

Document:-  
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**Summary record of the 1862nd meeting**

Topic:  
**Status of the diplomatic courier and the diplomatic bag not accompanied by the  
diplomatic courier**

Extract from the Yearbook of the International Law Commission:-  
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ther the reservation formulated in paragraph (b) should be expressed in such forceful terms, or whether it would not be sufficient to refer to the relevant rules of international organizations, a formula which had been adopted in many treaties.

*Mr. Barboza, Second Vice-Chairman, took the Chair.*

24. Mr. RIPHAGEN (Special Rapporteur) pointed out that the term “the rights of membership”, in paragraph (b) of draft article 16, did not mean *les droits de membre* of an international organization, but referred to such procedural matters as the right to expel a member for certain reasons or to suspend voting rights.

25. The term “belligerent reprisals”, in paragraph (c) of draft article 16, was also a technical term which was often used to cover what was permissible during a war. The question which arose was whether, if one State failed to comply with the rules laid down, for instance under the Hague or Geneva Conventions, the other State could do likewise. He had thought it better to leave the development of that kind of rule to the competent bodies. Presumably, however, in suggesting the words *tous les droits de la guerre*, Mr. Reuter had had in mind the Hague and Geneva Conventions. The point also had some relevance for the problem of nuclear weapons, which could not, however, be solved in the context of the draft.

*The meeting rose at 12.50 p.m.*

## 1862nd MEETING

*Monday, 16 July 1984, at 3.05 p.m.*

*Chairman:* Mr. Sompong SUCHARITKUL

*Present:* Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jacovides, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)\***  
(A/CN.4/L.378, ILC (XXXVI)/Conf. Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE  
DRAFTING COMMITTEE

ARTICLES 9 to 23

1. The CHAIRMAN invited the Chairman of the Drafting Committee to present the Committee's report

\* Resumed from the 1847th meeting.

(A/CN.4/L.378) on articles 9 to 27, and the texts of articles 10, 11, 13 to 17, 20, 21 and 23, paragraphs 2, 3 and 5, as adopted by the Committee.

2. Mr. MAHIOU (Chairman of the Drafting Committee) said that the Committee had held its first meeting during the first week of the session. Of the 27 meetings already held, 19 had been devoted to the topic under consideration. It was thanks to the diligence, good will and hard work of Mr. Yankov, the Special Rapporteur, and all the members of the Drafting Committee that the Commission now had before it a large number of draft articles. The Drafting Committee had made the maximum use of the time available to it, and had thus been able to make up some of the Commission's arrears of work. It must be pointed out, however, that such intensive working had sometimes prevented members of the Committee—or at least the Chairman of the Committee himself—from studying as they deserved the other reports submitted to the Commission by its special rapporteurs and from making detailed statements on them.

3. The Drafting Committee had had before it draft articles 9 to 19, referred to it by the Commission at the previous session, and draft articles 20 to 35, referred to it at the present session. Of those 27 articles, it had been able to examine 19. The document before the Commission (A/CN.4/L.378) contained the recommendations and texts formulated by the Drafting Committee in respect of 18 articles, namely articles 9 to 22 and 24 to 27, originally submitted by the Special Rapporteur.<sup>1</sup> In the case of article 23, the Committee had adopted, subject to reservations by some members, paragraphs 2, 3 and 5; it had been unable to reach agreement on paragraphs 1 and 4, the texts of which had been placed in square brackets to show that they had not been adopted by the Committee, but remained as proposed by the Special Rapporteur. It would be for the Commission to decide what was to be done with those two paragraphs and with the article as a whole. The reduction in the number of articles was due to the fact that the Drafting Committee had deleted some and combined others. In so doing, it had taken account of comments made by members of the Commission in plenary meeting and by representatives in the Sixth Committee of the General Assembly concerning the need to simplify and rationalize the draft.

4. In so far as it was necessary, the Drafting Committee had also tried to harmonize the texts examined with the corresponding articles of the four conventions codifying diplomatic law.<sup>2</sup> Of course, it had sometimes been more

<sup>1</sup> These draft articles were considered by the Commission as follows:

(a) arts. 9-14, at the thirty-fourth session, see *Yearbook ... 1982*, vol. I, 1745th to 1747th meetings;

(b) arts. 15-19, at the thirty-fifth session, see *Yearbook ... 1983*, vol. I, 1774th and 1780th to 1783rd meetings;

(c) arts. 20-23, at the thirty-fifth session, *ibid.*, 1782nd to 1784th and 1799th meetings; and at the present session, see 1824th and 1825th meetings;

(d) arts. 24-27, at the present session, see 1826th to 1829th meetings.

<sup>2</sup> 1961 Vienna Convention on Diplomatic Relations, 1963 Vienna Convention on Consular Relations, 1969 Convention on Special Missions and 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

appropriate to adopt the corresponding text of one of those conventions rather than that of another, and it had always been necessary to bear in mind the peculiarities of the status and situation of the diplomatic courier, which had sometimes made it necessary to adopt terminology and rules different from those of the said conventions. Moreover, harmonization had sometimes been necessary in only one of the three languages.

5. For the time being, each article had two numbers: the first was the number originally given by the Special Rapporteur and the second, which was placed in square brackets, was the new number resulting from deletions and merging of articles. It was the new numbers which would be used in the Commission's draft report. The old numbers had been retained at the present stage only to facilitate comparison with the texts originally submitted by the Special Rapporteur. It would also be necessary to adjust to the new numbering the references to subsequent articles made in article 13 and in article 8 provisionally adopted at the previous session.

6. Two drafting points of a general nature must be specially mentioned. First, in accordance with the decision taken at the previous session, the Drafting Committee had deleted the adjective "official" qualifying the "functions" of the courier in the texts submitted by the Special Rapporteur. Thus the texts of articles 15, 16, 17, 20 and 23 adopted by the Committee referred simply to the performance or exercise of "his functions". Secondly, for the sake of clarity, the Drafting Committee had decided to use, in most cases where reference was made to the receiving State and the transit State, the expression "the receiving State or, as the case may be, the transit State". That expression appeared in articles 15, 16, 17, 20, 21, 23, 24 and 25. In the Spanish text, the necessary precision was achieved by using the words *el Estado receptor y, en su caso, el Estado de tránsito*.

#### ARTICLE 9

7. During the examination of article 9 (Appointment of the same person by two or more States as a diplomatic courier)<sup>3</sup> members of the Drafting Committee had raised the question how that provision would operate, in particular if, as some members proposed, it was aligned with article 6 of the Vienna Convention on Diplomatic Relations, which provided that two or more States might accredit the same person as head of mission to another State, "unless objection is offered by the receiving State". The transposition of that provision to the case of a diplomatic courier appointed by two or more States had raised questions concerning the possibility that the transit State might object independently of the receiving State, and vice versa, and questions concerning the nationality of the diplomatic courier. Reference had been made to draft article 10, paragraph 3 (b), under which the receiving State could reserve the right to make the appointment of a diplomatic courier who was not a national of the sending State subject to its consent. And

<sup>3</sup> For the text submitted by the Special Rapporteur, see *Yearbook ... 1983*, vol. II (Part Two), p. 46, footnote 189. See also footnote 1 (a) above.

since, under article 9, a diplomatic courier could at one and the same time perform functions for several States, it might be difficult to determine which was the competent sending State with respect to various provisions of the draft, in particular article 14, paragraph I, concerning the obligations of the sending State in the case of a diplomatic courier being declared *persona non grata* or not acceptable.

