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Summary record of the 508th meeting

Topic:
Consular intercourse and immunities

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tions in, say, another post in the same country. Accordingly, the paragraph did not describe the existing practice in the matter and could not be accepted.

48. In reply to members who had suggested that honorary consuls should be mentioned in some way in article 3, he observed that the draft had been so constructed as to restrict chapters I and II to career consuls and chapter III to honorary consuls and similar officers. Moreover, article 35 referred back to article 3. He agreed with Mr. François that it would be better to concentrate all the provisions relating to honorary consuls in chapter III. The commentary to article 3 might say that the article related to honorary as well as to career consuls.

49. The generic term to be used to describe consular officers would be discussed in connexion with the article on definitions. However, he wished to clarify the situation that would arise if, in accordance with the suggestion of some members, that generic term were used instead of "heads of consular offices" in the introductory phrase of article 3. The draft could not aspire to classifying all consular officers; it should leave States free to organize their consular hierarchy as they wished.

50. Turning to paragraph 2 of his draft, he said he could accept Mr. Sandström's amendments. In reply to Mr. Matine-Daftary's question (see para. 21 above), he said the date mentioned was the easiest to establish, since it was mentioned in official gazettes and it was the date when a consular officer usually began to exercise his functions. The date of the communication of the consular commission was much more difficult to establish, as the Commission would find when it came to consider article 6. That date could be used only in the very unlikely case where the exequatur was granted in the same place and on the same date to two consular officers. With regard to the point raised by the Chairman (506th meeting, para. 14) concerning the exequatur, he thought that the difficulty might be obviated either by a reference to the article on definitions or, if Mr. Sandström's suggestion to make paragraph 2 a separate article were followed, by inserting that new article after article 11. In any case, the problem could be solved by the Drafting Committee. Finally, some members had suggested that the last sentence of paragraph 2 should be deleted. He had no objection to that suggestion in principle; nevertheless, he still believed, for the reasons he had already given, that the sentence had some value.

51. The CHAIRMAN suggested that, in view of the complexity of the discussion, the Special Rapporteur should be asked to redraft article 3 on the basis of his summing up.

It was so agreed.

The meeting rose at 1 p.m.

508th MEETING

Thursday, 4 June 1959, at 9.55 a.m.

Chairman: Sir Gerald FITZMAURICE

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

[Agenda item 2]

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

1. The CHAIRMAN invited the Commission to consider article 4 of the draft on consular intercourse and immunities, pending the preparation of the Special Rapporteur's redraft of article 3.

ARTICLE 4

2. Mr. ZOUREK, Special Rapporteur, introducing article 4, said that it stated a fundamental and generally recognized principle. He referred to the commentary on the article. He stressed that the statement of principle in the article constituted an introduction to subsequent articles concerning the procedure and form of the recognition of consuls, and pointed out that such a provision was also necessary in order to emphasize the fact that the draft before the Commission referred solely to those consular officers whose status was likewise governed by international law.

3. Mr. FRANÇOIS said that, since article 3 would be limited to heads of consular offices, the words "to a post in one of the four classes listed in article 3" should be omitted in article 4, since certain consular officers who were not heads of posts might also come within the provisions of article 4.

4. Mr. ZOUREK, Special Rapporteur, thought that the question raised by Mr. François related mainly to the drafting of article 4. The Commission should above all decide whether it agreed on the principles stated in that article.

5. The CHAIRMAN thought that if in article 3 the enumeration of the four classes were omitted, article 4 would become almost pointless. In effect, it would merely reiterate in different language the principle laid down earlier in the draft that the receiving State's consent was necessary for the admission of consuls.

6. Mr. SANDSTRÖM said that Mr. François's point was confirmed by paragraph 10 of the commentary on article 7. He thought that article 4 should be drafted in the form of a rule, not in the form of a definition.

7. Mr. EDMONDS expressed some doubt concerning article 4, in the light of the wording that seemed to have been agreed upon for article 3. He agreed with Mr. Sandström that the principle should be stated in terms of functions, rather than in terms of title. He preferred the corresponding provision of the Harvard Law School draft (article 3)[1] that a person became a consul through his appointment by a sending State to exercise consular functions and his admission to the exercise of such functions by the receiving State.

