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Summary record of the 513th meeting

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52. The Harvard draft stated, in the explanatory note to article 1, that "orthodox theory holds that when a State espouses a claim of its national, it is actually protecting its own rights rather than those of the individual". That was what, in his view, should have been the tendency of the draft prepared by the Harvard Law School. The explanatory note, however, went on to say, with reference to the judgement of the International Court of Justice in the *Nottebohm Case*, that "the views of the International Court are difficult to reconcile with the increased emphasis that has been placed in recent years upon the protection of human rights and of the individual under international law".

53. If some real progress was to be made in the codification of the law relating to State responsibility, certain limits would have to be laid down and a determined effort would have to be made to avoid being drawn into extraneous subjects, however attractive they might be. The problems of human rights should be treated within a human rights framework and if the Commission permitted itself to venture into that field, he had no doubt that Mr. Tunkin as a Soviet jurist—and Soviet jurists were among the most positivist of contemporary jurists—would wish the different concepts of property in the capitalist and socialist systems to be mentioned.

54. He urged the Special Rapporteur, whose purposes he did not question, to make his draft, first and foremost, a distillation of case-law and not an excursion into idealism.

The meeting rose at 1.5 p.m.

513th MEETING

Thursday, 11 June 1959, at 9.55 a.m.

Chairman: Sir Gerald FITZMAURICE

State responsibility (A/CN.4/96, A/CN.4/106, A/CN.4/111, A/CN.4/119) (*continued*)

[Agenda item 4]

1. The CHAIRMAN invited the Commission to continue the debate on the topic of State responsibility, with reference to the new Harvard draft presented at the previous meeting (512th meeting, paras. 5-13).

2. Mr. ZOUREK said the new Harvard draft, which reflected the thinking of United States scholars on State responsibility for injuries to aliens, was a useful work that would become even more useful when it was supplemented by the promised statement of the existing law. He agreed that that kind of consultation with scientific circles should continue and be expanded by consultation with scientific institutions in other countries, in particular in countries with different legal systems, notably the socialist countries and the countries of Latin America, Asia and Africa. The question of State responsibility was so broad that all legal systems had to be taken into account in preparing a work that would be generally acceptable.

3. In his view, the Commission's first task in dealing with the question of State responsibility should be to define the cases in which the State was responsible. It was only after it had disposed of that general question that it could take up the special case of responsibility for injuries to aliens.

4. The Harvard draft seemed in some respects to depart from well-established rules of international law.

For example, it recommended the recognition of the right of the individual to reparation although, as Mr. Amado had recalled at the previous meeting (512th meeting, para. 52), the accepted rule of international law was that the right to reparation belonged to the State, and that rule had been upheld in the fairly recent judgement of the International Court of Justice in the *Nottebohm case*.

5. He also noted, as had the Chairman (see 512th meeting, para. 20), that the rule concerning the nationality of the claim was to a large extent abandoned in the draft. In general, the draft seemed to be based on premises that were not recognized in the international law concerning State responsibility. In his view, the fundamental proposition should be that where there was no international obligation, there was no international responsibility, and that principle was not adhered to in the draft.

6. There were several references in the draft to the standards of justice generally recognized by civilized States, but those standards were nowhere defined. He was confident that a thorough study of that notion would show that, fundamentally, it was devoid of meaning. The term was merely reminiscent of the capitulations system; it was time that the invidious distinction between civilized and uncivilized States should be dropped. The expression "rules common to the principal legal systems of the world" would be preferable.

7. Professor Sohn had said (see 512th meeting, para. 7) that the work constituted only a preliminary draft. He (Mr. Zourek) suggested that in preparing their final draft the authors should re-examine very carefully those passages which departed too much from principles that could be accepted by all States irrespective of their social and economic system. While it was true that departures from established rules and proposals for new rules were admissible, it should not be forgotten that general international law was the only legal basis for co-operation and fair competition between States with different social and economic systems and for the solution of the disputes resulting therefrom. Consequently, before giving up an established principle of international law, codifiers should carefully consider whether what they were proposing was for better or for worse.