8. For those reasons and others, the Drafting Committee had decided that it would be more prudent not to provide for the exceptional case of a courier appointed by two or more States, but to mention the matter in the commentary to article 8, which had already been provisionally adopted. It would be pointed out in the commentary that, if multiple appointments were made, they would be subject, in particular, to articles 10 to 14 of the draft. It was therefore recommended that article 9 should not be included in the draft.

9. The CHAIRMAN said that, if there were no comments, he would take it that article 9 was deleted.

*Article 9 was deleted.*

#### ARTICLE 10 [9] (Nationality of the diplomatic courier)

10. Mr. MAHIU (Chairman of the Drafting Committee) presented the text of article 10 [9] as proposed by the Drafting Committee, which read as follows:

##### *Article 10 [9]. Nationality of the diplomatic courier*

1. The diplomatic courier should in principle be of the nationality of the sending State.

2. The diplomatic courier may not be appointed from among persons having the nationality of the receiving State except with the consent of that State, which may be withdrawn at any time.

3. The receiving State may reserve the right provided for in paragraph 2 of this article with regard to:

(a) nationals of the sending State who are permanent residents of the receiving State;

(b) nationals of a third State who are not also nationals of the sending State.

11. He said that the text of article 10 adopted by the Committee was almost the same as that submitted by the Special Rapporteur.<sup>4</sup> The title remained unchanged. The deletion of article 9 had made it necessary to delete paragraph 4 of the original article 10. Other changes had been made solely in order to bring the text into line with the corresponding articles of the conventions codifying diplomatic law. For example, paragraph 1 had been brought more closely into line with the corresponding paragraph of article 8 of the Vienna Convention on Diplomatic Relations. Thus the words "should, in principle, have the nationality of the sending State" had been replaced by the words "should in principle be of the nationality of the sending State".

12. The only change in paragraph 2, except for minor changes for alignment purposes, had been the deletion of the adjective "express". It had been noted that that adjective did not appear in the corresponding articles of three of the four conventions on diplomatic law. In par-

<sup>4</sup> *Ibid.*, footnote 190. See also footnote 1 (a) above.

ticular, it did not appear in article 10, paragraph 2, of the Convention on Special Missions, which, like the draft articles on the diplomatic courier, dealt with functions of a temporary nature. Some members had been concerned about the application to the case of the diplomatic courier of the last phrase of paragraph 2: “which may be withdrawn at any time”. The Drafting Committee had nevertheless considered that the phrase should be retained and that it should be explained in the commentary that the right to withdraw consent should not be abused in such a way as to obstruct the accomplishment of the courier’s mission once it had begun. In normal circumstances, withdrawal of consent should take place only before the beginning of a particular mission.

13. In paragraph 3, only a slight change had been made, which consisted in replacing the words “the same right under paragraph 2” by the words “the right provided for in paragraph 2 of this article”, in order to bring the wording into line with that of the corresponding article of the Convention on Special Missions.

14. Mr. KOROMA pointed out that the wording of article 10, paragraph 1, was bound to be influenced by the type of instrument that would emerge from the Commission’s work—a draft convention, model rules, or whatever it might be. In any case, he was not satisfied with the words “should in principle be”; he suggested that paragraph 1 be reworded to state simply that the diplomatic courier “should be” of the nationality of the sending State. In paragraph 2, he suggested that a comma be inserted after the words “of the receiving State”.

15. Mr. YANKOV (Special Rapporteur) explained that the language used in article 10 had been taken from article 8, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations. A great effort had been made to harmonize the texts of the articles with that of the existing conventions on diplomatic law, by using language taken from articles having similar subject-matter. The convention used as a model in that case—the 1961 Vienna Convention—enjoyed a very broad measure of support.

16. The CHAIRMAN said that, if there were no further comments, he would take it that article 10 [9] was provisionally adopted.

*Article 10 [9] was adopted.*

#### ARTICLE 11 [10] (Functions of the diplomatic courier)

17. Mr. MAHIOU (Chairman of the Drafting Committee) presented the text of article 11 [10] as proposed by the Drafting Committee, which read as follows:

##### *Article 11 [10]. Functions of the diplomatic courier*

The functions of the diplomatic courier consist in taking custody of, transporting and delivering at its destination the diplomatic bag entrusted to him.

18. He said that article 11 as submitted by the Special Rapporteur<sup>5</sup> had been simplified and shortened. First, the statement of the diplomatic courier’s functions had been

brought into line with the text of article 3, paragraph 1 (1). His functions now consisted in “taking custody of, transporting and delivering at its destination the diplomatic bag entrusted to him”. Secondly, it had been considered unnecessary to enumerate the various types of diplomatic bag in article 11, since article 3, paragraph 1 (2) gave a detailed definition of the “diplomatic bag”. Thirdly, the words “wherever situated” had been deleted as being unnecessary, because the words “at its destination” clearly showed that a specific place was prescribed for delivery of the diplomatic bag. The title remained unchanged.

19. The CHAIRMAN said that, if there were no comments, he would take it that article 11 [10] was provisionally adopted.

*Article 11 [10] was adopted.*

#### ARTICLE 12

20. Mr. MAHIOU (Chairman of the Drafting Committee) recalled that, during consideration of article 12 (Commencement of the functions of the diplomatic courier)<sup>6</sup> at the Commission’s thirty-fourth session,<sup>7</sup> a number of members had contested the need for that provision in the draft. The Drafting Committee had concluded that it was not necessary to specify when the courier’s functions began, since what was most important for the performance of his functions was the moment when his privileges and immunities began, which was the subject of article 28 of the draft, not the moment when his functions began, which might in fact be while he was still in the territory of the sending State or anywhere at all. The Drafting Committee therefore recommended that article 12 be deleted.

21. The CHAIRMAN said that, if there were no comments, he would take it that article 12 was deleted.

*Article 12 was deleted.*

#### ARTICLE 13 [11] (End of the functions of the diplomatic courier)

22. Mr. MAHIOU (Chairman of the Drafting Committee) presented the text of article 13 [11] as proposed by the Drafting Committee, which read as follows:

##### *Article 13 [11]. End of the functions of the diplomatic courier*

The functions of the diplomatic courier come to an end, *inter alia*, upon:

(a) notification by the sending State to the receiving State and, where necessary, to the transit State that the functions of the diplomatic courier have been terminated;

(b) notification by the receiving State to the sending State that, in accordance with article 14 [12], it refuses to recognize the person concerned as a diplomatic courier.

23. He said that, in addition to minor changes in the text and title of the provision, made for the purposes of alignment, article 13 contained some amendments to the text submitted by the Special Rapporteur.<sup>8</sup>

<sup>6</sup> *Ibid.*, footnote 192.

<sup>7</sup> See footnote 1 (a) above.

<sup>8</sup> See *Yearbook ... 1983*, vol. II (Part Two), p. 46, footnote 193. See also footnote 1 (a) above.