8. Mr. LIANG, Secretary to the Commission, said that the Commission had not as yet decided to replace the term "consular representative" by "consular officer". In the context of article 4, the term "consular officer" would be somewhat inappropriate, for it meant an official under domestic law. For example, in the legislation of Ireland the term "consular representative" was used. In the particular context, the latter term would be more suitable.

9. Turning to the point made by Mr. François, he considered that some distinction should be made be-

[1] Harvard Law School, *Research in International Law*, II. *The Legal Position and Functions of Consuls* (Cambridge, Mass., 1932), p. 231.

tween the recognition of heads of office and that of consular staff. The Special Rapporteur apparently wished to limit article 4 to the acquisition of consular status by heads of office. In that case, too, he was not happy about the term "heads of consular offices", which also carried a connotation of municipal law. The term "heads of consular districts" might be more suitable, since it had more significance in international law.

10. Apart from those points, he did not think that the Commission should have much trouble with article 4 in its present form. Difficulties might arise if the article were redrafted to cover consular staff who were not heads of offices or districts. Moreover, the draft on diplomatic intercourse and immunities separated the provisions on the accreditation of heads of mission from those concerning the staff of missions.

11. Mr. MATINE-DAFTARY drew attention to the words "an official appointed by a State". In some countries, the word "official" meant specifically a government servant. Actually, however, in some cases consuls were not government officials. In particular, honorary consuls were not "officers appointed or paid by the State" (see A/CN.4/108, part II, article 35). He therefore suggested that in article 4 the word "person" might be used instead of "official".

12. Mr. EL-KHOURI said that Mr. Matine-Daftary's statement further confirmed his view that the provisions on honorary consuls should be quite separate from the articles on career consuls.

13. Mr. YOKOTA agreed in principle with the general purport of the article. The only difficulty lay in the drafting. It should be remembered that article 4 and the subsequent articles dealt in principle with heads of consular offices. By analogy with the draft on diplomatic intercourse and immunities, in which the provisions relating to heads of mission and those relating to staff of missions had been separated, it might be advisable to make a similar distinction in the draft now before the Commission. He therefore suggested that the words "A 'consular representative' " at the beginning of article 4 should be replaced by "The head of a consular office".

14. Mr. ERIM thought that pending the redrafting of article 3 the consideration of article 4 should be postponed. If article 3 were amended, article 4 would have to be adjusted accordingly. Personally, for example, he hoped that article 3 would refer to all persons exercising consular functions, including honorary consuls and consular agents; however, article 4 in its present form excluded honorary consuls.

15. Mr. PADILLA NERVO agreed that it would be difficult to discuss article 4 so long as the terminology was not settled. With reference to the title of the article, he said that staff members of consular offices who were not heads of office had a consular status of their own; that point should be taken into account. Furthermore, it was not entirely clear whether the article was meant to relate to the commencement of the functions of consular officers or to the legal status of every consular official.

16. Mr. ZOUREK, Special Rapporteur, agreed that it might be difficult to discuss articles 4 and 5 so long as the terminology was not settled. He therefore suggested that the remainder of the discussion on articles 4 and 5 should be postponed until the Commission had dealt with the text of the article on definitions and had come to a decision regarding article 3.

17. Mr. SCELLE likewise thought that debate on articles 4 and 5 should be postponed. Besides, the acquisition of consular status should not, he thought, form the subject of a special article. The sending State appointed a consular officer, to whom an exequatur was subsequently granted by the receiving State; however, the official did not become a consul until he received the exequatur. An official might be appointed without the receiving State ever knowing of the appointment. Persons who were appointed to the consular service but never sent abroad might have the title of consular officer in the national hierarchy. The status of the officials referred to in article 4 was regulated by the national legislation of the sending State, and in his opinion article 4 was unnecessary if it did not contain a reference to the granting of the exequatur, which, in any case, was dealt with in article 7.

