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A/CN.4/SR.499

Summary record of the 499th meeting

Topic:
Consular intercourse and immunities

Extract from the Yearbook of the International Law Commission:-
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499th MEETING

Friday, 22 May 1959, at 9.55 a.m.

Chairman: Sir Gerald FITZMAURICE

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

[Agenda item 2]

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

ARTICLE 2 (*continued*)

1. The CHAIRMAN, speaking as a member of the Commission, said that his opinion on article 2 was similar to that of Mr. Ago (see 498th meeting, paras. 57-61): article 2 as a whole should be closely linked to article 1, paragraph 1, if necessary by a rearrangement of the provisions concerned, and article 2, paragraph 1, should be amended in such a way that it would apply to the consular section of a diplomatic mission. Unless the paragraph was so amended the implication of article 1, paragraph 2, of the Special Rapporteur's text would be that a diplomatic mission was automatically entitled to exercise consular functions over the entire territory of the receiving State. In his view, whatever kinds of tacit understanding might exist in practice, very few countries would accept that proposition without qualification. Accordingly, he could agree to the text of paragraph 1 subject to an amendment along the lines he had indicated.

2. Paragraph 2 as it stood could apply either to changes desired by the sending State or to changes desired by the receiving State. It was certainly correct to say that changes desired by the sending State could not be effected without the consent of the State of residence, and that rule was reflected both in paragraph 4 of the article and in paragraph 4 of the commentary on the article.

3. Conversely, under paragraph 2 as it stood, the agreement of the sending State would be required whenever the receiving State wished to make some change. It seemed to him that that was not at all the Special Rapporteur's intention. Normally, there would of course be consultation in such cases, but it would certainly be going too far to lay down categorically that the receiving State could never alter a consular district without the sending State's concurrence. He suggested that paragraph 2 should be so amended as to enable a receiving State to have the power, in the last resort, to effect such changes even without the consent of the sending State, provided that the power was exercised exceptionally only, never arbitrarily and always after adequate consultation with the Government of the sending State.

4. Some members had suggested the omission of paragraph 3, but he agreed with Mr. Padilla Nervo (498th meeting, para. 66) that paragraph 3, although not explicit, would cover the case in which a sending State wished to open additional consulates. The point could be brought out more clearly by the Drafting Committee.

5. He had no objection to paragraph 4 of the Special Rapporteur's text.

6. He agreed with Mr. Yokota (see 498th meeting, para. 33) that Mr. Edmonds's amendment to paragraph 2 (498th meeting, para. 14) did not deal with the same question as paragraph 2 and should be considered an additional point. Of course, an automatic most-favoured-nation provision could not be included. The probability was that at a place where a number of consular posts existed, many countries would have a legitimate interest in establishing consular posts of their own, but there were certain cases in which a country had no interests at all in the area concerned and in such a case the receiving State should have the right to refuse. However, the principle of most-favoured-nation treatment was a correct principle and could be included in article 2, subject to the right of the receiving State to refuse the application of the sending State. Accordingly, he favoured Mr. Yokota's approach.

7. He supported Mr. Sandström's amendment to paragraph 1 and his proposal that the statement in paragraph 4 of the commentary on article 2 should be included in the article itself (see 498th meeting, paras. 38 and 39).

8. Finally, he drew attention to paragraph 6 of the Special Rapporteur's commentary on article 2. He recalled that after considerable discussion of the right to acquire property for the use of diplomatic missions, a provision on the question had been included in the draft articles on diplomatic intercourse and immunities.[1] It seemed to him that the position of consular posts was analogous, and he suggested that the provision regarding the property of diplomatic missions should be included, *mutatis mutandis*.

9. Mr. MATINE-DAFTARY recalled his statement at the previous meeting (498th meeting, para. 64) and introduced the following redraft of article 2:

"(i) Change the title to read: 'Consular seat and district';

"(ii) Replace paragraph 1 by the following text:

" 'The seat and the district of consulates shall be specified in an agreement between the sending State and the receiving State (or in the agreement making subsequent amendments thereto).'

"(iii) Delete paragraph 3."

