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Summary record of the 505th meeting

Topic:
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505th MEETING

Monday, 1 June 1959, at 3.10 p. m.

Chairman: Sir Gerald FITZMAURICE

Welcome to Mr. Erim

1. The CHAIRMAN officially welcomed Mr. Erim, the new member of the Commission.

2. Mr. ERIM thanked the Chairman for his words of welcome and assured the members of the Commission that he would do his best to justify the confidence they had shown in him by electing him as a member.

Programme of work for the remainder of the session

3. The CHAIRMAN suggested that, of the remaining four weeks of the session, two should be used for substantive work on the draft concerning consular intercourse and immunities and the last two for the preparation of the report on the two principal topics discussed at the session and miscellaneous matters. The topic of State responsibility should form the subject of one meeting, at which representatives of the Harvard Law School who were in Geneva might present their draft on State responsibility.[1]

The Chairman's suggestions were adopted.

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*)*

4. The CHAIRMAN reviewed the discussion that had taken place on article 2 (see 498th and 499th meetings).

5. With regard to paragraph 1, he said it had been agreed to postpone the final wording until the Commission had considered in more detail the exact nature of consular relations. In that connexion, the Special Rapporteur had offered to deal with the establishment of consular relations and with the opening of consulates in separate articles (see 499th meeting, para. 58).

6. After a full discussion of paragraph 2, the Special Rapporteur had suggested that that paragraph should be redrafted along the lines of paragraph 5 of his commentary. He (the Chairman) had suggested an additional clause providing that, exceptionally, the State of residence could change the consular district in view of special circumstances and after consultation with the sending State (499th meeting, para. 30).

7. There had been general agreement, as a result of the discussion, that paragraph 3 should be retained subject to drafting changes, and Mr. Edmonds's amendment to paragraph 4 (498th meeting, para. 14) had found general support.

8. Two additional provisions had been suggested for article 2: the most-favoured-nation clause originally suggested by Mr. Edmonds as a substitute for paragraph 2, and a provision concerning the acquisition of property for the use of consulates, to which reference was made in paragraph 6 of the Special Rapporteur's Commentary on article 2 (A/CN. 4/108, part II), along the lines of the corresponding article in the draft articles on diplomatic intercourse and immunities.[2]

9. There had also been considerable discussion concerning the exercise of consular functions by a diplomatic mission. He believed it was virtually agreed that consular functions which required dealings with local authorities of the State of residence could only be performed by consuls recognized as such by that State, whereas other consular functions could be exercised equally by consuls and diplomatic officers, in other words, by the consular section of a diplomatic mission.

10. Mr. ZOUREK, Special Rapporteur, observed that diplomatic missions could also exercise consular functions which required dealings with local authorities, in so far as such functions could be performed through the ministry of foreign affairs. in the light of the discussion on article 2 he had prepared the following revised version of the article:

"1. No consulate may be established on the territory of the State of residene without that State's consent.

"2. The agreement concerning the establishment of a consulate shall specify, *inter alia,* the seat of the consulate and the consular district.

"3. Subsequent changes in the seat of the consulate or in the consular district may not be made by the sending State except with the consent of the State of residence.

"4. Save as othewise agreed, a consul may exercise his functions outside his district only with the consent of the State of residence.

"5. The consent of the State of residence shall also be required if the consulate is at the same time to exercise consular functions in another State."

11. He had included only provisions on which there had been general agreement. The most-favoured-nation clause referring to the special case which formed the subject of Mr. Edmonds's amendment, would be more suitable in bilateral than in multilateral treaties and, what was more, if the Commission decided to include it, a provision would have to be drafted concerning the effects of the most-favoured-nation clause on all aspects of consular relations, including the prerogatives of consuls and their functions. In any case, he thought that the majority of the Commission had not supported Mr. Edmonds's suggestion. Again—for reasons he had already stated—he had not included a provision on obtaining property for consular purposes, but if the Commission desired such a provision, he would prepare one for examination by the Drafting Committee. He suggested, however, that the question might form the subject of a later article.

