point the consular officer was entitled to take up his functions and to enjoy consular privileges and immunities.

46. Mr. EDMONDS doubted whether the article was necessary, since it stated something that should be taken for granted. Moreover, it was clear from the commentary that the article was intended to apply to provisional recognition; if that was so, provisional recognition should be mentioned explicitly in the text.

47. Mr. GARCIA AMADOR, replying to Mr. Scelle, said it was obvious that consular treaties would be fully applicable and were regarded as the law of the land, even in the absence of an express provision to that effect. He did not consider that the article was controversial, since it stated a standard obligation which was laid down in all international conventions on the subject. However, he thought that the drafting might be improved, for as it stood it might be misconstrued to mean that what determined the commencement of a consular officer's functions was the notification to the authorities of the consular district.

48. Mr. LIANG, Secretary to the Commission, also did not consider that the article was controversial, but thought that the words "has taken office" were used somewhat ambiguously. It should be made clear that the State of residence would notify the competent authorities before the consular officer had taken office in order that the necessary steps might be taken to facilitate the exercise of his functions. The point at which the notification should be made was that of the granting of the exequatur; when the consular officer had taken office, there was less need to notify the authorities.

The meeting rose at 6 p.m.

511th MEETING

Tuesday, 9 June 1959, at 9.55 a.m.

Chairman: Sir Gerald FITZMAURICE

Consular intercourse and immunities (A/CN.4/108, A/CN.4/L.79, A/CN.4/L.80, A/CN.4/L.82) (*continued*)

[Agenda item 2]

DRAFT PROVISIONAL ARTICLES ON CONSULAR INTERCOURSE AND IMMUNITIES (A/CN.4/108, PART II) (*continued*)

ARTICLE 10 (*continued*)

1. Mr. ZOUREK, Special Rapporteur, replying to comments made at the preceding meeting, observed that there seemed to be general agreement on the basic rule set forth in article 10.

2. Mr. Yokota had suggested that the text should make clearer exactly when the consular officer concerned would take office (see 510th meeting, para. 42). The term "take office" had been used for practical reasons, in order to cover both the granting of the exequatur and provisional recognition. He agreed, however, that explicit reference might be made to those two acts, which marked the commencement of consular functions.

3. Mr. Edmonds had suggested that the article might be dispensed with and, furthermore, that it seemed to apply mainly to provisional recognition (see 510th meeting, para. 46). Actually, the obligation laid down in the article followed logically from the recognition of any foreign consul and could not be disregarded, particularly since it was mentioned in many international conventions; moreover, the obligation was not very onerous. He added that the article applied equally to provisional recognition and to the granting of the exequatur.

4. In reply to Mr. García Amador's remark (510th meeting, para. 47) that the article as it stood might be interpreted to mean that the commencement of a consul's functions was contingent on the notification to the local authorities, he suggested that an explanatory sentence might be included in the commentary to remove any doubt.

5. He could not agree with Mr. Sandström's suggestion (see 510th meeting, para. 45) that only the first part of the article should stand and that the idea expressed in the remainder of the article should be transferred to the commentary. The second part of the article contained an important obligation incumbent on the receiving State, and the provision should certainly not be omitted, particularly as provisions laying down that obligation occurred even more frequently in consular treaties than did provisions corresponding to that in the first part.

6. In reply to the Secretary's observation that notification should be given before the consul took office (see 510th meeting, para. 48), he said that would be the logical procedure but added that in law logic was often limited by practical considerations. In actual practice, it was not possible for the central Government to notify the authorities of the consular district in advance; in that connexion he cited the Consular Convention between the United Kingdom and France, signed at Paris on 31 December 1951.[1]

7. Finally, in reply to Mr. Scelle's question regarding failure to give effect to a treaty in force between the two States concerned (see 510th meeting, para. 43), he said that the first step would be to make representations through the diplomatic channel. If satisfaction were not obtained, the most appropriate procedure under the treaty would be resorted to, as in the case of any other dispute concerning the interpretation of a treaty.

8. Mr. LIANG, Secretary to the Commission, agreed with the Special Rapporteur that there were no substantive differences of opinion on the article. His criticism had related mainly to the vagueness of the French expression *"entrée en fonctions"* and to the even more objectionable form in English "has taken office", for he believed that the consular officer could not be said to have "taken office" until he arrived in the consular district and took up his duties. If Mr. Yokota's suggestion were accepted, however, that point would have been met.

9. Mr. SCELLE thought that the Special Rapporteur had not quite understood his point. He was concerned by the possibility that the article might enable a Government to delay the exercise of functions by a consular officer by failing to notify the competent authorities. The Special Rapporteur had rightly stated that all non-observance of treaties must be dealt with by specific procedures. However, under article 10, a consular officer who arrived at his post before notification had been given might be placed in a difficult position, and the receiving State could considerably delay the commencement of the exercise of his functions.

10. Mr. EDMONDS observed that he had not meant to say that the article related to provisional recognition rather than to definitive recognition. He had merely pointed out that since, according to the commentary, the article covered provisional recognition as well as the granting of the exequatur, it might be advisable to refer to provisional recognition in the article itself.

11. Mr. TUNKIN thought that the present drafting of the article was not quite satisfactory. It would probably be an improvement to omit any reference to notification, which in any case was an internal procedure. The Drafting Committee might consider rewording the article to state that, from the moment of the recognition of the consular officer, the receiving State should without delay take all the necessary steps to enable him to carry out the duties appertaining to his office and to enjoy the privileges and immunities recognized by existing conventions and by the articles of the draft.

12. Mr. PADILLA NERVO considered that the second part of the article should be redrafted. The right of a consular officer to enjoy privileges and immunities was not founded on measures taken by the local authorities. The local authorities were obliged to facilitate the exercise of consular functions, but the right to the enjoyment of privileges and immunities was conferred by the exequatur and the existing conventions, and it was consequently the obligation of the State of residence to ensure that the privileges and immunities were in fact enjoyed.

13. Mr. AMADO considered that the best formulation of the article had been suggested by Mr. Yokota at the preceding meeting. It would be enough to provide that the Government of the State of residence should immediately notify the competent authorities of the consular district that the exequatur or other authorization had been granted to the consular officer. The remainder of the article was superfluous since all the legal consequences were produced by the exequatur.

14. Mr. YOKOTA thought that the whole article should be retained, with some modification. If Mr. Tunkin's suggestion were followed, some important substantive points would be omitted. Of course, the exequatur or any other authorization implied that the necessary measures would be taken, but it should be borne in mind that, in the case of consular officers, in contradistinction to that of diplomatic agents, the consular district was usually situated at some distance from the seat of the central Government. Accordingly, it was essential to provide that the local authorities should be notified as soon as possible when the exequatur or other authorization had been granted. Moreover, it might be assumed that when the local authorities received such notification, they would take all the necessary steps to enable the consular officer to carry out his duties.

15. Mr. TUNKIN said he had no objection to retaining the provision concerning the obligation to notify the local authorities. He wished to stress, however, that the obligation should rest with the central Government, and not with the local authorities. The article might therefore be revised to lay down the obligation of the central Government to notify the local authorities and its additional obligation to ensure that the necessary steps were taken to enable the consular officer to carry

[1] Cmd. 8457 (London, H.M.S.O.).

out his duties and enjoy certain privileges and immunities.

16. Mr. MATINE-DAFTARY recalled his remarks at the preceding meeting to the effect that the article was especially pertinent to federal States (see 510th meeting, para. 44).

17. He agreed with Mr. Tunkin that a provision intended to state a rule of international law should not lay down obligations for local authorities. He therefore proposed that article 10 should be replaced by the following text:

"The Government of the State of residence, immediately after recognizing a consular officer provisionally or by exequatur, shall give the necessary instructions to the competent authorities of the consular district and ensure that the said authorities take all necessary steps without delay to enable the consular officer to carry out the duties appertaining to his office and to enjoy the privileges and immunities recognized by existing conventions and by these articles."

18. The CHAIRMAN thought that the best way of meeting Mr. Scelle's objections would be to follow Mr. Tunkin's suggestion. Under recognized principles of international law, when a Government granted an exequatur or provisional recognition to a consul, it was bound to take all the necessary steps to ensure the fulfilment of its international obligations. Under article 10 as it stood, the local authorities might conceivably disclaim all knowledge of a consular officer sent to their district. That misinterpretation might be avoided either by making it quite clear that notification was not a condition of the exercise of consular functions, or by omitting all reference to local authorities, as Mr. Tunkin had originally suggested.

19. Mr. ZOUREK, Special Rapporteur, pointed out that the central Government was responsible under international law for enabling a consular officer to exercise his functions and to enjoy privileges and immunities. It should be stressed, however, that the State was under a duty to take all the necessary steps to that effect and, in the case of distant consular seats or districts, it was obviously obliged to act through the local authorities. The difficulty might be simply obviated by including the words "on the presentation of the exequatur or other authorization" in the second part of the article. Another solution might be to adopt Mr. Matine-Daftary's amendment (see para. 18 above). Furthermore, he considered that Mr. Matine-Daftary's point concerning the importance of the article to federal States should be taken into account.

20. The CHAIRMAN suggested that article 10 should be referred to the Drafting Committee, to be reworded in the light of the debate.

It was so agreed.

ARTICLE 11

21. Mr. ZOUREK, Special Rapporteur, introducing article 11 (Ad interim *functions*), said that its purpose was to regulate the status of an acting head of consular office, whose functions might be assimilated to those of the *chargé d'affaires ad interim* in diplomatic relations. A provision of that kind was included in nearly all consular treaties, both old and new, and the commentary showed that the practice of appointing an acting head was solidly established.

22. He thought the wording of paragraph 1 might be clarified by substituting the words "shall perform *ipso jure*" for "shall be permitted *ipso jure* to perform". In paragraph 2, the wording might be changed in order to specify the obligation incumbent upon the State of residence, in accordance with the suggestions made by some members with regard to article 10.

23. Mr. BARTOŠ endorsed the principle contained in article 11, but did not think that the Special Rapporteur's explanation of the basis of the article was quite consistent with reality. When the post of titular head of a consular office fell vacant, the officer acting as head of office *ad interim* received provisional recognition in that capacity. That officer was, however, in any case an accredited consular officer and as such enjoyed consular privileges by virtue, not of his status as acting head of office, but of his functions.

24. Mr. LIANG, Secretary to the Commission, said that, both in English and in French, the term "substitute" in the context of article 11 might suggest that the acting head of the consular office was a person specially appointed and expressly sent by the sending State to take over the functions of head of the consular office. However, article 11 envisaged also a more normal situation, corresponding to that in which a *chargé d'affaires ad interim* assumed the direction of an embassy, as the Special Rapporteur clearly indicated at the beginning of paragraph 1 of his commentary. Accordingly, he would suggest the replacement of the word "substitute".

25. The normal situation was clearly indicated in many consular conventions. For example, the Treaty of Friendship, Commerce and Consular Rights between the United States of America and Germany, signed at Washington on 8 December 1923,[2] provided in article XX that the consular function of the deceased, incapacitated or absent consular officer could temporarily be exercised by a subordinate consular officer at the post, even by a secretary or chancellor, whose official character had previously been made known to the Government of the State of residence. Of course, in the case of a consulate-general the name of any subordinate consular officer such as the consul, and of other consular staff would have been communicated to the State of residence.

26. Again, the Consular Convention between Poland and the Union of Soviet Socialist Republics, signed at Moscow on 18 July 1924,[3] provided in article 8 that "In case of the absence, sickness or death of a consul, or of his being prevented by any other circumstance from carrying out his duties, his deputy, who must be one of the consulate staff and whose name must have been duly communicated to the Commissariat of the People (or to the Ministry) for Foreign Affairs of the consul's country of residence, shall be authorized, of full right, to fulfil the duties of the consular office *ad interim* . . .".

27. He felt that such a formulation might be more descriptive of the normal situation than that set out in article 11, which might imply an independent, new official and the necessity of a new act of communication on the part of the sending State.

28. Furthermore, the expression "competent service" was not sufficiently precise. The last Consular Convention he had cited provided that the communication must have been addressed to the Ministry for Foreign Affairs, and in his view that was nearly invariably the

[2] See *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No.: 58.V.3), p. 433.

[3] *Ibid.*, p. 448.

case. He suggested that the words "the competent service of" should be replaced by the words "the Ministry for Foreign Affairs of" or simply omitted, since the raising of the question of the competent service might call for definition on the part of either the sending State or the State of residence.

29. Mr. FRANÇOIS agreed with the Secretary that the text of article 11, paragraph 1, was too broad. If the substitute appointed by the sending State was not already a member of the consular corps in the State of residence, would not a new exequatur be necessary? To suggest that the sending State could appoint an unknown substitute whom the State of residence could not object to and was bound to accept was going too far. In practice, the person appointed acting head of a consular office was generally a consular officer already stationed in the territory of the State of residence, and paragraph 1 should be amended accordingly.

30. As to paragraph 2, he did not think that the problem of the acting head's rank was so easily solved. In the case of diplomatic officers, the matter of rank was governed by the Regulation adopted at the Congress of Vienna and the Protocol of the Conference of Aix-la-Chapelle: a *chargé d'affaires ad interim* had his own rank, which was below that of the first three classes of diplomatic officer. However, he did not think that such a rule could be applied to consular officers, because it was unthinkable that the acting head of a consular office should rank below a consular agent.

31. There remained the possibilities of his assuming the rank of the officer he had replaced or of his retaining the rank he had held before becoming acting head. The practice was not uniform on that point and the Commission would be justified in contributing to its standardization.

32. However, he was not suggesting that the Commission should propose a solution forthwith. It should draw the attention of Governments to the question and ask them to describe their practice. The Commission could then decide, in the light of the replies, whether it was possible to formulate a rule.

33. Mr. PADILLA NERVO read out article 9 of the Havana Convention regarding Consular Agents, of 1928, and article I, paragraph 6, of the Consular Convention between the United States of America and Costa Rica, of 1948, and observed that for the purposes envisaged in article 11 of the draft under discussion the head of a consular office was normally replaced by the next-ranking consular officer in his office or, in the absence of such an officer, by an officer of another consular district in the State of residence. In either case, the acting head would be a person previously known to and accepted by the State of residence.

34. However, article 11, paragraph 1, was not clear in that respect and might be understood to mean that the acting head was a person who had not previously been accepted by the State of residence.

35. Mr. YOKOTA saw no essential difference between the situation of an *ad interim* head of a consular office and a *chargé d'affaires ad interim,* and suggested that so far as paragraph 1 was concerned the Drafting Committee should apply *mutatis mutandis* the formula adopted for article 17 of the draft articles on diplomatic intercourse and immunities.

36. He agreed with Mr. François that the regulation of the rank of an acting head of a consular office presented a difficult problem. While such an officer undoubtedly enjoyed the privileges and immunities of a head of consular office so far as the performance of his duties was concerned, he might not be entitled to all of those privileges in matters of precedence.

37. He noted that the draft on diplomatic intercourse and immunities did not lay down a ruling on the privileges and immunities of a *chargé d'affaires ad interim* and he suggested that, similarly, paragraph 2 of article 11 might be dispensed with. If necessary, some reference to the subject could be included in the commentary.

38. Mr. EDMONDS agreed with previous speakers that article 11 was too loosely drawn. In the first place, it permitted the acting head of the consular office to serve "pending the . . . return to duty [of the head of the office *ad interim*] or the appointment of a new head", in other words, for an indefinite period. While it was difficult to set a time limit in such a case, some consular conventions used the word "temporarily" and that, at least, implied that the return to a normal situation should not be unduly delayed. Furthermore, the article should contain some reference to the question of the eligibility—from the point of view of the State of residence—of persons appointed acting heads of office.

39. Mr. VERDROSS agreed with Mr. François that article 11 did not appear to be in accord with practice. He suggested that the article should be redrafted along the lines of article 9 of the Havana Convention.

40. Mr. ALFARO thought that there was general agreement that article 11 could refer only to a situation in which there had been a previous arrangement between the two States concerning the succession to the post of head of office. He suggested that the text of article 11, paragraph 1, could be amended to provide for that point by changing the words "whose name must be communicated" to the words "whose name must have been communicated".

41. He considered the provision of the Havana Convention too narrow for the purposes of the Commission's draft, because it dealt with substitution within a single consular district.

42. Finally, he pointed out that there was a tautology at the end of paragraph 1: after the words *"ad interim"* the words "pending the latter's return to duty or the appointment of a new head" were unnecessary.

43. Mr. ZOUREK, Special Rapporteur, commenting on the suggestions made, said that there appeared to be general agreement that an article regarding *ad interim* functions was necessary. He had no objection to replacing the word "substitute", which he had thought would be wide enough to cover all situations. He suggested that the Drafting Committee should select a term that would be applicable to the two situations mentioned by Mr. Padilla Nervo.

44. With regard to the question of precedence, he remarked that Mr. Yokota was right in saying that the precedence of *chargés d'affaires ad interim* was not dealt with in the draft on diplomatic intercourse and immunities, but he agreed with Mr. François that the Commission should ask Governments to describe their practice in the matter. If sufficient uniformity was found, there was no reason why the Commission should not include a provision on the precedence of acting heads of consular offices.

45. He did not think that Mr. Yokota's suggestion that the Drafting Committee should follow the formula adopted for article 17 of the draft on diplomatic intercourse and immunities should cause any problem.

46. In reply to Mr. Edmonds, he said that in his opinion the temporary nature of the function of the acting head seemed to be sufficiently emphasized by the title of the article and by the words *"ad interim"*. He saw no objection to replacing the words *"ad interim"* by the term "temporarily".

47. The corresponding provision of the Havana Convention had been suggested as a model, but in his view it was not suitable because it did not cover all possible situations and particularly the two referred to by Mr. Padilla Nervo.

48. Mr. Alfaro had said that the article dealt with a situation for which an arrangement between the States concerned existed in advance. He agreed that that was very often the case but he felt that the article should be so drafted as also to cover cases in which there was no arrangement and the post of head of consular office fell vacant. He had no objection to the omission of the final phrase of paragraph 1 if it was considered superfluous.

49. As to the Secretary's suggestion that the words "competent service" should be replaced by the words "Ministry for Foreign Affairs", he said he preferred the original wording, because the question of the authority to whom the communication should be addressed was governed by municipal law; there might be cases, perhaps in federal States, in which the law provided for notification to some other authority.

50. The CHAIRMAN suggested that article 11 should be referred to the Drafting Committee on the basis indicated by the Special Rapporteur.

It was so agreed.

ARTICLE 12

51. The CHAIRMAN drew attention to the amendment to article 12 (*Consular relations with unrecognized States and Governments*) submitted by Mr. Scelle:

"Replace article 12 by the following text:

'In case of disturbance, civil war or overthrow of the Government in a country of residence, a consular officer who has previously received the exequatur shall continue in his post and functions pending the decision of the sending State concerning recognition, whether *de facto* or *de jure*.'"

52. Mr. ZOUREK, Special Rapporteur, introducing article 12, said that he had included the article because the question of consular relations with unrecognized States arose in practice and had been widely discussed in theory. Two possible situations could present themselves: a Government might grant an exequatur to a consul sent by a State or Government which it did not recognize; or a Government might send a consul to a State which it did not recognize or whose Government it did not recognize.

53. In the first hypothesis, the fact of granting an exequatur was generally accepted as implying recognition, for consent to the performance of functions by an agent of an unrecognized Government in the territory of the State of residence was undeniably a form of tacit recognition.

54. As to the second hypothesis, opinion was divided but in his view the act of a State's requesting an exequatur implied recognition of the Government and State to which the request was addressed, and of its sovereignty over the territory in which the consul was to exercise his functions. However, there were exceptions, namely, when the sending State's request for an exequatur was accompanied by an express declaration that that request did not imply recognition, or when special circumstances excluded such an interpretation. As he had said, opinion was divided on the question and he did not think that it should be settled at the present session. It was a question which was encountered in practice and should be brought to the attention of Governments.

55. Mr. Scelle's amendment dealt with a situation that was entirely different from those which he had just described. It dealt with the case of a consul who was already at his post when civil disturbance broke out in the State of residence. He could not, therefore, accept Mr. Scelle's amendment as a substitute for article 12 and suggested that the Commission should first discuss article 12 and then take up Mr. Scelle's amendment as a new proposal.

56. Finally, he suggested that the Commission should disregard for the time being the position of a neutral consul in occupied territory. That question would be dealt with in his second report.

57. Mr. VERDROSS said that personally he shared the opinion of the Special Rapporteur that the granting of an exequatur to the head of a consular office of an unrecognized State or Government implied the recognition of the State or Government concerned, but it seemed to him that it would exceed the scope of a draft on consular intercourse and immunities to lay down such a rule. The law relating to consuls covered the functions, rights and privileges of consuls but not the legal consequences of consular functions on other spheres of international law. He therefore suggested that article 12 should be omitted, especially as the problem of the nature of recognition of a State or Government was too complex to be settled, *en passant* as it were, in a rule of consular law.

58. As to Mr. Scelle's amendment, he agreed with the Special Rapporteur that it was not an amendment but a proposal dealing with a different situation and that it should be discussed separately.

59. Mr. PAL considered that article 12 should be omitted: the proper place for such a provision would be an entirely separate draft on the broader question of recognition. On the other hand Mr. Scelle's proposal, which was perhaps suggested by paragraph 3 of the commentary, could be revised in terms that would make it suitable for inclusion in the present draft, but it should be taken up together with articles 17 to 19, to which it properly related.

60. Mr. SCELLE agreed with Mr. Pal. He was opposed to article 12 because it was contrary to law in confusing two wholly separate conceptions and was dangerous because it implied, in violation of international law, that States could trade exequaturs for recognition. The exchange of consular officials, an essential element in international relations, had nothing whatsoever to do with recognition and in numerous instances consuls continued to exercise their functions at a time when the Government of the State of residence was either not yet recognized or had been refused recognition. His amendment did not cover the situation during a state of war, which posed other problems that would be considered in connexion with articles 18 and 19.

61. The grant of, or request for, an exequatur could not imply recognition because unlike diplomatic agents, consular officers were not representatives of the sending State and had other functions to fulfil: functions which were particularly important during disturbances or civil war. Those were the considerations underlying his amendment, which was designed to ensure that consular officials could continue to carry out their duties during such times.

62. A further objection to article 12 was that it did not distinguish between *de facto* and *de jure* recognition. The former could be withdrawn and did not signify recognition of the legitimacy of a Government. The latter was absolute. The practical problem was what should be the position of consular offices during the period, which could be of some duration, while the sending State was deciding whether to recognize the State of residence *de facto* or *de jure*. Surely it was inconceivable that there should be no consular relations whatever during that time, and that the nationals of the sending State would be deprived of any protection. It was in the public interest that consular officers who had already received their exequatur should continue to discharge their functions.

63. For those reasons he considered that article 12 should be replaced by his own text, which dealt with an entirely separate question.

64. Mr. LIANG, Secretary to the Commission, suggested that the problem might be viewed from another angle, namely, from an analysis of the interests which the institution of consular relations was designed to protect and promote. That was an approach which was familiar to jurists under the title of *"Interessenjurisprudenz"*, and it might prove extremely useful in the present context. An examination of the functions of consuls, as set out in the second variant of article 13, would show how predominant was the protection by consuls of the interests of individuals. He added, in parenthesis, that he wondered why writers on the international protection of human rights did not make haste to stress the importance of an institution, namely, the institution of the consul, which touched very intimately the life of the nationals of the States which maintained consular relations with each other.

65. If, then, the predominant purpose of consular relations was to protect the interests of individuals, and that proposition was accepted in the practice and experience of States, it might be preferable to base any rule on that practice and experience rather than on what pure logic might suggest. Oliver Wendell Holmes, the well-known American jurist, had rightly said that the life of law was experience, not logic. Therefore, although he conceded that the logic in the Special Rapporteur's reasoning supported the view that the establishment of consular relations in some measure implied recognition, he thought logic should not be utilized so as to discourage States from establishing consular relations where they wished to do so but did not wish, for reasons of policy, to afford recognition, *de facto* or *de jure*, to each other. In that way the main purpose of consular relations, the protection of the interests of individuals and the promotion of commercial intercourse, would be, perhaps unnecessarily, jeopardized and defeated. He would, therefore, prefer a rule which permitted the establishment of consular relations without implying recognition or the establishment of diplomatic relations, in order that the limited purposes of consular relations might be achieved as widely as possible.

66. Mr. YOKOTA shared the view that the complex question of recognition should not be dealt with in the present draft. If, however, it were decided to say something on the matter he felt bound to point out that article 12 as it stood was too absolute and seemed to suggest, mistakenly, that consular officials acted in a representative capacity. He agreed with those members of the Commission who, during the discussion on the first three articles, had contended that the main function of consular officers was to assure the protection of rights and interests of his compatriots and further the economic and commercial interests of the sending State. One could not, therefore, theoretically maintain that a request for the issue of an exequatur necessarily implied recognition of a State or Government. Moreover, there were cases in practice where the maintenance of consular officers or consulates in the territory of an unrecognized State or Government did not imply recognition of that State or Government. It would therefore be more consistent with practice at least to include in an article on consular relations with unrecognized States the proviso contained at the end of paragraph 2 of the commentary: "unless the special circumstances . . . no intention of according such recognition". As an instance of the cases where the maintenance of consulates or consular officers had been made without recognition of the State of residence he mentioned the action taken by the United States and the Soviet Union in maintaining consulates in Manchukuo.

67. Mr. MATINE-DAFTARY considered that article 12, which was extremely controversial in its present form, should be omitted: the question of recognition had nothing to do with consular intercourse and immunities. Mr. Scelle had rightly emphasized that, whether the sending State recognized the State of residence or not, the former's nationals needed consular protection. He therefore appealed to the Special Rapporteur to withdraw the article.

68. Mr. HSU also found article 12 as it stood out of place in the draft, though he would not be averse to an article expressly stating that the maintenance of consular relations was a matter that was entirely independent of recognition. The interests of individuals, which were supreme, should not be exposed to the whims of States; for otherwise, declarations about the sanctity of human rights would be but empty phrases.

69. Mr. AGO said he did not propose to discuss the extremely complex and controversial question whether or not consular relations implied recognition. The different hypotheses were very numerous and though the affirmative thesis was not acceptable in general, the reverse thesis was not in all cases justified either. He was inclined to believe that the establishment of consular relations with a new State should be interpreted as implying at least *de facto* recognition. On the other hand, the maintenance of consular offices during civil war and requests for exequaturs when consular officers had to be replaced did not necessarily constitute recognition of the Government in power in a consular district.

70. He believed, therefore, that it would be inadvisable to maintain article 12; it was quite unnecessary in the present draft to consider the possible consequences of consular relations for the wholly separate question of recognition.

The meeting rose at 1 p.m.

512th MEETING

Wednesday, 10 June 1959, at 9.45 a.m.

Chairman: Sir Gerald FITZMAURICE

State responsibility (A/CN.4/96, A/CN.4/106, A/CN.4/111, A/CN.4/119)

[Agenda item 4]

1. The CHAIRMAN recalled that at its 505th meeting the Commission had agreed to devote one meeting during the week to the topic of State responsibility. He welcomed Professor Louis B. Sohn and Professor Richard R. Baxter, who had prepared the Harvard Law School draft on the subject.[1]

2. Mr. LIANG, Secretary to the Commission, recalled that during the discussion on State responsibility at its eighth session (1956), he had informed the Commission about the collaboration between the United Nations Secretariat and the Harvard Law School in the preliminary work on that topic.[2] As he had indicated at the time, he had largely been responsible for initiating the co-operation inasmuch as he had suggested that the Harvard draft of 1929,[3] prepared in anticipation of the Conference for the Codification of International Law held at The Hague (1930) by Professor Edwin M. Borchard with the help of an Advisory Committee, might be revised and that a new draft would be of great service to the Commission. Though the draft now circulated was not the final version, he was sure that members would be interested in reading it and would find it useful for reference and comparison with the draft contained in the Special Rapporteur's fourth report (A/CN.4/119).

3. He was glad to have persuaded the Harvard Law School to have taken up the work and he was certain that the Commission would welcome the opportunity of availing itself of that type of outside collaboration.

4. The CHAIRMAN invited Professor Sohn to make an introductory statement about the Harvard draft.

5. Professor SOHN, thanking the Commission for giving him an opportunity of presenting the draft, said that, as indicated by the Secretary, it formed the continuation to some extent of the work inaugurated in 1928. During the 1920's and 1930's the Harvard Law School Research in International Law had been keenly interested in the codification of international law. After the war, a personal connexion had been established between the Commission and the Harvard Law School through the membership of Professor Manley O. Hudson on the Commission; and, on the latter's retirement, Professor Milton Katz, Director of International Legal Studies at Harvard, had given some thought to how the relationship between the two bodies might be maintained. Mr. Liang's suggestion had therefore been welcomed by the Harvard Law School.

6. The work had been undertaken by himself and Mr. Baxter under the general supervision of Professor Katz and with the help of an Advisory Committee composed of professors and practising lawyers. The authors of the draft were particularly grateful for the advice of Mr. García Amador, the Commission's Special Rapporteur on the topic. In many instances he had pointed out departures from existing law or gaps: for example, the thesis he had propounded in his third report (A/CN.4/111) concerning the sufficiency of justification had largely inspired article 4 in the Harvard draft. In addition, he had made a large number of useful suggestions, as had Mr. Liang, who had also taken part in the meetings of the Advisory Committee.

7. The draft, which was the ninth, had not yet reached final form and there might be two more versions, depending on the progress made in preparing the comment. The final text would consist of three parts: a draft convention, explanatory notes of the draftsmen and statements of existing law. Originally, the intention had been to bring Professor Borchard's text up-to-date in the light of more recent practice but, on careful examination, it had been found to be incomplete and the very massive volume of material had had to be reviewed again. Hence, the work had progressed slowly but he hoped that the treatise contemplated would be completed in two years.

8. As the Commission's experience would no doubt confirm, it was difficult to establish exactly where codification ended and the progressive development of international law began. In order to secure consistency between the different articles and for reasons of equity or logic, it had been found necessary to depart from certain widely accepted rules, such as those relating to the nationality of the claim. In other cases, the practice differed so widely that it could only be harmonized by means of a compromise which was virtually a new rule.

9. The new Harvard draft, in keeping with what appeared to be the Commission's intention, was concerned solely with the responsibility of the State for official acts or omissions; it did not deal with the responsibility of international organizations or with responsibility for the violation of treaties in general.

10. The structure of the Harvard draft was simple. Article 1 sought to state in general terms the subject of State responsibility as such, and it was subsequently amplified and defined in the succeeding articles. The method might be a novel one, but perhaps would be found useful.

11. He said that in certain respects the draft departed from existing law. The Harvard draft of 1929 had contained different rules about exhaustion of local remedies which had depended on the kind of official action taken. The authors of the present text, considering that doctrine had developed in a different direction since that time, had embodied in article 1 a general rule concerning the exhaustion of local remedies equally applicable in all situations. Nor had they been content merely to lay down the rule that the State was responsible for its wrongful acts under international law; they had, in addition, specified the most important categories of such acts. Furthermore, the draft provided that States were responsible for acts which were intentional and directed against aliens as well as for acts which were due to negligence. The authors believed that the time had not yet come to attempt to codify the principle of liability without fault, though he noted that the International Atomic Energy Agency had displayed interest in the possibility of such a codification.

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[1] Harvard Law School, *Convention on the International Responsibility of States for Injuries to Aliens* (Preliminary Draft with Explanatory Notes), Harvard Law School, 1959.

[2] *Yearbook of the International Law Commission, 1956*, Vol. I (United Nations publication, Sales No.: 1956.V.3, Vol. I), 370th meeting, para. 16.

[3] Harvard Law School, *Research in International Law, II. Responsibility of States* (Cambridge, Mass., Harvard Law School, 1929).

12. The new Harvard draft included provisions concerning denial of justice without using that term but enumerating the type of cases in which justice could be said to have been denied. Emphasis had been placed on injuries to and arrest of individuals, but special clauses dealt also with injury to property rights and contractual rights. An express provision had been included concerning the barring of claims by lapse of time, though the time was intentionally not specified. In addition, the draft contained provisions limiting the alien's right to claim in cases where he had expressly waived the right or where he had knowingly accepted the risk involved in taking up residence in the foreign State. Finally, the draft contained elaborate provisions on damages.

13. The authors of the draft had followed Mr. Scelle's views[4] and had given high priority to direct claims by individuals, though subject to certain limitations. They had not felt bound by the traditional view—now largely abandoned—that individuals could not present their claims directly. However, even on that issue it had not proved necessary to depart too far from existing doctrine.

14. The CHAIRMAN thanked Professor Sohn for drawing the Commission's attention to a number of extremely interesting features in the Harvard draft.

15. Mr. GARCIA AMADOR, Special Rapporteur, expressing his gratitude to the Harvard Law School for its hospitality and help in his own work on State responsibility, regretted that no other private institution in the Americas was as yet studying the topic. It was unfortunate that, although the General Assembly's request for a codification of the principles of international law governing State responsibility dated back to 1953 (resolution 799 (VIII)) and although the subject was of great importance, little progress had as yet been made by the Commission. He hoped that the Commission would be able to devote a considerable part of its next session to the topic.

16. If the study of the subject were to gain in depth and scope it was essential to obtain further information on certain particularly controversial matters. Commenting on his first report (A/CN.4/96) members of the Commission had said that the opening clauses of the draft code should expressly define the circumstance in which a State incurred international responsibility for certain acts. His second report (A/CN.4/106) dealt with the matter in a somewhat summary manner, indicating that reparation for injuries resulting from acts that were not a violation of international law could be settled by reference to the general obligation of States to protect the rights of aliens. Subsequently, he had studied in greater detail the whole question of the abuse of rights as well as precedents with a view to elaborating a coherent system. His concept of the natural limitation on the exercise of rights by States had been reflected in the second paragraph of article 2 of the Convention on the High Seas adopted by the United Nations Conference on the Law of the Sea in 1958:[5] that development could provide a basis for future work on State responsibility. The doctrine of abuse of rights was an essential feature of certain aspects of State responsibility, and the only way in which the limitations on the exercise of the rights of the State could be determined was to decide in what instances States had failed to carry out their obligations under international law. By means of inquiry along those lines it would be possible to differentiate between "wrongful" and "arbitrary" acts of the State, the former being breaches of contractual obligations, the latter the improper performance of an act that would otherwise have been lawful. That important doctrine had not been discussed by the Commission, which had considered State responsibility in terms of violation of international law and of omission. He had pointed out that in the modern world it was difficult to elaborate a theory of objective responsibility based on the concept of omission. For example, States conducting nuclear tests were exercising a right recognized in international law. Hence it would be easier to frame coherent and exact rules on the basis of a doctrine of abuse of rights.

17. His fourth report was devoted to a detailed study of the most controversial chapter in his second report, chapter IV, in which, as requested by the Commission, he had examined the problem in the light of traditional theory and the conclusions of The Hague Conference. The fourth report sought to cover most hypotheses as well as certain problems not previously discussed. He had drawn upon experience since the Second World War and had made a distinction between general contractual relations governed by municipal law and those governed by new instruments subject to international law. He had drawn an analogy with treaties and the principle of *pacta sunt servanda*. Though the theory was an old one, his presentation was new. He had also devoted considerable space to the nature and content of acquired rights. All those problems were of great topical importance.

18. The CHAIRMAN said that the delay in taking up the topic of State responsibility was not due to any lack of appreciation on the Commission's part of the great practical and theoretical importance of the subject.

19. Commenting on the question of State responsibility, he said that the cruder forms of maltreatment of aliens and denial of justice might be regarded as becoming more rare. On the other hand, the possibilities of injuries to aliens or foreign corporations were increasing and he was pleased to see that the new Harvard draft gave a good deal of space to the forms of injury which had been overlooked in the past.

20. He was extremely interested in the Special Rapporteur's remarks about the doctrine of abuse of rights which should be instrumental in developing the whole theory of State responsibility. The notion of "arbitrariness" (A/CN.4/119, chapter I, section 5) was essential in that it could serve to distinguish certain acts from others in such matters as deportation, which in itself was not a violation of international law. In certain circumstances the grant of nationality in the absence of a genuine link between the State and the individual was an abuse of rights and, as had been stated by the International Court of Justice in its judgement in the Nottebohm Case (second phase),[6] might preclude the presentation of a claim by that State on behalf of the individual. He would not, however, go so far as to say (as the new Harvard draft seemed to) that the State of nationality could never present a claim on behalf of a national who had only slender links with that State. It might be more correct to say that the State was

[4] *Yearbook of the International Law Commission, 1956*, Vol. I (United Nations publication, Sales No.: 1956.V.3, Vol. I), 371st meeting, paras. 31 *et seq.*

[5] United Nations Conference on the Law of the Sea, *Official Records, Vol. II: Plenary Meetings* (United Nations publication, Sales No.: 58.V.4, Vol. II), annexes, document A/CONF.13/L.53, p. 136.

[6] *I.C.J. Reports 1955* (Liechtenstein v. Guatemala).

prima facie entitled to make its claim, but that the other State was free to declare that the circumstances did not oblige it to be a defendant having a liability to the plaintiff State in regard to the person concerned.

21. The provision in the new Harvard draft barring a State from claiming on behalf of a person who had waived or settled the claim was unduly categorical. There had been cases where individuals had waived their claims, but the Government of the State of nationality had refused to give up the claim, because a point of general principle and public policy had been involved. For example, where a wrong was done to a ship and to a person on board, the flag State might wish to press the claim, even if the individual decided to waive his claim.

22. He was not surprised to see that no definition had been attempted of the "standards of justice generally recognized by civilized States", an expression which occurred frequently in the draft. Although acts not in conformity with those standards were a constant subject of international claims, it was extremely difficult to establish an objective definition.

