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**Summary record of the 517th meeting**

Topic:  
**Consular intercourse and immunities**

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Mr. Padilla Nervo and would probably be acceptable to the Commission. He would prepare a redraft of article 17 along those lines.

51. Mr. TUNKIN supported the solution that had now been accepted by the Special Rapporteur. In his view, the position of a consular officer, so far as acceptability to the receiving State was concerned, was to some extent analogous to that of a diplomatic agent. A consul performed official functions in the territory of the State of residence and the text should not be capable of being construed as providing possible grounds for litigation between the States concerned if the State of residence no longer considered the consul *persona grata* and asked the sending State to recall him. The position was, *mutatis mutandis*, the same as that covered by article 8 of the draft on diplomatic intercourse and immunities.

52. He suggested that the Special Rapporteur's redraft of article 17 should be submitted direct to the Drafting Committee.

*It was so agreed.*

#### ARTICLES 18 AND 19

53. The CHAIRMAN suggested that, in keeping with the precedent of the draft on diplomatic intercourse and immunities, articles 18 and 19 of the present draft, both of which related to the termination of consular functions, should be discussed in connexion with a later chapter.

54. Mr. ZOUREK, Special Rapporteur, agreed to that course.

The meeting rose at 1 p.m.

### 517th MEETING

*Wednesday, 17 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 13 (continued)\*

1. The CHAIRMAN drew attention to the revised text of article 13, with two variants, submitted by the Special Rapporteur.

#### *"Consular functions"*

##### *"FIRST VARIANT"*

"1. The task of a consulate is to defend, particularly in relations with the authorities of the consular district, the rights and interests of the sending State and of its nationals and to give assistance and relief to the nationals of the sending State, as well as to exercise other functions specified in the relevant conventions or entrusted to the consulate by the sending State, without prejudice to the laws of the State of residence.

"2. Without prejudice to the consular functions deriving from the preceding paragraph, a consulate may perform the undermentioned functions (among others:

#### *"I. Functions concerning trade and shipping"*

"1. To protect and promote trade between the sending State and the State of residence, and to foster the development of economic relations between them;

"2. To render all necessary assistance to ships and merchant vessels flying the flag of the sending State which are in a port within its consular district;

"3. To render all necessary assistance to aircraft registered in the sending State;

"4. To render assistance to vessels owned by the sending State, and particularly its warships, which visit the State of residence;

#### *"II. Functions concerning the protection of nationals"*

"5. To see that the sending State and its nationals enjoy all the rights accorded to them under the laws of the State of residence and under the existing international conventions and to take appropriate steps to obtain redress if these rights have been infringed;

"6. To propose, where necessary, the appointment of guardians or trustees for nationals of the sending State, to submit nominations to courts for the Office of guardian or trustee, and to supervise the guardianship of minors and the trusteeship for insane and other incapable persons who are nationals of the sending State and who are in the consular district;

"7. To represent in all cases connected with succession, without producing power of attorney, the interests of absent heirs-at-law who have not appointed special agents for the purpose, to approach the competent authorities of the State of residence in order to arrange for the compilation of an inventory of assets and for the winding up of estates, and to settle disputes and claims covering the estates of deceased nationals of the sending State;

#### *"III. Administrative functions"*

"8. To perform or record acts of civil registration (births, deaths, marriages) in so far as it is authorized to do so under the laws of the sending State, without prejudice to the obligation of declarants to make whatever declarations are necessary in pursuance of the laws of the State of residence;

"9. To solemnize marriages in accordance with the laws of the sending State, where this is not contrary to the laws of the State of residence;

"10. To serve judicial documents or take evidence on behalf of courts of the sending State, in the manner specified by existing conventions or in any other manner compatible with the laws of the State of residence;

#### *"IV. Notarial functions"*

"11. To receive any statements which nationals of the sending State may have to make; to draw up, attest and receive for safe custody wills and deeds-poll executed by nationals of the sending State and indentures the parties to which are nationals of the sending State or nationals of other States, provided that they do not relate to immovable property or to rights *in rem* in connexion with such property;

\* Resumed from the 514th meeting.

