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Summary record of the 514th meeting

Topic:
Consular intercourse and immunities

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commercial interests of the sending State might be placed second. And lastly, mention might be made of the promotion of cultural relations between the sending State and the State of residence, although that was not a very important consular function. If the three or four principal functions were mentioned in the article, the other details in the enumeration might be transferred to the commentary.

62. Mr. PAL thought that a third variant should be worked out by combining the first and second variants. He considered that the general proposition in the first variant should be used and followed by the enumeration in the second variant, which was extremely illuminating, if not exhaustive. Moreover, the enumeration should be preceded by a provision stating that it in no way detracted from the generality of the first paragraph.

63. Mr. ERIM agreed with previous speakers that the first variant in fact said practically nothing, since it was the Commission's special task to establish the international law in the matter.

64. He would prefer a formula combining Mr. Verdross's amendment with the Special Rapporteur's enumeration, particularly since the words *"inter alia"* in the introductory phrase showed that the enumeration was not intended to be restrictive, but merely illustrative.

65. Some of the functions mentioned created a particular legal situation between the sending State and the consular officer, while others authorized legal representations *vis-à-vis* the receiving State. He thought that those different classes of functions should be distinguished from each other.

66. He pointed out that paragraph 3 of the enumeration mentioned a number of functions relating to the general protection of shipping, while paragraph 5 referred to assistance to aircraft. He thought that, since ships and aircraft were both means of communication, the paragraphs might be amalgamated.

67. Turning to the first paragraph of the second variant, he said that to defend and further the economic and legal interests of their countries and to safeguard cultural relations between the sending State and the State of residence was the the task of diplomatic agents, rather than of consular officers. While those tasks were not excluded from consular functions, the main concern of consular officers was to protect the nationals of the sending State. That point emerged clearly from many bilateral treaties; thus, in the Consular Convention between the United States of America and Costa Rica, signed at San José on 12 January 1948[8], the provisions on consular functions spoke of the protection of nationals, and most of the corresponding articles of the Consular Convention between the United Kingdom and Sweden of 14 March 1952, which had already been cited, related to the protection of the private interests of individuals.

68. In conclusion, he considered that the enumeration would facilitate the application of the positive international law that the Commission was trying to formulate, so long as the enumeration was not restrictive. It would therefore be advisable to abridge it considerably and to retain only the principal functions.

The meeting rose at 1.5 p.m.

[8] *Ibid.*, p. 452.

514th MEETING

Friday, 12 June 1959, at 10 a.m.

Chairman: Sir Gerald FITZMAURICE

Consular intercourse and immunities (A/CN.4/108, A/CN.4/L.79, A/CN.4/80, 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 13 (*continued*)

1. Mr. BARTOŠ agreed with the speakers who considered that the draft should specify which consular functions came directly within the scope of the rules of international law. He pointed out, however, that in appointing a consular officer the sending State could not deny that officer's right to perform certain functions traditionally attaching to his status. In practice, considerable difficulties arose if a State which requested and obtained an exequatur and opened a consulate did not grant its consular officers the customary powers; such an act would amount to an abuse of the right to open consulates. In his opinion, article 13 should be drafted in general terms, making it clear that consuls had certain customary functions under international law, but that the sending State might instruct them to perform other functions as well, provided that those other functions were in conformity with municipal law and with consular treaties.

2. Mr. AMADO said it was obvious that certain consular functions were outside the scope of municipal law and were vested in the consul by virtue of customary international law. While it was often necessary to state the obvious, he did not believe that such a general clause as the Special Rapporteur's first variant of article 13, or article 10 of the Havana Convention regarding Consular Agents, of 20 February 1928, could serve any useful purpose.