23. Lastly, he thought that article 3 of the Harvard draft, which defined what judicial or administrative decisions adverse to aliens were wrongful, did not fully cover certain possible situations. While admittedly a decision which violated international law or a treaty would be wrongful, international law or the treaty in question might not contain a rule governing the specific issue adjudicated. Again, the standard of justice applied generally in the State concerned might not be on a par with the standards recognized by civilized States. Such cases might be uncommon, but he thought they should be covered in the draft.

24. Mr. TUNKIN said that some of the problems raised in the Harvard draft and in the Special Rapporteur's reports related not so much to State responsibility properly so called as to the rights of aliens, especially those relating to property. Some of those problems were closely connected with the existence in the world of two different economic systems. The Harvard draft proceeded in that respect from the principles of the capitalist system of private property expressing practically the point of view of the United States. The rules proposed in that draft concerning the expropriation of the property of aliens were based on the principle of the sanctity of private property. In the third and fourth decades of the twentieth century, the question of State responsibility had been discussed from one point of view only, and the existence of a new economic system had been practically ignored. At that time, certain States might have hoped that the new system would disappear or that they would be able to impose certain rules on the only socialist State then in existence. At the present juncture, however, it was inconceivable that the principles of one system should be accepted as general international law. It would therefore be desirable, if not indispensable, to plan unofficial studies of the question so as to take into account the point of view of the institutions of socialist States. Furthermore, institutions and jurists in the new States of Asia and Africa would also be interested in contributing to such studies. He hoped it was not too late to remedy the situation.

25. Mr. MATINE-DAFTARY observed that the discussion of the Special Rapporteur's draft had been postponed not only owing to lack of time, but also because the draft was based on purely European standards of justice. The Special Rapporteur had found it difficult to find a criterion and had decided to base his draft on fundamental human rights; it had been pointed out during the debates at the ninth session that he was suggesting that the International Law Commission should undertake work which the Commission on Human Rights had been trying to carry out for ten years. That basis was therefore unrealistic, and the Harvard Law School and the Special Rapporteur should endeavour to find a formula which would be more acceptable to all States. The seminar on human rights for Asian countries (Seminar on judicial and other remedies of the abuse of administrative authority) organized by the United Nations in Kandy, Ceylon, which he had attended in May 1959, had shown that a great deal of work remained to be done in that field, since under the existing systems of many States even the nationals of those countries could not claim damages. The principle that aliens should receive the same treatment as the nationals of a country seemed to be a praiseworthy one, but if the Special Rapporteur's draft was based on fundamental human rights, which were so far only proclaimed in the Universal Declaration of Human Rights—an instrument which had no binding force—it was hard to see what useful work the Commission could accomplish in the matter. Moreover, new countries which were coming into being were extremely conscious of their newly-won independence and were anxious to eradicate all vestiges of the colonial system; under the circumstances, it was only natural that aliens in those countries should go through a transitory period of liquidation. In his opinion, therefore, Mr. García Amador's draft should be regarded as a study which would be of use to the Commission on Human Rights; when the General Assembly of the United Nations adopted the draft International Covenants on Human Rights, the International Law Commission could begin to deal with the matter. Until then, its consideration of the question would be purely academic.

26. Mr. ERIM wished to draw the attention of the authors of the Harvard draft and of the Special Rapporteur on State responsibility to one specific subject. In the relevant article of the Harvard draft, the right of protection of the State concerned was confined exclusively to its nationals. However, that provision had already been exceeded in positive international law by the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950,[7] to which fifteen countries were parties. For the first time in the history of international law, a State which had allegedly violated human rights could be brought by an individual—even by one of its own nationals—before an international jurisdiction, if it was a party to the Convention. It should be borne in mind that the Convention made no distinction between nationals and aliens, and in fact two cases relating to the protection of aliens had been brought before the European Commission on Human Rights. Moreover, hundreds of cases had been brought to the notice of the European Commission by individuals, although the jurisdiction of the Commission was optional in such cases. Furthermore, the European Court of Human Rights, possessing jurisdiction in the matter of all complaints not settled by the European Commission, had come into existence, since nine States had recognized its jurisdiction as compulsory. Therefore, he would draw

[7] United Nations, *Treaty Series*, vol. 213 (1955), No. 2889, p. 222.

the attention of the representatives of the Harvard Law School to a development within Europe: the responsibility of States was not only a matter of "protection of the rights and interests of nationals". It was more than that: for those States which, in addition to accepting the jurisdiction of the European Court of Human Rights, had also accepted the right of individual petition, the individual could protest against a violation of his rights without invoking the diplomatic protection of his own State.

27. Mr. BARTOŠ said that, while recognizing that the Harvard draft was the fruit of much hard work, he had a general objection to the method used in its preparation. Most of the existing drafts on State responsibility were based on former rules concerning the "status of aliens"; it should be borne in mind, however, that in the history of the development of social institutions those rules had been elaborated concurrently with the development of the colonial system. He endorsed both the thesis advanced by Mr. Tunkin and the considerations expressed by Mr. Matine-Daftary, which were perhaps even more pertinent. The Harvard draft and the Special Rapporteur's draft were based on an inequality between the States which had become prosperous through imperialism and those which had recently won their independence and enjoyment of the right to self-determination. It was obvious that upon liberation from colonialism the economic basis of that system had not disappeared all at once.

28. The International Law Association at its forthcoming congress intended to discuss the question of modernizing the rules governing the compensation of expropriated aliens together with the question of the rights of States which were in the process of eliminating the effects of the vestiges of colonialism. In that connexion, he recalled that the matter had arisen in the history of the Latin American States, when Spanish concessions in those countries had been liquidated. In those days, private acquired rights had been recognized, but in modern times, even in capitalist States, views had changed. The right of property had first been regarded as a *jus naturae*, but certain constitutions enacted after the Second World War placed limitations on that right.

29. When the question of equitable compensation was raised, there was a tendency to forget that prior compensation might be involved. Expropriation without compensation was held by some to be a violation of human rights, but some States which believed that they had those property rights did not admit that others had similar rights.

30. International law could not be divided into strictly separated compartments. The right of self-determination having been admitted into international law, the community of nations should recognize that countries which had thrown off the yoke of colonialism were also entitled to liberate themselves from the economic burdens of that system. He did not mean to imply that newly liberated States should always expropriate aliens without compensation, but rather that in some cases expropriation was not necessarily wrongful. A codification of the rules on the subject should take into account the realities of modern international life; therefore a purely technical draft based on the principle of acquired rights—which were not even recognized in all capitalist States—was unsatisfactory. To demand compensation for social reform in effect deprived States of the sovereign right to carry out reforms. The principal fault of the system set forth in the Harvard draft was that it placed aliens on an equal footing with nationals in cases where that equality operated in favour of aliens, but allowed them to plead "acquired rights" in cases where they were called upon to make sacrifices to social reform.

31. With regard to the concept of "standards of justice generally recognized by civilized States", he said he did not agree with the view that civilization could be regarded as the attribute of any single group of States. So long as that view was held, it would be impossible to codify general rules of international law concerning State responsibility and any rules prepared on that basis would be unacceptable to the international community at large.

32. Mr. VERDROSS considered that the Commission should separate its consideration of the two subjects referred to in the title of the Harvard draft, namely. international responsibility in general, and the rights of aliens. If, for example, consideration was given to the acts for which States were responsible and to the consequences of wrongful acts by States, without particular reference to aliens—whose rights would be studied separately—it would be much easier to reach agreement on a generally acceptable draft.

33. Mr. AGO said the new Harvard draft would be a valuable contribution both to the work of the Commission and to the development of the international law relating to State responsibility.

34. Commenting on the organization of the draft, he agreed with the view of Mr. Verdross. Professor Sohn had conceded that the draft had had to depart somewhat from the system adopted in the 1929 draft by Borchard. In his (Mr. Ago's) view, it would be desirable in future work to depart even further, for the mixture of the law of State responsibility and the law concerning the treatment of aliens was still to be found in the new Harvard draft, even though it was the declared intention of the authors to separate the two.

35. The question of State responsibility was a general one and was not necessarily linked to the treatment of aliens. A State was responsible every time it committed an international wrong, in other words, a violation of a rule of international law, whether or not there was injury to an alien. The test of the State's responsibility was not the injury to the alien, but the violation of an obligation. Therefore, he found it difficult to agree with the definition given in the very first article of the Harvard draft, which provided that: "A State is responsible for an act or omission which is attributable to that State, which is wrongful under international law, and which causes an injury to an alien". In that provision the final relative clause impaired what was otherwise a definition of State responsibility.

36. On the other hand, the effects of having dealt with the question of the treatment of aliens from the standpoint of responsibility was even more apparent in the draft's definitions of wrongful acts and omissions. The authors were forced to state in a negative way what should have been laid down in positive terms as principles governing the obligations of States towards aliens.

37. The discussion had indicated that there were two conceptions in the Commission concerning the definition of the obligations of States with respect to the treatment of aliens. In his opinion the two conceptions were much closer to each other than they appeared to be. With regard to the so-called "western" view, he would

venture to say that writers on the subject sometimes had a tendency to confuse the real position in customary and statutory law with their personal aspirations. He felt sure that a careful examination of the international case-law would show that it frequently consisted of no more than a certain irreducible minimum to which there could not be much objection.

38. On the other side, he had the impression that in countries which had a socialized economy there was sometimes a tendency to overlook the fact that, even within the framework of their principles, certain rights could not be denied to aliens, and that there were certain institutions typical of the "western" view which were perfectly adaptable to their system.

39. Mr. LIANG, Secretary to the Commission, said, with reference to Mr. Tunkin's statement (see para. 24 above), that the Secretariat had always made strenuous efforts to provide the Commission with adequate reference or comparison material from different regions. For example, he had been pleased to learn, in 1957, that the then newly established Asian-African Legal Consultative Committee had on its programme the study of questions appearing on the agenda of the Commission, and the members of the Commission would remember that it had invited that Committee to send in any material reflecting the legal thinking in Asian and African countries on questions of interest to the Commission (see A/3623, paras. 21, 23 and 24; and A/3859, para. 73). Unfortunately, no such material had so far been received from that quarter.

40. Again, the Secretariat attached great importance to the discussion in Latin America of matters of interest to the Commission. He recalled that he had reported to the Commission on such matters discussed at the third meeting of the Inter-American Council of Jurists held at Mexico City in 1956 and that he had also undertaken to make a report concerning the forthcoming fourth meeting of that body at Santiago, Chile.

41. Such elaborate and long-range studies as that represented by the Harvard draft were of great value to the work of the Commission. In that connexion he observed that in the very first Harvard Research drafts, on subjects discussed at the Codification Conference held at The Hague in 1930, the authors had made it clear that the drafts were representative of the point of view of United States lawyers, and although no such *caveat* appeared in the present draft, it could be reasonably assumed—and he was sure—that no claim was made that it was representative of international legal thinking.

42. He wished to make it clear that the Harvard draft had been prepared entirely on the responsibility of its authors under the general auspices of the Harvard Law School and that there had been no responsibility on the part of the United Nations Secretariat so far as the financing and the substance of the draft were concerned.

43. The Secretariat expressed the hope that similar efforts would be made in States where a different legal concept of general international law prevailed and that before long the Commission would have available similar works for purposes of comparison.

44. As to the point raised by Mr. Verdross (see para. 32 above), he recalled that in 1957 the Commission had held a full discussion, in connexion with Mr. García Amador's first report, on the interrelationship of the question of State responsibility and the question of the treatment of aliens.

45. As he had ventured to submit on the former occasion, the treatment of aliens as a subject for codification would cover a wider field than State responsibility. Furthermore, it might be looked upon as a question within the sphere of the unification of municipal law, and he recalled that the International Conference on Treatment of Foreigners, held at Paris in 1929, had attempted to draft a convention reconciling certain aspects of the municipal law of the States relating to the status of aliens.

46. He was attracted by Mr. Ago's position (see para. 34 above) that the matter to be codified under the caption of responsibility of States should be the material on the obligations of States, with respect to the treatment of aliens, at the international law level. The point of view envisaged in Mr. García Amador's first report had also been that in order to determine State responsibility, the obligations of States would first have to be defined.

47. Mr. EL-KHOURI observed that the draft presented to the Commission would add to the reputation of the Harvard Law School for scholarly work. However, it seemed to him that the draft was based on principles which were out-moded and which were reminiscent of the capitulations system applied in the territories of the Ottoman Empire in the nineteenth century, where aliens were almost a privileged class as compared with nationals. In modern times, most of the guarantees envisaged in the draft for aliens had been incorporated in the legislation of civilized States in respect of their nationals and there was no longer any need for special legislation in respect of aliens. He did not think, for example, that immigrants should expect to enjoy a status better than that of the people among whom they came to live.

48. He suggested that the draft on State responsibility to be prepared by the Commission should be based on the principle that aliens should not receive worse treatment than the nationals of the State of residence. The Commission should aim at a draft which could be readily accepted by most States, including the new States, and which would not discourage States from admitting aliens, for that was what would happen if provisions were drafted that were too onerous.

49. Mr. AMADO said that the draft was a work which deserved respect and which was in the best traditions of the Harvard Law School. In listening to the discussion he had been thinking of the decisions in some of the leading cases, and of the writings of learned jurists, which related to the question under discussion and which he had expected would be the basis of the Harvard draft.

50. He would say in all frankness that if the Commission departed in its future draft from those earlier sources, its work would not be a serious contribution to the international law on the question. He recalled that when State responsibility had first been discussed in the Commission—at its eighth session—he had expressed strong objection to the ambitious project of the Special Rapporteur, who had wished to include the question of criminal responsibility. He was very grateful to Mr. García Amador for having dropped that project.

51. Today he wished to appeal to the Special Rapporteur to leave aside also the question of human rights and he wished to suggest to him that the best approach would be to elaborate the rule concerning the reparation of injury, which was the established principle, and then proceed to link that rule to the treatment of aliens.

52. The Harvard draft stated, in the explanatory note to article 1, that "orthodox theory holds that when a State espouses a claim of its national, it is actually protecting its own rights rather than those of the individual". That was what, in his view, should have been the tendency of the draft prepared by the Harvard Law School. The explanatory note, however, went on to say, with reference to the judgement of the International Court of Justice in the Nottebohm Case, that "the views of the International Court are difficult to reconcile with the increased emphasis that has been placed in recent years upon the protection of human rights and of the individual under international law".

53. If some real progress was to be made in the codification of the law relating to State responsibility, certain limits would have to be laid down and a determined effort would have to be made to avoid being drawn into extraneous subjects, however attractive they might be. The problems of human rights should be treated within a human rights framework and if the Commission permitted itself to venture into that field, he had no doubt that Mr. Tunkin as a Soviet jurist—and Soviet jurists were among the most positivist of contemporary jurists—would wish the different concepts of property in the capitalist and socialist systems to be mentioned.

54. He urged the Special Rapporteur, whose purposes he did not question, to make his draft, first and foremost, a distillation of case-law and not an excursion into idealism.

The meeting rose at 1.5 p.m.

513th MEETING

Thursday, 11 June 1959, at 9.55 a.m.

Chairman: Sir Gerald FITZMAURICE

State responsibility (A/CN.4/96, A/CN.4/106, A/CN.4/111, A/CN.4/119) (*continued*)

[Agenda item 4]

1. The CHAIRMAN invited the Commission to continue the debate on the topic of State responsibility, with reference to the new Harvard draft presented at the previous meeting (512th meeting, paras. 5-13).

2. Mr. ZOUREK said the new Harvard draft, which reflected the thinking of United States scholars on State responsibility for injuries to aliens, was a useful work that would become even more useful when it was supplemented by the promised statement of the existing law. He agreed that that kind of consultation with scientific circles should continue and be expanded by consultation with scientific institutions in other countries, in particular in countries with different legal systems, notably the socialist countries and the countries of Latin America, Asia and Africa. The question of State responsibility was so broad that all legal systems had to be taken into account in preparing a work that would be generally acceptable.

3. In his view, the Commission's first task in dealing with the question of State responsibility should be to define the cases in which the State was responsible. It was only after it had disposed of that general question that it could take up the special case of responsibility for injuries to aliens.

4. The Harvard draft seemed in some respects to depart from well-established rules of international law. For example, it recommended the recognition of the right of the individual to reparation although, as Mr. Amado had recalled at the previous meeting (512th meeting, para. 52), the accepted rule of international law was that the right to reparation belonged to the State, and that rule had been upheld in the fairly recent judgement of the International Court of Justice in the Nottebohm case.

5. He also noted, as had the Chairman (see 512th meeting, para. 20), that the rule concerning the nationality of the claim was to a large extent abandoned in the draft. In general, the draft seemed to be based on premises that were not recognized in the international law concerning State responsibility. In his view, the fundamental proposition should be that where there was no international obligation, there was no international responsibility, and that principle was not adhered to in the draft.

6. There were several references in the draft to the standards of justice generally recognized by civilized States, but those standards were nowhere defined. He was confident that a thorough study of that notion would show that, fundamentally, it was devoid of meaning. The term was merely reminiscent of the capitulations system; it was time that the invidious distinction between civilized and uncivilized States should be dropped. The expression "rules common to the principal legal systems of the world" would be preferable.

7. Professor Sohn had said (see 512th meeting, para. 7) that the work constituted only a preliminary draft. He (Mr. Zourek) suggested that in preparing their final draft the authors should re-examine very carefully those passages which departed too much from principles that could be accepted by all States irrespective of their social and economic system. While it was true that departures from established rules and proposals for new rules were admissible, it should not be forgotten that general international law was the only legal basis for co-operation and fair competition between States with different social and economic systems and for the solution of the disputes resulting therefrom. Consequently, before giving up an established principle of international law, codifiers should carefully consider whether what they were proposing was for better or for worse.

8. The CHAIRMAN said that some members had seemed to take the view that practically all the law relating to the treatment of aliens was a product of colonialism. That, of course, was quite incorrect historically as everyone knew who had read e.g. the chapter on the historical and legal foundations of the law relating to the denial of justice in Alwyn V. Freeman's standard work.[1]

9. The law relating to the treatment of aliens had come into being, long before the era of colonialism, out of conditions in Europe soon after the Middle Ages, when foreigners had had very little status and in many cases no rights before the law or access to the court.

10. Professor SOHN expressed his appreciation to the Commission for its discussion of the Harvard Law School's preliminary draft. Some important points had been raised which would be taken into account in the preparation of the final draft. Without wishing to enter into a debate, he would avail himself of the opportunity to express some views on the more general questions that had been raised.

[1] Alwyn V. Freeman, *The International Responsibility of States for Denial of Justice* (New York, Longmans, 1938).

11. With regard to the remarks of Mr. Amado (512th meeting, paras. 49-54) and other members, he said that the authors of the draft had tried as far as possible to reflect the jurisprudence and practice of nations, and the few departures therefrom were designed to make the law dealt with in the draft more acceptable to nations which had not participated in the creation of that law. Most of the departures, whether with respect to the Calvo Clause, the protection of property or the law of contract, were aimed at accommodating the underdeveloped nations or the nations with a socialized economy.

12. While the draft contained novel features, to which he had alluded at the previous meeting, he could say that more than 90 per cent of it followed case-law closely. Even in the crucial matter of the rights of the individual, one of the main reasons for the new rule proposed in the draft had been to take the question of the protection of the rights of aliens to some extent out of the sphere of power diplomacy and to make it an issue between an individual and a Government instead of an issue between two Governments, in which the less powerful Government was often at a disadvantage. Moreover, that departure was minimal, depending to a large extent on future treaties giving individuals direct access to special international tribunals.

13. As the Secretary had said (512th meeting, para. 41), the draft to a large extent represented the prevailing view of university circles in the United States, but not, of course, of the United States Government. He agreed with the view that studies from other countries would be very useful and he endorsed the Secretary's expression of hope that similar drafts would be prepared by law schools in other nations, or at least that the relevant practice of other nations would be collected. The authors of the Harvard draft would be the first to welcome studies of the practice of such countries as the Soviet Union and India in protecting their nationals abroad. He was confident that such comparative studies would show that the views of learned jurists in those countries on the law of State responsibility did not differ too much from those of United States lawyers, for the principles adopted in the Harvard draft would find application in the relations between two peoples' democracies or two African or Asian States.

14. He did not think that it was right to suggest that the subject matter of the Harvard draft was somehow connected with colonialism or imperialism. In modern times, when the interdependence of nations was continually growing, when citizens of every country travelled and studied in foreign countries, it seemed to him that all States, including those with a socialized economy, had an equal interest in seeing that their nationals abroad were correctly treated and not arrested arbitrarily. He agreed that there were some areas, such as the protection of property, where the interests of some nations might be greater than those of others, but those areas too would become increasingly important to all States as commercial relations continued to develop among the Asian and African countries and the countries with a socialized economy.

15. Reference had been made to the expression "the standards of justice generally recognized by civilized States", which appeared frequently in the Harvard draft. What the authors had had in view was the standards that were now applied by almost all nations of the world, excluding only the very few that still showed survivals from mediaeval times and such cases as Nazi Germany, in others words, the standards which had been fairly described as "the common law of mankind" in the recent book by Mr. Jenks, Assistant Director-General of the International Labour Office.[2]

16. As to the relationship of the draft to the law of State responsibility on the one hand and to the law concerning the treatment of aliens on the other, he pointed out that the subject matter of the draft was on the borderline between the two, and covered only a small part of those two broad areas of international law. As could be seen from the European Convention on Establishment, signed at Paris on 13 December 1955, which had embodied the principles that had been put forward but not adopted at the International Conference on the Treatment of Foreigners in Paris, 1929, the largest part of the law of the treatment of aliens applied to the acquisition of rights, whereas the subject matter of the Harvard draft related to the impairment of such rights.

17. With regard to Mr. Erim's statement (512th meeting, para. 26), he said that the authors had been aware that in certain regions such as Europe and Latin America, nations might be prepared to go much further and perhaps conclude agreements permitting interventions on behalf not only of their own nationals but also of aliens. However, the authors had felt that that was a new area of law and that more progress would first have to be made at the regional level.

18. Professor BAXTER said that he would like to comment on four points that had been raised by the Chairman at the previous meeting (512th meeting, paras. 20-23).

19. With regard to the question whether the authors of the draft had not read too much into the ruling of the International Court of Justice in the Nottebohm Case in 1955, he pointed out that the relevant clause of the draft (article 23, paragraph 3) was expressed in the form of a condition on the right to sue: "A State is not entitled to present a claim on behalf of a natural person who is its national if that person lacks a genuine connection . . . with that State". While there might be a theoretical difference between a condition on the right to sue and a possible defence, it seemed to him that the practical effects would be the same: if the respondent State decided not to raise the objection of the lack of a genuine link, the results would be the same as if the paragraph had been worded in terms of a possible defence and the respondent State did not avail itself of that defence.

20. In reply to the Chairman's observation (512th meeting, para. 21) concerning the clause debarring a State from claiming on behalf of a person who had waived his claim, he said that the Harvard draft recognized the importance of the interests of the State over and above those of the claimant, the injured alien. It did so by excluding from its scope the separate interests of the State, which gave rise to separate claims, such as a claim arising out of widespread violations of international law, systematic oppression of an ethnic minority, insults to the flag and so forth. Since the draft was not intended to cover such State-to-State claims, they would not be barred by the individual's waiver.

21. Supplementing Professor Sohn's remarks concerning the standards of justice generally recognized by civilized States, he said it would have been impossible

[2] C. Wilfred Jenks, *The Common Law of Mankind* (London, Stevens and Sons, 1958).

for the authors to specify what those standards were because it would have been necessary either to make a comparative study of the legal systems of all States or to draw up a complete international code of procedural and substantive law.

22. With reference to the Chairman's observations concerning the provisions defining what adverse decisions (judicial or administrative) were to be regarded as "wrongful", he explained that the provisions were intended to embrace both procedural and substantive law, as indicated in article 3, paragraph 2, of the Harvard draft, which stated that "the wrongfulness of an act or omission may be the result of a deficient application of the law of the State concerned or the fact that that law does not conform to international standards".

23. In conclusion, he thanked the Commission for the fruitful discussion that had been held, and expressed his gratitude to the Chairman for arranging it and to the Secretary and Mr. García Amador, the Special Rapporteur, for their encouragement of the research of the Harvard Law School on the subject of State responsibility.

24. The CHAIRMAN thanked the representatives of the Harvard Law School for having presented and explained their draft.

Consular intercourse and immunities (A/CN.4/108, A/CN.4/L.79, A/CN.4/L.80, A/CN.4/L.82) (*continued*)

[Agenda item 2]

DRAFT PROVISIONAL ARTICLES ON CONSULAR INTERCOURSE AND IMMUNITIES (A/CN.4/108, PART II) (*continued*)

ARTICLE 12 (*continued*)*

25. The CHAIRMAN invited the Commission to resume debate on the draft on consular intercourse and immunities.

26. Mr. ZOUREK, Special Rapporteur, commenting on the discussion regarding article 12, said that very few members had dealt with the substance of the article; most of them had been content to express the view that the article should not be included in the draft.

27. The most serious attack on the provisions of article 12 had been made by Mr. Scelle (see 511th meeting, paras. 60-63). However, Mr. Scelle's argument had been based upon two false premises: that a consul did not represent his State, and that States had a duty to enter into consular relations.

28. Mr. Scelle had made a distinction between agents of the State and representatives of the State. In his (the Special Rapporteur's) view an agent represented his principal. He would limit himself, however, to citing a well-known French handbook on consular and diplomatic practice which contained the following paragraph:

> "A consul is an official agent stationed by a State in a particular foreign territory. Within his consular district he is the holder of the authority retained by the sending State over nationals outside its territory."[3]

29. As to the alleged duty of States to enter into consular relations, he would simply point out that in the discussion on previous articles the Commission had concluded that consular relations were subject to the consent of the States concerned.

30. A further criticism of article 12 had been that the provision implied some kind of bargaining, in which consular relations would be exchanged for recognition. Although it was theoretically conceivable that a request for an exequatur might be accompanied by a declaration of non-recognition, it was hardly probable, in view of political realities, that such a situation would arise. He could not envisage how a State could request another State to receive consuls, to assume obligations towards those consuls—thereby to accept certain limitations of its sovereign powers—and to grant them privileges, prerogatives and immunities of all kinds, and then offer that State, in return, a declaration of non-recognition.

31. That the granting of an exequatur implied the recognition of the sending State was a generally accepted and by no means new principle. Already in 1819 the United States Secretary of State, John Quincy Adams, had declared that the exequatur for a consul-general could obviously not be granted without recognizing the authority from whom his appointment proceeded as sovereign. The Secretary of State had also cited the opinion of Vattel that while a consul was not a public official he was furnished with a commission from his sovereign and was received in that capacity by those in whose country he was to exercise his functions.[4]

32. The case of Manchukuo had been cited by Mr. Yokota (see 511th meeting, para. 66) in support of the argument that article 12 did not accurately reflect practice. However, the example of Manchukuo might have been cited in the comment to reinforce article 12, inasmuch as the Advisory Committee of the Assembly of the League of Nations had recommended on 7 June 1933 that the countries concerned should not apply for exequaturs.[5]

33. Though there were exceptions to the rule laid down in article 12, such as the case where there were two Governments in a country during a civil war, he was somewhat reluctant to embody in the article itself the statement concerning exceptions contained at the end of paragraph 2 of the commentary.

34. He was not able to subscribe to the Secretary's thesis that consular relations mainly served the interests of individuals. The degree to which that was true depended on the economic and social structure of the sending State. In addition, there were certain consular activities in the matters of commerce, navigation, culture and so forth, which concerned bodies corporate more particularly. Certainly that seemed to be the present trend of evolution. But even if the Secretary's thesis were accepted it must still be admitted that consular powers emanated from the sending State. Consular officials could not be regarded as representatives of nationals of the sending State, as had been done in the past; they exercised their functions as representatives of the sending State itself.

35. In reply to the criticism that article 12 had no place in the draft, he said that he was prepared, regretfully, to withdraw it because it was not indispensable and

* Resumed from the 511th meeting.

[3] Jean Serres, *Manuel pratique de Protocole* (Paris, Simonnet, Hachette & Cie., 1952), p. 39, para. 71.

[4] E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, vol. III, translation of the 1758 edition (Washington, D. C., Carnegie Institution of Washington, 1916), book II, chap. II, sect. 34, p. 124.

[5] League of Nations, *Official Journal, Special Supplement No. 113*, p. 13.

might give rise to protracted discussion. On the other hand it did serve to make the draft more complete, and he might wish to reintroduce it at a later stage when the Commission had more time for discussion.

It was so agreed.

36. Mr. MATINE-DAFTARY said that while not contesting the validity of the Special Rapporteur's arguments in support of article 12, he hoped that the Commission would introduce a progressive development of law by elaborating a rule to the effect that States were bound to agree to the establishment of consular relations with any State whose nationals were living in their territory. Such a rule, aimed at the protection of the rights of aliens, would be a step towards the acceptance of the concept of State responsibility as envisaged in Mr. García Amador's reports.

37. The CHAIRMAN said, in reply to Mr. Matine-Daftary, that it had been decided to accept the principle that the establishment of consular relations depended on the consent of the State of residence. In deference to Mr. Matine-Daftary's views, however, an express provision might be added stipulating that consent could not be refused arbitrarily or unreasonably.

38. Mr. MATINE-DAFTARY said that solution would be acceptable to him.

39. Mr. SCELLE, speaking in reply to some observations by the Special Rapporteur, reaffirmed that consular officials were appointed to discharge certain functions and had nothing to do with the representation of the sending State. He had never contended that the exequatur could not be denied to any particular individual: rather, he maintained that States were not at liberty to refuse systematically to establish consular relations. The international community was not made up of States, but of individuals. Any other view was a pure abstraction and to hold that the State was supreme was a denial of the existence of the international community. Hence any Government was bound in law to admit the consular officials of other States, provided that the requisite conditions had been fulfilled. He therefore welcomed the possibility of article 12 being omitted.

40. The example of Manchukuo, where consular offices had continued to function without the sending States applying for new exequaturs, confirmed his thesis that the continuity of the consular function must be safeguarded, whatever the circumstances.

41. The CHAIRMAN asked whether Mr. Scelle would agree to having to his amendment (511th meeting, para. 51) considered in connexion with article 14.

42. Mr. SCELLE replied in the affirmative.

Mr. Hsu, Vice-Chairman, took the Chair.

43. Mr. LIANG, Secretary to the Commission, said, in regard to the observations of the Special Rapporteur, that his principal point had been that States should be entitled to enter into relations with each other for limited purposes without that implying recognition, and that he had only pointed out as an argument that the institution of consular relations was designed for the protection of individuals, which term included juristic persons as well as natural persons. With regard to the League of Nations Advisory Committee on "Manchukuo", he recalled that the Committee's recommendations had represented a system of sanctions. No explicit decision had been given as to the juridical consequences of requests for exequaturs. Many measures had been recommended in order to preclude any specific action on the part of States from being misinterpreted or inadvertently construed as implied recognition.

44. Though the Special Rapporteur had invoked certain learned authorities in support of article 12, he doubted whether it reflected positive law.

45. Mr. YOKOTA said that though no applications for an exequatur or other form of authorizaton had been addressed to the Government of Manchukuo by States Members of the League of Nations or by the United States, the Soviet Union had made such a request, which confirmed that in certain circumstances it was conceivable that a request for an exequatur did not signify recognition of the State of residence.

46. Mr. ZOUREK, Special Rapporteur, said that he had not contested that the League of Nations Advisory Committee's recommendations constituted sanctions resulting from the decision not to recognize the Manchukuo Government, but it could be deduced from those recommendations that, in the Committee's view, an application for an exequatur was tantamount to recognition.

47. Mr. EL-KHOURI entirely agreed with Mr. Scelle that a consular mission did not represent the sending State. The establishment and maintenance of commercial, cultural, economic and other relations was effected through diplomatic missions, as was the establishment of consular missions themselves. Mr. Scelle's proposal filled a real need and should be inserted in the draft. He also endorsed the principle mentioned by Mr. Matine-Daftary (see para. 36 above) that States were not entitled to refuse arbitrarily requests for the establishment of consular offices.

ARTICLE 13

48. Mr. ZOUREK, Special Rapporteur, introduced article 13 (*Consular Functions*) and referred to the commentary. Consular functions were determined by custom, international conventions and the respective national legislation, which explained why there was no uniformity in the scope of those functions. In many cases the differences were attenuated by the application of the most-favoured-nation clause.

49. The first question to be settled was which of the two variants in his draft offered the better approach. When preparing the draft he had felt some preference for the first alternative, but there was no insurmountable difficulty in adopting the second if it could be qualified by a provision to the effect that consuls could also exercise other functions provided that they did not conflict with the legislation of the State of residence. If the text appeared too long, the article could be reduced to the essential categories of function and the details relegated to the commentary. He would welcome further suggestions.

50. He agreed with the contention in the last sentence of Mr. Verdross's comment (A/CN.4/L.79) on the second variant, and in his draft had sought to itemize all types of characteristic consular activities as exemplified in recent consular conventions. Some might be regarded as a development of the rules of international law and would only be binding on States which accepted the Commission's draft.

51. In his comment Mr. Verdross stated flatly that consular officers did not represent the economic and cultural interests of the sending State; he (the Special Rapporteur) could not agree with that view. The fact was that consuls represented the interests of the sending State; only the extent of that representation varied according to the economic and social structure of the

sending State. Furthermore, if the consul was the sole representative of his country in the State of residence, it was natural that his role as a representative of the sending State should be expanded. Article 13 would have to be considered in the light of the kind of tasks which consuls had to fulfil.

52. With regard to the comments submitted by Mr. Verdross on paragraph 8 of the second variant, he thought on the contrary that a consul was entitled to register all persons—even if refugees were concerned—when they were nationals of the sending State. Mr. Verdross would no doubt develop his views during the debate.

53. The Commission's best course would be to exchange views on the type of definition to be adopted, on the provisions to be retained and those to be deleted and on the method of presentation.

54. Mr. VERDROSS said that two courses were possible: either the article could state a general formula or else it could enumerate all the consular functions that were mentioned in many different treaties. He was in favour of the first course, since an absolutely exhaustive enumeration would be impossible. Functions which were governed exclusively by the legislation of the sending State, such as the issue of passports, should be distinguished from those governed by international law. After those functions had been segregated, a distinction should be drawn between the functions which came within existing international law and those which were governed only by bilateral treaties. The only general function that remained under international law was that of providing assistance and relief to the nationals of the sending State and, in particular, the function of protecting those nationals before the local authorities. He therefore proposed the following text for article 13:

> "The task of consuls is to provide assistance and relief to the nationals of the State which appointed them, in particular to protect them *vis-à-vis* the local authorities, and to perform such other functions as are conferred on them by consular treaties."

55. Mr. MATINE-DAFTARY thought that the Commission would save time by first deciding which variant the majority of members preferred.

56. Mr. VERDROSS agreed with Mr. Matine-Daftary and said that he preferred the first variant.

57. Mr. AGO agreed that the form of article 13, of which the second variant was the most elaborate provision of the draft, should be discussed before its substance. Mr. Verdross had expressed a preference for the first variant and had proposed an amendment to it; it appeared, however, from that amendment, that he had in fact chosen the second variant. The first variant proposed by the Special Rapporteur stated absolutely nothing, and that was unacceptable, for it was manifestly the object of the draft not only to refer to the principles of international law concerning the functions of consuls, but to state them when they existed. Moreover, in the draft on diplomatic intercourse and immunities (A/3859, chapter III), the functions of diplomatic agents were enumerated; therefore, for the sake of harmony with that draft, the Commission should also enter into the merits of the functions of consuls. Nevertheless, to retain the second variant in its present form would be dangerous and erroneous since, as Mr. Verdross had pointed out (see para. 54 above), most of the functions enumerated were governed purely by the domestic law of the sending State. The Commission's task was to enumerate the principles of international law concerning consular functions, whether their purpose was to authorize them or to indicate limits to the freedom of the States in the matter. Moreover, no enumeration could be entirely exhaustive. The Commission should therefore follow the course proposed by Mr. Verdross, and at the same time integrate his proposal, in order to adopt a more comprehensive formula.

58. Mr. SANDSTRÖM thought that a third course was possible: the first variant might be combined with the second and a more or less complete enumeration might be included, with the exception of functions governed by the law of the sending State. He pointed out that enumerations were not unknown in bilateral conventions; thus, the Consular Convention between the United Kingdom and Sweden, signed at Stockholm on 14 March 1952,[6] contained an enumeration of functions which was longer than that drafted by the Special Rapporteur.

59. Mr. LIANG, Secretary to the Commission, said that article 13 was likely to raise more difficulties than any other, in the Commission, at any conference on the subject and in the General Assembly, because it was not a statement of the rights and obligations of parties, as was usual in treaties, but required agreement on an abstract rule. He had been somewhat sceptical concerning the inclusion of an article on functions in the draft on diplomatic intercourse and immunities, and the relevant article had given rise to lengthy discussions in the Commission and the General Assembly. Despite those difficulties, however, the Commission had decided at its eighth session[7] that, for the draft on consular intercourse and immunities to be complete, a definition of functions was desirable. In that connexion, he drew attention to paragraph 9 of the commentary on article 13.

60. With regard to the technique to be used, he considered that, although the Special Rapporteur's enumeration of consular functions would be extremely useful, it would hardly be advisable to retain it in the article itself. He agreed with Mr. Ago and Mr. Sandström that a middle way between the two variants should be taken. The second variant might be included *in toto* in the commentary. The first variant, on the other hand, was not a useful provision. With regard to the idea of using a reference to domestic law or, as Mr. Verdross had done in his amendment, to consular conventions, he pointed out that that procedure was not very useful. In many cases States might enter into consular relations without or before concluding a consular convention. Accordingly, in his opinion, the best course would be for the Special Rapporteur to abbreviate his second variant, classifying the functions under several headings and describing them in general language.