18. Mr. BARTOŠ, supported by Mr. Sandström, could not agree with Mr. Scelle that article 4 was unnecessary. Within the structure of the draft, it seemed advisable to state the general principle of the recognition of consuls in article 4 and the principle of the competence of the sending State to appoint consuls in article 5.

19. The CHAIRMAN suggested that the Commission should postpone its discussion of articles 4 and 5 until the texts of article 3 and the article on definitions had been discussed.

It was so agreed.

ARTICLE 6

20. Mr. ZOUREK, Special Rapporteur, introduced article 6. Paragraph 1, which described the consular commission, seemed to be an indispensable provision, since the commission in consular practice occupied a position similar to that of credentials in diplomatic practice. He drew attention to the commentary on the article, which described some of the forms used by certain States in wording such commissions.

21. Paragraphs 2 and 3 endeavoured to codify the procedure for communicating the consular commission to the authorities of the State of residence. The legislation of many countries, and a large number of international conventions, notably the Havana Convention of 20 February 1928 regarding consular agents (article 4),[2] provided that that should be done through the diplomatic channel. Paragraph 3 dealt with the specific case where the sending State had no diplomatic mission in the State of residence. The text reflected general practice and hence should be acceptable.

22. One question that would have to be settled was whether the draft should also refer specifically to the nomenclature used for the letters of appointment issued to vice-consuls and consular agents, or whether a single document should be referred to throughout the draft. He believed that, in view of the fact that article 3 laid down and standardized the nomenclature to be used for the various categories of heads of posts, it would be best to use only the word "commission" in article 6 to describe the official documents of heads of consular posts of all categories and to refer in the commentary to the various terms used in national legislation, particularly in connexion with vice-consuls and consular

[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), pp. 422 *et seq.*

agents. However, if the majority of the Commission wished to include other terms in the article itself, the addition could be made.

23. He drew special attention to corresponding provisions of the Havana Convention of 1928 regarding consular agents, which might be used as a guide in the matter.

24. Mr. GARCIA AMADOR thought that the last phrase of paragraph 2 was somewhat confusing, in the light of the text that the Commission had accepted for article 1, paragraph 1 (see 497th meeting, para. 6), where the agreement of the sending State and the receiving State was required for the establishment of consular relations. On the other hand, article 7, concerning the exequatur, provided that the assent of the Government of the receiving State must be given before heads of consular offices could take up their duties. The last phrase of article 6, paragraph 2, might apply to either of these two cases; he thought it should be either deleted or replaced by a clearer provision.

25. Mr. BARTOŠ approved in principle the Special Rapporteur's attempt in article 6 to formulate a rule that would both generalize existing practice and promote uniformity. He wished to draw attention to some desirable practices which might be mentioned in the commentary.

26. The practice of the United States of America and some other States, as reflected in consular commissions addressed to the Yugoslav authorities, was to indicate in the commission as the consular district the port or town that was to be the seat of the consulate and the "surrounding region". Details concerning the district, except the future place of residence of the consular officer designated by the consular commission, were then worked out jointly between the Yugoslav authorities and the embassy of the sending State concerned.

27. A problem arose in connexion with the *brevet* of a vice-consul, or *licence* of a consular agent, if the vice-consul or consular agent were appointed by a consul or a consul-general. The *brevet* or *licence* was submitted not to the Ministry of Foreign Affairs but to the authorities with whom the appointed officer normally communicated. Such documents should probably not be treated as on a par with a consular commission, which was usually signed by the head of the sending State.

28. Referring to paragraph 3, he pointed out that in cases where the two States concerned had no diplomatic relations with each other, the means used for transmitting the consular commission was usually the existing channel for diplomatic communications. For example, the commissions of consuls of the Federal Republic of Germany were transmitted to Yugoslavia through the French Embassy at Belgrade and those of Yugoslav consuls to the Federal Republic of Germany through the Swedish diplomatic mission at Bonn. In the case of the British Dominions with which Yugoslavia had no diplomatic relations, consular commissions were transmitted through the High Commission of the Dominion concerned in London and inversely through the British Embassy at Belgrade.

