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Summary record of the 518th meeting

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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 1928.³ 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

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), p. 422.

nationals of the sending State and that he could in no case defend the rights of the State as a sovereign entity and a subject of international law. Others considered that the definition should take into account the consul's earlier role of trader and judge. He referred to the description of the historic evolution of the consular functions given in his report (A/CN.4/108, part I, especially paras. 23 *et seq.*). In modern times, consuls could not be regarded merely as persons providing assistance to the nationals of the sending State. In the first place, it was recognized that consuls held the authority of the sending State within their district; secondly, if they defended the rights and interests of nationals of the sending State, they were doing so not as representatives of nationals but as representatives of the sending State; and thirdly, they sometimes defended the rights and interests of the State as a subject of international law. The Chairman had cited the cases of assistance to Government-owned ships and the maintenance of war cemeteries (see 517th meeting, para. 20); to those examples could be added those of the issue of entry certificates for ships in quarantine, the examination of ships' papers, the issue of passports and visas, and obtaining redress for nationals of the sending State who had suffered from the violation of international treaties.

3. He had carefully based his text on precedents found in national legislation and international conventions. Some doubts had been expressed as to whether a consul could defend the rights and interests of the State as a subject of international law; in that connexion, he quoted from the relevant legislation of Brazil, Switzerland and the United States, which provided for that consular function. Incidentally, he thought it might be useful if the Secretariat prepared a collection of national laws and regulations governing the organization of consular services as a supplement to volume VII of the United Nations Legislative Series (*Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*). Furthermore, provisions extending a consul's functions beyond assistance to nationals to the defence of the rights and interests of States were contained in many international conventions, not only in conventions between socialist States, but also, for example, in article 28 of the Consular Convention between the United Kingdom and France of 31 December 1951¹. Moreover, it followed logically from the thesis that a consul's sole function was to protect his nationals, and that no consulate could be set up unless there were nationals of the sending State in the State of residence, yet, in practice, consulates were established in countries where there were no resident nationals of the sending State.

4. It had been said during the debate that, when a consul defended the economic interests of his country, he was defending the State as trader and not the State as a subject of international law. He considered the theory that a State could sometimes act *de jure imperii* and sometimes *de jure gestionis* to be untenable. In his opinion, any State, irrespective of its economic system, always acted in a sovereign capacity with respect to foreign countries, even in economic matters. As an eminent United States authority had said, to ensure the well-being of the population was as sovereign an act as building up a navy.

5. Nor could he agree with the view expressed by Mr. Ago (517th meeting, para. 45) that a consul's functions were always governed by municipal law, even when seeking redress for the violation of international treaties. When such a violation occurred, the consul had the right to make representations before the local authorities, but

his functions in that respect were governed by international law, in accordance with the treaty concerned.

6. Turning to matters of detail that had been raised, he referred to Mr. Matine-Daftary's suggestion (517th meeting, para. 34) that a general clause, on the lines of the introductory paragraph of Mr. Padilla Nervo's amendment (*ibid.*, para. 2) should precede the second variant prepared by the Special Rapporteur. He thought it might be difficult to follow that course, since there might be some doubt as to whether the functions enumerated in that variant were already recognized in international law. On the other hand, he could accept Mr. Matine-Daftary's suggestion that sub-paragraph (d) of Mr. Padilla Nervo's amendment should replace sub-paragraph (a) of the second variant. With regard to the doubts expressed concerning the phrase in paragraph 1 of the first variant—"without prejudice to the laws of the State of residence"—he said that the phrase was taken from article 10 of the Havana Convention of 1928 and was indispensable, since the functions conferred upon the consul by the sending State might be at variance with the laws of the State of residence. In reply to Mr. Amado's criticism (517th meeting, para. 39) of the expression "by all lawful means" in sub-paragraph (f) of the second variant, he pointed out that the same expression was used in the corresponding provision of the draft on diplomatic intercourse and immunities (A/3859, chapter III, article 3). Mr. Verdross had expressed anxiety (517th meeting, para. 6) concerning the wide scope of the expression "the rights and interests of the sending State" and had suggested in his amendment (513th meeting, para. 54) that the functions should be limited to those conferred on consuls by consular treaties and conventions. Yet consuls might derive certain rights not from those instruments but from customary international law. He suggested that the Drafting Committee should be asked to devise suitable wording to show that consular functions were not as wide as diplomatic functions.

