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Summary record of the 515th meeting

Topic:
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515th MEETING

Monday, 15 June 1959, at 3.5 p.m.

Chairman: Sir Gerald FITZMAURICE

Communication from the Asian-African Legal Consultative Committee

1. Mr. LIANG, Secretary to the Commission, said he had received a letter from the Secretary of the Asian-African Legal Consultative Committee, enclosing a copy of the summary report of the Committee's second session, held at Cairo in October 1958. The letter stated that the Committee's recommendations on diplomatic intercourse and immunities corresponded to a large extent to the articles that the Commission had drafted at its tenth session (A/3859, para. 53). The Secretary of the Committee also asked whether the Commission wished to send an observer to the third session, to be held at Colombo from 5 to 19 November 1959.

2. Mr. Liang suggested that he should inform the Secretary of the Committee that the question of diplomatic intercourse and immunities would be dealt with by the General Assembly at its fourteenth session, and that the Committee's report might be useful to members of the Sixth Committee of the Assembly. With regard to the suggestion that an observer might be sent to the Colombo session, he said it was too late to make suitable arrangements for sending an observer to that session. The Secretary of the Asian-African Legal Consultative Committee might be asked whether an invitation to a subsequent session could not be sent at an earlier date, in order that the necessary arrangements might be made.

3. The CHAIRMAN suggested that the Commission should take note of the Secretary's statement.

It was so agreed.

Planning of future work of the Commission

[Agenda item 7]

4. The CHAIRMAN thought there should be little controversy about the Commission's programme at its twelfth session. Its first task was obviously to complete the draft on consular intercourse and immunities, in order that the draft might be sent to Governments for comments and approved in final form at the thirteenth session. He estimated that the work would require approximately five weeks to complete. With regard to the law of treaties, he said the Commission had nearly completed the section on the conclusion of treaties, and it would probably be possible to complete that section in two or three weeks. Finally, two or three weeks should be devoted to the subject of State responsibility, for it would be advisable at least to begin a study of that difficult subject. When the draft on consular intercourse and immunities was completed, more time would be devoted to State responsibility.

5. Mr. SANDSTRÖM said that his draft on *ad hoc* diplomacy (see A/3859, para. 51) should be completed early in 1960 and might be considered at the next session, so that the final section of the draft on diplomatic intercourse and immunities might be submitted to Governments together with the draft on consular intercourse and immunities.

6. Mr. FRANÇOIS expressed some anxiety with regard to the method of the Commission's work, which had changed in recent years. At its earlier sessions, not every member of the Commission had stated his opinion on every point at length; after a few members had spoken on the particular subject, the discussion was closed and a vote taken. That practice had been abandoned, however, and now all members made statements on each point. Repetition was therefore inevitable. Votes were no longer taken, as the discussion had already disclosed the opinion of the majority. The procedure had some advantages in that interesting statements were made, but the Commission's work was being excessively delayed by that method. After all, the Commission was not a legal debating society, but a body whose task was to codify international law. He suggested that the Commission should consider returning to its original system.

7. Mr. TUNKIN agreed with Mr. François to a certain degree; the Commission's debates could be shortened when it was obvious that arguments became repetitive. Nevertheless, he believed that the method that the Commission was now using was satisfactory, since it was wise to discuss each point as fully as possible. Very often such discussion led to mutual understanding, which was much more important than the saving of a few hours.

8. Mr. ZOUREK agreed with the programme outlined by the Chairman, but thought that he was perhaps over-optimistic in his estimates of the time required. In the space of three weeks at the current session the Commission had dealt with eleven articles of the draft on consular intercourse and immunities; if it proceeded at that rate, the subject would take up most of the next session. He shared Mr. François's views concerning the method of work and believed that an effort should be made to limit debate on purely procedural matters. To speed up its work the Commission might well carry out the decision taken at the tenth session regarding the organization of its work (A/3859, para. 64).