29. Mr. VERDROSS said that article 6 was acceptable to him in principle. He suggested that in paragraph 1 the words "in the form of a commission" should be replaced by the words "in the form of an official document", in view of the many different titles given to the letters patent of consular officers. While he agreed that a consular commission did not always contain the elements specified in paragraph 1, he considered that they should be retained in the text in the interests of the progressive development of international law.

30. On the other hand, paragraph 3 was too rigid, since in the absence of diplomatic relations between the two States concerned a consular commission could always be transmitted through a third Power. He added that some different expression should replace "consular mission", which was a term that did not correspond to existing international practice.

31. Mr. ALFARO pointed out, with reference to paragraph 1, that it was limited to the case of heads of consular offices. He felt that it should be amended to cover also the case of a consul or vice-consul having a consular commission who was to serve in a consulate-general as a deputy or assistant. He asked for an explanation of the words "consular category and class", which were synonymous. Finally, he said it might be difficult for a Government to say definitely, at the time of issuing a consular commission, where a consular officer would reside.

32. Mr. EDMONDS considered article 6 unduly complex and burdened with details with which international law should not be concerned. It would be enough if article 6 simply provided that there should be official accreditation. It was immaterial how a consular officer was accredited so long as he was accepted by the State of residence. Moreover, he saw no reason why paragraph 2 should require the consular commission to be communicated through the diplomatic channel. Why should not a consular officer be able to present his credentials personally?

33. Mr. SCELLE did not think that the term "full powers", in paragraph 1, was quite correct in connexion with consular officers. It was borrowed from diplomatic usage, but diplomats were representatives of their States and had general freedom of action. Consuls, on the other hand, were functionaries with the limited powers specified in consular conventions. It seemed to him that the word "powers" would be sufficient.

34. Mr. TUNKIN agreed with the previous speakers, especially Mr. Edmonds, who had expressed the view that article 6 should be more flexible. The article should simply provide, first, that there should be an official document testifying to the consul's appointment, and secondly, that the document should be communicated to the competent authorities of the State of residence. The form of the official document and the channel of communication were not important.

35. There had been in recent years some cases in USSR practice in which neither a consular commission nor an exequatur had been granted. For example, in regard to the Soviet consul-general at Istanbul the practice was that the Soviet Embassy at Ankara simply notified the Turkish Ministry of Foreign Affairs that a certain person had been appointed as USSR consul-general at Istanbul, with the request that the necessary instructions should be given to local authorities to recognize him in that capacity. Inversely, the same procedure had been followed in the case of a Turkish consul stationed at Batum.

36. Generally, there was a tendency in practice to simplify certain formalities whose origins went back to the days of inadequate communications.

37. Mr. YOKOTA agreed with Mr. Edmonds and Mr. Tunkin that article 6, and in particular paragraph 1,

was too rigid. He pointed out that some consular commissions addressed to Japan indicated the seat of the consulate but not the consular district and that such commissions were accepted by Japan.

38. He asked the Special Rapporteur whether the words "the representative's future place of residence" did not refer to the seat of the consulate.

39. Finally, he said the words "shall be furnished", in paragraph 1, might imply that a consular commission which did not contain all of the elements specified might not be valid.

40. Mr. SANDSTRÖM said that the points made by Mr. Bartoš might be taken into account by omitting paragraph 3 and amending the beginning of paragraph 2 to read "The State appointing . . . shall communicate the commission through the diplomatic or other appropriate channel . . .".

41. Mr. PADILLA NERVO pointed out that article 6 consisted of two elements: a definition of the consular commission, and a substantive provision to the effect that the commission should be communicated to the State of residence. It might be advisable to separate the two elements by placing the first in the article on definitions.

42. In connexion with paragraph 3 he asked for clarification of the reference to the absence of diplomatic relations. Did paragraph 3 refer to the case of non-recognition or to the absence of diplomatic relations between States which recognized each other? The question was important inasmuch as article 12 provided that the granting of an exequatur or a request for the issue of an exequatur implied recognition of the State or Government concerned.