61. Mr. YOKOTA thought that the provisions of article 13 should be drafted in general terms, but not so generally as to convey no definite idea. Accordingly, some of the principal functions of consular officers should be mentioned. He drew special attention to the opening paragraph of the second variant. The most important task of consular officers—and originally their sole function—was to protect nationals of the sending State. It might therefore be advisable to mention it first. The protection and development of the economic and

[6] See *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. 476-478.

[7] *Yearbook of the International Law Commission, 1956*, Vol. I (United Nations publication, Sales No.: 1956.V.3, Vol. I), 374th meeting, para. 32.

commercial interests of the sending State might be placed second. And lastly, mention might be made of the promotion of cultural relations between the sending State and the State of residence, although that was not a very important consular function. If the three or four principal functions were mentioned in the article, the other details in the enumeration might be transferred to the commentary.

62. Mr. PAL thought that a third variant should be worked out by combining the first and second variants. He considered that the general proposition in the first variant should be used and followed by the enumeration in the second variant, which was extremely illuminating, if not exhaustive. Moreover, the enumeration should be preceded by a provision stating that it in no way detracted from the generality of the first paragraph.

63. Mr. ERIM agreed with previous speakers that the first variant in fact said practically nothing, since it was the Commission's special task to establish the international law in the matter.

64. He would prefer a formula combining Mr. Verdross's amendment with the Special Rapporteur's enumeration, particularly since the words *"inter alia"* in the introductory phrase showed that the enumeration was not intended to be restrictive, but merely illustrative.

65. Some of the functions mentioned created a particular legal situation between the sending State and the consular officer, while others authorized legal representations *vis-à-vis* the receiving State. He thought that those different classes of functions should be distinguished from each other.

66. He pointed out that paragraph 3 of the enumeration mentioned a number of functions relating to the general protection of shipping, while paragraph 5 referred to assistance to aircraft. He thought that, since ships and aircraft were both means of communication, the paragraphs might be amalgamated.

67. Turning to the first paragraph of the second variant, he said that to defend and further the economic and legal interests of their countries and to safeguard cultural relations between the sending State and the State of residence was the the task of diplomatic agents, rather than of consular officers. While those tasks were not excluded from consular functions, the main concern of consular officers was to protect the nationals of the sending State. That point emerged clearly from many bilateral treaties; thus, in the Consular Convention between the United States of America and Costa Rica, signed at San José on 12 January 1948[8], the provisions on consular functions spoke of the protection of nationals, and most of the corresponding articles of the Consular Convention between the United Kingdom and Sweden of 14 March 1952, which had already been cited, related to the protection of the private interests of individuals.

68. In conclusion, he considered that the enumeration would facilitate the application of the positive international law that the Commission was trying to formulate, so long as the enumeration was not restrictive. It would therefore be advisable to abridge it considerably and to retain only the principal functions.

The meeting rose at 1.5 p.m.

[8] *Ibid.*, p. 452.

514th MEETING

Friday, 12 June 1959, at 10 a.m.

Chairman: Sir Gerald FITZMAURICE

Consular intercourse and immunities (A/CN.4/108, A/CN.4/L.79, A/CN.4/80, A/CN.4/L.82) (*continued*)

[Agenda item 2]

DRAFT PROVISIONAL ARTICLES ON CONSULAR INTERCOURSE AND IMMUNITIES (A/CN.4/108, PART II) (*continued*)

ARTICLE 13 (*continued*)

1. Mr. BARTOŠ agreed with the speakers who considered that the draft should specify which consular functions came directly within the scope of the rules of international law. He pointed out, however, that in appointing a consular officer the sending State could not deny that officer's right to perform certain functions traditionally attaching to his status. In practice, considerable difficulties arose if a State which requested and obtained an exequatur and opened a consulate did not grant its consular officers the customary powers; such an act would amount to an abuse of the right to open consulates. In his opinion, article 13 should be drafted in general terms, making it clear that consuls had certain customary functions under international law, but that the sending State might instruct them to perform other functions as well, provided that those other functions were in conformity with municipal law and with consular treaties.

2. Mr. AMADO said it was obvious that certain consular functions were outside the scope of municipal law and were vested in the consul by virtue of customary international law. While it was often necessary to state the obvious, he did not believe that such a general clause as the Special Rapporteur's first variant of article 13, or article 10 of the Havana Convention regarding Consular Agents, of 20 February 1928, could serve any useful purpose.

3. On the other hand, a lengthy enumeration of functions, as in the Special Rapporteur's second variant of article 13, could not be exhaustive and, moreover, the enumeration in the second variant was somewhat confused in so far as the order was concerned. Consular functions should be divided into three categories: those deriving from the internal legislation of the sending State, those agreed upon in bilateral treaties, and those deriving from customary international law. The latter group, which included the traditional protection extended by the consuls to the nationals of the sending State, was probably the most important. In that connexion, he observed that the first two tasks described in the first paragraph of the second variant were unduly wide for consular officers and properly belonged to diplomatic agents.

4. In conclusion, he considered that the Commission's best course would be to include a classification, rather than an enumeration, of consular functions in article 13.

5. Mr. PADILLA NERVO agreed that no enumeration of consular functions could be regarded as complete, that a general definition could not take into account certain special circumstances covered by bilat-

eral treaties and that a broad, general definition would, in fact, operate restrictively in cases where local custom admitted broader functions than those defined. He thought that there should be some harmony between article 13 of the draft before the Commission and article 3 of the draft on diplomatic intercourse and immunities, which was similar in form to the first paragraph of the Special Rapporteur's second variant. The passage in Mr. Verdross's amendment (see 513th meeting, para. 54) which related to the protection of nationals before the local authorities of the State of residence should be taken into account, and it would also be wise to incorporate the wording of article 10 of the Havana Convention; the protection of nationals, the furtherance of economic interests and the promotion of cultural relations were all functions conferred upon consuls by the sending State, but in the performance of those functions consuls had to respect the legislation of the receiving State. The resulting article might thus combine the provisions of the first paragraph of the second variant, Mr. Verdross's amendment and article 10 of the Havana Convention. He agreed with Mr. Yokota (see 513th meeting, para. 61) that the Special Rapporteur's enumeration could usefully be retained in the commentary.

6. Mr. EDMONDS thought that article 13 was especially important, since the definition of functions might be taken as a measure of a consul's official acts and hence would have a bearing on his immunities.

7. The danger of the Special Rapporteur's second variant was that it might restrict consular duties to the enumeration, which could not be exhaustive. A possible way out of that difficulty would be to set forth the minimum consular functions, and to say that the receiving State recognized the right of consular officers to perform *at least* certain functions; but that might perhaps be going too far, since even some of those minimum functions might be contrary to the law of the receiving State. On the other hand, the first variant stated only half of the principle involved. The best plan might be to adopt the first variant, reworded to convey the idea that consular officers had the powers granted them by the sending State, provided that those powers were not inconsistent with the legislation of the receiving State.

8. Mr. TUNKIN agreed with those members who considered the first variant inadequate. The Commission's task was to codify the rules of international law and in so important a matter as consular functions it could not content itself with a vague reference to international law. He was therefore in favour of some kind of enumeration.

9. It had been suggested that article 13 should follow the model of article 3 of the draft articles on diplomatic intercourse and immunities, which contained a short enumeration in general terms. He was not convinced that such a course would be justified since the position of a diplomatic mission and the position of a consulate were different. There were numerous conventions describing the functions of consuls and a widely accepted practice, and he felt that the Commission should go into more detail than it did in the draft on diplomatic intercourse.

10. It had been said that if the draft was too elaborate, it might include some provisions that would not be acceptable to States. He agreed that care should be exercised, but thought that the draft should go as far as possible. An enumeration of functions would not only serve to codify existing practice but would to some extent embrace the duties of consuls. There were disadvantages of course, for no enumeration could be exhaustive. That, however, should not be an insuperable obstacle. He noted that the second variant of article 13 used the words *"inter alia"*. Another safeguard that could be incorporated into the text was the Special Rapporteur's oral proposal (513th meeting, para. 49) to the effect that consuls could perform other functions if such functions were permissible under, and not in conflict with, the legislation of the State of residence.

11. Mr. LIANG, Secretary to the Commission, said that the discussion reminded him of the long debates, in connexion with the definition of aggression, as to whether it should be a general, enumerative or mixed definition.

12. He recalled his statement at the previous meeting (513th meeting, para. 60) in which he had suggested that the method used in the corresponding article in the draft on diplomatic intercourse and immunities could be used in the present draft and that the enumeration in the second variant might be grouped in a smaller number of more general provisions. He did not agree that there was a greater need for detail in the case of consular functions. If anything, the contrary was true, since there were very many consular conventions, whereas there were few conventions containing detailed provisions on diplomatic intercourse and immunities.

13. He drew attention to the possibilities of controversy inherent in a detailed enumeration. He recalled that when Mr. Sandström's original draft (A/CN.4/91) had been discussed, the article defining the functions of a diplomatic mission had given rise to a long debate in the Commission itself at its ninth session, and in the General Assembly at the thirteenth session, concerning the diplomatic protection of nationals, with considerable argument centring on the local remedies rule and other matters never intended by the author. The idea of consular protection of nationals might give rise to more serious objection. It seemed to him that the best means of avoiding misunderstanding was to follow the model of article 3 of the Commission's draft on diplomatic intercourse and immunities.

14. Mr. SANDSTRÖM recalled that at the previous meeting he had suggested the combination of an enumeration of functions with a general provision, and in that connexion he had drawn attention to the Consular Convention of 1952 between the United Kingdom and Sweden (see 513th meeting, para. 58). That Convention was a good illustration of what he had had in mind. After fourteen articles on consular functions there followed "General provisions relating to consular functions", in article 32, which stated:

> "(1) The provisions of articles 18 to 31 relating to the functions which a consular officer may perform are not exhaustive. A consular officer shall also be permitted to perform other functions, provided that—
>
> "(*a*) They are in accordance with international law or practice relating to consular officers, as recognized in the territory; or
>
> "(*b*) They involve no conflict with the laws of the territory and the authorities of the territory raise no objection to them.
>
> "(2) It is understood that in any case where any article of this Convention gives a consular officer the right to perform any functions, it is for the sending

State to determine to what extent its consular officers shall exercise such right."[1]

15. He agreed with Mr. Tunkin that the Commission should not follow the model of the corresponding article in the draft on diplomatic intercourse and immunities, both because of the difference in the nature of diplomatic and consular functions and in view of the possibility that States might be willing to rely on the Commission's draft, in the form of a multilateral convention as a basis for their consular relations without supplementing it by a bilateral convention. It seemed to him that the Special Rapporteur's second variant of article 13 could serve, after appropriate amendments, as a basis for the enumeration. He suggested that the introductory sentence could be omitted, and after necessary changes had been made in the remainder of the variant, the different functions could be grouped in separate articles with special headings. The number of provisions could be considerably reduced by combining some of them into one shorter provision; for example, paragraph 8 (*e*) might be merged into paragraph 2 since both concerned the promotion of trade.

16. Mr. MATINE-DAFTARY said that he agreed with the members who were in favour of a "mixed" solution, combining a general provision with a not too detailed enumeration. He suggested that, in addition to mentioning the functions and powers of consular offices, the article should refer to some of the activities which a consul should not engage in.

17. He suggested that the redraft of article 13 should include both positive and negative provisions.

18. Mr. HSU agreed with the Secretary that the Commission had something to learn from the attempt to define aggression. He had taken an active part in the work on the question of defining aggression, and in his view the failure to define aggression was due not to the form of the proposed definition or to the fact that it was indefinable but to the policies of the great Powers, which had considered the time inopportune for such a definition. The overwhelming majority of the General Assembly had favoured a definition in general terms followed by an illustrative enumeration, with a certain emphasis on new types of aggression.

19. He suggested that that was the method which the Commission should follow in the case of the definition of consular functions. The Special Rapporteur's suggestion at the previous meeting (513th meeting, paras. 47-53) and the suggestions of various members were very close to that method. The debate on the form of the definition had already consumed much time which should have been devoted to substance. After all, the essential task was to reach agreement on the practice in the matter of consular functions. He felt that the time had come to take up the substance of the question.

20. Mr. ZOUREK, Special Rapporteur, wished to make a brief observation on the form of article 13. Complete parallelism with the corresponding article in the draft on diplomatic intercourse and immunities did not seem desirable because diplomatic functions were of a general nature, whereas consular functions related only to a limited aspect of inter-State relations. He agreed with Mr. Padilla Nervo (see para. 5 above) that article 10 of the Havana Convention of 1928 could be used, but he felt that an enumeration should be added which would not be exhaustive, giving examples of all the typical functions of consuls. It seemed to him that such a formula would meet the requirements of the draft and would be acceptable to Governments.

21. Mr. VERDROSS said that, after hearing the observations of other members, he wished to broaden somewhat the amendment he had submitted at the previous meeting (513th meeting, para. 54).

22. He suggested that article 13 should begin with an enumeration of the consular functions which derived from general international law and which were performed even in the absence of a consular convention between the sending State and the State of residence; that first category included the right and obligation of consuls to lend aid and assistance to nationals of the sending State before local authorities.

23. The enumeration would continue with a second category of functions, those normally, though not necessarily, performed by consuls. That category would include such functions as the promotion of trade between the two countries concerned, as suggested by Mr. Yokota (513th meeting, para 61).

24. Finally, a general clause might provide that consuls could exercise other functions by virtue of treaties, and if desired, examples could be given.

25. Mr. SCELLE, referring to Mr. Matine-Daftary's remarks (see para. 16 above), said it would hardly be particularly appropriate to specify in article 13 what activities would be unlawful. In any event, the Commission would no doubt discuss the question in connexion with article 17.

26. Mr. ALFARO said that the general consensus seemed to be in favour of a solution intermediate between the very detailed enumeration in the Special Rapporteur's second variant and a general statement of the kind contained in the first variant. He suggested that the article might enumerate the main categories of functions, as in the numbered paragraphs of the second variant; all of those functions resulted from the legislation of the sending State and were exercised without prejudice to the legislation of the State of residence and to any bilateral convention between the two States.

27. Mr. ZOUREK, Special Rapporteur, observed that most members of the Commission seemed to favour the principle of the second variant but opinion was divided as to the form it should take. As he had said before (see para. 20 above) it would be desirable to define consular functions by means of concrete examples, though not necessarily at such length as in his draft. Mr. Alfaro's suggestion was particularly interesting. He believed that agreement could be reached on a general clause of the kind that prefaced his own text of the second variant or on the lines of Mr. Verdross's amendment or Mr. Padilla Nervo's suggestion (see para. 5 above). The general clause could be followed by a catalogue of the main consular functions and by a final clause stating that other functions could be performed provided that they did not conflict with the law of the State of residence. One of the unquestionable advantages of that solution would be that it would obviate the danger of consular officials assigning themselves powers that were outside their competence. It might

[1] See *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No.: 58. V.3), p. 484.

thus satisfy Mr. Matine-Daftary, who had suggested that the article should mention the activities which consular officers should not carry on.

28. Though the classification of consular functions suggested by Mr. Verdross (see paras. 22-24 above) could be justified theoretically, he (the Special Rapporteur) could not see the practical value of it. Indeed, the draft would finally take the form of a convention and would bind signatory States only.

29. In order to help the Commission reach a decision he might attempt to elaborate a shorter text for consideration at the next meeting. Of course, there were dangers in being too brief. If, for example, the question of the settlement of cases connected with succession—which was the subject matter of paragraph 13—were treated too summarily, the text might prove to be unacceptable, as practice in the matter varied greatly.

30. Mr. BARTOŠ welcomed the support expressed for Mr. Verdross's amendment. However, the Special Rapporteur had sidestepped the main issue and appeared to be advocating that only functions specified in existing consular conventions should be mentioned in the definition, whereas the main categories were those long recognized everywhere in law and custom. A State which granted an exequatur tacitly agreed that the functions recognized by international law and custom as vesting *ex jure* in consuls could be exercised within its territory. The main question to be settled in article 13 was whether or not it should differentiate between functions expressly conferred by convention and those generally recognized as exercisable by consuls, even in cases where no convention had been concluded. In his view it would be a disservice to international law not to mention the second category.

31. Mr. ZOUREK, Special Rapporteur, did not think that his view differed fundamentally from that of Mr. Bartoš. He agreed that the Commission should determine which were the essential consular functions according to existing law and practice. The matter was largely one of presentation and he suggested it would be sufficient to explain in the commentary that certain, not very numerous functions had long been recognized as attaching to the consular office, and that others had been defined by national legislation or international instruments; if any other solution were adopted, article 13 would have to contain an elaborate classification which might not be suitable to a multilateral convention expressly stating—as it presumably would do—that its provisions were without prejudice to existing bilateral treaties.

32. Mr. BARTOŠ found the Special Rapporteur's suggestion quite unacceptable, particularly after the fate of the commentary to the texts adopted by the United Nations Conference on the Law of the Sea, in 1958. His country had been very much concerned about the difficulty of arranging for the defence of nationals arrested on foreign soil. To deny consuls access to arrested persons was a flagrant violation of international law; the consular function of protecting nationals of the appointing State was fundamental, and hence should be mentioned first in the enumeration. The draft should respect rules which had for centuries been generally recognized in international law and in the practice of States, regardless of whether or not there was a convention, or whether the convention expressly provided for that function or not.

33. Mr. YOKOTA considered that the article should be framed in very general terms and that it should only mention a few of the main consular functions. Most of the detail could be relegated to the commentary, otherwise the lack of uniformity in the practice would cause great difficulties. He even had serious doubts about a general article accompanied by the principal functions enumerated in the numbered paragraphs of the second variant, as suggested by Mr. Alfaro (see para. 26 above). Some paragraphs without sub-paragraphs had little, if anything, to say and, what was worse, might be interpreted to give too wide functions to consular officers. He cited paragraphs 8 and 10 by way of illustration. On the other hand, if the Commission went into too much detail, many difficulties would arise. To illustrate such difficulties, he referred to paragraph 3 (*h*) and (*j*) of the Special Rapporteur's second variant and asked whether those provisions truly reflected practice, and were acceptable to many States.

34. Mr. TUNKIN said that, in view of the Commission's twofold task of codifying generally accepted rules of international law and of promoting the development of international law, it should be possible for the Commission to express forthwith, by a vote, a preference for the one or the other of the two alternative methods of presenting article 13. In the light of the decision, the Special Rapporteur could then prepare a new text for consideration.

35. The CHAIRMAN did not think it would be desirable to proceed to a vote before further thought had been given to the considerations mentioned by Mr. Verdross and Mr. Bartoš. It was true that even in the absence of bilateral conventions there were certain fundamental consular functions recognized by international law which might usefully be specified in the draft.

36. Mr. ZOUREK, Special Rapporteur, pointed out that the question of what rules codified existing general law and which were being proposed by the Commission *de lege ferenda* was pertinent to all the articles in the draft and not solely to article 13. If the Commission had intended to confine itself to codifying customary law the draft would have been much too schematic. It was for that reason that he had attempted to introduce some elements of progressive development drawn from numerous conventions which, it could be reasonably assumed, would find acceptance among many States.

37. In reply to Mr. Yokota's question about paragraph 3 (*h*) and (*j*), he said that the functions there described appeared in many consular conventions, which would tend to prove that a true international custom was involved.

38. The CHAIRMAN, replying to the Special Rapporteur, said it was arguable that article 13 constituted a special case and that it would be desirable to indicate in the commentary that certain consular functions had long been recognized in customary law.

39. Mr. TUNKIN suggested that the Special Rapporteur should be asked to submit two alternative versions, one of a general character on the lines of article 3 in the draft on diplomatic intercourse and immunities and the other of a more detailed kind, as suggested during the discussion.

It was so agreed.

The meeting rose at 1 p.m.

515th MEETING

Monday, 15 June 1959, at 3.5 p.m.

Chairman: Sir Gerald FITZMAURICE

Communication from the Asian-African Legal Consultative Committee

1. Mr. LIANG, Secretary to the Commission, said he had received a letter from the Secretary of the Asian-African Legal Consultative Committee, enclosing a copy of the summary report of the Committee's second session, held at Cairo in October 1958. The letter stated that the Committee's recommendations on diplomatic intercourse and immunities corresponded to a large extent to the articles that the Commission had drafted at its tenth session (A/3859, para. 53). The Secretary of the Committee also asked whether the Commission wished to send an observer to the third session, to be held at Colombo from 5 to 19 November 1959.

2. Mr. Liang suggested that he should inform the Secretary of the Committee that the question of diplomatic intercourse and immunities would be dealt with by the General Assembly at its fourteenth session, and that the Committee's report might be useful to members of the Sixth Committee of the Assembly. With regard to the suggestion that an observer might be sent to the Colombo session, he said it was too late to make suitable arrangements for sending an observer to that session. The Secretary of the Asian-African Legal Consultative Committee might be asked whether an invitation to a subsequent session could not be sent at an earlier date, in order that the necessary arrangements might be made.

3. The CHAIRMAN suggested that the Commission should take note of the Secretary's statement.

It was so agreed.

Planning of future work of the Commission

[Agenda item 7]

4. The CHAIRMAN thought there should be little controversy about the Commission's programme at its twelfth session. Its first task was obviously to complete the draft on consular intercourse and immunities, in order that the draft might be sent to Governments for comments and approved in final form at the thirteenth session. He estimated that the work would require approximately five weeks to complete. With regard to the law of treaties, he said the Commission had nearly completed the section on the conclusion of treaties, and it would probably be possible to complete that section in two or three weeks. Finally, two or three weeks should be devoted to the subject of State responsibility, for it would be advisable at least to begin a study of that difficult subject. When the draft on consular intercourse and immunities was completed, more time would be devoted to State responsibility.

5. Mr. SANDSTRÖM said that his draft on *ad hoc* diplomacy (see A/3859, para. 51) should be completed early in 1960 and might be considered at the next session, so that the final section of the draft on diplomatic intercourse and immunities might be submitted to Governments together with the draft on consular intercourse and immunities.

6. Mr. FRANÇOIS expressed some anxiety with regard to the method of the Commission's work, which had changed in recent years. At its earlier sessions, not every member of the Commission had stated his opinion on every point at length; after a few members had spoken on the particular subject, the discussion was closed and a vote taken. That practice had been abandoned, however, and now all members made statements on each point. Repetition was therefore inevitable. Votes were no longer taken, as the discussion had already disclosed the opinion of the majority. The procedure had some advantages in that interesting statements were made, but the Commission's work was being excessively delayed by that method. After all, the Commission was not a legal debating society, but a body whose task was to codify international law. He suggested that the Commission should consider returning to its original system.

7. Mr. TUNKIN agreed with Mr. François to a certain degree; the Commission's debates could be shortened when it was obvious that arguments became repetitive. Nevertheless, he believed that the method that the Commission was now using was satisfactory, since it was wise to discuss each point as fully as possible. Very often such discussion led to mutual understanding, which was much more important than the saving of a few hours.

8. Mr. ZOUREK agreed with the programme outlined by the Chairman, but thought that he was perhaps over-optimistic in his estimates of the time required. In the space of three weeks at the current session the Commission had dealt with eleven articles of the draft on consular intercourse and immunities; if it proceeded at that rate, the subject would take up most of the next session. He shared Mr. François's views concerning the method of work and believed that an effort should be made to limit debate on purely procedural matters. To speed up its work the Commission might well carry out the decision taken at the tenth session regarding the organization of its work (A/3859, para. 64).

9. The CHAIRMAN pointed out that the method advocated by Mr. Zourek would mean transferring a good deal of the Commission's work to a drafting committee. That could not be done without cancelling two or three of the Commission's plenary meetings each week.

10. Mr. LIANG, Secretary to the Commission, thought it was clearly important for the Commission to complete certain sections of its work on the law of treaties and State responsibility, both of the items having been on the agenda for a long time. It would be wise, however, not to regard those vast subjects as an integrated whole, but to divide them into sections, as the Institut de droit international had done. He had raised the matter at the 369th meeting of the Commission in 1956 and, on that occasion, had given as an illustration the text of the three articles prepared by the Institut on the subject of the interpretation of treaties. The Institut had thus dealt with only one section of the topic of the law of treaties, a topic which in its entirety might well be as vast in its scope as that of the responsibility of States. He reiterated the point now, and cited the same illustration, not merely because of its aptness to the current discussion, but also to correct the very erroneous record of his statement in 1956 which appeared in the summary record of that meeting.[1]

[1] *Yearbook of the International Law Commission, 1956*, Vol. I (United Nations publication, Sales No.: 1956.V.3, Vol. I), 369th meeting, para. 65.

11. He did not think that the Commission's method of work had changed as sharply as Mr. François seemed to think. The prolongation of debate might well be attributed to the increase in the membership of the Commission. Moreover, it was debatable whether the completion of a certain number of articles in the form of bare texts was more useful than the enunciation of considered views. While it was true that the success of the United Nations Conference on the Law of the Sea, held in 1958, had been due to the careful preparation of the articles concerned, the records of the Commission's debates were equally of much interest and usefulness to students and lawyers as the adoption of articles.

12. Mr. Zourek had again raised the question of setting up a sub-committee or drafting committee in order to expedite the work. It would be recalled that that system had not been a success in the treatment of the topic of arbitral procedure at the ninth session (see A/3623, paras. 18 and 19). One-half of the members of the Commission had participated in the committee, and the work of that body had given rise to such long discussions in the plenary Commission that the work had been retarded rather than advanced. Moreover, it was difficult to select ten members of the Commission representing different legal systems as envisaged in Mr. Zourek's plan (A/3859, para. 59 and footnote 33), and to distinguish questions of principle from questions of detail to be referred to the sub-committee.

13. Mr. AGO said that, whenever the question of the Commission's method of work was raised, there was a tendency to urge the adoption of as many drafts as possible. According to that thesis, the General Assembly expected the Commission to produce drafts at an ever more rapid rate. In his opinion, that was incompatible with the long-term work of codification. If the Commission took a year or two longer over the codification of a particular topic than had been estimated, no great danger could arise; the danger was that the quality of the codification might be impaired through haste. Codification on a sound basis would contribute to the maintenance of international peace and security, but scamped work would lead to a retrogression of international law itself. He was not in favour of establishing subsidiary groups to deal with the Commission's work.

14. He could not agree with Mr. François that the Commission should revert to the method of hearing a few speakers and then proceeding to a vote. It could be left to each member to endeavour to avoid repetitions; but it should be borne in mind that the Commission was not always engaged on the drafting of conventions. The Secretary had rightly pointed out that the Commission's debates were sometimes more interesting—not only to experts and students, but even to judges—than the texts adopted. The system of voting was useful in connexion with conventions of a political character, but could not be satisfactory in dealing with scientific matters.

15. Mr. VERDROSS considered that the Commission's real task was to promote the world-wide application of the rules of international law evolved in western Europe over the centuries. In view of the magnitude of that task, some change of method seemed to be necessary. There could be no doubt that a general debate on every subject was indispensable, but when that debate had been closed, further action should take the form of concrete proposals.

16. Mr. ZOUREK pointed out that it was the Commission's invariable practice to appoint a drafting committee. Moreover, he questioned whether any great difficulty had arisen from the fact that such committees dealt with substantive matters. He quite agreed with the view that the Commission should not proceed with undue haste in its work of codification, but thought that arrangements could and should be made to speed up the work without damaging its quality.

17. Mr. GARCIA AMADOR thought that the Commission should make it clear that it would begin to consider State responsibility when it had completed its work on the draft on consular intercourse and immunities.

18. With regard to the method of work, he said he was in favour of the idea that in some cases the Commission should be prepared to appoint sub-committees through the drafting committee. That system had been used in 1955 at the seventh session with complete success, when six members had completed a final draft for submission to Governments in eight meetings. No difficulty had arisen concerning the membership, as the draft was to be sent back to the plenary Commission. The system could be successful, therefore, but each case should be considered on its own merits, for there had been cases where texts had been referred back to the drafting committee several times.

19. He agreed with the Secretary that the subject of State responsibility could be divided into different sections. However, during the two or three weeks to be devoted to that subject at the twelfth session, the Commission should discuss the basic problems of State responsibility and should leave aside the question of division for the time being.

20. Mr. FRANÇOIS, replying to criticisms of the Commission's earlier method of work, observed that satisfactory results had been obtained by following that procedure, while years would pass before the results of the new methods would be known. It had implied that the votes taken under the earlier method had been premature; members would recall, however, that no question had been put to the vote until the Commission had agreed that the point had been sufficiently discussed. Under the present system, the Commission was constantly avoiding votes, while formerly if members had agreed with certain arguments, they had found it unnecessary to repeat them, because their agreement could be expressed by their vote. Mr. Ago had said that the time factor was not important; it seemed unlikely, however, that at the present rate of progress the work on consular intercourse and immunities could be completed by the twelfth session. Mr. Ago's thesis would be sound if the Commission were a standing body for legal deliberations; but in actual fact it had only ten weeks a year in which to prepare drafts.

21. Mr. BARTOŠ considered that the length and repetitiveness of the Commission's debates at its current session were largely due to the fact that it had been obliged to interrupt its consideration of agenda items. He agreed with Mr. Ago that it was better to work slowly than to allow drafts to suffer from undue haste. Furthermore, when matters unsolved in the plenary Commission had been referred to a drafting committee, lengthy discussions had taken place when the final drafts had been returned. Accordingly, no questions should be referred to a drafting committee or sub-committee or voted upon until they had been exhaustively discussed in the plenary Commission and

all members had had an opportunity to express their views.

22. Mr. PAL said he could not agree that the Commission had abandoned the system of voting. Articles had been discussed at plenary meetings and on the basis of the discussion certain suggestions had been made. In every case the Chairman had asked whether there was objection to the suggested course. Thus, in effect there had been voting although not by a show of hands, and nearly invariably the decisions had been unanimous.

23. Any suggestion that the Chairman should prevent repetitious statements would be unacceptable, for the Chairman could hardly assume in advance that a member was going to repeat himself.

24. As to the question of a sub-committee, he said that if Mr. Zourek's system involved a general discussion followed by referral to the sub-committee, that was in effect what the Commission had been doing. If, on the other hand, it was intended that questions would be debated first in the sub-committee, then he was sure that such a system would be more repetitious than the current method. Decisions of the sub-committee would not be final and members would be less inclined to compromise since they would hope to see their views prevail in the plenary meetings. The result could only be a repetition of all the arguments that had been put forward in the sub-committee.

25. He did not think that the Commission's present method of work was defective.

26. Mr. TUNKIN agreed with the Chairman's suggestions concerning the agenda of the twelfth session. He thought it particularly important to begin the discussion of the question of State responsibility, and he agreed with Mr. García Amador on the need for a decision on the scope of the work on State responsibility.

27. As to the question of the method of work, he did not agree that voting was a good way to frame rules of international law. They could not be imposed on States, and lack of agreement in the Commission would only reduce the prospects of the eventual acceptance of the Commission's work. Although reaching agreement through discussion would require more time than voting, the resulting texts would probably find greater support among Governments.

28. Mr. SCELLE was opposed to the suggestion concerning a sub-committee. That system would not save time, but, rather, would require the re-discussion of questions at plenary meetings. In his view considerable time would be saved if the Commission decided to deal with one item at a time until the item was completed. The discussion of an item over a number of sessions tended to encourage the re-examination of points which had been thoroughly examined before.

29. He thought that the Chairman should intervene from time to time in order to ensure that speakers did not dwell on points which had been fully examined and which would not be affected by further consideration. There was no use discussing the same points again and again, referring them back and forth to a subordinate body and postponing them from one session to the next.

30. Mr. MATINE-DAFTARY said that the discussion had shown that there were two views in the Commission: some members thought that full discussion was necessary, and others considered that discussion should be briefer and decisions taken, if necessary, by voting. In his opinion, both views would be wrong if applied in an extreme manner and both would be right if applied in moderation. Some problems might have to be discussed at length and others might have to be decided by a vote. He did not think that the Chairman should have the right to deny the floor to a member, for there was no way of knowing in advance whether or not the speaker had something new to contribute. However, he thought that the Chairman could intervene from time to time for the purpose of shortening the discussion.

31. He was not opposed to the idea of a sub-committee in principle; indeed, it might contribute to a more thorough study of questions. On the other hand, he doubted very strongly that it would help to save time. In his view the work of the Commission might be expedited if a separate drafting committee were established for each substantive item of the agenda.

32. Mr. PADILLA NERVO agreed with the views of the Chairman and Mr. García Amador on the programme of work for the twelfth session. With regard to the Commission's method of work, he felt that the best method was to work and not to discuss the method of work. In his experience in United Nations bodies he had found that discussions of ways to save time nearly invariably wasted time. He did not think that the Commission should change the system it had been following. Each question had different characteristics and it would not be practicable to establish a rigid system.

33. The CHAIRMAN observed that the question under discussion was the Commission's programme of work for the twelfth session. With regard to the remarks made on the method of work, he said he had not been conscious of any change in the Commission's procedure since 1955, when he had become a member. He did not think that members came to the sessions of the Commission merely in order to register their votes. One of the great merits of the Commission was that it was an international forum in which it was possible to persuade members to change their points of view, since they were not bound by instructions from Governments.

34. He did not think that there had been many cases of automatic and pointless repetition. Often a statement that appeared to be repetitious was in fact an expression of support for a particular view by different arguments or a change of emphasis.

35. Nor did he agree that the Commission did not do enough work. Its sessions had a good record of output; the total number of articles completed at the current session might be slightly less than the average, because for reasons beyond its control the Commission had not been able to adhere to its programme of work.

36. He agreed with the Secretary's view concerning the idea of a sub-committee. The Commission's method of having a drafting committee which enjoyed a certain freedom had worked out very well. It was only when a certain measure of agreement, or at least a majority view, on a question had emerged through discussion in plenary meetings, that a question could be referred to a subordinate body, and there was no point in a body like the International Law Commission referring a matter first to a sub-committee for elaboration.

37. As to the programme of work of the twelfth session, he thought that there was agreement that the Commission should first complete the draft on consular inter-

course and immunities. Thereafter, it would be essential in his view to spend two or three weeks on the topic of State responsibility and then continue with the law of treaties.

38. The remaining problem was the topic of *ad hoc* diplomacy. Since the Special Rapporteur on that topic expected to have a draft ready before the beginning of the session (see para. 5 above), members would be in a position to discuss it. However, much depended on the action that would meanwhile have been taken by the General Assembly.

39. Mr. LIANG, Secretary to the Commission, said that *ad hoc* diplomacy was a new subject and that members might wish to have more time to study the Special Rapporteur's draft. Apart from that technical matter of reproducing the draft several months in advance of the session, there were other conditions which were difficult to foresee, and he did not think that it would be wise to take a firm decision on the matter at the present time.

40. Mr. SANDSTRÖM, speaking as the Special Rapporteur on *ad hoc* diplomacy, did not think that his subject would require much time. However, in view of the uncertainties, he suggested that it should be placed on the agenda of the twelfth session provisionally. The Commission could decide at the beginning of that session whether or not to take it up.

41. Mr. EDMONDS said that, while he did not feel strongly about the Commission's method of work, he thought that better results would be achieved if the Commission continued with one item until it was completed. He suggested that discussion might be expedited if the rule were adopted that a member could not speak a second time on a particular question until every other member had had an opportunity to speak. Such a rule might encourage members to say what they had to say in a single statement, or at least to keep their second statement short.

42. Mr. YOKOTA thought that everyone was in agreement that the first item at the next session should be consular intercourse and immunities. The other items should be placed on the agenda, but there was no need to take a decision regarding their order. The General Assembly might, in the meantime, express an opinion on the question of priorities, or some unforeseen circumstance might force the Commission to change any order of discussion decided upon at the present time.

43. Apart from the topic of consular intercourse and immunities, which should be completed, he would be inclined to complete the remaining articles of part I of the Special Rapporteur's draft on the law of treaties (A/CN.4/101), and to discuss the general principles of the question of State responsibility with a view to deciding on the scope of the project. When State responsibility had first been discussed, the Commission had decided to deal with the responsibility of States for injuries to aliens, but since then some members had indicated that the Commission should first take up the question of State responsibility in general.

44. Mr. MATINE-DAFTARY thought that the question of *ad hoc* diplomacy should appear on the agenda of the twelfth session. To do so would encourage the Special Rapporteur and would be in accord with General Assembly resolution 1289 (XIII).

45. The CHAIRMAN agreed that, in view of the Commission's experience at the current session, a rigid order should not be established. However, he thought that members should have some provisional idea of the order in which items would be discussed, and accordingly he suggested that all four items should be placed on the agenda in the following provisional order: (1) consular intercourse and immunities; (2) State responsibility; (3) law of treaties; and (4) *ad hoc* diplomacy. The order did not necessarily indicate the amount of time that would be spent on each item.

It was so agreed.

The meeting rose at 6 p.m.

516th MEETING

Tuesday, 16 June 1959, at 9.45 a.m.

Chairman: Sir Gerald FITZMAURICE

Consular intercourse and immunities (A/CN.4/108, A/CN.4/L.79, A/CN.4/L.80, A/CN.4/L.82) (*continued*)

[Agenda item 2]

DRAFT PROVISIONAL ARTICLES ON CONSULAR INTERCOURSE AND IMMUNITIES (A/CN.4/108, PART II) (*continued*)

ARTICLES 14 AND 15

1. Mr. ZOUREK, Special Rapporteur, introduced article 14 (*Extension of consular functions in the absence of a diplomatic mission of the sending State*), and drew attention to the commentary. It should be stressed, of course, that the performance of isolated diplomatic acts could never confer diplomatic status on the consul under international law. A provision similar to article 14 of the draft appeared in the Havana Convention of 1928 regarding Consular Agents (article 12), and provisions enabling consuls to perform diplomatic acts in certain circumstances were embodied in the national law of some countries, as stated in paragraph 3 of the commentary.

2. Since article 12 (*Consular relations with unrecognized States and Governments*) had been withdrawn in deference to the wishes of the majority (see 513th meeting, para. 35), the scope of article 14 had become wider, as it dealt both with countries which were recognized and those which were not. In principle, however, the question of recognition should not be raised in connexion with article 14.