9. The CHAIRMAN pointed out that the method advocated by Mr. Zourek would mean transferring a good deal of the Commission's work to a drafting committee. That could not be done without cancelling two or three of the Commission's plenary meetings each week.

10. Mr. LIANG, Secretary to the Commission, thought it was clearly important for the Commission to complete certain sections of its work on the law of treaties and State responsibility, both of the items having been on the agenda for a long time. It would be wise, however, not to regard those vast subjects as an integrated whole, but to divide them into sections, as the Institut de droit international had done. He had raised the matter at the 369th meeting of the Commission in 1956 and, on that occasion, had given as an illustration the text of the three articles prepared by the Institut on the subject of the interpretation of treaties. The Institut had thus dealt with only one section of the topic of the law of treaties, a topic which in its entirety might well be as vast in its scope as that of the responsibility of States. He reiterated the point now, and cited the same illustration, not merely because of its aptness to the current discussion, but also to correct the very erroneous record of his statement in 1956 which appeared in the summary record of that meeting.[1]

[1] *Yearbook of the International Law Commission, 1956*, Vol. I (United Nations publication, Sales No.: 1956.V.3, Vol. I), 369th meeting, para. 65.

11. He did not think that the Commission's method of work had changed as sharply as Mr. François seemed to think. The prolongation of debate might well be attributed to the increase in the membership of the Commission. Moreover, it was debatable whether the completion of a certain number of articles in the form of bare texts was more useful than the enunciation of considered views. While it was true that the success of the United Nations Conference on the Law of the Sea, held in 1958, had been due to the careful preparation of the articles concerned, the records of the Commission's debates were equally of much interest and usefulness to students and lawyers as the adoption of articles.

12. Mr. Zourek had again raised the question of setting up a sub-committee or drafting committee in order to expedite the work. It would be recalled that that system had not been a success in the treatment of the topic of arbitral procedure at the ninth session (see A/3623, paras. 18 and 19). One-half of the members of the Commission had participated in the committee, and the work of that body had given rise to such long discussions in the plenary Commission that the work had been retarded rather than advanced. Moreover, it was difficult to select ten members of the Commission representing different legal systems as envisaged in Mr. Zourek's plan (A/3859, para. 59 and footnote 33), and to distinguish questions of principle from questions of detail to be referred to the sub-committee.

13. Mr. AGO said that, whenever the question of the Commission's method of work was raised, there was a tendency to urge the adoption of as many drafts as possible. According to that thesis, the General Assembly expected the Commission to produce drafts at an ever more rapid rate. In his opinion, that was incompatible with the long-term work of codification. If the Commission took a year or two longer over the codification of a particular topic than had been estimated, no great danger could arise; the danger was that the quality of the codification might be impaired through haste. Codification on a sound basis would contribute to the maintenance of international peace and security, but scamped work would lead to a retrogression of international law itself. He was not in favour of establishing subsidiary groups to deal with the Commission's work.

14. He could not agree with Mr. François that the Commission should revert to the method of hearing a few speakers and then proceeding to a vote. It could be left to each member to endeavour to avoid repetitions; but it should be borne in mind that the Commission was not always engaged on the drafting of conventions. The Secretary had rightly pointed out that the Commission's debates were sometimes more interesting—not only to experts and students, but even to judges—than the texts adopted. The system of voting was useful in connexion with conventions of a political character, but could not be satisfactory in dealing with scientific matters.

15. Mr. VERDROSS considered that the Commission's real task was to promote the world-wide application of the rules of international law evolved in western Europe over the centuries. In view of the magnitude of that task, some change of method seemed to be necessary. There could be no doubt that a general debate on every subject was indispensable, but when that debate had been closed, further action should take the form of concrete proposals.

16. Mr. ZOUREK pointed out that it was the Commission's invariable practice to appoint a drafting committee. Moreover, he questioned whether any great difficulty had arisen from the fact that such committees dealt with substantive matters. He quite agreed with the view that the Commission should not proceed with undue haste in its work of codification, but thought that arrangements could and should be made to speed up the work without damaging its quality.