<sup>5</sup> *Ibid.*, footnote 191. See also footnote 1 (a) above.

24. Subparagraphs (a) and (d) of the original text had been deleted. Subparagraph (a) had provided for completion of the courier's task by delivery of the diplomatic bag to its final destination. It had been considered unnecessary to deal with that case, for, as in the case of article 12, what was important was the duration of the courier's privileges and immunities under article 28, which did not depend on the moment when he delivered the bag to its final destination. Subparagraph (d) of the original text had covered the case of the death of the diplomatic courier. That subparagraph had been withdrawn by the Special Rapporteur, who had considered that it was not appropriate, because the article was intended to determine how the courier's functions came to an end in law, not to state what was self-evident.

25. Consequently, the former subparagraph (b) had become subparagraph (a) of the text adopted by the Drafting Committee. That subparagraph provided that notification by the sending State that the functions of the diplomatic courier had been terminated should be given not only to the receiving State, but where necessary also to the transit State. The former subparagraph (c) had become subparagraph (b) of the new text. Its wording had been brought into line with that of paragraph 2 of article 14, to which it referred. No change had been made in that provision, although it was understood that refusal by the receiving State to recognize the official status of the diplomatic courier in accordance with article 14 could have effects only in the territory of the receiving State.

26. Mr. DÍAZ GONZÁLEZ said that, in the Spanish title of article 13, the first word *terminación* should be replaced by the word *fin* or *término*, which were more elegant.

27. If, as stated in article 11, the functions of the diplomatic courier consisted in "taking custody of, transporting and delivering at its destination the diplomatic bag entrusted to him", it was evident that they came to an end when the bag was delivered. Logically, article 13 should begin by stating that the functions of the diplomatic courier came to an end when the diplomatic bag was delivered to its destination, or better still "to the consignee". But it was obvious that the privileges and immunities of the diplomatic courier subsisted until he had left the territory of the receiving State or, as the case might be, the transit State.

28. It was true that, according to subparagraph (a) of article 13, the functions of the diplomatic courier could be brought to an end by notification by the sending State to the receiving State or the transit State, but in that case the courier must be a duly accredited diplomatic agent. As that was not normally the case, it would seem strange to start from that principle. Article 13 should therefore refer to the case in which the diplomatic courier's functions came to an end by delivery of the bag to the consignee, before dealing with cases in which the courier was assumed to be a permanently accredited diplomatic agent.

29. Sir Ian SINCLAIR said that the valid point raised by Mr. Díaz González should be taken up on second reading. He himself wished to draw attention to the links

between article 13, on the one hand, and articles 14 and 18, on the other. Unfortunately, the Drafting Committee had not yet been able to report on article 28, which dealt with the duration of privileges and immunities. He wished to stress, in particular, the close link between article 13, subparagraph (b), and article 14, paragraph 2. That latter paragraph, however, had been placed between square brackets and its retention, modification or deletion would depend on the Commission's decision on article 28.

30. Mr. FRANCIS said that the point raised by Mr. Díaz González was a very important one. On reflection, however, the possibility could not be ruled out that a sending State might terminate the appointment of a diplomatic courier even before the diplomatic bag had been delivered. The provision in subparagraph (a) of article 13 might therefore be useful.

31. Mr. KOROMA pointed out that there was an inconsistency in terminology in article 13. The title began: "End of the functions ..." and the opening sentence of the article stated that the functions of the diplomatic courier "come to an end...". Subparagraph (a), on the other hand, spoke of the functions of the courier having been "terminated". It was necessary to make the terminology consistent, and his own suggestion would be to replace the words "have been terminated" in subparagraph (a) by "have come to an end".

32. Mr. STAVROPOULOS said that the expression "come to an end" had been aptly used by the Special Rapporteur in the original article 13 to cover such situations as the completion of a courier's task and the death of the courier. The word "terminated" was more appropriate where the courier's functions were brought to an end by the action of the sending State or by his being declared *persona non grata*.

33. Mr. LACLETA MUÑOZ said he had the same difficulties as Mr. Díaz González, which he attributed to the structure of the draft as a whole. Those difficulties concerned not only articles 14 and 28, but also previous articles relating to the appointment of the diplomatic courier. In the first place, the appointment of a diplomatic courier was not notified to the receiving State and, secondly, the object of article 13 was to enable the diplomatic courier to continue to enjoy privileges and immunities in the receiving State after delivering one diplomatic bag and until he delivered another bag. That was the only reason for including such an article, since it was understood that the functions of the diplomatic courier normally came to an end when he delivered the bag. The Commission should consider both those problems in second reading.

34. In reply to a question by Mr. Malek, Mr. MAHIU (Chairman of the Drafting Committee) suggested that the French text of article 13, subparagraph (b), should be brought into line with the English by replacing the words *cet Etat* by the word *il*.

35. Mr. YANKOV (Special Rapporteur) said that the point raised by Mr. Díaz González could perhaps be taken up later, in the light of other articles of the draft. The text he had originally submitted had contained a ref-

erence to the completion by the courier of his task of delivering the bag.

36. He also drew attention to the opening words of article 13: "The functions of the diplomatic courier come to an end, *inter alia*, upon: ...". Those words made it clear that the subparagraphs which followed contained only a non-exhaustive list of examples of the termination of functions. No reference was made to such obvious cases of termination as death or completion of mission.

37. The CHAIRMAN said that, subject to the objections placed on record, he took it that article 13 [11] was provisionally adopted, on the understanding that the commentary would contain an appropriate passage on the completion of the courier's task of delivering the bag at its destination and on other cases of termination of his functions, and that the position as to article 13 would be reviewed when the Commission had considered articles 14 and 28.

*It was so agreed.*

Article 13 [11] was adopted.

ARTICLE 14 [12] (The diplomatic courier declared *persona non grata* or not acceptable)

38. Mr. MAHIOU (Chairman of the Drafting Committee) presented the text of article 14 [12] as proposed by the Drafting Committee, which read as follows:

*Article 14 [12]. The diplomatic courier declared persona non grata or not acceptable*

1. The receiving State may at any time, and without having to explain its decision, notify the sending State that the diplomatic courier is *persona non grata* or not acceptable. In any such case, the sending State shall, as appropriate, either recall the diplomatic courier or terminate his functions to be performed in the receiving State. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.

[2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this article, the receiving State may refuse to recognize the person concerned as a diplomatic courier.]

39. He said that a number of amendments had been made to article 14 as submitted by the Special Rapporteur.<sup>9</sup> In paragraph 1, minor drafting changes had been made in the first sentence in order to lighten the text—for instance, the deletion of the words "of the latter State"—and to bring it into line with the corresponding provisions of the conventions on diplomatic law.

40. In the second sentence, the Drafting Committee had followed the terms of article 9 of the Vienna Convention on Diplomatic Relations, also making it clear that, when a sending State terminated the functions of a courier, the only functions which came to an end were those which the courier was to perform in the receiving State. That change had been made to take account of the fact that the functions of the courier were not performed with respect to the receiving State. In reality, they concerned the missions, consular posts and so on, situated in the territory of the receiving State. The word

"terminate", without any explanatory qualification, might give the impression that the functions of the courier in general were finally brought to an end, which was not the intended meaning. The purpose of the restriction "to be performed in the receiving State" was to show that what was meant was termination of the performance, or intended performance, of the courier's functions only in the receiving State which had declared him *persona non grata* or not acceptable. That point should be mentioned in the commentary.

