

Document:-
A/CN.4/SR.1781

Summary record of the 1781st meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1983, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

courier's functions ended, was not satisfactory. That point should be made clear in the text of the draft articles. He observed that it was because of a drafting problem that one representative in the Sixth Committee had expressed doubts about the need for article 14, paragraph 2 (*ibid.*, para. 209). The wording of that provision should be amended to make it clear that the sending State had an option, not an obligation, to replace a diplomatic courier declared *persona non grata*.

46. Draft article 9 had already been referred to the Drafting Committee, but it should be more carefully considered by the Commission. His own country had no experience of the practice of two or more States appointing the same person as a diplomatic courier. In his opinion, that possibility was in conflict with the importance attaching to the inviolability of the diplomatic courier and, for the few States which engaged in the practice, it represented a kind of abandonment of their sovereignty. The article should therefore be deleted. At its previous session, moreover, the Commission had agreed not to include in its draft articles provisions which would not be generally applicable.

47. The other draft articles were useful, but draft article 18 could give the impression that it overlapped with draft article 4. The Commission should therefore examine that provision more closely to see whether it was really necessary. Another question that arose in regard to article 18 was that of who decided whether it was necessary to facilitate the communications of the diplomatic courier. The words "when necessary" called for some clarification. He proposed that they should be replaced by the words "if the diplomatic courier so requests". In the French text of draft article 19, the word *aident* should be replaced by the words *doivent aider*; a more satisfactory formulation than the words "in connection with the performance of his official functions" should also be found. Finally, he suggested that the last phrase of draft article 17, "or when returning to the sending State", should be deleted. He reserved the right to speak again when the addenda to the fourth report had been circulated in French.

The meeting rose at 6.05 p.m.

1781st MEETING

Tuesday, 14 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Calero Rodrigues, Mr. Castañeda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Ushakov, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/359 and Add.1,¹ A/CN.4/372 and Add.1 and 2,² A/CN.4/374 and Add.1-4,³ A/CN.4/L.352, sect. E, ILC(XXXV)/Conf.Room Doc.7)

[Agenda item 3]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR⁴ (*continued*)

ARTICLE 15 (General facilities)

ARTICLE 16 (Entry into the territory of the receiving State and the transit State)

ARTICLE 17 (Freedom of movement)

ARTICLE 18 (Freedom of communication) *and*

ARTICLE 19 (Temporary accommodation)⁵ (*continued*)

1. Mr. CALERO RODRIGUES said that he agreed in principle with the course adopted by the Special Rapporteur and considered it very useful to set forth in draft article 15 the principle that the receiving State and the transit State should accord general facilities to the diplomatic courier. In regard to draft article 17, however, he wondered whether it would not be advisable to set some limitation on the freedom of movement. As it was now worded, the article accorded virtually the same freedom of movement as that accorded to diplomats under article 26 of the Vienna Convention on Diplomatic Relations; but diplomats generally had a wider mission and should thus have wider freedom of movement than the courier.

2. As to draft article 18, he saw no reason to confine the missions with which the courier could communicate to those situated in the territory of the receiving or transit States. There might be cases in which, for practical reasons, the courier should be in communication with one of his country's missions in a country other than the receiving or transit States. That possibility could be provided for by ending with the words "and its missions" and deleting the last part of the article. He did not agree with Mr. Flitan (1780th meeting) that article 18 duplicated the terms of article 4.

3. Lastly, he noted that whereas article 18 provided that facilities for communication should be accorded "when necessary", article 19 provided that facilities for accommodation should be granted by the receiving State and the transit State "when requested". As the intent was the same in both cases, the terms in question should be aligned.

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem*.

⁴ For the texts of draft articles 1 to 14 referred to the Drafting Committee at the Commission's thirty-fourth session, see *Yearbook* . . . 1982, vol. II (Part Two), pp. 115 *et seq.*, footnotes 314, 315, 318 and 320-330.

⁵ For the texts, see 1774th meeting, para. 1.

4. Sir Ian SINCLAIR said that the tapestry woven by the four conventions on diplomatic law was composed of the ambassador and his staff, the consul and his staff, the permanent representative to international organizations, and the special mission, and somewhere in the background stood the figure of the diplomatic courier. It was the task of the Commission to give that figure more definition, not to undo and remake the whole tapestry.

5. The general observations which he had made at the previous session remained valid and he still wondered whether the relatively few problems that arose in the law on the matter warranted the extensive treatment proposed. His remark was not a reflection on the Special Rapporteur but rather on the significance of the topic as compared with others on the agenda.