The Special Rapporteur's suggestion was agreed to.

12. Mr. ZOUREK, Special Rapporteur, explained that his revised version of article 2 was based on the assump-

[1] For the association of Harvard Law School with the Commission's work on State responsibility, see *Yearbook of the International Law Commission, 1956,* Vol. II (United Nations publication, Sales No.: 1956.V.3, Vol. II), document A/CN. 4/96, paras. 13 and 14.

* Resumed from the 499th meeting.

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

tion that article 1 would deal solely with the establishment of consular relations and would not mention the opening of consulates, the two being quite distinct matters.

13. In the new paragraph 1, the word "consulate" was a generic term and meant any consular office.

14. The new paragraph 2 was a simplified version of the former paragraph 1.

15. The new paragraph 3 narrowed the scope of the old paragraph 2 to the sole case of subsequent changes in a consular district proposed by the sending State. With regard to the clause that had been suggested by the Chairman (see para. 6 above), he thought it best not to mention subsequent changes desired by the State of residence, for in that way the powers of the State of residence to make such changes would remain unaffected. However, if the Commission desired a provision along the lines suggested by the Chairman, he would include it.

16. The new paragraph 4 took account of Mr. Edmonds's amendment to the old paragraph 4.

17. Finally, the new paragraph 5 embodied Mr. Sandström's suggestion that paragraph 5 of the Special Rapporteur's commentary on article 2 should be included in the text of the article.

18. The CHAIRMAN suggested that if there was no objection to the new paragraph 1, it should be referred to the Drafting Committee subject to possible re-examination in the light of the Commission's decisions concerning the text of article 1.

It was so agreed.

19. Mr. EL-KHOURI asked what were the implications of the words "consular district" in the new paragraph 2. Did they mean, for example, that a consul could not issue visas to persons who came from outside his district?

20. Mr. ZOUREK, Special Rapporteur, said that the consul's competence was limited to his consular district in the case of matters localized in the territory of the State of residence or in the case of appearance before the authorities of that State. That did not mean that a person passing through the district could not avail himself of the consul's services. However, the consul could not exercise his powers outside his district without the consent of the State of residence.

21. Mr. MATINE-DAFTARY observed that, like courts, consulates had their jurisdiction *ratione personae, ratione loci* and *ratione materiae*. That might mean that in relation to a particular matter a person might be directed to apply to another consulate.

22. Mr. TUNKIN did not think that the jurisdiction of consulates was so clearly delimited in practice. For example, a citizen of State A, living in State B where State A had no consulate, could go to State C where State A had a consulate, in order to have his passport renewed.

23. Mr. MATINE-DAFTARY agreed, but observed that the matter would be within the jurisdiction of the consulate in State C *ratione personae*.

24. Mr. PADILLA NERVO pointed out that there were two types of consular functions; those which involved dealings with local authorities and those which did not. The first category of functions could not be exercised outside a consul's district without the consent of the State of residence. The second category of functions, which included the case cited by Mr. Tunkin, did not require such consent.

25. He inquired whether the word "agreement" in the new paragraph 2 referred to the customary type of consular convention, to a special agreement concerning the opening of a particular consulate, or to the agreement constituted by the acceptance of a consul's commission and the issuing of the exequatur. He asked the question because very often a consular convention, while providing for the establishment of consulates, did not specify the particular places in which consulates were to be established or the consular districts.

26. Mr. ZOUREK, Special Rapporteur, replying to Mr. Matine-Daftary, said that he did not think that the jurisdiction of consuls was fixed as rigidly as that of the courts. Generally speaking, a consul's relations with the State of residence were confined to the local authorities situated within his consular district, but he could freely exercise consular functions as regards persons not resident in his district if no relations with the authorities of the State of residence outside his consular district were involved.

27. In reply to Mr. Padilla Nervo's question, he drew attention to draft article 38. If a consular convention or other agreement between the sending State and the State of residence specified the seats of the consulates and the consular districts, the requirements of paragraph 2 would have been satisfied. On the other hand, if the agreement in question merely provided for the establishment of consulates without specifying seats and districts, the question would have to be settled by some form of subsequent agreement. In other words, there would have to be an agreement on both matters, unless they had been regulated by a pre-existing agreement. He did not think that a consul could arrive in the State of residence with a commission specifying a consular district or the seat of a consulate, to the establishment of which the State of residence had not previously given its consent.

