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Summary record of the 373rd meeting

Topic:
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paragraph 3 for fixing the character and measure of reparation were not too exacting. Incidentally, the statement in the last sentence of the paragraph—" it should be determined by the real owner of the original interest or right "—referred, he assumed, to the quantity of the claim rather than to the actual quantity of reparation. Injured parties frequently submitted exaggerated claims in order to leave some margin for negotiation.

47. Referring to paragraph 1 of basis for discussion No. VII, he remarked that case law was consistent on the point that an " international claim " was to be regarded as a new claim in all cases and not merely in the one mentioned at the end of the paragraph.

48. Sir Gerald FITZMAURICE agreed with Mr. Zourek on the last point, which was perhaps more of theoretical than of practical interest. He would have thought that an " international claim " must almost inevitably be a new claim, since a totally different field of law came into play. A decision on a claim brought by a private person under municipal law might be correct under that law and not under international law, or, if one took a monistic view of law, correct under one section and incorrect under another section of law. Perhaps the Special Rapporteur had merely stated his idea in rather too sweeping a fashion.

49. Mr. LIANG, Secretary to the Commission, pointed out that the Spanish original used two different terms in paragraphs 1 and 2: first an " international claim " and then " a claim of one State against another ". The difference was not so clearly brought out in the English text.

50. According to traditional international law, an international claim could only be a claim of one State against another. That was borne out by the title of the claims before the United States and Mexican Mixed Commission, which ran: " United States versus Mexico (Hopkins case) ", " United States versus Mexico (Janes case) ", and so on. From the way the Special Rapporteur approached the subject in his report, it might be argued that he meant claims of an international character—that was, claims containing an international element—but in the text of the basis for discussion it was clear that an " international claim " and an " inter-state claim " meant the same thing. In his opinion, the problem could not be solved until the Commission had settled the question of whether or not it was the individual that brought the claim against a State.

51. Whether the international claim was a new one or not depended on the approach adopted. According to traditional international law, even when a claim brought by a State was based on a claim brought by an individual before the local courts, the State's claim was not only new, but entirely independent of the local court case.

52. Mr. AMADO pointed out that, according to accepted doctrine, international responsibility was always a relation between one State and another. International responsibility was based on the supposition that a State claimed satisfaction for some injury done to it. Such injury could be either a direct wrong—such as violation of the rights of the flag, a breach of international law—breach of a treaty, for example, or an injury suffered by a national. According to the judgment of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case [18] it was an elementary principle of international law that a State was entitled to protect its nationals who had suffered injury through acts contrary to international law committed by another State from which they had failed to obtain satisfaction through ordinary channels. A similar view was expressed by Max Huber in his arbitral award [19] of 1 May 1925 on United Kingdom claims in the Spanish Zone of Morocco —namely, that once the State to which the claimant belonged made a diplomatic intervention on behalf of its national, quoting either conventional rights or principles *juris gentium* applying apart from treaties on the rights of aliens, a new claim of one State against another was born.

53. Mr. SPIROPOULOS said that he did not think there was any need for a prolonged discussion of the question. The formulation of basis for discussion No. VII would have to be modified in the light of the Commission's conclusions regarding basis for discussion No. III. According to those conclusions, it was evident that the State's claim was quite distinct from that of the individual and must be based on an alleged violation of international law. He did not see how any other view was possible without accepting the Special Rapporteur's thesis that the individual should be allowed to carry his claim on to the international plane.

The meeting rose at 1.05 p.m.

[18] *Publications of the Permanent Court of International Justice*, Series A, No. 2, 1924.

[19] United Nations publication: *Reports of International Arbitral Awards*, Vol. II, 1949, p. 633.

373rd MEETING

Friday, 22 June 1956, at 10 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Radhabinod PAL, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM,

Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary to the Commission.

State responsibility (item 6 of the agenda) (A/CN.4/96) (*continued*)

1. The CHAIRMAN, summing up the Commission's discussion in his capacity as Special Rapporteur, said that, although in the existing state of international law there were incontestably two classes of responsibility, civil and criminal, there could be no doubt that the Commission's task was solely to codify the law on civil responsibility. From the debate on basis for discussion No. I, it appeared to be the unanimous view of the Commission that the international responsibility of States was limited to a duty to make reparation *stricto sensu*. His purpose in studying both types of responsibility in his report had merely been to establish a distinction between the two in order to facilitate the Commission's task.

