

Document:-
A/CN.4/SR.1799

Summary record of the 1799th 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>)*

attention to the intention expressed by the Special Rapporteur in his preliminary report (A/CN.4/370, para. 19) to present a second report which would follow the guidelines established by the Commission. Like Mr. Calero Rodrigues (1797th meeting) and Mr. Malek, he fully endorsed those guidelines. He also agreed that the 1967 Secretariat study¹⁹ should be brought up to date, to take into account the considerable developments and changes that had taken place in international affairs during the past 16 years.

63. Regional organizations should be included in the study, but he supported the Special Rapporteur's suggestion that the question of whether to include them in the ultimate codification should be decided only after the study had been completed. It was true that caution was called for, because regional organizations would raise a host of difficulties and specific problems which could delay the Commission's work. Those problems might not prove to be permanent, however, and it should be remembered that the inclusion of regional organizations in the study would make it possible to draw an overall picture, which would be an aid to future codification.

64. It was pertinent to inquire to what extent the ultimate convention or set of rules would concern all States. A regional organization, for example, might not have any activities in the majority of States. He shared the doubts expressed by Mr. Quentin-Baxter as to whether States should be called upon to recognize all international organizations. Nevertheless, he believed that the study would prove valuable, since the ultimate convention or set of rules could constitute a framework treaty and serve as a model for host agreements, or for rules to be adopted by regional organizations or their member States.

65. Lastly, he agreed that the privileges and immunities granted to international organizations and their officials should not exceed what was stipulated in Article 105, paragraph 1, of the Charter; he favoured the functional approach of that Article.

66. Mr. USHAKOV said that the term "regional organizations" was very ambiguous. Apart from the specific meaning which the Articles of Chapter VIII of the Charter gave to the term "regional agencies", the expression "regional organizations" lent itself to many interpretations. It seemed that it should include all international organizations other than those of a universal character.

The meeting rose at 1.05 p.m.

¹⁹ See 1797th meeting, footnote 3.

1799th MEETING

Thursday, 7 July 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

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

Relations between States and international organizations (second part of the topic) (concluded) (A/CN.4/370¹)

[Agenda item 7]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. Mr. DÍAZ GONZÁLEZ (Special Rapporteur), summing up the discussion on his preliminary report (A/CN.4/370), said he was glad to note that all members who had spoken had approved the guidelines fixed by the Commission at its thirtieth session in 1978² after examining the second report of the previous Special Rapporteur.³ All were agreed that the study of the second part of the topic of relations between States and international organizations should be continued and that it was necessary to proceed very cautiously. It was only on minor points that some slight differences of opinion had come to light.
2. It did not seem possible to affirm, as Mr. McCaffrey had done (1797th meeting), that no international organization had requested the Commission to carry out the study. Indeed, it was the General Assembly of the United Nations, an international organization if ever there was one, which had entrusted that study to the Commission. Under the terms of Article 13, paragraph 1 (a), of the United Nations Charter, the General Assembly could initiate studies for the purpose of encouraging the progressive development of international law and its codification. Moreover, the specialized agencies and IAEA, to which the Secretariat had sent a questionnaire at the Commission's request, had tacitly endorsed the study by replying to that questionnaire.
3. As to the words "a broad outlook" in his report (A/CN.4/370, para. 11 (c)), on which Mr. Njenga had asked (1798th meeting) for some clarification, those were the words which the previous Special Rapporteur had used in his second report and which had been approved in 1978 by the members of the Commission, including Mr. Njenga. They should probably be interpreted as meaning

¹ Reproduced in *Yearbook . . . 1983*, vol. II (Part One).

² See 1798th meeting, footnote 16.

³ *Ibid.*, footnote 15.

that the Commission gave the topic a sufficiently wide scope to include regional organizations.

4. It was when the previous Special Rapporteur had left the Commission, following his election as a Judge of the ICJ, that he (Mr. Díaz González) had been designated as his successor. The Commission had then decided not to resume the study of the topic until its change of membership had taken place. In drafting his preliminary report, he had therefore considered it advisable to give the new members of the Commission an opportunity to express their views on how he should proceed in carrying out the study entrusted to him. Although all those who had spoken had approved of the Commission's conclusions, some of the positions taken were very far from one another. For instance, Sir Ian Sinclair (1797th meeting) and Mr. McCaffrey were for granting the minimum of privileges and immunities to international organizations and persons taking part in their work, whereas Mr. Thiam and Mr. Malek (1798th meeting) favoured greater generosity. In view of Article 105 of the United Nations Charter, a middle course could probably be found. It might perhaps be sufficient to adhere to the provisions of that Article and to well-established practice.

