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Summary record of the 524th meeting

Topic:
Other topics

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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.