6. In general, there had been somewhat unequal treatment of the diplomatic courier *ad hoc*, a useful institution as attested to by State practice. Occasionally, the diplomatic courier *ad hoc* appeared to have been forgotten, for instance in paragraph 1 (3) of article 3, where presumably there should have been a reference to the diplomatic courier *ad hoc* after the words "diplomatic courier". Likewise, in draft article 10 a reference should have been made to the nationality of the diplomatic courier *ad hoc*. In United Kingdom practice, the same rule applied to the nationality of the diplomatic courier *ad hoc* as to that of the diplomatic courier *stricto sensu* and he would be quite content if the necessary references were simply inserted in paragraphs 1, 2 and 4 of draft article 10. Those points, however, could be dealt with in the Drafting Committee.

7. In the main, he had no difficulty with the content of draft article 15. The Special Rapporteur, in his oral introduction (1774th meeting), had none the less mentioned that he had sought inspiration in the Convention on Special Missions, for there was some analogy between diplomatic couriers and special missions in that the task of both was temporary. It might therefore be advisable to add, at the end of draft article 15, the phrase "having regard to the nature and task of the diplomatic courier". Article 22 of the Convention on Special Missions contained a similar qualification, no doubt for the reason the Special Rapporteur had indicated.

8. No real problem of principle arose in connection with draft article 17, but article 26 of the Vienna Convention on Diplomatic Relations, article 34 of the Vienna Convention on Consular Relations, article 27 of the Convention on Special Missions and article 56 of the Vienna Convention on the Representation of States used the phrase "zones entry into which is prohibited or regulated for reasons of national security" rather than "zones where access is prohibited or regulated for reasons of national security". The Commission should keep to that hallowed formula, if only to avoid possible misinterpretations. By the same token, the phrase "or when returning to the sending State", at the end of the article, could be deleted. It added nothing to the meaning and could lead to misguided interpretations of the other conventions which contained no corresponding language.

9. Such difficulty as he did experience lay more in draft

articles 18 and 19 and he very much doubted whether either was really necessary. So far as article 18 was concerned, the diplomatic courier by definition would carry the bag of the sending State to its diplomatic or other missions in the receiving State and would therefore naturally have access in the receiving State to the official communications of the sending State's missions. Hence it was open to question whether there was any need to make special provision for an obligation on the receiving State to assist the diplomatic courier to communicate with the authorities of the sending State or its missions. In the case of the transit State, paragraph 2 of draft article 4 already appeared to cover much the same ground. If some eventuality had not been covered—if, for instance, a diplomatic courier in transit needed to communicate by telephone or telex with the sending State's mission in the receiving State to warn it of an unexpected delay—the matter could surely be dealt with in the commentary to draft article 15, on general facilities.

10. Similar considerations applied in the case of draft article 19. The possible provision of temporary accommodation for the diplomatic courier surely fell within the scope of the obligation on both receiving and transit States to accord the diplomatic courier the facilities required for the performance of his official functions. Mention could certainly be made in the commentary to draft article 15 of the possible need to assist the diplomatic courier, upon request, in obtaining temporary accommodation. If that was done, it did seem that articles 18 and 19 could be dispensed with in the overall interest of the economy of the draft.

11. Mr. NI congratulated the Special Rapporteur on the progress he had achieved in the study and codification of the status of the diplomatic courier and the diplomatic bag and noted that the objectives set out in paragraph 4 of the fourth report (A/CN.4/374 and Add.1-4) provided an encouraging basis for further work. Given the complexity of modern international relations, the topic under discussion was assuming growing importance and the formulation of appropriate articles would serve to promote the development of co-operation.

12. The existing provisions on freedom of communication were fragmentary and disparate and the draft articles should therefore aim at systematization and amplification. As a guiding principle, account should be taken of the requirements of secrecy for the sending State and security for the receiving and transit States, safe and speedy delivery of the diplomatic bag, compliance with the laws of the receiving and transit States, and the need to prevent any abuse of rights on the part of either the sending State or the receiving State. The pragmatic approach adopted by the Special Rapporteur was particularly appropriate for a topic that was concerned with practical problems.

13. The position of the diplomatic courier had been assimilated to or compared with that of a diplomatic agent, a member of a special mission, or a member of the administrative, technical or service staff. Such assimilations or comparisons were not entirely without foundation but, in formulating the draft articles, attention

should be focused on the special role played by the diplomatic courier and not on his rank in the diplomatic service. The importance of freedom of communication between States and their missions abroad, which was a fundamental principle of international law and a prerequisite for the normal functioning of those missions, could not be over-emphasized. It was the diplomatic courier who performed that important task of communication. His position was unique and differed from that of any other member of the diplomatic staff. Consequently, it might be inappropriate to base the status of the diplomatic courier on any undue assimilation to any other diplomatic personnel. In view of the importance of his duties, the diplomatic courier should be afforded the requisite facilities to fulfil his task, and that idea was the guideline for draft articles 15 to 19.