3. He had no objection in principle to Mr. Scelle's amendment (A/CN.4/L.82) but thought it was more relevant to a different situation, that covered by article 15, which related to diplomatic functions that might be performed permanently by consuls-general, whereas article 14 dealt only with occasional diplomatic acts which would otherwise be performed by diplomatic missions. Mr. Scelle might have meant that article 15 should be deleted, but his amendment did not state that.

4. The CHAIRMAN suggested that, in Mr. Scelle's absence, his amendment might be discussed in connexion with article 15.

5. Mr. BARTOŠ said that there was no existing rule in international law providing for the performance of diplomatic functions by consuls, nor was it necessary to propose such a rule *de lege ferenda*. On the contrary, he believed that consuls could not perform dip-

lomatic functions except with the prior agreement of the States involved. As recently as 1958, the United States Government had sent a circular to foreign missions stating that persons with consular status could not perform any diplomatic functions in the United States and could not even act as representatives to the United Nations. It was true that consuls had performed such functions formerly in countries in which the system of capitulations had applied, but those countries were now bitterly opposed to the practice. Yugoslavia had consuls in countries in which it maintained no diplomatic mission, but they could not perform any diplomatic acts, except serve as a channel for diplomatic notifications on behalf of the Yugoslav Government. A provision referring to the combination of consular and diplomatic functions was neither necessary nor desirable in a codification of the law on consular intercourse.

6. Mr. SANDSTRÖM said that, since article 14 dealt rather with diplomatic intercourse, it seemed to be out of context in a draft on consular intercourse. It was evident, of course, that any two States were free to arrange by agreement for the extension of consular functions in the circumstances contemplated in the article.

7. The CHAIRMAN thought that in view of the similarity of articles 14 and 15, they might well be combined.

8. Mr. ZOUREK, Special Rapporteur, explained that article 14 dealt with exceptional acts performed only in cases of need, not with the regular diplomatic function. Such acts in no way changed the representative's legal status. On the other hand, article 15 dealt with the case in which, aside from the consular function, the consul performed a permanent diplomatic function, entitling him to diplomatic privileges and immunities. He would have no objection to combining the two articles if the Commission so wished, but he would prefer to keep them separate, as they dealt with different situations in law.

9. The CHAIRMAN suggested that the Commission should at any rate discuss articles 14 and 15 together.

It was so agreed.

10. Mr. TUNKIN agreed with the Special Rapporteur that the situations in articles 14 and 15 were entirely distinct. The articles might be discussed together, but should not be combined.

11. Article 14 covered an existing practice. The Union of Soviet Socialist Republics at one time had maintained a consul-general in the Union of South Africa who had in some instances been entrusted with certain diplomatic acts performed purely incidentally, as long as no objection had been raised by the Government of the receiving State. Cases occurred where it was really necessary to entrust a consul with performing certain diplomatic acts from time to time. The question was whether that practice should be reflected in the draft. Articles 14 and 15 were not *jus cogens,* but explanatory, and expressed the view that the situation was in no way extraordinary. The articles should be retained in the draft on consular intercourse, even though they dealt incidentally with acts of diplomatic intercourse, for the acts in question were performed by consuls and so came within the scope of consular intercourse.

12. Mr. MATINE-DAFTARY agreed with the Chairman's suggestion that articles 14 and 15 be combined. Article 14 as it stood was too ambiguous and loosely worded. Some countries still harboured bitter memories of diplomatic, and even political, activities carried on by consuls. The Special Rapporteur had said that article 14 covered acts performed only in certain cases, but it was not clearly stated whether the authorization to perform those acts was intended to be provisional or, as in article 15, permanent. The cases cited in the commentary were not relevant. Against the case of the Commonwealth of Australia could be set the case of India before it had achieved independence. At that time, India had not been able to receive ambassadors or ministers, but only consuls-general, but they had in fact acted as ministers. The Australian precedent was in fact relevant to article 15, not article 14. The cases of Haiti, Monaco and the Republic of San Marino were also not relevant, since those countries could hardly be regarded as Powers and few countries would be likely to send them plenipotentiary diplomatic agents. If article 14 were retained, it should be worded more explicitly in order to prevent consuls from engaging in diplomatic or even political activities in the State of residence.

13. Mr. PADILLA NERVO said that article 15 dealt with diplomatic functions conferred on consuls by the sending Government in cases where consuls-general performed all diplomatic functions, whereas article 14 merely empowered a consul to approach the central Government if he failed to receive satisfaction from the local authorities and if there was no diplomatic mission of the sending State. Articles 11 and 12 of the Havana Convention of 1928 contained provisions similar to those of article 14 of the present draft. Articles 14 and 15 of the draft differed from each other in substance. The two articles should preferably be kept separate and, even if article 14 was not retained, article 15 should be, since its substance appeared in many consular conventions.

14. Mr. EL-KHOURI observed that articles 14 and 15 both provided a special solution for special circumstances and might well be amalgamated, with drafting changes. He did not agree with Mr. Sandström that the articles were more concerned with diplomatic intercourse and immunities. Indeed, they might appear both in the draft on diplomatic intercourse and immunities and in the draft on consular intercourse and immunities; in the latter they would explain in what special circumstances a consul might perform diplomatic functions, and in the latter they would show how the absence of a diplomatic mission might, in certain circumstances, be remedied.

15. Mr. EDMONDS said that for practical considerations article 14 was needed, but it might be combined with article 15, even though the situations were rather different. With regard to the Havana Convention of 1928, he pointed out that Venezuela had entered a particular reservation that such provisions were foreign to its tradition;[1] furthermore, other States denied all diplomatic functions to consular officers. The provision should be drafted with some care, since, according to article 3 of the draft articles on diplomatic intercourse and immunities (A/3859, chapter III) one of the diplomatic mission's functions was to protect in the receiving State the interests of the sending State and of its nationals. If article 13 of the present draft was

[1] League of Nations, *Treaty Series,* vol. CLV (1934-1935), No. 3582, p. 302.

not adopted and article 14 was, the net effect might be that the functions of consular officers might in the particular circumstances be confined to protecting the interests of the sending State in the receiving State.

16. Mr. YOKOTA thought that article 14 should be retained in the draft on consular intercourse and immunities, and not moved to the draft on diplomatic intercourse and immunities. Inasmuch as the establishment of diplomatic relations did not necessarily imply the establishment of a diplomatic mission, it was quite possible that there was no diplomatic mission, although diplomatic relations had been established. But a provision concerning the manner in which diplomatic functions were to be performed in that case had not been laid down. Therefore there was no reason why a provision such as article 14 should be inserted in the draft on diplomatic intercourse. On the other hand, as that article allowed the consul to perform certain diplomatic functions, it was important that it should appear in the draft on consular intercourse and immunities.

17. Mr. ERIM suggested that Mr. Matine-Daftary's point might be met by using the negative formulation employed in article 16 in order to place the emphasis on the need for the permission of the Government of the State of residence. Articles 14 and 15 might well be amalgamated, although they dealt with different situations.

18. Mr. VERDROSS agreed with the Special Rapporteur that articles 14 and 15 corresponded to international practice, and he considered that the provisions should be included in the draft on consular intercourse, because they related to cases in which consuls exercised diplomatic functions as an exceptional measure. He did not think that article 14 was open to abuse in the manner indicated by Mr. Matine-Daftary; the express requirements of the consent of the Government of the State of residence and the implication of a special agreement between the two States concerned constituted adequate safeguards.

19. Mr. ALFARO thought that the inclusion of articles 14 and 15 was justified, but that their present wording suggested that both contemplated the same situation. It should be made perfectly clear in article 14 that the diplomatic action concerned would be transitory, and it might perhaps be advisable to add a cross-reference to article 14 in article 15. The Drafting Committee could no doubt revise the articles in order to stress the contrast between them.

20. Mr. ZOUREK, Special Rapporteur, observed that the Commission seemed to be agreed in principle. He shared Mr. Alfaro's view that the accidental and transitory character of article 14 should be stressed.

21. Mr. BARTOŠ said he would have no objection to the adoption of Mr. Erim's suggestion.

22. The CHAIRMAN suggested that articles 14 and 15 should be referred to the Drafting Committee for redrafting in the light of the discussion.

It was so agreed.

ARTICLE 16

23. Mr. ZOUREK, Special Rapporteur, introducing article 16, (*Discharge of consular functions on behalf of a third State*), said that cases of discharge of consular functions on behalf of a third State were not infrequent in practice. He referred to the provision requiring the express permission of the State of residence. As was pointed out in the commentary, the situation covered by article 16 might arise in two different sets of circumstances: either where the third State had no consul on the spot, as under the provisions of article VI of the Caracas Convention of 18 July 1911, or where consular relations had been broken off, but the need to retain certain consular functions was still felt. Since similar provisions were included in the legislation of many countries, he had thought it necessary to include the article in the draft.

24. The CHAIRMAN thought that the principle was scarcely open to question. It might, however, be more appropriate to move the article nearer to the Special Rapporteur's new article 2, paragraph 5 (see 505th meeting, para. 10), which had a certain relationship with article 16. He suggested that the article should be referred to the Drafting Committee.

It was so agreed.

ARTICLE 17

25. Mr. ZOUREK, Special Rapporteur, introducing Article 17 (*Withdrawal of the exequatur*), said that the right to withdraw the exequatur was recognized by doctrine and by practice and was provided for in many international treaties, including article 8 of the Havana Convention of 1928.

26. One point which might prove controversial was whether the text should be retained in its present form or whether the second clause in paragraph 1 limiting the right ("but, except . . .") should be deleted. In his opinion, the text should be kept in its present form. Mr. Verdross had stated in his comments on article 17 (A/CN.4/L.79) that there should be no provision in paragraph 2 concerning the withdrawal of the exequatur of a consular representative that was more rigorous than those for diplomatic representatives. He (the Special Rapporteur) believed, however, that the withdrawal of the exequatur was a more serious act than that of declaring a diplomatic agent *persona non grata,* for the consul's position was very different; consuls exercised a wide variety of functions requiring daily contacts with the State of residence. It would be going too far to admit that that State had unqualified power to withdraw the exequatur. He thought that the article achieved a balance: all the necessary guarantees were provided for the State of residence in the first clause of paragraph 1, and the modest qualification in the second clause had been introduced to prevent arbitrary withdrawals.

27. Another question that might be controversial was whether the State of residence should be obliged to give reasons for withdrawal. He recalled that, in the case of article 8 (*Refusal of the exequatur*), he had taken the view that the draft could not lay down an obligation to give reasons for the refusal (see 509th meeting, para. 29). In the present instance, however, since the withdrawal of official recognition given by the State of residence was bound to have serious effects on the operation of the consulate, he believed that reasons for the decision should be given. Nevertheless, he reserved his final position on the matter.

28. Turning to Mr. Scelle's amendments to article 17 (A/CN.4/L.82), he said he had no objection in principle to the addition of the proposed phrase to paragraph 1, although he did not consider it strictly necessary. With regard to the proposed paragraph 3, he thought that the guarantee given in paragraph 1 was enough and that Mr. Scelle's new paragraph might be placed in the commentary. In any case, decisions on

those points should be postponed until Mr. Scelle could be present to introduce his amendments.

29. Mr. VERDROSS did not think that the Special Rapporteur had given enough reasons in the commentary for such a wide differentiation between diplomatic relations and consular offices. The exercise of consular functions, like that of diplomatic functions, presupposed the receiving State's confidence in the person concerned. There might be sufficient grounds for withdrawing the exequatur even if the officer concerned was not guilty of an infringement of the laws of the receiving State. Accordingly, he believed that, in order to reflect the existing practice, the provision should be drafted in the same way as the corresponding article of the draft on diplomatic intercourse and immunities.

30. The CHAIRMAN drew attention to the relevant provisions of the Havana Convention of 1928 (article 8), the Convention of Friendship and Consular Relations of 18 July 1903 between Denmark and Paraguay[2] (article VIII), the Consular Convention between Italy and Czechoslovakia of 1 March 1924[3] (article 1, paragraph 7), the Convention between the United States of America and Costa Rica of 12 January 1948[4] (article I, paragraph 4), the Consular Convention between the United Kingdom and Sweden of 14 March 1952[5] (article 5, paragraph 3) and the Consular Convention between the United Kingdom and Italy of 1 June 1954[6] (article 5, paragraph 3). Those provisions reflected the existing practice in the matter and showed that, although certain qualifications were made concerning the modalities of the withdrawal of the exequatur, none of them contained any such express conditions as that proposed by the Special Rapporteur in the first clause of paragraph 1. In fact, most of those provisions were concerned with the question whether or not the consular officer had given cause for complaint.

31. Mr. EDMONDS agreed that the provision of the first clause of paragraph 1 was too narrow and was not in conformity with existing practice.

32. Mr. ZOUREK, Special Rapporteur, said that since the practice in the matter was not uniform, he had drafted the article as a proposal *de lege ferenda*. It was true that certain consular treaties contained more flexible provisions on the subject; thus, under the Consular Convention between the United Kingdom and France of 31 December 1951[7] (article 4, paragraph 5), the receiving State could not refuse or revoke an exequatur "except for grave reasons". If any member of the Commission wished to propose a different formula he would be prepared to accept it. He further drew attention to the Consular Convention between the United States of America and the United Kingdom of 6 June 1951[8] (article 5, paragraph 3), which provided that "the receiving State may revoke the exequatur or other authorization of a consular officer whose conduct has given serious cause for complaint" and that "the reason for such revocation shall, upon request, be furnished to the sending State through diplomatic channels". That article provided an alternative solution to the problem of the obligation to furnish reasons for the withdrawal of the exequatur; however, he believed that the provision in paragraph 2 would suffice.

33. Mr. MATINE-DAFTARY agreed with speakers who had criticized the first clause of paragraph 1 as being too narrow. A broader formula should be found to cover all types of cases where the conduct of consular officers left much to be desired. Referring to paragraph 2, he said he saw no reason why States should be obliged to communicate the reasons for the withdrawal of the exequatur; if, however, the majority of the Commission wished to retain that provision, it should be stated, either in the article itself or in the commentary, that the reasons would be furnished for information only. Such a provision would make it possible to avoid disputes with regard to withdrawals.

34. Mr. YOKOTA agreed with the previous speakers who had criticized the article on the grounds that it limited the withdrawal of the exequatur to cases of infringement of local laws. He pointed out that article 8, paragraph 1, of the draft on diplomatic intercourse and immunities did not limit the right of the receiving State to declare a diplomatic agent *persona non grata*. Since the results of such a declaration would far more seriously affect subsequent relations beween the States concerned than would the withdrawal of a consul's exequatur, he failed to see why a consular officer should be better protected than a diplomatic agent.

35. Nor could he agree to the requirement in paragraph 2 of article 17 that reasons for the withdrawal of the exequatur should be given. He recalled that a similar provision had been suggested by the Special Rapporteur on diplomatic intercourse and immunities and that the Commission had ultimately decided not to include it. Admittedly there was a difference between the position of a diplomatic agent and that of a consular officer, but he did not think that it was so great as to impose the obligation to give reasons. He therefore suggested that paragraph 2 should be deleted.

36. Mr. SANDSTRÖM supported the views of Mr. Verdross and Mr. Yokota.

37. The CHAIRMAN was of the same opinion. The practical effect of paragraph 1 might be to make it impossible for the State of residence to withdraw the exequatur, since it was unusual for the consul to infringe the laws of that State. In his view it would be better either to follow the model of the corresponding article in the draft on diplomatic intercourse and immunities, or to replace the words "in the event of his being guilty of an infringement of that State's laws" by the words "for serious cause".

38. Mr. PADILLA NERVO said that he had similar reservations with regard to the article under consideration. He suggested that paragraph 1 of article 17 should provide that the Government of the State of residence could withdraw the exequatur of a consular officer who had ceased to be *persona grata* or acceptable to the State of residence. Paragraph 2 should reflect the second clause of the Special Rapporteur's text of paragraph 1, and provide that, except in urgent cases, the State of residence should not resort to that measure without previously endeavouring to secure the consular officer's recall by his sending State. Those two para-

[2] See *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No.: 58.V.3), p. 430.

[3] *Ibid.*, p. 437.

[4] *Ibid.*, p. 452.

[5] *Ibid.*, p. 467.

[6] Cmd. 9193 (London, Her Majesty's Stationery Office).

[7] Cmd. 8457 (London, His Majesty's Stationery Office).

[8] United Nations, *Treaty Series*, vol. 165 (1953), No. 2174, p. 128.

graphs would cover all the possibilities that might arise in practice.

39. Usually there was an exchange of views between the Governments concerned for the purpose of avoiding formal action and of maintaining good relations. That being so, paragraph 2 of article 17 was unnecessary, since the reasons for requesting a consul's recall would have been alluded to during the exchange of views.

40. Mr. LIANG, Secretary to the Commission, pointed out that in the ordinary intercourse between States matters did not go so far as the wording of article 17 would indicate. Under paragraph 1, the conviction of a consul in judicial proceedings would be necessary. In practice, where a consul misconducted himself, the matter was dealt with more discreetly with a view to avoiding a worsening of relations between the States concerned. Even where there was a strong case for a consul's conviction, the State of residence would ordinarily not bring him to trial but either seek his recall or revoke his exequatur. One of the reasons for that practice was that, even in the event of acquittal, the consul would find himself in an awkward position if he decided to continue in his post, although he would have a perfect right to do so. Thus, in either eventuality, the cause of friendly relations between the States concerned would not be served by bringing a consul to trial, nor did he think that it would be served by any provision in the draft which might encourage such a practice.

41. Mr. ZOUREK, Special Rapporteur, pointed out that the right to withdraw the exequatur was qualified in most recent consular conventions, including those between the United Kingdom and France (1951), between the United Kingdom and the United States of America (1951), between the United Kingdom and Sweden (1952), and between the United Kingdom and Norway (1951). He therefore felt that some kind of limitation should be indicated in article 17.

42. He agreed that a consul might become undesirable to the State of residence without violating its laws; accordingly, he would have no objection to amending paragraph 1 by replacing the words in question by the words "for serious cause", as had been suggested by the Chairman, or by the clause, which was found in consular conventions, "if his conduct has given serious cause for complaint." He also agreed with Mr. Padilla Nervo that the second clause of paragraph 1 should be retained and perhaps be made more explicit.

43. It was true that in practice that clause would mean that the reasons for requesting a consular officer's recall would be given, and it was also true, as the Secretary had indicated, that ordinarily the question of a consul's misconduct was dealt with in a discreet manner. However, there were exceptions in which a State of residence did not follow such a procedure and simply withdrew the exequatur without communicating in advance with the sending State. An unexpected withdrawal of an exequatur without any communication of reasons was bound to cause tension between the States concerned, and in his view the Commission would contribute to better international understanding if it created an obligation to give reasons. He was therefore in favour of retaining paragraph 2.

44. Mr. ERIM drew attention to another consideration. If the present draft became a treaty, it would be a law-making treaty embodying the rules of international law respecting consular activities. He was not in favour of requiring the State of residence to give reasons for withdrawing a consul's exequatur, but if the Commission were to take the opposite view, he thought it would be better to indicate in paragraph 1 that the exequatur could be withdrawn in the event of the consul's being guilty of an infringement of international law, rather than of the laws of the State of residence, since some of those laws might be contrary to international law.

45. The CHAIRMAN felt that there was at least one question of substance that should be settled first. The General Assembly might well ask why the Commission's treatment of consular officers had been more liberal than that of diplomatic officers. It seemed to him that the Commission should first decide whether any formula was needed in article 17 other than that in the corresponding article in the draft on diplomatic intercourse and immunities.

46. Mr. PADILLA NERVO agreed with the Chairman. Conceivably, cases could occur in which a consul had not violated either international law or the domestic law of the State of residence but his conduct had been such as to make him unacceptable. There had been cases in which the attitude or behaviour of a consul had not been in keeping with the dignity of his office or in which he had abused certain privileges. Accordingly, he suggested that the corresponding article on diplomatic officers should be used as a model, but he felt that it would be useful to retain the provision in the second clause of paragraph 1 of the Special Rapporteur's draft, after deleting the words "except in urgent cases". As so amended, the article would encourage a more discreet treatment of consular misconduct and at the same time imply, without saying so expressly, that reasons should be given.

47. Mr. ZOUREK, Special Rapporteur, said that withdrawing of a consul's exequatur was a more serious measure than declaring a diplomat *persona non grata*. He agreed with Mr. Padilla Nervo that the words "except in urgent cases" might be omitted.

48. Mr. EL-KHOURI pointed out that the functions of consular officers and diplomatic agents were quite different. A consular officer had limited functions relating to the enforcement of the sending State's laws. He could easily be hampered in his proper activities by misguided local functionaries and was therefore in more need of protection than a diplomatic agent.

49. Mr. AGO was in favour of the Chairman's idea of following the model of article 8 of the draft on diplomatic intercourse and immunities as closely as possible. He asked the Special Rapporteur if he would not agree to reversing the order of the ideas in article 17. The article might begin with a first paragraph stating that the State of residence could at any time inform the sending State that it intended to withdraw the exequatur of a consul because his conduct had given serious cause for complaint, and request the recall of the consul in question. A second paragraph might then provide that if the sending State refused to recall the consul, the State of residence could withdraw the exequatur without the consent of the sending State. Such a formulation would be parallel to that of the corresponding article on diplomatic officers and would constitute a more "diplomatic" approach to the question of the withdrawal of the exequatur.

50. Mr. ZOUREK, Special Rapporteur, welcomed Mr. Ago's suggestion, which was similar to that of

Mr. Padilla Nervo and would probably be acceptable to the Commission. He would prepare a redraft of article 17 along those lines.

51. Mr. TUNKIN supported the solution that had now been accepted by the Special Rapporteur. In his view, the position of a consular officer, so far as acceptability to the receiving State was concerned, was to some extent analogous to that of a diplomatic agent. A consul performed official functions in the territory of the State of residence and the text should not be capable of being construed as providing possible grounds for litigation between the States concerned if the State of residence no longer considered the consul *persona grata* and asked the sending State to recall him. The position was, *mutatis mutandis,* the same as that covered by article 8 of the draft on diplomatic intercourse and immunities.

52. He suggested that the Special Rapporteur's redraft of article 17 should be submitted direct to the Drafting Committee.

It was so agreed.

ARTICLES 18 AND 19

53. The CHAIRMAN suggested that, in keeping with the precedent of the draft on diplomatic intercourse and immunities, articles 18 and 19 of the present draft, both of which related to the termination of consular functions, should be discussed in connexion with a later chapter.

54. Mr. ZOUREK, Special Rapporteur, agreed to that course.

The meeting rose at 1 p.m.

517th MEETING

Wednesday, 17 June 1959, at 9.55 a.m.

Chairman: Sir Gerald FITZMAURICE

Consular intercourse and immunities (A/CN.4/108, A/CN.4/L.79, A/CN.4/L.80, A/CN.4/L.82) (*continued*)

[Agenda item 2]

DRAFT PROVISIONAL ARTICLES ON CONSULAR INTERCOURSE AND IMMUNITIES (A/CN.4/108, PART II) (*continued*)

ARTICLE 13 (*continued*)*

1. The CHAIRMAN drew attention to the revised text of article 13, with two variants, submitted by the Special Rapporteur.

"*Consular functions*

"FIRST VARIANT

"1. The task of a consulate is to defend, particularly in relations with the authorities of the consular district, the rights and interests of the sending State and of its nationals and to give assistance and relief to the nationals of the sending State, as well as to exercise other functions specified in the relevant conventions or entrusted to the consulate by the sending State, without prejudice to the laws of the State of residence.

"2. Without prejudice to the consular functions deriving from the preceding paragraph, a consulate may perform the undermentioned functions (among others:

"I. *Functions concerning trade and shipping*

"1. To protect and promote trade between the sending State and the State of residence, and to foster the development of economic relations between them;

"2. To render all necessary assistance to ships and merchant vessels flying the flag of the sending State which are in a port within its consular district;

"3. To render all necessary assistance to aircraft registered in the sending State;

"4. To render assistance to vessels owned by the sending State, and particularly its warships, which visit the State of residence;

II. *Functions concerning the protection of nationals*

"5. To see that the sending State and its nationals enjoy all the rights accorded to them under the laws of the State of residence and under the existing international conventions and to take appropriate steps to obtain redress if these rights have been infringed;

"6. To propose, where necessary, the appointment of guardians or trustees for nationals of the sending State, to submit nominations to courts for the Office of guardian or trustee, and to supervise the guardianship of minors and the trusteeship for insane and other incapable persons who are nationals of the sending State and who are in the consular district;

"7. To represent in all cases connected with succession, without producing power of attorney, the interests of absent heirs-at-law who have not appointed special agents for the purpose, to approach the competent authorities of the State of residence in order to arrange for the compilation of an inventory of assets and for the winding up of estates, and to settle disputes and claims covering the estates of deceased nationals of the sending State;

"III. *Administrative functions*

"8. To perform or record acts of civil registration (births, deaths, marriages) in so far as it is authorized to do so under the laws of the sending State, without prejudice to the obligation of declarants to make whatever declarations are necessary in pursuance of the laws of the State of residence;

"9. To solemnize marriages in accordance with the laws of the sending State, where this is not contrary to the laws of the State of residence;

"10. To serve judicial documents or take evidence on behalf of courts of the sending State, in the manner specified by existing conventions or in any other manner compatible with the laws of the State of residence;

"IV. *Notarial functions*

"11. To receive any statements which nationals of the sending State may have to make; to draw up, attest and receive for safe custody wills and deeds-poll executed by nationals of the sending State and indentures the parties to which are nationals of the sending State or nationals of other States, provided that they do not relate to immovable property or to rights *in rem* in connexion with such property;

* Resumed from the 514th meeting.

"12. To attest or certify signatures and to stamp, certify or translate documents in any case in which these formalities are requested by a person of any nationality for use in the sending State or in pursuance of the laws of that State. If an oath or declaration in lieu of oath is required under the laws of the sending State, such oath or declaration may be sworn or made before the consul;

"13. To receive for safe custody such sums of money, documents and articles of any kind as may be entrusted to it by nationals of the sending State;

"V. *Other functions*

"14. To further the cultural interests of the sending State, particularly in science, the arts, the professions and education;

"15. To act as arbitrators or mediators in any disputes submitted to it by nationals of the sending State, where this is not contrary to the laws of the State of residence;

"16. To gather information by all lawful means concerning trade and other aspects of national life in the State of residence and to report thereon to the Government of the sending State or to interested parties in that State;

"17. A consulate may perform additional functions as specified by the sending State, provided that their performance is not prohibited by the laws of the State of residence.

"SECOND VARIANT

"Within its district, a consulate is entitled *inter alia*:

"(*a*) To defend the rights and interests of the sending State and of its nationals;

"(*b*) To give assistance and relief to the nationals of the sending State;

"(*c*) To exercise administrative and notarial functions as specified in the existing conventions or entrusted to it by the sending State, without prejudice to the laws of the State of residence;

"(*d*) To render all necessary assistance to ships and merchant vessels flying the flag of the sending State, and to aircraft registered in the sending State, which are in the consular district;

"(*e*) To further cultural relations, particularly in science, the arts, the professions and education;

"(*f*) To gather information by all lawful means concerning conditions of trade and other aspects of national life, and to report thereon to the Government of the sending State or to interested parties."

2. He also drew attention to the amendment to article 13 submitted by Mr. Padilla Nervo in the following terms:

"Consuls shall exercise the functions which, in accordance with international law, are specified by the law of the sending State without prejudice to the laws of the State of residence, as well as those conferred upon them by the relevant consular conventions.

"The task of consuls is:

"(*a*) To give assistance and relief to nationals and bodies corporate of the sending State and to protect them *vis-à-vis* the local authorities;

"(*b*) To perform certain notarial and civil registration functions with respect to nationals of the sending State and certain administrative functions conferred by municipal law;

"(*c*) To protect and assist within their district ships flying the flag of the sending State and aircraft registered in that State;

"(*d*) To defend the economic interests of their countries, to promote trade and to further the development of economic and cultural relations between the two States."

3. Mr. ZOUREK, Special Rapporteur, said that he had prepared the two new variants of article 13 in accordance with the recommendation adopted by the Commission (see 514th meeting, para. 39). The first of the new variants began with a general clause, in the drafting of which he had been guided by the amendments of Mr. Verdross (see 513th meeting, para. 54, and 514th meeting, para. 24) and Mr. Pal (see 513th meeting, para. 62; an additional amendment to Mr. Verdross's amendment was submitted in writing by Mr. Pal after the 514th meeting[1]). The clause was broad enough to cover not only functions under customary international law but also functions that might be performed under conventions or under the municipal law of the States concerned. The general clause was followed by an enumeration which, in accordance with the suggestions of various members, was much shorter than that set out in article 13 of his original draft and which comprised the most typical functions of consuls. The new enumeration was, again, not exhaustive but purely illustrative. In order to make it unmistakably clear that the enumeration was not intended to be exhaustive, sub-paragraph 17 provided, in keeping with a suggestion made during the discussion, that the consul could perform additional functions. The second variant, which was much shorter than the first, followed the pattern of article 3 of the Commission's draft on diplomatic intercourse and immunities (A/3859, chapter III).

4. He much preferred the first variant. In his view States would be more likely to accept a multilateral convention which contained a precise description of consular functions. A general article would not reflect the state of international law since consular functions, unlike diplomatic functions, were limited *ratione materiae* to certain categories.

5. He suggested that the Commission should first consider the various proposals before it with a view to taking a decision on the structure of the article. Thereafter the draft reflecting the structure favoured by the Commission coud be referred to the Drafting Committee for improvements of detail.

6. Mr. VERDROSS did not agree that paragraph 1 of the first variant reflected his views. If the task of a consulate was to defend the rights and interests of the sending State, in what way did its task differ from that of a diplomatic mission? In his view the first task

[1] The text of that amendment reads as follows:

"1. The task of consuls is to provide assistance and relief for the nationals of the State which appointed them, in particular to protect them *vis-à-vis* the local authorities, and to perform such other functions as are conferred on them by the sending State in accordance with international law and usage and without prejudice to the legislation, if any, of the receiving State, subject always to the terms of treaties or conventions, if any, between the sending State and the State of residence.

"2. Without, in any way, detracting from the generality of the above provision, such functions may in particular be:"

of a consulate was to concern itself with the rights and interests of the nationals of the sending State. The difference of emphasis was important and it was a question on which the Commission should take a definite decision.

7. Mr. LIANG, Secretary to the Commission, said that the choice between the first and second variants depended on another choice which had already been made: that between a code and a multilateral convention. If the Commission had been drafting a code, he would have agreed that the first variant would be very useful. States would be able to employ certain elements of the detailed enumeration for the purposes of their bilateral conventions. However, since the draft was to be presented to the General Assembly as a multilateral convention, the detailed enumeration might cause difficulties. Comparison between a detailed enumeration in a general convention and the provisions of existing consular conventions might show divergencies and States would not be too eager to adopt a multilateral convention that conflicted in certain respects with their existing treaties, even though the multilateral convention might contain an article, similar to article 30 of the Convention on the High Seas[2] stating that its provisions "shall not affect conventions or other international agreements already in force, as between States parties to them".

8. It would be somewhat unrealistic to expect all States to become parties to a multilateral convention which contained a detailed enumeration of consular functions, for they preferred to deal with certain problems connected with their relations with other States in bilateral conventions. It therefore seemed to him that a general formula would be likely to find wider support.

9. Mr. ZOUREK, Special Rapporteur, said in reply to Mr. Verdross that the difference between a diplomatic agent and a consular officer was that the latter defended the rights and interests of the sending State within his consular district, whereas the former did so, in a more general way, in relation to the receiving State as a whole. Furthermore, the extent to which a consul was concerned with the rights and interests of the sending State partly depended on the social and economic structure of the sending State. It seemed to him that if the text was to be acceptable to all States, it would have to take account of that fact.

10. With regard to the Secretary's remarks, he pointed out that, by virtue of article 38 of his draft, existing conventions would not be affected. The general multilateral convention would apply only to questions not covered by existing bilateral conventions.

11. A general formula would be more likely to give rise to varying interpretations and disputes. All recent bilateral conventions contained an enumeration, a fact which suggested that States desired a definition at least of the essential functions of consuls.

12. Finally, he recalled that the Commission's first draft would be submitted to Governments for their comments. A detailed enumeration would be more likely to elicit their views and the Commission would thus have a considerable amount of material on which to base its decisions respecting the final draft. By contrast, a general formula would provoke little comment.

13. Mr. TUNKIN regretted that he could not agree with Mr. Verdross. When a consul exercised his duty to seek compliance, within his consular district, with the provisions of treaties between the sending State and the State of residence, he was defending the rights and interests of the sending State. To some extent he was also defending those rights and interests when he intervened to protect the nationals of the sending State. Owing to the social and economic structure of socialist States, one of the most important duties of their consuls was to defend the rights and interests of their States. If the draft was to reflect existing general practice and was to be acceptable to all States, it would have to contain a provision along the lines indicated by the Special Rapporteur. He suggested that the Drafting Committee might be able to improve the wording.

14. He endorsed the Special Rapporteur's remarks concerning the difference between the functions of a diplomatic agent and those of a consular officer. The difference lay in the scope of their functions and in the sphere of their activities. A consular officer defended the rights and interests of the sending State in his consular district and it followed that he was not empowered to deal with general problems affecting relations between the two States concerned.

15. As to the two new variants proposed by the Special Rapporteur, he suggested that it might be useful to elaborate both of them and submit them to Governments with a request that they should not only comment on the text but should also state which of the two they preferred.

16. Mr. YOKOTA observed that many of the provisions of the first variant might not reflect existing practice. He noted, for example, that the functions enumerated in sub-paragraphs 8, 9, and 10 were qualified by conditional clauses, whereas those in sub-paragraphs 6, 7 and 11 were not so qualified. It might therefore be necessary to examine the enumeration paragraph by paragraph in order to ensure that consuls had an unqualified right to exercise some of the functions specified. For that reason he preferred a more general formula.

17. In that connexion, he pointed out that the fundamental difference between the Special Rapporteur's second variant and the amendments of Mr. Verdross and Mr. Padilla Nervo was that the formula emphasized the protection of the rights and interests of the *sending State,* whereas the latter stressed the protection of the rights and interests of *nationals of the sending State*. In his view consular functions were still mainly concerned with nationals and therefore the rights and interests of nationals should be mentioned first. Of the various texts before the Commission, he preferred that submitted by Mr. Padilla Nervo.

18. Mr. EDMONDS thought that the word "defend", which appeared in some of the proposals before the Commission, had a certain connotation of force, and he suggested that it should be replaced by the word "protect".

19. Mr. VERDROSS agreed with Mr. Yokota that the classical right of consuls to protect the rights and interests of nationals should be mentioned first. Then, if necessary, the protection of the economic rights and interests of the sending State might be mentioned. He still failed to see in what way a consul defended the

[2] United Nations Conference on the Law of the Sea, *Official Records, Volume II: Plenary Meetings* (United Nations publication, Sales No.: 58.V.4, Vol. II), annexes, document A/CONF.13/L.53, p. 138.

general rights and interests of the sending State before the local authorities. With regard to Mr. Tunkin's observation he pointed out that the Special Rapporteur's first variant implied, in view of the words in paragraph 1, "*particularly* in relations with the authorities of the consular district", a general right of a consul to defend the rights and interests of the sending State, including *vis-à-vis* the *central* authorities of the State of residence. The formula proposed by Mr. Zourek was therefore too broad.

20. The CHAIRMAN said that, for example when consuls administered war cemeteries in concert with the local authorities or dealt with cases affecting Government-owned ships in their district, they were obviously defending the rights and interests of the sending State. The Special Rapporteur's text, with appropriate redrafting, might be acceptable, because it confined the consul's function to the consular district. The defence of the interests of the sending State was part of the consular function in so far as those interests were local in character.

21. Mr. ZOUREK, Special Rapporteur, observed that any measure taken by a State to protect its own nationals was in fact a defence of its own interests. Under many consular conventions consuls were expressly empowered to defend the interests of the sending State; indeed, whenever a consul defended the interests of a national, he was in fact defending the application of the rules of international law and particularly the consular conventions. In view of those considerations, it would be wrong to restrict the consular functions to the protection of *nationals* of the sending State.

22. He would be willing to delete the expression "among others" in paragraph 2 of the first variant, and also to explain in the commentary that a consul might in certain cases, with the consent of the State of residence, act outside the consular district. The question of the order of the paragraphs raised by Mr. Verdross could easily be settled by the Drafting Committee.

23. In reply to Mr. Edmond's criticism of the term "defend" (see para. 18 above), he suggested that that word corresponded exactly to the nature of the consular mission and was therefore more suitable than the word "protect". Moreover, that was a point which could be referred to the Drafting Committee.

24. The answer to Mr. Yokota's doubts whether article 13 corresponded in all respects with existing law (see para. 16 above) was that the article went beyond customary law in that it borrowed from consular conventions a number of provisions which they had in common and which might reasonably be expected to find acceptance in a multilateral convention. To that extent, the article contributed to the progressive development of international law.

25. Mr. SANDSTRÖM said he preferred the first variant in the Special Rapporteur's revised text. The difficulties pointed out by the Secretary might be overcome by a cross-reference to article 38. Too much emphasis had probably been placed on the rights and interests of the sending State, but the Drafting Committee might specify what those rights were; they would probably prove to be mainly questions of private law.

26. He favoured Mr. Tunkin's suggestion that both variants should be sent to Governments for comment.

27. Mr. ALFARO said that he preferred the Special Rapporteur's second variant as a general expression of the essential functions of a consulate. Discussion of so exhaustive a list as that in the first variant would take too long and, in any case, the Commission should concentrate on general statements of principle. He suggested that for the purpose of obtaining the views of Governments the full enumeration given in the first variant should be reproduced in the Commission's report with a note explaining that, owing to its length, the catalogue of functions had not been discussed in detail.

