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Summary record of the 497th meeting

Topic:
Consular intercourse and immunities

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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 INTER-COURSE 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.

7. He thought that the Special Rapporteur's draft of paragraph 2 had perhaps been unduly criticized. It was a fact of international life that the establishment of diplomatic relations was normally followed by consular relations, but the establishment of consular relations implied a much more detailed process than did that of diplomatic relations. For example, the Treaty of Friendship, Commerce and Consular Rights between the United States of America and Germany concluded at Washington on 8 December 1923² contained some extremely detailed provisions. Furthermore, diplomatic relations were governed by customary law, while consular matters were covered by more complex systems which had to be agreed upon by the States concerned; it was therefore logical that the establishment of diplomatic relations was not necessarily followed by consular relations. He was inclined to agree with those who believed that the question should not be dealt with in article 1 and that the question of the situation when consular functions were performed by diplomatic agents should be dealt with in another part of the draft.

8. He was not sure that the word "includes" in paragraph 2 was entirely correct. Although in fact consular relations normally followed diplomatic relations, the use of the word "*comporte*" in the French text might be taken to imply an obligation, and that point of view might not be acceptable to all members. Furthermore, the Special Rapporteur had agreed (see 496th meeting, para. 17) not to refer to the "right" to establish consular relations, which had appeared in the original paragraph 1 of his draft.

9. Mr. EDMONDS introduced his redraft of article 1:

"1. The establishment of consular relations between States takes place by mutual consent.

"2. The establishment of diplomatic relations includes the establishment of consular relations in the absence of an explicit statement by the State of residence to the contrary."

10. The purpose of the new paragraph 2 was to make it quite clear that in existing international practice the dividing line between the functions of diplomatic missions and those of consulates was becoming blurred.

11. Mr. YOKOTA introduced his redraft of article 1:

"1. The establishment of consular relations between States takes place by mutual consent.

"2. In case consular officers have not been exchanged or admitted, diplomatic agents may perform functions which are usually carried out by consular officers, unless the receiving State objects to such performance."

12. Clearly, most members did not consider that the establishment of diplomatic relations necessarily included that of consular relations, but they agreed that mutual consent was required for the establishment of consular relations. He had accordingly drafted his paragraph 1 much along the lines of the corresponding provision in article 2 of the draft on diplomatic intercourse and immunities.

13. With regard to paragraph 2, he said the Special Rapporteur's view that the establishment of diplomatic relations included the establishment of consular relations and that diplomatic agents might perform consular func-

tions even if consulates were established in the receiving State was not acceptable; functions which were usually carried out by consular officers might be performed by diplomatic agents when no consular officers had been exchanged or admitted. The performance of such functions was the result of diplomatic relations, but he could not agree that in that case the functions performed by diplomatic agents were consular functions properly so-called; they were not performed by the diplomatic agent on behalf of or in the capacity of a consular officer, but in his own capacity, and one could not speak of consular relations in the strict sense of the term. Since that distinction might be too subtle for the purpose of the draft, he did not insist on it, and was ready to meet the Special Rapporteur's argument by referring to the performance of consular functions by diplomatic agents only in those cases in which no consular officers had been exchanged or admitted. Moreover, his draft of paragraph 2 contained no mention of consular relations, which were quite controversial, as he had already said, and it merely stated that diplomatic agents might perform consular functions unless the receiving State objected.

14. Mr. TUNKIN observed that paragraph 1 of all three new texts proposed for article 1 was based on article 2 of the draft on diplomatic intercourse and immunities. He preferred the Special Rapporteur's formulation of that paragraph, because it was more elaborate and more accurate. In any case, the paragraph could be accepted by the Commission and referred to the Drafting Committee.

15. Paragraph 2 of Mr. Yokota's text did not conform with the general practice. Every diplomatic mission performed certain consular functions. For example, in the Consular Treaty between the USSR and Austria of January 1959, the provisions relating to the rights and duties of consuls also applied to members of diplomatic missions who performed consular functions. Similarly, in January 1958 the United States Government had addressed a note to all diplomatic missions in Washington stating that the United States Government would recognize the double capacity of members of diplomatic missions who performed consular functions, and that note had not encountered any objections. Indeed, it was an urgent necessity for a diplomatic mission to be able to deal with consular functions as soon as it was established. According to Mr. Yokota, however, diplomatic missions could perform consular functions only in those cases in which the sending State had no consulates in the territory of the receiving State. That view did not correspond to existing practice.