17. Mr. GARCIA AMADOR thought that the Commission should make it clear that it would begin to consider State responsibility when it had completed its work on the draft on consular intercourse and immunities.

18. With regard to the method of work, he said he was in favour of the idea that in some cases the Commission should be prepared to appoint sub-committees through the drafting committee. That system had been used in 1955 at the seventh session with complete success, when six members had completed a final draft for submission to Governments in eight meetings. No difficulty had arisen concerning the membership, as the draft was to be sent back to the plenary Commission. The system could be successful, therefore, but each case should be considered on its own merits, for there had been cases where texts had been referred back to the drafting committee several times.

19. He agreed with the Secretary that the subject of State responsibility could be divided into different sections. However, during the two or three weeks to be devoted to that subject at the twelfth session, the Commission should discuss the basic problems of State responsibility and should leave aside the question of division for the time being.

20. Mr. FRANÇOIS, replying to criticisms of the Commission's earlier method of work, observed that satisfactory results had been obtained by following that procedure, while years would pass before the results of the new methods would be known. It had implied that the votes taken under the earlier method had been premature; members would recall, however, that no question had been put to the vote until the Commission had agreed that the point had been sufficiently discussed. Under the present system, the Commission was constantly avoiding votes, while formerly if members had agreed with certain arguments, they had found it unnecessary to repeat them, because their agreement could be expressed by their vote. Mr. Ago had said that the time factor was not important; it seemed unlikely, however, that at the present rate of progress the work on consular intercourse and immunities could be completed by the twelfth session. Mr. Ago's thesis would be sound if the Commission were a standing body for legal deliberations; but in actual fact it had only ten weeks a year in which to prepare drafts.

21. Mr. BARTOŠ considered that the length and repetitiveness of the Commission's debates at its current session were largely due to the fact that it had been obliged to interrupt its consideration of agenda items. He agreed with Mr. Ago that it was better to work slowly than to allow drafts to suffer from undue haste. Furthermore, when matters unsolved in the plenary Commission had been referred to a drafting committee, lengthy discussions had taken place when the final drafts had been returned. Accordingly, no questions should be referred to a drafting committee or sub-committee or voted upon until they had been exhaustively discussed in the plenary Commission and

all members had had an opportunity to express their views.

22. Mr. PAL said he could not agree that the Commission had abandoned the system of voting. Articles had been discussed at plenary meetings and on the basis of the discussion certain suggestions had been made. In every case the Chairman had asked whether there was objection to the suggested course. Thus, in effect there had been voting although not by a show of hands, and nearly invariably the decisions had been unanimous.

23. Any suggestion that the Chairman should prevent repetitious statements would be unacceptable, for the Chairman could hardly assume in advance that a member was going to repeat himself.

24. As to the question of a sub-committee, he said that if Mr. Zourek's system involved a general discussion followed by referral to the sub-committee, that was in effect what the Commission had been doing. If, on the other hand, it was intended that questions would be debated first in the sub-committee, then he was sure that such a system would be more repetitious than the current method. Decisions of the sub-committee would not be final and members would be less inclined to compromise since they would hope to see their views prevail in the plenary meetings. The result could only be a repetition of all the arguments that had been put forward in the sub-committee.

25. He did not think that the Commission's present method of work was defective.

26. Mr. TUNKIN agreed with the Chairman's suggestions concerning the agenda of the twelfth session. He thought it particularly important to begin the discussion of the question of State responsibility, and he agreed with Mr. García Amador on the need for a decision on the scope of the work on State responsibility.

27. As to the question of the method of work, he did not agree that voting was a good way to frame rules of international law. They could not be imposed on States, and lack of agreement in the Commission would only reduce the prospects of the eventual acceptance of the Commission's work. Although reaching agreement through discussion would require more time than voting, the resulting texts would probably find greater support among Governments.