41. The third sentence of paragraph 1 was new, in that it had not been included in the text submitted by the Special Rapporteur. It corresponded, however, to the equivalent provisions of the Vienna Conventions of 1961 on diplomatic relations and of 1963 on consular relations and of the Convention on Special Missions. The text before the Commission was modelled on the provision in article 12 of the Convention on Special Missions. Although doubts had been expressed about the usefulness of that sentence, it had been considered more prudent to include it, for the sake of completeness and harmonization with the conventions in question.

42. For paragraph 2 of article 14, the Special Rapporteur had submitted a text providing that, when a diplomatic courier was declared *persona non grata* or not acceptable, the sending State should send another diplomatic courier to the receiving State. Taking account of the Commission's discussion on that paragraph at its thirty-fourth session,<sup>10</sup> the Drafting Committee had accepted the Special Rapporteur's proposal that it be deleted. The provision in the former paragraph 2 had been considered self-evident; it could be replaced by an appropriate passage in the commentary to the article.

43. The question had arisen, however, whether article 14 should not contain a provision corresponding to article 9, paragraph 2, of the 1961 Vienna Convention, which provided that, if the sending State refused or failed within a reasonable period to carry out its obligations under paragraph 1 of that article, the receiving State could refuse to recognize the person concerned as a member of the mission. It had been noted that article 12 of the Convention on Special Missions, which dealt with missions of a temporary character, also contained a provision along those lines. In addition, in subparagraph (c) of article 13 as submitted by the Special Rapporteur, which had now become subparagraph (b) of the text proposed by the Drafting Committee, it was provided that the receiving State should notify the sending State that, in accordance with article 14, it refused to recognize the official status of the diplomatic courier. On the other hand, there had been some doubt about the need to include such a provision at that point, since the paragraph in question in fact concerned the duration of privileges and immunities, which was dealt with in article 28.

44. Finally, it had been decided to introduce provisionally the new paragraph 2, which was based on a similar provision in article 9 of the 1961 Vienna Convention, and to revert to the matter when the Drafting Committee had examined article 28 and was in a position to appraise the

<sup>9</sup> *Ibid.*, footnote 194.

<sup>10</sup> See footnote 1 (a) above.

relationship between article 28 and article 14, paragraph 2. That paragraph should therefore be left in square brackets until article 28 had been examined. Lastly, the title of article 14 had been amended to make it correspond more precisely with the content of the article.

45. Mr. DÍAZ GONZÁLEZ observed that, like article 13, article 14 postulated the principle that the diplomatic courier was a permanently accredited diplomatic agent. That was clear from the first sentence of paragraph 1, according to which the receiving State could notify the sending State that the diplomatic courier was *persona non grata* or not acceptable. But the sending State which appointed a diplomatic courier was not required to obtain the agreement of the receiving State. Hence it was not until the diplomatic courier presented to the authorities of the receiving State an official document showing his status that the receiving State knew who had been appointed diplomatic courier. According to the second sentence of paragraph 1, the sending State terminated the "functions to be performed in the receiving State" of a diplomatic courier declared *persona non grata* or not acceptable. But since the functions of the diplomatic courier came to an end when he delivered the bag, it might well be asked what other functions the sending State terminated. Lastly, the third sentence of paragraph 1 stated that a person could be declared *non grata* or not acceptable before arriving in the territory of the receiving State, which was only possible if that State knew in advance who had been appointed diplomatic courier.

46. Mr. YANKOV (Special Rapporteur) replied that, in practice, cases did arise in which article 14 would be applicable. For example, where a visa was required for the courier, the authorities of the sending State had to apply for it well before his journey. The receiving State—or the transit State—would then have ample time to declare the courier *persona non grata*, by refusing to grant him a visa.

47. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to adopt article 14 [12] provisionally, on the understanding that it would be reviewed in the light of the discussion on article 28.

*It was so agreed.*

*Article 14 [12] was adopted.*

#### ARTICLE 15 [13] (Facilities)

48. Mr. MAHIU (Chairman of the Drafting Committee) presented the text of article 15 [13] as proposed by the Drafting Committee, which read as follows:

##### *Article 15 [13]. Facilities*

1. The receiving State or, as the case may be, the transit State shall accord to the diplomatic courier the facilities necessary for the performance of his functions.

2. The receiving State or, as the case may be, the transit State shall, upon request and to the extent practicable, assist the diplomatic courier in obtaining temporary accommodation and in establishing contact through the telecommunications network with the sending State and its missions, consular posts or delegations, wherever situated.

49. He pointed out that article 15, as submitted by the

Special Rapporteur,<sup>11</sup> had consisted of a single paragraph headed "General facilities", whereas the article adopted by the Drafting Committee comprised two paragraphs and was entitled "Facilities". The Committee had endeavoured to group together in a single article the matters dealt with by the Special Rapporteur in three separate articles, namely articles 15, 18<sup>12</sup> and 19.<sup>13</sup> Paragraph 1 of the new article under consideration corresponded to the article 15 submitted by the Special Rapporteur and paragraph 2 related to the questions formerly dealt with in articles 18 and 19.

50. In paragraph 1, the expression "the facilities required" had been replaced by "the facilities necessary", in accordance with a suggestion made at the Commission's previous session.<sup>14</sup> That amendment had been considered appropriate because of the status and tasks of the diplomatic courier and the functional approach which should be adopted in regard to the facilities granted to the courier. Some members of the Drafting Committee had expressed reservations, however, as to whether it was necessary or advisable to include in the draft a provision which seemed to them to be too vague and to go beyond existing law. Furthermore, the general obligation embodied in the conventions on diplomatic law to grant facilities to diplomatic agents, consular officials and others did not, according to them, extend to the diplomatic courier, who performed different functions and whose needs were different from those of the agents referred to in those conventions.

51. Paragraph 2 of article 15 replaced the provisions originally submitted by the Special Rapporteur in articles 18 and 19, entitled "Freedom of communication" and "Temporary accommodation", respectively. It had been considered that those two articles related to certain particular aspects of the general facilities to be accorded to the diplomatic courier under article 15. It had also been recalled that, during consideration of the topic in the Commission and in the Sixth Committee of the General Assembly, reference had been made to the need to consolidate and simplify the draft as much as possible. That was why the Drafting Committee had merged the three articles into one, under the title "Facilities".

52. Whereas the object of article 19 as submitted by the Special Rapporteur, which was to assist the courier in obtaining temporary accommodation, remained the same in the new paragraph 2 of article 15, the object of the former article 18 had been set out in greater detail. The original article 18 had referred to "the communications of the diplomatic courier by all appropriate means with the sending State and its missions, as referred to in article 1". The Drafting Committee had considered that it was access to the most important and the most commonly used means of communication, namely the "telecommunications network", which should be facilitated for the diplomatic courier. That particular had now been in-

<sup>11</sup> See *Yearbook ... 1983*, vol. II (Part Two), p. 48, footnote 202. See also footnote 1 (b) above.