8. The CHAIRMAN said that some members had seemed to take the view that practically all the law relating to the treatment of aliens was a product of colonialism. That, of course, was quite incorrect historically as everyone knew who had read e.g. the chapter on the historical and legal foundations of the law relating to the denial of justice in Alwyn V. Freeman's standard work.¹

9. The law relating to the treatment of aliens had come into being, long before the era of colonialism, out of conditions in Europe soon after the Middle Ages, when foreigners had had very little status and in many cases no rights before the law or access to the court.

10. Professor SOHN expressed his appreciation to the Commission for its discussion of the Harvard Law School's preliminary draft. Some important points had been raised which would be taken into account in the preparation of the final draft. Without wishing to enter into a debate, he would avail himself of the opportunity to express some views on the more general questions that had been raised.

¹ Alwyn V. Freeman, *The International Responsibility of States for Denial of Justice* (New York, Longmans, 1938).

11. With regard to the remarks of Mr. Amado (512th meeting, paras. 49-54) and other members, he said that the authors of the draft had tried as far as possible to reflect the jurisprudence and practice of nations, and the few departures therefrom were designed to make the law dealt with in the draft more acceptable to nations which had not participated in the creation of that law. Most of the departures, whether with respect to the Calvo Clause, the protection of property or the law of contract, were aimed at accommodating the underdeveloped nations or the nations with a socialized economy.

12. While the draft contained novel features, to which he had alluded at the previous meeting, he could say that more than 90 per cent of it followed case-law closely. Even in the crucial matter of the rights of the individual, one of the main reasons for the new rule proposed in the draft had been to take the question of the protection of the rights of aliens to some extent out of the sphere of power diplomacy and to make it an issue between an individual and a Government instead of an issue between two Governments, in which the less powerful Government was often at a disadvantage. Moreover, that departure was minimal, depending to a large extent on future treaties giving individuals direct access to special international tribunals.

13. As the Secretary had said (512th meeting, para. 41), the draft to a large extent represented the prevailing view of university circles in the United States, but not, of course, of the United States Government. He agreed with the view that studies from other countries would be very useful and he endorsed the Secretary's expression of hope that similar drafts would be prepared by law schools in other nations, or at least that the relevant practice of other nations would be collected. The authors of the Harvard draft would be the first to welcome studies of the practice of such countries as the Soviet Union and India in protecting their nationals abroad. He was confident that such comparative studies would show that the views of learned jurists in those countries on the law of State responsibility did not differ too much from those of United States lawyers, for the principles adopted in the Harvard draft would find application in the relations between two peoples' democracies or two African or Asian States.

14. He did not think that it was right to suggest that the subject matter of the Harvard draft was somehow connected with colonialism or imperialism. In modern times, when the interdependence of nations was continually growing, when citizens of every country travelled and studied in foreign countries, it seemed to him that all States, including those with a socialized economy, had an equal interest in seeing that their nationals abroad were correctly treated and not arrested arbitrarily. He agreed that there were some areas, such as the protection of property, where the interests of some nations might be greater than those of others, but those areas too would become increasingly important to all States as commercial relations continued to develop among the Asian and African countries and the countries with a socialized economy.

15. Reference had been made to the expression "the standards of justice generally recognized by civilized States", which appeared frequently in the Harvard draft. What the authors had had in view was the standards that were now applied by almost all nations of the world, excluding only the very few that still showed survivals from mediaeval times and such cases

as Nazi Germany, in other words, the standards which had been fairly described as "the common law of mankind" in the recent book by Mr. Jenks, Assistant Director-General of the International Labour Office.²

16. As to the relationship of the draft to the law of State responsibility on the one hand and to the law concerning the treatment of aliens on the other, he pointed out that the subject matter of the draft was on the borderline between the two, and covered only a small part of those two broad areas of international law. As could be seen from the European Convention on Establishment, signed at Paris on 13 December 1955, which had embodied the principles that had been put forward but not adopted at the International Conference on the Treatment of Foreigners in Paris, 1929, the largest part of the law of the treatment of aliens applied to the acquisition of rights, whereas the subject matter of the Harvard draft related to the impairment of such rights.

17. With regard to Mr. Erim's statement (512th meeting, para. 26), he said that the authors had been aware that in certain regions such as Europe and Latin America, nations might be prepared to go much further and perhaps conclude agreements permitting interventions on behalf not only of their own nationals but also of aliens. However, the authors had felt that that was a new area of law and that more progress would first have to be made at the regional level.