2. A similar problem arose in connexion with basis for discussion No. VI. In future reports he would be at pains to avoid the intrusion of any punitive element in the concept of reparation, despite the fact that such an element was undoubtedly to be found in certain international arbitral awards and, above all, in the diplomatic practice of States with regard to claims. He agreed that the question of criminal responsibility could arise only with reference to individuals.

3. The question of responsibility without fault, referred to during the discussion, was one which he had not touched upon in his report because of the serious objections to the concept which he had discovered when studying it. From the case law of the Permanent Court of International Justice, the International Court of Justice, various claims commissions, and other international tribunals, the almost unanimous conclusion emerged that only the violation or non-observance of an international obligation could give rise to State responsibility. Furthermore, the concept of responsibility without fault not being clearly definable in international law as it was in municipal law, he could conceive of an immense number of cases in which, were the concept adopted, a State might be regarded as responsible without any precise grounds being adducible for its responsibility. The introduction of such a concept into international law would widen the scope of international responsibility almost indefinitely. He would nevertheless study the question and submit proposals in his next report for the Commission's consideration.

4. In connexion with basis for discussion No. III, the first question raised had been one of terminology. He agreed that the terms " active subject " and " passive subject " of international law, although used by some authorities, were not universally valid or accepted. Defective as they were, however, he had had no alternative but to use them in order to distinguish the two problems with which he had to deal: that of the imputability of responsibility and that of the ownership of the injured interest or right. In traditional international law no such terminological problem arose, the State being the sole subject of responsibility and the sole owner of the injured interest or claim. But, in present circumstances, when there were subjects other than States whose interests might be affected by a violation or non-fulfilment of an international obligation, some distinction was necessary.

5. The Commission had also discussed the complex substantive problem of whether a private person was a subject of international law. The question was, however, largely academic and need not be settled in the particular cases with which he had to deal. Admittedly, the bald statement that a private person was a subject of international law would be difficult to accept. On the other hand, when studying the draft Code of Offences against the Peace and Security of Mankind, the Commission had found no difficulty in accepting the thesis that the individual was a subject of criminal responsibility, thereby directly admitting that the individual was a subject of international obligations. And there were other cases which pointed to the same conclusion. Whether those quite numerous cases justified regarding the individual as a subject of international law was another matter. But the fact could not be denied that international law now imposed certain obligations on and accorded certain rights to the individual. The question which concerned the Commission, however, was whether aliens, when injured parties, were sole owners of the injured interest or right. Though he had some doubt on that point, he had had to bear in mind the many concrete cases in which the State had not concerned itself, and indeed had had no reason to concern itself, with the injury to an individual, In such cases, unless the alien individual were recognized as the owner of the injured interest or right, no wrong would have been committed, and the alien would be deprived of all protection from international law. It was precisely in order to avoid placing the alien individual in such a situation that he had included the thesis of the capacity of the individual. Naturally, such considerations in no way affected the right of the State to take up the claim on the individual's behalf or on the grounds of a " general interest " in the case.

6. Although the " general interest " of a State was not a very clearly defined concept, it was one which emerged from certain major judgments and awards. It was an attempt to preserve the traditional idea that a State took over and made its own the interest of its national when submitting a claim for reparation. In cases where it did not do so, however, the need arose for an additional concept to ensure that the individual was not completely deprived of his rights as he had often been in the past.

7. Referring to basis for discussion No. IV, he said that he had noted with satisfaction the broad agreement among members of the Commission on the possibility of reconciling the concept of the international standard of justice with the Latin-American principle of the equality of aliens and nationals. The task was no easy one, but he felt that the Commission should endeavour to find a compromise formula. If it succeeded, it would have solved the most difficult problem of the conflict between two diametrically opposed schools of thought.