3. On the other hand, a lengthy enumeration of functions, as in the Special Rapporteur's second variant of article 13, could not be exhaustive and, moreover, the enumeration in the second variant was somewhat confused in so far as the order was concerned. Consular functions should be divided into three categories: those deriving from the internal legislation of the sending State, those agreed upon in bilateral treaties, and those deriving from customary international law. The latter group, which included the traditional protection extended by the consuls to the nationals of the sending State, was probably the most important. In that connexion, he observed that the first two tasks described in the first paragraph of the second variant were unduly wide for consular officers and properly belonged to diplomatic agents.

4. In conclusion, he considered that the Commission's best course would be to include a classification, rather than an enumeration, of consular functions in article 13.

5. Mr. PADILLA NERVO agreed that no enumeration of consular functions could be regarded as complete, that a general definition could not take into account certain special circumstances covered by bilat-

eral treaties and that a broad, general definition would, in fact, operate restrictively in cases where local custom admitted broader functions than those defined. He thought that there should be some harmony between article 13 of the draft before the Commission and article 3 of the draft on diplomatic intercourse and immunities, which was similar in form to the first paragraph of the Special Rapporteur's second variant. The passage in Mr. Verdross's amendment (see 513th meeting, para. 54) which related to the protection of nationals before the local authorities of the State of residence should be taken into account, and it would also be wise to incorporate the wording of article 10 of the Havana Convention; the protection of nationals, the furtherance of economic interests and the promotion of cultural relations were all functions conferred upon consuls by the sending State, but in the performance of those functions consuls had to respect the legislation of the receiving State. The resulting article might thus combine the provisions of the first paragraph of the second variant, Mr. Verdross's amendment and article 10 of the Havana Convention. He agreed with Mr. Yokota (see 513th meeting, para. 61) that the Special Rapporteur's enumeration could usefully be retained in the commentary.

6. Mr. EDMONDS thought that article 13 was especially important, since the definition of functions might be taken as a measure of a consul's official acts and hence would have a bearing on his immunities.

7. The danger of the Special Rapporteur's second variant was that it might restrict consular duties to the enumeration, which could not be exhaustive. A possible way out of that difficulty would be to set forth the minimum consular functions, and to say that the receiving State recognized the right of consular officers to perform *at least* certain functions; but that might perhaps be going too far, since even some of those minimum functions might be contrary to the law of the receiving State. On the other hand, the first variant stated only half of the principle involved. The best plan might be to adopt the first variant, reworded to convey the idea that consular officers had the powers granted them by the sending State, provided that those powers were not inconsistent with the legislation of the receiving State.

8. Mr. TUNKIN agreed with those members who considered the first variant inadequate. The Commission's task was to codify the rules of international law and in so important a matter as consular functions it could not content itself with a vague reference to international law. He was therefore in favour of some kind of enumeration.

9. It had been suggested that article 13 should follow the model of article 3 of the draft articles on diplomatic intercourse and immunities, which contained a short enumeration in general terms. He was not convinced that such a course would be justified since the position of a diplomatic mission and the position of a consulate were different. There were numerous conventions describing the functions of consuls and a widely accepted practice, and he felt that the Commission should go into more detail than it did in the draft on diplomatic intercourse.

10. It had been said that if the draft was too elaborate, it might include some provisions that would not be acceptable to States. He agreed that care should be exercised, but thought that the draft should go as far as possible. An enumeration of functions would not only serve to codify existing practice but would to some extent embrace the duties of consuls. There were disadvantages of course, for no enumeration could be exhaustive. That, however, should not be an insuperable obstacle. He noted that the second variant of article 13 used the words *"inter alia"*. Another safeguard that could be incorporated into the text was the Special Rapporteur's oral proposal (513th meeting, para. 49) to the effect that consuls could perform other functions if such functions were permissible under, and not in conflict with, the legislation of the State of residence.

11. Mr. LIANG, Secretary to the Commission, said that the discussion reminded him of the long debates, in connexion with the definition of aggression, as to whether it should be a general, enumerative or mixed definition.