28. Mr. SCELLE was opposed to the suggestion concerning a sub-committee. That system would not save time, but, rather, would require the re-discussion of questions at plenary meetings. In his view considerable time would be saved if the Commission decided to deal with one item at a time until the item was completed. The discussion of an item over a number of sessions tended to encourage the re-examination of points which had been thoroughly examined before.

29. He thought that the Chairman should intervene from time to time in order to ensure that speakers did not dwell on points which had been fully examined and which would not be affected by further consideration. There was no use discussing the same points again and again, referring them back and forth to a subordinate body and postponing them from one session to the next.

30. Mr. MATINE-DAFTARY said that the discussion had shown that there were two views in the Commission: some members thought that full discussion was necessary, and others considered that discussion should be briefer and decisions taken, if necessary, by voting. In his opinion, both views would be wrong if applied in an extreme manner and both would be right if applied in moderation. Some problems might have to be discussed at length and others might have to be decided by a vote. He did not think that the Chairman should have the right to deny the floor to a member, for there was no way of knowing in advance whether or not the speaker had something new to contribute. However, he thought that the Chairman could intervene from time to time for the purpose of shortening the discussion.

31. He was not opposed to the idea of a sub-committee in principle; indeed, it might contribute to a more thorough study of questions. On the other hand, he doubted very strongly that it would help to save time. In his view the work of the Commission might be expedited if a separate drafting committee were established for each substantive item of the agenda.

32. Mr. PADILLA NERVO agreed with the views of the Chairman and Mr. García Amador on the programme of work for the twelfth session. With regard to the Commission's method of work, he felt that the best method was to work and not to discuss the method of work. In his experience in United Nations bodies he had found that discussions of ways to save time nearly invariably wasted time. He did not think that the Commission should change the system it had been following. Each question had different characteristics and it would not be practicable to establish a rigid system.

33. The CHAIRMAN observed that the question under discussion was the Commission's programme of work for the twelfth session. With regard to the remarks made on the method of work, he said he had not been conscious of any change in the Commission's procedure since 1955, when he had become a member. He did not think that members came to the sessions of the Commission merely in order to register their votes. One of the great merits of the Commission was that it was an international forum in which it was possible to persuade members to change their points of view, since they were not bound by instructions from Governments.

34. He did not think that there had been many cases of automatic and pointless repetition. Often a statement that appeared to be repetitious was in fact an expression of support for a particular view by different arguments or a change of emphasis.

35. Nor did he agree that the Commission did not do enough work. Its sessions had a good record of output; the total number of articles completed at the current session might be slightly less than the average, because for reasons beyond its control the Commission had not been able to adhere to its programme of work.

36. He agreed with the Secretary's view concerning the idea of a sub-committee. The Commission's method of having a drafting committee which enjoyed a certain freedom had worked out very well. It was only when a certain measure of agreement, or at least a majority view, on a question had emerged through discussion in plenary meetings, that a question could be referred to a subordinate body, and there was no point in a body like the International Law Commission referring a matter first to a sub-committee for elaboration.

37. As to the programme of work of the twelfth session, he thought that there was agreement that the Commission should first complete the draft on consular inter-

course and immunities. Thereafter, it would be essential in his view to spend two or three weeks on the topic of State responsibility and then continue with the law of treaties.

38. The remaining problem was the topic of *ad hoc* diplomacy. Since the Special Rapporteur on that topic expected to have a draft ready before the beginning of the session (see para. 5 above), members would be in a position to discuss it. However, much depended on the action that would meanwhile have been taken by the General Assembly.

39. Mr. LIANG, Secretary to the Commission, said that *ad hoc* diplomacy was a new subject and that members might wish to have more time to study the Special Rapporteur's draft. Apart from that technical matter of reproducing the draft several months in advance of the session, there were other conditions which were difficult to foresee, and he did not think that it would be wise to take a firm decision on the matter at the present time.

