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Summary record of the 523rd meeting

Topic:
Other topics

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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)