5. Generally speaking, all the members of the Commission who had spoken were agreed that the Special Rapporteur should be left wide freedom of action, that caution was needed and that any decisions concerning regional international organizations and the ultimate fate of the draft articles should be left until later. On the last point, however, it was understood that the Commission's object was to prepare a set of draft articles, but that only when it submitted them to the General Assembly in final form would it make any express recommendation on the subject.

6. Mr. Njenga (*ibid.*, para. 26) had proposed that regional international organizations should be sent a questionnaire similar to that sent to universal international organizations. It was for the Commission to decide on that step, which would undoubtedly be useful for the accomplishment of its work. Nevertheless, consideration should be given to the difficulties pointed out by Mr. Ushakov at the previous meeting, concerning the exact meaning of the term "regional organization". It seemed to be agreed that the study prepared by the Secretariat in 1967⁴ should be brought up to date in the light of the replies to the 1978 questionnaire.

7. All questions of substance, including the problem of the legal capacity of organizations and that of the justification for granting privileges and immunities to international organizations and their officials and experts, should be left aside until the following session. It would then be important to take account of the practice of international organizations and of States, as it appeared in multilateral and bilateral functions, and of national jurisprudence, including that of new States. It would also be important to avoid theoretical discussions.

8. The CHAIRMAN thanked the Special Rapporteur

for his excellent summing-up of the discussion. He reminded the Commission of Mr. Njenga's suggestion that a questionnaire should be sent to regional organizations to ascertain how they conducted their relations with States. Mr. Ushakov had suggested that the term "regional organization" should be construed within the meaning of Chapter VIII of the Charter. That question of interpretation could be taken up when the Commission decided whether to include regional organizations within the scope of the draft articles.

9. If there were no objections, he would take it that the Commission agreed to adopt the suggestion made by Mr. Njenga.

It was so agreed.

10. Mr. CALERO RODRIGUES drew attention to the Special Rapporteur's suggestion (A/CN.4/370, para. 13) that the 1967 Secretariat study should be revised in the light of the replies to the 1978 questionnaire, to produce an updated version.

11. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt that suggestion.

It was so agreed.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)^{*} (A/CN.4/359 and Add.1,⁵ A/CN.4/372 and Add.1 and 2,⁶ A/CN.4/374 and Add.1-4,⁷ A/CN.4/L.352, sect. E, ILC(XXXV)/Conf.Room Doc.7)

[Agenda item 3]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR⁸ (*concluded*)

ARTICLE 20 (Personal inviolability)

ARTICLE 21 (Inviolability of temporary accommodation)

ARTICLE 22 (Inviolability of the means of transport) *and*

ARTICLE 23 (Immunity from jurisdiction)⁹ (*concluded*)

12. Mr. NI said that, according to the Special Rapporteur, the question of privileges and immunities granted to the diplomatic courier related mainly to the inviolability of the courier's person and his immunity from jurisdiction. In drafting articles on the subject, consideration should be given to the special role of the diplomatic courier, in order to make the privileges and immunities accorded to him correspond as closely as possible to that role and to ensure that the courier could perform his task without hindrance.

^{*} Resumed from the 1784th meeting.

⁵ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

⁶ Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

⁷ *Idem.*

⁸ 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.

⁹ For the texts, see 1782nd meeting, para. 47.

⁴ See 1797th meeting, footnote 3.

13. In article 20, which laid down the principle of personal inviolability, he wondered whether the phrase “and shall prosecute and punish persons responsible for such infringements”, in paragraph 2, was necessary. Although the rationale of the provision was understandable and the role of the diplomatic courier was very important to freedom of communication, it was doubtful whether such a provision was appropriate, for it had no equivalent in any of the four codification conventions. It should be considered whether the provision was commensurate with the need for protection of the diplomatic courier. Moreover, it would oblige States to adopt laws and regulations for its implementation. Lastly, even without that provision, the personal inviolability of the diplomatic courier would be sufficiently guaranteed if paragraph 1 and the first part of paragraph 2 were fully applied.