10. Mr. TUNKIN thought that Mr. Matine-Daftary's redraft was too rigid in that it presupposed that the agreement on the establishment of consular relations always provided for the opening of consulates. That, however, was not the case. For example, a recent agreement between the Soviet Union and the Federal Republic of Germany was intended in the first instance to regulate consular functions exercised by a section of the diplomatic mission and said nothing about consular districts except that future agreements on the opening of consulates would specify the consular district in each case. Both the case envisaged by Mr. Matine-Daftary and that just described by him would be covered by amending the redraft of paragraph 1 to read: "The seat and district of consulates shall be specified by agreement between the sending and the receiving State".

11. Mr. MATINE-DAFTARY said that he had no objection to Mr. Tunkin's amendment, but observed that the point was covered by the words "or in the agreement making subsequent amendments thereto".

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

12. Mr. SCELLE supported Mr. Matine-Daftary's amendment to paragraph 1. Before considering such questions as most-favoured-nation treatment, the Commission should be concerned about establishing equality of rights between large and small States and, in the matter of consular relations, between the States which were parties to a consular convention. Paragraph 1 should clearly provide for an agreement specifying the places at which consulates were to be established. In that connexion, he felt somewhat uneasy about the wording of paragraph 3, which gave the impression that, even after an agreement had been entered into, it was for the State of residence to decide whether or not a consulate would be established. He opposed any tendency, of which he had noticed more evidence in the debate, to place the State of residence *qua* territorial sovereign in a privileged position in consular relations.

13. Mr. ZOUREK, Special Rapporteur, said he would not deal with the terminological problems that had been raised except to say that it might after all be better, in order to satisfy those who objected to the term "consular representatives", to use instead the word "consuls" and, in an appropriate article, to define the term "consuls" in its generic sense.

14. It had been suggested that paragraph 1 of article 2 should be linked to article 1, paragraph 1. But article 2 was wider in scope than article 1, paragraph 1. While it was true that consulates might be established at the time when consular relations were established, there were other cases in which consulates were not established at the same time, or were opened later, after the establishment of consular relations, and there were also the cases in which new consulates were established in addition to the one already existing.

15. After listening to the discussion on paragraph 2, he agreed that it would be wiser to limit the scope of that paragraph, as had been suggested by the Chairman, to the case of changes proposed by the sending State. It would be enough to say:

> "Subsequent changes in the consular district by the sending State may not be made without the consent of the State of residence."

16. In reply to Mr. Amado's question concerning what changes could be made in consular districts (498th meeting, para. 34), he said that the *size* of a consular district might be altered, or the territory of a third State or of part of that State might be included in a consular district; the latter case had now been covered by Mr. Sandström's amendment (498th meeting, para. 39), which was acceptable to him.

17. Mr. Scelle had suggested the insertion of the words "either directly or indirectly" (498th meeting, para. 27). However, the inclusion of the word "indirectly" seemed to refer to cases where the consul of the sending State might try to exercise consular functions outside the limits of his consular district without any change in those limits. Such cases, however, were covered by the prohibition contained in paragraph 4 of article 2. If, on the other hand, Mr. Scelle was concerned about the refusal to grant, or the withdrawal of, the exequatur, that case was dealt with in later articles. Consequently, he was not sure that Mr. Scelle's amendment would be desirable in paragraph 2.

18. He had no objection to Mr. Yokota's amendment inserting the words "or seat" in paragraph 2 (see 498th meeting, para. 31).

19. Several members had said that paragraph 3 was superfluous, on the grounds, apparently, that agreement on the opening of consulates should be simultaneous with agreement on establishing consular relations; but as he had pointed out, in many cases that did not occur. Perhaps it would be best to follow Mr. Verdross's suggestion (498th meeting, para. 30) and make a clear distinction between two ideas, limiting article 1 to the establishment of consular relations and devoting article 2 to the opening of consulates. That would exclude any misunderstanding and permit paragraph 3 of article 2 to perform a real function.

20. It had been suggested that paragraph 4 was too rigid and that the word "express" should be omitted. He had no objection to that amendment. Mr. Edmonds's amendment to paragraph 4 (498th meeting, para. 14) seemed to him to be sound; he pointed out, however, that later articles, for example articles 14 and 16, dealt with circumstances in which a consul might find it necessary to carry on certain activities outside his consular district. For that reason it might be better to use a formula that would cover all possibilities, for example, by beginning the paragraph with the words "except as otherwise agreed", and continuing with the Special Rapporteur's draft.

