CHAPTER I

THE NOTION OF CONSULAR LAW.CHARACTERISTICS OF CONSULAR LAW

1.1. The notion of consular law

Consular law represents all norms and rules governing consular relations, the organization and functioning of consular offices, the legal status of consular offices and their personnel.

Consular law is, undoubtedly, a part of Public International Law, even if many important aspects of consular activities are regulated by the internal law of the states.

In comparison with other branches of Public International Law, consular law is a set of international principles and norms governing the cooperation between states in protecting their own citizens, by monitoring through specific mechanisms the implementation of a certain system applicable for these citizens.

In essence, consular relations are interstate relations, and consular activity although it is, usually, directly related to a legal or natural person that is a matter of national law, which stems from the interferences occurring between the national jurisdiction of a state and the territorial one of another state, so of two national legislations, being outlined as a mechanism for interstate cooperation, which forms a bridge between two legal systems.

What determines the international character of Consular Law comes from the urgent and undeniable need that each state provides assistance and protection for its citizens, wherever they are, so even if the person or the interests of a citizen are in the territory of another state, situation where it has to respect its jurisdiction.

This competition of competence of bodies belonging to two states, questions the matter of distinguishing the scope of their duties and, thereby, generates interstate relations with this specific, consular character.

As in the case of Diplomatic Law, in the Consular Law there are some elements that highlight even to a greater extent the interference of the two categories of legal orders, international and national, the normative coexistence area being much broader, in the consular activity being wider sectors which are regulated by the internal law.

In this context there may be mentioned the ways of organization of consular relations, the appointment and admission of consuls, the establishment of consular functions, and, especially, the limits and how to exercise them, but also in terms of

some aspects of the legal status of the consular office and its members, when there is made reference to the internal law of the state of residence. However, they are not yet capable of changing the interstate essence of those relations.

The representation nature of consular bodies has a subsequent degree to that involving diplomatic representation but, however, it is undeniable that, as the diplomat, the consul represents the state that sent him, even if *this representation does not include, usually, a political representation.*

The consul is appointed by a state as its representative in another state. The appointment and admission are materialized in documents issued either by the heads of the states concerned or by the governments of those countries. Also, the fact that in his daily activty, the consul works with representatives of local bodies and not with the central ones of the residence state, has no necessary relevance in order to deny the that the consulate has the nature of an organ of external relations, character that is, in fact, expressly mentioned in the legislation of states.

The content of consular functions and the cooperation between consular bodies and local authorities are regulated by international norms and the very bodies that administer these relationships are established and operate under procedures regulated in this purpose by international legal norms.

At the same time, it must be highlighted the character of variability and specificity of the system of rules of Consular Law not only in time, but also in space, with nuances that are never identical. Although Consular Law includes, of course, general principles that have universal value, the references to a specific national law, which varies from state to state, attributes the consular activity particular shades, a certain individuality, generated by solutions and forms of activity.

1.2. Characteristics of consular law

Underlying Consular Law, there are the fundamental principles of Public International Law, consular relations being also relations between states. This body of mandatory rules, from which there is no derogation, acts and in the case of consular relations between states, which, being a part of a whole, has the same characteristics and essence that the international law has as such.

In the regulations of Consular Law coexist together the international rules with the ones of the internal legal order of the states, and under the influence of the first, there are established the points of contact and is produced the harmonization of the latter. In this sense, we can say that the elements of constancy of the consular system are of the legal values which belong to the international legal order, and the variability aspect characterizes the values pertaining to the domestic legal order of states.

Between the Consular Law and internal law, there is, basically, the same relationship as between Public International Law and domestic law, characterized by distinct legal orders, not subordinated to each other, but which have ratios of mutual influence. Consular Law is the legal space where there is reflected, in the most brilliant way, the mutual influence between the norms of Public International Law and the internal law, each having its contribution to building the Consular Law system, making up a whole that has as a common element the object of regulation.

The international rules regarding the establishment and functioning of foreign consulates have a specific general function, in that they often permit or represent the insertion by countries in their own legislation of certain rules that regulate the activity of consular bodies. As a result of the existence of consular relations between two states, there remain in the task of each of them a complex of international obligations that could not be brought out by its organs, except to the extent that they will be taken over by its national law, meaning that the legislation will include procedures and activities arising from the international obligations.

Between Consular Law and the domestic law of states, as between the legal orders of the two states that maintain consular relations, there is a greater or less degree of consistency and or points of contact or harmonization, a balance without which there could not exist normal consular relations.