16. In view of those considerations he thought the Special Rapporteur's wording of paragraph 2 should be approved. The argument that the severance of diplomatic relations did not necessarily end consular relations was not valid, since special provision could be made for the maintenance of consular relations in that eventuality. It had been suggested that the cases where diplomatic missions performed consular functions should form the subject of a separate provision, but that suggestion was likewise not in keeping with general practice. In his opinion, the Special Rapporteur's formula was sound. It did not imply that the establishment of diplomatic relations was automatically followed by the establishment of consulates.

17. Mr. VERDROSS thought that there was no longer any great difference of opinion on the wording of the new paragraph 1. With regard to paragraph 2, he drew attention to a proposal he had made during

² Extracts reprinted in *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No.: 58.V.3), pp. 433ff.

the tenth session,³ to the effect that paragraph 2 should be prefaced by the words "Without prejudice to the functions which are governed by the internal law of the State of residence". The Special Rapporteur had not objected to the substance of the proposal of the time; but Mr. Tunkin's statement implied that practice had changed and that diplomatic missions had developed certain consular functions. He had made his proposal because he doubted whether a diplomatic agent had the right—which the consul possessed—to defend the rights of his country's nationals before the courts or administrative authorities of the receiving State. If the practice had changed to the extent implied by Mr. Tunkin, however, he would be prepared to withdraw his proposal.

18. Mr. SCALLE agreed with the Secretary that the word "*comporte*" in the French text of the Special Rapporteur's version of paragraph 2 was inappropriate, in view of the many cases in which the establishment of diplomatic relations was not accompanied by that of consular relations and *vice versa*. He also agreed with Mr. Verdross that the powers of diplomatic agents to perform specific consular functions were open to discussion. He drew attention to article 14 of the Special Rapporteur's draft, which raised the important and delicate point of relations between two Governments. That article seemed to suggest that consuls could in certain circumstances replace diplomatic agents. Actually, however, such a change of functions required the mutual consent of the States concerned. Paragraph 1 as now drafted was acceptable, but it should be made clear that it was the duty of the receiving State to agree to consular relations. A State could not arbitrarily refuse to enter into consular relations. The Special Rapporteur's version of paragraph 2 did not, he thought, correspond to existing practice.

19. Mr. ALFARO observed that the situation contemplated in the Special Rapporteur's and Mr. Edmonds' versions of paragraph 2 was quite different from that covered by Mr. Yokota's draft. In his opinion, the principle that States which agreed to establish diplomatic relations also agreed to establish consular relations was acceptable. Nevertheless, the case referred to in Mr. Yokota's amendment (performance of consular functions by diplomatic agents where no consulate existed) should also be taken into account. All the proposals could therefore be combined.

20. Mr. MATINE-DAFTARY observed, in connexion with Mr. Tunkin's remarks, that the modern world was roughly divided into two groups of States: those which engaged in State trading and those in which trade was in private hands. Since consular functions were concerned mainly with trade, countries such as the Soviet Union and Czechoslovakia, which carried on their commercial relations through trade delegations with diplomatic privileges and immunities, could dispense with institutions performing the classical consular functions. By contrast, his country had no consuls in those countries and its diplomatic agents in Moscow had to look after the interests of its nationals throughout the territory of the Soviet Union. The economic systems of various countries could not be changed, but the draft should take the realities into account. The Commission should find a formula which corresponded to the systems of different countries; however, the

Special Rapporteur's version of paragraph 2 only took into account the position of countries carrying on State trading.

21. Mr. PADILLA NERVO considered paragraph 1 of the Special Rapporteur's new text of article 1 acceptable. In paragraph 2, there was a danger of confusion between consular functions as such and functions that could be exercised by diplomatic representatives. To some extent, Mr. Yokota's amendment to that paragraph was at variance with existing practice, for the majority of the functions described in draft article 13 could as a matter of course be exercised by diplomatic missions. Therefore, it was unnecessary to limit the performance of consular functions by diplomatic agents to cases in which consular officers had not been exchanged or admitted.

