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Summary record of the 496th meeting

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Zourek or Mr. García Amador, to begin the consideration of one of the other items of the agenda.

The meeting rose at 12.45 p.m.

496th MEETING

Tuesday, 19 May 1959, at 3.10 p.m.

Chairman: Sir Gerald FITZMAURICE

Programme of work

1. The CHAIRMAN welcomed Mr. García-Amador and Mr. Zourek, the Special Rapporteurs on item 4 (*State responsibility*) and item 2 (*Consular intercourse and immunities*), respectively. He recalled that the Commission had decided to take up item 3 (*Law of treaties*) owing to the absence of the Special Rapporteurs on the other items. Now that they had arrived the Commission would have to decide on its programme of work for the remaining six weeks of its session, one of which would have to be devoted to the preparation of its report.

2. The Commission's decision would depend primarily on what it considered to be the chances of completing work on Mr. Zourek's report. He recalled that at its previous session the Commission had decided that Governments would be allowed two years within which to submit comments.[1] If the Commission did not succeed in completing the draft on consular intercourse and immunities at the current session, it would not be able to submit the draft to the General Assembly before 1962, whereas it was most desirable that the draft should be discussed at the same Assembly session as the draft on diplomatic intercourse and immunities.[2]

3. If the Commission considered that it would be able to complete its work on item 2 (*Consular intercourse and immunities*) at the current session, it should take up the item at once. In that case he doubted that the Commission would have time for dealing with any other topic.

4. Mr. LIANG, Secretary to the Commission, recalled that at the thirteenth session of the General Assembly the Sixth Committee had expressed the hope that the Commission would be able to complete its work on consular intercourse and immunities at its 1959 session. Nevertheless, the Commission had been confronted with an unexpected situation owing to the unavoidable absence of Mr. Zourek. At the beginning of the present session he (Mr. Liang) had felt that the Commission would probably be able to complete its work on item 2. Now, only five weeks of the session remained for substantive work and the hypotheses assumed at the beginning of the session were no longer valid.

5. At the previous session Mr. Zourek had made an important contribution to the discussion of the Commission's methods of work, and the Commission had adopted some of his suggestions, particularly with regard to the procedure for dealing with the question of consular intercourse and immunities. In that connexion he recalled that at its tenth session the Commission had approved Mr. Zourek's proposal for discussion in a sub-commission,[3] but not that part of the proposal calling for the provision of simultaneous interpretation and summary records. Accordingly, if a sub-commission were now appointed, it would not be possible to provide it with those facilities. Furthermore, a sub-commission as envisaged by Mr. Zourek would contain only ten of the Commission's members.

6. While the Secretariat considered the proposal quite acceptable in principle, it might require a period of trial in order to operate satisfactorily. If Mr. Zourek's system had been instituted at the beginning of the session and had not worked satisfactorily, the Commission would have been able to revert to the practice of considering the Special Rapporteur's draft in plenary meetings, but he doubted whether that was possible at the present stage.

7. Mr. ZOUREK thanked the Chairman for his welcome and regretted that he had missed the beginning of the session, having been detained by his duties as a judge *ad hoc* of the International Court of Justice. He particularly regretted that he had missed the debate on part of the draft code on the law of treaties.

8. In his view the Commission could, by holding a few additional meetings, complete its examination of his report on consular intercourse and immunities in the remaining five weeks of the present session if it applied the system which it had decided upon at the preceding session and to which the Secretary had referred. He had not quite understood from the Secretary's statement why it would be more difficult to institute the system of a sub-commission during the latter half than during the first half of the session, since a period of five weeks would still be available for the discussion of the draft, as decided at the last session.

9. Of course, the Commission would not be able to complete its examination at the present session if it decided to deal with every detail *in extenso* in plenary meetings. However, if the "summary" procedure decided upon at the last session was applied, the remaining five weeks would be sufficient, and he recalled that the Commission had required only six or seven weeks to deal with the more complex question of diplomatic intercourse and immunities. In any case, the effort should be made in view of the desire expressed at the last two sessions of the General Assembly for a report on consular intercourse and immunities as soon as possible after that on diplomatic intercourse and immunities.