14. In regard to article 21, which stipulated the inviolability of temporary accommodation, he agreed with the comment made by the Special Rapporteur in paragraph 69 of his report (A/CN.4/374 and Add.1-4) that “it was of paramount importance for the inviolability of the courier and the bag that the courier should be housed in a safe and secure place”. Normally, the courier was lodged in the premises of the embassy or consulate, but sometimes he was accommodated elsewhere. The rule stated in article 21 was therefore necessary and was generally acceptable. However, paragraph 2 could be combined with paragraph 1. As to paragraph 3, according to the present text, the inviolability of the diplomatic courier might be nullified, because the “serious grounds” would certainly be determined by the receiving State or the transit State. If the diplomatic courier was really suspected of carrying objects the import or export of which was prohibited by the law or controlled by the quarantine regulations of the receiving or the transit State, he should be subjected to customs inspection on entering or leaving the country rather than be subject to inspection at any time in his temporary accommodation. It should therefore be considered whether that paragraph ought to be retained. It should also be considered whether the article should not provide that, in case of fire or other emergency, officials of the receiving State or the transit State were permitted to enter the temporary accommodation of the diplomatic courier. If it was considered necessary to provide for such a contingency, a provision could be drafted on the model of the last sentence of article 31, paragraph 2, of the Vienna Convention on Consular Relations, which read:

The consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action.

In such a case, the inviolability of the diplomatic courier and the diplomatic bag he was carrying should nevertheless be guaranteed.

15. Paragraph 2 of article 22 should be re-examined for the same reasons as paragraph 3 of article 21. The Special Rapporteur had drafted article 23 on the model of article 60 of the Vienna Convention on the Representation of States, and it was basically acceptable. Paragraph 4, however, which provided that “the diplomatic courier is not obliged to give evidence as a witness”, would raise

difficulties of application. For according to paragraph 2, the diplomatic courier did not enjoy immunity from jurisdiction in respect of acts performed outside the exercise of his official functions. If he did not appear in court to give evidence, it would be difficult to establish the facts and the proceedings might be hampered. There was also a certain contradiction between paragraphs 4 and 5, since after an accident involving the vehicle of a diplomatic courier, which might not be insured, it would be difficult to establish the facts without his appearing as a witness. Lastly, when a person who had infringed the personal inviolability of the diplomatic courier was to be prosecuted and punished as provided for in article 20, paragraph 2, it would be difficult to proceed if the diplomatic courier did not give evidence.

16. Article 23, paragraph 5, which concerned liability for damages arising from an accident caused by a vehicle used or owned by the courier, made no distinction between acts performed in the exercise of his official functions and non-official acts. But according to article 31, paragraph 2 (d), of the Convention on Special Missions, “in the case of . . . an action for damages arising out of an accident caused by a vehicle used outside the official functions of the person concerned”, that person did not enjoy immunity from the civil or administrative jurisdiction of the receiving State. As the situation was very similar in the case of the diplomatic courier, he should not enjoy immunity from jurisdiction in respect of damages arising from acts outside his official functions.

17. As to diplomatic couriers sent by international organizations, there was some well-established practice. At the 1783rd meeting, Mr. Njenga had pointed out that OAU sent confidential conference documents to its member States by diplomatic courier, for reasons of speed and security. As the number of international organizations was increasing and their activities expanding, the question of the status of their couriers should be considered. It would also be advisable to study the status of diplomatic couriers sent by national liberation movements recognized by the United Nations and by a large number of Member States.

18. Mr. YANKOV (Special Rapporteur), summing up the discussion on articles 20 to 23, said that a number of very useful drafting suggestions had been made, but he would not comment on them at the present stage. He would deal only with comments on the substance of the articles.

19. Article 20 had not attracted any criticism of substance and had, in general, been favourably received.

20. Article 21 contained certain innovations which had been criticized by several members, including Mr. Balanda, Mr. Calero Rodrigues, Mr. Flitan, Mr. Laclea Muñoz, Mr. Ni, Mr. Pirezada, Sir Ian Sinclair and Mr. Ushakov. Paragraph 3 would allow inspection or search of the temporary accommodation of the diplomatic courier if there were serious grounds for suspecting the presence of articles whose import or export was prohibited by law or controlled by the quarantine regulations of the receiving State or the transit State. The paragraph also laid down certain rules on the procedure to be

followed: the inspection or search had to be conducted in the presence of the diplomatic courier, without infringing his personal inviolability or the inviolability of the diplomatic bag, and without causing unreasonable delays or impediments to the delivery of the diplomatic bag. But, despite those safeguards, the paragraph had caused concern and it had also been suggested that provision should be made for the case of fire or other emergencies, along the lines of article 31, paragraph 2, of the Vienna Convention on Consular Relations. He would give careful consideration to all the criticisms made during the discussion.