28. At the same time, the Commission might prepare a text combining the amendments submitted by Mr. Verdross and Mr. Padilla Nervo with the Special Rapporteur's second variant. The introductory clause, taken from Mr. Padilla Nervo's amendment, might be linked to the short list by some such phrase as "and in particular the following". He suggested that the Drafting Committee should be asked to work out a text on those lines.

29. Mr. HSU said that if the Commission preferred a shorter version of the article he would support Mr. Padilla Nervo's amendment, because it described consular functions more precisely and more comprehensively than the Special Rapporteur's second variant. If the first variant was adopted, some term should be found in English to replace "defend" and "protect". A consul could defend or protect a national of his State only by the exercise of power and in doing so would probably have to call upon his Government and would therefore be acting virtually as a diplomatic representative. The terms "protect" and "defend" awakened unpleasant memories of the former ex-territorial powers of consuls in non-European countries.

30. Mr. ERIM said that when article 13 had first been discussed, he had objected (see 513th meeting, para 67) to the proposition that the first task of a consulate was to defend the rights and interests of the sending State; nevertheless, the same language had been retained in the Special Rapporteur's revised version. The discussion had not been without value, however. It had been argued that the sole difference between diplomatic and consular functions was the difference in scope, or, in other words, that the consular function was limited to the consular district. He disagreed: the diplomatic and the consular function differed in their very nature. A consul acted virtually as an advocate, defending individuals or bodies corporate that were nationals of the sending State. Although the State might control the bodies corporate, in that context the State was not acting as a sovereign but as a trader. For example, a merchant vessel owned by a State-controlled enterprise was not on the same footing as a warship. A diplomatic agent acted, one might say, as a representative of the *imperium* of his own State, whereas a consul performed what were more properly conceived as *"actes de gestion"*. The difference was obvious. The consul protected and promoted trade between two States. That was not a political or diplomatic function. Therefore it was necessary to find a clear and unambiguous formula which showed that the first task of a consul was to protect the rights and interests of the *nationals* of the sending State.

31. He would therefore prefer a combination of the amendments submitted by Mr. Verdross and Mr. Padilla Nervo. Such a text would take the first paragraph from Mr. Verdross's amendment and add to it the four sub-paragraphs in Mr. Padilla Nervo's amendment (see para. 2 above). The Special Rapporteur's second variant was too general and might be open to unduly broad construction.

32. Mr. MATINE-DAFTARY said he preferred the Special Rapporteur's second variant. He was not in favour of submitting both variants to Governments, especially in the light of the Secretary's remarks. The

details set out in the Special Rapporteur's first variant, which were more suitable for bilateral conventions, might be placed in the commentary to show the basis for the second variant.

33. The expression "rights and interests of the sending State" might be ambiguous, since it tended to blur the distinction between the diplomatic and the consular function. It should be specified at least that the interests in question were commercial.

34. Mr. Padilla Nervo's introductory paragraph might introduce the Special Rapporteur's second variant. Sub-paragraph (*d*) of Mr. Padilla Nervo's amendment was preferable to sub-paragraph (*a*) of the Special Rapporteur's second variant, if some other word could be found for "defend". The reference to the development of "cultural relations" should, however, be deleted, since such activities lay outside the scope of the consular functions, which had always been commercial and economic. In sub-paragraph (*c*) of the Special Rapporteur's second variant the phrase "without prejudice to the laws of the State of residence" should be deleted, since consuls dealt mainly with the personal status of nationals of the sending State; the phrase "within the limits of the consular conventions" might be substituted. Similarly, the phrase "and other aspects of national life" in sub-paragraph (*f*) of the Special Rapporteur's second variant was far too broad, since consuls were concerned only with their consular district.

35. Mr. BARTOŠ referred to his earlier statement (514th meeting, para. 1) that the draft should mention the functions vested in consuls by virtue of customary international law. He would leave the framing to the Drafting Committee and would reserve his right to record a dissenting opinion if the Drafting Committee could not accept that idea.

36. He agreed that Governments should be invited to comment on the draft, for in the light of their comments it would be possible to decide between the two variants submitted and also to settle the controversy in the Commission concerning certain consular functions.

37. Mr. Padilla Nervo's amendment was a good example of synthesis, which he accepted, with some slight reservations based on his conception of the position and tasks of consuls. He had considerable doubt, however, about the phrase "without prejudice to the laws of the State of residence". In so far as those words could be construed to mean that the municipal law of the State of residence prevailed over customary international law, they were unacceptable, for if they were approved as part of the article they would concede the liberty of that State to enact legislation hampering the exercise of the consular function in a manner incompatible with international law.

38. Mr. AMADO said that, in principle he was against all enumeration, especially in a text like that under consideration. The Special Rapporteur's first variant was excessively burdened with detail and hence unsuitable for a multilateral convention; on the other hand, the second variant contained some very vague provisions, for example, sub-paragraph (*e*). It could not be said that one of the consul's functions was to further cultural relations in general unless the consular function were equated with the diplomatic function. Undoubtedly, a consul could arrange lectures and similar activities in his own district, but the modern tendency was to further cultural relations by means of the appointment of cultural attachés to embassies.

39. He criticized the phrase "by all lawful means" in sub-paragraph (*f*) of the second variant, for surely it was unthinkable that the Commission could contemplate the idea of consuls acting in any manner other than lawful.

40. He was inclined to support Mr. Tunkin's suggestion (see para. 15 above) that both variants should be sent to Governments, though he pointed out that the second was as open as the first to the objection against enumeration. Since the Commission would probably not decide the matter by vote, he would agree to the course which seemed to be generally acceptable.

41. Mr. AGO, referring to the suggestion that both the variants in the Special Rapporteur's redraft should be referred to Governments for comment, said that in his opinion the first variant should not be thus submitted. The long enumeration which it contained was merely a compendium of provisions taken from specific conventions; the Commission's task was not to compile such provisions, which were in any case subject to amendment, but to set forth the essential rules of international law concerning consular functions. He therefore preferred the form of the second variant and of Mr. Verdross's and Mr. Padilla Nervo's amendments.

42. Turning to paragraph 1 of the first variant, he observed that the defence of the rights and interests of the sending State was a point on which there seemed to be some confusion. A consul could obviously not prosecute at the international level violations by the State of residence of international rights of the sending State; he could intervene only at an earlier stage of such violation, while the question was still at the level of the internal law of the State of residence. Similarly, the phrase "and to take appropriate steps to obtain redress if these rights have been infringed" in sub-paragraph 5 of the first variant seemed to be descriptive not of the consular but of the diplomatic function. Finally, he agreed with Mr. Amado that the promotion of culture and trade on an international basis was also too wide a field for consular functions.

43. Mr. TUNKIN said it was an obsolete view that economic relations were conducted independently of the State as a subject of international law. A new economic system had come into being under which the State played an increasingly important part in economic activities. No agreement could be reached in the Commission if members adhered to an obsolete position; new situations must be taken into account and the rules drafted must be acceptable to all. The socialist States could not accept the thesis that consular officers acted only incidentally in defence of the rights and interests of the State as such; the Commission could not ignore the fact that the consular officers of socialist States very frequently acted in that capacity.

44. Moreover, he could not agree that the Special Rapporteur's new draft of article 13 confused the diplomatic with the consular function. In practice, a consul might take the necessary steps to defend rights and interests in his own sphere. He thought that, while the first variant reflected the real practice in the matter quite accurately, its wording might perhaps be improved. He was surprised, however, that such strong objections had been voiced in the Commission to the statement of a practice which in itself had not given rise to objections.

45. Mr. AGO considered that the Commission's task was not to differentiate between economic systems but to define what consuls could or could not do. In carrying

on economic activities, a socialist State which conducted the entire economy of the country would be acting as a subject of municipal law, not of international law; the consuls of that State could therefore perform the consular functions connected with such activities. In the matter of the protection of rights and interests, the difference between diplomatic agents and consular officers was that the former acted on behalf of the State at the international level, while the latter acted at the level of municipal law, also when they acted in defence of the rights of the sending State. The question of the different territorial spheres of diplomatic and consular action was irrelevant and merely confused the issue.

46. Mr. VERDROSS thought that consular functions were governed by municipal and not by international law; that was proved by the fact that the consular activities were performed in contact with the local authorities of the State of residence, which were obliged to apply the internal law of that State, including the treaties accepted as law. He further agreed with Mr. Ago that the defence of the rights and interests of the sending State could not be regarded as a consular function under general international law.

47. Mr. TUNKIN considered that Mr. Ago's thesis that a State was not acting as a subject of international law in the performance of its economic activities was absolutely untenable. Moreover, in practice consuls often defended not only the rights of nationals, but the rights and interests of the State itself. Finally, he said that in speaking of the different spheres of diplomatic and consular functions, he had had scope and not actual area in mind.

48. Mr. GARCIA AMADOR said that the Commission should not go into the details of the difference between diplomatic and consular functions, since the matter was extraneous to the debate. It should simply define consular functions and should draft the article in flexible terms, in order to make it adaptable to various developments.

49. Turning to Mr. Padilla Nervo's amendment, he asked whether the phrase "in accordance with international law" meant that only the law of the sending State had to be in conformity with international law, or whether the law of the State of residence likewise had to be in conformity with international law.

50. The CHAIRMAN agreed that it was unnecessary to discuss at length the difference between diplomatic and consular functions. He pointed out that differences of opinion on the subject of State commercial activity existed not only between socialist and non-socialist States, but also between Anglo-Saxon and continental jurists. The difference between the two types of functions should not be stated too rigidly, for it was not quite true that a consul could not exercise any functions at the international level. Some particular matter might be governed by a treaty, but the consul could take action locally if the treaty had been violated locally; nevertheless, he still could not deal with the central government.

51. Mr. BARTOŠ agreed with Mr. Ago's views on the position of the State regarding economic activities (see para. 45 above). In Yugoslavia, for example, the State carried on all the economic activities but was nevertheless subject to the same rules as other traders and was afforded the same consular protection. In that way, Yugoslavia avoided misunderstandings with non-socialist States in commercial matters; for example, if a ship were seized for debt, it would be a far more serious matter to deal with the case under international law than under municipal law. Apart from that theoretical aspect of the question, he observed that in practice consular officers frequently defended the rights and interests of their States as juridical persons.

52. Mr. PADILLA NERVO said he preferred the second variant of the Special Rapporteur's redraft, but had submitted an amendment to it because it still confused functions under international law, functions under bilateral treaties and functions deriving from the domestic law of the sending State. In his amendment, therefore, he had tried to eliminate details on which it was difficult to reach agreement. He had also avoided any possible confusion between diplomatic and consular functions, since all the tasks enumerated derived directly from the exequatur. Moreover, his sub-paragraph (*a*) was completely different from the corresponding provision of the draft on diplomatic intercourse and immunities—article 3 (*b*)—(A/3859, chapter III).

53. In reply to Mr. García Amador, he said that his amendment owed something to the Special Rapporteur's original draft article and to the wording of article 10 of the Havana Convention of 1928.[3] The provision meant that a consul could not contravene the general principles of international law and that his action in accordance with the law of the sending State must be regarded as unlawful if it were not in conformity with international law. While some members might consider it best to transmit his amendment to the Drafting Committee, he believed the Commission should decide to include only one variant—the shorter—in its draft of article 13, reflecting the Commission's idea of what consular functions should be. The opinions of Governments on the enumeration in the Special Rapporteur's first variant might be obtained by reproducing it in the commentary.

The meeting rose at 1.5 p.m.

518th MEETING

Thursday, 18 June 1959, at 9.50 a.m.

Chairman: Sir Gerald FITZMAURICE

Consular intercourse and immunities (A/CN.4/108, A/CN.4/L.79, A/CN.4/L.80, A/CN.4/L.82) (*continued*)

[Agenda item 2]

DRAFT PROVISIONAL ARTICLES ON CONSULAR INTERCOURSE AND IMMUNITIES (A/CN.4/108, PART II) (*continued*)

1. The CHAIRMAN invited the Commission to continue its debate on the Special Rapporteur's redraft of article 13 and the amendments submitted (see 517th meeting, paras. 1 and 2 and footnote 1).

ARTICLE 13 (*continued*)

2. Mr. ZOUREK, Special Rapporteur, said that the Commission's debate on the definition of consular functions reflected the different views held by members concerning the role of the consul. Some considered that the sole mission of the consul was to give assistance to the

[3] See *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No.: 58.V.3), p. 422.

nationals of the sending State and that he could in no case defend the rights of the State as a sovereign entity and a subject of international law. Others considered that the definition should take into account the consul's earlier role of trader and judge. He referred to the description of the historic evolution of the consular functions given in his report (A/CN.4/108, part I, especially paras. 23 *et seq.*). In modern times, consuls could not be regarded merely as persons providing assistance to the nationals of the sending State. In the first place, it was recognized that consuls held the authority of the sending State within their district; secondly, if they defended the rights and interests of nationals of the sending State, they were doing so not as representatives of nationals but as representatives of the sending State; and thirdly, they sometimes defended the rights and interests of the State as a subject of international law. The Chairman had cited the cases of assistance to Government-owned ships and the maintenance of war cemeteries (see 517th meeting, para. 20); to those examples could be added those of the issue of entry certificates for ships in quarantine, the examination of ships' papers, the issue of passports and visas, and obtaining redress for nationals of the sending State who had suffered from the violation of international treaties.

3. He had carefully based his text on precedents found in national legislation and international conventions. Some doubts had been expressed as to whether a consul could defend the rights and interests of the State as a subject of international law; in that connexion, he quoted from the relevant legislation of Brazil, Switzerland and the United States, which provided for that consular function. Incidentally, he thought it might be useful if the Secretariat prepared a collection of national laws and regulations governing the organization of consular services as a supplement to volume VII of the United Nations Legislative Series (*Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*). Furthermore, provisions extending a consul's functions beyond assistance to nationals to the defence of the rights and interests of States were contained in many international conventions, not only in conventions between socialist States, but also, for example, in article 28 of the Consular Convention between the United Kingdom and France of 31 December 1951[1]. Moreover, it followed logically from the thesis that a consul's sole function was to protect his nationals, and that no consulate could be set up unless there were nationals of the sending State in the State of residence, yet, in practice, consulates were established in countries where there were no resident nationals of the sending State.

4. It had been said during the debate that, when a consul defended the economic interests of his country, he was defending the State as trader and not the State as a subject of international law. He considered the theory that a State could sometimes act *de jure imperii* and sometimes *de jure gestionis* to be untenable. In his opinion, any State, irrespective of its economic system, always acted in a sovereign capacity with respect to foreign countries, even in economic matters. As an eminent United States authority had said, to ensure the well-being of the population was as sovereign an act as building up a navy.

5. Nor could he agree with the view expressed by Mr. Ago (517th meeting, para. 45) that a consul's functions were always governed by municipal law, even when seeking redress for the violation of international treaties. When such a violation occurred, the consul had the right to make representations before the local authorities, but his functions in that respect were governed by international law, in accordance with the treaty concerned.

6. Turning to matters of detail that had been raised, he referred to Mr. Matine-Daftary's suggestion (517th meeting, para. 34) that a general clause, on the lines of the introductory paragraph of Mr. Padilla Nervo's amendment (*ibid.*, para. 2) should precede the second variant prepared by the Special Rapporteur. He thought it might be difficult to follow that course, since there might be some doubt as to whether the functions enumerated in that variant were already recognized in international law. On the other hand, he could accept Mr. Matine-Daftary's suggestion that sub-paragraph (*d*) of Mr. Padilla Nervo's amendment should replace sub-paragraph (*a*) of the second variant. With regard to the doubts expressed concerning the phrase in paragraph 1 of the first variant—"without prejudice to the laws of the State of residence"—he said that the phrase was taken from article 10 of the Havana Convention of 1928 and was indispensable, since the functions conferred upon the consul by the sending State might be at variance with the laws of the State of residence. In reply to Mr. Amado's criticism (517th meeting, para. 39) of the expression "by all lawful means" in sub-paragraph (*f*) of the second variant, he pointed out that the same expression was used in the corresponding provision of the draft on diplomatic intercourse and immunities (A/3859, chapter III, article 3). Mr. Verdross had expressed anxiety (517th meeting, para. 6) concerning the wide scope of the expression "the rights and interests of the sending State" and had suggested in his amendment (513th meeting, para. 54) that the functions should be limited to those conferred on consuls by consular treaties and conventions. Yet consuls might derive certain rights not from those instruments but from customary international law. He suggested that the Drafting Committee should be asked to devise suitable wording to show that consular functions were not as wide as diplomatic functions.

7. With regard to the question of submitting the redraft of article 13 to Governments, he thought it would be useful to submit both the variants he had drafted. The first variant, though shorter than the enumeration in his original draft (A/CN.4/108, part II), was still explicit enough to give rise to interesting observations. Moreover, there was a precedent for the method of submitting variants—the case of the Commission's drafts on statelessness[2].

8. Mr. VERDROSS drew attention to the expression "within its district" in the opening clause of the second variant in the Special Rapporteur's redraft of article 13. He doubted whether a consulate was entitled to defend the rights and interests of the nationals of the sending State vis-à-vis the central authorities of the receiving State in the district of the consulate. It would be better to provide that a consulate could take action only before the local authorities.

9. In his opinion, the difference between consular protection and diplomatic protection lay in the fact that the consul upheld the rights of individuals under local law, including treaties in force in the State of residence, whereas diplomatic agents could only uphold the international rights of the sending State on behalf of its nationals, after local remedies had been exhausted.

10. The CHAIRMAN thought that many of the points raised could best be dealt with by a reference in the commentary.

[1] Cmd. 8457 (London, His Majesty's Stationery Office).

[2] See *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, chap. IV.

11. The Commission now had to decide whether it preferred the first (longer) or the second (shorter) variant in the Special Rapporteur's redraft of article 13, whether both variants should appear in its draft, or, if the Commission preferred the second variant, whether the first variant should be placed in the commentary and Governments should be invited to comment on both texts. The main objection to placing the first variant in the article itself was that the Commission had not discussed the enumeration in detail and that doubts had been expressed concerning some of the items. Perhaps a vote could be taken on the basis that the variant preferred by the majority would become the draft article and that the other would be reproduced in the commentary.

12. Mr. TUNKIN pointed out that it was unusual to ask Governments to make observations on the commentary. If the Commission wanted an opinion on both variants, they should both appear as draft articles.

13. Mr. LIANG, Secretary to the Commission, agreed with Mr. Tunkin that it was not the practice to ask Governments to send observations on the commentary, which, in any case, was usually prepared when the final text was adopted. On the other hand, in the particular case, where some difficult points were involved, the views of Governments on such questions as whether the consular section of a diplomatic mission needed an exequatur from the State of residence, might be extremely useful. Governments might also be asked whether they preferred a detailed or a general version of article 13, but not until after those versions had been discussed. If it were decided that both variants should be retained, the Commission should discuss the substance of the Special Rapporteur's redraft and the amendments thereto.

14. He agreed with the Special Rapporteur that a supplementary volume of the Legislative Series relating to the organizational aspects of consular activities would be most useful and hoped that it would be possible for the Secretariat to prepare such a volume.

15. The CHAIRMAN thought that there had been a precedent for requesting the views of Governments on certain points in the commentary. He also saw no harm in sending the variants to Governments without substantive discussion, provided that the Governments were informed of the exact situation.

16. Mr. ALFARO thought that, if the Commission decided in favour of the second variant, it might submit that text to Governments as the one approved by the Commission and annex the texts proposed by the Special Rapporteur which the Commission had not approved.

17. Mr. YOKOTA did not think it advisable to include the two variants in the draft, since that would imply that they were both acceptable to the Commission, whereas the provisions of the first variant had not been fully discussed. Indeed, some members had expressed doubts and even objections with regard to certain items of the enumeration. Accordingly, he thought that the article should consist of the second variant and that the first variant should be transferred to the commentary.

18. Mr. AGO agreed with the voting procedure outlined by the Chairman. He pointed out that if the principle of a shorter formula was adopted, the work of the Commission would be simplified. There was still time to elaborate a definitive text for inclusion in the draft. On the other hand, if the vote was in favour of a longer formula or of including both formulas as variants in the preliminary draft, the Commission would be in difficulty. There was insufficient time at the current session to examine a detailed enumeration of consular functions and he did not think that it would be opportune to submit to Governments for their comments a text that had not been discussed by the Commission.

19. Mr. ZOUREK, Special Rapporteur, agreed that a vote should be taken first on the question whether both variants should be included in the draft.

20. He pointed out that, in fact, neither of them had been carefully examined, for the discussion had dealt more with the type of definition to be adopted than with the actual substance of that definition. If it was decided to include both a longer and a shorter text in the draft, the Commission could still hold an exchange of views and indicate in its report that the texts were only provisional. Governments could not be invited to comment until the draft convention as a whole was completed at the next session; the Commission's report on its work on consular intercourse at the current session would be in the nature of a progress report.

21. Mr. LIANG, Secretary to the Commission, recalled, in connexion with the question of requesting the views of Governments, that in 1955 the Commission had followed a similar procedure in connexion with the question of the breadth of the territorial sea.[3] However, he agreed with the Special Rapporteur that the Governments could not be invited to comment until the whole draft had been completed. It would not serve a useful purpose to send to Governments texts which had not been decided on by the Commission. They would be justified in replying that they wished to comment on the views of the Commission and not on those of the Special Rapporteur or of individual members.

22. Finally, he was of the opinion that, if the Commission decided in favour of a shorter formula, there would still be time at the current session to examine it more carefully.

23. Mr. MATINE-DAFTARY recalled his suggestion at the previous meeting (517th meeting, para. 34) that the Commission should adopt, as the text of article 13, a shorter, more general formula which would begin with the first sentence of Mr. Padilla Nervo's amendment; the longer enumeration might be given in the commentary as an illustration of the consular functions covered by the adopted text. States would then be free to use the provisions set out in the commentary in framing the bilateral consular conventions referred to in Mr. Padilla Nervo's amendment.

24. He did not consider that the article itself should be drafted in the form of alternatives, for Governments had a right to expect the Commission to know its own mind.

25. The CHAIRMAN did not agree that the Commission had to express a preference. It was not an unusual procedure for the Commission to ask Governments to comment on alternative texts of an article.

26. Mr. AMADO said there had not been any substantive discussion on any of the formulas before the Commission, nor did he think that there was sufficient time at the current session to adopt a definitive text of even a short article defining consular functions.

27. He therefore proposed that the Commission should defer further discussion of article 13 to the next session. The Commission's report could mention in the commentary the different versions that had been submitted

[3] *Ibid., Tenth Session, Supplement No. 9,* chap. III, footnote 14.

but, in his view, it would be wrong to invite Governments to comment on texts that had not been carefully examined.

28. Mr. TUNKIN supported Mr. Amado's proposal. Since the Commission would not in any event invite comments on a partial draft convention, nothing would be lost by deferring article 13 to the next session.

29. Mr. PAL also supported Mr. Amado's proposal. He pointed out that when, on earlier occasions, the Commission had invited the comments of Governments on alternative texts, the latter had previously been fully discussed in the Commission.

30. Mr. MATINE-DAFTARY said it would be regrettable if, after spending so many meetings in discussing article 13, the Commission postponed further consideration of it. The Special Rapporteur was not asking for a vote on a particular text but was asking the Commission to express a preference for the one or other formula, to guide him in the preparation of an article for the next session.

31. Mr. PADILLA NERVO could not agree that the Commission had not studied the material before it. The members of the Commission had had ample opportunity to consider the Special Rapporteur's two variants long before the beginning of the session.

32. While not opposed to the substance of the longer variant—after all, every one of its provisions could be found in bilateral treaties—he was in favour of the adoption of a more general formula because the Commission was not making a study of consular relations but was preparing a multilateral convention, which would be more widely acceptable if article 13 was drafted in general terms. He urged the Commission to take a decision along those lines so that the four meetings which had been devoted to article 13 would not have been wasted.

33. Mr. SCELLE supported Mr. Amado's proposal (see para. 27 above). He preferred a full enumeration of consular functions and considered that there would not be sufficient time at the current session to prepare such an enumeration. He failed to see the utility of a convention that would contain a description of consular functions scarcely distinguishable from a table of contents that could be found in any elementary textbook. Governments would wish to know what the Commission considered to be the functions of consuls. They would always be free to enter reservations when accepting the convention or to supplement it by special agreements.

34. Mr. SANDSTRÖM said he was prepared to support Mr. Amado's proposal.

35. Mr. EL-KHOURI said that he was in favour of a shorter, more general version of article 13 with an enumeration of consular functions in the commentary. That was the best way of taking the first step towards the ultimate objective of a single multilateral consular convention.

36. He did not think that the Commission should ask Governments to comment on texts which it had not studied carefully. Governments valued the opinion of the Commission. On the other hand, it should be remembered that the comments of Governments were often formulated by functionaries who did not have the wide experience and real training of the members of the Commission and therefore the Commission should not exaggerate the value of such comments.

37. The CHAIRMAN proposed that the list of speakers should be closed.

It was so agreed.

38. Mr. ALFARO said that there seemed to be some confusion concerning what was about to be decided. The first question was not whether Governments should be asked for their comments but whether the Commission would embark on the dangerous course of a detailed enumeration or adopt a shorter formula which would summarize all of the consular functions painstakingly collected and presented by the Special Rapporteur.

39. He therefore suggested that the Commission should decide first whether it preferred, in principle, the longer or the shorter version. If it decided in favour of the latter, it would have time to prepare an article at the current session but it would probably be an imperfect article. If it decided in favour of the longer version, further consideration of article 13 should be deferred to the next session.

40. Mr. ZOUREK, Special Rapporteur, said that during the discussion some members had expressed the view that article 13 was to be submitted to the Governments; actually, however, the draft convention on consular intercourse and immunities would not be submitted to them before it had been fully completed.

41. The first variant had been criticized as too long. It was, however, much shorter than the definitions in many consular conventions and could hardly be shortened further if it was meant to summarize the main consular functions. He did not agree that an enumeration was dangerous. On the contrary, if the Commission had had time to discuss the enumeration thoroughly, it would have found that almost all the points were contained in consular conventions. In any case, his text contained adequate safeguards (e.g. sub-paragraph 17 of the first variant). He could, however, convince the Commission of the truth of his assertion only if the first variant was discussed paragraph by paragraph, for which there was insufficient time. If the variant was not so discussed, the Commission could hardly take a decision on the substance. For the same reason, it could not take a decision on the second variant, which was admittedly unsatisfactory for the reasons given by Mr. Scelle. He would not, therefore, oppose the suggestion that the article should be held over until the twelfth session, though he pointed out that he would still have to prepare two variants.

42. The CHAIRMAN asked the Commission to vote on the proposal that the drafting of article 13 be deferred until the next session.

That proposal was rejected by 9 votes to 8.

43. The CHAIRMAN asked the Commission to vote on the proposal that both variants of the Special Rapporteur's redraft of article 13 should be included in the report on the current session; he explained that the vote would not decide whether the draft provisions would appear in the form of an article or in the commentary.

That proposal was adopted by 10 votes to 4, with 3 abstentions.

44. The CHAIRMAN said that he felt that the consensus of the Commission was that one variant should be given as an article and the other reproduced in the commentary.

45. After further discussion, Mr. TUNKIN said the procedure suggested by the Chairman would inevitably

imply a preference for the one or the other variant. That would be inconsistent with the decision that both variants would be included in the report. Accordingly, he proposed that both the versions given in the Special Rapporteur's redraft of article 13 should be reproduced, as alternatives, in the report.

The proposal was rejected by 10 votes to 7, with 1 abstention.

46. The CHAIRMAN said that in view of the foregoing decision it now became necessary to choose which of the two versions should appear in the report in the form of an article.

By 11 votes to 6, with 1 abstention, the Commission decided that the longer variant (the first variant in the Special Rapporteur's redraft of article 13) would not appear in the report in the form of an article.

47. The CHAIRMAN said that the result of the vote implied that the second (shorter) variant would appear as article 13 and the longer variant in the commentary. Texts for the shorter version had been submitted in the Special Rapporteur's second variant, by Mr. Padilla Nervo (517th meeting, para. 2), by Mr. Verdross (513th meeting, para. 54 and 514th meeting, para. 24) and, in an amendment to Mr. Verdross's text, by Mr. Pal (517th meeting, footnote 1). As all contained similar elements, all might be referred to the Drafting Committee, on the following understanding: It would not be necessary to go into the question of the State acting *de jure imperii* and *de jure gestionis* nor to draw a formal distinction between diplomatic and consular functions. The draft article should not exclude the possibility that consuls might take action in the interests of the sending State, but should make it clear that they could do so only within the consular district, only vis-à-vis local authorities and only within the scope of consular functions.

48. An introductory clause might be drafted taking account of those points and of some others raised in the discussion, including those made by Mr. Matine-Daftary (see para. 23 above) and the proviso that consuls could not contravene the local law.

49. The introductory clause might be followed by a number of sub-paragraphs such as those suggested in Mr. Padilla Nervo's amendment and in the Special Rapporteur's second variant. The advisability of including a clause concerning the consul's role in furthering cultural relations might be considered.

50. The Drafting Committee might also consider whether some of the points in the Special Rapporteur's first variant which did not appear in any of the shorter versions should be embodied in the draft article, notably the important function of representing the interests of nationals in cases connected with succession (sub-paragraph 7 of the first variant) and some such general clause as that in sub-paragraph 17.

51. Mr. YOKOTA said that if the Drafting Committee was to carry out its work the Commission should decide whether the protection of the nationals of the sending State or the defence of the rights and interests of that State should be the main consular function. It was on that substantive question that the Special Rapporteur's second variant differed from the other texts.

52. The CHAIRMAN thought that that was a question of presentation, to which the Drafting Committee might well find the solution.

53. He announced that the Commission had concluded its preliminary work on the topic of consular intercourse and immunities.

Consideration of the Commission's draft report covering the work of its eleventh session (A/CN.4/L.83 and Corr.1)

CHAPTER I: ORGANIZATION OF THE SESSION (A/CN.4/L.83 AND CORR.1)

54. The CHAIRMAN asked the Commission to consider the chapter of its draft report relating to the organization of the session.

55. Referring to paragraph 7 (A/CN.4/L.83/Corr.1), Mr. ZOUREK said that he was not sure that he had been absent from the Commission "for more than half the session".

56. Mr. AMADO suggested that the phrase should be amended to read "almost half the session".

It was so agreed.

57. Mr. LIANG, Secretary to the Commission, referring also to paragraph 7, suggested that the phrase "without taking up the reports of the Special Rapporteur for that subject" should be deleted.

It was so agreed.

Chapter I, as so amended and with further drafting changes, was adopted

The meeting rose at 1 p.m.

519th MEETING

Friday, 19 June 1959, at 9.50 a.m.

Chairman: Sir Gerald FITZMAURICE

Consideration of the Commission's draft report covering the work of its eleventh session (A/CN.4/L.83 and Corr.1, A/CN.4/L.83/Add.1 (*continued*)

CHAPTER II: LAW OF TREATIES (A/CN.4/L.83/ADD.1)

1. The CHAIRMAN asked the Commission to consider the chapter of its draft report relating to the Law of treaties.

I. General observations

Paragraph 1

2. Mr. GARCIA AMADOR said it was unnecessary to itemize the subjects selected for priority treatment; he suggested that the phrase "namely arbitral procedure . . . and high seas fisheries" should be deleted.

It was so agreed.

Paragraph 2

No observations.

Paragraph 3

No observations.

Paragraph 4

After an exchange of views, it was agreed that no change would be made in paragraph 4.

Paragraph 5

3. Mr. TUNKIN pointed out that the first two sentences merely repeated the reasons why the Com-

mission had been unable to complete the subject of consular intercourse and immunities. Those reasons were given in chapter I of the draft report (A/CN.4/L.83 and Corr.1).

4. On a suggestion by Mr. LIANG, Secretary to the Commission, the CHAIRMAN proposed that the two sentences in question and footnote 8 be deleted, that a footnote to the third sentence should refer to the relevant paragraph in chapter I and that consequential drafting changes be made.

It was so agreed.

Paragraph 6

5. Mr. TUNKIN said that owing to its decision regarding the agenda for the twelfth session (515th meeting, para. 45), the Commission could hardly hope to complete a first draft on the subject of the framing, conclusion and entry into force of treaties at that session.

6. The CHAIRMAN proposed that at the begining of the paragraph the words "at its next (twelfth) session in 1960" be deleted and the words "in the fairly near future" inserted after the word "complete".

It was so agreed.

7. Mr. PAL proposed that the word "and" be substituted for the words "in order" in the last phrase of the last sentence.

It was so agreed.

Paragraph 7

8. Mr. TUNKIN doubted whether the Commission should at that stage invite any comments from Governments.

9. Mr. LIANG, Secretary to the Commission, pointed out that members of the Sixth Committee of the General Assembly would probably make some comments on the Commission's report in any case, but it would be inadvisable either to suggest that Governments might care to make comments or, at that stage, to employ the more correct procedure of directly inviting comments.

10. Mr. AGO proposed that paragraph 7 be deleted and the subsequent paragraphs renumbered accordingly.

It was so agreed.

Paragraph 8

No observations.

Paragraph 9

11. Mr. TUNKIN suggested that problems of theory should preferably be avoided in the report. In his view, agreement began to take form when the treaty-making process started and was complete at the final stage. It might be preferable to delete the end of the first sentence beginning "i.e. the conversion . . ." and to delete the remainder of the paragraph after *"ne varietur"*. He could not accept the idea that the drawing up of the text had no connexion with agreement and that agreement was manifested only at the time of signature.

12. The CHAIRMAN said that he could not accept Mr. Tunkin's suggestion, for the articles already approved were based on the idea that there was no agreement until signature, and that, even then, the agreement was provisional only.

13. Mr. TUNKIN replied that it would be perfectly easy to avoid controversial theoretical problems.

14. Mr. PAL observed that paragraph 9 did not deal with theory but merely summarized the sections of the draft. He saw no reason for the proposed deletions.

15. Mr. LIANG, Secretary to the Commission, recalled that at one stage the phrase "basis for potential agreement" had been used in connexion with establishing the text. The question whether there was an element of agreement in establishing the text was a relevant one, and he thought that there was such an element, though it was not the same as substantive agreement to the treaty. He suggested that the phrase "as being the text to which they will agree if they eventually agree to it at all" might be unnecessary, since if the parties did not in some way agree on the text, it could not be established.

16. Mr. YOKOTA said that the difficulty seemed to lie in the word "conversion". The phrase beginning "i.e. the conversion . . ." might be deleted.

17. Mr. TUNKIN agreed with Mr. Yokota's suggestion.

18. The CHAIRMAN objected that members appeared to be reopening the discussion on the substance of the articles. The Commission had decided that a further step was needed to convert an established text into an actual agreement.

19. Mr. AGO suggested that, to avoid repetition, the phrases "considered simply as a text" and "the negotiators have drawn up the text and have authenticated it in some way, so that" should be omitted. Some different term should be found to replace the term "conversion".

20. The CHAIRMAN accepted the suggestions made by Mr. Ago and Mr. Yokota. Paragraph 9 might therefore be amended to read:

> ". . . the topic of the drawing up and authentication of the text; and in the second place, the topic of the conclusion and entry into force of the treaty (i.e. the initial text becomes an actual international agreement by signature, ratification and entry into force). The first section would cover the treaty-making process up to the point where the text is established *ne varietur*. But up to this point . . ."

21. The last sentence in the paragraph would begin: "To cause the text, as initially drawn up, to become an operative treaty . . .".

It was so agreed.

22. Mr. AGO questioned the use of the words *"force exécutoire"* in the French text.

23. Mr. AMADO strongly objected to the phrase *"force exécutoire"*, on the grounds that it was completely alien to the ordinary language of treaties.

24. Mr. SCELLE drew attention to the great change in treaty law that had occurred, in his view, since the United Nations Charter had come into force. Before that time treaties might be said to have had *force exécutoire*, in the sense that a State might have enforced them. That concept no longer prevailed. He suggested that the phrase *"force obligatoire"* should be substituted for *"force exécutoire"*.

It was so agreed.

Paragraph 10

No observations.

Paragraph 11

25. Mr. FRANÇOIS objected to the reference to domestic legal systems in the last phrase of the first sentence. Domestic legislation had binding force, while the code that the Commission was preparing would merely constitute guidance.

26. The CHAIRMAN suggested that the phrase should be omitted.

It was so agreed.

27. Mr. TUNKIN said that the first sentence was based on the theory—to which he could not subscribe—that general international law was customary international law, not based on agreement, whereas conventional international law was only particular law. He believed that both categories of norms of international law were based on agreement and were, moreover, closely inter-connected. The sentence further implied that the Commission had taken a final decision that the draft should take the form of a code, rather than a convention; in actual fact, the question would have to be reopened when the draft was completed.

28. Mr. YOKOTA agreed that the first sentence was unduly categorical with regard to the ultimate form of the draft.

29. The CHAIRMAN suggested, in deference to Mr. Tunkin's and Mr. Yokota's observations, that the words "by the Commission or" should be inserted before "by the General Assembly", that the words "as yet" should be inserted before "envisaged its work" and that the first part of the second sentence should be altered to read: "The reasons for and advantages of this conception, as they appeared to the Special Rapporteur, are stated in the following passage from paragraph 9 of the introduction to his first report".

It was so agreed.

30. Mr. LIANG, Secretary to the Commission, drew attention to footnote 14, which did not appear in the introduction to the Special Rapporteur's report. He wondered whether such an important legal principle should be mentioned merely in a footnote.

31. The CHAIRMAN endorsed the Secretary's remarks and suggested that the footnote should be incorporated in the text of the Commission's report.

It was so agreed.