10. Mr. SANDSTRÖM proposed that the Commission should begin its work on Mr. Zourek's report at once and should re-examine the situation in two weeks' time, when it would be in a better position to decide whether or not it could complete its work on agenda item 2. He further proposed that the item should be discussed in plenary meetings of the Commission and that as much use as possible should be made of the Drafting Committee for questions of form.

11. Mr. SCELLE and Mr. ALFARO supported the proposal.

12. The CHAIRMAN observed that, on the basis of the Commission's normal rate of progress, it was very doubtful that it would be able to complete work on Mr. Zourek's draft at the current session. However, he agreed that the Commission should take up item 2 at once, discuss the draft articles in plenary meetings and then refer them to the Drafting Committee of which Mr. Zourek would be a member in his capacity as Special Rapporteur.

[1] See *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9*, chap. V, para. 61.

[2] *Ibid.*, chap. III.

[3] *Ibid.*, chap. V, para. 64.

13. Mr. TUNKIN also supported Mr. Sandström's proposal. As to the pace of the Commission's work, he suggested that each member should try to limit his statement to five minutes.

Mr. Sandström's proposal was adopted.

Law of treaties (A/CN.4/101) *(continued)*

[Agenda item 3]

ARTICLES 20 AND 21 (*continued*)

14. The CHAIRMAN said he took it that the discussion of articles 20 and 21 had been more or less exhausted at the previous meeting. He suggested that they should be referred to the Drafting Committee in the light of that discussion.

It was so agreed.

Consular intercourse and immunities (A/CN.4/108, A/CN.4/L.79, A/CN.4/L.80, A/CN.4/L.82)

[Agenda item 2]

15. The CHAIRMAN asked the Commission to consider the report by Mr. Zourek, the Special Rapporteur on consular intercourse and immunities (A/CN.4/108). A general discussion had been held at the Commission's tenth session on the introduction and article 1.[4]

DRAFT PROVISIONAL ARTICLES ON CONSULAR INTERCOURSE AND IMMUNITIES (A/CN.4/108, PART II)

ARTICLE 1

16. Mr. ZOUREK, Special Rapporteur, said that the Commission had completed its general debate and had discussed article 1 (*Establishment of consular relations*) fairly fully at the tenth session and it might save time if he summed up the position then reached.

17. There had been several objections to article 1, paragraph 1, and, on reflection, he thought the paragraph should be amended, so as to also to include the amendment submitted by Mr. Verdross (A/CN.4/L.79), to read: "Every sovereign State is free to establish consular relations with foreign States". If that version failed to find approval, he would reluctantly drop the paragraph altogether.

18. Paragraph 2 had received wide support. Some of the objections to it had been based on a misinterpretation of the rule laid down therein. Fears had been expressed that the rule might be interpreted as permitting consulates to be set up without the consent of the State of residence. Such an interpretation would be in obvious contradiction with the text of article 2 and hence invalid. Other objections had been based on too narrow an interpretation of the term "consular relations". Lastly, some objections seemed to have resulted from an obsolete view of consular functions. It had been stated that the consular function was essentially the protection of the interests of the nationals of the sending State. That was no longer true. Consular officials were also representatives of the national community and were organs of the State, and hence their functions and immunities were regulated by international law. Certainly, consuls still protected the interests of nationals, but they also protected the interests of their State, naturally only within the scope of their consular functions. Nevertheless, unlike diplomatic agents, they did not represent the State in all its international relations; their functions were more limited. Moreover, in most cases those functions were exercised only in part of the territory of the State of residence.

19. It had also been stated that consular relations between two countries were established only when those two countries had exchanged consuls, or at least when one of the countries had decided to receive a consul. Such a definition would unduly narrow the draft and leave a great part of the consular activity unregulated, namely, the consular function exercised by diplomatic missions.

20. In modern times, consular functions were exercised either by consulates or by the diplomatic missions as part of their normal duties. In the latter case, consular relations existed and were governed by international law as soon as diplomatic relations were established. That was the ordinary practice. All diplomatic missions performed consular functions, if no consulate was established, without need for any special agreement between the sending and the receiving State. In many cases, a special consular section was set up within the diplomatic mission, but that was an internal question for each mission.