43. Mr. LIANG, Secretary to the Commission, said the view had been expressed that the rather diversified practice in the matter of consular commissions might indicate that a simple notification would suffice. In his opinion, that would not be as desirable as it might seem. The exequatur was a formal document and there was consequently a case for recommending that the consular officer's "powers", as Mr. Scelle had suggested (see para. 33 above), should be communicated in the form of a formal document on the basis of which the exequatur was to be issued.

44. He noted that in paragraph 5 of the commentary to article 6 the Special Rapporteur said that "in addition to these regular documents" States accepted "irregular" documents—presumably "informal" documents were meant—such as a notification concerning the appointment of the consular officer. In one of the conventions cited in that connexion by the Special Rapporteur, the Consular Convention of 14 March 1952 between the United Kingdom and Sweden, article 4, paragraph (2), provided that the exequatur or other authorization was to be granted "on presentation of the consular officer's commission or other notification of appointment".[3] Thus, even in that Convention the wording indicated a preference for the consular commission.

45. Mr. ZOUREK, Special Rapporteur, observed that there seemed to be general agreement on the substance of article 6. In reply to Mr. Padilla Nervo's general remark, he said he still thought it preferable not to transpose part of article 6 to the article on definitions, because the commission was the essential document where the acquisition of consular status was concerned; besides, article 6 was closely linked with the succeeding articles.

46. Replying to the criticism that paragraph 1 was too rigid, he said that his aim had been to mention the essential particulars to be supplied to the State of residence at the time when a consul was appointed. However, as there were occasions when it might be difficult to specify the consul's future place of residence, in other words the seat of the consulate, he was prepared to qualify the last phrase of paragraph 1 by some such phrase as "if possible".

47. He had no objection in principle to the deletion of the word "full" in paragraph 1, as suggested by Mr. Scelle, but he did not see in what way the expression "full powers" was open to criticism.

48. It had been rightly pointed out, and indeed the practice was mentioned in the commentary to article 6, that in some cases Governments merely notified the State of residence of a consul's appointment, and he was willing to take the practice into account, either by substituting a general term for the word "commission" or by expressly stating that the commission could be replaced by an intimation from the sending State to the State of residence, provided that such a procedure was acceptable to the latter.

49. It had furthermore been argued that paragraph 2 should be drafted in more flexible terms. Although the text as it stood reflected practice, he could accept Mr. Sandström's suggestion, which would cover all contingencies.

50. Mr. García Amador had expressed doubt about the last phrase in paragraph 2. He did not think that the passage in question could be construed to mean that some additional form of consent was required other than that mentioned in the succeeding articles to which, if necessary, direct reference could be made. In any case, it was a question of drafting, which should be referred to the Drafting Committee.

51. In reply to Mr. Padilla Nervo's question concerning the opening phrase in paragraph 3, he explained that the passage was meant to cover the cases where diplomatic relations had not yet been established as well as those where they had been temporarily broken off. Though it might not be a general practice to transmit the commission through the consular mission, such a possibility was envisaged in some legislations and he thought it was a reasonable method in the circumstances contemplated in paragraph 3, since it would thereby be made clear that, except in that particular case, no other channel could be used.

52. Paragraph 3 could be deleted as suggested by Mr. Sandström provided that the words "or any other" were inserted in paragraph 2 after the word "diplomatic". Nevertheless he would prefer to retain paragraph 3.

53. The CHAIRMAN said that while he agreed on the need to avoid excessive rigidity some element of formality was desirable, particularly in the case of consular officers appointed to posts remote from the capital, because despite the ease of modern communications it might take a long while for the notification to reach the local authorities. In those cases the consular officer should possess a formal document.

[3] *Ibid.*, p. 469.

54. He suggested that article 6 might be referred to the Drafting Committee for examination in the light of the discussion.

It was so agreed.