21. He understood that Mr. Edmonds was not pressing for the adoption of his amendment to paragraph 1. Referring to Mr. Edmonds's amendment to paragraph 2, he conceded that a most-favoured-nation clause worded as Mr. Edmonds proposed was found in certain consular conventions. However, it was used mostly in bilateral conventions which took into account certain specific relationships. It would be less acceptable in a multilateral convention and the objection might furthermore be made that it did not take into account another rule encountered in consular conventions, namely the rule of reciprocity.

22. He had no objection to Mr. Sandström's amendment to paragraph 1 or to his proposal to insert an additional paragraph (see 498th meeting, paras. 38 and 39).

23. As to Mr. Matine-Daftary's amendment (see para. 9 above), he said he could accept the proposed title if the French text read: *"Siège de consulat et circonscription consulaire"*. If, however, his (the Special Rapporteur's) proposal that article 2 should deal with the opening of consulates were adopted, the heading of that article would have to be "Agreement on the establishment of consulates". Mr. Matine-Daftary's amendment to paragraph 1 failed to cover all the possibilities, as he had already pointed out.

24. Mr. Pal and the Chairman had raised the question whether an article should not be inserted in the draft whereby the State of residence would be bound to ensure that accommodation was provided for the consulate, and had referred to the draft articles on diplomatic intercourse and immunities (article 19). He had some doubt whether in that respect a consular post should be put on the same footing as a diplomatic mission, for they were intrinsically different; the inclusion of a similar obligation in the law relating to consuls would in fact place a much heavier burden on States, since consular functions were often carried out by several consulates. However, he was prepared to include such a provision as the Chairman had suggested if the Commission desired it.

25. He suggested that the authors of the amendments to paragraph 2 should confer with him with a view to working out an agreed text.

26. Mr. YOKOTA said that he could support the retention of paragraph 3 if it was slightly amended to cover the case in which a consulate might wish to establish a branch office in a town other than the seat of the consulate. A request to that effect would certainly require the permission of the State of residence. He suggested that the words "no consulate" should be replaced by the words "no consular office".

27. Mr. ZOUREK, Special Rapporteur, accepted the amendment.

28. Mr. SANDSTRÖM said that he would not object to the retention of paragraph 3 if it was modified to take into account the point mentioned by Mr. Padilla Nervo (498th meeting, paras. 65 and 66).

29. The CHAIRMAN thought that the Commission should deal with some further points before it referred article 2 to the Drafting Committee. He suggested the insertion in paragraph 1 of the phrase "including the opening of consular sections of diplomatic missions" after the words "consular representatives".

30. The new wording suggested by the Special Rapporteur for paragraph 2 (see para. 15 above) completely changed the original and was tantamount to replacing it by paragraph 5 of the commentary. Whereas Mr. Scelle had referred to the case in which the State of residence might wish to change or even abolish the seat of the consular mission, the Special Rapporteur's revised version of paragraph 2 implied that the sending State might change the seat with the consent of the State of residence. Recognition should be given to the special position of the State of residence, which must have a residual right in certain circumstances to alter the arrangements unilaterally; the Commission should recognize but qualify that right. Paragraph 2 might, therefore, be retained, with the addition of some such phrase as:

> "Exceptionally, however, the State of residence may change the consular district in view of special circumstances and after consultation with the sending State."

The Commission should decide whether to accept the principle involved before referring the paragraph to the Drafting Committee.

31. Since the Special Rapporteur had explained the need for the inclusion of paragraph 3, no further divergence persisted, and it could be regarded as accepted, subject to further drafting and the inclusion of Mr. Yokota's amendment.

32. No agreement had, however, yet been reached on the insertion of the most-favoured-nation principle suggested by Mr. Edmonds. The Commission might accept the principle, so long as the receiving State retained a residual right to refuse to agree that a consulate be opened solely on the grounds of the most-favoured-nation principle.