22. Paragraph 2 of the Special Rapporteur's text, if it meant anything at all, meant that once two States had agreed to establish diplomatic relations, there was no basic disagreement between them over the exchange of consular officers. While admittedly a State which established diplomatic relations with another State was in general terms agreeable to the establishment of consular relations, the wording of paragraph 2 might imply that a State had some obligation to accept the establishment of consulates on its territory. The fact was that a State was free at all times to agree or not to agree to the establishment of consulates, a point dealt with in draft article 2.

23. The retention of paragraph 2 might therefore give rise to certain difficulties, and furthermore the clause was unnecessary. All the purposes of the draft would be served by the Special Rapporteur's new paragraph 1, read in conjunction with article 2, paragraph 1. However, if the Commission decided to retain a provision along the lines of article 1, paragraph 2, of the new text, it should include an explanation, at least in the commentary, regarding the scope and implications of the provision, in particular as to the existence of any obligation to accept or exchange consular officers.

24. Mr. AMADO observed that both Mr. Yokota's amendment and Mr. Tunkin's argument overlooked the fact that whereas diplomatic relations concerned a country as a whole, consular relations concerned particular parts of a country. Consuls were assigned to a particular district, to a certain port and for the exercise of limited functions. That was an essential difference which would be brought out in article 2. While recognizing that there was now a tendency for diplomatic missions to exercise certain consular functions, he felt that any attempt to formulate a provision to that effect would lead to confusion between the two types of relations.

25. Paragraph 1 of the Special Rapporteur's new text was acceptable to him. On the other hand, paragraph 2 was not, for it was not true that the establishment of diplomatic relations included the establishment of consular relations. Diplomatic relations might, but did not invariably, lead to consular relations.

26. Mr. LIANG, Secretary to the Commission, observed, with reference to the remarks of Mr. Yokota, Mr. Tunkin and the Special Rapporteur, that whereas paragraph 2 of the Special Rapporteur's original and new drafts treated of a general principle, paragraph 2 of Mr. Yokota's amendment contemplated a specific situation. It was not logical to treat the fact that a diplomatic officer could exercise consular functions as

³ Yearbook of the International Law Commission 1958, vol. I (United Nations publication, Sales No.: 58.V.1, vol. I), 470th meeting, para. 60.

an illustration of the principle that the establishment of diplomatic relations included the establishment of consular relations. As he had said before, the one normally followed the other, but there was no obligation or necessary consequence involved.

27. The case dealt with by Mr. Yokota and Mr. Tunkin was a common practice but did not affect the question of principle. The first part of Mr. Yokota's paragraph 2 was subject to amendment because it envisaged the general problem whereas the second part dealt with a certain practice.

28. Moreover, the practice referred to was subject to the prior consent of the State of residence and not the other way round, as paragraph 2 suggested. While it might not be necessary for a diplomatic officer to obtain an exequatur in order to perform certain consular functions, he had to obtain permission from the State of residence beforehand in case consular officers had not been admitted or had been withdrawn.

29. Mr. ZOUREK, Special Rapporteur, dealt with the various points that had been raised during the discussion. For the reasons stated in chapter VI of part I of his report (A/CN.4/108), he still thought that the term "consular representatives" would be the best in the circumstances. He agreed with Mr. Tunkin that the difference between diplomatic and consular officers as representatives was a difference of degree rather than of quality. Nevertheless, in order to satisfy the members of the Commission who had raised objections to the term "consular representatives", he would be prepared to replace it by "consuls" or "consular officers", even though a consular officer was a representative of his State within his consular district, which in some cases extended to the whole territory of the State of residence.

30. He had heard no objections in principle to his new paragraph 1 (see para. 6 above), which tried to take into account the comments made at the previous meeting while conforming as close as possible to the corresponding provision of the draft articles on diplomatic intercourse and immunities. He wished to emphasize that the conclusion of the agreement referred to in paragraph 1 was a condition not only of the establishment of consular relations but also of the opening of consular offices.

31. There had been a great deal of misunderstanding concerning paragraph 2. Several members had said that while the establishment of diplomatic relations was normally followed by the establishment of consular relations, the one did not necessarily include the other. If that implied a dissociation of the two types of relations, he was forced to say that the implication was not borne out by current practice, as Mr. Tunkin had demonstrated.