7. With regard to the question of submitting the redraft of article 13 to Governments, he thought it would be useful to submit both the variants he had drafted. The first variant, though shorter than the enumeration in his original draft (A/CN.4/108, part II), was still explicit enough to give rise to interesting observations. Moreover, there was a precedent for the method of submitting variants—the case of the Commission's drafts on statelessness².

8. Mr. VERDROSS drew attention to the expression "within its district" in the opening clause of the second variant in the Special Rapporteur's redraft of article 13. He doubted whether a consulate was entitled to defend the rights and interests of the nationals of the sending State vis-à-vis the central authorities of the receiving State in the district of the consulate. It would be better to provide that a consulate could take action only before the local authorities.

9. In his opinion, the difference between consular protection and diplomatic protection lay in the fact that the consul upheld the rights of individuals under local law, including treaties in force in the State of residence, whereas diplomatic agents could only uphold the international rights of the sending State on behalf of its nationals, after local remedies had been exhausted.

10. The CHAIRMAN thought that many of the points raised could best be dealt with by a reference in the commentary.

¹ Cmd. 8457 (London, His Majesty's Stationery Office).

² See *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, chap. IV.

11. The Commission now had to decide whether it preferred the first (longer) or the second (shorter) variant in the Special Rapporteur's redraft of article 13, whether both variants should appear in its draft, or, if the Commission preferred the second variant, whether the first variant should be placed in the commentary and Governments should be invited to comment on both texts. The main objection to placing the first variant in the article itself was that the Commission had not discussed the enumeration in detail and that doubts had been expressed concerning some of the items. Perhaps a vote could be taken on the basis that the variant preferred by the majority would become the draft article and that the other would be reproduced in the commentary.

12. Mr. TUNKIN pointed out that it was unusual to ask Governments to make observations on the commentary. If the Commission wanted an opinion on both variants, they should both appear as draft articles.

13. Mr. LIANG, Secretary to the Commission, agreed with Mr. Tunkin that it was not the practice to ask Governments to send observations on the commentary, which, in any case, was usually prepared when the final text was adopted. On the other hand, in the particular case, where some difficult points were involved, the views of Governments on such questions as whether the consular section of a diplomatic mission needed an exequatur from the State of residence, might be extremely useful. Governments might also be asked whether they preferred a detailed or a general version of article 13, but not until after those versions had been discussed. If it were decided that both variants should be retained, the Commission should discuss the substance of the Special Rapporteur's redraft and the amendments thereto.

14. He agreed with the Special Rapporteur that a supplementary volume of the Legislative Series relating to the organizational aspects of consular activities would be most useful and hoped that it would be possible for the Secretariat to prepare such a volume.

15. The CHAIRMAN thought that there had been a precedent for requesting the views of Governments on certain points in the commentary. He also saw no harm in sending the variants to Governments without substantive discussion, provided that the Governments were informed of the exact situation.

16. Mr. ALFARO thought that, if the Commission decided in favour of the second variant, it might submit that text to Governments as the one approved by the Commission and annex the texts proposed by the Special Rapporteur which the Commission had not approved.

17. Mr. YOKOTA did not think it advisable to include the two variants in the draft, since that would imply that they were both acceptable to the Commission, whereas the provisions of the first variant had not been fully discussed. Indeed, some members had expressed doubts and even objections with regard to certain items of the enumeration. Accordingly, he thought that the article should consist of the second variant and that the first variant should be transferred to the commentary.