21. Article 22 had been criticized by nearly all the members who had spoken on it. That applied especially to paragraph 2, regarding which the fear had been expressed by several members that its provisions might detract from, or even nullify altogether, the protection given by paragraph 1. His aim had been to strike a balance between the requirement of inviolability and the legitimate interests of the receiving State or transit State in financial, fiscal, economic or public health matters. The provisions of paragraph 2 would have to be reconsidered in the light of all the comments made, with a view to finding a generally acceptable formulation.

22. There had been some question of making provision in article 22 for preventive or coercive measures, along the lines of article 20, paragraph 2. It had been suggested that a sending State which provided the opportunity for the abuse of its bag had an obligation to take the necessary preventive and punitive measures. As he saw it, the provisions of paragraph 2 of article 22, combined with action by the sending State regarding its own courier and bag, could meet that objective.

23. In the face of the objections raised by Mr. Calero Rodrigues, Mr. Laclea Muñoz, Mr. Ni, Mr. Quentin-Baxter, Sir Ian Sinclair and other members, he would not, of course, defend his draft article 22 to the end. But he thought an effort had to be made to respond to the clear request made in the Sixth Committee of the General Assembly that provisions be included dealing with abuse of the diplomatic bag; it had been repeatedly stressed in the proceedings of the Sixth Committee that such abuse was the problem which most required attention at present. In introducing the provisions of paragraph 2 on inspection and search, he had acted in response to a very general demand by States. It was true that a sending State was anxious to ensure the full effectiveness of the rules on inviolability, protection, facilities and privileges for the diplomatic courier and the diplomatic bag. But that attitude changed when the same State was a receiving or a transit State; it then preferred to be able to carry out inspection and search, in order to prevent abuses.

24. He was grateful for the reactions of members, which would help him to determine the best course of action to meet the legitimate needs of States. It was worth noting that States were concerned not so much with the occasional spectacular abuse which attracted publicity as with everyday minor irregularities; the incidents to which those minor irregularities led were usually settled through diplomatic channels and did not come to public notice.

25. The main rules set out in paragraph 1 of article 21 and paragraph 1 of article 22 were derived from contemporary State practice. The rule of inviolability of temporary accommodation had been framed on the understanding that it was based on the functional approach.

26. With regard to article 23, Mr. Ni and certain other speakers had stressed the clear distinction to be made between acts performed in the exercise of official functions, which were exempted from local jurisdiction, and other acts, which enjoyed no such exemption. His own view was that the rules on immunity from jurisdiction were governed by functional necessity. Like all other privileges and immunities, immunity from judicial and administrative jurisdiction had to be based on that principle. After hearing the comments made during the discussion, he realized that it would probably be necessary to revise the drafting of article 23, in order to make it clear that it was based on the functional necessity principle.

27. Paragraph 4 of article 23 exempted the diplomatic courier from giving evidence as a witness. Similar provisions relating to diplomatic agents and to administrative and technical staff were contained in article 31, paragraph 2, and article 37, paragraph 2, of the Vienna Convention on Diplomatic Relations and in other diplomatic conventions. It had, however, been suggested by some members that the provisions of paragraph 4 might impede judicial proceedings and hinder the administration of local justice. But where the giving of evidence was in the interest of the person concerned, who might be a diplomatic courier, that person would certainly appear voluntarily as a witness. As for other cases, there were several possibilities. One was to provide that the diplomatic courier was not obliged to give evidence on matters relating to his official duties. Another was to exempt him from the general duty of giving evidence as a witness, but to make an exception for traffic accidents and certain other specific cases. He agreed that the suggestions made on that point should receive very careful consideration.

28. While some members had taken the view that article 23 was generally satisfactory, others had pointed out that the provision in paragraph 4 was not included in the first two diplomatic conventions. He had been gratified to note, however, that several members had endorsed his approach, which followed article 60 of the Vienna Convention on the Representation of States, because that article seemed more in keeping with the temporary nature of the functions of the diplomatic courier. Paragraph 6 of draft article 23, which was a safeguard clause designed to provide the injured party with another option, had not given rise to any special observations and appeared to be generally acceptable.

