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Summary record of the 2069th meeting

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2069th MEETING

Tuesday, 28 June 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Benouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

The law of the non-navigational uses of international watercourses (continued) (A/CN.4/406 and Add.1 and 2,¹ A/CN.4/412 and Add.1 and 2,² A/CN.4/L.420, sect. C, ILC(XL)/Conf.Room Doc.1 and Add.1)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPporteur
(continued)

PART V OF THE DRAFT ARTICLES:

ARTICLE 16 [17] (Pollution of international watercourse[s] [systems])

ARTICLE 17 [18] (Protection of the environment of international watercourse[s] [systems]) and

ARTICLE 18 [19] (Pollution or environmental emergencies)³ (continued)

1. Mr. FRANCIS, concluding the statement he had begun at the previous meeting, said that some members had asked what would happen to a State that suffered appreciable harm, within the meaning of article 16, if it were established that the upper riparian State, which had caused the harm, had done everything that could reasonably be expected of it in the circumstances. The Special Rapporteur had replied that the question fell under Mr. Barboza's topic. It would perhaps, however, be advisable to include an express provision to that effect in the draft articles on international watercourses.

2. Article 35 of part 1 of the draft articles on State responsibility⁴ had already set forth the following reservation as to compensation for damage: "Preclusion of the wrongfulness of an act of a State [. . .] does not prejudice any question that may arise in regard to compensation for damage caused by that act." The same idea was to be found in article 5 as proposed by Mr. Barboza (see 2044th meeting, para. 13), which read:

Article 5. Absence of effect upon other rules of international law

The fact that the present articles do not specify circumstances in which the occurrence of transboundary injury arises from a wrongful act or omission of the State of origin shall be without prejudice to the operation of any other rule of international law.

¹ Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

² Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

³ For the texts, see 2062nd meeting, para. 2.

⁴ *Yearbook . . . 1980*, vol. II (Part Two), p. 61.

In his view, the draft on international watercourses should contain a similar article, although the concept of the "wrongfulness of an act of a State" and of a "wrongful act or omission of the State of origin" should be replaced by the concept of "acts not prohibited by international law". That would be a tidier way of approaching the problem.

3. The CHAIRMAN said that the Commission had to take a decision with regard to draft articles 16, 17 and 18, concerning environmental protection and pollution, submitted by the Special Rapporteur in his fourth report (A/CN.4/412 and Add.1 and 2). The Special Rapporteur had suggested that articles 16 and 17 should be referred to the Drafting Committee, and that the discussion on article 18 should be resumed at the next session.

4. If there were no objections, he would take it that the Commission agreed to refer draft articles 16 and 17 to the Drafting Committee, together with the observations made during the discussion, on the understanding that the reservations entered by some members would be reflected in the summary records.

It was so agreed.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/409 and Add.1-5,⁵ A/CN.4/417,⁶ A/CN.4/L.420, sect. F.3)

(Agenda item 4)

EIGHTH REPORT OF THE SPECIAL RAPporteur

CONSIDERATION OF THE DRAFT ARTICLES
ON SECOND READING

5. The CHAIRMAN recalled that, at its thirty-eighth session, in 1986, the Commission had concluded its first reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, in which connection the General Assembly had sought the comments and observations of Governments. It was on the basis of the replies of Governments (A/CN.4/409 and Add.1-5) that the Special Rapporteur had prepared his eighth report (A/CN.4/417).

6. The draft articles provisionally adopted on first reading⁷ read as follows:

PART I

GENERAL PROVISIONS

Article 1. Scope of the present articles

The present articles apply to the diplomatic courier and the diplomatic bag employed for the official communications of a State with its missions, consular posts or delegations, wherever situated, and for the official communications of those missions, consular posts or delegations with the sending State or with each other.

⁵ Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

⁶ *Ibid.*

⁷ *Yearbook . . . 1986*, vol. II (Part Two), pp. 24 *et seq.*

Article 2. Couriers and bags not within the scope of the present articles

The fact that the present articles do not apply to couriers and bags employed for the official communications of international organizations shall not affect:

- (a) the legal status of such couriers and bags;
- (b) the application to such couriers and bags of any rules set forth in the present articles which would be applicable under international law independently of the present articles.