<sup>12</sup> *Ibid.*, footnote 205.

<sup>13</sup> *Ibid.*, footnote 206.

<sup>14</sup> *Yearbook ... 1983*, vol. I, p. 154, 1781st meeting, para. 14 (Mr. Ni).

cluded in article 15. It had also been specified that the purpose of the assistance given to the courier was to enable him to establish contact through the telecommunications network with the sending State and its missions, consular posts or delegations, wherever situated. The expression “telecommunications network” should be understood to mean, in general, the telecommunications facilities normally accessible to the public, but could naturally include, in exceptional circumstances, any other telecommunications facilities that might be available.

53. It had been recognized that paragraph 2 was designed to cover exceptional situations in which the courier required assistance. Since it was difficult for the courier or his sending State to foresee such situations, and even more so for the receiving State or the transit State, the obligation to assist the courier to obtain temporary accommodation or to establish contact through the telecommunications network had been attenuated by the restrictive clause “upon request and to the extent practicable”. Thus the obligation stated in paragraph 2 was not intended to impose a heavy burden on the receiving State or the transit State. The assistance to the courier should be granted having regard to the special circumstances in which he was placed and to the situation obtaining in the receiving State or the transit State concerned.

54. Several members of the Drafting Committee had, however, expressed reservations about paragraph 2. They had questioned whether that paragraph still served any purpose after the insertion of the restrictive clause. They had also noted that paragraph 2 appeared to weaken the obligation to accord facilities, which was presented as a general obligation in paragraph 1. Moreover, if it was really intended to impose obligations on the receiving State or the transit State, those obligations would be too heavy and impossible to fulfil, since they would require those States to ensure the availability of temporary accommodation and means of telecommunication at all times and throughout their respective territories. The difficulties raised by the reference to temporary accommodation in article 15 were increased by the inclusion of article 21 on the inviolability of temporary accommodation.

55. Mr. McCaffrey said that he reserved his position on article 15. That article purported to impose on the receiving State and the transit State obligations which were very similar, both in nature and in content, to those incumbent on a receiving State in respect of diplomatic agents and diplomatic staff. He questioned the advisability of imposing such obligations in view of the paucity of legal precedents and the current mood in the world.

56. The formula used in paragraph 1 of article 15 was much too vague. It was difficult to see what obligations it imposed in regard to the facilities to be granted to the diplomatic courier. Those obligations took the form of obligations of result, which, in the circumstances, it would be very difficult for the receiving State or transit State to meet. The crucial provision of article 27 of the Vienna Convention on Diplomatic Relations, on the other hand, laid down only a negative obligation; the last sentence of

paragraph 5 of that article, dealing with the diplomatic courier, read: “He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.” It would be going much too far to place an affirmative obligation upon the receiving State and the transit State without any great support in existing law or practice.

57. Paragraph 2 of article 15 raised the question why certain particular facilities had been mentioned. It might be argued *a contrario* that other facilities were excluded. The diplomatic courier might, for example, require certain transport facilities and it was not desirable to exclude them by implication. Moreover, the language of paragraph 2 was unduly vague: the scope, nature and extent of the obligations which it purported to impose were very indefinite. Consequently, the paragraph was dangerous: States which, because of their geographical position, acted as transit States to a large number of diplomatic couriers would surely object to its provisions.

58. Sir Ian SINCLAIR said that he, too, reserved his position on article 15, especially paragraph 2, for reasons similar to those stated by Mr. McCaffrey. He asked that his reservation be recorded in the report on the work of the session.

59. The CHAIRMAN said that the reservations entered by Mr. McCaffrey and Sir Ian Sinclair would be duly recorded. If there were no further comments, he would take it that the Commission agreed to adopt article 15 [13] provisionally.

*It was so agreed.*

*Article 15 [13] was adopted.*

ARTICLE 16 [14] (Entry into the territory of the receiving State or the transit State)

60. Mr. MAHIOU (Chairman of the Drafting Committee) presented the text of article 16 [14] as proposed by the Drafting Committee, which read as follows:

*Article 16 [14]. Entry into the territory of the receiving State or the transit State*

1. The receiving State or, as the case may be, the transit State shall permit the diplomatic courier to enter its territory in the performance of his functions.

2. Visas, where required, shall be granted by the receiving State or the transit State to the diplomatic courier as promptly as possible.

61. He said that, apart from a few drafting amendments, the title and text of the article proposed by the Drafting Committee were practically the same as those of article 16 as submitted by the Special Rapporteur.<sup>15</sup> The main purpose of the amendments had been to bring the text into line with that of article 79 of the 1975 Vienna Convention on the Representation of States. The Drafting Committee had also considered it advisable to include the words “where required” after the word “visas”. It had been understood that the article was of a general nature and did not, of course, imply the obligation to grant a visa to any particular courier. Article 16 should be understood subject to the provisions of article 14.

<sup>15</sup> See *Yearbook ... 1983*, vol. II (Part Two), p. 49, footnote 203. See also footnote 1 (b) above.

62. Mr. LACLETA MUÑOZ suggested that it might be advisable, at a later stage, to combine articles 14 and 16.

63. The CHAIRMAN said that, if there were no further comments, he would take it that article 16 [14] was provisionally adopted.

*Article 16 [14] was adopted.*

ARTICLE 17 [15] (Freedom of movement)

64. Mr. MAHIOU (Chairman of the Drafting Committee) presented the text of article 17 [15] as proposed by the Drafting Committee, which read as follows:

*Article 17 [15]. Freedom of movement*

**Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State or, as the case may be, the transit State shall ensure to the diplomatic courier such freedom of movement and travel in its territory as is necessary for the performance of his functions.**

65. He said that the text of article 17 had been brought into line with that of article 27 of the Convention on Special Missions, but the title remained unchanged. In the text submitted by the Special Rapporteur,<sup>16</sup> the words "shall ensure freedom of movement" might have given the impression that excessive obligations, which would be difficult or impossible to fulfil, were being imposed on the receiving State and the transit State. The Committee had therefore followed the terms of article 27 of the Convention on Special Missions, which provided for "such freedom of movement and travel... as is necessary for the performance of the functions" in question.

66. In addition, the Committee had thought it preferable not to retain the last phrase of the original text "or when returning to the sending State". Those words might have led to certain conclusions regarding the interpretation of the expression "for the performance of his functions". The Committee had therefore thought it more prudent to avoid any such complication in the text of the article and to mention the matter in the commentary.

67. The CHAIRMAN said that, if there were no comments, he would take it that article 17 [15] was provisionally adopted.

*Article 17 [15] was adopted.*

ARTICLES 18 and 19

68. Mr. MAHIOU (Chairman of the Drafting Committee) recalled that articles 18 and 19 had been combined with article 15 (see para. 49 above).