14. In draft article 15, the word "required" should be replaced by the word "necessary", since the diplomatic courier could determine what was necessary in the light of the given circumstances, whereas the word "required" could give rise to different interpretations. Also the legal meaning of the word "facilities" called for clarification. In that connection, it had been said that "facilities" would necessarily cover certain rights and obligations of a general nature to facilitate the performance of the functions of the courier or the bag or more specific matters such as obtaining accommodation, the issue of visas, transportation and so on. The latter items were, of course, specifically dealt with in draft articles 16 to 19.

15. In regard to draft article 16, it would be preferable, in paragraph 2, to replace the words "if required" by "where required" and the phrase "as quickly as" by "as expeditiously as". As to draft article 19, it was very unlikely that the diplomatic courier would not obtain temporary accommodation in the receiving or transit State, and the Special Rapporteur had himself expressed the view (1774th meeting) that assistance to the diplomatic courier in that connection should not be regarded as a routine obligation on the receiving State or the transit State. In the event of some real urgency, the receiving or transit State would be under an obligation, under article 15, to accord the facilities required.

16. Mr. KOROMA said that, as a result of the Special Rapporteur's skilful handling of the topic, the doubts regarding its codification had been largely dispelled. The Special Rapporteur had rightly continued to adopt a pragmatic approach and reminded the Commission that the functions of the diplomatic courier were to facilitate communication between a Government and its missions abroad. Equally important, however, was the need for confidentiality in such communication. That point, the very essence of the matter, was dealt with in draft article 15, which provided that the receiving and transit States were to accord the diplomatic courier such facilities as were required, or necessary, for the proper performance of his official functions. An underlying element was the principle of reciprocity, one that was particularly important and relevant because it struck the necessary balance between the receiving and sending States.

17. In his opinion, the Special Rapporteur should extend the study to include diplomatic couriers and diplomatic bags of international organizations and entities other than States which used them for the same reason as States, namely to facilitate communication and ensure confidentiality. That reason became even more valid when the entity in question enjoyed widespread recognition and representation abroad.

18. He agreed that the status of the diplomatic courier should not be assimilated to that of the diplomatic agent, but two points were worth noting. First, in certain cases the courier himself was a diplomatic agent and therefore enjoyed all the privileges and immunities of such an agent; second, and particularly important, the contents of his bag were confidential and inviolable. Thus there was every reason for a diplomatic courier to enjoy the same privileges and immunities, not only when he was himself a diplomatic agent but also in order to ensure the confidentiality and inviolability of the bag. Clearly, strong arguments could be adduced for not unduly curtailing the immunities and privileges of the diplomatic courier, who in some cases needed them even more than did the diplomatic agent himself.

19. As to draft article 17, one of the prerequisites for the effective functioning of the diplomatic courier was speed: the diplomatic courier should be able to use the most expeditious and direct means to carry out his functions and the article should be worded in such a way that it did not impede communication or make the courier's task more difficult than necessary. He therefore agreed with Sir Ian Sinclair's suggestion that use should be made of the wording employed in the Conventions on Diplomatic Relations and on Consular Relations. The fact that those Conventions were now part of international law would prevent any abuse or discrimination that might defeat the purpose and functions of the diplomatic courier.

20. Since draft article 18 was intended to apply in the event of *force majeure* or if a courier was in difficulty, he agreed with Mr. Flitan (1780th meeting) that the receiving and transit States should facilitate communications with the sending State "if the courier so requests" rather than "when necessary". In the final analysis, the test of reasonableness could be expected to apply and, if a diplomatic courier was in serious difficulty and made an appropriate request to a transit State or to the receiving State, those States should be under an obligation to extend the necessary assistance to enable him to communicate with his mission or State. That again was in keeping with the underlying principle of reciprocity. Lastly, he endorsed draft article 19, relating to the obligation to provide temporary accommodation.

21. Mr. DÍAZ GONZÁLEZ congratulated the Special Rapporteur on his fourth report (A/CN.4/374 and Add.1-4) and said that he fully supported the four principles stated in paragraph 23 and on which draft articles 15 to 19 had been based, for they were fully in keeping with State practice. It was thus quite obvious that, in the course of performing his task, the diplomatic courier must enjoy the same facilities, privileges and immunities as diplomatic agents.