1.3. Consular Law sources

As relations between states, consular relations are regulated within the international legal order and, therefore, the sources of consular law are the same that we know from the Public International Law.

The custom has been and continues to be the source of general rules regarding this institution, especially if we consider that many of the institutions of Consular Law formed and refined since ancient times, from when custom played the primordial role in the matter of Public International Law sources. Even today, given that there is already a codification of the Consular Law, the custom still has to rule important aspects, making appeal to the customary law whenever there appear aspects not covered under this Convention.

The treaty is, of course, the main source of Consular Law, there existing a coding convention, a number of multilateral conventions with a regional nature and numerous bilateral agreements between the states which carry out consular activity of receiving or sending consuls.

In the context of the Consular Law sources, there must be made clear that springs of Consular Law are not just the treaties governing specifically and exclusively, unitary and organic, the matter of consular relations, known generically

as consular conventions, as often, in the practice of states, the rules governing consular relations may be contained in international treaties or agreements concluded in other areas and, only incidentally, deal with one aspect or another of consular relations. In this regard there may be mentioned, the establishment conventions, trade and navigation agreements, legal assistance treaties, etc.

As for the special conventions concluded regarding the regulations of Consular Law they, normally, include clauses that standardize consular relations, out of which we can mention the establishment of consular offices, admission of consuls, consular and functions and how these can be exercised, status of the consular office and members of the consular office, with the rights and obligations they have, as well as the immunities, privileges and facilities they are entitled to.

Multilateral agreements in the matter of Consular Law are concluded by states either to regulate the cooperation regarding the establishment of consular relations within a particular group of countries, or *to simplify the legal instrumentation*, replacing with only one convention all the existing bilateral consular conventions within such a group of states, such as the European consular Convention in order *to codify rules of customary law* and *rules of international practice.*

Similar to the Diplomatic Law, alongside the main sources of law, the doctrine has stated a series of derivative or secondary sources. This category includes the *analogy*. This spring has been created to respond to realities, determined by the fact that consular relations present continuously issues and new requirements that are not standardized in the existing regulations, nor could form any customary in such cases, making it necessary to resort to *analogy* or to the *sending process*, which differs from *analogy.*

In this situation, the specific of the matter makes that whenever there is an unresolved problem by the Consular Law, emerges the need to resort to rules and solutions from the Diplomatic Law, possibility created by the kinship of the two matters that offer this opportunity. Analogy is a selective source, lending solutions being made only to the extent that their implementation in the field of consular activity would not be in conflict with the core of rules of the Consular Law and would not lead to inaccuracies.

Similar to the situation in Diplomatic Law, Public International Law sources are, joined by the internal law springs and, above all, by the national legislation of the two states which have consular relations. Only in this way there can be established consular organs, by combining the two categories of sources, each generating the tools needed for the articulation of consular activity, namely domestic and international.

In this context, it should be noted that consular organs can be established only based on international rules regarding consular relations and the internal rules of the states being in consular relations, both the sending and the residence one, are applicable to certain stages and phases of consular relations (creating these bodies), but only to the extent that international norms make reference to them or at least does not reject them.

CHAPTER II

CONSULAR RELATIONS. NOTION. CHARACTERIZATION. DEFINITION

2.1. General considerations

The expression *consular relations*, means all relations established between two statesas a result of the exercise of consular functions by their bodies. In the broadest sense, consular relations are the form by which two states come to establish special bodies of one in the others territory, which aim to exercise consular functions.[1]

Consular relations are those relationships that exist *between states that have agreed to work together in the consular field.* Therefore, *consular relations*, as relations between states, must not be confused with the various relationships established between the authorities of the residence state and *consular organs* when setting them up, granting protection and consular assistance, and any official activitity carried out by these organs.

From the above mentioned, as in the case of diplomatic relations, there results the characteristic feature of consular relations, that they are established by a special agreement concluded in this respect, by which there are *reunited the sovereign wills* of two states that want to establish consular relations, without this agreement to incumbent also details on how to achieve these relationships.

2.2. Subjects of consular relations. Content and legal nature of consular relations

a. Subjects of consular relations

International entities that have the features and privileges involved through the quality of subjects of consular relations are the states, holders of personal sovereign prerogatives. Citizenship is the legal link between the state and the person whose citizen he is, regardless of where it is in space, creating thus an *active subject* in the consular report. Under this legal reality, the state can carry out, through its abroad organizations, an activity of consular assistance and protection for its citizens.

