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**A/CN.4/SR.1693**

**Summary record of the 1693rd meeting**

Topic:  
**<multiple topics>**

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*Article 19. Transfer of part of the territory of a State*

1. When part of the territory of a State is transferred by that State to another State, the passing of the State debt of the predecessor State to the successor State is to be settled by agreement between them.

2. In the absence of an agreement, the State debt of the predecessor State shall pass to the successor State in an equitable proportion, taking into account, *inter alia*, the property, rights and interests which pass to the successor State in relation to that State debt.

*Article 19 was adopted.*

ARTICLE 20<sup>45</sup> (Newly independent State)

112. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee had simply brought the English and Spanish versions of paragraph 2 into line with the French version of that paragraph and of paragraph 4 of article 11, which was the corresponding article in Part II. The proposed text (A/CN.4/L.328) read:

*Article 20. Newly independent State*

1. When the successor State is a newly independent State, no State debt of the predecessor State shall pass to the newly independent State, unless an agreement between the newly independent State and the predecessor State provides otherwise in view of the link between the State debt of the predecessor State connected with its activity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State.

2. The agreement referred to in paragraph 1 shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor shall its implementation endanger the fundamental economic equilibria of the newly independent State.

*Article 20 was adopted.*

ARTICLE 21<sup>46</sup> (Uniting of States)

113. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that, in the light of the Commission's wishes, the Committee had decided to delete paragraph 2, and the article therefore read (A/CN.4/L.328):

*Article 21. Uniting of States*

1. When two or more States unite and so form a successor State, the State debt of the predecessor States shall pass to the successor State.

*Article 21 was adopted.*

ARTICLE 22<sup>47</sup> (Separation of part or parts of the territory of a State)

114. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee had made no change to the article as adopted on first reading.<sup>48</sup>

*Article 22 was adopted.*

ARTICLE 23<sup>49</sup> (Dissolution of a State)

115. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that, for the same reasons as in the case of article 14, which was the corresponding article in Part II, the words "an equitable proportion of the State debt of the predecessor State shall pass to each successor State" had been replaced by "the State debt of the predecessor State shall pass to the successor States in equitable proportions". The text of article 23 as proposed by the Drafting Committee (A/CN.4/L.328) therefore read:

*Article 23. Dissolution of a State*

When a predecessor State dissolves and ceases to exist and the parts of its territory form two or more States, and unless the successor States otherwise agree, the State debt of the predecessor State shall pass to the successor States in equitable proportions, taking into account all relevant circumstances.

*Article 23 was adopted.*

*The meeting rose at 1.10 p.m.*

<sup>48</sup> For text, see 1688th meeting, para. 3.

<sup>49</sup> For initial consideration of the text by the Commission at the current session, see 1688th meeting, paras. 3–32.

**1693rd MEETING**

*Friday, 17 July 1981, at 10.30 a.m.*

*Chairman:* Mr. Doudou THIAM

*Present:* Mr. Aldrich, Mr. Barboza, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)\***  
(A/CN.4/347 and Add.1 and 2)

[Item 8 of the agenda]

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

ARTICLE I (Scope of the present articles),

\* Resumed from the 1691st meeting.

<sup>45</sup> *Idem*, 1688th meeting, paras. 3–32.

<sup>46</sup> *Idem*.

<sup>47</sup> *Idem*.

ARTICLE 2 (Couriers and bags not within the scope of the present articles),

ARTICLE 3 (Use of terms),

ARTICLE 4 (Freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags),

ARTICLE 5 (Duty to respect international law and the laws and regulations of the receiving and the transit State), and

ARTICLE 6 (Non-discrimination and reciprocity)<sup>1</sup>  
(continued)

1. Mr. USHAKOV said that, in his view, the Commission should use a generic term such as "official courier", "government courier" or "*courrier de cabinet*" to designate the diplomatic, consular and other couriers it wished to cover, and another generic term such as "official bag", "Government bag" or "*valise de cabinet*" to designate the various types of bag concerned. It should then be made clear that those terms covered not only diplomatic couriers and bags but other couriers and bags. No reference should be made, in the definitions to be given to those terms, to the rules relating to the status of such couriers and bags.