28. The CHAIRMAN drew attention, in that connexion, to paragraph 85 of part I of the Special Rapporteur's report.

29. Mr. LIANG, Secretary to the Commission, said that on a previous occasion (499th meeting, para. 66) he had drawn attention to the importance of separating functions which were exclusively consular from those which were not so. Those which belonged to the former category could not be exercised outside the consular district without the consent of the State of residence. Functions which belonged to the latter category, such as the issue of passports to nationals of the sending State, were those with respect to which the question of consular district was not important.

30. As an example of functions that were exclusively consular, he cited those described in articles XXVI and XXVIII of the Treaty of Friendship, Commerce and Consular Rights between the United States of America and Germany, 8 December 1923, as amended, which provided, *inter alia*, that "a consular officer of either High Contracting Party shall have the right to inspect within the ports of the other High Contracting Party within his consular district, the private vessels of any flag destined or about to clear for ports of the country appointing him in order to observe the sanitary conditions and measures taken on board such vessels . . . " and that "all proceedings relative to the salvage of vessels of either High Contracting Party wrecked upon the coasts of the other shall be directed by the consular officer of the country to which the vessels belong and within whose district the wreck may have

occurred . . . ".[3] It was inconceivable that a foreign consul whose consular district was around New Orleans could exercise his functions in the area around San Francisco in regard to the matters covered by the two articles cited.

31. On the other hand, the promotion of commercial relations and the issuing of passports, for example, were not exclusively consular functions and could equally be performed by diplomatic officers. For functions of that kind the question of consular district did not arise and consuls in all consular districts were entitled to perform them.

32. Mr. ALFARO said that it was clear from the discussion that the word "agreement" in paragraph 2 of the revised article 2 could only be interpreted respectively, in the sense of an agreement regarding a particular consular seat and district, and the words "consular district" meant the area within which the consul could exercise his functions, not the place of residence of persons who solicited the services of the consul.

33. Mr. PADILLA NERVO suggested that a cross-reference to article 38 might be added in the commentary on article 2.

34. Mr. TUNKIN agreed with Mr. Padilla Nervo that, so long as no dealings with the local authorities of the State of residence were involved, the consul could perform services for his countrymen who were outside his consular district and even outside the State of residence.

35. He felt that the difficulty about the words "the agreement" in paragraph 2 was due to the absence of any reference to an agreement in paragraph 1. He suggested the following text for paragraph 2:

> "The seat of the consulate and the consular district shall be determined by agreement between the sending State and the State of residence."

36. That formula would cover all the possible situations: specification of the consular districts in the original consular convention, a special agreement on the consular district, or agreement constituted by acceptance of a consul's commission specifying a particular consular district and the issuing of an exequatur.

37. Mr. MATINE-DAFTARY thought the competence of consulates should be defined in a separate article.

38. Mr. ZOUREK, Special Rapporteur, said that such a definition was included in article 13 (*Second variant*) on consular functions.

39. The CHAIRMAN thought that paragraph 2 could be referred to the Drafting Committee.

40. Referring to the new paragraph 3, he noted that it differed fundamentally from the original paragraph 2. He suggested that a phrase should be added to the effect that the sending State might make changes in consular districts, but only if the change was necessary for some special reason and only with the consent of the authorities of the State of residence. Such a provision would be a counterpart of a provision, suggested by Mr. Scelle (see 499th meeting, para. 12), to the effect that the State of residence could not make changes in consular districts without the consent of the sending State. It might also be advisable to mention the special case he had alluded to earlier (see para. 6 above).

41. Mr. PADILLA NERVO thought that any change in the seat of a consulate would, in effect, be the establishment of a new seat and hence require the consent of the State of residence. A change in the district, however, might require consultation only.