Meanwhile, states are holding territorial jurisdiction, over which they exercise sovereign powers, which gives it the quality of *passive subject* of consular

[1] Maresca, Adolfo, *Le relazioni consolari*, Milano, 1966, p. 5.

report. In the legal basis of this quality, the state exercisses powers arising from the principle of territorial sovereignty towards foreigners who are in their territory, with the legitimacy to decide on the *admissibility of foreign consuls* and the *limits of their activity*.

Similar to the situation encountered in Diplomatic Law, the state has both the power to appoint its own consuls in another state and to establish consular offices in its territory, and the power to receive in its territory the consular offices of a foreign state. This dual capacity, which mirrors the state in both instances, the *active subject* and *passive subject* meets in the legal concept of *consular law*,[2] which can only belong to the state.

As in the case of the right of legation falling under the Diplomatic Law, the right of the consulate is not a subjective right of the state as the state is not obliged to receive on its territory consuls of another state and, accordingly, can not claim other states to receive its own consuls on their territory, without their consent. But there can exist a right and, as a corollary, an obligation, only if between the states concerned there would intervene certain arrangements in this regard.

According to the fundamental principles of Public International Law, states are not the only subjects of it that bear sovereignty, but also the peoples fighting for liberation. In this context, the same logic regarding the right of the consulate can also apply to insurgents who have a *passive consulate right* when exercising control over a part of the territory of a state and an *active consulate right*, according to some circumstances and the interests that other states have to recognize them as a political entity, distinct from the legal government.

In general, the quality of holder the consulate right that insurgents have follows the international legal personality logic that they can be invested with. For this reason, we can state that the consulate right of insurgents is provisional.

Consular activity, in its natural sense, can not depart from its content, that of protecting the rights and interests of the sending state and its citizens, as granting protection and consular assistance. From this point of view, no matter the number of other tasks that a consular office would have, such as the development of trade and economic, cultural, educational relations and so on, they appear rather as a finality that can be achieved in the context of ongoing consular activity.

Therefore, other subjects of Public International Law, such as international organizations, can not have the quality of subjects of consular relations, since they *can not develop such an activity.* Starting from the very purpose for which international organizations were created, as subjects of derivatives of Public International Law, under

[2] Anziloti, Dionisio, *Cours de Droit international*, tome I, Sirey, Paris, 1919, p. 276 și urm.

the *principle of specialty* and *not of sovereignty*, an international organization may not have other capacity, than that required for carrying out the functions for which it was established and according to its statute of foundation.

The international organization can not have the character of a state even if it enjoys international legal personality and it is a subject of international law, it remains a sui generis legal entity, and its legal capacity remains limited to the exclusive achievement of powers fixed by its constitutive act (Charter).[3]

Accordingly, an international organization *does not have citizens* to protect and and to offer consular assistance, and without citizens, consular activity is nonsense.

Also, as mentioned, the establishment of consular relations is not an unilateral act, but rather an act that occurs between two states based on the agreement of will between them. Consequently, the conclusion of such an agreement can not be done only between two states or governments who mutually recognize the quality of subject of international law.

Therefore, in the case of an unrecognized state or government, the acceptance of consuls or their appointment is a case of tacit recognition, as a consul's appointment or admission is an act, either of the government or even of the head of state.

b. Legal content of consular relations

The existence of consular relations presupposes the existence of two distinct national legal orders, the bodies of the sending state tend to exercise consular functions in the state of residence, so to achieve a transfer of jurisdiction to the detriment of the latter's bodies jurisdiction.

Meanwhile, the receiving State tends to limit as much exercise by state bodies sending consular functions on its territory. On the other hand, consular relations involve a diverse and multiple cooperation between the authorities of the residence state and the consular bodies of the sending state. Hence the contradictory nature and, at the same time, unitary of consular relations.

Consular relations contain specific features of any other relation established between two states. First, they are *international*, because they are mutual relations between states as subjects of international law, the sending state and the receiving state. Also, consular relations have a *regulated nature* whereas the right of consulate

[3] Oppenheim, Lassa, *International law: A Treatise*, 3rd ed., Ed. Longmans, Londra 1920, p. 422; ICJ Advisory Opinion in the case Reparation for injuries Suffered in Service of the United Nations, when it recognizes him as "a limited international personality" in L.C.Green, *International Law through the Cases*, London, 1959, p. 119 ff. and in Georg Schwarzenberger, *International Law*, vol. I; *International Law as applied by International Courts and Tribunals*, 3rd edition, Stevens, London, 1957, p. 522.