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Summary record of the 1462nd meeting

Topic:
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17. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer article 21 to the Drafting Committee.

*It was so agreed.*³

The meeting rose at 11.15 a.m.

³ For the consideration of the text proposed by the Drafting Committee, see 1469th meeting, paras. 1-10.

1462nd MEETING

Monday, 18 July 1977, at 3.10 p.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (para. 4 of General Assembly resolution 31/76) (concluded)*
(A/CN.4/300, A/CN.4/305)

[Item 5 of the agenda]

REPORT OF THE WORKING GROUP (A/CN.4/305)

1. Mr. EL-ERIAN (Chairman of the Working Group), introducing the report, said that the Working Group set up by the Commission to consider item 5 of the agenda (A/CN.4/305) had held three meetings, at which it had discussed ways and means of carrying out the task entrusted to it and had reached agreement on the course of action to be recommended to the Commission.

2. Most of the members of the Working Group had been of the opinion that the Commission should undertake the study of the topic at its 1978 session, so that the Secretary-General could take the results into account in the report on the implementation of the 1961 Vienna Convention on Diplomatic Relations, which he had been requested to submit to the General Assembly at its thirty-third session, pursuant to paragraph 5 of General Assembly resolution 31/76. They had also maintained that the Commission would require further information and observations from Governments. Other members of the Group had taken the view that the study should concentrate mainly on finding solutions to the problems concerning abuses of the diplomatic immunities of diplomatic couriers and abuses of the diplomatic bag. The Working Group had nevertheless been able to reach a consensus

* Resumed from the 1425th meeting.

on suitable ways and means of dealing with the topic. The conclusions it had agreed to recommend to the Commission were contained in paragraph 4 of its report, which it was submitting to the Commission for its consideration and approval.

3. The Group had recommended that the topic should be included in the Commission's programme of work for its 1978 session, and that it should be taken up during the first half of that session in order to facilitate the Secretary-General's task in submitting his analytical report to the General Assembly at its thirty-third session. The Working Group considered it advisable to follow a procedure similar to that adopted by the Commission when studying the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, and it was prepared to undertake the first stage of the study of the topic and to report on it to the Commission without appointing a special rapporteur.

4. The Working Group intended to study the topic on the basis of the proposals and observations submitted by States Members of the United Nations, pursuant to General Assembly resolutions 3501 (XXX) and 31/76. To facilitate the Group's task, members of the Commission would be invited to submit papers, preferably before the beginning of the 1978 session, and the Secretariat would be requested to remind Member States of the Commission's intention of studying the topic and of the desirability of sending it their proposals and observations. The Secretariat would also be requested to prepare a paper presenting the proposals submitted by Member States. The Working Group had agreed that the Secretariat paper would consist of an introductory part dealing with proposals relating to the topic in general, and a substantive part containing an analysis of those proposals.

5. Mr. TABIBI said he fully supported the report prepared by the Working Group and the recommendations it contained. He would, however, be grateful to the Chairman of the Working Group for a fuller explanation of why the Group had considered it appropriate to depart from the usual practice, which was that the Chairman raised questions and asked members of the Group and of the Commission to comment on them.

6. When the Working Group undertook its study, he thought it should bear in mind the complicated nature of the status of the diplomatic courier and the diplomatic bag, and the many developments in the practice of States that had taken place since the adoption of the 1961 Convention on Diplomatic Relations. For example, the diplomatic bag was, at present, often carried by special, rather than regularly scheduled, aircraft. The Group would therefore have to decide whether the protocol to be drafted should contain provisions relating to such special aircraft.

7. Since the topic of the diplomatic courier and the diplomatic bag was a matter of concern to all States Members of the United Nations, he thought that the States which had not yet done so should be urged to transmit their proposals and observations to the Commission in time for its 1978 session. Those proposals and observations would be of great assistance to the Commis-

sion when it came to consider the details of State practice relating to the diplomatic courier and the diplomatic bag.