18. Professor BAXTER said that he would like to comment on four points that had been raised by the Chairman at the previous meeting (512th meeting, paras. 20-23).

19. With regard to the question whether the authors of the draft had not read too much into the ruling of the International Court of Justice in the *Nottebohm Case* in 1955, he pointed out that the relevant clause of the draft (article 23, paragraph 3) was expressed in the form of a condition on the right to sue: "A State is not entitled to present a claim on behalf of a natural person who is its national if that person lacks a genuine connection . . . with that State". While there might be a theoretical difference between a condition on the right to sue and a possible defence, it seemed to him that the practical effects would be the same: if the respondent State decided not to raise the objection of the lack of a genuine link, the results would be the same as if the paragraph had been worded in terms of a possible defence and the respondent State did not avail itself of that defence.

20. In reply to the Chairman's observation (512th meeting, para. 21) concerning the clause debarring a State from claiming on behalf of a person who had waived his claim, he said that the Harvard draft recognized the importance of the interests of the State over and above those of the claimant, the injured alien. It did so by excluding from its scope the separate interests of the State, which gave rise to separate claims, such as a claim arising out of widespread violations of international law, systematic oppression of an ethnic minority, insults to the flag and so forth. Since the draft was not intended to cover such State-to-State claims, they would not be barred by the individual's waiver.

21. Supplementing Professor Sohn's remarks concerning the standards of justice generally recognized by civilized States, he said it would have been impossible

² C. Wilfred Jenks, *The Common Law of Mankind* (London, Stevens and Sons, 1958).

for the authors to specify what those standards were because it would have been necessary either to make a comparative study of the legal systems of all States or to draw up a complete international code of procedural and substantive law.

22. With reference to the Chairman's observations concerning the provisions defining what adverse decisions (judicial or administrative) were to be regarded as "wrongful", he explained that the provisions were intended to embrace both procedural and substantive law, as indicated in article 3, paragraph 2, of the Harvard draft, which stated that "the wrongfulness of an act or omission may be the result of a deficient application of the law of the State concerned or the fact that that law does not conform to international standards".

23. In conclusion, he thanked the Commission for the fruitful discussion that had been held, and expressed his gratitude to the Chairman for arranging it and to the Secretary and Mr. García Amador, the Special Rapporteur, for their encouragement of the research of the Harvard Law School on the subject of State responsibility.

24. The CHAIRMAN thanked the representatives of the Harvard Law School for having presented and explained their draft.

**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 12 (continued)*

25. The CHAIRMAN invited the Commission to resume debate on the draft on consular intercourse and immunities.

26. Mr. ZOUREK, Special Rapporteur, commenting on the discussion regarding article 12, said that very few members had dealt with the substance of the article; most of them had been content to express the view that the article should not be included in the draft.

27. The most serious attack on the provisions of article 12 had been made by Mr. Scelle (see 511th meeting, paras. 60-63). However, Mr. Scelle's argument had been based upon two false premises: that a consul did not represent his State, and that States had a duty to enter into consular relations.

28. Mr. Scelle had made a distinction between agents of the State and representatives of the State. In his (the Special Rapporteur's) view an agent represented his principal. He would limit himself, however, to citing a well-known French handbook on consular and diplomatic practice which contained the following paragraph:

"A consul is an official agent stationed by a State in a particular foreign territory. Within his consular district he is the holder of the authority retained by the sending State over nationals outside its territory."³

29. As to the alleged duty of States to enter into consular relations, he would simply point out that in the discussion on previous articles the Commission had

concluded that consular relations were subject to the consent of the States concerned.

30. A further criticism of article 12 had been that the provision implied some kind of bargaining, in which consular relations would be exchanged for recognition. Although it was theoretically conceivable that a request for an exequatur might be accompanied by a declaration of non-recognition, it was hardly probable, in view of political realities, that such a situation would arise. He could not envisage how a State could request another State to receive consuls, to assume obligations towards those consuls—thereby to accept certain limitations of its sovereign powers—and to grant them privileges, prerogatives and immunities of all kinds, and then offer that State, in return, a declaration of non-recognition.