"12. To attest or certify signatures and to stamp, certify or translate documents in any case in which these formalities are requested by a person of any nationality for use in the sending State or in pursuance of the laws of that State. If an oath or declaration in lieu of oath is required under the laws of the sending State, such oath or declaration may be sworn or made before the consul;

"13. To receive for safe custody such sums of money, documents and articles of any kind as may be entrusted to it by nationals of the sending State;

#### "V. Other functions

"14. To further the cultural interests of the sending State, particularly in science, the arts, the professions and education;

"15. To act as arbitrators or mediators in any disputes submitted to it by nationals of the sending State, where this is not contrary to the laws of the State of residence;

"16. To gather information by all lawful means concerning trade and other aspects of national life in the State of residence and to report thereon to the Government of the sending State or to interested parties in that State;

"17. A consulate may perform additional functions as specified by the sending State, provided that their performance is not prohibited by the laws of the State of residence.

#### "SECOND VARIANT

"Within its district, a consulate is entitled *inter alia*:

"(a) To defend the rights and interests of the sending State and of its nationals;

"(b) To give assistance and relief to the nationals of the sending State;

"(c) To exercise administrative and notarial functions as specified in the existing conventions or entrusted to it by the sending State, without prejudice to the laws of the State of residence;

"(d) To render all necessary assistance to ships and merchant vessels flying the flag of the sending State, and to aircraft registered in the sending State, which are in the consular district;

"(e) To further cultural relations, particularly in science, the arts, the professions and education;

"(f) To gather information by all lawful means concerning conditions of trade and other aspects of national life, and to report thereon to the Government of the sending State or to interested parties."

2. He also drew attention to the amendment to article 13 submitted by Mr. Padilla Nervo in the following terms:

"Consuls shall exercise the functions which, in accordance with international law, are specified by the law of the sending State without prejudice to the laws of the State of residence, as well as those conferred upon them by the relevant consular conventions.

"The task of consuls is:

"(a) To give assistance and relief to nationals and bodies corporate of the sending State and to protect them *vis-à-vis* the local authorities;

"(b) To perform certain notarial and civil registration functions with respect to nationals of the sending State and certain administrative functions conferred by municipal law;

"(c) To protect and assist within their district ships flying the flag of the sending State and aircraft registered in that State;

"(d) To defend the economic interests of their countries, to promote trade and to further the development of economic and cultural relations between the two States."

3. Mr. ZOUREK, Special Rapporteur, said that he had prepared the two new variants of article 13 in accordance with the recommendation adopted by the Commission (see 514th meeting, para. 39). The first of the new variants began with a general clause, in the drafting of which he had been guided by the amendments of Mr. Verdross (see 513th meeting, para. 54, and 514th meeting, para. 24) and Mr. Pal (see 513th meeting, para. 62; an additional amendment to Mr. Verdross's amendment was submitted in writing by Mr. Pal after the 514th meeting<sup>1</sup>). The clause was broad enough to cover not only functions under customary international law but also functions that might be performed under conventions or under the municipal law of the States concerned. The general clause was followed by an enumeration which, in accordance with the suggestions of various members, was much shorter than that set out in article 13 of his original draft and which comprised the most typical functions of consuls. The new enumeration was, again, not exhaustive but purely illustrative. In order to make it unmistakably clear that the enumeration was not intended to be exhaustive, sub-paragraph 17 provided, in keeping with a suggestion made during the discussion, that the consul could perform additional functions. The second variant, which was much shorter than the first, followed the pattern of article 3 of the Commission's draft on diplomatic intercourse and immunities (A/3859, chapter III).

4. He much preferred the first variant. In his view States would be more likely to accept a multilateral convention which contained a precise description of consular functions. A general article would not reflect the state of international law since consular functions, unlike diplomatic functions, were limited *ratione materiae* to certain categories.

5. He suggested that the Commission should first consider the various proposals before it with a view to taking a decision on the structure of the article. Thereafter the draft reflecting the structure favoured by the Commission could be referred to the Drafting Committee for improvements of detail.