42. The CHAIRMAN said it was generally agreed that changes desired by the sending State required the consent of the State of residence. The difficulty arose in cases where the State of residence wished to make a change in a consular district. The Special Rapporteur's new draft article 2 placed no limits on the capacity of the State of residence to make such changes. In practice, great inconvenience might be caused to the sending State if such changes were made suddenly. On the other hand, it would be readily seen that the State of residence might, in cases of emergency, see fit to change consular districts.

43. Mr. PADILLA NERVO said that even in cases of emergency it was arguable that the State of residence would require the consent of the sending State to the formal procedure of altering letters patent or exequaturs.

44. Mr. PAL said that he did not quite understand whether Mr. Padilla Nervo had meant that consultation with the sending State or the consent of that State would be necessary in case of change. After all, a change would mean amendment of the original agreement concerning the consular district and as such would require another agreement.

45. The CHAIRMAN, speaking as a member of the Commission, thought that Mr. Padilla Nervo had raised a very pertinent point. The seat of the consulate and the extent of the consular district were specified in an agreement, and they could not be changed by the State of residence without the sending State's consent. That case was not dealt with in the Special Rapporteur's new draft of paragraph 3. He thought that Mr. Padilla Nervo meant that the State of residence could not change a consular district without at least consulting the sending State. The question before the Commission was whether the State of residence had any unilateral powers, despite the original agreement with the sending State, and how those powers, if any, should be limited.

46. Mr. PAL thought that when Mr. Padilla Nervo had said "consultation" he had in fact meant "consent". In any case, it might be best to accept paragraph 3 in its present form and to add a new paragraph relating to the case mentioned by the Chairman.

47. Mr. PADILLA NERVO said that he had used the word "consultation" to denote the absolute minimum that was necessary. However, the consultation might result either in a new agreement or in disagreement between the parties. Any limitation of the consular district called for consultations, inasmuch as it varied the agreement constituted by the acceptance of consular relations.

48. Mr. SANDSTRÖM considered that the main problem was what would happen if consultation did not lead to agreement. There might be cases where the State of residence should have the right to change the seat of a consulate; if it were decided to establish a defence area, for example, it could be held that, by virtue of its sovereignty, the State of residence had an implied right to change the seat of a consulate without the consent of a sending State. In such a case, the important or urgent reasons for the change should be stated.

49. Mr. FRANÇOIS saw great difficulties of principle in giving any State the unilateral right to alter an agree-

[3] 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. 436-437.

ment. It was absolutely impossible to empower the State of residence to change a consular district or to establish a new consular seat unilaterally, in the absence of a new agreement on the subject. If no such agreement was reached, the State of residence must be deemed to have denounced the original agreement.

50. Mr. YOKOTA asked whether, in actual practice, there had been any cases where the State of residence had unilaterally changed a consular district or seat despite the disagreement of the sending State.

51. He thought that the Chairman's suggestion was but one of two possible solutions. Another solution would be that adopted by the Commission in article 20 (*Inviolability of the mission premises*) of the draft on diplomatic intercourse and immunities. He referred to paragraph 7 of the commentary on that article, which stated that although the premises of the diplomatic mission were inviolable, the sending State should co-operate in every way in the implementation of plans for public works which the receiving State might be contemplating. It had been decided not to include that provision in the text of article 20; the Commission might similarly decide to embody in the commentary a passage to the effect that while the State of residence had a right to change a consular district or seat, it should make every effort to get the consent of the sending State to such change and the latter should co-operate in every way in the realization of the said change.

52. Mr. AMADO said that the State of residence was also a sending State. Because the relationship was reciprocal, the consent of the sending State was indispensable, but the last word must rest with the State of residence. Accordingly, he could see no objection to the Special Rapporteur's text of paragraph 3.