8. Although his views on the nature of an international

claim as set out in basis for discussion No. VII might appear revolutionary, in reality they were not. He of course agreed that in all cases in which the State could invoke a general interest, it had the right to lodge an international claim which would be new and quite distinct from that of the individual. His object in including the disputed passages had been to distinguish from others those cases in which, under agreements between States, the individual had the right to appear before an international tribunal as the entity directly lodging the claim, and at the same time to avoid introducing the idea inherent in the " public character " of a claim, since that idea was inconsistent with the real nature of the cases to which he had just referred. Such cases, though described by some members as exceptional, were not infrequent. Apart from the example of the Central American Court of Justice and the Mixed Arbitral Tribunal for Upper Silesia (which had dealt with more than 2,000 individual claims), there was the more recent instance of the Treaty between the Federal Republic of Germany and the United States of America under which a private person, recognized as the owner of an injured right, could have direct recourse to an international tribunal without the intervention of his government, except in so far as his government might be said to have made an anticipatory intervention when establishing by convention an international legal system in which the individual appeared as a party. It was with such cases in mind that he had stated, in basis for discussion No. III, that " the real owner of the injured interest or right should be recognized, in principle, as having the capacity to bring an international claim for the damage sustained ". Whether the individual possessed such capacity in practice would depend on the circumstances of the disputes. Since the examples he had quoted suggested that the Commission was faced with a practice which, though only beginning, showed every sign of continuing, he considered it inadvisable to do anything to discourage its further development.

9. Reference had also been made to the mutual security agreements concluded by the United States of America with, among others, some Latin American countries, the Philippines and Yugoslavia. Such agreements, generally drafted in much the same terms, related, however, only to specific cases of responsibility with regard to investments made under the United States Economic Co-operation Act of 1948. They did not appear to affect the " Calvo clause ". The State could intervene only when the private person relinquished his claim to the protecting State in return for reimbursement of his loss; and in cases where the private person had already renounced diplomatic protection, the protecting State would be powerless to act unless some breach or non-observance of an international obligation were also involved. Though the agreements could not be said to play a very large part in the general scheme of international responsibility, he would take them into account in his efforts at codification.

10. Mr. SPIROPOULOS said that the Special Rapporteur still appeared to adhere to the thesis which formed the very basis of his report—namely, that the individual as owner of an injured interest or right was entitled to bring an international claim for the damage sustained. That thesis had been accepted by only one member of the Commission, and had been rejected, with varying degrees of emphasis, by all the others, except himself (Mr. Spiropoulos). Since a Special Rapporteur could hardly continue to submit reports which ran counter to the majority view, it was obvious that the situation must be regulated. That was, in fact, the object of his intervention at so late a stage.

11. The Special Rapporteur's report had the merit of containing a number of new ideas. Unfortunately, those ideas, though quite in place in a theoretical work, were too novel for inclusion in a codification of the law on state responsibility. The Commission, however, should not adopt too conservative an attitude and reject them out of hand, In the quarter of a century since the Codification Conference at the Hague, developments had taken place which could not be ignored, and one such development was the conclusion of a Convention on Human Rights by some of those European countries which had created international law in the first place. Many governments, his own included, had not accepted the provisions giving private persons the right to bring complaints against their own State before an international tribunal, but the important point was that certain governments had, and that the tribunal was already seized of some hundred private complaints. On the basis of that precedent and of others cited by the Special Rapporteur, it might be possible to evolve a compromise principle.

12. After all, in many disputes involving individuals, but where no breach of international law was alleged, the appearance of the claimant State before the International Court was a pure formality. The individual was the real protagonist, his choice of counsel being automatically approved by his government. Why not, therefore, enunciate the principle that the State might grant its nationals the right, which they otherwise would not possess, to appeal directly to the International Court? Naturally such a course would be exceptional and proper provision would have to be made for it in an international convention. Another, more ambitious, solution would be to recognize the right of the individual to appeal directly to the International Court, the State of his nationality retaining the right to veto such action.

13. Faris Bey el-KHOURI observed that, though the International Court might agree to allow the individual to appear before it on behalf of his government, it would not and could not permit him to appear on his own behalf. For Mr. Spiropoulos' proposal to be put into effect, the Statute of the Court would have to be revised.

14. Mr. SPIROPOULOS admitted that such a system would naturally have to be sanctioned by an international agreement—which the legal advisers of the national departments concerned would have a full say in drafting. And the system would apply only to those States which had accepted the optional jurisdiction clause of the Statute of the International Court.

15. The CHAIRMAN, speaking as Special Rapporteur, said that the purpose of the discussion was to provide guidance for the Special Rapporteur, who would take due account of the opinions expressed. Because he still

maintained the viewpoint set forth in his report, which was obviously not shared by all the members of the Commission, he had in his previous statement attempted to explain his position as set out in the method of formulation that he had adopted—namely, a series of bases for discussion.