40. Mr. SANDSTRÖM, speaking as the Special Rapporteur on *ad hoc* diplomacy, did not think that his subject would require much time. However, in view of the uncertainties, he suggested that it should be placed on the agenda of the twelfth session provisionally. The Commission could decide at the beginning of that session whether or not to take it up.

41. Mr. EDMONDS said that, while he did not feel strongly about the Commission's method of work, he thought that better results would be achieved if the Commission continued with one item until it was completed. He suggested that discussion might be expedited if the rule were adopted that a member could not speak a second time on a particular question until every other member had had an opportunity to speak. Such a rule might encourage members to say what they had to say in a single statement, or at least to keep their second statement short.

42. Mr. YOKOTA thought that everyone was in agreement that the first item at the next session should be consular intercourse and immunities. The other items should be placed on the agenda, but there was no need to take a decision regarding their order. The General Assembly might, in the meantime, express an opinion on the question of priorities, or some unforeseen circumstance might force the Commission to change any order of discussion decided upon at the present time.

43. Apart from the topic of consular intercourse and immunities, which should be completed, he would be inclined to complete the remaining articles of part I of the Special Rapporteur's draft on the law of treaties (A/CN.4/101), and to discuss the general principles of the question of State responsibility with a view to deciding on the scope of the project. When State responsibility had first been discussed, the Commission had decided to deal with the responsibility of States for injuries to aliens, but since then some members had indicated that the Commission should first take up the question of State responsibility in general.

44. Mr. MATINE-DAFTARY thought that the question of *ad hoc* diplomacy should appear on the agenda of the twelfth session. To do so would encourage the Special Rapporteur and would be in accord with General Assembly resolution 1289 (XIII).

45. The CHAIRMAN agreed that, in view of the Commission's experience at the current session, a rigid order should not be established. However, he thought that members should have some provisional idea of the order in which items would be discussed, and accordingly he suggested that all four items should be placed on the agenda in the following provisional order: (1) consular intercourse and immunities; (2) State responsibility; (3) law of treaties; and (4) *ad hoc* diplomacy. The order did not necessarily indicate the amount of time that would be spent on each item.

It was so agreed.

The meeting rose at 6 p.m.

516th MEETING

Tuesday, 16 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*)

ARTICLES 14 AND 15

1. Mr. ZOUREK, Special Rapporteur, introduced article 14 (*Extension of consular functions in the absence of a diplomatic mission of the sending State*), and drew attention to the commentary. It should be stressed, of course, that the performance of isolated diplomatic acts could never confer diplomatic status on the consul under international law. A provision similar to article 14 of the draft appeared in the Havana Convention of 1928 regarding Consular Agents (article 12), and provisions enabling consuls to perform diplomatic acts in certain circumstances were embodied in the national law of some countries, as stated in paragraph 3 of the commentary.

2. Since article 12 (*Consular relations with unrecognized States and Governments*) had been withdrawn in deference to the wishes of the majority (see 513th meeting, para. 35), the scope of article 14 had become wider, as it dealt both with countries which were recognized and those which were not. In principle, however, the question of recognition should not be raised in connexion with article 14.

3. He had no objection in principle to Mr. Scelle's amendment (A/CN.4/L.82) but thought it was more relevant to a different situation, that covered by article 15, which related to diplomatic functions that might be performed permanently by consuls-general, whereas article 14 dealt only with occasional diplomatic acts which would otherwise be performed by diplomatic missions. Mr. Scelle might have meant that article 15 should be deleted, but his amendment did not state that.

4. The CHAIRMAN suggested that, in Mr. Scelle's absence, his amendment might be discussed in connexion with article 15.

5. Mr. BARTOŠ said that there was no existing rule in international law providing for the performance of diplomatic functions by consuls, nor was it necessary to propose such a rule *de lege ferenda*. On the contrary, he believed that consuls could not perform dip-