6. Mr. VERDROSS did not agree that paragraph 1 of the first variant reflected his views. If the task of a consulate was to defend the rights and interests of the sending State, in what way did its task differ from that of a diplomatic mission? In his view the first task

<sup>1</sup> The text of that amendment reads as follows:

"1. The task of consuls is to provide assistance and relief for the nationals of the State which appointed them, in particular to protect them *vis-à-vis* the local authorities, and to perform such other functions as are conferred on them by the sending State in accordance with international law and usage and without prejudice to the legislation, if any, of the receiving State, subject always to the terms of treaties or conventions, if any, between the sending State and the State of residence.

"2. Without, in any way, detracting from the generality of the above provision, such functions may in particular be:"

of a consulate was to concern itself with the rights and interests of the nationals of the sending State. The difference of emphasis was important and it was a question on which the Commission should take a definite decision.

7. Mr. LIANG, Secretary to the Commission, said that the choice between the first and second variants depended on another choice which had already been made: that between a code and a multilateral convention. If the Commission had been drafting a code, he would have agreed that the first variant would be very useful. States would be able to employ certain elements of the detailed enumeration for the purposes of their bilateral conventions. However, since the draft was to be presented to the General Assembly as a multilateral convention, the detailed enumeration might cause difficulties. Comparison between a detailed enumeration in a general convention and the provisions of existing consular conventions might show divergencies and States would not be too eager to adopt a multilateral convention that conflicted in certain respects with their existing treaties, even though the multilateral convention might contain an article, similar to article 30 of the Convention on the High Seas<sup>2</sup> stating that its provisions "shall not affect conventions or other international agreements already in force, as between States parties to them".

8. It would be somewhat unrealistic to expect all States to become parties to a multilateral convention which contained a detailed enumeration of consular functions, for they preferred to deal with certain problems connected with their relations with other States in bilateral conventions. It therefore seemed to him that a general formula would be likely to find wider support.

9. Mr. ZOUREK, Special Rapporteur, said in reply to Mr. Verdross that the difference between a diplomatic agent and a consular officer was that the latter defended the rights and interests of the sending State within his consular district, whereas the former did so, in a more general way, in relation to the receiving State as a whole. Furthermore, the extent to which a consul was concerned with the rights and interests of the sending State partly depended on the social and economic structure of the sending State. It seemed to him that if the text was to be acceptable to all States, it would have to take account of that fact.

10. With regard to the Secretary's remarks, he pointed out that, by virtue of article 38 of his draft, existing conventions would not be affected. The general multilateral convention would apply only to questions not covered by existing bilateral conventions.

11. A general formula would be more likely to give rise to varying interpretations and disputes. All recent bilateral conventions contained an enumeration, a fact which suggested that States desired a definition at least of the essential functions of consuls.

12. Finally, he recalled that the Commission's first draft would be submitted to Governments for their comments. A detailed enumeration would be more likely to elicit their views and the Commission would thus have a considerable amount of material on which to

base its decisions respecting the final draft. By contrast, a general formula would provoke little comment.

13. Mr. TUNKIN regretted that he could not agree with Mr. Verdross. When a consul exercised his duty to seek compliance, within his consular district, with the provisions of treaties between the sending State and the State of residence, he was defending the rights and interests of the sending State. To some extent he was also defending those rights and interests when he intervened to protect the nationals of the sending State. Owing to the social and economic structure of socialist States, one of the most important duties of their consuls was to defend the rights and interests of their States. If the draft was to reflect existing general practice and was to be acceptable to all States, it would have to contain a provision along the lines indicated by the Special Rapporteur. He suggested that the Drafting Committee might be able to improve the wording.

14. He endorsed the Special Rapporteur's remarks concerning the difference between the functions of a diplomatic agent and those of a consular officer. The difference lay in the scope of their functions and in the sphere of their activities. A consular officer defended the rights and interests of the sending State in his consular district and it followed that he was not empowered to deal with general problems affecting relations between the two States concerned.

15. As to the two new variants proposed by the Special Rapporteur, he suggested that it might be useful to elaborate both of them and submit them to Governments with a request that they should not only comment on the text but should also state which of the two they preferred.