2. In that connection, the definition of the term "diplomatic courier", as proposed by the Special Rapporteur in article 3, subparagraph 1 (1), contained unnecessary elements deriving from the rules which defined the status of the diplomatic courier and which belonged in subsequent articles. The term "government courier" could, for example, be defined as meaning a person having the status of courier, sent by a State to deliver the government bag or other communication to its destination. A similar definition could be given to the generic term that would be adopted to designate the various kinds of bag.

3. Article 1, (Scope of the draft articles) could then simply stipulate that the draft would apply to communications of States by means of a government courier or governmental bag. As that provision dealt only with the scope of application of the draft articles, there was no point in referring to special rules; in his view, even the expression "for all official purposes" was in the nature of a rule. It should be made clear in a subsequent article that the sending State could send a government courier to deliver a communication to its missions situated in the territory of the receiving State. There would then follow an article drafted along the lines of draft article 4, which laid down the obligations of the receiving State.

4. If the Commission were to use the terms "diplomatic courier" and "diplomatic bag" to designate all categories of courier and bag envisaged, it would inevitably be inviting difficulty, since those terms were used in a very special sense in the 1961 Vienna Convention.<sup>2</sup>

5. Draft article 5, entitled "Duty to respect international law and the laws and regulations of the receiving and the transit State", seemed premature, since the Commission should lay down the duty to respect international law and internal law only after enumerating the relevant facilities, privileges and immunities.

6. Referring specifically to paragraph 1 of article 5, he said that the duty to respect the rules of international law was incumbent only on subjects of international law, and not on the government courier. The latter could not even be regarded as an organ of the State, since he carried out very special duties and did not exercise any State power. In any event, even the organs of the State had never been deemed to have a duty to respect international law; such a duty was incumbent only on the States on whose behalf they acted.

7. Mr. ŠAHOVIĆ said he sometimes had the impression that the Commission exaggerated the importance of the subject under consideration. It was actually a fairly modest subject, although it had its practical aspects, as the Special Rapporteur has pointed out. At all events, no controversial legal problems were involved, for the general status of the diplomatic courier and the diplomatic bag had already been laid down in various multilateral conventions which had codified the rules of customary law. That raised the question how an examination of the subject by the Commission could contribute to the codification and progressive development of international law. From the outset, the Commission had emphasized the need to pinpoint those new and practical aspects of the subject that were the outcome of progress in the field of communications and of the abuse of certain privileges and immunities. The need, then, was to introduce the necessary innovations and provide the information essential for the guidance of States in the application of the existing rules of international law. It followed that, in future, the Special Rapporteur should concentrate his research on State practice, with a view to determining which legal problems called for regulation. Any other approach might lead to a work of codification for which positive law would be the sole basis.

8. While the assimilation of the diplomatic courier and bag to other types of courier and bag had been debated at length, the assimilation of the courier and bag of international organizations had so far been neglected. In Mr. Ushakov's view, the Commission's work would only be genuinely of use if it also took account of the courier and bag of international organizations. In that connection, he himself differed from other members of the Commission concerning the need to find a generic term: the terms "diplomatic courier" and "diplomatic bag" were themselves general terms and were used in that sense in the terminology of the subject under consideration. It would therefore suffice to make it clear that the rules laid down in the draft articles applied to all forms of diplomatic courier and bag.

<sup>1</sup> For texts, see 1691st meeting, para. 1.

<sup>2</sup> See 1691st meeting, footnote 1.

