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Summary record of the 525th meeting

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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. SCALLE 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, defini-

tion 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. BARTOS 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. SCALLE 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 "*inconvenient*" 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. SCALLE 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. SCALLE 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. SCALLE 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. SCALLE, Mr. ZOUREK, Mr. ALFARO, Mr. FRANÇOIS, Mr. BARTOŠ, Mr. TUNKIN and Mr. AMADÓ paid a tribute to the Chairman's integrity, patience, intellectual honesty, respect for the opinion of others, knowl-

edge, 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.