ARTICLE 7

55. Mr. ZOUREK, Special Rapporteur, introducing article 7, said that its object was to codify existing practice. The exequatur was the document whereby the State of residence granted formal recognition to a person sent to that State as a consul. The form of the exequatur was regulated entirely by the legislation of the State of residence. The forms in which it could be granted were described in the commentary. He emphasized the fact that, in the article, the term "exequatur" was used to describe any kind of formal permission to exercise consular functions in the territory of the State of residence granted by that State to a foreign consul. Since provisional recognition could be accorded to the consul pending the delivery in due form of the exequatur and since consular functions could also be exercised *ad interim*, the article opened with a reference to articles 9 and 11, which dealt, respectively, with provisional recognition and *ad interim* functions. He drew attention to paragraph 2 of the commentary on article 10 adding that the granting of an exequatur was usually published in official gazettes.

56. In conclusion, he said that the expression "consular representatives" should be replaced by the word "consuls".

57. Mr. VERDROSS said that article 7 seemed to be at variance with the Special Rapporteur's fundamental thesis that the establishment of diplomatic relations implied the establishment of consular relations. If a diplomatic mission could include a consular department, the latter could clearly carry out such normal functions as the issuing of visas, which were governed by the domestic legislation of the sending State, without an exequatur. The exequatur was only required for specifically consular activities, such as the protection of nationals by appearing before the local authorities, or the exercise of some administrative and judicial functions that were governed by the legislation of the State of residence.

58. Mr. SANDSTRÖM said he had no objection to the substance of article 7, but considered that it should take into account the fact that an exequatur could take a different form, as in the case of the provision contained in the Consular Convention of 1952 between the United Kingdom and Sweden.

59. Commenting on the form of the article, he considered that it would be more consistent with the Special Rapporteur's intention, and clearer, to give pride of place to the second sentence, which should be followed—in a second paragraph—by the content of article 10. The remainder of article 7 could then form a third paragraph or a separate article.

60. Mr. ZOUREK, Special Rapporteur, replying to Mr. Verdross, said that article 7 was not open to misconstruction because it clearly related solely to heads of consular offices, and an exequatur was obviously not required in cases where consular functions were performed by a section of a diplomatic mission. Even where, in exceptional cases, the sending State asked for exequaturs for one or more of its officials in charge of consular matters within a diplomatic mission, its object in so doing was to ensure that its consular representatives would have the right to enter into direct relations with the local authorities or to exercise activities which would necessarily involve dealings with the local authorities.

61. Mr. AMADO said that the query had not been fully answered. For example, it was Brazil's practice to apply for an exequatur when an official in a diplomatic mission exercised consular functions which were entirely different from normal diplomatic work.

62. Mr. ZOUREK, Special Rapporteur, thought that, if discussion of that point was still considered necessary, it should take place in connexion with article 1, paragraph 2, which had been deferred. He again emphasized the fact that diplomatic missions required no permission to exercise normal consular functions, unless they wished to make direct contact with the local authorities of the State to which they were accredited. So far as it was known, international usage did not require the head of the consular section of a diplomatic mission to obtain an exequatur before entering upon his duties; he continued to be a member of the diplomatic mission and worked under the orders and responsibility of the head of the mission. The grant of an exequatur to such an official, in the very few cases in which it had been accorded or requested, meant that the person concerned was authorized to enter into direct relations with the local authorities in the manner determined by the State of residence; but it could in no way be held to be a pre-condition for the exercise of consular functions by a diplomatic mission. The distinction was an important one, and it would be valuable to obtain information on present practice from Governments.

63. Mr. MATINE-DAFTARY said that the Special Rapporteur had not answered the question raised by Mr. Verdross whether, for the purpose of functions governed solely by the domestic legislation of the sending State, such as the issue of visas, the officer concerned, if serving in the diplomatic mission, needed an exequatur.

The meeting rose at 1 p.m.

509th MEETING

Friday, 5 June 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*)

1. The CHAIRMAN suggested that before resuming discussion on article 7, the Commission might wish to give some thought to the general question of the relationship between the draft on consular intercourse and immunities and the draft on diplomatic intercourse and immunities adopted at the tenth session. The former text had been prepared by the Special Rapporteur before the adoption of the latter, and certain differences of presentation were largely fortuitous.

2. He thought it would be desirable to harmonize the texts where the subject matter was substantially similar and to explain in the commentary in what respects and for what reasons seemingly comparable pro-