16. In reply to Mr. Spiropoulos, he would repeat what he had already stated with regard to the question of intervention in the matter of State responsibility in the international field—that his approach had been based on the need to leave the door open for the development of the principles established by the Central American Court of Justice, and originally by the Mixed Arbitral Tribunal for Upper Silesia, and which were also found in the treaty between the United States and the Federal Republic of Germany, which contained a provision authorizing foreign private individuals to lodge a claim in respect of injury sustained, without the intervention of the State. If, as he inferred from Mr. Spiropoulos' statement, the Commission took a contrary view on all the cases he had quoted, the only conclusion that could be drawn would be the inconceivable one that the Commission had set its face against the existing practice of international law. He urged the Commission to defer taking a definite decision until he had submitted his second report in 1957.

17. Faris Bey el-KHOURI said that the Commission had merely been engaged in a general discussion; there was no question of taking any decision in the matter. It should be left to the Special Rapporteur to prepare a further text for consideration at the ninth session.

18. Mr. FRANÇOIS, concurring, said that it would be premature to take a decision which would tie the Special Rapporteur to a particular course. The discussion had been too brief for the close consideration that the subject deserved, and it could not be claimed that any clear consensus of opinion had emerged. The Special Rapporteur would no doubt bear in mind Mr. Spiropoulos' interesting suggestion. The discussion should now be closed and the Commission should pass on to the next item on its agenda.

19. Mr. SCELLE entirely agreed with Mr. François. The question should not be pre-judged on the basis of any such preliminary discussion, but there was no point in continuing the discussion at present.

20. Mr. ZOUREK, demurring, said that Mr. Spiropoulos had correctly interpreted the mind of the Commission as regards the lack of capacity of the individual to lodge an international claim for damages for injury. It must always be kept in mind that the Commission's report would be submitted to the General Assembly, which was the body that would take any final decision. In view of that condition, it was imperative that the Commission should not depart in any way from the provisions of existing international law. He was, however, in full sympathy with those who urged that further time should not be spent on a purely academic discussion.

21. Mr. LIANG, Secretary of the Commission, said that if it had been decided that the Commission should issue a directive to the Special Rapporteur, it would have been necessary to indicate clearly what should be his general approach and, in consequence, more time would have been allotted to the discussion of what was a very broad topic. It had been understood from the outset, however, that the general discussion should not be followed by any immediate decision and that the Special Rapporteur would be free to continue his work in the manner that he saw fit. No difficulties would arise if there were complete identity of view between the Special Rapporteur and those members of the Commission who differed from him. The divergence of view was no reason for the Commission attempting to take any decision before it had considered a text of specific draft articles. The appropriate time for recommending any modification of his report to the Special Rapporteur would be when the draft articles were before the Commission. It had always been the Commission's practice to pronounce on topics studied by special rapporteurs in that form.

22. Mr. SALAMANCA urged that the discussion should be closed. The Commission would always respect the tenacity with which a sincere minority opinion might be maintained, but he was convinced that it could command the full collaboration of Mr. Spiropoulos.

23. The CHAIRMAN, speaking as Special Rapporteur, said, in reply to Mr. Spiropoulos and Mr. Zourek, that a distinction must be drawn between the case in which the preparation of a report on a given topic was entrusted to a special rapporteur, and the preparation by a special rapporteur of a draft convention upon which the Commission would take a decision, which would be followed by the special rapporteur in continuance of his task. In the former case, the special rapporteur would have complete freedom in his approach to the subject, because no directive would have been given him. In his report on international responsibility he (the Special Rapporteur) had not submitted draft articles, but had merely put forward certain ideas in the form of bases for discussion, upon which the Commission could not take a formal decision. If he were to submit a further report, he would enjoy exactly the same freedom of judgment, although that report would obviously be prepared in the light of the discussion at the present session. The difference of opinion that had emerged did not necessarily mean that his view conflicted with that of the Commission, for there had been only two dissentient voices.

24. Speaking as Chairman, *he declared the general discussion on state responsibility closed.*

25. Mr. KATZ, Director of International Legal Studies in the University of Harvard, speaking at the invitation of the Chairman, gave a brief summary of the study being undertaken by his department on the topic of international responsibility.