32. The tendency in the amendment submitted by Mr. Yokota and Mr. Edmonds to recognize the possibility of consular relations being excluded at the time of establishing diplomatic relations was completely contrary to practice. He did not know of a single case in which a diplomatic mission had been completely dissociated from consular functions. Once a diplomatic mission was admitted, it was inconceivable that it should not be able to exercise the essential functions of consular officers as described in draft article 13. It seemed to him that the misunderstanding of some members was due to the idea that one could speak of consular relations

only where consular functions were exercised by an office independent of the diplomatic mission.

33. As to Mr. Padilla Nervo's doubts concerning the scope of paragraph 2, he did not think that the paragraph could be interpreted as implying a right to demand the establishment of a consular office. That question was touched upon in the commentary and a more explicit reference could be added, if necessary, in the article itself, although paragraph 1 already provided that "the opening of consulates shall be effected by an agreement between the States concerned".

34. It had been suggested that paragraph 2 might be omitted. If that were done, the article would be incomplete, for it would mean that consular relations did not exist in the absence of a specific agreement concerning the opening of consulates. The article would then fail to cover the great majority of cases of consular relations being conducted by diplomatic missions, which in very many cases had special officers for the purpose or consular departments. He would suggest that the Commission should not be too hesitant in accepting the paragraph in question at the present stage because Governments would be able to comment on the article and would undoubtedly say whether or not paragraph 2 corresponded to practice. The Commission would have an opportunity to re-examine the provision in the light of those comments.

35. He wished to correct the impression of Mr. Matine-Daftary that States having a planned economy of the socialist type were not as interested in consular offices as other States because they preferred to use commercial missions. Commercial missions were interested only in trade but consular relations covered a much wider field. His country, for example, maintained many consulates abroad. Consulates, precisely because they permitted daily contact between States of different economic and social systems, were institutions of a general character which served the interests of all States.

36. Mr. Verdross had recalled (see para. 17 above) his suggestion at the tenth session to insert, at the beginning of paragraph 2, the words "Without prejudice . . . State of residence". If that amendment referred to consular intercourse with local authorities, the idea could be accepted in one form or another. However, the formulation must not be too broad, for it might imply that the powers of consuls were always subordinate to the internal law, and that of course was not the case.

37. Mr. Verdross had also suggested that one of the characteristics of a consul was that he was entitled to make representation directly to local authorities. In his (the Special Rapporteur's) view that was an aspect of the question which related not to the essential characteristics of a consul but rather to the manner in which he exercised his functions. However, it was a point that could be treated more appropriately in connexion with a later article.

38. Mr. Amado had very rightly pointed out that consular functions were limited to particular districts. However, there were cases in which such districts coincided with the whole territory of the State of residence, and he felt that the article should be drafted in a way that would cover all possibilities.

39. Finally, Mr. Scelle had suggested that the cessation of diplomatic relations did not *ipso facto* mean the cessation of consular relations; he (Mr. Zourek) agreed

but thought that that was a point which should be considered in connexion with article 19 (*Breaking-off of consular relations*).

40. Mr. MATINE-DAFTARY asked the Special Rapporteur whether in fact countries with a socialist organization, such as Czechoslovakia, still maintained consulates in countries in which they did not have diplomatic representation. He would also be interested to know whether they maintained separate consulates in countries in which they had diplomatic missions, and whether they granted exequaturs to consuls of other countries in similar circumstances.

41. Mr. YOKOTA observed that his amendment had been misunderstood by some members. It might perhaps not have been drafted clearly enough. In paragraph 2 he had not meant that diplomatic agents might perform what were usually consular functions only in those cases where consular officers had not been exchanged or admitted. The situation he had intended to cover was that in which diplomatic relations had been established, but no agreement had yet been reached on the opening of consulates. At that period the question arose whether consular relations had or had not yet been established. The Special Rapporteur believed that they had been established, but several members, including himself, did not think so. The question might be regarded as somewhat theoretical, and he thought the Commission should avoid laying down a provision regarding that controversial matter. He had purposely refrained from speaking of consular relations. As to his amendment, in order to avoid a possible misunderstanding it might be improved by adding the word "even" before "in case" at the beginning of paragraph 2.