33. Mr. TUNKIN said he could not agree with the Chairman's amendment to paragraph 1. The legal consequences would be to require a specific agreement in each particular case to the formation of a consular section in a diplomatic mission. That would be a complete innovation, out of keeping with generally accepted international practice. As Mr. Bartoš had explained (497th meeting, para. 51), in United Kingdom practice the Foreign Office asked that heads of consular sections of diplomatic missions should hold the consular commission and apply for the exequatur if they desired to be able to appear before courts. But it was not considered as a foundation for a diplomatic mission's ability to exercise consular functions not usually exercised by diplomatic missions. In general, when a member of a diplomatic mission was appointed head of a consular section of a diplomatic mission, the sole requirement was a notification to the ministry of foreign affairs. As the Chairman himself had stated at the previous meeting (498th meeting, para. 4), consular functions performed by a diplomatic mission might be regarded as part of its ordinary diplomatic duties.

34. Mr. BARTOŠ explained that the United Kingdom Government merely recommended but did not require that the exequatur be applied for. A diplomatic mission in the United Kingdom could perform consular functions through the diplomatic channel without the exequatur, but, if it was granted the exequatur, it had direct access to local authorities.

35. The CHAIRMAN thought that the purpose of the intention was to stipulate that some agreement his amendment had been misunderstood by Mr. Tunkin; should be concluded concerning the consular district in cases where a diplomatic mission performed consular functions. The Special Rapporteur still differed from some other members of the Commission. It was generally agreed that in all circumstances consular functions could be exercised only with the agreement of the State of residence, but the Commission had not decided whether a special agreement was required or whether such agreement arose automatically from the agreement to establish diplomatic relations. The Commission had agreed at the previous meeting to defer the consideration of the general question, but, in any case, it would be just as necessary to specify the district covered by a consular section in a diplomatic mission as to specify the consular district.

36. The real difficulty did not lie in the argument that certain consular functions might be performed equally by a consulate and by a consular section in a diplomatic mission, but in the fact that those functions did not include all the typical consular functions.

37. Mr. Bartoš had correctly described the practice in the United Kingdom, but that practice implied that the Government of the State of residence had the right to object to the performance of specific consular functions by the consular section of a diplomatic mission, even though that right might never be exercised. The Special Rapporteur, however, held that that Government had no right to object to the opening of a consular section in a diplomatic mission.

38. Mr. SCELLE agreed with the Chairman that the State of residence could not debar a diplomatic mission from exercising consular functions, but those functions were not technically exercised in the same way as they would be by a consulate. A special agreement would therefore be necessary, especially for contact between the diplomatic mission and local authorities.

39. He criticized the use of the word "permission" (*autorisation*) in paragraph 3. Its use seemed to give the State of residence a discretionary power which was incompatible with the equality of the rights of the sending State and the State of residence. The word "agreement" (*accord*) should therefore be substituted. The sending State had an absolute right, and indeed virtually

a duty, to open a consulate when the circumstances so required, and any State of residence which arbitrarily objected would be in breach of international law. The Commission should have introduced that principle into the draft at the outset, but it would still have a chance to do so when it reverted to the final drafting of article 1.

40. Mr. AGO associated himself with the Chairman's remarks concerning paragraph 1.

41. Article 2 dealt specifically with the consular district. It would seem that if the same functions were to be recognized equally to a consulate and to a consular section in a diplomatic mission, without defining the district of the latter, such district would be coextensive with the district covered by the diplomatic mission; and that would be a manifest absurdity.

42. Mr. AMADO, referring to the same point, said that, if the district of a consular section in a diplomatic mission really covered the whole territory, the provisions concerning the movement of consuls and subsequent changes in the consular district would be meaningless.

43. With reference to Mr. Scelle's criticism of the word "permission," he suggested that the word "consent" should be used instead.

44. Mr. HSU supported the Chairman's amendment to paragraph 1. As consular sections in diplomatic missions were something of an innovation, the point was not covered by most of the textbooks. It had been said that consular functions were part of ordinary diplomatic functions, but it must be recognized that they differed in certain respects. If a consular section was set up within a diplomatic mission, certain arrangements would have to be made, and although an agreement would undoubtedly have to be concluded, it was the arrangements rather than the agreement that constituted the main point.

45. A provision dealing with the consular district was certainly necessary because a great many purely material arrangements had to be made and also because consular relations might be established long before diplomatic relations. It was deplorable that there had been instances of such arrangements being exploited in such a way as to influence the establishment of consulates and that certain politcal considerations had been involved. Those practices should be deplored, since they did nothing to promote good international relations.