21. Obviously, the procedure differed according to whether the consular function was exercised by a diplomatic mission or by a consular office. When consular functions were performed by diplomatic missions, they were (unless otherwise agreed) carried on through the Ministry of Foreign Affairs, whereas when consulates were established by mutual agreement, their relations with the authorities of the State of residence were governed either by the law of the State of residence or by local custom. The criterion of ability to enter into relations with the local authorities could not be accepted, except where a consular office had been established and such procedure prevailed in the State of residence. Where the consular function was exercised by a diplomatic mission, it would be exercised in conformity with the rules governing diplomatic missions. Hence in practice a diplomatic mission would as a rule be unable to engage in activities requiring direct contact with the local authorities. For that reason, some consular conventions contained express authorizations to that effect.

22. The establishment of consular relations as part of diplomatic relations did not, however, confer the right to appoint a consul without the consent of the State of residence. That was where the misunderstanding had arisen at the tenth session. The mere fact of establishing diplomatic relations did not confer the right to establish consular offices. If a State wished to do so, it would be bound to engage in negotiations and conclude a special agreement on the subject, as provided in article 2.

23. There had been no opposition of principle to article 1, paragraph 3, at the tenth session. Various proposals had, however, been advanced. He could accept Mr. Scelle's suggested insertion, in paragraph 2, of the word "normally" before the word "includes" (A/CN.4/L.82). Of the two additional texts suggested by Mr. Scelle, he could accept the idea embodied in the text to be added at the end of paragraph 2, although it might be better to dissociate the idea of

[4] *Yearbook of the International Law Commission, 1958*, vol. I (United Nations publication, Sales No.: 58.V.1, vol. I), 468th to 470th meetings.

recognition of the consul, since that was dealt with in articles 7 to 9. He would have no difficulty in accepting the new paragraph 4 proposed by Mr. Scelle if it referred to consuls *de carrière*, but not if it was meant to relate to honorary consuls.

24. Mr. ALFARO said that the general feeling at the tenth session had been that the establishment of consular relations was not a right of States, but required the consent of the other party concerned. He therefore proposed that article 1, paragraph 1, be worded similarly to article 2 of the draft articles on diplomatic intercourse and immunities.[5] That view was strengthened by the use of the word "agreement" in article 2, paragraph 1, of Mr. Zourek's draft. He was in general opposed to invoking the "right of legation". The point was pertinent to the insertion of the word "sovereign", which was controversial, inasmuch as it brought up the distinction between sovereign and semi-sovereign States. If the formula he suggested was used, that controversy would be avoided.

25. The CHAIRMAN observed that the Commission should bear in mind that consular intercourse and immunities should not be accorded more favourable status than diplomatic intercourse and immunities. In article 2 of the draft articles on diplomatic intercourse and immunities the reference was to "mutual consent", not to "right".

26. Mr. SCELLE remarked that the insertion of the word "sovereign" seemed unnecessary, since nearly all States, except a few semi-sovereign States which would probably soon disappear, were sovereign. He would prefer in paragraph 1 some such wording as: "Every State has the right to establish consular relations with foreign States if they are in agreement that such consular relations shall be effected" and even: "and have the duty to maintain consular relations".

27. He fully subscribed to the Special Rapporteur's excellent historical introduction and to the idea that consular relations had changed in nature since ancient times. It was impossible to say that in modern times consuls normally represented the countries sending them.

28. His greatest interest, however, in article 1 lay in the fact that the consular function was one of the typical examples of the organization of international law. International trade was the foundation of international law. Some authors had even held that if a State voluntarily shut itself off from international trade, it thereby deprived itself of all its rights under international law. Although cases of State trading existed, international trade was on the whole conducted directly or indirectly on the initiative of private individuals, and it was the function of the consul especially to protect the interests of nationals of the sending State. It was in that respect that the consular function differed from the diplomatic function: the diplomatic agent represented the Government. As long as trade relations subsisted, and the interests of nationals of the sending State continued to need protection, even if diplomatic relations were severed, consular relations should continue despite the severance of diplomatic relations, for it was precisely in that event that the nationals of the sending State needed the consular protection most. There were numerous examples of the continuance of consular relations under those circumstances, and in that connexion he recalled the case of Manchukuo, *inter alia*. Furthermore, consular relations should be established with a sovereign or semi-sovereign State, even if in the absence of diplomatic relations. Hence, the question of the establishment of consular relations was wholly irrelevant to the question of recognition.