18. Mr. AGO agreed with the voting procedure outlined by the Chairman. He pointed out that if the principle of a shorter formula was adopted, the work of the Commission would be simplified. There was still time to elaborate a definitive text for inclusion in the draft. On the other hand, if the vote was in favour of a longer formula or of including both formulas as variants in the preliminary draft, the Commission would be in difficulty. There was insufficient time at the current

session to examine a detailed enumeration of consular functions and he did not think that it would be opportune to submit to Governments for their comments a text that had not been discussed by the Commission.

19. Mr. ZOUREK, Special Rapporteur, agreed that a vote should be taken first on the question whether both variants should be included in the draft.

20. He pointed out that, in fact, neither of them had been carefully examined, for the discussion had dealt more with the type of definition to be adopted than with the actual substance of that definition. If it was decided to include both a longer and a shorter text in the draft, the Commission could still hold an exchange of views and indicate in its report that the texts were only provisional. Governments could not be invited to comment until the draft convention as a whole was completed at the next session; the Commission's report on its work on consular intercourse at the current session would be in the nature of a progress report.

21. Mr. LIANG, Secretary to the Commission, recalled, in connexion with the question of requesting the views of Governments, that in 1955 the Commission had followed a similar procedure in connexion with the question of the breadth of the territorial sea.³ However, he agreed with the Special Rapporteur that the Governments could not be invited to comment until the whole draft had been completed. It would not serve a useful purpose to send to Governments texts which had not been decided on by the Commission. They would be justified in replying that they wished to comment on the views of the Commission and not on those of the Special Rapporteur or of individual members.

22. Finally, he was of the opinion that, if the Commission decided in favour of a shorter formula, there would still be time at the current session to examine it more carefully.

23. Mr. MATINE-DAFTARY recalled his suggestion at the previous meeting (517th meeting, para. 34) that the Commission should adopt, as the text of article 13, a shorter, more general formula which would begin with the first sentence of Mr. Padilla Nervo's amendment; the longer enumeration might be given in the commentary as an illustration of the consular functions covered by the adopted text. States would then be free to use the provisions set out in the commentary in framing the bilateral consular conventions referred to in Mr. Padilla Nervo's amendment.

24. He did not consider that the article itself should be drafted in the form of alternatives, for Governments had a right to expect the Commission to know its own mind.

25. The CHAIRMAN did not agree that the Commission had to express a preference. It was not an unusual procedure for the Commission to ask Governments to comment on alternative texts of an article.

26. Mr. AMADO said there had not been any substantive discussion on any of the formulas before the Commission, nor did he think that there was sufficient time at the current session to adopt a definitive text of even a short article defining consular functions.

27. He therefore proposed that the Commission should defer further discussion of article 13 to the next session. The Commission's report could mention in the commentary the different versions that had been submitted

³ *Ibid.*, Tenth Session, Supplement No. 9, chap. III, footnote 14.

but, in his view, it would be wrong to invite Governments to comment on texts that had not been carefully examined.

28. Mr. TUNKIN supported Mr. Amado's proposal. Since the Commission would not in any event invite comments on a partial draft convention, nothing would be lost by deferring article 13 to the next session.

29. Mr. PAL also supported Mr. Amado's proposal. He pointed out that when, on earlier occasions, the Commission had invited the comments of Governments on alternative texts, the latter had previously been fully discussed in the Commission.

30. Mr. MATINE-DAFTARY said it would be regrettable if, after spending so many meetings in discussing article 13, the Commission postponed further consideration of it. The Special Rapporteur was not asking for a vote on a particular text but was asking the Commission to express a preference for the one or other formula, to guide him in the preparation of an article for the next session.

31. Mr. PADILLA NERVO could not agree that the Commission had not studied the material before it. The members of the Commission had had ample opportunity to consider the Special Rapporteur's two variants long before the beginning of the session.

32. While not opposed to the substance of the longer variant—after all, every one of its provisions could be found in bilateral treaties—he was in favour of the adoption of a more general formula because the Commission was not making a study of consular relations but was preparing a multilateral convention, which would be more widely acceptable if article 13 was drafted in general terms. He urged the Commission to take a decision along those lines so that the four meetings which had been devoted to article 13 would not have been wasted.