12. He recalled his statement at the previous meeting (513th meeting, para. 60) in which he had suggested that the method used in the corresponding article in the draft on diplomatic intercourse and immunities could be used in the present draft and that the enumeration in the second variant might be grouped in a smaller number of more general provisions. He did not agree that there was a greater need for detail in the case of consular functions. If anything, the contrary was true, since there were very many consular conventions, whereas there were few conventions containing detailed provisions on diplomatic intercourse and immunities.

13. He drew attention to the possibilities of controversy inherent in a detailed enumeration. He recalled that when Mr. Sandström's original draft (A/CN.4/91) had been discussed, the article defining the functions of a diplomatic mission had given rise to a long debate in the Commission itself at its ninth session, and in the General Assembly at the thirteenth session, concerning the diplomatic protection of nationals, with considerable argument centring on the local remedies rule and other matters never intended by the author. The idea of consular protection of nationals might give rise to more serious objection. It seemed to him that the best means of avoiding misunderstanding was to follow the model of article 3 of the Commission's draft on diplomatic intercourse and immunities.

14. Mr. SANDSTRÖM recalled that at the previous meeting he had suggested the combination of an enumeration of functions with a general provision, and in that connexion he had drawn attention to the Consular Convention of 1952 between the United Kingdom and Sweden (see 513th meeting, para. 58). That Convention was a good illustration of what he had had in mind. After fourteen articles on consular functions there followed "General provisions relating to consular functions", in article 32, which stated:

> "(1) The provisions of articles 18 to 31 relating to the functions which a consular officer may perform are not exhaustive. A consular officer shall also be permitted to perform other functions, provided that—
>
> "(*a*) They are in accordance with international law or practice relating to consular officers, as recognized in the territory; or
>
> "(*b*) They involve no conflict with the laws of the territory and the authorities of the territory raise no objection to them.
>
> "(2) It is understood that in any case where any article of this Convention gives a consular officer the right to perform any functions, it is for the sending

State to determine to what extent its consular officers shall exercise such right."[1]

15. He agreed with Mr. Tunkin that the Commission should not follow the model of the corresponding article in the draft on diplomatic intercourse and immunities, both because of the difference in the nature of diplomatic and consular functions and in view of the possibility that States might be willing to rely on the Commission's draft, in the form of a multilateral convention as a basis for their consular relations without supplementing it by a bilateral convention. It seemed to him that the Special Rapporteur's second variant of article 13 could serve, after appropriate amendments, as a basis for the enumeration. He suggested that the introductory sentence could be omitted, and after necessary changes had been made in the remainder of the variant, the different functions could be grouped in separate articles with special headings. The number of provisions could be considerably reduced by combining some of them into one shorter provision; for example, paragraph 8 (*e*) might be merged into paragraph 2 since both concerned the promotion of trade.

16. Mr. MATINE-DAFTARY said that he agreed with the members who were in favour of a "mixed" solution, combining a general provision with a not too detailed enumeration. He suggested that, in addition to mentioning the functions and powers of consular offices, the article should refer to some of the activities which a consul should not engage in.

17. He suggested that the redraft of article 13 should include both positive and negative provisions.

18. Mr. HSU agreed with the Secretary that the Commission had something to learn from the attempt to define aggression. He had taken an active part in the work on the question of defining aggression, and in his view the failure to define aggression was due not to the form of the proposed definition or to the fact that it was indefinable but to the policies of the great Powers, which had considered the time inopportune for such a definition. The overwhelming majority of the General Assembly had favoured a definition in general terms followed by an illustrative enumeration, with a certain emphasis on new types of aggression.

19. He suggested that that was the method which the Commission should follow in the case of the definition of consular functions. The Special Rapporteur's suggestion at the previous meeting (513th meeting, paras. 47-53) and the suggestions of various members were very close to that method. The debate on the form of the definition had already consumed much time which should have been devoted to substance. After all, the essential task was to reach agreement on the practice in the matter of consular functions. He felt that the time had come to take up the substance of the question.