29. Inviolability and immunity from jurisdiction were two very important elements in the rules on the status of the diplomatic courier, and perhaps the Commission should therefore be given another opportunity to express its views on articles 20 to 23 when consideration of the topic was resumed.

30. He then drew attention to the additional sections of his report (A/CN.4/374 and Add.1-4) containing, respectively, the final draft articles of part II of the draft (arts. 24-30), the draft articles of part III (arts. 31-39) and those of part IV (arts. 40-42).

ARTICLES 24 TO 30 (Exemptions accorded to the diplomatic courier and the diplomatic courier *ad hoc*, and status of the captain of a commercial aircraft or the master of a merchant ship entrusted with the transportation and delivery of a diplomatic bag)

31. Article 24, on exemption from personal examination, customs duties and inspection, and article 25, on exemption from dues and taxes, were modelled on the corresponding provisions of the four main diplomatic conventions.

32. Article 26 dealt with exemption from personal and public services. Although there might not be many occasions when a diplomatic courier was called upon to perform such services, it was probably advisable to provide for that possibility, because of the nature of his duties.

33. Article 27, on exemption from social security provisions, would probably also be of rather limited application. Articles 28 and 29 dealt with the duration of privileges and immunities, and waiver of immunity, respectively.

34. Article 30 dealt with the rights and obligations of the captain of a commercial aircraft or the master of a merchant ship entrusted with the delivery of a diplomatic bag. The reference to "an authorized member of the crew" had been included because it was often difficult to place additional responsibility on the captain or master of a highly complicated machine. No reference had been made to military aircraft or vessels, because the language of the draft article had been modelled on the corresponding provisions of the four main diplomatic conventions; but the Commission might wish to consider whether such a reference was needed.

ARTICLES 31 TO 39 (Status of the diplomatic bag)

35. Article 31 related to indication of status and provided that the packages constituting the diplomatic bag must bear visible external marks of their official character.

36. Article 32 dealt with the content of the diplomatic bag, which was a key issue since it related to abuses of the bag. When examining State practice in the matter, he had come across several instances in which the sending State had imposed sanctions on persons involved in misuse of the diplomatic bag.

37. Articles 33-38 dealt, respectively, with the status of the diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew; the status of the diplomatic bag dispatched by postal services or other means; general facilities accorded to the diplomatic bag; inviolability of the diplomatic bag; exemption from customs and other inspections; and exemption from customs duties and all dues and taxes.

38. Article 39, which was of a more general nature, provided for protective measures in circumstances preventing the delivery of the diplomatic bag. To take account of such rather rare cases, paragraph 1 of the article stipulated that "the receiving State or the transit State shall take the appropriate measures to ensure the integrity and safety of the diplomatic bag, and shall immediately notify the sending State . . ."; paragraph 2 dealt with the case of the unaccompanied bag.

ARTICLES 40 TO 42 (Miscellaneous provisions)

39. The draft articles of part IV dealt only with issues of a general nature and therefore contained neither final clauses nor provisions on the settlement of disputes.

40. Article 40 set out the obligations of the transit State in case of *force majeure* or fortuitous event, in other words the obligations of a State which normally would not have been a transit State, but happened to become one. Article 41 dealt with situations in which a State or Government was not recognized or there were no diplomatic or consular relations, and was modelled on the corresponding provisions of the four main diplomatic conventions.

41. Article 42, which dealt with the relationship between the draft articles and other conventions, was very tentative. The Commission would note the proviso embodied in it.

42. He hoped to submit a further report which would take account of the comments made in the Sixth Committee of the General Assembly and of any considerations that might arise out of the work of the Drafting Committee. Articles 20-23 could be referred to the Drafting Committee either at once, or at the Commission's next session; that was a matter for the Commission itself to decide.

43. After a procedural discussion in which the CHAIRMAN, Mr. DÍAZ GONZÁLEZ, Mr. FLITAN, Mr. McCAFFREY, Mr. NJENGA and Sir Ian SINCLAIR took part, Mr. LACLETA MUÑOZ (Chairman of the Drafting Committee) pointed out that the Drafting Committee would not have time to consider draft articles 20-23 at the current session. In the circumstances, it would be preferable to refer those articles to the Drafting Committee at the Commission's next session.

It was so agreed.

The meeting rose at noon.

1800th MEETING

Monday, 11 July 1983, at 3.05 p.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Koroma, Mr. Lacleta