33. Mr. SCELLE supported Mr. Amado's proposal (see para. 27 above). He preferred a full enumeration of consular functions and considered that there would not be sufficient time at the current session to prepare such an enumeration. He failed to see the utility of a convention that would contain a description of consular functions scarcely distinguishable from a table of contents that could be found in any elementary textbook. Governments would wish to know what the Commission considered to be the functions of consuls. They would always be free to enter reservations when accepting the convention or to supplement it by special agreements.

34. Mr. SANDSTRÖM said he was prepared to support Mr. Amado's proposal.

35. Mr. EL-KHOURI said that he was in favour of a shorter, more general version of article 13 with an enumeration of consular functions in the commentary. That was the best way of taking the first step towards the ultimate objective of a single multilateral consular convention.

36. He did not think that the Commission should ask Governments to comment on texts which it had not studied carefully. Governments valued the opinion of the Commission. On the other hand, it should be remembered that the comments of Governments were often formulated by functionaries who did not have the wide experience and real training of the members of the Commission and therefore the Commission should not exaggerate the value of such comments.

37. The CHAIRMAN proposed that the list of speakers should be closed.

It was so agreed.

38. Mr. ALFARO said that there seemed to be some confusion concerning what was about to be decided. The first question was not whether Governments should be asked for their comments but whether the Commission would embark on the dangerous course of a detailed enumeration or adopt a shorter formula which would summarize all of the consular functions painstakingly collected and presented by the Special Rapporteur.

39. He therefore suggested that the Commission should decide first whether it preferred, in principle, the longer or the shorter version. If it decided in favour of the latter, it would have time to prepare an article at the current session but it would probably be an imperfect article. If it decided in favour of the longer version, further consideration of article 13 should be deferred to the next session.

40. Mr. ZOUREK, Special Rapporteur, said that during the discussion some members had expressed the view that article 13 was to be submitted to the Governments; actually, however, the draft convention on consular intercourse and immunities would not be submitted to them before it had been fully completed.

41. The first variant had been criticized as too long. It was, however, much shorter than the definitions in many consular conventions and could hardly be shortened further if it was meant to summarize the main consular functions. He did not agree that an enumeration was dangerous. On the contrary, if the Commission had had time to discuss the enumeration thoroughly, it would have found that almost all the points were contained in consular conventions. In any case, his text contained adequate safeguards (e.g. sub-paragraph 17 of the first variant). He could, however, convince the Commission of the truth of his assertion only if the first variant was discussed paragraph by paragraph, for which there was insufficient time. If the variant was not so discussed, the Commission could hardly take a decision on the substance. For the same reason, it could not take a decision on the second variant, which was admittedly unsatisfactory for the reasons given by Mr. Scelle. He would not, therefore, oppose the suggestion that the article should be held over until the twelfth session, though he pointed out that he would still have to prepare two variants.

42. The CHAIRMAN asked the Commission to vote on the proposal that the drafting of article 13 be deferred until the next session.

That proposal was rejected by 9 votes to 8.

43. The CHAIRMAN asked the Commission to vote on the proposal that both variants of the Special Rapporteur's redraft of article 13 should be included in the report on the current session; he explained that the vote would not decide whether the draft provisions would appear in the form of an article or in the commentary.

That proposal was adopted by 10 votes to 4, with 3 abstentions.

44. The CHAIRMAN said that he felt that the consensus of the Commission was that one variant should be given as an article and the other reproduced in the commentary.

45. After further discussion, Mr. TUNKIN said the procedure suggested by the Chairman would inevitably

imply a preference for the one or the other variant. That would be inconsistent with the decision that both variants would be included in the report. Accordingly, he proposed that both the versions given in the Special Rapporteur's redraft of article 13 should be reproduced, as alternatives, in the report.

The proposal was rejected by 10 votes to 7, with 1 abstention.

46. The CHAIRMAN said that in view of the foregoing decision it now became necessary to choose which of the two versions should appear in the report in the form of an article.

By 11 votes to 6, with 1 abstention, the Commission decided that the longer variant (the first variant in the Special Rapporteur's redraft of article 13) would not appear in the report in the form of an article.