53. Mr. BARTOŠ thought that the Commission must decide whether the initial agreement was or was not a source of contractual relations. There were only two possible views on the matter; either the opening of a consulate was effected by the authorization of a sovereign State, or it was effected by agreement between two States. He agreed with Mr. François that, so long as an agreement existed, both parties to it were obliged to respect the agreement. On the other hand, in certain situations the receiving State would be obliged to request agreement to certain changes, although it could not impose such changes. In such cases, if the objective of the agreement changed, the situation would be governed by the implied *clausula rebus sic stantibus*. If the sending State did not agree to the change, the matter must be regulated as in other cases under international law. But the State of residence had no absolute or sovereign power to impose changes of consular districts or seats, except where the change was dictated by national defence or by a state of war; and in such contingencies consular relations would in any case be suspended. Mr. Pal had rightly said that consent, rather than consultation, was needed. Consent implied a contractual bond, from which the necessary practical conclusions must be drawn.

54. Mr. TUNKIN considered that, irrespective of which of the alternative views of Mr. Bartoš the Commission accepted, it could deal with the question practically along the lines suggested by the Chairman. In his opinion, it was inevitable to introduce some kind of reservation, even if it were accepted that contractual relations existed between the States concerned. There was no rule without an exception, and the exception to the rule should be stated. He was therefore in favour of the Chairman's suggestion, because specific cases could be cited where the State of residence exercised sovereign powers for certain important reasons. It was only logical to allow circumstances in which it was indispensable for the State of residence to change consular districts and seats.

55. Mr. EL-KHOURI thought that a clearer definition of consular districts and seats would go far to eliminating the difficulty before the Commission.

56. Mr. ERIM thought that the difficulty lay in the drafting of new paragraphs 2 and 3. Inasmuch as paragraph 2 stipulated agreement, paragraph 3 might be superfluous. Under paragraph 3, and if no mention was made of the point raised by the Chairman, the State of residence remained legally free to change consular districts and seats unilaterally. If, on the other hand, paragraph 3 were deleted, no changes could be made without mutual consent. The drafting of paragraph 3 had introduced an element of uncertainty; he asked the Special Rapporteur to explain.

57. Mr. ZOUREK, Special Rapporteur, observed that the original paragraph 2 had stipulated that changes could be made only by agreement between the sending State and the State of residence. Such a provision took into account the contractual nature of the agreement regarding the establishment of a consulate. During the discussion, however, some members had pointed out that that wording was not quite correct when read in conjunction with paragraph 1, and that the position of the State of residence was not identical with that of the sending State, since the fact that the latter exercised certain functions in the territory of the State of residence to some extent limited the sovereignty of that State. He had accordingly prepared a new text for that paragraph, in which no reference was made to the powers of the State of residence: it merely stated that the sending State could not change the seat of a consulate or its consular district without the consent of the State of residence. Some members, however, had interpreted that provision to mean that it gave the State of residence the right to change, unilaterally and at any time, the seat of a consulate and the district attached to it. Such an interpretation failed to take into account paragraph 1 of the article and was not tenable. In view of the wording of paragraph 1, the intention of the provision was certainly not to empower the State of residence at any time to change a consular district or seat unilaterally. On the other hand, when an agreement was entered into by two States, it could not be said that the State of residence could never bring about a change in a consular district or seat. In the first place, the agreement regarding the seat of a consulate and its district could cease to exist for a variety of reasons and not only by mutual consent. Secondly, provision had to be made for the fact that the State of residence might be compelled by exceptional circumstances to ask the sending State to change the seat of the consulate or to alter the consular district. Accordingly, the authorities of the State of residence might find it necessary to take steps of the kind to which he had referred in order to protect the interests of the State, without infringing the rules of international law.

58. He wondered whether, in view of such divergent interpretations, the solution of the problem might not be to retain the original paragraph 2 and to add a clause reserving the right of the State of residence to make changes in exceptional circumstances.

59. The CHAIRMAN shared the Special Rapporteur's view that the agreement referred to in the original paragraph 2 must be subject to the reservation of certain powers exercisable by the State of residence. The sentence to be added to the original paragraph 2 might be drafted along the following lines: "In exceptional cases, the State of residence may, after consultation and for urgent reasons, make unilateral changes in the consular district or seat."