26. The starting point of the study was the Harvard Research draft convention of 1929 on the responsibility of States. The far-reaching developments that had taken place in the field of international responsibility since that period called for something more than a mere revision of the earlier text, and what was proposed was a thorough re-examination of the entire problem, drawing upon all the source material available. The specific topic of study

was the responsibility of States, in the civil sense, in respect of injury sustained by foreign private individuals. It would not be related to the problems arising out of the duty of a State to make reparation to another State on account of injury sustained directly by the latter State, nor would it deal with the responsibility of a State to render measures of redress other than reparation, such as apology, the rendering of honours and the punishment of the guilty party.

27. The work would be the sole responsibility of the Harvard Law School and it was hoped that it would be accepted as a contribution to a general understanding of the subject. If, also, the study were to prove of use to the Commission, that would be a source of particular gratification to him and his colleagues.

Consular intercourse and immunities (A/CN.4/98) (item 5 of the agenda)

28. Mr. ZOUREK, Special Rapporteur, introducing the item, submitted the following list of questions on which he desired the opinion of members of the Commission.

1. *Scope of codification*

Do the members of the Commission share the Special Rapporteur's view that his task is not only to codify the rules of customary international law but also, by examining international treaties and particularly consular conventions and national legislation relating to consuls, to deduce principles likely to be accepted by States representing all the economic and legal systems of the world ?

2. *Form of codification*

Do the members of the Commission consider that the codification of consular intercourse and immunities should take the form of a draft convention or draft articles relating to consular intercourse and immunities as the Special Rapporteur proposes that it should, or do they consider that a different form should be adopted ?

3. *Honorary consuls*

Should the draft articles on consular intercourse and immunities include provisions concerning honorary consuls ? If so, it will be necessary to decide, in the light of the fact that many States do not recognize or appoint honorary consuls, whether two draft conventions should be prepared or whether the provisions concerning honorary consuls should be inserted in a single draft, the final clauses of which would provide that States whose legislation does not recognize honorary consuls need not accept the chapter relating to them.

4. *Consular representatives*

Do the members of the Commission consider it desirable to introduce the following classification of consular offices:

(*a*) Consuls-General
(*b*) Consuls
(*c*) Vice-Consuls
(*d*) Consular agents.

5. *Consular duties*

Should the Special Rapporteur endeavour to formulate a definition of consular duties, based on the examination of consular conventions and national legislations, or should he, as he proposes, leave the matter to national legislations by inserting an article which might be worded as follows:

"Subject to the conventions in force, the functions and powers of consular representatives shall be determined, in conformity with international law, by the States appointing them."

6. *Relationship between the rules contemplated and previous consular conventions*

What should be the relationship between the rules contemplated, assuming that they are accepted by governments, and the very numerous bilateral conventions, in particular consular conventions ? It seems reasonable to provide in the draft that the proposed rules shall not affect existing bilateral conventions, the general convention applying in such cases only to questions not regulated by the bilateral conventions. The answer to this question is calculated to affect the method of work and the content of the draft to be prepared.

29. The theoretical aspect of the subject raised no difficulties. The problem was rather to find formulae which, while representative of customary international law, at the same time would generalize the provisions of the numerous international treaties and, in particular, of consular conventions. He would disregard for the moment provisions in respect of immunities, as there were not many such based on customary law. There were, however, numerous provisions in consular conventions, which constituted a corpus of law adopted by States on a basis of reciprocity.

30. In that respect, a study of national legislation relating to consuls was of particular importance. In all countries, the status of consular agents was materially affected by the provisions of municipal law concerning, on the one hand, the organization of consular services and, on the other, the legal status of foreign consuls. Such a study would fill many gaps and at the same time provide solutions for a number of obscure or controversial problems. It would, moreover, materially assist the establishment of principles concerning exemption from customs duties, which would be acceptable to many States. For example, many national legislations contained provisions in that respect for the duty-free entry of certain goods on the basis of reciprocity. The list of articles admitted free of duty varied from country to country but a comparative study of the relevant laws disclosed that three main categories of articles were admitted free of duty by most countries, namely, national flags and emblems, consulate office furniture and the personal effects of consular representatives and their families. It could therefore be presumed that a provision to the effect that the three categories of articles just mentioned should be admitted free of duty would be acceptable to a very large number of governments.

31. One difficulty lay in the fact that documentation on the texts of national laws was out of date, for Feller & Hudson's work had been published in 1933.[1] The Secretariat of the United Nations was preparing a new collection of such laws and regulations, but as yet not all the texts were available, a fact which explained the delay in the drafting of his report. That was not a serious matter, however, because in view of the Commission's heavy agenda, there would in any event have been no

[1] Feller & Hudson: *A Collection of the Diplomatic and Consular Laws and Regulations of Various Countries*, 1933.

opportunity for a detailed discussion on the topic at the present session.