16. Mr. YOKOTA observed that many of the provisions of the first variant might not reflect existing practice. He noted, for example, that the functions enumerated in sub-paragraphs 8, 9, and 10 were qualified by conditional clauses, whereas those in sub-paragraphs 6, 7 and 11 were not so qualified. It might therefore be necessary to examine the enumeration paragraph by paragraph in order to ensure that consuls had an unqualified right to exercise some of the functions specified. For that reason he preferred a more general formula.

17. In that connexion, he pointed out that the fundamental difference between the Special Rapporteur's second variant and the amendments of Mr. Verdross and Mr. Padilla Nervo was that the formula emphasized the protection of the rights and interests of the *sending State*, whereas the latter stressed the protection of the rights and interests of *nationals of the sending State*. In his view consular functions were still mainly concerned with nationals and therefore the rights and interests of nationals should be mentioned first. Of the various texts before the Commission, he preferred that submitted by Mr. Padilla Nervo.

18. Mr. EDMONDS thought that the word "defend", which appeared in some of the proposals before the Commission, had a certain connotation of force, and he suggested that it should be replaced by the word "protect".

19. Mr. VERDROSS agreed with Mr. Yokota that the classical right of consuls to protect the rights and interests of nationals should be mentioned first. Then, if necessary, the protection of the economic rights and interests of the sending State might be mentioned. He still failed to see in what way a consul defended the

<sup>2</sup> United Nations Conference on the Law of the Sea, *Official Records, Volume II: Plenary Meetings* (United Nations publication, Sales No.: 58.V.4, Vol. II), annexes, document A/CONF.13/L.53, p. 138.

general rights and interests of the sending State before the local authorities. With regard to Mr. Tunkin's observation he pointed out that the Special Rapporteur's first variant implied, in view of the words in paragraph 1, "particularly in relations with the authorities of the consular district", a general right of a consul to defend the rights and interests of the sending State, including *vis-à-vis* the central authorities of the State of residence. The formula proposed by Mr. Zourek was therefore too broad.

20. The CHAIRMAN said that, for example when consuls administered war cemeteries in concert with the local authorities or dealt with cases affecting Government-owned ships in their district, they were obviously defending the rights and interests of the sending State. The Special Rapporteur's text, with appropriate re-drafting, might be acceptable, because it confined the consul's function to the consular district. The defence of the interests of the sending State was part of the consular function in so far as those interests were local in character.

21. Mr. ZOUREK, Special Rapporteur, observed that any measure taken by a State to protect its own nationals was in fact a defence of its own interests. Under many consular conventions consuls were expressly empowered to defend the interests of the sending State; indeed, whenever a consul defended the interests of a national, he was in fact defending the application of the rules of international law and particularly the consular conventions. In view of those considerations, it would be wrong to restrict the consular functions to the protection of *nationals* of the sending State.

22. He would be willing to delete the expression "among others" in paragraph 2 of the first variant, and also to explain in the commentary that a consul might in certain cases, with the consent of the State of residence, act outside the consular district. The question of the order of the paragraphs raised by Mr. Verdross could easily be settled by the Drafting Committee.

23. In reply to Mr. Edmond's criticism of the term "defend" (see para. 18 above), he suggested that that word corresponded exactly to the nature of the consular mission and was therefore more suitable than the word "protect". Moreover, that was a point which could be referred to the Drafting Committee.

24. The answer to Mr. Yokota's doubts whether article 13 corresponded in all respects with existing law (see para. 16 above) was that the article went beyond customary law in that it borrowed from consular conventions a number of provisions which they had in common and which might reasonably be expected to find acceptance in a multilateral convention. To that extent, the article contributed to the progressive development of international law.

25. Mr. SANDSTRÖM said he preferred the first variant in the Special Rapporteur's revised text. The difficulties pointed out by the Secretary might be overcome by a cross-reference to article 38. Too much emphasis had probably been placed on the rights and interests of the sending State, but the Drafting Committee might specify what those rights were; they would probably prove to be mainly questions of private law.

26. He favoured Mr. Tunkin's suggestion that both variants should be sent to Governments for comment.

27. Mr. ALFARO said that he preferred the Special Rapporteur's second variant as a general expression of the essential functions of a consulate. Discussion of so exhaustive a list as that in the first variant would take

too long and, in any case, the Commission should concentrate on general statements of principle. He suggested that for the purpose of obtaining the views of Governments the full enumeration given in the first variant should be reproduced in the Commission's report with a note explaining that, owing to its length, the catalogue of functions had not been discussed in detail.