60. Mr. TUNKIN endorsed the Special Rapporteur's suggestion.

61. Mr. FRANÇOIS thought that the Drafting Committee should be extremely cautious in drafting the suggested additional clause. In his opinion, it was impossible for the State of residence to fix a consular district or seat. That State could not impose its will on the sending State, but could at most propose a change; if the proposal was not accepted, there would be no agreement and the consular district or seat could not be established. He therefore thought that it would be unsatisfactory merely to say that the State of residence could change a consular district or seat in exceptional cases.

62. The CHAIRMAN agreed with Mr. François that the State of residence could not impose its will on the sending State; in the case of inability to reach agreement, however, consular relations would come to an end in respect of the district or seat concerned.

63. On that understanding, he suggested that the Drafting Committee should be requested to prepare the provision in question.

It was so agreed.

The meeting rose at 6 p.m.

506th MEETING

Tuesday, 2 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*)

ARTICLE 2 (*continued*)

1. The CHAIRMAN noted that agreement had been reached on the substance of paragraphs 1 to 3 of the redraft of article 2 (see 505th meeting, para. 10). Paragraph 4 was consequential on paragraph 3 and not controversial. He therefore suggested that paragraphs 1 to 4 should be referred to the Drafting Committee.

It was so agreed.

2. Mr. SANDSTRÖM thought that the Drafting Committee should be recommended to insert a reference to a consul, as well as to consulate, in paragraph 5.

3. The CHAIRMAN agreed with Mr. Sandström. He asked Mr. Edmonds whether he wished to maintain his proposal for a most-favoured-nation clause in article 2 (see 498th meeting, para. 14 (ii)).

4. Mr. EDMONDS though that the clause would be useful. However, since some members had pointed out that the question of most-favoured-nation treatment arose in connexion with other articles of the draft, he would have no objection to including the clause elsewhere.

5. The CHAIRMAN suggested that article 2 as a whole should be referred to the Drafting Committee, on the understanding that the Special Rapporteur would draft a paragraph, or perhaps a new article, on the right of consulates to acquire premises and would also draft a definition of consular districts and seats.

It was so agreed.

ARTICLE 3

6. The CHAIRMAN invited the Special Rapporteur to introduce article 3 of his draft.

7. He drew attention to the following amendment submitted by Mr. Sandström:

"(i) Replace the first sentence of paragraph 2 by the following.

'Heads of consulates shall take precedence in their respective classes in the order of the date of the granting of the exequatur.'

"(ii) Place the amended paragraph as a new article after article 8."

8. Mr. ZOUREK, Special Rapporteur, introducing article 3, said that the main purpose of the article was to codify the existing practice of classifying consular officers who were heads of posts. The intention was to draw up a codification relating to consuls which would be similar to that established for diplomatists more than 140 years previously by the Congresses of Vienna and Aix-la-Chapelle. He referred to his commentary on article 3. The four classes mentioned were enumerated in the legislation of many countries and in many international conventions, both old and recent. In particular, as would be seen from paragraph 6 of the commentary, many recent consular conventions specified those four classes of heads of consular offices. While the legislation of some countries did not include all the four classes, the proposed codification would probably meet with general approval. The codification would not mean that all States would be obliged to introduce four classes into their consular practice. For example, those States whose laws did not mention consular agents would not be obliged to introduce legislation referring to them.

9. He stressed that the four classes related only to "heads of consular offices" and that those words should replace "consular representatives" at the beginning of paragraph 1. He referred to the discussion of terminology in chapter VI of part I of his report. As explained there, the term "consular agents" had been used in the past in a generic sense to mean all consular officers; in article 3 it had a technical sense (see commentary, para. 7). He could not accept the suggestion that consular agents should form the subject of a separate article. It was true that consular agents were sometimes appointed by consuls-general or consuls and that they held full powers which were not known as commissions but as *"patentes"*, *"licences"* or *"brevets"*, as the case might be. But it was equally true that, in the case of many States, consular agents were appointed by the central government in the same way as heads of posts belonging to the other categories of consul. He conceded that, under the laws of some countries, consular agents had more limited powers than did consuls-general or consuls, for example. But that was