20. Mr. ZOUREK, Special Rapporteur, wished to make a brief observation on the form of article 13. Complete parallelism with the corresponding article in the draft on diplomatic intercourse and immunities did not seem desirable because diplomatic functions were of a general nature, whereas consular functions related only to a limited aspect of inter-State relations. He agreed with Mr. Padilla Nervo (see para. 5 above) that article 10 of the Havana Convention of 1928 could be used, but he felt that an enumeration should be added which would not be exhaustive, giving examples of all the typical functions of consuls. It seemed to him that such a formula would meet the requirements of the draft and would be acceptable to Governments.

21. Mr. VERDROSS said that, after hearing the observations of other members, he wished to broaden somewhat the amendment he had submitted at the previous meeting (513th meeting, para. 54).

22. He suggested that article 13 should begin with an enumeration of the consular functions which derived from general international law and which were performed even in the absence of a consular convention between the sending State and the State of residence; that first category included the right and obligation of consuls to lend aid and assistance to nationals of the sending State before local authorities.

23. The enumeration would continue with a second category of functions, those normally, though not necessarily, performed by consuls. That category would include such functions as the promotion of trade between the two countries concerned, as suggested by Mr. Yokota (513th meeting, para 61).

24. Finally, a general clause might provide that consuls could exercise other functions by virtue of treaties, and if desired, examples could be given.

25. Mr. SCELLE, referring to Mr. Matine-Daftary's remarks (see para. 16 above), said it would hardly be particularly appropriate to specify in article 13 what activities would be unlawful. In any event, the Commission would no doubt discuss the question in connexion with article 17.

26. Mr. ALFARO said that the general consensus seemed to be in favour of a solution intermediate between the very detailed enumeration in the Special Rapporteur's second variant and a general statement of the kind contained in the first variant. He suggested that the article might enumerate the main categories of functions, as in the numbered paragraphs of the second variant; all of those functions resulted from the legislation of the sending State and were exercised without prejudice to the legislation of the State of residence and to any bilateral convention between the two States.

27. Mr. ZOUREK, Special Rapporteur, observed that most members of the Commission seemed to favour the principle of the second variant but opinion was divided as to the form it should take. As he had said before (see para. 20 above) it would be desirable to define consular functions by means of concrete examples, though not necessarily at such length as in his draft. Mr. Alfaro's suggestion was particularly interesting. He believed that agreement could be reached on a general clause of the kind that prefaced his own text of the second variant or on the lines of Mr. Verdross's amendment or Mr. Padilla Nervo's suggestion (see para. 5 above). The general clause could be followed by a catalogue of the main consular functions and by a final clause stating that other functions could be performed provided that they did not conflict with the law of the State of residence. One of the unquestionable advantages of that solution would be that it would obviate the danger of consular officials assigning themselves powers that were outside their competence. It might

[1] 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. 484.

thus satisfy Mr. Matine-Daftary, who had suggested that the article should mention the activities which consular officers should not carry on.

28. Though the classification of consular functions suggested by Mr. Verdross (see paras. 22-24 above) could be justified theoretically, he (the Special Rapporteur) could not see the practical value of it. Indeed, the draft would finally take the form of a convention and would bind signatory States only.

29. In order to help the Commission reach a decision he might attempt to elaborate a shorter text for consideration at the next meeting. Of course, there were dangers in being too brief. If, for example, the question of the settlement of cases connected with succession—which was the subject matter of paragraph 13—were treated too summarily, the text might prove to be unacceptable, as practice in the matter varied greatly.

30. Mr. BARTOŠ welcomed the support expressed for Mr. Verdross's amendment. However, the Special Rapporteur had sidestepped the main issue and appeared to be advocating that only functions specified in existing consular conventions should be mentioned in the definition, whereas the main categories were those long recognized everywhere in law and custom. A State which granted an exequatur tacitly agreed that the functions recognized by international law and custom as vesting *ex jure* in consuls could be exercised within its territory. The main question to be settled in article 13 was whether or not it should differentiate between functions expressly conferred by convention and those generally recognized as exercisable by consuls, even in cases where no convention had been concluded. In his view it would be a disservice to international law not to mention the second category.