ARTICLE 20 [16] (Personal protection and inviolability)

69. Mr. MAHIOU (Chairman of the Drafting Committee) presented the text of article 20 [16] as proposed by the Drafting Committee, which read as follows:

*Article 20 [16]. Personal protection and inviolability*

**The diplomatic courier shall be protected by the receiving State or, as the case may be, by the transit State in the performance of his func-**

**tions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.**

70. He said that the text of article 20 as submitted by the Special Rapporteur<sup>17</sup> had consisted of two paragraphs and had been based on article 29 of the 1961 Vienna Convention on Diplomatic Relations. During the discussion in the Commission (1824th meeting), however, the importance of article 27, paragraph 5, of that Convention had been emphasized, because it made special provision for the case of the diplomatic courier, whereas its article 29 applied to diplomatic agents. In view of that factor and of others, such as the situation when the diplomatic courier had the nationality of the receiving State, the Drafting Committee had decided to reproduce in article 20 the terms of article 27, paragraph 5, of the 1961 Vienna Convention.

71. Paragraph 2 of the original text had thus become unnecessary, though its object could be mentioned in the commentary in connection with the protection which, under the new formulation, the receiving State and the transit State were required to give the courier in the performance of his functions. Thus the article presented to the Commission consisted of a single paragraph reproducing a provision of the 1961 Vienna Convention dealing specifically with the diplomatic courier. The title had been amended to show that the article covered not only inviolability, but also personal protection.

72. The CHAIRMAN said that, if there were no comments, he would take it that article 20 [16] was provisionally adopted.

*Article 20 [16] was adopted.*

ARTICLE 21 [17] (Inviolability of temporary accommodation)

73. Mr. MAHIOU (Chairman of the Drafting Committee) presented the text of article 21 [17] as proposed by the Drafting Committee, which read as follows:

*Article 21 [17]. Inviolability of temporary accommodation*

1. **The temporary accommodation of the diplomatic courier shall be inviolable. The agents of the receiving State or, as the case may be, of the transit State may not enter the temporary accommodation, except with the consent of the diplomatic courier. Such consent may, however, be assumed in case of fire or other disaster requiring prompt protective action.**

2. **The diplomatic courier shall, to the extent practicable, inform the authorities of the receiving State or the transit State of the location of his temporary accommodation.**

3. **The temporary accommodation of the diplomatic courier shall not be subject to inspection or search, unless there are serious grounds for believing that there are in it articles the possession, import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or the transit State. Such inspection or search shall be conducted only in the presence of the diplomatic courier and on condition that the inspection or search be effected without infringing the inviolability of the person of the diplomatic courier or the inviolability of the diplomatic bag carried by him and will not cause unreasonable delays or impediments to the delivery of the diplomatic bag.**

74. He said that, after a very long discussion, the Com-

<sup>16</sup> *Ibid.*, footnote 204. See also footnote I (b) above.

<sup>17</sup> See 1824th meeting, para. 22. See also footnote I (c) above.

mittee had arrived at a formulation which had not won the approval of all members for all its paragraphs. Some members had expressed reservations on the first sentence of paragraph 1, while others had expressed reservations on paragraph 3.

75. The first two sentences of paragraph 1 reproduced the text submitted by the Special Rapporteur,<sup>18</sup> with minor drafting changes to harmonize the text with that of the corresponding provisions of the relevant conventions on diplomatic law. A third sentence had been added, which was modelled on article 31 of the 1963 Vienna Convention on Consular Relations, stating that consent might be assumed in case of fire or other disaster requiring prompt protective action. That clause had been considered necessary because the temporary accommodation of a courier might be in a hotel or other residential building, regarding which it was in the general interest not to provide for absolute inviolability.

76. Some members of the Committee had expressed reservations on the first sentence of paragraph 1. They had considered it unnecessary, because the courier was normally housed in premises placed at his disposal by the sending State, which in most cases were already inviolable by virtue of one of the existing conventions on diplomatic law. Moreover, a provision prescribing inviolability in the unusual case of hotel accommodation seemed somewhat unreasonable, unjustified and impossible to apply, since a receiving State could not be expected to know the whereabouts of a courier, who normally stayed only briefly in its territory. According to that view, the main consideration was the inviolability of the diplomatic bag, which was the subject of article 36. To be justified, any inviolability of the courier's temporary accommodation must depend on the presence of the diplomatic bag.

77. It had been argued, however, that it was only right to give the courier's accommodation the same inviolability as that granted under the 1961 Vienna Convention on Diplomatic Relations not only to diplomatic agents, but also to members of the administrative and technical staff of a diplomatic mission. Inviolability of the temporary accommodation was a natural extension of the personal inviolability granted to the courier under article 20 of the draft. It had in fact been granted to delegations by article 59 of the 1975 Vienna Convention on the Representation of States and was a necessary condition for the performance of the courier's functions. Finally, due account had been taken of the interests of the receiving State by adding to paragraph 1 a third sentence concerning assumed consent in case of fire or other disaster and by the introduction of a new paragraph 2.

78. Paragraph 2 of article 21 as submitted by the Special Rapporteur had imposed the duty to take appropriate measures to protect the temporary accommodation of the diplomatic courier from intrusion. After the revision of article 20 on personal protection and inviolability, and of paragraph 1 of article 21, it had been considered unnecessary to retain such a provision in the article, although the matter could be mentioned in the commentary at the appropriate point. The new para-

graph 2 was modelled on article 47, paragraph 1 (e), of the 1975 Vienna Convention, concerning notification of the location of the premises of the delegation and of private accommodation. That provision was intended to facilitate fulfilment by the receiving State or the transit State of the obligations stated in paragraph 1. It had been recognized that the location of the courier's temporary accommodation might not be known to the authorities of the receiving State or the transit State; paragraph 2 thus provided that the diplomatic courier should, to the extent practicable, inform the authorities of the location of his temporary accommodation. According to one member of the Drafting Committee, however, the new paragraph 2 was unnecessary and would be impossible to apply.

79. Paragraph 3 of article 21 was based on the text submitted by the Special Rapporteur. Some drafting amendments had been made to bring it into line with the corresponding provisions of the relevant conventions, in particular article 36 of the 1961 Vienna Convention. Other drafting changes had been made in the interests of clarity and precision. A new element introduced was that of the possession of articles prohibited by the law or controlled by the quarantine regulations of the receiving State or the transit State. It had been considered useful to add that element in order to take account of the national law of some countries.

80. One member of the Committee had nevertheless expressed reservations, because he considered that paragraph 3 unnecessarily and unjustifiably weakened the inviolability of the temporary accommodation provided for in paragraph 1. Since the courier was in any case subject to inspection of his personal effects on entering and leaving the territory of the receiving State or the transit State, that provision was not necessary. Moreover, the matter was already the subject of a general provision in article 5 of the draft and could be treated along the lines of article 41, paragraph 3, of the 1961 Vienna Convention.

81. The members of the Drafting Committee had nevertheless considered that paragraph 3 was useful or even indispensable in that, by moderating the provisions on inviolability in paragraph 1, it established a balance. Paragraph 3 showed that the provision in paragraph 1 was not absolute, but admitted of exceptions; the inviolability of the courier's temporary accommodation provided for in the article as a whole was thus restricted and conditional. The title of the article remained unchanged.