31. That the granting of an exequatur implied the recognition of the sending State was a generally accepted and by no means new principle. Already in 1819 the United States Secretary of State, John Quincy Adams, had declared that the exequatur for a consul-general could obviously not be granted without recognizing the authority from whom his appointment proceeded as sovereign. The Secretary of State had also cited the opinion of Vattel that while a consul was not a public official he was furnished with a commission from his sovereign and was received in that capacity by those in whose country he was to exercise his functions.⁴

32. The case of Manchukuo had been cited by Mr. Yokota (see 511th meeting, para. 66) in support of the argument that article 12 did not accurately reflect practice. However, the example of Manchukuo might have been cited in the comment to reinforce article 12, inasmuch as the Advisory Committee of the Assembly of the League of Nations had recommended on 7 June 1933 that the countries concerned should not apply for exequaturs.⁵

33. Though there were exceptions to the rule laid down in article 12, such as the case where there were two Governments in a country during a civil war, he was somewhat reluctant to embody in the article itself the statement concerning exceptions contained at the end of paragraph 2 of the commentary.

34. He was not able to subscribe to the Secretary's thesis that consular relations mainly served the interests of individuals. The degree to which that was true depended on the economic and social structure of the sending State. In addition, there were certain consular activities in the matters of commerce, navigation, culture and so forth, which concerned bodies corporate more particularly. Certainly that seemed to be the present trend of evolution. But even if the Secretary's thesis were accepted it must still be admitted that consular powers emanated from the sending State. Consular officials could not be regarded as representatives of nationals of the sending State, as had been done in the past; they exercised their functions as representatives of the sending State itself.

35. In reply to the criticism that article 12 had no place in the draft, he said that he was prepared, regretfully, to withdraw it because it was not indispensable and

⁴ E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, vol. III, translation of the 1758 edition (Washington, D. C., Carnegie Institution of Washington, 1916), book II, chap. II, sect. 34, p. 124.

⁵ League of Nations, *Official Journal, Special Supplement No. 113*, p. 13.

* Resumed from the 511th meeting.

³ Jean Serres, *Manuel pratique de Protocole* (Paris, Simonet, Hachette & Cie., 1952), p. 39, para. 71.

might give rise to protracted discussion. On the other hand it did serve to make the draft more complete, and he might wish to reintroduce it at a later stage when the Commission had more time for discussion.

It was so agreed.

36. Mr. MATINE-DAFTARY said that while not contesting the validity of the Special Rapporteur's arguments in support of article 12, he hoped that the Commission would introduce a progressive development of law by elaborating a rule to the effect that States were bound to agree to the establishment of consular relations with any State whose nationals were living in their territory. Such a rule, aimed at the protection of the rights of aliens, would be a step towards the acceptance of the concept of State responsibility as envisaged in Mr. Garcia Amador's reports.

37. The CHAIRMAN said, in reply to Mr. Matine-Daftary, that it had been decided to accept the principle that the establishment of consular relations depended on the consent of the State of residence. In deference to Mr. Matine-Daftary's views, however, an express provision might be added stipulating that consent could not be refused arbitrarily or unreasonably.

38. Mr. MATINE-DAFTARY said that solution would be acceptable to him.

39. Mr. SCELLE, speaking in reply to some observations by the Special Rapporteur, reaffirmed that consular officials were appointed to discharge certain functions and had nothing to do with the representation of the sending State. He had never contended that the exequatur could not be denied to any particular individual: rather, he maintained that States were not at liberty to refuse systematically to establish consular relations. The international community was not made up of States, but of individuals. Any other view was a pure abstraction and to hold that the State was supreme was a denial of the existence of the international community. Hence any Government was bound in law to admit the consular officials of other States, provided that the requisite conditions had been fulfilled. He therefore welcomed the possibility of article 12 being omitted.

40. The example of Manchukuo, where consular offices had continued to function without the sending States applying for new exequaturs, confirmed his thesis that the continuity of the consular function must be safeguarded, whatever the circumstances.

41. The CHAIRMAN asked whether Mr. Scelle would agree to having to his amendment (511th meeting, para. 51) considered in connexion with article 14.

42. Mr. SCELLE replied in the affirmative.

Mr. Hsu, Vice-Chairman, took the Chair.