28. At the same time, the Commission might prepare a text combining the amendments submitted by Mr. Verdross and Mr. Padilla Nervo with the Special Rapporteur's second variant. The introductory clause, taken from Mr. Padilla Nervo's amendment, might be linked to the short list by some such phrase as "and in particular the following". He suggested that the Drafting Committee should be asked to work out a text on those lines.

29. Mr. HSU said that if the Commission preferred a shorter version of the article he would support Mr. Padilla Nervo's amendment, because it described consular functions more precisely and more comprehensively than the Special Rapporteur's second variant. If the first variant was adopted, some term should be found in English to replace "defend" and "protect". A consul could defend or protect a national of his State only by the exercise of power and in doing so would probably have to call upon his Government and would therefore be acting virtually as a diplomatic representative. The terms "protect" and "defend" awakened unpleasant memories of the former ex-territorial powers of consuls in non-European countries.

30. Mr. ERIM said that when article 13 had first been discussed, he had objected (see 513th meeting, para 67) to the proposition that the first task of a consulate was to defend the rights and interests of the sending State; nevertheless, the same language had been retained in the Special Rapporteur's revised version. The discussion had not been without value, however. It had been argued that the sole difference between diplomatic and consular functions was the difference in scope, or, in other words, that the consular function was limited to the consular district. He disagreed: the diplomatic and the consular function differed in their very nature. A consul acted virtually as an advocate, defending individuals or bodies corporate that were nationals of the sending State. Although the State might control the bodies corporate, in that context the State was not acting as a sovereign but as a trader. For example, a merchant vessel owned by a State-controlled enterprise was not on the same footing as a warship. A diplomatic agent acted, one might say, as a representative of the *imperium* of his own State, whereas a consul performed what were more properly conceived as "*actes de gestion*". The difference was obvious. The consul protected and promoted trade between two States. That was not a political or diplomatic function. Therefore it was necessary to find a clear and unambiguous formula which showed that the first task of a consul was to protect the rights and interests of the *nationals* of the sending State.

31. He would therefore prefer a combination of the amendments submitted by Mr. Verdross and Mr. Padilla Nervo. Such a text would take the first paragraph from Mr. Verdross's amendment and add to it the four sub-paragraphs in Mr. Padilla Nervo's amendment (see para. 2 above). The Special Rapporteur's second variant was too general and might be open to unduly broad construction.

32. Mr. MATINE-DAFTARY said he preferred the Special Rapporteur's second variant. He was not in favour of submitting both variants to Governments, especially in the light of the Secretary's remarks. The

details set out in the Special Rapporteur's first variant, which were more suitable for bilateral conventions, might be placed in the commentary to show the basis for the second variant.

33. The expression "rights and interests of the sending State" might be ambiguous, since it tended to blur the distinction between the diplomatic and the consular function. It should be specified at least that the interests in question were commercial.

34. Mr. Padilla Nervo's introductory paragraph might introduce the Special Rapporteur's second variant. Sub-paragraph (*d*) of Mr. Padilla Nervo's amendment was preferable to sub-paragraph (*a*) of the Special Rapporteur's second variant, if some other word could be found for "defend". The reference to the development of "cultural relations" should, however, be deleted, since such activities lay outside the scope of the consular functions, which had always been commercial and economic. In sub-paragraph (*c*) of the Special Rapporteur's second variant the phrase "without prejudice to the laws of the State of residence" should be deleted, since consuls dealt mainly with the personal status of nationals of the sending State; the phrase "within the limits of the consular conventions" might be substituted. Similarly, the phrase "and other aspects of national life" in sub-paragraph (*f*) of the Special Rapporteur's second variant was far too broad, since consuls were concerned only with their consular district.

35. Mr. BARTOŠ referred to his earlier statement (514th meeting, para. 1) that the draft should mention the functions vested in consuls by virtue of customary international law. He would leave the framing to the Drafting Committee and would reserve his right to record a dissenting opinion if the Drafting Committee could not accept that idea.