46. The suggested provision concerning consular sections of diplomatic missions should not be so rigid as the rules concerning consular districts had been in the past. The inclusion of such provisions might affect the provisions relating to consular districts themselves and show that they too should not be unduly rigid. Consular sections were set up to perform certain specific functions. It would be unwise to make the relevant provisions so rigid that they could be exploited as an instrument of policy.

47. Mr. BARTOŠ said that one substantive question, which should be decided upon by the Commission as a whole and which could not be answered by a mere drafting change, was whether the permission given by the State of residence was a sovereign act or a contractual act.

48. Mr. PAL said he could not support the Chairman's amendment to paragraph 1 of article 2. The proposed amendment would once again take the Commission back to article 1, paragraph 2, on which no decision had yet been reached. Even the meaning of article 1, paragraph 2, as suggested by the Special Rapporteur, that certain consular functions were included in diplomatic functions, would not obviate the difficulty. The question would still remain whether the so-called "consular functions" would constitute part of the diplomatic functions so as to entitle a diplomatic agent to take them up as part of his own functions or whether the diplomatic agent, while taking them up, would himself be functioning as a consular agent. If the former were the case, then such a provision belonged properly to article 3 of the draft on diplomatic intercourse and immunities, not to the draft now before the Commission. The second alternative was not in accordance with international law: if diplomatic agents could exercise certain consular functions, they did so in their capacity as diplomatic agents and because diplomatic relations had been established, and not because consular relations had been established. The so-called consular section, therefore, would only be a diplomatic office, and the establishment of a consular section of a diplomatic mission should be dealt with in article 11 of the draft on diplomatic intercourse and immunities and not in the present draft.

49. He reminded the Commission that no decision had yet been reached on article 1, paragraph 2. The statement that the establishment of diplomatic relations included the establishment of consular relations did not accurately express the international law. The establishment of diplomatic relations would not *ipso jure* establish consular relations, though it might satisfy the requirement of such relations: nor would the establishment of diplomatic relations entitle the diplomatic agents to assume the consular functions as such. The diplomatic agents as such might have functions largely covering the consular field; but such functions, when performed by the diplomatic agents, would be diplomatic functions. Further diplomatic functions would not cover the entire consular field. Accordingly, a decision must first be taken on the consular functions that diplomatic missions could exercise; but even in that case, any reference to consular sections of diplomatic missions would be out of place in the article under consideration and the appropriate place for it would be in the draft on diplomatic intercourse and immunities.

50. Mr. PADILLA NERVO said that one source of confusion was the use of the same adjective to qualify certain functions which might legitimately be exercised by diplomatic missions and by consulates. If in both cases the Commission described the functions as "consular", it would be ignoring the fact that consular functions proper were closely linked with the powers of consular officers to act in certain specified districts.

51. The Special Rapporteur's draft of article 1, paragraph 2, might be interpreted to mean either that there should be mutual agreement between States on the establishment of diplomatic relations and that that agreement implied acceptance of consular relations, or else that the establishment of diplomatic relations normally implied willingness to accept certain consular functions as a normal attribute of diplomatic missions.

52. He considered that some difficulties might be created by referring to consular sections of diplomatic missions in article 2. Normally, an ambassador attributed to certain officials, who were not necessarily consular officers, consular functions such as issuing passports and visas. Moreover, certain conventions, such as the Havana Convention regarding consular

agents of 20 February 1928,[2] provided that the same person could combine diplomatic representation and the consular function, with the consent of the State of residence. By virtue of the exequatur, consular officers exercised their functions in specific districts, but some functions which might be termed consular were regarded as part of the functions of a diplomatic mission and could be exercised without express consent. If it were considered necessary, therefore, to include a reference to those functions, the proper context would be article 1, paragraph 2, and not article 2. He thought that such a provision should state that the establishment of diplomatic relations normally implied agreement to the exercise by diplomatic missions of certain functions which were their own, but which were closely related to consular functions proper. In that way it would be clear that the functions in question could be exercised without specific agreement and without the establishment of a special consular section.

53. Mr. SANDSTRÖM considered that an element of confusion had been introduced by the treatment of consular functions as though they were intrinsically different from diplomatic functions. Actually, nearly all the functions performed by consuls could be performed by diplomatic missions, and the difference was merely one of procedure. A consul could apply to local authorities while a diplomatic agent could not do so, but if it was out of order for the consular section of a diplomatic mission to approach local authorities, it should not be assimilated to a consulate. The establishment of a consulate required the consent of the State of residence because it involved the opening of an office of a foreign State in the territory of the receiving State. Such consent, however, was not essential for the opening of a consular section, unless that section wished to deal with local authorities. Accordingly, the amendment suggested by the Chairman seemed to be unnecessary.