32. In order to facilitate the discussion, he would take his questions *seriatim*, beginning with:

1 & 2. *Scope and form of codification*

A restriction of his task to the codification of the rules of customary international law would inevitably give an air of incompleteness to the first part of his report, for it would entail the omission of several items that were codified in multilateral conventions, such as that signed at Caracas in 1911 by five Latin American States, and the Havana Convention on Consular Agents of 1928, and also in many bilateral consular conventions and other treaties containing provisions relating to consuls. Another solution would be to codify, quite apart from the rules of customary international law, the principles generally observed by international conventions, particularly consular conventions, and by the laws of the various countries. That solution would permit the preparation of a much more complete scheme of codification and would have the advantage of generalizing the application of principles derived from an analysis of international conventions and a study of national laws, if those principles were adopted by the Commission and approved by the General Assembly. That was the method he proposed to adopt.

33. Mr. AMADO said that he entirely agreed with the Special Rapporteur that his task was not only to codify the rules of customary international law, but also to deduce principles likely to be accepted by all States by examining international treaties and particularly consular conventions and international legislation relating to consuls.

34. Mr. LIANG, Secretary to the Commission, said that the Secretariat had been aware that the collection of laws and regulations relating to consuls made by Feller & Hudson was not up to date and was attempting to complete it. They had already sent the Special Rapporteur a number of texts, and hoped to be able to supply him with more before the end of the year.

35. It was to be feared that if the codification took the form of a draft convention it would meet with difficulties because the question of consular intercourse and immunities, being mainly governed by bilateral treaties, was unlikely to arouse very much interest. It should preferably take the form of draft articles upon which States might draw for the purposes of concluding bilateral conventions.

36. Mr. SPIROPOULOS agreed that the draft should certainly state principles likely to be accepted by States representing all the economic and legal systems of the world. It should not be a codification of existing rules, for there were very few, but rather the deduction of certain rules from the existing conventions. With regard to the form of codification he agreed with the Secretary that there was likely to be little interest in a general convention. The Commission should rather prepare a form of model treaty upon which States might base themselves for drafting their own treaties, with certain reservations.

37. Mr. SCELLE agreed that the form of codification should be model articles rather than a general convention. Existing bilateral treaties embodied many provisions which would not be generally accepted in a convention.

38. Sir Gerald FITZMAURICE also agreed with those views. Undoubtedly the Special Rapporteur would have to deduce his principles mainly from international treaties and consular conventions, but there was in fact a certain amount of customary international law on the subject, which the Special Rapporteur might embody in a separate section of his report. He should also take into account a number of very recent consular conventions, such as those concluded between the United Kingdom and Mexico, Sweden and the United States. They had been the result of very careful consideration in the light of modern conditions and of many weeks of negotiation. The Special Rapporteur should find them a useful guide to the latest thinking on the subject.

39. The CHAIRMAN, speaking as a member of the Commission, agreed with the Special Rapporteur that he should deduce principles from international treaties and consular conventions, not merely codify the rules of customary international law on the subject. He also agreed that the Commission should draft articles relating to consular intercourse and immunities, rather than a general convention. As the treatment of the draft on arbitral procedure by the Sixth Committee had shown, however, the Commission should harbour no illusions that the model treaty which had been suggested as a basis for regional or bilateral conventions would encounter less opposition in the General Assembly than a draft convention.

40. Mr. SALAMANCA agreed that the scope of codification should be as broad as possible. The Commission might well leave open the question whether a model treaty, a code or a general convention would be preferable and the General Assembly might be asked for its opinion when the topic came before it. The actual drafting would not be greatly affected by the final choice of form.

3. *Honorary consuls*

41. Mr. ZOUREK, Special Rapporteur, passing to his third question, observed that the existence of honorary consuls complicated the work of codification, since the same immunities were not afforded to both categories of consul in consular conventions and national legislation. The League of Nations committee of experts on the progressive codification of international law had been opposed to the category of honorary consuls, and the practice of States and the legal doctrine were not uniform on that point. There were, however, very many States which did recognize the institution. When the committee of experts for the codification of international law had suggested in its questionnaire the abolition of honorary consuls, some governments, in particular those of the Netherlands, Finland and Switzerland, had raised objections on financial grounds. The rules concerning honorary consuls should therefore be codified, but the question was how to do it technically, whether in two draft conventions or in a single draft, containing a special chapter devoted to honorary consuls, the final clauses of which would provide that States whose legislation did

not recognize honorary consuls need not accept the chapter relating to them.