36. He agreed that Governments should be invited to comment on the draft, for in the light of their comments it would be possible to decide between the two variants submitted and also to settle the controversy in the Commission concerning certain consular functions.

37. Mr. Padilla Nervo's amendment was a good example of synthesis, which he accepted, with some slight reservations based on his conception of the position and tasks of consuls. He had considerable doubt, however, about the phrase "without prejudice to the laws of the State of residence". In so far as those words could be construed to mean that the municipal law of the State of residence prevailed over customary international law, they were unacceptable, for if they were approved as part of the article they would concede the liberty of that State to enact legislation hampering the exercise of the consular function in a manner incompatible with international law.

38. Mr. AMADO said that, in principle he was against all enumeration, especially in a text like that under consideration. The Special Rapporteur's first variant was excessively burdened with detail and hence unsuitable for a multilateral convention; on the other hand, the second variant contained some very vague provisions, for example, sub-paragraph (*e*). It could not be said that one of the consul's functions was to further cultural relations in general unless the consular function were equated with the diplomatic function. Undoubtedly, a consul could arrange lectures and similar activities in his own district, but the modern tendency was to further cultural relations by means of the appointment of cultural attachés to embassies.

39. He criticized the phrase "by all lawful means" in sub-paragraph (*f*) of the second variant, for surely it was unthinkable that the Commission could contemplate the idea of consuls acting in any manner other than lawful.

40. He was inclined to support Mr. Tunkin's suggestion (see para. 15 above) that both variants should be sent to Governments, though he pointed out that the second was as open as the first to the objection against enumeration. Since the Commission would probably not decide the matter by vote, he would agree to the course which seemed to be generally acceptable.

41. Mr. AGO, referring to the suggestion that both the variants in the Special Rapporteur's redraft should be referred to Governments for comment, said that in his opinion the first variant should not be thus submitted. The long enumeration which it contained was merely a compendium of provisions taken from specific conventions; the Commission's task was not to compile such provisions, which were in any case subject to amendment, but to set forth the essential rules of international law concerning consular functions. He therefore preferred the form of the second variant and of Mr. Verdross's and Mr. Padilla Nervo's amendments.

42. Turning to paragraph 1 of the first variant, he observed that the defence of the rights and interests of the sending State was a point on which there seemed to be some confusion. A consul could obviously not prosecute at the international level violations by the State of residence of international rights of the sending State; he could intervene only at an earlier stage of such violation, while the question was still at the level of the internal law of the State of residence. Similarly, the phrase "and to take appropriate steps to obtain redress if these rights have been infringed" in sub-paragraph 5 of the first variant seemed to be descriptive not of the consular but of the diplomatic function. Finally, he agreed with Mr. Amado that the promotion of culture and trade on an international basis was also too wide a field for consular functions.

43. Mr. TUNKIN said it was an obsolete view that economic relations were conducted independently of the State as a subject of international law. A new economic system had come into being under which the State played an increasingly important part in economic activities. No agreement could be reached in the Commission if members adhered to an obsolete position; new situations must be taken into account and the rules drafted must be acceptable to all. The socialist States could not accept the thesis that consular officers acted only incidentally in defence of the rights and interests of the State as such; the Commission could not ignore the fact that the consular officers of socialist States very frequently acted in that capacity.

44. Moreover, he could not agree that the Special Rapporteur's new draft of article 13 confused the diplomatic with the consular function. In practice, a consul might take the necessary steps to defend rights and interests in his own sphere. He thought that, while the first variant reflected the real practice in the matter quite accurately, its wording might perhaps be improved. He was surprised, however, that such strong objections had been voiced in the Commission to the statement of a practice which in itself had not given rise to objections.

45. Mr. AGO considered that the Commission's task was not to differentiate between economic systems but to define what consuls could or could not do. In carrying

on economic activities, a socialist State which conducted the entire economy of the country would be acting as a subject of municipal law, not of international law; the consuls of that State could therefore perform the consular functions connected with such activities. In the matter of the protection of rights and interests, the difference between diplomatic agents and consular officers was that the former acted on behalf of the State at the international level, while the latter acted at the level of municipal law, also when they acted in defence of the rights of the sending State. The question of the different territorial spheres of diplomatic and consular action was irrelevant and merely confused the issue.