Article 3. Use of terms

1. For the purposes of the present articles:

(1) "diplomatic courier" means a person duly authorized by the sending State, either on a regular basis or for a special occasion as a courier *ad hoc*, as:

- (a) a diplomatic courier within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;
- (b) a consular courier within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;
- (c) a courier of a special mission within the meaning of the Convention on Special Missions of 8 December 1969; or
- (d) a courier of a permanent mission, of a permanent observer mission, of a delegation or of an observer delegation, within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

who is entrusted with the custody, transportation and delivery of the diplomatic bag, and is employed for the official communications referred to in article 1;

(2) "diplomatic bag" means the packages containing official correspondence, and documents or articles intended exclusively for official use, whether accompanied by diplomatic courier or not, which are used for the official communications referred to in article 1 and which bear visible external marks of their character as:

- (a) a diplomatic bag within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;
- (b) a consular bag within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;
- (c) a bag of a special mission within the meaning of the Convention on Special Missions of 8 December 1969; or
- (d) a bag of a permanent mission, of a permanent observer mission, of a delegation or of an observer delegation, within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

(3) "sending State" means a State dispatching a diplomatic bag to or from its missions, consular posts or delegations;

(4) "receiving State" means a State having on its territory missions, consular posts or delegations of the sending State which receive or dispatch a diplomatic bag;

(5) "transit State" means a State through whose territory a diplomatic courier or a diplomatic bag passes in transit;

(6) "mission" means:

- (a) a permanent diplomatic mission within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;
- (b) a special mission within the meaning of the Convention on Special Missions of 8 December 1969; and

(c) a permanent mission or a permanent observer mission within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

(7) "consular post" means a consulate-general, consulate, vice-consulate or consular agency within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

(8) "delegation" means a delegation or an observer delegation within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

(9) "international organization" means an intergovernmental organization.

2. The provisions of paragraph 1 of the present article regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or the internal law of any State.

Article 4. Freedom of official communications

1. The receiving State shall permit and protect the official communications of the sending State, effected through the diplomatic courier or the diplomatic bag, as referred to in article 1.

2. The transit State shall accord to the official communications of the sending State, effected through the diplomatic courier or the diplomatic bag, the same freedom and protection as is accorded by the receiving State.

Article 5. Duty to respect the laws and regulations of the receiving State and the transit State

1. The sending State shall ensure that the privileges and immunities accorded to its diplomatic courier and diplomatic bag are not used in a manner incompatible with the object and purpose of the present articles.

2. Without prejudice to the privileges and immunities accorded to him, it is the duty of the diplomatic courier to respect the laws and regulations of the receiving State or the transit State, as the case may be. He also has the duty not to interfere in the internal affairs of the receiving State or the transit State, as the case may be.

Article 6. Non-discrimination and reciprocity

1. In the application of the provisions of the present articles, the receiving State or the transit State shall not discriminate as between States.

2. However, discrimination shall not be regarded as taking place:

- (a) where the receiving State or the transit State applies any of the provisions of the present articles restrictively because of a restrictive application of that provision to its diplomatic courier or diplomatic bag by the sending State;
- (b) where States modify among themselves, by custom or agreement, the extent of facilities, privileges and immunities for their diplomatic couriers and diplomatic bags, provided that such a modification is not incompatible with the object and purpose of the present articles and does not affect the enjoyment of the rights or the performance of the obligations of third States.

PART II

STATUS OF THE DIPLOMATIC COURIER AND THE CAPTAIN OF A SHIP OR AIRCRAFT ENTRUSTED WITH THE DIPLOMATIC BAG

Article 7. Appointment of the diplomatic courier

Subject to the provisions of articles 9 and 12, the diplomatic courier is freely appointed by the sending State or by its missions, consular posts or delegations.

Article 8. Documentation of the diplomatic courier

The diplomatic courier shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag which is accompanied by him.

Article 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.

Article 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.

Article 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 12, it refuses to recognize the person concerned as a diplomatic courier.

Article 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.

Article 13. Facilities accorded to the diplomatic courier

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.

Article 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.

Article 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.

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

Article 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.