Paragraph 12

32. Mr. FRANÇOIS did not consider it appropriate to give as a reason for abridging the commentary the fact that the ground covered by the articles had already been covered by the reports of three Special Rapporteurs. That statement in the second sentence gave the erroneous impression that the Commission had approved the reports in question.

33. The CHAIRMAN suggested that the opening phrase of the second sentence "Not only has the ground . . . by way of commentary; but, in addition" should be deleted.

It was so agreed.

Paragraph 13

No observations.

II. Text of draft articles and commentary

Article 1

34. Mr. GARCIA AMADOR suggested that, since paragraph 4 related to both oral and written unilateral declarations, the generic term "unilateral acts" should be used instead of "unilateral instruments".

It was so agreed.

Commentary on article 1

35. In order to take into account points raised by Mr. Ago and Mr. Amado, the CHAIRMAN suggested that the opening sentence of paragraph (1) of the commentary should end with the words ". . . second and third sessions in 1950 and 1951", and that the next sentence should read "The term 'treaty' usually connotes a particular type of international agreement, namely, the single formal instrument which is normally subject to ratification".

It was so agreed.

36. Mr. AGO suggested that the words "international instruments" in the second (now third) sentence of paragraph (1) should be replaced by the words "international agreements".

It was so agreed.

37. Mr. LIANG, Secretary to the Commission, pointed out that the effect of that change would be to make the sentence read: ". . . there are international agreements . . . which . . . are indubitably international agreements . . .".

38. The CHAIRMAN suggested that the word "international" should be deleted where it appeared the second time before the word "agreements".

It was so agreed.

39. Mr. AGO pointed out that the words "substantive validity", in the second sentence of paragraph (3) (*b*) of the commentary, would exclude such other forms of validity as temporal validity. He suggested that the word "substantive" should be deleted.

It was so agreed.

40. Mr. EDMONDS, referring to the same sentence, thought that the use of the word "indifferently", might give rise to misunderstanding.

41. The CHAIRMAN said that the word might be omitted.

It was so agreed.

42. Mr. LIANG, Secretary to the Commission, felt that the question at the end of paragraph (3) (*b*) should be put in the form of an indirect question.

43. The CHAIRMAN suggested that the question should be replaced by the words "But the question arises whether it is necessary to do even that".

It was so agreed.

44. Mr. AGO felt that the word "segregations" in the final sentence of paragraph (4) (*a*) was an odd usage. He suggested that the sentence should be amended to read: "No express distinctions between different forms of instruments are necessary for this purpose".

It was so agreed.

45. Mr. LIANG, Secretary to the Commission, observed that the meaning of the words "restricted class or group of States" as used in the definition of the word "plurilateral" in paragraph (5) was not clear. He suggested that the word "class" should be omitted.

46. The CHAIRMAN said that, whereas the word "group" meant a regional group, the word "class" was intended to imply that the States in the particular class had something in common other than a regional con-

nexion. He suggested that the word "class" should be replaced by the word "number".

It was so agreed.

47. Mr. LIANG, Secretary to the Commission, suggested that footnote 24 to paragraph (7) unnecessarily opened a debate concerning the drafting and implications of an article of the Charter. He suggested that footnote 24 should be omitted.

It was so agreed.

48. Mr. FRANÇOIS, referring to the fifth sentence of paragraph (8),* pointed out that technically the legislature did not ratify a treaty but approved ratification by the executive.

49. Mr. BARTOŠ said that that was not always the case. The constitutions of a number of East European States provided for ratification by the legislature.

50. Mr. AGO suggested that the words "require ratification by the legislature" should be replaced by the words "require that ratification shall be given or authorized by the legislature".

It was so agreed.

51. Mr. TUNKIN suggested that the words "considerations of general law" in paragraph (8) *bis* (*b*) and again in paragraph (9) should be replaced by the words "general principles of international law".

It was so agreed.

52. Mr. TUNKIN suggested that, in the fourth sentence of paragraph (8) *bis* (*b*) the words "for the purposes of the present Code" should be inserted between the words "could not" and the words "be treated".

It was so agreed.

COMMENTARY ON ARTICLE 2

53. Mr. AGO, referring to paragraph (1), doubted whether the word "defined" was appropriate.

54. The CHAIRMAN suggested that the word should be replaced by the word "used".

It was so agreed.

55. Mr. AGO observed that the play on the word "international" in the sentence "An agreement between States . . . is no doubt an 'international' agreement", in paragraph (3), might be difficult to follow. He suggested that the sentence should be deleted and that the beginning of the following sentence should be amended to read: "Is an agreement between States always . . .".

It was so agreed.

56. Mr. LIANG, Secretary to the Commission, referring to the words "customary international law (a part of treaty law, but also transcending it)", observed that the reverse was also true: the law of treaties was a part of international law.

57. The CHAIRMAN agreed and suggested that the words in parenthesis should be deleted.

It was so agreed.

58. Mr. TUNKIN suggested that the last two sentences of paragraph (3) should be deleted. The illustration cited related to the question of State responsibility, the codification of which was part of the future work of the Commission.

59. Mr. GARCIA AMADOR, Special Rapporteur on the subject of State responsibility, supported the suggestion.

60. Mr. LIANG, Secretary to the Commission, drew attention to the possibility that the sentences might be quoted out of context by a student of international law.

Mr. Tunkin's suggestion was adopted.

The meeting rose at 1.5 p.m.

520th MEETING

Monday, 22 June 1959 at 3 p.m.

Chairman: Sir Gerald FITZMAURICE

Consideration of the Commission's draft report covering the work of its eleventh session (A/CN.4/L.83 and Corr.1, A/CN.4/L.83/Add.1) (*continued*)

CHAPTER II: LAW OF TREATIES (A/CN.4/L.83/ADD.1) (*continued*)

II. TEXT OF DRAFT ARTICLES AND COMMENTARY (*continued*)

1. Mr. EDMONDS, referring to the procedure employed, said that in the past the Commission's practice had always been to vote on an article and on the amendments to it, refer it to the Drafting Committee and then discuss further and vote on the text submitted by the Drafting Committee. At the current session, the Commission had taken almost no votes. It was an innovation for an article prepared by the Special Rapporteur to be referred to the Drafting Committee with amendments but without a vote. As a result, the report would contain articles which the Commission had not in fact approved. He appreciated the procedural difficulties which had beset the session; nevertheless, he considered that the report should state frankly that the text of the articles was that originally presented by the Special Rapporteur, as revised by the Drafting Committee, but had not been approved by the Commission as a whole.

2. The CHAIRMAN explained that he had been proposing to put the text to the vote in due course. Any member was free to raise any point he wished in connexion with the articles or the commentary. He had not yet put the articles to the vote because considerations arising out of the commentaries might lead to a change in the text of an article. After the discussion of the commentary he had been intending to ask whether any member wished the vote to be taken on any article or on any part of any article, and if no such wish was expressed, to regard the article as unanimously approved. He now agreed that a vote was necessary, subject to the understanding that the draft at that stage was provisional and that all the articles would have to be reviewed in the light of further work.

3. Mr. BARTOŠ, associating himself with the criticism of the procedure, said that, unless all members of the Commission had an opportunity of discussing the texts prepared by the Drafting Committee, the report would not be a true account of what had actually occurred.

4. Mr. TUNKIN said that, although the criticisms by Mr. Edmonds and Mr. Bartoš were justified, the procedure followed by the Commission did not differ greatly from the procedure it would have adopted if

* Owing to a typographical error there were two paragraphs numbered "(8)" in the draft report. For the sake of clarity, the first will in this summary record be referred to as "(8)" and the second as "(8) *bis*".

it had had more time. The articles in the draft report were those prepared by the Drafting Committee, not by the Special Rapporteur, who was responsible only for the commentaries. Any observations on the draft report would be in effect observations on the Drafting Committee's text.

5. Mr. LIANG, Secretary to the Commission, said that Mr. Edmonds was quite correct about the usual procedure adopted by the Commission, but at the present session processes had had to be telescoped. The only difference from the usual procedure was that the Drafting Committee's text had been presented together with a lengthy commentary. If the Commission wished to revert to the former procedure, it could adopt the articles and then consider the commentary.

6. Mr. AGO thought that the Special Rapporteur should be congratulated on preparing the commentary before the text of the articles had been formally adopted by the Commission. Mr. Edmonds and Mr. Bartoš were, however, quite right; the articles should be put to the vote, and the commentary on each should be discussed immediately after.

7. Mr. BARTOŠ agreed with Mr. Ago. Certainly the Special Rapporteur's work should not be wasted, but as jurists the Commission should be procedurally correct and should first discuss the Drafting Committee's texts. If it did not do so, members of the Commission who had not been members of the Drafting Committee would be at a disadvantage. It was not likely that any great changes would be needed in the commentary as a result of the votes on the articles.

8. Mr. ALFARO said that, although the principles of the articles had been amply discussed, he agreed that the correct procedure would be to put the text as contained in the draft report to the vote.

9. The CHAIRMAN said that in view of the debate concerning procedure he would put the articles to the vote in the order in which they appeared in the draft report.

ARTICLE 1 (*continued*)

10. The CHAIRMAN recalled that at the previous meeting Mr. García Amador had suggested that in paragraph 4 of the article the word "instruments" should be replaced by the word "acts", an amendment which had been agreed to.

Article 1, as amended, was adopted by 17 votes to none, with 1 abstention.

11. Mr. BARTOŠ explained that he had abstained from voting, not because he objected to the substance of the article, but because it did not take into account his earlier suggestion that the article should specify that the only fundamental condition of a treaty was that it should not constitute a written instrument, but evidence in writing of the will of the parties (*ad probendum*) to enter into an agreement.

ARTICLE 2

12. The CHAIRMAN called for a vote on article 2.

Article 2 was adopted by 15 votes to none, with 3 abstentions.

13. Mr. BARTOŠ explained that, though not opposed to the article as such, he had abstained from voting for reasons similar to those accounting for his abtention on article 1.

14. Mr. ZOUREK said that he had abstained because he objected to the phrase "governed by international law"; it was not conceivable that an international agreement between two or more States should not be governed by international law.

COMMENTARY ON ARTICLE 2 (*continued*)

15. Mr. TUNKIN said that his objection to parts of paragraph (4) of the commentary would explain his abstention from voting on the text of article 2. The phrase "analogous legal considerations" was too vague and sweeping and might have undesirable implications. He suggested that the whole passage "or, to some extent, . . . legal considerations" should be deleted.

16. Mr. AGO suggested that the phrase "governed by international law" should be inserted after the word "agreement" in the second sentence of paragraph (4). The French text of the second sentence should be brought into line with the English.

17. The CHAIRMAN agreed to the amendments suggested by Mr. Ago and Mr. Tunkin.

18. After some discussion concerning the last sentence, the CHAIRMAN suggested that he should submit a redraft for the Commission's consideration.

It was so agreed.

19. Mr. EL-KHOURI, referring to paragraph (5) of the commentary, thought that protected States had at least the capacity to conclude treaties with the protecting State concerning their protection, unless they were placed under protection by some international organization.

20. Mr. AGO thought that the wording of the latter part of the paragraph was too complicated.

21. Mr. TUNKIN said that the paragraph as it stood might have serious implications. All States had the treaty-making capacity under general international law since they were subjects of international law, but there might be constitutional impediments for the members of a federal union. Those were internal restrictions affecting the treaty-making capacity, but, from the point of view of international law, there was no restriction, in so far as they were sovereign States. For example, the Byelorussian Soviet Socialist Republic and the Ukrainian Soviet Socialist Republic were members of the Soviet Union but also Members of the United Nations and parties to many international agreements. As the text of the article itself did not refer to federal unions, it might be preferable not to raise such a topic in the commentary.

22. Mr. LIANG, Secretary to the Commission, suggested that, in view of the misgivings expressed by certain members of the Commission, it might be undesirable to summarize the whole subject of treaty-making capacity in a few sentences, especially as the subject was dealt with in the Special Rapporteur's third report (A/CN.4/115). It might be best to retain only the first sentence of the paragraph, and to state that the Commission would take up the question what States possessed the treaty-making capacity at a later session, for which the Special Rapporteur had already prepared a report.

23. Mr. BARTOŠ said that the Commission had not examined the controversial question of the treaty-making capacity of States of a federal union. In Switzerland, for example, the Cantons had the capacity, by virtue of powers delegated by the Confederation, to conclude certain international agreements concerning frontier matters. In Yugoslavia, the Federal Republic had no treaty-making capacity. In nineteenth-century Germany,

the members of the Germanic Federation had been empowered to conclude concordats with the Holy See, which were not subject to ratification by the central Parliament, but only by the Parliament of the member States concerned. Even in the United States of America it was possible that the individual states might conclude treaties, subject to the consent of the federal authority. In his opinion, the question could not be settled in a few sentences, precisely because it was so controversial.

24. The CHAIRMAN proposed that the Secretary's suggestion should be accepted, since that solution would dispose of the objections raised by Mr. Bartoš and Mr. Tunkin. Only the first sentence should be retained, and another sentence should be added stating that the Commission had not examined the question of the treaty-making capacity of members of a federal union, which it would consider later in connexion with the third report on the law of treaties (A/CN.4/115).

It was so agreed.

25. Referring to paragraph (6) of the commentary, the CHAIRMAN suggested that the word "by", in the passage "treaties concluded by, with or between international organizations", in the fifth sentence, was redundant and could be omitted.

It was so agreed.

26. Mr. TUNKIN said that he was unable to endorse paragraph 7 of the commentary.

27. Mr. FRANÇOIS, referring to the sentence beginning "A treaty of friendship . . .", in paragraph 8 (*b*) of the commentary, said that he could not agree that all treaties ceding territory or demarcating a frontier did not provide for continuing obligations or relationships.

28. The CHAIRMAN agreed with Mr. François so far as some treaties ceding territory were concerned. However, treaties demarcating a frontier only fixed the frontier; the obligation not to violate the frontier was imposed by the general principles of international law.

29. Mr. YOKOTA felt that there might be obligations for a certain period and that would be dangerous to generalize. He suggested that the passage in question should be omitted.

30. The CHAIRMAN observed that Mr. Yokota's suggestion would require the deletion of three sentences, beginning with the words "A treaty of friendship" and ending with the words "such instruments were treaties".

It was agreed that the three sentences indicated by the Chairman would be omitted.

ARTICLE 3

31. Mr. LIANG, Secretary to the Commission, wondered whether the word "aspects", in paragraph 1, was the best word for describing the three types of validity, in view of the clause "all of which must be present". "Aspects" were always present; what might be absent would be one or more of the three types of validity: formal, substantial, or temporal.

32. The CHAIRMAN said that after discussion the Drafting Committee had decided not to refer to three different types of validity but to three aspects of a single concept of validity.

33. Mr. MATINE-DAFTARY wondered whether paragraph 1 was really necessary in the text of the article. The wording appeared to be in the nature of a discussion of doctrine and might be more suitable for inclusion in the commentary.

34. Mr. SCELLE saw no serious objection to the paragraph. What it said was that in order to be valid a treaty had to fulfil certain conditions of form, substance and time.

35. Mr. MATINE-DAFTARY considered Mr. Scelle's statement a better formulation than that contained in paragraph 1.

36. Mr. SCELLE said that paragraph 1 was acceptable as it stood.

Article 3 was adopted by 14 votes to 1, with 1 abstention.

ARTICLE 4

Article 4 was adopted unanimously.

COMMENTARY ON ARTICLES 3 AND 4

37. Mr. LIANG, Secretary to the Commission, felt that the commentary should have indicated more explicitly the way in which the three "aspects" of validity were present in respect of the parties.

38. Mr. TUNKIN pointed out that the third sentence of paragraph (1) of the commentary, which indicated that a valid treaty might not be obligatory because it had not yet come into force, was not consistent with article 3, paragraph 4.

39. The CHAIRMAN agreed and suggested that the third and fourth sentences should be combined and amended to read: "For instance, a treaty may be valid in every respect but may, for the time being, not be operative because its operation is subject to some suspensive condition, or is dependent on an event yet to occur."

It was so agreed.

40. Mr. SCELLE said that the words "*force exécutoire*" had a more specific meaning in French than the word "operative" in English. A treaty could not have *force exécutoire* unless a judgment had intervened.

41. Mr. AMADO suggested that in the French text the words "*qu'il n'a pas effectivement force exécutoire*" should be replaced by the words *qu'il n'a pas effectivement produit ses effets.*

It was so agreed.

42. Mr. BARTOŠ pointed out that in article 3 there were references to "Part I" of the chapter in paragraph 2, to "Part II" in paragraph 3 and to "Part III" in paragraph 4. He suggested that some reference to the various parts of the first chapter should be inserted in paragraph (1) of the commentary.

It was so agreed.

43. Mr. BARTOŠ suggested that a reference should be included at the end of paragraph (2) to the case of a party which no longer considered itself bound by a multilateral treaty that was still valid.

44. The CHAIRMAN suggested that Mr. Bartoš should prepare a suitable text.

ARTICLE 5

Article 5 was adopted by 15 votes to none, with 1 abstention.

45. Mr. TUNKIN explained that he had abstained for the reasons he had indicated during the discussion of the article.

COMMENTARY ON ARTICLE 5

46. Mr. LIANG, Secretary to the Commission, suggested that the word "metaphysically", in paragraph (1) of the commentary, was not self-explanatory and might be omitted.

It was so agreed.

The meeting rose at 6 p.m.

521st MEETING

Tuesday, 23 June 1959, at 10.20 a.m.

Chairman: Sir Gerald FITZMAURICE

Consideration of the Commission's draft report covering the work of its eleventh session (A/CN.4/L.83 and Corr.1, A/CN.4/L.83/Add.1 and 2) (*continued*)

CHAPTER II: LAW OF TREATIES (A/CN.4/L.83/ADD.2) (*continued*)

II. TEXT OF DRAFT ARTICLES AND COMMENTARY (*continued*)

ARTICLE 6

1. Mr. SANDSTRÖM asked for an explanation of the reference to "meetings of representatives" in the first sentence of paragraph 1.

2. The CHAIRMAN explained that the process of negotiation in the case of bilateral treaties would normally take place either through the diplomatic or through some other convenient official channel; in the case of multilateral treaties, at an international conference; and in the case of plurilateral treaties—treaties between a small number of States—at a small conference which could best be described as "meetings of representatives".

Article 6 was adopted by 14 votes to none, with 2 abstentions.

COMMENTARY ON ARTICLE 6

3. Mr. EDMONDS asked, with reference to paragraph (2) of the commentary, whether in the case of a treaty negotiated by a person having apparent authority, but not inherent authority, the State that person had represented could sign and ratify the treaty, and if so, whether another party to the treaty could invoke that situation as grounds for considering the treaty void.

4. The CHAIRMAN replied to Mr. Edmonds's first question in the affirmative. As to his second question, he observed that all the Commission could do was to draw up the rules for treaty-making; it could not go into all the legal consequences resulting from failure to conform to those rules.

5. Mr. PAL drew attention to the problem which would arise if some of the voting representatives at an international conference at which decisions were taken by a simple majority were found not to have possessed authority to vote. However, he agreed that the Commission could not solve all the difficulties at the present stage; there would be another opportunity after the comments of Governments had been received.

6. The CHAIRMAN said that in the report it would not be necessary to consider the legal consequences of such eventualities since they would be governed by general principles of law.

7. Mr. AGO pointed out that the reference in one of the footnotes to paragraph (1) should be to the International Labour Organisation and not to the International Labour Office.

8. The CHAIRMAN agreed and drew attention to another typographical error in the English text of paragraph (3), where the sentence beginning with the words "In the case" should begin: "In this case".

9. Mr. AMADO said with reference to the final sentence of paragraph (3) that he wished to record his opposition to any implication that initialling a text and signing it *ad referendum* produced similar consequences. There was an essential difference between the two acts: signature *ad referendum* was a signature whereas initialling was not.

10. Mr. BARTOŠ agreed with Mr. Amado.

11. The CHAIRMAN pointed out that the text did not imply that initialling and signature *ad referendum* were equivalent. It simply said that in the circumstances described a representative could do either of two different things.

12. Mr. ZOUREK expressed some doubts concerning the validity of the analogy indicated in paragraph (5). The position of a permanent representative of a State to an international organization in negotiations with the organization was not comparable to that of a head of a diplomatic mission in negotiations with the State to which he was accredited.

13. Mr. AGO expressed similar doubts. In the case of conventions negotiated at International Labour Conferences, permanent representatives required special powers to participate in the work of the Conference. He suggested that the last three sentences of paragraph (5) beginning with the words "The same principle would apply to the Permanent Representatives of a State" should be deleted.

It was so agreed.

14. Mr. AGO suggested that in paragraph (6) the words "or otherwise" in the English text should not be translated by the words *"ou de toute autre façon"* in French.

15. Mr. FRANÇOIS suggested that in the first sentence of paragraph (8) the words "the second or third decade of the present century" should be replaced by the words "the First World War".

It was so agreed.

16. Mr. LIANG, Secretary to the Commission, referring to the term "treaty law" in paragraph (10) (*a*), suggested that the terminology should be standardized. The term "treaty law" might be understood as meaning conventional law, in other words, the law embodied in treaties. In order to avoid confusion, it would be better if the report consistently used the expression "law of treaties".

It was so agreed.

17. Mr. AGO pointed out that in paragraph (11), which in the English text was erroneously numbered paragraph (ii), there was again a reference to the International Labour Office instead of the International Labour Organisation.

18. Mr. TUNKIN, referring to the fifth sentence of paragraph (11), beginning with the words "Even where they do not . . .", said it should be stressed that the organ prescribing the voting rule in advance must have constitutional authority to do so. He sug-

gested that the sentence in question should be amended to read:

"However, the appropriate organ of the organization, if it is constitutionally empowered to do so, may, in deciding to hold or convene a conference, prescribe the voting rule in advance, as one of the conditions of holding or convening the conference."

It was so agreed.

19. Mr. LIANG, Secretary to the Commission, suggested that the sixth and seventh sentences of paragraph (11), reporting a statement made by him, would reflected his views better if they were combined into a single sentence beginning with the words:

"At the same time, it was pointed out by the Secretary of the Commission that when the General Assembly of the United Nations convened a conference, what normally occurred was that the Secretariat . . .".

It was so agreed.

ARTICLE 7

20. Mr. AGO suggested that in the French text of paragraph 2 the words *"ses buts"* should be replaced by the words *"son objet"*.

It was so agreed.

21. Mr. TUNKIN suggested that the word "objects" in the English text should be used in the singular, in order to indicate that it had the same meaning as the French word *"objet"*.

It was so agreed.

22. Mr. AGO suggested that in paragraph 2 of the French text the words *"dispositions relatives à sa date et à son mode d'entrée en vigueur"* should be replaced by the words *"dispositions relatives à la date et au mode de son entrée en vigueur"*.

It was so agreed.

23. Mr. MATINE-DAFTARY said that the words *"ces formalités doivent être remplies"* in the French text of paragraph 3 were a weak rendering of the corresponding passage in the English text.

24. Mr. SCELLE proposed that the words in question should be replaced by the words *"ces opérations doivent être accomplies"*.

It was so agreed.

25. Mr. AGO asked whether in paragraph 3 the omission of any reference to withdrawal from an international organization was intentional.

26. The CHAIRMAN recalled that the Commission had decided to reserve the question of treaties involving an international organization. In any case, withdrawal might be considered a form of denunciation, to which reference was made in the text of article 3.

27. Mr. YOKOTA observed that if withdrawal were mentioned, it would be necessary to include other processes, such as expulsion. In the context of the present draft it was not necessary to enter into so much detail.

28. Mr. LIANG, Secretary to the Commission, did not think the wording of article 7 would affect the situation resulting from the withdrawal of a State from the United Nations, for example, so far as the Charter was concerned. It was generally accepted that although the question of withdrawal was not mentioned in the Charter a Member State was free to withdraw from the Organization. There was a report on the subject[1] which formed an essential part of the work of the San Francisco Conference in 1945 and which recorded the understanding that withdrawal was a kind of inherent right and that if a State did withdraw, it would, of course, no longer be a party to the Charter. Thus, it might be said that the Charter contained an implied denunciation clause, in the event of withdrawal.

29. However, he agreed with the Chairman that it was not necessary to deal with such matters in the part of the draft under consideration.

Article 7, as amended, was adopted unanimously.

COMMENTARY ON ARTICLE 7

30. Mr. EDMONDS wondered whether the Commission should not be asked to vote on the commentaries.

31. The CHAIRMAN replied that the Commission had usually not voted on the commentaries, but had simply adopted the report as a whole.

32. Mr. PAL said that he could not find in the records of the proceedings at the ninth and tenth sessions any indication that the commentaries had been put to the vote.

33. The CHAIRMAN pointed out that any member was free to make a reservation on any point in the commentaries, which would be noted in the summary record, and to ask for a vote on any particular statement in the commentaries.

34. Mr. PAL and Mr. MATINE-DAFTARY questioned the expression "legal necessity" in paragraph (1).

35. Mr. SCELLE and Mr. AMADO thought that the expression was perfectly satisfactory.

36. The CHAIRMAN explained that the comment signified that, whereas the clauses referred to habitually appeared in treaties, it was strange that they were not required by any legal necessity for the purpose of the formal validity of a treaty. As opinions were divided, it might be preferable to retain the term.

It was so agreed.

37. Mr. AMADO said that the qualification "absolutely" weakened the word "essential" at the beginning of paragraph (1) and should be deleted.

It was so agrecd.

38. Mr. TUNKIN pointed out that it would be more correct to speak of the essential elements that must be found in the text of a treaty for the treaty to exist as such. He suggested that the words "the text of" should be inserted in the first sentence.

It was so agreed.

39. Mr. MATINE-DAFTARY suggested that the words "several lines" should be substituted for "six lines" in the third sentence of paragraph (1).

It was so agreed.

40. Mr. AGO suggested that the word "often" be inserted in the second sentence and that the word *"objet"* in the singular should be substituted for the plural in the first sentence in the French text.

41. The CHAIRMAN suggested that in the English text the word "objects" should be replaced by the word "purpose" and that that change in the commentary should also be reflected in article 7, paragraph 2.

It was so agreed.

[1] United Nations Conference on International Organization, document 1179, I/9(1).

42. Mr. TUNKIN thought that the last two sentences in paragraph (1) were too sweeping and that any confusion that might arise would not be entirely removed by the explanations in footnote 46.

43. The CHAIRMAN suggested that the last sentence and the footnote might be deleted.

It was so agreed.

44. Mr. AGO said that the second sentence of paragraph (2) and the latter half of the last sentence gave the impression that general supplementary rules of law existed by means of which gaps or deficiencies of the kind described in the comment could be filled. Surely, however, such defects were remedied by interpretation rather than by the application of any supplementary rule of law. If, for example, the parties failed to insert the date of a treaty's entry into force, an attempt might be made to infer the intended date by interpretation, but there was not a general rule of international law determining the date of a treaty's entry into force when the parties did not indicate a date.

45. The CHAIRMAN disagreed, for it was impossible to interpret a non-existent provision. In the case cited by Mr. Ago for illustration, the rule would be that the treaty entered into force on the date of signature.

46. Mr. AGO said he was not convinced. The Commission would find it dangerous to go deeply into the matter at that stage. Even if a rule of international law existed, it would be a rule of interpretation.

47. Mr. TUNKIN shared Mr. Ago's doubts about the existence of rules in international law for the purpose contemplated.

48. Mr. ZOUREK said that paragraph (2) referred to a question which was to be dealt with later. He doubted whether it would be correct to state categorically that any deficiencies of the kind mentioned in the commentary could be cured either by interpretation or by a rule of law.

49. The CHAIRMAN replied that some rules must be applied. If they did not exist, the Commission would have to propose them.

50. Mr. TUNKIN replied that, whereas under municipal law defects in a text might be remedied by the application of canons of construction, the position under international law was quite different. The parties were masters of the treaty, and if they had failed to state some particular, no one could state it on their behalf. The question was of great importance and had not been studied by the Commission. In any case, paragraph (2) did not follow from the text of article 7 and might well be deleted, with the possible exception of the first sentence.

51. The CHAIRMAN explained that if some formal clause were omitted from a treaty and a dispute arose concerning a question which should have been settled in the missing clause, there should be some rule which the International Court of Justice could apply.

52. Mr. TUNKIN said that the general principles of international law would of course apply, but the Commission had not yet considered whether they would remedy all gaps or deficiencies.

53. Mr. PAL suggested that it might not be necessary to raise the question discussed in paragraph (2) in connexion with article 7.

54. Mr. YOKOTA suggested that the commentary might state that it would be seen in the later parts of the draft that rules of interpretation were applied to fill gaps of the kind mentioned.

55. The CHAIRMAN suggested that, in view of what had been said, the second and third sentences and the latter part of the last sentence, after the word "recitals", might be deleted.

56. Mr. LIANG, Secretary to the Commission, said that the last sentence of paragraph (2), beginning "The matter might therefore . . .", was worded rather strongly. In any case, some obscurity remained both in that and in the first sentences, which raised but hardly solved the question. It might be more advisable to delete the last sentence and give examples of the rules on the basis of which such things as the date or method of entry into force of the treaty could be inferred.

57. The CHAIRMAN suggested that perhaps the phrase "the law will not permit them to escape from the consequences of that agreement" might be replaced by the words "they are not absolved from carrying it out".

58. Mr. TUNKIN thought that paragraph (2) should be omitted altogether.

59. Mr. PAL observed that article 7 did not relate to formal validity properly so called, but set forth the elements of the text. It would be quite enough merely to say in the commentary that the omission of those elements did not affect the validity of the treaty. Accordingly, it might be best to retain only the first sentence of paragraph (2), which stated that principle.

60. Mr. MATINE-DAFTARY said he could see no connexion between the first sentence of paragraph (2) and paragraph (1). Consent was a condition of substantive validity, according to article 3 as adopted at the previous meeting.

61. Mr. LIANG, Secretary to the Commission, pointed out that the first sentence of paragraph (2) was redundant, since the phrase "consent . . . in good and due form" was in effect a repetition of the words "duly consented to by the parties" in paragraph (1).

62. The CHAIRMAN observed that the consensus of the Commission seemed to be that paragraph (2) should be deleted.

It was agreed to delete paragraph (2) of the commentary.

63. Mr. AMADO thought that the word *"définir"* in the French text of the first sentence of paragraph (3) should be replaced by the word *"établir"*.

64. Mr. BARTOŠ reiterated his view that clauses relating to entry into force and accession were not formal, but substantive.

ARTICLE 8

65. Mr. PAL objected to the words "as finally drawn up" in paragraph 1. The text finally drawn up was in fact binding on the parties once it had been adopted. He proposed that the words should be omitted.

It was so decided.

66. Mr. YOKOTA strongly objected to the inference in paragraph 2 that there was any legal obligation under international law for States which had not signed a treaty to refrain from taking the action described.

67. The CHAIRMAN drew attention to paragraph (2) of the commentary where Mr. Yokota's views were described.

68. He called for a vote on article 8.

Article 8, as amended, was adopted by 13 votes to 1, with 2 abstentions.

COMMENTARY ON ARTICLE 8

69. Mr. TUNKIN, referring to the penultimate sentence of paragraph (1), said he could not accept the notion of the "conversion" of a text into an international agreement. He suggested that the words "has been converted from a mere text into" should be replaced by the words "becomes".

70. The CHAIRMAN said that Mr. Tunkin's point might be further stressed by replacing the word "treaty" by "text" and underlining the words "only as a text".

Those changes were approved.

71. Mr. PADILLA NERVO, referring to the fifth sentence of paragraph (2), thought it was not clear whether the negative obligation mentioned applied to negotiations at international conferences convened by the United Nations or the specialized agencies, as well as to bilateral negotiations and negotiations among a limited number of States. The illustration subsequently given seemed to apply to bilateral negotiation.

72. The CHAIRMAN said that the question was left open in paragraph 2 of the article. The obligation was general, although it was more likely to apply to bilateral negotiations than to international conferences.

73. Mr. SCELLE expressed regret that paragraph (2) had been drafted in its present terms. The fact that two or more States decided to negotiate an international instrument was evidence of their agreement that the question concerned was an issue between them. Accordingly, by virtue of agreeing to negotiate they were estopped from taking any action detrimental to the purpose of the negotiation. Failure to make that clear in paragraph (2) represented a retrograde step in the development of international law.

74. Mr. TUNKIN suggested that the word "international" should be inserted before "law" in the last sentence of paragraph (5).

It was so agreed.

ARTICLE 9

75. The CHAIRMAN called for a vote on article 9.

Article 9 was adopted by 15 votes to none, with 1 abstention.

76. Mr. BARTOŠ explained that he had abstained from voting on the article for the reasons, connected with the mention of signature *ad referendum* in paragraph 2, which he had expressed during the debate.

COMMENTARY ON ARTICLE 9

77. Mr. LIANG, Secretary to the Commission, said he had received some authoritative information from the Legal Counsel of the United Nations which had a bearing on the article and might be inserted in the commentary. With regard to initialling, as a matter of practice (not based on any doctrinal position), the older custom of initialling had never been used in the United Nations in the establishment of texts of multilateral conventions. In a sense, the very purpose of initialling —that of authentication—had been supplanted in the more institutionalized treaty-making processes of the United Nations by such standard machinery as the recorded vote, the adopting resolution, or the final act. Nor had it ever occurred that a representative had asked to initial a text of an instrument deposited with the Secretary-General. It might be concluded, therefore, and stated in the commentary that the use of initialling was practically confined to bilateral treaties.

78. The CHAIRMAN thought that, while the information was interesting, it was scarcely relevant to the commentary, since the number of treaties concluded under United Nations auspices was very small compared to that of other international instruments drawn up every year.

79. Mr. LIANG, Secretary to the Commission, could not agree with the Chairman's view. Moreover, the Legal Counsel of the United Nations had stated in his communication that it must be recognized that a draft code of treaties could not leave out of account, much less specifically contradict, the practice of the largest treaty-making organization in the world.

80. The CHAIRMAN remarked that, although the United Nations was undoubtedly the largest international organization in the world, the number of treaties it produced was small.

81. Mr. BARTOŠ supported the Secretary's remarks. The practice of the United Nations reflected a concerted effort to promote international co-operation. Accordingly, the Commission, as a United Nations organ, should respect United Nations practice in its work of codification.

82. The CHAIRMAN suggested that the Secretary might draft a paragraph for insertion in either the commentary to article 9 or, preferably, the commentary on article 10.

83. Mr. LIANG, Secretary to the Commission, said that he intended to suggest some changes in the commentary to article 10 and would prefer his statement to be included in the commentary to article 9.

84. Mr. PADILLA NERVO objected to the last two sentences of paragraph (1). He doubted whether it was true that decisions adopted by a majority vote at an international conference were not "susceptible of alteration"; if a large minority had voted against such decisions, the question might be reopened in order to obtain a larger number of accessions.

85. The CHAIRMAN drew Mr. Padilla Nervo's attention to paragraph (4), and particularly to the last sentence, which stated that any subsequent alteration would result in a new text, itself requiring authentication.

ARTICLE 10

86. Mr. AMADO reiterated his view that signature *ad referendum* was in the practice of the United Nations considered as a definitive signature by the State. In his opinion, every signature was *ad referendum*, in the sense that it transferred the treaty from the international to the constitutional field of States. Moreover, it was not usual when representatives at international conferences signed the instruments drawn up to require the confirmation of their Governments for such signature.

87. The CHAIRMAN called for a vote on article 10.

Article 10 was adopted by 15 votes to none, with 1 abstention.

The meeting rose at 1 p.m.

522nd MEETING

Wednesday, 24 June 1959, at 9.45 a.m.

Chairman: Sir Gerald FITZMAURICE

Consideration of the Commission's draft report covering the work of its eleventh session (A/CN.4/L.83 and Corr.1, A/CN.4/L.83/Add.1-4) (*continued*)

CHAPTER II: LAW OF TREATIES (A/CN.4/L.83/ADD.2 AND 3) (*continued*)

II. TEXT OF DRAFT ARTICLES AND COMMENTARY (*continued*)

COMMENTARY ON ARTICLE 10

1. The CHAIRMAN, speaking as the Special Rapporteur, suggested that, in order to take into account the views expressed by Mr. Amado at the preceding meeting, paragraph (1) of the commentary should be supplemented by the following passage:

"However, according to one opinion expressed in the Commission, there was only a difference of form and not of substance between outright signature and signature *ad referendum*. This opinion was based on the view that every signature was always and necessarily *'ad referendum'*. Thus, even a signature without the addition of the words *ad referendum* must be understood as if those words had in fact been added. For these reasons, signature *ad referendum* was in all respects equivalent to a full and definitive signature. The Commission took note of this point of view, while not being able to agree with it."

2. Mr. AMADO stated that he did not think it necessary to insert such a passage in the report.

3. Mr. TUNKIN observed that the words *"sans réserve"* in the French text of paragraph (1) might be confused with reservations to a treaty. He suggested that the expression *"sans condition"* should be used.

It was so agreed.

4. Mr. TUNKIN thought that the case referred to in the second sentence of paragraph (4) was rare in modern times, for communications had become easy and governmental instructions could be obtained without delay. The case in the third sentence, however, was common in current practice and should be emphasized.

5. The CHAIRMAN, supported by Mr. ALFARO, thought that the reference to the case of the representative who initialled a text on his own initiative should be retained, because such cases still occurred in practice.

6. Mr. AGO thought that the second sentence of paragraph (4) gave the impression that the negotiator had no authorization to sign. It was well known, however, that initialling was often used, not because no authorization had been given, but because the State did not wish to go beyond a certain stage in the negotiations. He hoped that the sentence might be redrafted accordingly.

7. The CHAIRMAN suggested that the order of the two sentences might be reversed, in order to emphasize that the cases referred to in the third sentence were most common, and that Mr. Ago's point should be taken into account.

It was so agreed.