54. Mr. AMADO considered that the terms of article 13 of the Havana Convention of 20 February 1928 were perfectly satisfactory and there was no need for the Commission to discuss the matter at greater length.

55. Mr. AGO thought that the Commission's difficulties arose from the confusion of two somewhat different questions. In saying that the consent of the State of residence was required for the establishment of consular sections of diplomatic missions, members were envisaging the performance of full consular functions by such sections, in which case the consular district had to be specified. In cases, however, where such sections performed narrower consular functions not involving contact with local authorities, there was no need to obtain the specific consent of the State of residence. That case seemed to be covered by the draft on diplomatic intercourse and immunities.

56. The CHAIRMAN, speaking as a member of the Commission, thought that a common point of view was emerging. Nevertheless, he felt that Mr. Sandström had gone too far in saying that all the functions of consulates could be exercised by an embassy and that the question was one of procedure only. Even if that were so, that procedural question was so vital as to affect the functions concerned. It was obvious that diplomatic agents could deal only with the ministry of foreign affairs of the State of residence, while consular officers dealt with many different local authorities and with the courts of that State. In any case, since the question was closely bound up with the nature of specific consular functions, it might be deferred until article 13 had been considered. Moreover, the Commission's decision on article 1, paragraph 2, would affect both the wording and the arrangement of articles 1 and 2.

57. Mr. ALFARO endorsed Mr. Padilla Nervo's view that article 1, paragraph 2, as drafted by the Special Rapporteur was open to two different interpretations. In the first place, it might be interpreted to mean that agreement between two States to establish diplomatic relations presupposed agreement to establish consular relations. On the other hand, it might be held to mean that diplomatic functions could be transformed into consular functions. On the basis of the second interpretation the Chairman's amendment to article 2, paragraph 1, would imply that the same consent on the part of the State of residence would be required for the establishment of a consular section of a diplomatic mission as was required for the establishment of a consulate.

58. Mr. ZOUREK, Special Rapporteur, thought that Mr. Padilla Nervo had quite rightly raised the point of two possible interpretations. He was prepared to dissociate the two concepts contained in article 1 and to devote article 1 to the establishment of consular relations and article 2 to the opening of consulates, irrespective of the time and the circumstances, either before or after the establishment of consular relations or before or after the establishment of diplomatic relations. That procedure should eliminate any ambiguity.

59. Turning to the points raised by the Chairman, he agreed with the members who did not consider it opportune to refer to consular sections of diplomatic missions. Like Mr. Sandström and Mr. Tunkin, he would emphasize that under existing practice diplomatic missions could exercise the functions of consular officers and that the difference between the two types of function was essentially one of procedure. Of course, differences in the scope of those functions could be caused by *de facto* situations, but there were no legal obstacles to the performance of consular functions by diplomatic agents. That statement, however, should be qualified. In the absence of a convention, diplomatic missions could only exercise normal consular functions without the permission of the State of residence. In other, more important cases, the sending State could not act without permission.

60. Some members had rightly pointed out that it was difficult to speak of consular districts in connexion with diplomatic missions, since only a consulate had a "consular district". That matter, moreover, was linked with article 1, paragraph 2, which the Commission had deferred, and might be set aside for the time being. It was obvious that opinions on the question were drawing closer together. Thus, all members seemed now to agree that diplomatic missions might exercise consular functions, but that the permission of the State of residence was required to enable the diplomatic mission to enter into direct contact with local authorities.

61. With regard to the Chairman's suggestion to extend the scope of paragraph 2, and to take into account certain practical cases in which changes might take place without consent, he would point out that

[2] See *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No.: 58.V.3), p. 422 (especially article 13).

agreements on consular districts might, like any other international agreement, be modified for reasons other than mutual consent. The Chairman's point might be met by providing simply that a consular district could not be changed by the sending State without the consent of the State of residence. Such a wording would not affect the powers of the State of residence, but it would not be possible to infer from it that the State of residence was able to oblige the sending State to introduce changes into a consular district. He preferred that formula to the alternative of adding the Chairman's suggested reference to exceptional cases.