9. Referring to article 1, he said that paragraph 2 could be simplified, since it merely assimilated diplomatic couriers and bags to other types of courier and bag.
10. With regard to article 2, he stressed that the couriers and bags used by international organizations should be included within the scope of the draft articles. Article 2 should therefore be replaced by a provision specifying what the relationship was between the rules laid down in the draft and the other rules of international law concerning diplomatic couriers and bags.
11. The definitions of terms laid down in article 3 should, as several members of the Commission had pointed out, be stripped in so far as possible of any element in the nature of a legal rule.
12. Lastly, he trusted that provision would be made for an article on the duties of the sending State, in order to supplement articles 4, 5 and 6, which related, respectively, to the duty of the receiving State and the transit State to respect the freedom of communication; the duty of the diplomatic courier to respect international law and the internal law of the receiving State and the transit State; and the duty of the sending State and the receiving State to respect the principles of non-discrimination and reciprocity.
13. Mr. TABIBI said he was sure that, on the basis of the approach adopted and the proposals made by the Special Rapporteur, the Commission would have every chance of success in formulating draft articles on the topic under consideration. What made that topic so important was that the protection of freedom of communication and of diplomatic couriers and bags was one of the oldest principles of international law. That principle and others of fundamental importance had, of course, been embodied in the 1961 Vienna Convention and in the 1963 Vienna Convention,<sup>3</sup> which had become part of the internal law of many Member States of the United Nations. In dealing with the present topic, the Commission should attempt, not to rewrite the principles embodied in those instruments, but rather to formulate principles on which those instruments were silent, taking particular care to protect the rights and interests of smaller countries, which had at their disposal many fewer technical resources than larger countries for inspecting and controlling the content of diplomatic bags and preventing abuses thereof.
14. In his view, article 1, on the scope of the draft articles, was not restrictive enough, and the reference it made to all kinds of communications of States might be misconstrued. He agreed with Mr. Šahović that articles 4, 5 and 6 were particularly important. Article 4, on freedom of communication, referred to the obligations of the receiving State. A reference to the obligations of the sending State should, however, be included in article 5 because the balance between the rights and duties of sending and receiving States was an essential element of the topic under consideration.
15. He agreed with Mr. Calle y Calle, (1691st meeting) that the interests of organizations such as the Palestine Liberation Organization and the South West Africa People's Organization (SWAPO) should be taken into account in the draft articles, which would take on even greater significance if they also applied to couriers and bags used by international organizations for official purposes.
16. Mr. NJENGA said that the Special Rapporteur, in his excellent report and lucid oral introduction, had successfully demonstrated that the law relating to the status of the diplomatic courier and the diplomatic bag was now ripe for codification.
17. Referring to article 1, he said that he had been taken by surprise when he had read paragraphs 45 to 48 of the second report (A/CN.4/347 and Add.1 and 2), in which the Special Rapporteur had suggested that the draft articles should apply to the couriers and bags used by States and not to those used by international organizations. The arguments put forward by the Special Rapporteur in support of that suggestion were not very convincing, particularly since the practice of international organizations in respect of the use of couriers and bags for official purposes was well-established and generally accepted by States. It would therefore be perfectly justified for the Commission to look into that practice and into the relevant provisions of treaties concluded by international organizations and host countries with a view to extending the scope of the draft articles to communications by international organizations through couriers and bags. Such a course of action might ultimately save the Commission considerable time and effort, because the General Assembly would then not have to request it to prepare draft articles on the question of the status of couriers and bags used by international organizations.
18. One of the most important facts established by the Special Rapporteur in his survey of existing multilateral conventions was that the principle of freedom of communication and the principle of the inviolability of the diplomatic bag were generally recognized. An exception to the latter principle had been provided for in article 35, paragraph 3, of the 1963 Vienna Convention, but not in subsequent conventions. To his mind, that indicated that State practice established no grounds for such an exception. It might nevertheless be a good idea for the Commission to give careful consideration to the principle of inviolability because, although States had an obligation to use diplomatic couriers and bags for official purposes only, abuses did occur, and it might be expedient to provide for stronger safeguards in the draft articles.
19. In that connection, in paragraph 165 of his report the Special Rapporteur had pointed out that, according to the principle of the inviolability of official correspondence, the diplomatic bag was exempt "from any kind of inspection or control, directly or through soph-

<sup>3</sup> *Idem*, footnote 2.

isticated technical devices". It was, however, open to question whether the electronic scanning of diplomatic bags could be ruled out entirely when it was considered in the light of the duty of a State which hosted a large international conference to ensure the protection of the representative of other States attending that conference. That was a matter of practical importance, because States assumed enormous responsibilities when they hosted large conferences and they could not run the risk that diplomatic couriers and bags might be used for "unofficial" purposes. The Commission should therefore take particular care to ensure that the draft articles established a balance between the rights and obligations of sending and receiving States.