82. Sir Ian SINCLAIR said that he doubted the need to accord inviolability to the temporary accommodation of the diplomatic courier, since the courier would normally be temporarily housed in the premises of another member of the diplomatic mission of the sending State in the receiving State, which would already be inviolable. Alternatively, he would be lodged in a hotel room, and it would be a quite unnecessary complication to accord temporary inviolability to a hotel room occupied by a diplomatic courier for one or two nights, the exact location of which might not be known to the receiving State or the sending State. Despite the attempts made to alleviate that doubt, the basic principle expressed in the first two

<sup>18</sup> *Idem.*

sentences of article 21, paragraph 1, remained, and he therefore entered a reservation on the article as a whole.

83. Mr. McCAFFREY, associating himself with Sir Ian Sinclair's remarks, noted that the title of the document containing the text of the article proposed by the Drafting Committee (A/CN.4/L.378) referred to articles "adopted" by the Drafting Committee; that could be misleading, since serious reservations about article 21 had been made in the Committee.

84. The notion of the inviolability of temporary accommodation raised the question of what exactly was expected of the receiving State and the transit State. Caution should be exercised in adding further to the obligations States already had under article 15, paragraph 2, and article 20, since they could react by maintaining that that was going beyond what was necessary to ensure freedom of communication. He therefore agreed that it was impractical to seek to ensure the inviolability of temporary accommodation and that such inviolability could, in any event, apply only when the diplomatic bag was present.

85. Lastly, although article 59 of the 1975 Vienna Convention on the Representation of States did provide for such an obligation, it had been adopted as part of a compromise which involved the non-inviolability of the premises of the delegation. For those reasons he, too, entered a reservation on article 21.

86. Mr. USHAKOV said that he had already expressed his opposition to paragraph 3 in the Drafting Committee. In his view, the provision had no practical application, since it was only when the diplomatic courier was entering or leaving the territory of a State that it could be established whether he was carrying articles whose import or export was prohibited. It could not be expected that there would be an inspection or search at the courier's place of residence to check whether he had such articles.

87. Mr. DÍAZ GONZÁLEZ also expressed reservations as to the usefulness of article 21, which called for a number of comments. First of all, what was meant by "temporary accommodation"? The diplomatic courier was usually lodged in premises which already enjoyed diplomatic immunity. If he stayed in a hotel, a motel or a pension, or with a friend, was it his room that would be considered inviolable or the whole building? There was also the question of how long "temporary" could be. Did the inviolability of the accommodation begin from the time when the hotel reservation was made? And why should a search be made in the temporary accommodation of the courier? Would the State be required to protect the courier's future accommodation before he even arrived, for fear that a bomb might be planted there, for instance? Those numerous questions led him to think that article 21 was unnecessary.

88. Mr. QUENTIN-BAXTER said that his doubts were of much the same kind as those expressed by Sir Ian Sinclair, Mr. McCaffrey and Mr. Díaz González. He wished to reiterate, however, that the problems which might arise in the context not only of article 21, but also of other articles, in regard to the receiving State, were in-

initely greater in regard to the transit State. The draft said little about the transit State, but there had been intimations during the debate that there was a slightly stricter conception of it as a State that was ordinarily traversed by couriers or bags on their way from the sending State to the receiving State. Paragraph 2 of article 4, however, provided in effect that the transit State was bound by whatever rules the receiving State chose to apply, and thus placed a rather large obligation upon a State which might not even know that a person who appeared in its territory was a diplomatic courier and had no easy method of applying a *renvoi* to discover what were the rules of the receiving State in regard to the bag. A receiving State at least had opportunities of identifying the courier. He therefore considered it essential to examine such difficult cases more and more with reference to the transit State as well as the receiving State.

89. Mr. REUTER associated himself with the reservations expressed by Sir Ian Sinclair. He considered article 21 unnecessary and dangerous.

90. The CHAIRMAN said that, if there were no further comments, he would take it that article 21 [17] was provisionally adopted, subject to the reservations expressed.

*It was so agreed.*

*Article 21 [17] was adopted.*

#### ARTICLE 22

91. Mr. MAHIOU (Chairman of the Drafting Committee) said that, on the recommendation of the Special Rapporteur, the Drafting Committee had decided to delete article 22 (Inviolability of the means of transport),<sup>19</sup> which had not received sufficient support during the general debate. The provision on "inviolability of the means of transport" dealt with a situation so rare that it did not justify a separate article. It had been agreed, however, that the matter could be mentioned in the commentary to one of the articles, and that it would be for the Special Rapporteur to propose an appropriate formulation and where it should be inserted. The Drafting Committee recommended that article 22 should not be retained in the draft.

92. The CHAIRMAN said that, if there were no comments, he would take it that article 22 was deleted.

*Article 22 was deleted.*

#### ARTICLE 23 [18] (Immunity from jurisdiction)

93. Mr. MAHIOU (Chairman of the Drafting Committee) presented the text of article 23 [18] as proposed by the Drafting Committee, which read as follows:

##### *Article 23 [18]. Immunity from jurisdiction*

[1. The diplomatic courier shall enjoy immunity from the criminal jurisdiction of the receiving State or the transit State.]

2. He shall also enjoy immunity from the civil and administrative jurisdiction of the receiving State or, as the case may be, the transit State in respect of all acts performed in the exercise of his functions.

<sup>19</sup> *Idem.*

This immunity shall not extend to an action for damages arising from an accident caused by a vehicle the use of which may have involved the liability of the courier where those damages are not recoverable from insurance.

3. No measures of execution may be taken in respect of the diplomatic courier, except in cases where he does not enjoy immunity under paragraph 2 of this article and provided that the measures concerned can be taken without infringing the inviolability of his person, temporary accommodation or the diplomatic bag entrusted to him.

[4. The diplomatic courier is not obliged to give evidence as a witness.]

5. Any immunity of the diplomatic courier from the jurisdiction of the receiving State or the transit State does not exempt him from the jurisdiction of the sending State.

94. He said that the Committee had discussed article 23 as submitted by the Special Rapporteur<sup>20</sup> at some length, but had been unable to reach a conclusion. As he had pointed out in his opening remarks, the Committee had managed to adopt paragraphs 2, 3 and 5 of the article, subject to reservations by some members on those paragraphs and on the article as a whole. It had not been possible to adopt paragraphs 1 and 4, owing to marked and irreconcilable differences of opinion. The Committee had therefore decided, with regret, to place paragraphs 1 and 4 of the original text in square brackets. He would briefly explain the differences of opinion which had made that necessary and the reservations entered. It would then be for the Commission to decide what was to be done.

95. In the text presented to the Commission, paragraph 5 corresponded to paragraph 6 of the original text, and the former paragraph 5 had been incorporated in the new paragraph 2.

96. With regard to paragraph 1, there had been an animated discussion in the Drafting Committee on the necessity and advisability of including such a provision in the draft. Some members had raised strong objections to that paragraph; in their opinion, article 20, which provided that the diplomatic courier "shall not be liable to any form of arrest or detention", made it unnecessary. Total immunity from criminal jurisdiction was simply not necessary to the courier for the performance of his functions. The fact that the administrative and technical staff of an embassy enjoyed such immunity under the 1961 Vienna Convention on Diplomatic Relations was irrelevant, since such staff remained in the host State for long periods and might have acquired confidential information concerning the sending State. That did not apply to the diplomatic courier. Lastly, it had been argued that it was unnecessary to include such a provision and that its presence would only reduce the chances of general acceptance of the draft by Governments, some of which, as a result of recent events, were not inclined to receive favourably any new rules giving the courier such total immunity from jurisdiction as was accorded to diplomatic and other staff.