62. Mr. Edmonds and the Chairman had referred to the most-favoured-nation clause in connexion with article 2. That clause played a greater part in securing parity of consular privileges and immunities on the one hand and consular functions on the other hand, and it was above all for that reason that it was included in many treaties. If the majority of the Commission wished to include such a provision, it should cover all cases in which the most-favoured-nation clause was applicable, and not merely the right to establish consultates; it should be inserted *in extenso* in the appropriate place.

63. Finally, with regard to the question of premises, he said he would be prepared to draft a provision if the Commission wished him to do so. However, that would be a provision *de lege ferenda* and not a provision codifying existing law. Moreover, he was not sure whether Governments would be prepared to accept such a provision, which would impose obligations considerably exceeding those of the corresponding provisions of the draft on diplomatic intercourse and immunities.

64. Mr. BARTOŠ pointed out that the Special Rapporteur had referred to the most-favoured-nation clause in its general sense. The case of the opening of consulates was a special one and special most-favoured-nation clauses in that respect were often included in consular treaties.

65. Mr. LIANG, Secretary to the Commission, observed that the important question of consular functions had been commented on in the Special Rapporteur's introduction to his report (A/CN.4/108, part I). In paragraph 67, the Special Rapporteur pointed out that consuls were State agents whose competence was limited *ratione materiae*, and very often *ratione loci* as well. Furthermore, it was stated in paragraph 69 that the appointment of consuls was covered not by international but by municipal law. He thought that the question of the performance of consular functions by diplomatic missions went much further than that of whether those missions could or could not deal with local authorities; the functions themselves should be studied in relation to their performance by the two kinds of agents.

66. The essential point was that consuls were allowed by the State of residence to execute acts which, in the ordinary way, would amount to a derogation from the territorial sovereignty of that State. The enumeration of consular functions in article 13 showed that consuls were authorized to carry out certain sovereign acts of the sending State, particularly in respect of the nationals of that State who were engaged in trade. Those functions were not exercised *ratione materiae* by diplomatic agents, but by consular officers, either under consular conventions or by virtue of the regulations of the State of residence. They could not possibly be exercised by diplomatic agents unless the latter assumed consular functions, with the consent of the State of residence. As examples of acts which were not, properly speaking, diplomatic functions, he cited those referred to in article 13, paragraphs 9, 10 and 11. Certain functions, such as the furthering of commercial and economic relations and issuing passports and visas, were not such acts. It could not be contended that all diplomatic and consular functions were identical. Accordingly, when diplomatic agents performed functions which were exclusively consular, they assumed the status of consular officers and had to obtain the consent of the State of residence to do so.

The meeting rose at 1.5 p.m.

500th MEETING

Monday, 25 May 1959, at 3.5 p.m.

Chairman: Sir Gerald FITZMAURICE

Date and place of the twelfth session

[Agenda item 6]

1. Mr. LIANG, Secretary to the Commission, observed that, since the General Assembly had decided the place of the Commission's sessions, the only question to be settled was that of dates. According to General Assembly resolution 694 (VII) of 20 December 1952, the Commission's session should not overlap with the Economic and Social Council's summer session. The Economic and Social Council would begin its session on 5 July; accordingly, the Commission's twelfth session could be held from 25 April to 1 July.

2. The CHAIRMAN suggested that the Commission should approve the dates mentioned by the Secretary.

It was so agreed.

Representation of the Commission at the Fourteenth session of the General Assembly

3. Mr. LIANG, Secretary to the Commission, said it was the Commission's practice to ask its Chairman to represent it at the sessions of the General Assembly.

4. Mr. ALFARO, Second Vice-Chairman, suggested that the Chairman should be requested to represent the Commission at the fourteenth session of the General Assembly.

It was so agreed.

5. Mr. GARCIA AMADOR suggested that the Chairman might informally approach the Secretariat and, perhaps, the delegations with a view to scheduling the Commission's sessions for a more convenient time of the year.

6. The CHAIRMAN said he would act on that suggestion.

General Assembly resolution 1272 (XIII) on control and limitation of documentation

[Agenda item 8]

7. Mr. LIANG, Secretary to the Commission, observed that item 8 arose out of the General Assembly's annual review of United Nations documentation.