43. Mr. LIANG, Secretary to the Commission, said, in regard to the observations of the Special Rapporteur, that his principal point had been that States should be entitled to enter into relations with each other for limited purposes without that implying recognition, and that he had only pointed out as an argument that the institution of consular relations was designed for the protection of individuals, which term included juristic persons as well as natural persons. With regard to the League of Nations Advisory Committee on "Manchukuo", he recalled that the Committee's recommendations had represented a system of sanctions. No explicit decision had been given as to the juridical consequences of requests for exequaturs. Many measures had been recommended in order to preclude any specific action on the part of

States from being misinterpreted or inadvertently construed as implied recognition.

44. Though the Special Rapporteur had invoked certain learned authorities in support of article 12, he doubted whether it reflected positive law.

45. Mr. YOKOTA said that though no applications for an exequatur or other form of authorization had been addressed to the Government of Manchukuo by States Members of the League of Nations or by the United States, the Soviet Union had made such a request, which confirmed that in certain circumstances it was conceivable that a request for an exequatur did not signify recognition of the State of residence.

46. Mr. ZOUREK, Special Rapporteur, said that he had not contested that the League of Nations Advisory Committee's recommendations constituted sanctions resulting from the decision not to recognize the Manchukuo Government, but it could be deduced from those recommendations that, in the Committee's view, an application for an exequatur was tantamount to recognition.

47. Mr. EL-KHOURI entirely agreed with Mr. Scelle that a consular mission did not represent the sending State. The establishment and maintenance of commercial, cultural, economic and other relations was effected through diplomatic missions, as was the establishment of consular missions themselves. Mr. Scelle's proposal filled a real need and should be inserted in the draft. He also endorsed the principle mentioned by Mr. Matine-Daftary (see para. 36 above) that States were not entitled to refuse arbitrarily requests for the establishment of consular offices.

ARTICLE 13

48. Mr. ZOUREK, Special Rapporteur, introduced article 13 (*Consular Functions*) and referred to the commentary. Consular functions were determined by custom, international conventions and the respective national legislation, which explained why there was no uniformity in the scope of those functions. In many cases the differences were attenuated by the application of the most-favoured-nation clause.

49. The first question to be settled was which of the two variants in his draft offered the better approach. When preparing the draft he had felt some preference for the first alternative, but there was no insurmountable difficulty in adopting the second if it could be qualified by a provision to the effect that consuls could also exercise other functions provided that they did not conflict with the legislation of the State of residence. If the text appeared too long, the article could be reduced to the essential categories of function and the details relegated to the commentary. He would welcome further suggestions.

50. He agreed with the contention in the last sentence of Mr. Verdross's comment (A/CN.4/L.79) on the second variant, and in his draft had sought to itemize all types of characteristic consular activities as exemplified in recent consular conventions. Some might be regarded as a development of the rules of international law and would only be binding on States which accepted the Commission's draft.

51. In his comment Mr. Verdross stated flatly that consular officers did not represent the economic and cultural interests of the sending State; he (the Special Rapporteur) could not agree with that view. The fact was that consuls represented the interests of the sending State; only the extent of that representation varied according to the economic and social structure of the

sending State. Furthermore, if the consul was the sole representative of his country in the State of residence, it was natural that his role as a representative of the sending State should be expanded. Article 13 would have to be considered in the light of the kind of tasks which consuls had to fulfil.

52. With regard to the comments submitted by Mr. Verdross on paragraph 8 of the second variant, he thought on the contrary that a consul was entitled to register all persons—even if refugees were concerned—when they were nationals of the sending State. Mr. Verdross would no doubt develop his views during the debate.

53. The Commission's best course would be to exchange views on the type of definition to be adopted, on the provisions to be retained and those to be deleted and on the method of presentation.

54. Mr. VERDROSS said that two courses were possible: either the article could state a general formula or else it could enumerate all the consular functions that were mentioned in many different treaties. He was in favour of the first course, since an absolutely exhaustive enumeration would be impossible. Functions which were governed exclusively by the legislation of the sending State, such as the issue of passports, should be distinguished from those governed by international law. After those functions had been segregated, a distinction should be drawn between the functions which came within existing international law and those which were governed only by bilateral treaties. The only general function that remained under international law was that of providing assistance and relief to the nationals of the sending State and, in particular, the function of protecting those nationals before the local authorities. He therefore proposed the following text for article 13:

"The task of consuls is to provide assistance and relief to 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 consular treaties."