47. The CHAIRMAN said that the result of the vote implied that the second (shorter) variant would appear as article 13 and the longer variant in the commentary. Texts for the shorter version had been submitted in the Special Rapporteur's second variant, by Mr. Padilla Nervo (517th meeting, para. 2), by Mr. Verdross (513th meeting, para. 54 and 514th meeting, para. 24) and, in an amendment to Mr. Verdross's text, by Mr. Pal (517th meeting, footnote 1). As all contained similar elements, all might be referred to the Drafting Committee, on the following understanding: It would not be necessary to go into the question of the State acting *de jure imperii* and *de jure gestionis* nor to draw a formal distinction between diplomatic and consular functions. The draft article should not exclude the possibility that consuls might take action in the interests of the sending State, but should make it clear that they could do so only within the consular district, only vis-à-vis local authorities and only within the scope of consular functions.

48. An introductory clause might be drafted taking account of those points and of some others raised in the discussion, including those made by Mr. Matine-Daftary (see para. 23 above) and the proviso that consuls could not contravene the local law.

49. The introductory clause might be followed by a number of sub-paragraphs such as those suggested in Mr. Padilla Nervo's amendment and in the Special Rapporteur's second variant. The advisability of including a clause concerning the consul's role in furthering cultural relations might be considered.

50. The Drafting Committee might also consider whether some of the points in the Special Rapporteur's first variant which did not appear in any of the shorter versions should be embodied in the draft article, notably the important function of representing the interests of nationals in cases connected with succession (sub-paragraph 7 of the first variant) and some such general clause as that in sub-paragraph 17.

51. Mr. YOKOTA said that if the Drafting Committee was to carry out its work the Commission should decide whether the protection of the nationals of the sending State or the defence of the rights and interests of that State should be the main consular function. It was on that substantive question that the Special Rapporteur's second variant differed from the other texts.

52. The CHAIRMAN thought that that was a question of presentation, to which the Drafting Committee might well find the solution.

53. He announced that the Commission had concluded its preliminary work on the topic of consular intercourse and immunities.

Consideration of the Commission's draft report covering the work of its eleventh session (A/CN.4/L.83 and Corr.1)

CHAPTER I: ORGANIZATION OF THE SESSION (A/CN.4/L.83 AND CORR.1)

54. The CHAIRMAN asked the Commission to consider the chapter of its draft report relating to the organization of the session.

55. Referring to paragraph 7 (A/CN.4/L.83/Corr.1), Mr. ZOUREK said that he was not sure that he had been absent from the Commission "for more than half the session".

56. Mr. AMADO suggested that the phrase should be amended to read "almost half the session".

It was so agreed.

57. Mr. LIANG, Secretary to the Commission, referring also to paragraph 7, suggested that the phrase "without taking up the reports of the Special Rapporteur for that subject" should be deleted.

It was so agreed.

Chapter I, as so amended and with further drafting changes, was adopted

The meeting rose at 1 p.m.

519th MEETING

Friday, 19 June 1959, at 9.50 a.m.

Chairman: Sir Gerald FITZMAURICE

Consideration of the Commission's draft report covering the work of its eleventh session (A/CN.4/L.83 and Corr.1, A/CN.4/L.83/Add.1 (continued))

CHAPTER II: LAW OF TREATIES (A/CN.4/L.83/ADD.1)

1. The CHAIRMAN asked the Commission to consider the chapter of its draft report relating to the Law of treaties.

I. GENERAL OBSERVATIONS

Paragraph 1

2. Mr. GARCIA AMADOR said it was unnecessary to itemize the subjects selected for priority treatment; he suggested that the phrase "namely arbitral procedure . . . and high seas fisheries" should be deleted.

It was so agreed.

Paragraph 2

No observations.

Paragraph 3

No observations.

Paragraph 4

After an exchange of views, it was agreed that no change would be made in paragraph 4.

Paragraph 5

3. Mr. TUNKIN pointed out that the first two sentences merely repeated the reasons why the Com-