46. Mr. VERDROSS thought that consular functions were governed by municipal and not by international law; that was proved by the fact that the consular activities were performed in contact with the local authorities of the State of residence, which were obliged to apply the internal law of that State, including the treaties accepted as law. He further agreed with Mr. Ago that the defence of the rights and interests of the sending State could not be regarded as a consular function under general international law.

47. Mr. TUNKIN considered that Mr. Ago's thesis that a State was not acting as a subject of international law in the performance of its economic activities was absolutely untenable. Moreover, in practice consuls often defended not only the rights of nationals, but the rights and interests of the State itself. Finally, he said that in speaking of the different spheres of diplomatic and consular functions, he had had scope and not actual area in mind.

48. Mr. GARCIA AMADOR said that the Commission should not go into the details of the difference between diplomatic and consular functions, since the matter was extraneous to the debate. It should simply define consular functions and should draft the article in flexible terms, in order to make it adaptable to various developments.

49. Turning to Mr. Padilla Nervo's amendment, he asked whether the phrase "in accordance with international law" meant that only the law of the sending State had to be in conformity with international law, or whether the law of the State of residence likewise had to be in conformity with international law.

50. The CHAIRMAN agreed that it was unnecessary to discuss at length the difference between diplomatic and consular functions. He pointed out that differences of opinion on the subject of State commercial activity existed not only between socialist and non-socialist States, but also between Anglo-Saxon and continental jurists. The difference between the two types of functions should not be stated too rigidly, for it was not quite true that a consul could not exercise any functions at the international level. Some particular matter might be governed by a treaty, but the consul could take action locally if the treaty had been violated locally; nevertheless, he still could not deal with the central government.

51. Mr. BARTOŠ agreed with Mr. Ago's views on the position of the State regarding economic activities (see para. 45 above). In Yugoslavia, for example, the State carried on all the economic activities but was nevertheless subject to the same rules as other traders and was afforded the same consular protection. In that way, Yugoslavia avoided misunderstandings with non-socialist States in commercial matters; for example, if a ship were seized for debt, it would be a far more

serious matter to deal with the case under international law than under municipal law. Apart from that theoretical aspect of the question, he observed that in practice consular officers frequently defended the rights and interests of their States as juridical persons.

52. Mr. PADILLA NERVO said he preferred the second variant of the Special Rapporteur's redraft, but had submitted an amendment to it because it still confused functions under international law, functions under bilateral treaties and functions deriving from the domestic law of the sending State. In his amendment, therefore, he had tried to eliminate details on which it was difficult to reach agreement. He had also avoided any possible confusion between diplomatic and consular functions, since all the tasks enumerated derived directly from the exequatur. Moreover, his sub-paragraph (a) was completely different from the corresponding provision of the draft on diplomatic intercourse and immunities—article 3 (b)—(A/3859, chapter III).

53. In reply to Mr. García Amador, he said that his amendment owed something to the Special Rapporteur's original draft article and to the wording of article 10 of the Havana Convention of 1928.<sup>3</sup> The provision meant that a consul could not contravene the general principles of international law and that his action in accordance with the law of the sending State must be regarded as unlawful if it were not in conformity with international law. While some members might consider it best to transmit his amendment to the Drafting Committee, he believed the Commission should decide to include only one variant—the shorter—in its draft of article 13, reflecting the Commission's idea of what consular functions should be. The opinions of Governments on the enumeration in the Special Rapporteur's first variant might be obtained by reproducing it in the commentary.

The meeting rose at 1.5 p.m.

## 518th MEETING

Thursday, 18 June 1959, at 9.50 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 continue its debate on the Special Rapporteur's redraft of article 13 and the amendments submitted (see 517th meeting, paras. 1 and 2 and footnote 1).

#### ARTICLE 13 (continued)

2. Mr. ZOUREK, Special Rapporteur, said that the Commission's debate on the definition of consular functions reflected the different views held by members concerning the role of the consul. Some considered that the sole mission of the consul was to give assistance to the

<sup>3</sup> See *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No.: 58.V.3), p. 422.