8. Mr. AMADO said that the process of confirmation of a signature *ad referendum*, referred to throughout the commentary, was not at all clear to him. Indeed, he knew of no cases where such confirmation had been given.

9. The CHAIRMAN thought that Mr. Amado was confusing signature *ad referendum* with signature *ad ratificandum*; the latter was used when the treaty contained no ratification clause. There was no technical difficulty with regard to confirmation; confirmation was communicated either through the diplomatic channel or, in the case of treaty-making international conferences, through the host Government or the secretariat of the conference.

10. Mr. LIANG, Secretary to the Commission, stated that the system described by the Chairman was in use but other systems were also prevalent. In United Nations practice confirmation of signatures *ad referendum* did not exist. He also drew attention to the notes (A/CN.4/121) on the practice of the United Nations Secretariat in relation to certain questions raised in connexion with the articles on the law of treaties, a document which he had just caused to be circulated to members of the Commission. The practice of the Secretariat with regard to signature *ad referendum* was briefly stated in that document, and, although the Secretariat was not a law-making institution, that practice had been accepted by States without demur and, to that extent, consolidated.

11. The basis of United Nations practice in that matter was simplicity. The procedure followed, according to that practice, was, besides being entirely correct, convenient for delegates to international conferences, who usually had to work under pressure. The simple process of signature, followed by ratification where the treaty was subject to ratification, was preferred by States. In practice States rarely signed *ad referendum* and, when they did, used that formula as equivalent to "subject to ratification". Moreover, only two instances had been found by the Secretariat of States expressly "confirming" a signature *ad referendum*, and both were cases where States became parties to the instruments in question by signature only.

12. In the draft report, however, various steps, such as initialling, signature *ad referendum*, confirmation, full signature and ratification were envisaged. At least in the United Nations practice, they would be thought to be cumbersome and unnecessarily complicated. The Commission might ask Governments to comment on the extent to which the system of signature *ad referendum* was used.

13. Mr. YOKOTA thought that the Commission should be very cautious in dealing with that point and, in particular, should avoid stating that any practice was incorrect or undesirable. In that connexion, he referred specifically to the last sentence of paragraph (4) and to paragraph (5).

14. Mr. TUNKIN thought that the point of view reflected in the commentary envisaged two different cases. In a case in which but for the addition of the words *ad referendum* a treaty would come into force on signature, signature *ad referendum* meant that the Government concerned hesitated to complete the final act of the treaty-making process. On the other hand, when the treaty contained a ratification clause, signature *ad referendum*, if not subsequently confirmed, had no logical meaning, since it could not be regarded as signa-

ture *ad ratificandum* in view of the existence of a ratification clause. Nevertheless, it seemed to be unwise to condemn a practice which might have constitutional meaning for certain States. Paragraph (5) (*c*) of the commentary in effect stated that ratification covered confirmation. He could not, therefore, agree with the statement that ratification covering confirmation of a signature *ad referendum* placed the Government in the position of ratifying a treaty it had never really signed. In his opinion, there was no harm in covering confirmation by ratification, particularly as certain States might be constitutionally obliged to sign *ad referendum*.

15. The CHAIRMAN said that he was prepared to delete from the commentary passages condemning certain practices, but pointed out that a certain condemnation was implicit in the description of the practices in question. Moreover, the practice which was peculiar to the United Nations covered a very small field of treaty law. Refusal to allow signature *ad referendum* without full powers was incorrect, since it was tantamount to treating signature *ad referendum* as full signature, although in fact signature *ad referendum* did not commit the Government concerned. Finally, he could not agree with Mr. Tunkin that there was no harm in the practice of covering confirmation of signature *ad referendum* by ratification; in such cases, the treaty was never really signed.

16. Mr. AGO thought that the difference between the two schools of thought might not be as great as it appeared. In fact, the Secretariat in its notes went rather too far, for it said virtually (A/CN.4/121, section A, para. 2) that full signature and signature *ad referendum* were identical. That might be true in practice, but it was not true in theory. So far as practice was concerned, however, he agreed with Mr. Tunkin that, if a State accepted a treaty it had signed *ad referendum*, confirmation logically followed from the act of ratification. If the State did not intend to ratify the treaty, it naturally would not confirm its signature *ad referendum*. There was no reason to approve or condemn the practice, but it should be noted in the commentary.

17. Mr. LIANG, Secretary to the Commission, referring to the question of the requirement of full powers for a signature *ad referendum*, observed that the question was largely a technical one, in the practice of international conferences. The credentials committees of such conferences received the credentials of representatives and decided whether full powers to sign had indeed been granted. Those committees were not in a position to know whether signature would be unconditional or *ad referendum*; the matter was for the representatives to decide. He drew attention to paragraph 3 of section A of the Secretariat's notes. The point of view advanced in the commentary differed from the practice which had evolved in the United Nations, but it had not been suggested in the Commission that that practice was incorrect. He appreciated the Chairman's concession in agreeing to omit paragraph (5), and pointed out that the fact that the General Assembly had no firm attitude to the question made it the more important to describe both the existing systems.

18. Mr. MATINE-DAFTARY agreed with speakers who had urged that the United Nations practice in the matter should not be condemned, but he thought that the difference between full signature and signature *ad referendum* existed not only in theory, but in practice, since signature *ad referendum*, unlike signature, could be withdrawn.

19. The CHAIRMAN suggested that, since there would be no time to redraft paragraph (5), it would be best to omit the last sentence of paragraph (4) and the whole of paragraph (5).

It was so agreed.

20. The CHAIRMAN invited the Commission to consider the articles and commentaries in part I, section B. He explained that the first text was article 14, because the Commission had decided to transpose three articles which it had not yet considered from section C to section B.

ARTICLE 14

21. Mr. AGO asked whether the effects of provisional signature would be dealt with in a subsequent article.

22. The CHAIRMAN answered in the affirmative. He called for a vote on article 14.

Article 14 was adopted by 14 votes to none, with 2 abstentions.

ARTICLE 15

23. Mr. BARTOŠ said he could not accept either paragraph 2 or paragraph 4. In practice only a person "qualified to sign" could sign *ad referendum*; in other words, he had to have a full power to sign, and if he signed *ad referendum*, he did so only in order to give the State he represented an opportunity to reconsider. With reference to paragraph 4, he restated his view that an uncorroborated statement by a representative that he possessed full powers could not be taken into consideration even provisionally.

24. If the article was put to the vote paragraph by paragraph, he would vote for paragraphs 1 and 3, and against paragraphs 2 and 4.

25. Mr. AMADO said that he would vote against paragraph 2 for the reasons he had explained when the article had been discussed earlier; he drew attention to section B of the Secretariat's notes on the practice of the United Nations Secretariat (A/CN.4/121).

26. Mr. AGO did not think that paragraph 4 should imply any duty to include in the text of the treaty a statement of recital concerning the authority to sign.

27. He also pointed out that at some later stage the draft would have to deal with the question of the validity of the signature of a person without full powers to sign affixed to a treaty that was later ratified by the State concerned.

28. The CHAIRMAN suggested that paragraph 4 should not form part of the article but should, with appropriate amendments, be inserted in the commentary.

It was so agreed.

29. The CHAIRMAN said, with regard to paragraph 2, that the requirement of full powers for a signature *ad referendum* was juridically illogical, for such a signature did not commit the signer's Government in any way, not even provisionally. He thought that if there was an unnecessary practice in certain cases, the Commission would not wish to consecrate it.

30. Mr. FRANÇOIS pointed out that the requirement of full powers for signature *ad referendum* did serve a useful purpose. In the absence of such a stipulation, anyone could come forward and say that he wished to sign a treaty *ad referendum* on behalf of a particular Government.

31. The CHAIRMAN observed that a signature *ad referendum* was normally effected by a person who had been authorized to negotiate. If at the stage of signature some new person presented himself he would of course have to show some evidence that he was an authorized representative of his Government. The case was not different from that of initialling.

32. Mr. MATINE-DAFTARY agreed with Mr. François. The practice of the United Nations of requiring full powers for a signature *ad referendum* was logical. When such a signature was later confirmed, it was confirmed with retroactive effect. Such a confirmation presupposed that the signature had been in good and due form; in other words, that it had been affixed by a qualified person. Therefore, a signature *ad referendum* did have some legal effects, though quite different from those of full signature.

33. The case of initialling was distinguishable. Initialling was used by a negotiator simply in order to authenticate what had been negotiated, but it had no legal effects.

34. The CHAIRMAN suggested that paragraph 2 should be deleted, since it did not express the view of the Commission, and that a paragraph should be inserted in the commentary indicating that opinion in the Commission was divided about the effects of signature *ad referendum* and the question whether full powers were necessary to effect it, but that as the Commission had been unable to come to any final conclusion on the matter at the current session, the point would be taken up when the law of treaties was again considered.

It was so agreed.

35. The CHAIRMAN pointed out that all that remained of article 15 was paragraph 1, minus the opening words "Except in the case mentioned in paragraph 2 below" and paragraph 3.

Article 15, as amended, was adopted by 14 votes to none, with 2 abstentions.

COMMENTARY ON ARTICLES 14 AND 15

36. The CHAIRMAN pointed out that the commentary would be affected by the deletions from article 15. Paragraphs (4) and (9) would have to be deleted; a new paragraph on the lines he had just suggested would be added; and paragraph (7) could be retained with the deletion of the words *"Paragraph 4"*.

The changes outlined by the Chairman were agreed to.

37. Mr. LIANG, Secretary to the Commission, remarked that the footnote to paragraph (6), footnote 58, was no longer relevant and could be deleted.

It was so agreed.

38. Mr. AGO suggested that the words "to the validity of the treaty" at the end of the first sentence of paragraph (8) should be deleted.

It was so agreed.

39. Mr. BARTOŠ said that he wished to draw attention, for the purposes of the Commission's future work on the law of treaties, to the theory, borrowed from the sphere of commercial law by certain German writers and applied in particular during the period of the Nazi régime, that an employee acting within the sphere of his responsibility committed his employer. That theory had been used to justify the practice of State functionaries signing agreements without full powers. It was a dangerous practice, which jeopardized democratic procedure in international relations.

ARTICLE 16

40. Mr. TUNKIN doubted whether the condition in the first sentence of article 16 was sufficiently broad. The parties to the treaty might have some special understanding concerning the time and place of signature without any reference to that special understanding appearing in the text of the treaty.

41. The CHAIRMAN suggested the insertion, immediately after the conditional clause, of the words "or in the absence of any special agreement between the parties".

It was so agreed.

Article 16, as amended, was adopted by 14 votes to none, with 1 abstention.

COMMENTARY ON ARTICLE 16

42. Mr. TUNKIN drew attention to a typographical error in paragraph (2): the word "unilateral" should real "multilateral".

43. Mr. LIANG, Secretary to the Commission, suggested that the footnote to paragraph 1, footnote 60, should be amended to read "The Commission had not reached this part of the work at the end of the present session."

It was so agreed.

ARTICLE 17

44. The CHAIRMAN asked the Commission to consider article 17. Recalling an earlier decision (see 519th meeting, para. 46), he pointed out that the word "number" should be substituted for the word "class" in paragraph 1 and that, in keeping with an earlier suggestion by Mr. Ago, the phrase "or to the States of the region or group, as the case may be" should be inserted after "negotiating States".

45. Mr. LIANG, Secretary to the Commission, suggested that the word "rules" be substituted for "considerations" in paragraph 2.

Those changes were agreed to.

46. Mr. BARTOŠ said that he accepted the text of article 17, because it was a good provision *de lege ferenda.*

47. Mr. ERIM said that he would abstain from the vote on the article because he agreed with those members who thought that a treaty of the kind referred to in paragraph 2 (*c*) should be open to any State without the requirement of the consent of a two-thirds majority.

Article 17 was adopted by 10 votes to none, with 4 abstentions.

48. Mr. TUNKIN explained that he had abstained for the reasons he had indicated in the general discussion.

49. Mr. MATINE-DAFTARY said that he had abstained because he could not accept the idea that States which had not participated in the negotiation might be subsequently admitted to the treaty.

COMMENTARY ON ARTICLE 17

50. Mr. TUNKIN objected to the phrase "of a norm creating character" in paragraph (1) on the grounds that other treaties besides general multilateral treaties created norms.

51. The CHAIRMAN pointed out that Mr. Tunkin himself had first used the expression; he suggested that the phrase "which create norms of general international law" be substituted.

It was so agreed.

52. Mr. TUNKIN said that the fifth sentence in paragraph (1) did not quite accurately express his view. He suggested that the latter part of the sentence should read: "would state the general principles governing the question of participation in multilateral treaties of a general character".

It was so agreed.

53. Mr. LIANG, Secretary to the Commission, referring to the ninth sentence in paragraph (1), wondered whether it was necessary to introduce the idea of forfeiture, which might imply the question of prescription.

54. The CHAIRMAN suggested that the word "forgo" should be substituted for the word "forfeit" in paragraph (1) and the words "or forfeited" be deleted in paragraph (3).

It was so agreed.

55. Mr. TUNKIN suggested that the words "or intended to create norms of international law" be substituted for "norm creating character" in paragraph (5).

It was so agreed.

56. Mr. TUNKIN pointed out, in connexion with paragraph (7), that participation in the conference was not essentially a political problem, but might also be a legal one.

57. The CHAIRMAN, speaking as Special Rapporteur, said that the point had in fact been made during the discussion, but he would suggest that the words "this was essentially a political, not a legal problem, because" and the words "on the political level" be deleted in paragraph (7).

It was so agreed.

58. The CHAIRMAN said that he wished to add at the end of the commentary a paragraph stating that the section on signature remained to be completed by one or more articles on the legal effects of signature, which the Commission had been unable to consider at the current session.

It was so agreed.

59. Mr. LIANG, Secretary to the Commission, said that he had thought that the Special Rapporteur had agreed to introduce a paragraph relating to the practice of the United Nations, based on the document submitted by the Secretariat (A/CN.4/121).

60. The CHAIRMAN replied that to do so would upset the balance, because it would be stated that opinions had been divided and the Commission had thought it better to revert to the question later. The Secretariat paper would of course remain in the Commission's records, but should not at that stage form part of the report.

It was so agreed.

CHAPTER IV: OTHER DECISIONS OF THE COMMISSION (A/CN.4/L.83/ADD.4)

61. The CHAIRMAN invited the Commission to consider the chapter of its draft report entitled "Other decisions of the Commission".

62. In section I he would prefer the phrase "may, however, be affected by" to be substituted for "will, however, depend in large measure upon", which was too strong.

It was so agreed.

Chapter IV of the Commission's draft report (A/CN.4/L.83/Add.4), as so amended, was adopted.

The meeting rose at 12.40 p.m.

523rd MEETING

Thursday, 25 June 1959, at 9.50 a.m.

Chairman: Sir Gerald FITZMAURICE

Consideration of the Commission's draft report covering the work of its eleventh session (A/CN.4/L.83 and Corr.1, A/CN.4/L.83/Add.1-7, A/CN.4/L.84) (*continued*)

CHAPTER III: CONSULAR INTERCOURSE AND IMMUNITIES (A/CN.4/L.83/ADD.5-7, A/CN.4/L.84)

III. TEXT OF DRAFT ARTICLES AND COMMENTARY

1. The CHAIRMAN asked the Commission to discuss and vote on the articles on consular intercourse and immunities submitted by the Drafting Committee (A/CN.4/L.84); he added that, as the full draft would be discussed at the twelfth session, the adoption of any text at the current session should be regarded as provisional.

2. Mr. EDMONDS said that he had consistently abstained from voting on texts which he had not had sufficient time to study. He had abstained in the votes on most of the draft articles concerning the law of treaties (A/CN.4/L.83/Add.1 to 3) for that reason, and would abstain from voting on the articles on consular intercourse and immunities.

DEFINITIONS ARTICLE

3. The CHAIRMAN observed that the definitions article had not been discussed by the Commission, but the Special Rapporteur's initial draft (A/CN.4/108) had been examined and amended by the Drafting Committee.

4. Mr. ZOUREK, Special Rapporteur, explained that the definitions article must necessarily be provisional, since a uniform terminology would have to be derived from the articles when they were examined as a whole at the next session.

5. Mr. YOKOTA said that it would be premature to vote even provisionally on an article which had never been discussed by the Commission. Certain definitions such as those of "consul" and "consular officials", were not wholly acceptable.

6. Mr. ZOUREK, Special Rapporteur, said that he would explain in the commentary that the definitions had been adopted purely provisionally and that the Commission would decide when it had considered all the articles whether some of the definitions might be simplified, whether any further definitions should be added, or whether any should be deleted. He would also explain that certain terms, such as those mentioned by Mr. Yokota, might need revision.

7. Mr. TUNKIN said that, if that explanation were placed in the commentary, the Commission could vote on the article.

8. Mr. SANDSTRÖM believed that the vote might be regarded as so provisional that any evident changes in the definitions called for by changes in the articles might be made even at the current session.

9. The CHAIRMAN agreed with Mr. Sandström's interpretation and called for the vote.

The definitions article was adopted by 10 votes to none, with 3 abstentions.

ARTICLE 1

10. Mr. ZOUREK, Special Rapporteur, pointed out that the text of the article he had proposed (A/CN.4/108) contained another paragraph providing that the establishment of diplomatic relations included the establishment of consular relations. The Commission had deferred a decision on that question until after it finished its examination of article 13, which, for want of time, could not take place until the following session.

Article 1 was adopted by 14 votes.

ARTICLE 2

11. Mr. SANDSTRÖM suggested that in the English text the words "seat of the consulate" should be substituted for "consular premises" in paragraph 2.

It was so agreed.

12. Mr. LIANG, Secretary to the Commission, suggested that in the English text of paragraph 2 the word "determined" should be substituted for "established".

It was so agreed.

Article 2, as amended, was adopted by 13 votes to none, with 1 abstention.

ARTICLE 2 A (FORMER ARTICLE 16)

13. Mr. TUNKIN suggested that the word "consent" should be substituted for "express permission".

It was so agreed.

Article 2 A, as amended, was adopted by 14 votes to none, with 1 abstention.

ARTICLE 3

Article 3 was adopted by 14 votes.

ARTICLE 4

Article 4 was adopted by 13 votes to none, with 2 abstentions.

ARTICLE 5

14. Mr. YOKOTA thought that the use of the words "the power to" in paragraphs 1 and 2 implied the power of the State, whereas what was really meant was the competence of the appropriate authority.

15. The CHAIRMAN suggested that the meaning might be clearer if paragraph 1 were amended to read: "Competence to appoint consuls and the manner of its exercise is governed by the internal law of the sending State" and if "competence" was substituted for "the power" in paragraph 2.

It was so agreed.

16. Mr. SANDSTRÖM wondered whether article 5 was really necessary, in view of the fact that in article 4 consuls were stated to be appointed by the sending State and recognized by the receiving State. The only additional element was a provision stipulating that the process must be in conformity with the internal law of those States.

17. Mr. ZOUREK, Special Rapporteur, said that what he had in view was explained in paragraph 2 of the commentary to that article (see A/CN.4/L.83/Add.5). The mistaken opinion had sometimes been voiced in the past that the power to appoint consuls was reserved to the heads of States; practice varied greatly, but was always governed by municipal law. The provision was useful as it stated a rule which might prevent friction among States.

18. Mr. AMADO said that, although the Special Rapporteur's reply to Mr. Sandström was correct, it was doubtful whether it was necessary for the draft to go into such detail. It was for the sending State alone to decide what authority was competent to appoint consuls under its internal law. He was opposed to the inclusion of the article, but would bow to the will of the majority.

19. Mr. TUNKIN said that he also had doubts about the substance and wording of the article, and would abstain from voting for it.

20. Mr. MATINE-DAFTARY said that he was in favour of paragraph 1 as redrafted, but thought that paragraph 2 might be open to misinterpretation and should therefore be deleted.

21. Mr. VERDROSS observed that if the statement was made that competence to appoint consuls was governed by the internal law of the sending State, the receiving State might ask whether some particular appointment had, in fact, conformed in all respects to that law.

22. Mr. ZOUREK, Special Rapporteur, replied that Mr. Verdross's interpretation went too far. The article merely stressed that the competence to appoint consuls and the manner of exercising that competence were governed by internal, not by international law; hence it would rebut any argument to the contrary. If the Commission believed that paragraph 1 was sufficient, he would not object to the deletion of paragraph 2.

23. Mr. ALFARO thought the article, although not essential, was useful, in that it laid down a clear rule concerning the competence to appoint consuls. Mr. Verdross's apprehensions were unfounded, since the principle of non-intervention in the domestic affairs of other States was established in international law and, consequently, no State would inquire whether any particular appointment was in conformity with the law of the appointing State.

24. The CHAIRMAN said that the article was at least innocuous and, although the Special Rapporteur was prepared to withdraw paragraph 2, the two paragraphs did establish a certain balance. He would, however, put the paragraphs to the vote separately.

Paragraph 1, as amended, was adopted by 11 votes to none, with 5 abstentions.

Paragraph 2, as amended, was adopted by 9 votes to 1, with 6 abstentions.

Article 5, as a whole, as amended, was adopted by 9 votes to none, with 7 abstentions.

ARTICLE 5 A (ADDITIONAL ARTICLE)

25. The CHAIRMAN thought that the term "consular officials" might possibly have to be revised in the light of amendments likely to be made to the definitions article. It was satisfactory as the definition now stood, since it did not extend to employees, who were customarily recruited from among the nationals of the receiving State.

Article 5 A was adopted by 14 votes to none, with 2 abstentions.

ARTICLE 6

26. Mr. VERDROSS recalled that during the discussion M. Scelle had objected to the term "full powers". He believed that the Commission had endorsed the objection.

27. Mr. FRANÇOIS said that the point had been discussed in the Drafting Committee, which had decided that the objection was unfounded. In French, at any rate, the term *"pleins pouvoirs"* was often used in civil law; it did not refer only to diplomatic credentials.

28. Mr. SCELLE observed that, admittedly, the term was used in civil law to denote that a power was discretionary, but it was ambiguous in an article dealing with consular intercourse.

29. Mr. AMADO pointed out that the term "full powers" was qualified by the words "in the form of a commission or similar document", which quite definitely delimited the true meaning of the term.

30. Mr. ZOUREK, Special Rapporteur, did not think that the term "full powers" was ambiguous in the context and it was in any case used in several consular conventions.

31. The CHAIRMAN agreed with Mr. Amado's observation. There could be no danger of confusion with any other type of full power.

It was agreed to retain the term "full powers".

32. Mr. SANDSTRÖM pointed out that the word "posts" should be substituted for "offices" in the English text of paragraph 1.

33. Mr. YOKOTA observed that, in accordance with the definitions, "consul" should be substituted for "consular officer" in paragraph 1.

Those amendments were agreed to.

34. After some discussion concerning the words "surname and first name" in paragraph 1, Mr. ALFARO suggested that the expression "full name" be used in the English text and *"nom et prénoms"* in the French.

It was so agreed.

35. Mr. LIANG, Secretary to the Commission, thought that the expression "by leave of the receiving State" in paragraph 3 was not quite appropriate; furthermore, he suggested that in the English text the phrase "by analogy" should be changed to *"mutatis mutandis"*.

36. The CHAIRMAN suggested that the beginning of paragraph 3 should in the English text be amended to read: "If the receiving State so accept, the commission may be replaced . . .". The other amendment suggested by the Secretary was acceptable.

The suggested amendments to paragraph 3 were approved.

37. Mr. BARTOŠ said that he could accept article 6 as amended, with the reservation that the consular commission might be furnished to officials other than heads of consular posts as was sometimes the practice.

38. The CHAIRMAN replied that the point was covered, because the article simply required that the head of the consular post must be furnished with a commission, but it did not preclude other consular officials from holding a commission.

Article 6, as amended, was adopted by 14 votes to none, with 1 abstention.

ARTICLE 7

39. Mr. SANDSTRÖM observed that as the definition of the exequatur in the definitions article ended with the phrase "whatever the form of such authorization", the use of the phrase "in the form of" in the second sentence of article 7 was somewhat misleading.

40. The CHAIRMAN suggested that the phrase should read "by means of".

It was so agreed.

41. Mr. AMADO thought that the second sentence might be qualified by the insertion of the word "normally".

42. The CHAIRMAN replied that that was unnecessary, since the sentence was in any case qualified by the reference to the provisions of article 9.

Article 7, as amended, was adopted by 14 votes to none, with 1 abstention.

ARTICLE 8

It was agreed that article 8 should remain deleted.

ARTICLE 9

43. Mr. FRANÇOIS said that in the English text the words "his exequatur" should be amended to read "the exequatur".

44. Mr. ZOUREK said that *"et"* should be inserted before *"au bénéfice"* in the French text.

Those amendments were agreed to.

45. Mr. BARTOŠ said that he could not vote for article 9, as it gave the impression that the head of a consular post might not be admitted to the exercise of his functions unless it was so provided in a consular convention. In his opinion, the consul should be admitted to the exercise of his functions under the rules of customary international law.

46. Mr. SCELLE agreed with Mr. Bartoš. Consular functions could be exercised in the absence of a consular convention, by custom or by virtue of the exchange of consuls.

47. Mr. AMADO also thought that a consul could exercise his functions in the absence of a consular convention. He suggested that the enjoyment of privileges and immunities might be described as inherent in the consular function and resulting from the present articles.

48. Mr. ALFARO agreed with Mr. Amado. It was inconceivable that a consul should be debarred from consular privileges and immunities simply because he was exercising his functions on a provisional basis.

49. Mr. SANDSTRÖM suggested that the phrase "privileges and immunities" should be substituted for the words "conventions in force".

50. Mr. TUNKIN agreed both with Mr. Amado and with Mr. Sandström, whose suggestions amounted to practically the same, except that Mr. Sandström's phrase would avoid raising the question whether the privileges and immunities were inherent in the function or were covered by a specific consular convention.

51. Mr. AMADO said that Mr. Sandström's suggestion was limiting, since provisional consuls enjoyed all the privileges and immunities of effective consuls.

52. Mr. ZOUREK, Special Rapporteur, explained that when the subject had been discussed in the Com-

mission some members had wished to express the legal position of a consul granted provisional recognition. The Drafting Committee had thought that by condensing the language it would cover the inherent right and also the benefit of privileges and immunities laid down in any consular conventions that might be in force and in the articles drafted by the Commission.

53. Mr. BARTOŠ observed that a matter of substance was involved, namely, whether the protection of consuls existed or did not exist by virtue of a rule of international law. In his view, consuls were always protected by the general provisions of customary international law, whether or not a relevant consular convention was in force.

54. Mr. ZOUREK, Special Rapporteur, replied that Mr. Bartoš should remember that the Commission was to codify the general provisions of customary international law in the second part of its work, so that the phrase "of the present articles" covered the customary rules of international law.

55. Mr. BARTOŠ maintained that the Commission's articles, in Mr. Zourek's interpretation, should still take precedence over the consular conventions in force.

56. Mr. ZOUREK, Special Rapporteur, referred to article 38 of his draft to refute Mr. Bartoš's interpretation and suggested that the end of article 9 should read: "and to the benefits of the present articles and of consular conventions in force".

That amendment was approved.

Article 9, as amended, was adopted by 9 votes to 4, with 3 abstentions.

ARTICLE 10

57. Mr. BARTOŠ proposed that article 10 should be amended in the same way as article 9.

It was so agreed.

58. Mr. YOKOTA asked what exactly was meant in the context by consular conventions. Many treaties of friendship and peace treaties contained provisions on consular relations. The term "consular conventions" was too narrow.

59. The CHAIRMAN suggested that the phrase used in article 13, paragraph 1, "by any relevant agreement in force" should be used in article 10.

It was so agreed.

60. Mr. SCELLE regretted that the article had been so drafted as to imply that a consul having received the exequatur could not approach the local authorities directly if those authorities had not been notified of his appointment by the Government. Under that system, a consul's exercise of his function might be delayed indefinitely.

61. The CHAIRMAN pointed out that there was nothing in the article to prevent the consul from approaching the local authorities immediately on his appointment. The provision merely laid down the obligation of the central Government to notify the local authorities.

62. Mr. SCELLE said that he would withdraw his objection if it were made clear in the commentary that the consul's exercise of his functions would not be delayed by the absence of notification from the Government.

63. Mr. ZOUREK, Special Rapporteur, said that he had tried to explain in the commentary (A/CN.4/L.83/Add.5) that the provision was not an additional condition for the exercise of consular functions, but merely an additional obligation on the State of residence. Moreover, the consul, having received the exequatur, could at any time produce proof of his official status.

64. Mr. LIANG, Secretary to the Commission, said he was puzzled by the different formulations used in articles 9 and 10. Article 9 referred to the benefits of consular conventions, while article 10 referred to the privileges and immunities recognized by consular conventions. The wording should be made uniform, if the meaning of the terms was the same.

65. Mr. ZOUREK, Special Rapporteur, said that the word "benefits" was wider than "privileges and immunities", since it comprised consular functions. He suggested that it would be better to use the word "benefits" in article 10 also.

It was so agreed.

Article 10, as amended, was adopted by 12 votes to none, with 2 abstentions.

ARTICLE 11

66. Mr. BARTOŠ, supported by Mr. VERDROSS, proposed that the solution used in articles 9 and 10 to convey the idea of the precedence of customary international law over the relevant agreements should be used in article 11.

It was so agreed.

Article 11, as amended, was adopted by 9 votes to none, with 2 abstentions.

ARTICLE 11 A

Article 11 A was adopted by 13 votes to none, with 2 abstentions.

67. The CHAIRMAN observed that article 12 had been deleted.

ARTICLE 13

68. Mr. ZOUREK, Special Rapporteur, introducing the Drafting Committee's text, said that in keeping with the Commission's decision (518th meeting, para. 46) the new article 13 was drafted in terms of a general definition of consular functions and a more detailed, enumerative definition was given in the commentary (A/CN.4/L.83/Add.7). Paragraph 1 of the new draft was a general clause defining consular functions within the consular district and distinguishing between two categories of functions: those provided for in the articles and in any relevant agreement in force, and those vested in the consul by the sending State, subject to the proviso that those functions did not constitute a breach of the law of the receiving State. Turning to the specific examples which were given after the general clause, he said that in sub-paragraph (*a*) the word "interests" comprised rights or interests based on national legislation and on international law, and that the word "nationals" included bodies corporate. In that connexion, he pointed out that the definitions article as yet included no definition of the word "nationals". Paragraph 2 of the new article stressed that the consul might communicate only with the local authorities in the exercise of his functions, subject to exceptions provided by the articles or by relevant agreements, when he might approach the authorities outside his district.

69. The functions described in the article were illustrative and the article was a summary of the functions of all consulates. He thought the Commission could easily agree on the text, particularly as it would be

submitted to Governments and, after their comments had been received, would be reconsidered in the Commission.

70. Mr. ERIM thought that the new article 13 reflected most of the ideas expressed in the general debate. However, since he and certain other members had stressed that a consul's primary duty was to protect the interests of the nationals of the sending State, he proposed that the nationals should be mentioned before the State in sub-paragraph (*a*).

71. Mr. VERDROSS pointed out that the functions listed in the new article were not all "ordinarily exercised by consuls", as was stated in paragraph 1. For example, it could not be said that promoting the development of cultural relations between the sending State and the receiving State was a normal consular function; such activities were rather within the scope of diplomatic functions. He would make no formal objections at the present stage, however, in view of the Special Rapporteur's explanation that amendments could be submitted after observations had been received from Governments.

72. Mr. MATINE-DAFTARY thought that the redraft was an improvement on the original texts, but wished to make two remarks. In the first place, the word "interests" in sub-paragraph (*a*) without a qualifying adjective, such as "economic", seemed to be too wide in a definition of consular functions. Moreover, the word "protect" also seemed to exaggerate the consul's role. It might also be wise to confine sub-paragraph (*a*) to the sending State and sub-paragraph (*b*) to the nationals of that State. Secondly, he thought that a paragraph might be added specifying what a consul could not do. For example, it might state that a consul must not engage in political activities.

73. Mr. LIANG, Secretary to the Commission, referring to sub-paragraph (*c*), observed that the French text was more accurate than the English, since it made it clear that the functions of a notary and a civil registrar were not administrative. He suggested that the English text of the last clause of the sub-paragraph should be altered to read "and to exercise other functions of an administrative nature".

74. With regard to sub-paragraph (*d*), he thought it would be too restrictive to limit the functions of "extending assistance" to commercial vessels only, since, for example, fishing vessels or ships carrying official visitors to the receiving State might be in need of the consul's assistance. It might be advisable to delete the word "commercial".

75. Finally, he associated himself with an objection originally expressed by Mr. Amado (517th meeting, para. 39) to the phrase "by all lawful means" in sub-paragraph (*f*). If that qualification were included in the sub-paragraph, there was no reason why it should not be used throughout the text. The fact that it had been included in the corresponding provision of the draft on diplomatic intercourse and immunities (see A/3859, para. 53) should not be regarded as decisive, since that draft was awaiting examination by the General Assembly.

76. Mr. ALFARO pointed out a discrepancy between the English and French texts of paragraph 1. The English text should refer to "the present articles" and not to "this article".

77. He noted that the French text began with the sentence: *"Les consuls ont pour fonction d'exercer . . . les attributions . . ."*; he thought that, since the words *"fonction"* and *"attributions"* were synonymous, it would be preferable to employ the language of the Special Rapporteur's original draft and to say: *"Les consuls ont pour mission d'exercer . . . les fonctions . . ."*.

78. Mr. BARTOŠ said he had no substantive criticism of the new draft article, which was an improvement over the original. He wished to point out, however, that paragraph 2 did not provide for cases where a consul's technical functions made it necessary for him to communicate with central, if not necessarily governmental, authorities, such as patent offices, with a view to protecting the interests of the sending State's nationals. That could not be described as a diplomatic function, and yet it could not be regarded as a special exception provided for in the articles or in relevant agreements in force. He asked the Special Rapporteur to refer to such cases in the commentary.

79. Mr. SCELLE said he could not vote for article 13 in its present form. It was little more than an inexact table of contents, which was open to criticism in a number of respects. More important still, he considered that the provision in paragraph 1 "such functions vested in him by the sending State as he may exercise without breach of the law of the receiving State" was absolutely unacceptable, since it placed the sending State and the receiving State on an unequal footing. It was true that the receiving State had certain sovereign territorial rights, but the sending State also had the absolute right to establish a consulate where necessary. Accordingly, unless the articles contained a clause providing for the compulsory jurisdiction of the International Court of Justice or for compulsory arbitration, the inclusion of such a provision as that in paragraph 1 would be contrary to the elementary rules of international law.

80. Mr. AMADO thought that, while the article had been improved, it was still unsatisfactory. In the first place, he did not consider that paragraph 1 stated any legal principle whatsoever, particularly in view of the vagueness of the expression "functions ordinarily exercised by consuls". In sub-paragraphs (*a*) and (*b*), an unnecessary distinction seemed to be made between protection and help and assistance to nationals of the sending State; he believed that protection comprised help and assistance. In connexion with sub-paragraph (*a*), he supported Mr. Erim's suggestion and also endorsed the Secretary's suggestion concerning sub-paragraph (*c*). With regard to sub-paragraph (*e*), he believed that the text exaggerated the role of consuls. Finally, he reiterated his objection to the phrase "by all lawful means" in sub-paragraph (*f*), and observed that a misstatement in the draft on diplomatic intercourse and immunities did not justify another error; the words in question should be omitted.

81. Mr. VERDROSS pointed out, in reply to Mr. Scelle, that paragraph 1 did not state that a consul exercised only those functions vested in him by the sending State which he could exercise without breach of the law of the receiving State. The passage in question meant that those functions were additional to those prescribed by the articles under discussion and by any relevant agreement. Accordingly, a consul could exercise functions prescribed by agreements even if the State of residence did not recognize those functions.

82. Mr. SANDSTRÖM shared Mr. Scelle's misgivings. The new article 13 contained no mention of certain important consular functions relating to property of the

nationals of the sending State, succession and many functions relating to shipping. Finally, he thought that the meaning of the last phrase of paragraph 2 was better conveyed in the French text than in the English.

83. Mr. YOKOTA supported Mr. Erim's proposal. In reply to Mr. Scelle's and Mr. Sandström's objections, he pointed out that the Commission had decided to formulate the definition of consular functions in general terms; the draft could therefore not be criticized on the grounds that it was too general. The Commission might decide to adopt the article provisionally, as it had done in the case of the definitions article.

84. Mr. AGO agreed with Mr. Yokota that the new text could not be criticized for being unduly synthetic. He had supported the idea of framing the definition in general terms, first, because the Commission, having adopted a summary definition of diplomatic functions, could hardly enumerate consular functions at length; and, secondly, because he believed that a general definition, so far from restricting consular functions, was actually more flexible; the longer the enumeration, the greater was the risk of omitting some element that was essential now or might become essential in the future. The Special Rapporteur's lengthy enumeration would be included in the commentary, but should be expressly described as illustrative and not exhaustive.

85. Mr. Scelle's objection to paragraph 1 had been answered effectively by Mr. Verdross. It would be inadmissible to say that the sending State could vest additional functions in the consul over and above those provided for in the articles and in agreements, without providing that those additional functions should not be contrary to the law of the receiving State.

86. With regard to the remarks that had been made concerning protection and help and assistance, he pointed out that "protection of interests" meant action in conjunction with local authorities, while "help and assistance" related directly to individuals. A distinction between the two was therefore logical.

87. In conclusion, he supported the suggestion that the words "by all lawful means" in sub-paragraph (*f*) should be deleted. While those words were justified to some extent in the draft on diplomatic intercourse and immunities, where interference in the political life of the receiving State might have serious consequences, the safeguard seemed to be excessive in the draft on consular intercourse and immunities.