42. Mr. AGO said that, subject to possible drafting changes, he was fully satisfied with the new text proposed by the Special Rapporteur for paragraph 1, and preferred it to those submitted by Mr. Edmonds and Mr. Yokota, which were identical.

43. The discussion had strengthened his conviction that paragraph 2 should be deleted. The Secretary had observed that all that the Commission could do was to record the fact that the establishment of diplomatic relations was normally accompanied by the establishment of consular relations. That was frequently true, and indeed more frequently than the reverse situation; but it was no use merely to record a fact. The Commission was called upon to state whether or not in law the establishment of diplomatic relations necessarily included the establishment of consular relations. On that crucial point he could not agree with the Special Rapporteur.

44. It might be argued that the greater included the less, and that, if States agreed to establish diplomatic relations, they agreed at the same time to establish consular relations. But that was not so. It was true that both diplomatic and consular functions had grown and that the original distinction between them had become somewhat blurred; but the basic distinction remained. The diplomatic mission represented the sending State in its international relations with another State, whereas the consul was concerned with the domestic situation of nationals of his State on foreign territory. Despite marginal cases, that basic distinction meant that a State might agree to establish consular relations, even if it did not wish to establish diplomatic relations and *vice versa*; but concurrent establishment was not automatic.

45. The Special Rapporteur and Mr. Tunkin had argued that paragraph 2 dealt only with consular relations, and not with the actual establishment of consulates, which, they recognized, required the agreement of the other State. But even with regard to the mere exercise of consular functions by diplomatic missions, the cases cited by Mr. Tunkin, interesting though they were, could also be construed in exactly the opposite sense, namely that the tacit consent of the receiving State was required before consular functions could be exercised. Moreover, some of the so-called consular functions that were exercised by embassies were evidence not of consular relations but of a particular form of diplomatic relations.

46. Mr. EL-KHOURI said that paragraph 2 should deal solely with the exercise of consular functions by diplomatic missions and should not cover the establishment of consular relations, which should be dealt with in paragraph 3.

47. Consular services were very important and the appropriate rules should make full provision for their continued existence in time of peace, since they were essential for the safeguarding of the nationals of the sending State. The Special Rapporteur and the Drafting Committee might see to it that that principle was preserved.

48. Mr. BARTOŠ said that, like Mr. Ago, he had certain theoretical objections to the way in which article 1 approached the question of consular relations, but he was willing to bow to the will of the majority, without, however, abandoning his convictions.

49. The main question was whether the establishment of diplomatic relations included the establishment of consular relations. In certain cases diplomatic and consular relations were undoubtedly merged; one of the functions of a diplomatic mission was to protect the interests of the sending State, and consequently those of its nationals, against breaches of international law. Hence, not every kind of protection was necessarily a form of consular protection.

50. Describing what happened in practice, he said that after the First World War, consulates had been closed in most capitals and replaced by consular departments in diplomatic missions. All States of residence did not, however, hold the same concept of the function of such consular departments. Even if the substance of protection was the same, the process of exercising it was not. Some States made no distinction between consuls and diplomatic officials serving in consular departments of missions, but other States held that all interventions by officials of consular departments must pass through the normal diplomatic channel, the ministry of foreign affairs, whereas consuls might deal with local authorities and appear before the courts. Some States required the heads of consular departments and their deputies to be furnished with letters patent issued by the sending State and an exequatur from the country in which they were serving as members of the diplomatic mission. Thus, in such cases what were called consular relations were established by acts performed by the mutual consent of the States concerned. In other cases, the consular department of diplomatic missions had few functions. In Europe, Belgium, France and the Netherlands made no distinction between consuls proper and consular departments in diplomatic missions, whereas in Italy a diplomatic mission had to submit the names of its members performing consular

functions. The Ministry of Foreign Affairs had to notify the authorities of the area in which they were interested so far as the performance of consular functions was concerned and such notification had to be confirmed to the local authorities.