20. The suggestion made by the Special Rapporteur in paragraph 186 of his report that the term "diplomatic bag" might be replaced by the term "official bag" was a good one that might also be applied to the definition of the term "diplomatic courier" in article 3, subparagraph 1 (1). The use of the term "official courier" would make it unnecessary to refer in article 3, paragraph 1, to all the different types of couriers, who basically had the same functions.

21. He had some difficulty with the reference to the idea of "consent" in article 3, subparagraph 1 (7), containing the definition of the term "transit State"; for obvious practical reasons, transit States did not actually give their express consent whenever a diplomatic courier was to pass through their territories. The words "and with whose consent" in article 3, subparagraph 1 (7), which would be unduly restrictive, might therefore have to be amended.

22. Mr. REUTER said that he could agree to Mr. Ushakov's suggestions concerning the approach to the topic and aimed at a stricter presentation of the articles, with the clear separation of articles that dealt, respectively, with definitions, the scope of the draft, and the substantive rules. There was, however, a link between those various aspects which the Commission should analyse when it came to consider the articles themselves.

23. Several members had expressed the view that the scope of the draft should include the case of international organizations. He, too, was convinced that the situation of international organizations was identical to that of States in the area in question. The draft was based on general principles, one of which was that international organizations, like States, required freedom of communication, which was wholly subordinate to the functions involved. The Commission should therefore treat freedom of communication as a derivative of the general principle of the inviolability of the archives of international organizations, which undoubtedly formed part of the general principles of contemporary customary international law. Certain disputes between international organizations and their host States as to whether an international organization could be made subject to a national law requiring any person holding archives in the territory of the State

concerned to allow the verification of archives stored in a computer, even when they contained information about individuals, should convince the Commission of the need to affirm the existence of a general principle of the inviolability of archives that would be applicable to international organizations and would, naturally, extend to archives in transit.

24. However, various technical factors might cause uncertainty as to the advisability of extending the application of the draft to international organizations. The draft before the Commission already dwelt at length on Governments, and a decision to cover international organizations as well would further complicate the Commission's task. He would therefore go along with the Commission and the Special Rapporteur in their choice on that point.

25. From a more general standpoint, two options were open so far as the approach to the draft was concerned: the privileges accorded to the courier could either merely be spelt out or they could be amplified as well. The Commission must, indeed, substantially clarify certain aspects of the topic, including even technical aspects, if its work was to be effective. The position adopted by the Special Rapporteur in that connection had been endorsed by all the members who had made known their views.

26. The Special Rapporteur had also held that the four most recent conventions on the topic under consideration demonstrated the existence within the international community of a broad current of opinion that could be taken as justification for the extension of the privileges already provided for under the first instrument considered, the 1961 Vienna Convention. On the basis of that trend, Mr. Yankov (1691st meeting) had even criticized a provision in one of those conventions that restricted certain privileges. For his own part he was in favour of everything that could increase protection for international relations, particularly since they were threatened in the present day and age by totally unacceptable acts of barbarity. Furthermore, a recent example suggested that certain forms of protection were not as effective as might have been thought.

27. The Commission should, however, ask itself whether that was the position of Governments too. The 1961 Vienna Convention had received virtually universal approval and had been ratified by numerous States, with no significant reservation. The 1963 Vienna Convention, on the other hand, had met with less success, while the 1975 Vienna Convention<sup>4</sup> had still not come into force. Although a clear and well-constructed text would, in his view, inevitably affect practice—perhaps even as much as a convention that had formally entered into force—he none the less considered that the Commission must decide whether its real wish was to prepare a draft that would not arouse misgivings on the part of Governments. In his view, it would be

<sup>4</sup> *Ibid*, footnote 4.

advisable to take account of certain fears that might be expressed and that had already come to light in the comments made by members of the Commission.