88. Mr. SCELLE observed that a consul's exercise of his functions were governed not only by the provision of the articles and relevant agreements, but also by customary international law. The legislation of the receiving State might be contrary to general custom and to the essential principles of international law which, in his opinion, should often be placed above international treaties. In fact, treaties represented but a part of the process of the evolution of customary international law. Accordingly, it was dangerous to state that the consul could not perform the functions vested in him by the sending State except in so far as they did not contravene the law of the receiving State. If a compulsory jurisdiction clause were to be inserted later, the provision might be acceptable; if not, the receiving State, under the pretext of territorial sovereignty, would be in a position of superiority vis-à-vis the sending State. According to his conception of consular organization, a consul was not only a national official of the sending State, but an international officer. Article 13, however, conveyed the contrary impression, which he could not accept.

89. Mr. AGO agreed with Mr. Scelle that general custom was an essential source of international law. However, the functions enumerated in paragraph 1 indicated the existing custom in the matter. If Mr. Scelle did not think that that was enough, a reference to custom might be inserted.

90. Mr. SCELLE did not consider that that solution would remedy the shortcomings of article 13.

91. Mr. TUNKIN pointed out that the Commission had already decided on the general tenor of the article and that the discussion could be renewed at the next session.

92. He agreed with Mr. Ago that the text stated the customary international law in the matter, but thought it would be unwise to introduce a reference to customary law, since the Commission's task was to codify law, and not to refer to abstract principles. Furthermore, if a reference to customary international law was inserted in article 13, a similar reference would have to be included in many other provisions.

93. The CHAIRMAN observed that it seemed to be the consensus of the Commission not to alter the structure of the article, but to agree upon certain drafting amendments. In paragraph 1, Mr. Alfaro's amendment to the French text seemed to be acceptable. In the English text, the words "this article" would be amended to read "the present articles". It seemed to be inadvisable to refer to customary law, since it would then have to be mentioned in other articles.

94. Mr. Erim's proposal that the order of the references to States and nationals should be reversed was acceptable. He did not think, however, that Mr. Matine-Daftary's suggestion to include a qualifying adjective before the word "interests" was acceptable, since other interests than economic ones might be involved. With regard to criticisms of the word "protect", he pointed out that it had been used in the draft on diplomatic intercourse and immunities and that no better word had been found. With regard to Mr. Matine-Daftary's suggestion that a paragraph should be added setting forth what consuls could not do, he observed that a similar provision in the draft on diplomatic intercourse and immunities (article 40) formed the subject of a special sub-section; the same procedure might be followed in the case of the draft on consular intercourse and immunities. The Secretary's suggestions with regard to sub-paragraphs (*c*) and (*d*) and Mr. Amado's proposal relating to sub-paragraph (*f*) could also be approved, and Mr. Sandström's point concerning the last phrase of paragraph 2 could be taken into account.

95. He called for a vote on article 13, with the amendments he had enumerated.

Article 13, as amended, was adopted by 8 votes to 1, with 6 abstentions.

The meeting rose at 1.10 p.m.

524th MEETING

Thursday, 25 June 1959, at 4.10 p.m.

Chairman: Sir Gerald FITZMAURICE

Consideration of the Commission's draft report covering the work of its eleventh session (A/CN.4/L.83 and Corr.1, A/CN.4/L.83/Add.1-7, A/CN.4/L.84) (*continued*)

CHAPTER III: CONSULAR INTERCOURSE AND IMMUNITIES (A/CN.4/L.83/ADD.5-7, A/CN.4/L.84) (*continued*)

III. TEXT OF DRAFT ARTICLES AND COMMENTARY (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the report of the Drafting Committee on the articles on consular intercourse and immunities (A/CN.4/L.84).

ARTICLE 14

2. Mr. BARTOŠ said that he would vote against article 14 for the reasons he had indicated (516th meeting, para. 5) during the earlier discussion of the article.

3. Mr. YOKOTA suggested that the word-order at the beginning of the English text of article 14 should be made to conform to that of article 15.

It was so agreed.

Article 14, as amended, was adopted by 9 votes to 1, with 1 abstention.

ARTICLE 15

4. Mr. BARTOŠ said that he would vote against the article. His objections to article 14 were equally, if not more, applicable to article 15.

5. Mr. AGO suggested that in the French text the words *"le consul"* should be replaced by the words *"un consul"* in order to avoid any implication that there could not be more than one consul in the receiving State.

It was so agreed.

Article 15, as amended, was adopted by 8 votes to 1, with 2 abstentions.

ARTICLE 15 A (ADDITIONAL ARTICLE)

6. Mr. LIANG, Secretary to the Commission, questioned the use of the words "acquire" and "acquisition" in the English text. Those words generally connoted ownership. A broader term which would cover the leasing of premises was required.

7. Mr. ZOUREK, Special Rapporteur, agreed. Some States permitted only the leasing of property for consulates. That was why the words *"se procurer"* had been used in the French text instead of the word *"acquérir"*, which had been employed in the corresponding article (article 19) in the draft on diplomatic intercourse and immunities (A/3859, para. 53), and which referred to the acquisition of ownership.

8. The CHAIRMAN suggested that the English text should use the words "procure" and "procuring".

It was so agreed.

Article 15 A, as amended, was adopted unanimously.

ARTICLE 16

9. The CHAIRMAN pointed out that article 16 had already been dealt with as article 2 A.

ARTICLE 17

10. Mr. SCELLE considered article 17 inadequate. He drew attention to the following substitute text, which he had submitted to the Drafting Committee:

"1. A consular officer's exequatur may be withdrawn by the Government of the State of residence in the event of his knowingly and systematically infringing the laws of that State or the duties of his office; but, except in extremely urgent cases, the State of residence shall not resort to this measure without previously attempting to obtain the consular officer's recall by his sending State.

"2. The reasons for withdrawal of the exequatur or for a request for recall shall be communicated to the sending State through the diplomatic channel.

"3. In any case, the withdrawal of the exequatur being a personal penalty can never be anything but an individual measure. It cannot be a collective measure and cannot be applied to an objectively determined class of consular agents with a view to modifying or obstructing the application of a consular convention or to impairing consular relations established by custom.

"Remark: This refers to incidents like those which occurred in Tunisia after the withdrawal of the exequatur from a group of the French consular corps in a particular geographical area, at the time when the fellagha bands entered Tunisian territory (see the article by Professor Charles Rousseau in *Revue Générale de Droit International Public*, 1958, No. 2, pp. 256 ff)."

11. While he did not challenge the right of the sending State to withdraw the exequatur, that right was all too often exercised, as Professor Rousseau had shown by numerous illustrations, in connexion with political controversies having nothing to do with consular relations, as in the case of Tunisia, or when a consul resisted interference by the receiving State with his lawful functions.

12. He urged the Commission to make a necessary contribution to the development of the law by giving serious consideration to his text or to any other provision that would help to reduce the abuse of the right to withdraw the exequatur.

13. Mr. BARTOŠ, while sympathizing with Mr. Scelle's view, said that it was based on the principle that there was an obligation to establish and maintain consulates. In fact, however, consular relations were established by agreement between the sending State and the receiving State, and Mr. Scelle's amendment might have the effect, by postulating a kind of right of tenure for consuls, of making consular conventions pointless. In his own view, article 17 should be based on the corresponding article concerning the declaration of a diplomatic agent as *persona non grata* in the articles on diplomatic intercourse and immunities, with the proviso that the sending State must be given the opportunity to recall the consul or to terminate his functions before the exequatur could be withdrawn.

14. The CHAIRMAN said that it would be difficult to reconsider the substance of article 17 at that stage of the session and suggested that Mr. Scelle might ask for the reconsideration of article 17 at the next session.

15. Mr. LIANG, Secretary to the Commission, pointed out that paragraph 1 of the Drafting Committee's text for article 17 provided that the receiving State might request the sending State to recall a consul or to terminate his functions. On the other hand, paragraph 2 referred to the request to recall the consul but said nothing about the termination of his functions.

16. The CHAIRMAN agreed that paragraph 2 should conform to paragraph 1. The reference to the termination of functions was necessary, for honorary consuls could not be recalled. He suggested that the words "to recall the consul" should be deleted from paragraph 2.

17. He also suggested that the beginning of paragraph 1 should be amended to read "Where the conduct of a consul gives serious grounds for complaint", and that in

paragraph 3 the word "the" should be inserted before the word "exequatur".

The Chairman's suggestions were agreed to.

Article 17, as amended, was adopted by 12 votes to 1, with 1 abstention.

COMMENTARY ON THE ARTICLE ON DEFINITIONS

18. The CHAIRMAN drew attention to the following commentary to the article on definitions supplied by the Special Rapporteur.

> "This article was adopted on a purely provisional basis until such time as the Commission's draft contains a consistent terminology. Certain members of the Commission expressed doubts concerning certain of these definitions, especially on the propriety of using the term 'consul' in a generic sense, and on the definition of 'consular official'. When, at the next session, the Commission concludes its examination of all the articles of the draft, it will re-examine this article in the light of the text adopted, and will decide whether the list of definitions can be simplified or, on the other hand, augmented by other definitions."

There were no observations.

19. The CHAIRMAN invited the Commission to consider the commentary (A/CN.4/L.83/Add.5) on the articles that had been adopted.

COMMENTARY ON ARTICLE 1

20. The CHAIRMAN suggested the insertion of the word "certain" before the words "consular functions" in the first sentence of paragraph 1.

It was so agreed.

21. Mr. BARTOŠ said that he could not accept the second sentence of paragraph 2. He agreed that it was sometimes expedient to conclude an agreement on the establishment or maintenance of consular relations in view of the absence or termination of diplomatic relations. However, there were many other possibilities, not covered by the sentence in question.

22. Mr. SANDSTRÖM pointed out that paragraph 1 already stated that the establishment of consular relations presupposed agreement between the States concerned; the sentence referred to by Mr. Bartoš was therefore unnecessary. He suggested that it should be deleted.

23. Mr. TUNKIN supported the suggestion. There might well be a tacit understanding concerning consular relations.

24. The CHAIRMAN also supported Mr. Sandström's suggestion.

Mr. Sandström's suggestion was agreed to.

25. Mr. SCELLE suggested the deletion of all of paragraph 3 with the exception of the first sentence. He did not think that there was much support in the Commission for the proposition that the establishment of diplomatic relations "includes" the establishment of consular relations.

26. Mr. ZOUREK, Special Rapporteur, was opposed to Mr. Scelle's suggestion. Paragraph 3 was simply a truthful account of what had been said during the session on the particular subject.

27. The CHAIRMAN, speaking in his personal capacity, agreed with the Special Rapporteur.

28. Mr. AGO said that the first sentence of paragraph 3 would have to be qualified somewhat. He did not think that the exercise of consular functions by diplomatic missions could be described as a general practice.

29. After suggestions had been made by Mr. TUNKIN, Mr. ZOUREK, Special Rapporteur, Mr. AGO and Mr. LIANG, Secretary to the Commission, the CHAIRMAN suggested that the first sentence of paragraph 3 should be amended to read: "Where diplomatic relations exist between States, the diplomatic missions often also exercise a number of consular functions, and usually maintain consular relations for that purpose". He also suggested that the second sentence should begin with the words "The Special Rapporteur, basing himself on this established practice had accordingly submitted . . .".

The Chairman's suggestions were agreed to.

30. The CHAIRMAN, referring to paragraph 4, suggested that the first sentence should be made consistent with the second by the substitution of the words "has the capacity to" for the word "may".

It was so agreed.

31. Mr. AGO observed that not all the possibilities were covered in the second sentence of paragraph 4: he mentioned, as an example, the case of States which were members of a union but were not federal States.

32. Mr. ZOUREK, Special Rapporteur, explained that he had followed the commentary on article 2 in the draft on diplomatic intercourse and immunities, though using somewhat different language; the comment could be amplified by a reference to the case mentioned by Mr. Ago and to other cases.

33. The CHAIRMAN doubted whether the second sentence in paragraph 4 was wholly correct; the question whether a member of a federal State had the capacity to establish consular relations had to be answered according to the municipal law. At all events, the question had not been adequately discussed in the Commission, and perhaps the sentence should be deleted and the Special Rapporteur asked to prepare a new draft for consideration at a later session.

It was so agreed.

34. Mr. FRANÇOIS considered that the second sentence in paragraph 5 went too far and that the remainder of the paragraph was altogether too sanguine: it should either be omitted or redrafted in more sober terms.

35. Mr. SANDSTRÖM said he was not convinced that the phrase "Since consuls maintain day-to-day contact between States" was in keeping with reality.

36. Mr. SCELLE said that the first sentence was counterbalanced by the second, which laid down clearly that in the interests of international intercourse a State was bound to establish consular relations. That obligation had existed from time immemorial and was an essential element in the recognition of the existence of an international society and therefore had an even more solid foundation than Article 1, paragraph 2 of the United Nations Charter, important as that document was.

37. Mr. YOKOTA said he failed to see why the paragraph was necessary, though he sympathized with the principle it enunciated: it applied with far greater force to diplomatic relations but had not been included in the comment to the draft on diplomatic intercourse and immunities.

38. Mr. BARTOŠ, while not opposed to paragraph 5, pointed out that the legal basis for the principle stated was to be found in the fifth paragraph of the preamble to the United Nations Charter.

39. The CHAIRMAN said that although the establishment of consular relations should not be refused without good cause, paragraph 5 went altogether too far and strained the language of the Charter. If it were approved

he would have to record his dissent. Perhaps it might suffice to retain the first sentence, to indicate that consular relations should not be systematically refused without adequate cause and finally to redraft the third sentence to read: "Since consuls maintain day-to-day contact between States, consular relations are extremely important."

40. Mr. ZOUREK, Special Rapporteur, pointed out in reply to Mr. Yokota that the comment on article 2 in the draft on diplomatic intercourse and immunities stated that the development of friendly relations between States, which was one of the purposes of the United Nations, necessitated the establishment of diplomatic relations.

41. Consular officials were more numerous than the members of diplomatic missions, and their role, which was extremely important for practical purposes, had too often been minimized. He did not therefore consider that paragraph 5 was exaggerated. Nevertheless, he was prepared to seek an acceptable formula to give satisfaction to Mr. Sandström and the Chairman.

42. Mr. TUNKIN considered that the Chairman's suggested amendments still went too far because they implied an obligation on States to establish consular relations. If it were intended to introduce such a rule *de lege ferenda,* its proper place was in the article itself. In keeping with the draft on diplomatic intercourse and immunities, he preferred some such statement as "However, one of the purposes of the United Nations is the development of friendly relations between States and consular activities contribute to this purpose".

43. The CHAIRMAN favoured a statement modelled, *mutatis mutandis,* on the second sentence in paragraph (1) of the comment to article 2 in the draft on diplomatic intercourse and immunities.

44. Mr. ZOUREK, Special Rapporteur, said that, although the solution was not ideal, he would be prepared to accept the Chairman's suggestion which would replace the whole of paragraph 5 while retaining the first sentence.

The Chairman's suggestion was approved.

COMMENTARY ON ARTICLE 2

45. Mr. BARTOŠ considered that Mr. Edmonds's amendments (see 498th meeting, para. 14) to article 2 should be mentioned in the comment even though they had not been accepted during the first reading.

It was so agreed.

46. Mr. TUNKIN suggested that the commentary should mention the observations put forward in the Commission concerning the need for a provision stipulating that the State of residence should take certain measures in connexion with the establishment of consulates in its territory.

47. The CHAIRMAN said that that suggestion would be borne in mind.

48. Mr. SANDSTRÖM, referring to paragraph 5, suggested that the words *"ratione loci"* were unnecessary and should be deleted.

49. He also suggested that the second sentence be redrafted to read "There may, however, be exceptions to this rule" and the third sentence should be deleted. The fourth sentence should then start "Some of the articles . . .".

50. Mr. ZOUREK, Special Rapporteur, pointed out that the words *"ratione loci"* served a useful purpose, for the consul's function might be limited in other respects as well, not merely geographically. He could accept Mr. Sandström's other amendments provided that their effect was not to suppress the two instances he had mentioned in his comment.

51. The CHAIRMAN supported Mr. Sandström's first amendment.

Mr. Sandström's amendments were approved.

COMMENTARY ON ARTICLE 2 A

52. Mr. YOKOTA suggested that, in keeping with the amendment to article 2 A, the words "express authorization" in the last sentence in paragraph 4 of the commentary should be replaced by the word "consent".

It was so agreed.

COMMENTARY ON ARTICLE 3

53. Mr. TUNKIN said that the last sentence in paragraph 5 was not clear.

54. The CHAIRMAN agreed, and suggested that the words "consuls engaged in gainful activity" should be substituted for the words "consular agents".

It was so agreed.

55. In reply to a question by Mr. SANDSTRÖM, Mr. ZOUREK, Special Rapporteur, explained that the second sentence in paragraph 6 was intended to point out that the practice of including heads of consular sections of diplomatic missions in consular classifications referred to a function of diplomatic missions and not to a new category of consular officials.

56. Perhaps the sentence would be clearer if the words "of a diplomatic mission" were inserted after the word "function".

57. The CHAIRMAN pointed out that the Commission had not really expressed a final opinion on the subject of consular sections of diplomatic missions.

58. Mr. ZOUREK, Special Rapporteur, suggested that the statement in the last sentence of paragraph 6 was difficult to refute since in certain cases consular sections undoubtedly existed as departments of diplomatic missions.

Paragraph 6 was approved without change.

COMMENTARY ON ARTICLE 4

59. Mr. YOKOTA pointed out that as article 4 concerned consuls only, that word should be substituted for the words "consular officials" in paragraph 2.

It was so agreed.

COMMENTARY ON ARTICLE 5

60. Mr. YOKOTA suggested that in order to bring the commentary into line with the article the word "competence" in the English text should be substituted for the word "power" in paragraph 1.

It was so agreed.

61. Mr. SANDSTRÖM suggested that in accordance with the changes made in article 7 the words "by means of" should be substituted for the words "in the form of" in the second sentence of paragraph 3.

It was so agreed.

COMMENTARY ON ARTICLE 5 A

62. The CHAIRMAN drew attention to the following commentary on article 5 A:

> "In the case where the sending State wishes to appoint as the head of a consular post a person who is a national of the receiving State, or who is both a national of the sending State and of the receiving State, it can only do so, in the Commission's view,

with the express consent of the receiving State. In effect, the case is one in which a conflict could arise between the consul's duties towards the sending State and his duties as a citizen towards the receiving State. Under the terms of this article, the consent of the receiving State is not required if the consular official is a national of a third State. This provision corresponds to article 7 of the draft articles on diplomatic relations and immunities."

63. He suggested that in the second sentence the words "consul's duties" should be replaced by the words "consular official's duties".

It was so agreed.

COMMENTARY ON ARTICLE 6

64. Mr. BARTOŠ pointed out that paragraph 2 introduced an innovation of which he approved but it should be described as such.

COMMENTARY ON ARTICLE 7

65. Mr. SCELLE observed that in the second sentence of paragraph 1 the word "competence" should be substituted for the word "authority".

It was so agreed.

66. The CHAIRMAN suggested that for the sake of uniformity the word "consul" should be substituted for the words "consular officer" in paragraph 6.

It was so agreed.

67. Mr. BARTOŠ, referring to paragraph 7, observed that practice differed and the question referred to in the paragraph had not been adequately discussed, a fact which should be mentioned in the comment.

68. Mr. ZOUREK, Special Rapporteur, observed that as far as he knew it was most exceptional for a State to apply for exequaturs for all consular officials. In the light of the observations of Governments the Commission would be able to judge whether the practice were sufficiently widespread as to warrant mention.

69. Mr. FRANÇOIS considered that from the second sentence in paragraph 7 it might be inferred that the State of residence did not have the right to refuse to grant privileges and immunities to a member of the consular staff, an inference which was at variance with a subsequent article.

70. Mr. ZOUREK, Special Rapporteur, said that the commentary might mention that the rights of the State of residence with respect to consular staff were treated in a subsequent article. He had been reluctant to touch upon the question in the comment at the present stage since the Commission had not had time to discuss it.

71. Mr. BARTOŠ pointed out that subordinate consular officials could not exercise their functions in the Special Rapporteur's own country until they had obtained a special card from the Protocol Department in Prague. In France, subordinate consular officials had to be registered with the Ministry of Foreign Affairs. The question was whether notification by the head of the consular office sufficed or whether the State of residence had to give its explicit consent.

72. The CHAIRMAN suggested that a passage should be inserted in paragraph 7 explaining that the statement it contained should be understood as being subject to the provisions of a subsequent article.

It was so agreed.

The meeting rose at 6.30 p.m.

525th MEETING

Friday, 26 June 1959, at 9.15 a.m.

Chairman: Sir Gerald FITZMAURICE

Consideration of the Commission's draft report covering the work of its eleventh session (A/CN.4/L.83 and Corr.1, A/CN.4/L.83/Add.1-7, A/CN.4/L.84) (*concluded*)

CHAPTER III: CONSULAR INTERCOURSE AND IMMUNITIES (A/CN.4/L.83/ADD.5-7) (*concluded*)

III. TEXT OF DRAFT ARTICLES AND COMMENTARY (*concluded*)

COMMENTARY ON ARTICLE 9

1. Mr. BARTOŠ hoped that the commentary, like the article, would stress that customary law took precedence over conventional law.

2. Mr. ZOUREK, Special Rapporteur, suggested that the last phrase of paragraph 4 should be brought into line with the article and should therefore read "by the present articles and by the international agreements in force".

It was so agreed.

3. Mr. EL-KHOURI said that the articles under consideration would not be binding until they entered into force in the form of a convention; when that happened, they would constitute one of the "international agreements in force" and would not have to be referred to specifically.

4. The CHAIRMAN said that, until the text came into force, the articles should be referred to specifically; otherwise, there would be nothing to show that the international agreements in force included the articles.

COMMENTARY ON ARTICLE 10

5. Mr. ZOUREK, Special Rapporteur, suggested that the last phrase of paragraph 1 (*b*) should be brought into line with the wording of the article and that the words "existing consular conventions" should be replaced by "international agreements in force".

It was so agreed.

COMMENTARY ON ARTICLE 11

6. Mr. TUNKIN, referring to paragraph 3, said that it was not clear from the first sentence whether an embassy official could be appointed as acting head of post where no consular official was available. That eventuality should be provided for.

7. Mr. ZOUREK, Special Rapporteur, suggested that the words "or from the officials of a diplomatic mission of that State" should be inserted at the end of the sentence.

It was so agreed.

8. Mr. BARTOŠ reiterated his view that employees of consular missions could never act as heads of post, but were in fact pro-consuls. In that respect, the commentary exceeded the scope of the article that had been adopted.

9. Mr. ZOUREK, Special Rapporteur, observed that the possibility was recognized in certain international agreements, such as the Havana Convention of 1928 regarding consular agents.

10. The CHAIRMAN suggested that the words "not to be recommended" in paragraph 5 should be replaced by "not desirable".

It was so agreed.

COMMENTARY ON ARTICLE 11 A

No observations.

11. Article 12 having been deleted, the CHAIRMAN invited the Commission to consider the commentary to article 13, which was contained in document A/CN.4/L.83/Add.7.

COMMENTARY ON ARTICLE 13

12. In response to several suggestions, Mr. ZOUREK, Special Rapporteur, proposed that the end of paragraph 1, after "general clause", should be amended to read: "contained an enumeration of most of the functions of a consul; this enumeration was not, however, exhaustive".

13. Mr. ALFARO, referring to paragraph 2, thought that in discussion it had been not so much the "dangers" of an excessively detailed enumeration as its impracticability and the lack of time which had been stressed.

14. Mr. ZOUREK, Special Rapporteur, said that the dangers had been mentioned, but the word "inconveniences" might, he suggested, be more suitable.

It was so agreed.

15. Mr. EL-KHOURI, referring to paragraph 3, suggested that it would be simpler to insert the words "by a majority" between "Commission" and "took" and to delete them in the sub-paragraphs.

It was so agreed.

16. Mr. ALFARO, referring to paragraph 3 (*b*), recalled that the Commission had discussed at length whether the commentary was to be submitted to the Governments and had decided not to do so until the commentary had been completed, but would see to it that it was brought to their attention as it now stood so that they might send in observations.

17. Mr. ZOUREK, Special Rapporteur, said that the actual decision had been that the draft, along with the commentary, would not be submitted to the Governments until it was completed. The words "when the Commission has completed the entire draft" might be inserted at the end of paragraph 3 (*b*).

It was so agreed.

18. Mr. LIANG, Secretary to the Commission, suggested that the amendments submitted by Mr. Verdross, Mr. Pal and Mr. Padilla Nervo might be reproduced in footnotes to paragraph 4.

It was so agreed.

19. The CHAIRMAN suggested that the phrase "for the article can only apply . . . as of legal right" in paragraph 7 should be deleted, since in the context interests were wider than rights.

20. Mr. YOKOTA suggested that in the same paragraph the word "always" be deleted.

Those amendments were agreed to.

21. Mr. TUNKIN said that the sentence in paragraph 10 reading: "Relations between the consul and . . . of the receiving State" was not accurate, since those relations were also governed by international law. The sentence was unnecessary and he suggested that it should be deleted.

It was so agreed.

22. After some suggestions had been made for amending the text of the more detailed, or enumerative, definition reproduced at the end of the commentary on the general definition, Mr. PAL pointed out that the text merely reproduced the draft of the longer variant originally submitted by the Special Rapporteur (A/CN.4/108), with some additional comments.

23. Mr. LIANG, Secretary to the Commission, observed that as the Commission had not adopted the text of the longer variant, there was no reason why it should approve the commentary on it.

24. The CHAIRMAN suggested that in the sentence introducing the longer definition the following phrase should be inserted after the words "Special Rapporteur": "together with a commentary which he has since added, but which has not yet been considered by the Commission".

It was so agreed.

COMMENTARY ON ARTICLE 14

25. The CHAIRMAN thought that the word "inevitably" in paragraph 1 was too strong, and suggested that it should be deleted.

It was so agreed.

26. Mr. ALFARO suggested that in the French text the word "*transactions*" should be replaced by "*actes*".

It was so agreed.

COMMENTARY ON ARTICLE 15

27. Mr. BARTOŠ pointed out that he had voted against the article, because the system described in it was a survival of the system of capitulations. Consequently, he also disapproved of the commentary.

28. The CHAIRMAN did not consider it necessary to state in paragraph 3: "The consul-general - *chargé d'affaires* must obtain the exequatur".

29. Mr. ZOUREK, Special Rapporteur, suggested that the passage in question should be reworded to read "In addition to having the exequatur, the consul-general - *chargé d'affaires* must be accredited by means of letters of credence".

It was so agreed.

COMMENTARY ON ARTICLE 15 A

30. The CHAIRMAN suggested that in the English text the word "acquire" in paragraph 1 should be changed to "procure", which would correspond to the wording of the article and to the French text.

It was so agreed.

31. Referring to paragraph 2, the CHAIRMAN thought it might be going too far to state that the acquisition of ownership of premises was not a normal procedure.

32. Mr. ZOUREK, Special Rapporteur, said that in the Drafting Committee some members had objected to using the same formula as in article 19 of the draft on diplomatic intercourse and immunities (A/3859, para. 53). The usual procedure was to rent premises for consular missions, but a State could also acquire ownership of such premises if the internal law of the State of residence permitted it.

33. He suggested that the last part of the paragraph should be reworded to read ". . . for the fact that, when the sending State seeks accommodation for its consulate in the receiving State, it usually does not acquire ownership of premises, but merely rents them".

It was so agreed.

COMMENTARY ON ARTICLE 17

34. Mr. LIANG, Secretary to the Commission, suggested that it was not too late to correct in the English text the phrase "according to the circumstances" in article 17, paragraph 1 (see A/CN.4/L.84), which, on reflection, appeared to refer to two different kinds of sanction. The phrase "as the case may be" might be added at the end of the paragraph and the other phrase might be deleted.

That amendment was adopted.

35. Mr. LIANG, Secretary to the Commission, suggested that the last phrase in paragraph 1 of the commentary, referring to the destruction or return of the exequatur, should be deleted as unnecessary. It was obvious that such obligations could not be imposed on the holder of a document. The consul would have already received notice that his exequatur had been withdrawn. Some Governments might possibly ask for the return of the document, but it was unlikely that any would require a consul to destroy it.

36. Mr. ZOUREK, Special Rapporteur, said that the State of residence should at least have the possibility of withdrawing the actual document when it withdrew the exequatur. As, however, the commentary was purely provisional, the phrase might be retained for the present.

It was so agreed.

37. Mr. SCELLE observed that paragraphs 2, 3 and 4 of the commentary remedied a great deal which he had found unacceptable in the article. In paragraph 3, the word *"inconvenable"* was not suitable. On the other hand, the word *"sanction"* should be retained, since the essential point was that the withdrawal of the exequatur, being a personal penalty, could never be anything but an individual measure. Because the sending State and the State of residence had, as it were, a common interest in the sending and receiving of a consul, the State of residence could not abruptly invoke its right to withdraw the exequatur without informing the sending State of the reasons why the penalty was being inflicted.

38. Mr. TUNKIN thought that the expression "penalizing" was too controversial. The point to be emphasized was that the withdrawal of the exequatur was an individual measure.

39. Mr. LIANG, Secretary to the Commission, said that he was not sure what the words "individual measure" meant in the context. The second sentence in paragraph 3 seemed in any case redundant.

40. Mr. SANDSTRÖM asked whether the sentence was necessary at all.

41. Mr. ZOUREK, Special Rapporteur, said that it was important in that it stressed the individuality of the measure and showed that the withdrawal of the exequatur should never be a collective measure affecting a whole group of consuls.

42. Mr. SANDSTRÖM observed that that did not emerge from the text of the article, but he could accept the explanation.

43. Mr. ZOUREK, Special Rapporteur, said that the fact that the withdrawal of the exequatur was an individual measure was implicit in the text of the article, but should be made explicit in the commentary, especially as several members had stressed that aspect. The sentence might be amended to read: "Consequently, the withdrawal of the exequatur is an individual measure which may only be taken in consequence of such conduct".

It was so agreed.

44. The CHAIRMAN said that the next sentence was not based on the text of the article and that the phrase "has a duty to state" was far too strong.

45. Mr. ZOUREK, Special Rapporteur, replied that the sentence followed from the article, because, if the sending State had the right to request the consul's recall only if there was ground for substantial complaint, it should specify what the ground was.

46. Mr. YOKOTA said that many members of the Commission had objected to the corresponding provision in the Special Rapporteur's original draft (A/CN.4/108). The receiving State had no duty to state the reasons for its action.

47. Mr. SANDSTRÖM said that the sentence could not stand as drafted, for a discretionary right to withhold reasons was implicit in the text of the article.

48. Mr. LIANG, Secretary to the Commission, said that the fact that certain points appeared in the commentaries drafted by the Commission which did not also appear in the text of the articles had given rise to criticism in the General Assembly on several occasions. The commentary on article 17 was definitely an example. If the Commission decided to include the sentence in question, a similar sentence would have to appear in the text of the article, and the latter part of paragraph 3 of the commentary would then be justified as support.

49. Mr. PAL thought that the solution adopted in the commentary on article 8 of the draft on diplomatic intercourse and immunities might be applied, *mutatis mutandis,* in the present commentary.

50. Mr. SCELLE replied that diplomatic and consular intercourse were not comparable, especially so far as the severance of relations was concerned. The withdrawal of the exequatur simply meant a change of consul, whereas the breaking off of diplomatic relations involved a radical change in the relationship between the States concerned. Paragraph 3 of the commentary should make the position clear.

51. Mr. SANDSTRÖM pointed out that justification for the severance of relations was not required in article 8 of the draft on diplomatic intercourse, whereas in the case of consular intercourse the Special Rapporteur's commentary required justification for the withdrawal of the exequatur. If the rule differed, it should be stated in the article, not in the commentary.

52. Mr. ZOUREK, Special Rapporteur, agreed with Mr. Sandström on the difference between diplomatic and consular intercourse, but did not think it was necessary to state the rule expressly in the text of the article, since it was implicit in paragraph 1 of the article. The commentary might, however, be brought more closely into line with the text of the article.

53. The CHAIRMAN observed that the sentence in the commentary went so far beyond the text of the article that it might have embarrassing results. After all, a State might have perfectly valid reasons for withdrawing an exequatur, but might not find it desirable to give them. The beginning of the next sentence was not correct, since the safeguard lay in the prior request for the recall of the consul, not in the statement of the motives.

54. Mr. ZOUREK, Special Rapporteur, suggested that the sentence reading: "It follows that the receiving State has a duty to state the reasons for its action" should be deleted and the following sentence should begin: "The obligation to request the recall of the consul constitutes . . .".

It was so agreed.

COMMENTARY ON ARTICLE 13 (*continued*)

55. Mr. ZOUREK, Special Rapporteur, observed that he would have to make some changes in the text of his enumerative definition of consular functions (A/CN.4/L.83/Add.7, para. 10). He assumed that that would be admissible as the text would be included in the report on his sole responsibility.

56. The CHAIRMAN confirmed that that would be in order.

I. INTRODUCTION

57. Mr. LIANG, Secretary to the Commission, suggested that it would be more consonant with the terms of the Commission's Statute to substitute the words "necessary and desirable" for the words "desirable and feasible" in the first sentence of paragraph 1 of the introduction (see A/CN.4/L.83/Add.6).

It was so agreed.

58. Mr. AMADO proposed the deletion of the words "and with which all members were thoroughly familiar" in paragraph 8.

It was so agreed.

59. Mr. FRANÇOIS suggested that paragraph 11 should end at the word "information" as it would be undesirable to make a request of that sort to Governments at the present stage: a similar decision had been adopted in the case of the draft on the law of treaties.

It was so agreed.

II. GENERAL CONSIDERATIONS

60. Mr. LIANG, Secretary to the Commission, suggested that the fourth sentence in paragraph 12 should be somewhat attenuated lest the reader should expect the distinction mentioned to have been drawn in the draft: that had not been the case though the Commission might have had the distinction in mind.

61. The CHAIRMAN did not think the distinction necessarily had to be drawn in the text of the articles themselves: it could be drawn in the commentary. He suggested that the sentence should be redrafted to read "The distinction must be borne in mind, as the Special Rapporteur has pointed out . . .".

It was so agreed.

62. The CHAIRMAN suggested that the word "long" be deleted from the second sentence in paragraph 19.

It was so decided.

63. The CHAIRMAN expressed doubts about paragraph 20, and particularly about the last sub-paragraph, since he believed that most members of the Commission would have questioned the substance of the original article 12.

64. Mr. YOKOTA considered that the whole of paragraph 20 should be deleted, for it was out of place in the introduction.

65. Mr. SCELLE agreed. Paragraph 20 failed to make it clear that there was no connexion whatever between consular representation and the recognition of a Government.

66. Mr. ZOUREK, Special Rapporteur, said that paragraph 20 faithfully reflected what had taken place in the Commission. It would be remembered that several members had agreed with the substance of the article in question while being opposed to its inclusion in the draft. Some explanation of why the article had been omitted should be given in the Commission's report though he was prepared to redraft the comment.

67. The CHAIRMAN, observing that article 12 of the Special Rapporteur's original draft was not the only provision which had been omitted, said that the Commission was not obliged to give reasons for its action, which in any event could be ascertained from the summary records. Most members of the Commission had felt that the article was outside the scope of the draft, a circumstance which might constitute a cogent argument in favour of omitting paragraph 20 altogether.

68. Mr. ZOUREK, Special Rapporteur, said he was prepared to withdraw the phrase "without objecting to the article in substance" in the last sub-paragraph of paragraph 20.

69. Mr. AMADO favoured the deletion of paragraph 20 in which the Special Rapporteur appeared anxious to explain why his draft was incomplete and in a sense to place the responsibility for the gap on the Commission itself.

70. Mr. ZOUREK, Special Rapporteur, disclaimed any intention of blaming the Commission for deciding to omit the article; it was perfectly free to take such action without incurring censure. He had simply tried to explain his personal view on the matter and then to record the action taken by the Commission.

71. Mr. SCELLE doubted whether the Special Rapporteur had been objective in suggesting that most members of the Commission had endorsed the substance of article 12. He hoped the matter would be discussed again at a later stage.

72. Mr. EL-KHOURI considered that as the substance of article 12 had proved unacceptable the whole of paragraph 20 should be omitted.

73. After further discussion, Mr. EDMONDS said that the Commission should not embark upon a procedural discussion of whether or not it must explain in its reports the reasons for omitting any article submitted by its special rapporteurs: personally he would have thought that such a practice would introduce unnecessary and irrelevant detail. All the requisite information could be found in the summary records. He formally proposed that the whole of paragraph 20 should be omitted.

The proposal was adopted by 13 votes to 1, with 1 abstention.

74. The CHAIRMAN put to the vote the Commission's draft report as a whole as amended.

The draft report as a whole, as amended, was adopted by 13 votes to none, with 1 abstention.

Closure of the session

75. The CHAIRMAN said that, although for various reasons it had been a somewhat difficult session, nonetheless the Commission had done some useful work.

76. It had been a great privilege to preside over its deliberations, and he was only too conscious of his own shortcomings, particularly when, from the point of vantage afforded by the Chair, he had had an unequalled

opportunity of observing the outstanding qualities of his colleagues.

77. He thanked all the members of the Secretariat for their services.

78. Mr. EDMONDS, Mr. EL-KHOURI, Mr. AGO, Mr. MATINE-DAFTARY, Mr. PAL, Mr. SCELLE, Mr. ZOUREK, Mr. ALFARO, Mr. FRANÇOIS, Mr. BARTOŠ, Mr. TUNKIN and Mr. AMADO paid a tribute to the Chairman's integrity, patience, intellectual honesty, respect for the opinion of others, knowledge, tolerance, sincerity and devotion to the Commission's work.

79. Mr. LIANG, Secretary to the Commission, thanked the Chairman for his appreciative words concerning the Secretariat.

80. The CHAIRMAN, thanking members for their kind words, declared the eleventh session of the International Law Commission closed.

The meeting rose at 12.30 p.m.

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