8. Mr. EL-ERIAN (Chairman of the Working Group), replying to Mr. Tabibi, said that the Working Group had decided not to follow the usual practice because it had considered that the appointment of a special rapporteur was not necessary and that all the members of the Commission who wished to do so could assist the Group by submitting papers on the status of the diplomatic courier and the diplomatic bag.

9. The other point made by Mr. Tabibi, concerning the developments which had taken place since the adoption of the Vienna Convention on Diplomatic Relations, was particularly pertinent because paragraph 4 of General Assembly resolution 31/76 had requested the Commission to study "the proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, which would constitute development and concretization of the Vienna Convention on Diplomatic Relations of 1961". Those proposals would thus be used as a basis for determining whether the time had come to codify the legal rules governing the diplomatic courier and the diplomatic bag. The Working Group would take Mr. Tabibi's point fully into account in its study of the topic.

10. He fully agreed with Mr. Tabibi that the replies of Member States to the Secretariat's request for information, proposals and observations were of the greatest importance. The Working Group had not considered it appropriate to begin its study of the topic at the present session precisely because it hoped that it would receive additional information by the 1978 session.

11. Mr. SCHWEBEL said that, as a member of the Working Group, he fully supported the approval of the report and its inclusion in the Commission's report to the General Assembly. The outcome of the study to be undertaken by the Group and, subsequently, by the Commission would in no way be prejudged by the procedural course of action recommended in the report. On completion of its study, the Group might thus recommend the elaboration of a protocol designed either to increase the diplomatic immunities of diplomatic couriers or to prevent abuses of such immunities.

12. Mr. ŠAHOVIĆ said that the Working Group had carried out its task admirably, taking account both of the nature of the subject and of the Commission's experience. He fully endorsed its recommendations and particularly that contained in paragraph 4 (*d*) which, he considered, was very realistic. He therefore had no hesitation in recommending the adoption of the report.

13. Mr. REUTER joined previous speakers in congratulating the Working Group on its excellent report, the conclusions of which he found logical and entirely satisfactory. The proposal in paragraph 4 (*f*) was particularly useful since it would help to expedite the Commission's work by allowing members to submit their comments in writing before the beginning of the thirtieth session.

14. He would like to know whether the Secretariat intended to send members of the Commission any additional information on the subject. In his view, such

information should reach them before the end of February 1978 so that they could send their comments to the Secretariat in good time.

15. Mr. EL-ERIAN (Chairman of the Working Group), replying to Mr. Reuter, said he was sure that the material which had been supplied to the members of the Group, as well as any other relevant material, could also be made available to all members of the Commission who might wish to submit papers to assist the Group in its task.

16. Mr. RYBAKOV (Secretary to the Commission) said that all the material relating to the topic under consideration as well as any further replies and observations received from Governments would, of course, be made available to all members of the Commission.

17. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to approve the report of the Working Group (A/CN.4/305) and to reproduce it in its report to the General Assembly on the work of its current session.

It was so agreed.

State responsibility (continued)
(A/CN.4/302 and Add.1-3, A/CN.4/L.263)
[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE

ARTICLE 20¹ (Breach of an international obligation requiring of a State a specifically determined action or omission)

18. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 20 adopted by the Committee, which read:

Article 20. Breach of an international obligation requiring of a State a specifically determined action or omission

There is a breach of an international obligation requiring of a State a specifically determined action or omission when the action or omission of that State is not in conformity with that required of it.

19. Mr. TSURUOKA (Chairman of the Drafting Committee) drew attention to the fact that several corrections should be made to the proposed text of draft article 20. The words "by a State" should be added after the word "breach"; the words "of a State" should be replaced by the words "of it"; and, at the end of the text, the words "of it" should be replaced by the words "by that obligation".