28. There was a technical aspect of the matter that would serve to illustrate that point of view. One of the draft articles proposed by the Special Rapporteur provided that the regime governing the bag should protect the courier and all objects for official use. That provision would therefore seem to exclude medicine, drugs and weapons, but to cover coding and decoding equipment; it also seemed to apply to currency to finance the recipient's official duties. Such a solution might, however, be unacceptable, particularly to certain developing countries which were obliged to control the circulation of currency and whose borders were eminently permeable. Aspects such as that should be given detailed study within the draft, with a view to defining what the courier was and to clarifying the duties of the State, quite apart from the question of possible sanctions. If the Commission were to proceed otherwise, it could provide States with a pretext for refusing to consider the draft.

29. In the same way, the principle of non-discrimination seemed to be the rule in diplomatic relations, but not in consular relations, which fell *de facto* within the realm of bilateralism and reciprocity and, hence, of discrimination. In general, the Commission should avoid taking up positions that were too remote from the actual concerns of Governments.

30. Sir Francis VALLAT said that, while he congratulated the Special Rapporteur on his report and oral introduction, he nevertheless had a number of difficulties with the approach adopted to the topic and with the proposals contained in the report.

31. In his view, the question of the status of diplomatic couriers and diplomatic bags presented the same problems to both large and small States. In the United Kingdom, for example, the diplomatic bag had been used to the detriment of the national economy. It had been used for the importation of industrial diamonds on a large scale and of narcotics. He was convinced, moreover, that it had also been used for the importation of terrorist devices. Such practices were surely an abuse of the diplomatic bag, which was designed to protect and further the conduct of diplomatic relations between States. The problem was one which called for close examination, and the Commission should exercise great caution in considering whether the complete immunity accorded to diplomatic couriers and bags should be extended to a wider field.

32. The approach proposed by the Special Rapporteur was neither inductive nor deductive. To take four articles from four different conventions and to attempt to amalgamate certain of their provisions into a single article, to apply to all situations, would inevitably lead to confusion, particularly where the conventions in question had not yet entered into force. It might be

preferable to begin with an examination of article 27 of the 1961 Vienna Convention, for example, to determine those respects in which it worked well or badly, and to endeavour to arrive at the solutions needed in that context. Consideration would then be given to the possibility of extending the results to other fields.

33. It had been his understanding that, since the inception of the United Nations, the view had become overwhelmingly accepted that in considering the question of diplomatic privileges and immunities a functional approach should be adopted. He was not convinced that precisely the same privileges and immunities should apply to consular and to diplomatic couriers and bags. Moreover, in the case of couriers and bags used by international organizations, quite different considerations applied, since, in the first place, the communications of such organizations were not in general regarded as secret. Consequently, he recommended that the Special Rapporteur should consider an alternative approach.

34. Mr. VEROSTA said that he shared many of the views and doubts expressed by other members of the Commission. He noted that draft article 3 proposed by the Special Rapporteur contained 23 definitions, and that among them were a number of rules which would be better dealt with separately as such. In his view, some of the definitions were not all that necessary, and he feared that such a long list was the precursor of an excessively long draft. He trusted that the Commission would not enlarge the functions of the courier unduly and that it would take a prudent attitude to assimilation, so as to facilitate the acceptance of the future draft by States.

**Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/338 and Add.1-4, A/CN.4/345 and Add.1-3, A/CN.4/L.328)**

[Item 2 of the agenda]

**DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)**

35. Mr. BEDJAoui (Special Rapporteur) expressed his gratitude and warm appreciation to all those who, in a spirit of friendship and a particularly stimulating climate of intellectual excellence, had assisted him in preparing the draft articles over thirteen years of combined effort, in the service of the codification and progressive development of international law for the benefit of the international community as a whole. The draft articles as finally adopted were a truly joint product of the Commission and of the Drafting Committee, which had been directly involved in the preparation of the text.

36. Particular thanks were due to the successive chairmen of the Drafting Committee and the members of the Secretariat.

*The meeting rose at 1.00 p.m.*