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Summary record of the 511th meeting

Topic:
Consular intercourse and immunities

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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 INTER-COURSE 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 of-

ficer 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 pre-

sented 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 exequa-

tur 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 "*Interessenjurisprudens*", 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.