29. Mr. YOKOTA pointed out that the Commission had fully discussed in connexion with diplomatic intercourse and immunities, the questions whether a State had a right to establish diplomatic relations and whether it was strictly a right or merely a faculty enjoyed with the agreement of the other State concerned. The Commission had concluded that the matter was so controversial that it could not draft any article on the subject. The Special Rapporteur had stated that, although he still maintained the thesis embodied in article 1, paragraph 1, he would not press the point in view of the many criticisms directed against it and would be prepared to withdraw it. The Commission might now decide to delete paragraph 1 and pass to the discussion of paragraph 2.

30. Mr. PAL agreed with Mr. Yokota. The questions involved had been discussed at the tenth session. In the light of that discussion, as also of the discussion which had already taken place at the present session, he was inclined to suggest that paragraph 1 should be deleted, that paragraph 3 should be drafted in terms similar to those of article 2 in the draft articles on diplomatic intercourse and immunities, and that only paragraph 2 needed further discussion. Retention of paragraph 1 would mean reverting to the capitulary system of olden days. As formulated, paragraph 2 hardly expressed the existing law. At the tenth session some members had thought the wording of that paragraph too broad. The Special Rapporteur had explained that he had meant that the diplomatic function included the consular function. If so, such a provision would be more appropriately placed in article 3 of the draft on diplomatic intercourse and immunities. He (Mr. Pal) was, therefore, in favour of deleting paragraph 2 also. The only occasion for such a provision in the article under discussion might be the removal of any possible apprehension lest the statement that consular relations were to be established by agreement should be interpreted as implying that such agreement was not necessary for the establishment of diplomatic relations. If there were any such implication, the apprehension might be adequately dealt with in the commentary on article 1 or on articles 2, 13 or 14.

31. Mr. AGO thought that the Commission was faced with a double task, which was, however, sometimes contradictory. It had rightly been pointed out that members should always bear in mind the draft on diplomatic intercourse and immunities and in some cases should adjust the draft on consular intercourse and immunities to that text, in order to maintain a parallel between the two. On the other hand, Mr. Scelle had quite rightly drawn attention to the sharp distinction between the diplomatic and consular functions.

32. He appreciated the Special Rapporteur's conciliatory spirit in agreeing not to refer to the general "right" to establish consular relations; indeed, no such right had ever been recognized. However, Mr. Zourek now seemed to be prepared to revise paragraph 1 to read "Every sovereign State is free to establish consular relations with foreign States." He (Mr. Ago) could

[5] See *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9*, chap. III.

not agree to the inclusion of the word "sovereign", in the first place, because it seemed to be unnecessary and, secondly, because it was not quite accurate, since some non-sovereign entities at particular stages of dependence might entertain consular relations. With regard to the clause "every State is free to establish consular relations", he pointed out that, if the meaning of such clause was that every State was free to enter into agreements with other States in order to set up consular relations, then the clause was too obvious to be necessary. On the other hand, the wording might suggest that the State had a general right to establish consular relations, and the words "is free to" in that connexion might be even more extreme than "has the right to". He therefore agreed with members who had suggested that the paragraph should be omitted.

33. With regard to paragraph 2, he observed that diplomatic relations were not necessarily accompanied by consular relations, and *vice versa*. No automatic inference could be drawn from the existence of diplomatic relations and it would be best to omit that paragraph also.

34. The problem in connexion with paragraph 3 seemed to be mainly one of finding satisfactory wording, and he agreed with members who had suggested that it should be based as far as possible on article 2 of the draft on diplomatic intercourse and immunities.

35. He had some doubts concerning the accuracy of the expression "consular relations", which conveyed an idea of reciprocity; however, it might be possible to use it for the sake of simplicity and by analogy with the draft on diplomatic intercourse and immunities. He could not, however, agree to the use of the term "consular representatives". Since diplomatic agents—who, surely much more so than consular officials, were representatives of their Governments—were referred to as "agents" in the draft on that subject, leaving aside any other consideration, consular officers should, *a fortiori*, be so described.