97. An opposite position had been just as strongly held, according to which it was necessary and only right to include paragraph 1. According to the holders of that view,

it was unthinkable to give the courier, who was an agent of the sending State, a lesser immunity than that enjoyed by members of the family of diplomatic agents and the administrative and technical staff of embassies. Article 20 was not sufficient to give the courier the necessary protection against the annoyances and disturbances in the performance of his functions which might result from criminal proceedings against him. In fact, it was precisely by reason of his relatively short stay in the receiving State or the transit State, and the need to perform his duties promptly, that the courier required immunity from criminal jurisdiction. Abuses were extremely rare in practice, and it would be wrong to take advantage of the adoption of rules relating to the diplomatic courier to call in question the provisions contained in the existing conventions on diplomatic law.

98. In view of those irreconcilable positions, the Drafting Committee had considered that the Commission should decide the fate of paragraph 1.

99. Paragraph 2 comprised two sentences. The first, apart from a few minor drafting changes, was the same as the paragraph 2 submitted by the Special Rapporteur. Some members of the Committee had expressed doubts about the need to include the first sentence. In their opinion, the courier stayed for such a short time that he would not, in practice, be subject to the civil and administrative jurisdiction of the receiving State or the transit State. Most members of the Committee, on the other hand, considered that the inclusion of the first sentence of paragraph 2 was only logical, in view of the preceding provision in paragraph 1 and the similar provisions contained in the conventions on diplomatic law. It had also been observed that a courier *ad hoc* and a courier having the nationality of the receiving State would need a provision of that kind. One member had said that, since the sentence in question had little practical effect and was inoffensive in itself, it could be retained. Another had said that it would have been preferable to follow the wording of article 37, paragraph 2, of the 1961 Vienna Convention.

100. The second sentence of paragraph 2 concerned a matter dealt with by the Special Rapporteur in paragraph 5 of the text he had submitted, namely an action for damages arising from an accident caused by a vehicle the use of which might have involved the liability of the courier. For the formulation of that sentence, the Drafting Committee had been guided by article 60, paragraph 4, of the 1975 Vienna Convention on the Representation of States. Certain changes had been made, however, to take account of the special situation of the diplomatic courier, including the brevity of his stay in the receiving State or the transit State. Thus it had been decided that it was not necessary to mention a "vessel or aircraft" and that the words "used or owned by the persons in question", appearing in article 60 of the 1975 Vienna Convention, should be replaced by the words "the use of which may have involved the liability of the courier". The object of the new wording was to indicate, in a neutral way, the link between the courier and the vehicle which had caused the accident. The matter would come under internal law on liability for accidents caused by motor vehicles. It was the internal law of the receiving State or the transit State which would

<sup>20</sup> *Idem.*

determine the liability of the courier in the light of the circumstances, which would be discussed in the commentary.

101. The relationship between the first and second sentences of paragraph 2 had also been the subject of disagreement in the Drafting Committee. The second sentence had been drafted so as not to prejudge, one way or the other, the various possible interpretations of the relationship. What the Committee had had mainly in mind was the need to protect the victim of a traffic accident who was not at fault, and his right to a remedy.

102. Paragraph 3 of article 23 had been slightly amended to bring the text into line with that of the corresponding provisions of the conventions on diplomatic law. Some members of the Committee had considered the paragraph unnecessary, because it was based on what they considered to be the mistaken theory that, in practice, the courier would be subject to the civil and administrative jurisdiction of the receiving State or the transit State. They had also expressed reservations about the inclusion in the text of a reference to the inviolability of the courier's temporary accommodation.

103. Paragraph 4, which appeared between square brackets, had been left in the form proposed by the Special Rapporteur, since the Committee had been unable to reach agreement on it. Some members of the Committee had opposed that paragraph because it dealt with a purely hypothetical case, was too rigidly drafted and, by implication, contradicted the second sentence of paragraph 2, according to which the courier was not immune from civil and administrative jurisdiction in the case of an accident of the kind referred to in that provision. Other members of the Committee, however, had considered the provision useful, appropriate and fully justified, having regard to the provisions of the conventions on diplomatic law. Lastly, some members thought that paragraph 4 would be more widely acceptable if it was confined, like paragraph 2, to acts connected with the performance of the courier's functions. As in the case of paragraph 1, it was for the Commission to decide what was to be done about paragraph 4.

104. The new paragraph 5 reproduced paragraph 6 of article 23 as submitted by the Special Rapporteur. The Drafting Committee had decided that, in view of the special situation of the courier, it would be wiser to model the text, except in the Spanish version, on article 60, paragraph 5, of the 1975 Vienna Convention, and to say "Any immunity ... does not exempt". Although paragraph 5 had been considered unnecessary by some members, the Drafting Committee had included it in article 23 for the sake of harmony with the corresponding provisions of the conventions on diplomatic law and in order to avoid the argument *a contrario*.

105. Lastly, for the reasons already indicated in connection with individual paragraphs, some members of the Committee had considered that article 23 as a whole was unnecessary and had no place in the draft. He suggested that the Commission should examine article 23 paragraph by paragraph, possibly beginning with the most controversial paragraphs, namely paragraphs 1 and 4.

*The meeting rose at 6 p.m.*

## 1863rd MEETING

*Tuesday, 17 July 1984, at 10.05 a.m.*

*Chairman:* Mr. Sompong SUCHARITKUL

*Present:* Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Jacovides, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

### Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/L.378, ILC (XXXVI)/Conf. Room Doc.3)

[Agenda item 4]

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

#### ARTICLE 23 [18] (Immunity from jurisdiction) (*continued*)

1. The CHAIRMAN invited the Commission to consider article 23 [18]<sup>1</sup> paragraph by paragraph.

##### *Paragraph 1*

2. Mr. OGISO said that the idea of according immunity from criminal jurisdiction to the diplomatic courier had no support in national legislation, firmly established State practice or judicial decisions. The one isolated case before a Hong Kong court, referred to in the Special Rapporteur's fourth report (A/CN.4/374 and Add.1-4, para. 127), seemed to indicate that immunity of the diplomatic courier from criminal jurisdiction was not an established custom of international law.

3. At the Commission's 1783rd meeting, the Special Rapporteur had said that his approach in drafting article 23 had been a "strictly functional" one.<sup>2</sup> Given that, under draft article 20, the diplomatic courier was not to be liable to any form of arrest or detention, the functional necessity of providing for him to have immunity from criminal jurisdiction seemed doubtful. Accordingly he was unable to agree to the argument by the Special Rapporteur that at least the same privileges and immunities should be accorded to the diplomatic courier as were accorded to the administrative and technical staff of a diplomatic mission.

4. His position was borne out by two facts related by the Special Rapporteur in his fourth report (*ibid.*, para. 50): first, an amendment introduced at the United Nations Conference on Diplomatic Intercourse and Immunities, with a view to providing that the diplomatic courier should enjoy personal inviolability to the same

<sup>1</sup> For the text, see 1862nd meeting, para. 93.

<sup>2</sup> *Yearbook ... 1983*, vol. I, p. 166, para. 33.