55. Mr. MATINE-DAFTARY thought that the Commission would save time by first deciding which variant the majority of members preferred.

56. Mr. VERDROSS agreed with Mr. Matine-Daftary and said that he preferred the first variant.

57. Mr. AGO agreed that the form of article 13, of which the second variant was the most elaborate provision of the draft, should be discussed before its substance. Mr. Verdross had expressed a preference for the first variant and had proposed an amendment to it; it appeared, however, from that amendment, that he had in fact chosen the second variant. The first variant proposed by the Special Rapporteur stated absolutely nothing, and that was unacceptable, for it was manifestly the object of the draft not only to refer to the principles of international law concerning the functions of consuls, but to state them when they existed. Moreover, in the draft on diplomatic intercourse and immunities (A/3859, chapter III), the functions of diplomatic agents were enumerated; therefore, for the sake of harmony with that draft, the Commission should also enter into the merits of the functions of consuls. Nevertheless, to retain the second variant in its present form would be dangerous and erroneous since, as Mr. Verdross had pointed out (see para. 54 above), most of the functions enumerated were governed purely by the domestic law of the sending State. The Commission's task was to enumerate the principles of international law concerning consular functions, whether their

purpose was to authorize them or to indicate limits to the freedom of the States in the matter. Moreover, no enumeration could be entirely exhaustive. The Commission should therefore follow the course proposed by Mr. Verdross, and at the same time integrate his proposal, in order to adopt a more comprehensive formula.

58. Mr. SANDSTRÖM thought that a third course was possible: the first variant might be combined with the second and a more or less complete enumeration might be included, with the exception of functions governed by the law of the sending State. He pointed out that enumerations were not unknown in bilateral conventions; thus, the Consular Convention between the United Kingdom and Sweden, signed at Stockholm on 14 March 1952,⁶ contained an enumeration of functions which was longer than that drafted by the Special Rapporteur.

59. Mr. LIANG, Secretary to the Commission, said that article 13 was likely to raise more difficulties than any other, in the Commission, at any conference on the subject and in the General Assembly, because it was not a statement of the rights and obligations of parties, as was usual in treaties, but required agreement on an abstract rule. He had been somewhat sceptical concerning the inclusion of an article on functions in the draft on diplomatic intercourse and immunities, and the relevant article had given rise to lengthy discussions in the Commission and the General Assembly. Despite those difficulties, however, the Commission had decided at its eighth session⁷ that, for the draft on consular intercourse and immunities to be complete, a definition of functions was desirable. In that connexion, he drew attention to paragraph 9 of the commentary on article 13.

60. With regard to the technique to be used, he considered that, although the Special Rapporteur's enumeration of consular functions would be extremely useful, it would hardly be advisable to retain it in the article itself. He agreed with Mr. Ago and Mr. Sandström that a middle way between the two variants should be taken. The second variant might be included *in toto* in the commentary. The first variant, on the other hand, was not a useful provision. With regard to the idea of using a reference to domestic law or, as Mr. Verdross had done in his amendment, to consular conventions, he pointed out that that procedure was not very useful. In many cases States might enter into consular relations without or before concluding a consular convention. Accordingly, in his opinion, the best course would be for the Special Rapporteur to abbreviate his second variant, classifying the functions under several headings and describing them in general language.

61. Mr. YOKOTA thought that the provisions of article 13 should be drafted in general terms, but not so generally as to convey no definite idea. Accordingly, some of the principal functions of consular officers should be mentioned. He drew special attention to the opening paragraph of the second variant. The most important task of consular officers—and originally their sole function—was to protect nationals of the sending State. It might therefore be advisable to mention it first. The protection and development of the economic and

⁶ See *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No.: 58.V.3), pp. 476-478.

⁷ *Yearbook of the International Law Commission*, 1956, Vol. I (United Nations publication, Sales No.: 1956.V.3, Vol. I), 374th meeting, para. 32.

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 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 1948⁸, 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.

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-

⁸ *Ibid.*, p. 452.