22. Although the substance of the draft articles was entirely satisfactory, the wording called for a few comments. In the case of article 16, paragraph 1, he was not sure that the word “official” was really necessary, since the functions of the diplomatic courier, who represented a State, were always official. In the Spanish text of paragraph 2 of that article, the words “con la mayor rapidez posible” should be replaced by the words “a la brevedad posible”, which would be more correct. He agreed with Sir Ian Sinclair that the wording of draft article 17 should be based on that of the corresponding provisions of the four conventions on codification of diplomatic law. The last phrase of draft article 18, which read “situated in the territory of the receiving State or in that of the transit State, as applicable”, was unnecessary and should be deleted because it had already been made clear that the missions in question were the same as the ones referred to in article 1.

23. As to draft article 19, rather than assist the diplomatic courier to obtain temporary accommodation, the receiving State and the transit State should accord him all the necessary facilities to obtain temporary accommodation for the duration of his stay in their territory in the performance of his functions. Draft article 19 should therefore be reworded as follows:

“The receiving State and the transit State shall accord the diplomatic courier all the necessary facilities to obtain temporary accommodation for the duration of his stay in their territory in the performance of his functions.”

24. Mr. USHAKOV said he hoped that the Commission would be able to complete its first reading of the draft articles at the following session or even at the current one. Draft articles 15 to 19 proposed by the Special Rapporteur in his fourth report (A/CN.4/374 and Add.1-4) were based on the principle embodied in article 27, paragraph 5, of the Vienna Convention on Diplomatic Relations, namely that the diplomatic courier was protected by the receiving State in the performance of his functions. Although he supported those five draft articles in principle, he thought that, as in the case of article 27 and other articles of the Convention on Special Missions, the diplomatic courier should be accorded only such privileges, immunities and facilities as were necessary for the performance of his functions. The titles of draft articles 17 and 18, in particular, were too vague and suggested that the diplomatic courier enjoyed the same freedom of movement and the same freedom of communication as did the members of permanent diplomatic missions, whereas the diplomatic courier benefited from freedom of movement and communication only to the extent necessary for the performance of his functions. The text of draft article 16 was perfectly clear and acceptable but its title, like those of articles 17 and 18, was not specific enough. On the other hand, the title of draft article 19 was sufficiently explicit. Once the Commission had considered the five draft articles, it could in his opinion refer them to the Drafting Committee for improvements in their wording.

Tribute to the memory of Mr. Emmanuel Kodjoe Dadzie, former member of the Commission

25. The CHAIRMAN said that it was his sad duty to report with deep regret the death in March 1983 of Mr. Emmanuel Kodjoe Dadzie, who was a member of the Commission from 1977 to 1981.

At the invitation of the Chairman, the Commission observed one minute's silence in tribute to the memory of Mr. Emmanuel Kodjoe Dadzie.

26. Mr. JAGOTA said that, for many years, it had been his privilege to know Mr. Dadzie, who had been noted for his erudition and many human qualities. Mr. Dadzie had made a significant contribution to the awareness of international law in Africa and to the strengthening of Asian-African solidarity. He had also made an important contribution in the field of refugee law. The Commission had lost a distinguished colleague and Africa a great scholar.

27. Sir Ian SINCLAIR said that he had learned with distress of the untimely death of Mr. Dadzie. All would mourn the loss of a notable figure in the international legal world.

28. Mr. NJENGA said that the death of Mr. Dadzie was an irreparable loss for Africa. He asked that sincere condolences be conveyed to Mr. Dadzie's family on behalf of the Commission.

29. Mr. CASTAÑEDA, speaking also on behalf of the Latin-American members of the Commission, paid tribute to the memory of Mr. Dadzie. At the meetings of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, for example, he had had an opportunity to appreciate the intelligence, broad culture and intellectual honesty of that distinguished jurist, whose human qualities and sense of humour had earned him everyone's warm respect and affection.

30. Mr. USHAKOV, speaking also on behalf of Mr. Flitan and Mr. Yankov, said that Mr. Dadzie had been a great diplomat and a distinguished African jurist who had represented his country in Moscow for many years and had made a valuable contribution to the success of the major codification conferences. He requested the Chairman to convey condolences to Mr. Dadzie's family.

31. Mr. SUCHARITKUL said that Mr. Dadzie's work would live on and people in Asia and Africa would continue to benefit from his contribution to refugee law.

32. The CHAIRMAN assured members that he would convey condolences to Mr. Dadzie's family on behalf of the Commission.

The meeting rose at 11.30 a.m.