31. Mr. ZOUREK, Special Rapporteur, did not think that his view differed fundamentally from that of Mr. Bartoš. He agreed that the Commission should determine which were the essential consular functions according to existing law and practice. The matter was largely one of presentation and he suggested it would be sufficient to explain in the commentary that certain, not very numerous functions had long been recognized as attaching to the consular office, and that others had been defined by national legislation or international instruments; if any other solution were adopted, article 13 would have to contain an elaborate classification which might not be suitable to a multilateral convention expressly stating—as it presumably would do—that its provisions were without prejudice to existing bilateral treaties.

32. Mr. BARTOŠ found the Special Rapporteur's suggestion quite unacceptable, particularly after the fate of the commentary to the texts adopted by the United Nations Conference on the Law of the Sea, in 1958. His country had been very much concerned about the difficulty of arranging for the defence of nationals arrested on foreign soil. To deny consuls access to arrested persons was a flagrant violation of international law; the consular function of protecting nationals of the appointing State was fundamental, and hence should be mentioned first in the enumeration. The draft should respect rules which had for centuries been generally recognized in international law and in the practice of States, regardless of whether or not there was a convention, or whether the convention expressly provided for that function or not.

33. Mr. YOKOTA considered that the article should be framed in very general terms and that it should only mention a few of the main consular functions. Most of the detail could be relegated to the commentary, otherwise the lack of uniformity in the practice would cause great difficulties. He even had serious doubts about a general article accompanied by the principal functions enumerated in the numbered paragraphs of the second variant, as suggested by Mr. Alfaro (see para. 26 above). Some paragraphs without sub-paragraphs had little, if anything, to say and, what was worse, might be interpreted to give too wide functions to consular officers. He cited paragraphs 8 and 10 by way of illustration. On the other hand, if the Commission went into too much detail, many difficulties would arise. To illustrate such difficulties, he referred to paragraph 3 (*h*) and (*j*) of the Special Rapporteur's second variant and asked whether those provisions truly reflected practice, and were acceptable to many States.

34. Mr. TUNKIN said that, in view of the Commission's twofold task of codifying generally accepted rules of international law and of promoting the development of international law, it should be possible for the Commission to express forthwith, by a vote, a preference for the one or the other of the two alternative methods of presenting article 13. In the light of the decision, the Special Rapporteur could then prepare a new text for consideration.

35. The CHAIRMAN did not think it would be desirable to proceed to a vote before further thought had been given to the considerations mentioned by Mr. Verdross and Mr. Bartoš. It was true that even in the absence of bilateral conventions there were certain fundamental consular functions recognized by international law which might usefully be specified in the draft.

36. Mr. ZOUREK, Special Rapporteur, pointed out that the question of what rules codified existing general law and which were being proposed by the Commission *de lege ferenda* was pertinent to all the articles in the draft and not solely to article 13. If the Commission had intended to confine itself to codifying customary law the draft would have been much too schematic. It was for that reason that he had attempted to introduce some elements of progressive development drawn from numerous conventions which, it could be reasonably assumed, would find acceptance among many States.

37. In reply to Mr. Yokota's question about paragraph 3 (*h*) and (*j*), he said that the functions there described appeared in many consular conventions, which would tend to prove that a true international custom was involved.

38. The CHAIRMAN, replying to the Special Rapporteur, said it was arguable that article 13 constituted a special case and that it would be desirable to indicate in the commentary that certain consular functions had long been recognized in customary law.

39. Mr. TUNKIN suggested that the Special Rapporteur should be asked to submit two alternative versions, one of a general character on the lines of article 3 in the draft on diplomatic intercourse and immunities and the other of a more detailed kind, as suggested during the discussion.

It was so agreed.

The meeting rose at 1 p.m.