36. Mr. MATINE-DAFTARY supported the principles expounded by Mr. Scelle concerning the difference between the diplomatic and the consular functions. While diplomatic relations existed between States, the object of consular relations was to protect the interests of persons. On the other hand, the omission of paragraph 1 did not provide a solution; the Commission should try to find a formula corresponding to modern realities.

37. In his opinion, as soon as commercial relations were entered into between the nationals of two countries, consular relations became indispensable. In its discussion of the draft, the Commission's most important task was to define the functions of a consul. The fact that some consuls had exceeded their proper functions of protecting commercial and individual interests and had engaged in political activities, had caused some countries to refuse to accept consuls appointed to them. If the Commission succeeded in drafting a satisfactory definition of consular functions in article 13, stating both the positive and negative aspects of those functions, the problem would be clarified and a satisfactory formula might be found for paragraph 1. It was important to state in the draft whether or not a State could refuse to maintain consular relations; in his opinion, although any State could refuse to maintain diplomatic relations with another, it could not refuse to engage in consular relations with any country with which it had commercial ties.

38. Mr. SANDSTRÖM agreed with previous speakers that paragraph 1 should be omitted.

39. With regard to paragraph 2, he said that even if the statement it contained were held to be correct, it should be included in the draft on diplomatic intercourse and immunities, rather than in the text under discussion. Moreover, the draft on diplomatic intercourse and immunities already contained a somewhat similar provision. He therefore thought it would be best to omit paragraph 2 and to redraft paragraph 3 along the lines of article 2 of the draft on diplomatic intercourse and immunities.

40. Mr. AMADO said he did not approve of the Special Rapporteur's wording of paragraph 1 and opposed the insertion of the word "sovereign". If that word were added, it would be only logical to alter all existing treaties and agreements so as to include that adjective. He also thought that paragraph 2 should be omitted, since it did not correspond to the existing facts. It would therefore be wise to leave only paragraph 3, amended to correspond with article 2 of the draft on diplomatic intercourse and immunities.

41. Mr. Ago had rightly pointed out (see para. 35 above) that the term "consular relations" was perhaps inappropriate and that it was quite inaccurate to speak of "consular representatives". Consular functions had indeeded developed considerably in modern times, but the difference between diplomatic and consular functions was so obvious and so formally consecrated by practice, that it was inadmissible to imply that consuls were representatives of States. The Special Rapporteur himself had stated in paragraph 69 of the introduction to his report (A/CN.4/108) that the appointment of consuls was governed not by international but by municipal law. Consuls were administrative officials or official agents, without any diplomatic or representative character, appointed by a State to serve in the towns or ports of other States with a view to defending commercial interests, rendering assistance and protection and so forth.

42. Mr. TUNKIN thought it unnecessary for the Commission to go into the details of the many complex theoretical problems involved in article 1. In his opinion, consular relations were relations between States. When the State disappeared as a social entity—which he believed could only happen when social classes were eliminated—the situation would undoubtedly be different. But it was unnecessary and even undesirable to discuss such theoretical problems. The Commission should confine itself to formulating rules of international law.

43. The question whether a consular official was or was not a representative was one on which opinions were divided and it might not be important for the Commission to formulate a specific provision on the subject, particularly since the question was a theoretical one. Personally, he considered that consular officers to some degree acted as representatives of Governments and that Governments were responsible for the activities of consuls; accordingly, they had a certain representative character, which differed from that of diplomatic officials, but nevertheless existed.

44. The debate at the Commission's tenth session had clearly shown that the majority of the Commission was in favour of omitting paragraph 1. He had no strong feelings on the subject and agreed with the suggestion

that paragraph 3 should be redrafted along the lines of article 2 of the draft on diplomatic intercourse and immunities. The revised paragraph might become paragraph 1 and paragraph 2 should be retained in its present form. The provision of the existing paragraph 2 seemed to be correct because diplomatic missions often fulfilled certain consular functions and because it was the practice of States in concluding consular treaties or conventions not to refer to the establishment but to the regulation of consular relations, which implied that consular relations had already been established at the same time as diplomatic relations. Furthermore, the provision could not be regarded as dangerous; the actual exchange of consular representatives took place by mutual agreement, since a State could not establish consulates on the territory of another without the express consent of the latter.