20. In dealing with the text proposed by the Special Rapporteur, the Drafting Committee had taken account of the comments made on it by the members of the Commission, and had made some drafting changes which did not alter the substance. The wording now proposed was modelled on the wording of article 16.² The words "a particular course of conduct", proposed by the Special Rapporteur, had been replaced by the words "a specifi-

¹ For the consideration of the text originally submitted by the Special Rapporteur, see 1454th to 1456th meetings.

² See 1454th meeting, foot-note 2.

cally determined action or omission", which were designed to bring out more clearly the difference between international obligations of conduct and international obligations of result.

21. Mr. USHAKOV suggested that the words "of a State" might be deleted from the title of the article.

22. Mr. AGO (Special Rapporteur) said he had no objection to that suggestion.

23. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to delete the words "of a State" from the title of draft article 20.

It was so agreed.

24. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to approve the title, as amended, and the text of article 20 proposed by the Drafting Committee.

*It was so agreed.*³

The meeting rose at 4.15 p.m.

³ See also 1469th meeting, paras. 1-5.

1463rd MEETING

Tuesday, 19 July 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

Later: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

State responsibility (*continued*) (A/CN.4/302 and Add.1-3) [Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*) *

ARTICLE 22 (Exhaustion of local remedies)

1. The CHAIRMAN invited the Special Rapporteur to introduce draft article 22, which read:

Article 22. Exhaustion of local remedies

There is a breach of an international obligation requiring the State to achieve a particular result, namely, to accord certain treatment to individuals, natural or legal persons, if, after the State's initial conduct has led to a situation incompatible with the required result,

the said individuals have employed and exhausted without success the local remedies which were available to them and which possessed the necessary effectiveness to ensure either that the required treatment would continue to be accorded to them or, if that should prove impossible, that appropriate compensation be awarded to them. Consequently, the international responsibility of the State for the initial act or omission and the possibility of enforcing it against the State are not established until after local remedies have been exhausted without satisfaction.

2. Mr. AGO (Special Rapporteur) said that articles 20 and 21 dealt, respectively, with the international obligations which required a State to adopt a particular course of conduct and with those which only required a State to achieve a particular result, leaving it free to determine the course of conduct by which to do so. In both cases, the State was required to perform or not to perform one or more actions or omissions; the difference was that, in the case of article 20, the required conduct was dictated by international law whereas, in the case of article 21, the initiative rested with the State. Moreover, the international obligations referred to in article 21 could be distinguished according to whether, in addition to being able to choose at the outset one means rather than another, the State did or did not have the faculty of rectifying, by a new course of conduct, the situation created by an initial inadequate course of conduct. If it had that faculty, there was no definitive breach of the international obligation until there had been a definitive failure to achieve the result, even in that exceptional manner. Sometimes, as had been seen, the obligation was so permissive that, when the originally required result was no longer attainable, the State could none the less discharge its obligation by achieving an equivalent result. That showed therefore how the way in which an international obligation was breached depended on the nature of the obligation itself.

3. Account should also be taken of a large and special category of international obligations: those assumed by States concerning the treatment of private individuals, particularly foreigners. When the result required by an international obligation was a certain kind of treatment for individuals, it was normal for the individuals concerned to co-operate in achieving that result, either by making an appropriate request at the outset or, if the obligation also allowed the State to rectify a situation which had been created by its initial conduct and which was incompatible with that required by the international obligation, by setting the necessary machinery in motion to remedy the unsatisfactory situation. For example, in the case of a conventional or customary international obligation providing for equality of treatment of nationals and foreigners in regard to the practice of a particular profession, if an authority of the State did not allow a foreigner to benefit from such equality of treatment, it was naturally incumbent on the foreigner to take the initiative to have the decision of that authority reversed by a higher administrative authority or by a judicial organ. The State itself could not be asked to take the initiative in every case, and that was how the principle of the exhaustion of local remedies had come into being.

4. On the other hand, when the beneficiary of an international obligation was a State and the obligation allowed it to remedy the effects of an inadequate initial course of

* Resumed from the 1461st meeting.