42. The question would be easier to solve if the codification were to be in the form of draft articles, as they would not have to be submitted to States for signature, or accession. He agreed, however, with Mr. Salamanca that it would be best to await the governments' final opinion, to prepare the codification in the form of a draft convention and then see whether the General Assembly would be willing to adopt it as a general convention. It it were not so willing, then it could take the form of a model treaty.

43. Mr. AMADO pointed out that certain countries attached very great importance to honorary consuls. Brazil had found its honorary consuls at Lausanne and Louvain, where there were several hundred Brazilian students, extremely useful. To codify the rules relating to honorary consuls would, however, be difficult and it would perhaps be even more difficult to make provision for them in a general convention. Yet the importance of honorary consuls in the general relations between States must not be overlooked. He himself could not decide at that stage whether it would be better to place the rules concerning them in a separate chapter, but their status should be defined in two or three rules.

44. Mr. FRANÇOIS said that the Netherlands attached the very greatest importance to the question of honorary consuls, as it had appointed only twenty career consuls, but five hundred honorary consuls. Any proposal that honorary consuls should be transferred to the career service could not be entertained. It was not merely a question of expense. The Netherlands needed consuls in all the ports in the world, even the smallest, but as a career consul in one of the smallest ports would not have enough work, a person was appointed who already had some other employment.

45. The Special Rapporteur had not correctly posed the question of honorary and career consuls. Whether a consul was regarded as an honorary or a career consul was purely a domestic matter. There were only two essential differences between them: training and remuneration. A career consul obtained his post by examination and received a fixed salary, whereas an honorary consul was not appointed by examination and did not receive a fixed salary.

46. If, on certain points, the legal status of honorary consuls seemed to differ from that of career consuls, it was due to the fact that certain general rules—on nationality, the exercise of other professions, etc.—applied in practice only to honorary consuls. In several consular treaties there were no special provisions for honorary consuls, and generally speaking, the rules they formulated covered, theoretically, both categories. So far as he was aware, no State refused to recognize honorary consuls merely on the ground that they were not career consuls.

47. Accordingly, he must take issue with the whole basis of the Special Rapporteur's third question.

48. Mr. SPIROPOULOS observed that the point brought out by Mr. François showed that the Special Rapporteur would have to make a very thorough examination of the question. The Special Rapporteur had obviously not intended to deny the existence of honorary consuls and their rights, as was clear from his question whether the draft articles on consular intercourse and immunities should include provisions concerning honorary consuls. He appreciated Mr. François' point, since small countries could not afford many career consuls, but he was not at all sure that their legal status was precisely the same as that of honorary consuls. The latter did not enjoy the same immunities as career consuls, who to some extent were afforded the same rights as diplomats. He hoped that the Special Rapporteur would be able to say at the next session to what extent honorary consuls also enjoyed such immunities.

49. Faris Bey el-KHOURI observed that the whole problem lay in the distinction as regards immunities and exemptions, and that must guide the Commission. Many States were unwilling to grant such immunities and exemptions to honorary consuls having the nationality of the State to which they were accredited.

50. Mr. SANDSTRÖM remarked that the topic of consular intercourse and immunities bore some relation to that of diplomatic intercourse and immunities, for which he was the Special Rapporteur. In dealing with diplomatic immunities in his report, he had touched on the question of the possibility of appointing agents of the nationality of the country to which they were accredited, and had proposed that they should be afforded a special type of immunity, in accordance with the present rules of international law. He had not, however, examined the position of consuls, since they received very restricted immunities.

51. Mr. AMADO agreed that honorary consuls were of great importance, but he could not at that stage attach quite so much importance to them as Mr. François did. The Special Rapporteur himself had not yet come to a decision. There were obvious differences between career and honorary consuls with regard to immunities and privileges. He could not entirely agree that no distinction should be drawn between the two types of consul as the matter was not so simple as Mr. François contended.

The meeting rose at 1.05 p.m.

374th MEETING

Monday, 25 June 1956, at 3 p.m.

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