45. Mr. BARTOŠ did not consider that it would be accurate to say that every sovereign State had the right to establish consular relations, since there were cases in past and present practice where non-sovereign entities had been allowed to set up consulates. In any case, the general trend towards the exercise of the right of self-determination led to the assumption that more sovereign States would be created in the near future.

46. He agreed with members who had criticized the use of the term "consular representatives". It was possible for a State to appoint consuls to a country with which it had no diplomatic relations. For example, Yugoslavia had no such relations with Australia, New Zealand or the Union of South Africa; its consular agents in those countries were not authorized to represent the State, but only—by way of exception—to act as intermediaries for communications of a diplomatic nature.

47. He also agreed with Mr. Ago that the term "consular relations" was not quite accurate. Consuls exercised their functions under international public law, since they were appointed by one State and accepted by the other according to the rules of international law, and sometimes no reciprocity was involved. Moreover, it was possible for a State to have diplomatic relations with another State where it had no consulates; thus, Yugoslavia and the USSR maintained diplomatic relations and the USSR had consulates in Yugoslavia, but there were no Yugoslav consulates in the Soviet Union.

48. He agreed with Mr. Scelle (see para. 28 above) that the question of diplomatic relations and of the establishment of consulates were quite separate. To illustrate the point, he observed that when diplomatic relations between the Federal Republic of Germany and Yugoslavia had been severed, it had been specifically provided that consulates should continue to function. Accordingly, while diplomatic functions were exercised through intermediaries, consular functions were in no way affected.

49. In that connexion he noted that the Special Rapporteur had stressed, in the commentary on article 1 (see A/CN.4/108), the trend since the First World War towards the merger of the diplomatic and consular functions, which had resulted in the closure of consulates and the emergence of consular sections of embassies. He (Mr. Bartoš) thought, therefore, that the Commission could usefully examine different cases in which the diplomatic missions assumed consular functions and the practice of various countries in the matter.

The meeting rose at 6.5 p.m.

497th MEETING

Wednesday, 20 May 1959, at 9.50 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 INTERCOURSE AND IMMUNITIES (A/CN.4/108, PART II) (*continued*)

ARTICLE 1 (*continued*)

1. The CHAIRMAN invited the Commission to continue its discussion of article 1 of the Special Rapporteur's draft.

2. Mr. GARCIA AMADOR noted that, in discussing article 1, members of the Commission were not referring exclusively to the establishment of consular relations, but were also commenting on consular functions, which were more specifically the subject of article 13. It was not clear whether those who referred to consular functions considered that the nature of those functions was settled in international law or that the terms of article 1 should be drafted in the light of the later definition of the consular functions. In the latter case, provisions concerning the establishment of consular relations could not be approved unless the real nature and scope of consular functions was known. His personal view was that it should be possible to approve article 1 forthwith, particularly as it had been sufficiently debated at the tenth session.

3. Mr. HSU thought that it would have been advisable to begin the draft with a definition of consular relations, with particular reference to their connexion with diplomatic relations. Such a definition might state that consular relations were that part of diplomatic relations in which public officers, in co-operation with foreign States, looked after the interest of their nationals in the foreign States concerned.

4. He thought the terms "intercourse", "relations" and "consular representatives" confusing; the title of the draft should have been "Consular functions and immunities" and the term "consular officers" should be used throughout.

5. Referring to article 1, he considered that paragraph 1 should be omitted and that paragraph 3 should be redrafted along the lines of the corresponding provision of the draft on diplomatic intercourse and immunities.[1] With regard to paragraph 2, he supported Mr. Scelle's amendment (A/CN.4/L.82) proposing the insertion of the word "normally".

6. Mr. LIANG, Secretary to the Commission, read out the new text of article 1 proposed by the Special Rapporteur:

> "1. The establishment of consular relations and the opening of consulates shall be effected by an agreement between the States concerned.
>
> "2. The establishment of diplomatic relations includes the establishment of consular relations."

[1] See *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9*, chap. III, para. 53.