51. In the United Kingdom officials of consular departments were recommended to obtain letters patent and an exequatur. Local authorities accepted the intervention of such officials even without letters patent and an exequatur, but the reply came through the Foreign Office, even if the original intervention had been with the Home Office or the local authorities. The United Kingdom courts did not accept the intervention of diplomatic agents unless they had the exequatur.

52. Officials of diplomatic missions had to be able to perform consular functions in cases where no normal consular office existed. Thus, even *de lege ferenda*, once diplomatic relations had been established, there would be no great difficulty in developing consular relations. He could not, however, wholly agree with Mr. Scelle that States had a duty to establish consular relations. The idea was reasonable, but did not yet exist in international law.

53. With regard to the question of competence, he said that trade was not the exclusive concern of consuls, although the conclusion of specific private law contracts was normally part of the consular function. On the other hand, trade policy, the conclusion of trade treaties and even protests against violations of trade treaties remained matters dealt with at the diplomatic level; consuls might, in the case of private individuals, make representations to protect their interests. A further distinction between the diplomatic agent and the consular officer was that, whereas the latter could not properly be denied the right to proceed to a particular place in his district for the purpose of protecting the interests of a national of the sending State, the former might have to obtain the express permission of the receiving State for a like purpose.

54. If in the draft on consular intercourse and immunities, the Commission wished to promote the progressive development of international law, he could accept the Special Rapporteur's text of article 1, perhaps by amending it, with certain reservations, as proposed by Mr. Yokota and Mr. Edmonds, since it was the current practice to accord States equal treatment in the opening of consular offices. If, however, the Commission was engaged in codification, that text would not be wholly suitable.

55. Mr. TUNKIN observed that the Commission was trying to form rules of international law, whether *de lege lata* or *de lege ferenda*. Undoubtedly it must take into account existing practice, if that was beneficial to international relations and world peace; nobody could, of course, contest that even if the general practice did not yet exist, the rule might well be drafted *de lege ferenda*. The universal practice was, however, that every diplomatic mission might perform some consular functions. That was not an exception, as Mr. Ago had suggested. No one had ever contested that right regardless of whether consulates existed on the territory concerned. The main question was whether the practice was beneficial to international relations, and that it was so could not be denied. The fewest obstacles should therefore be placed in its way. The words "includes the establishment of consular relations" in the Special Rapporteur's revised text of paragraph 2 gave rise to

some doubts and might be deleted and the paragraph redrafted. The main objective was to see to it that the possibility for diplomatic missions to exercise consular functions was not excluded. The Drafting Committee could no doubt find some method of stating that in every case diplomatic missions might perform consular functions.

The meeting rose at 12.55 p.m.

498th MEETING

Thursday, 21 May 1959, at 9.45 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 asked the Commission to continue the debate on the Special Rapporteur's new article 1 (see 497th meeting, para. 6).

2. Mr. HSU observed that the new text proposed by the Special Rapporteur seemed to be self-contradictory. If the establishment of diplomatic relations included the establishment of consular relations, the opening of consulates would not be effected by agreement, while, if consulates were opened by agreement, the establishment of diplomatic relations did not include the establishment of consular relations. It had been stated that paragraph 2 implied a liberalization in the establishment of consular relations. That idea should be welcomed, but it should be presented logically, and the phrase referring to the opening of consulates in paragraph 1 should be amended. Whereas it was relatively immaterial whether consular functions were exercised by a consulate or by the consular section of an embassy, the opening of a consulate involved other material considerations. Preferably, therefore, the phrase "and the opening of consulates" should be placed in a different context and elaborated, but without the qualification that the opening of consulates was subject to agreement.

3. The CHAIRMAN, speaking as a member of the Commission, observed that the Special Rapporteur's text dealing with the connexion between the establishment of diplomatic relations and the exercise of consular functions was preferable to the texts suggested by Mr. Yokota and Mr. Edmonds (see 497th meeting, paras. 11 and 9) because it embodied the ideas both of establishing consular relations and of opening consulates. He doubted, however, whether "consular relations" was the correct term. One could, of course, speak of diplomatic relations, but instead of "consular relations" he would prefer some such phrase as "the reception of consular officers" or "the carrying out of consular functions", though he would not necessarily press that suggestion.

4. There was some doubt about the meaning of the term "consular functions". Many functions were carried out by consuls which were not specifically consular