Article 18. Immunity from jurisdiction

1. The diplomatic courier shall enjoy immunity from the criminal 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.

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. 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 in cases involving the exercise of his functions. He may be required to give evidence in other cases, provided that this would not cause unreasonable delays or impediments to the delivery of the diplomatic bag.

5. The 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.

Article 19. Exemption from personal examination, customs duties and inspection

1. The diplomatic courier shall be exempt from personal examination.

2. The receiving State or, as the case may be, the transit State shall, in accordance with such laws and regulations as it may adopt, permit entry of articles for the personal use of the diplomatic courier imported in his personal baggage and shall grant exemption from all customs duties, taxes and related charges on such articles other than charges levied for specific services rendered.

3. The personal baggage of the diplomatic courier shall be exempt from inspection, unless there are serious grounds for believing that it contains articles not for the personal use of the diplomatic courier or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or, as the case may be, of the transit State. Such inspection shall be conducted only in the presence of the diplomatic courier.

Article 20. Exemption from dues and taxes

The diplomatic courier shall, in the performance of his functions, be exempt in the receiving State or, as the case may be, in the transit State from all those dues and taxes, national, regional or municipal,

for which he might otherwise be liable, except for indirect taxes of a kind which are normally incorporated in the price of goods or services and charges levied for specific services rendered.

Article 21. Duration of privileges and immunities

1. The diplomatic courier shall enjoy privileges and immunities from the moment he enters the territory of the receiving State or, as the case may be, the transit State in order to perform his functions, or, if he is already in the territory of the receiving State, from the moment he begins to exercise his functions. Such privileges and immunities shall normally cease at the moment when the diplomatic courier leaves the territory of the receiving State or the transit State. However, the privileges and immunities of the diplomatic courier *ad hoc* shall cease at the moment when the courier has delivered to the consignee the diplomatic bag in his charge.

2. When the functions of the diplomatic courier come to an end in accordance with article 11 (b), his privileges and immunities shall cease at the moment when he leaves the territory of the receiving State, or on the expiry of a reasonable period in which to do so.

3. Notwithstanding the foregoing paragraphs, immunity shall continue to subsist with respect to acts performed by the diplomatic courier in the exercise of his functions.

Article 22. Waiver of immunities

1. The sending State may waive the immunities of the diplomatic courier.

2. Waiver must always be express, except as provided in paragraph 3 of this article, and shall be communicated in writing.

3. The initiation of proceedings by the diplomatic courier shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

5. If the sending State does not waive the immunity of the diplomatic courier in respect of a civil action, it shall use its best endeavours to bring about a just settlement of the case.

Article 23. Status of the captain of a ship or aircraft entrusted with the diplomatic bag

1. The captain of a ship or aircraft in commercial service which is scheduled to arrive at an authorized port of entry may be entrusted with the diplomatic bag of the sending State or of a mission, consular post or delegation of that State.

2. The captain shall be provided with an official document indicating the number of packages constituting the bag entrusted to him, but he shall not be considered to be a diplomatic courier.

3. The receiving State shall permit a member of a mission, consular post or delegation of the sending State to have unimpeded access to the ship or aircraft in order to take possession of the bag directly and freely from the captain or to deliver the bag directly and freely to him.

PART III

STATUS OF THE DIPLOMATIC BAG

Article 24. Identification of the diplomatic bag

1. The packages constituting the diplomatic bag shall bear visible external marks of their character.

2. The packages constituting the diplomatic bag, if unaccompanied by a diplomatic courier, shall also bear a visible indication of their destination and consignee.

Article 25. Content of the diplomatic bag

1. The diplomatic bag may contain only official correspondence, and documents or articles intended exclusively for official use.

2. The sending State shall take appropriate measures to prevent the dispatch through its diplomatic bag of articles other than those referred to in paragraph 1.

Article 26. Transmission of the diplomatic bag by postal service or by any mode of transport

The conditions governing the use of the postal service or of any mode of transport, established by the relevant international or national rules, shall apply to the transmission of the packages constituting the diplomatic bag.

Article 27. Facilities accorded to the diplomatic bag

The receiving State or, as the case may be, the transit State shall provide the facilities necessary for the safe and rapid transmission or delivery of the diplomatic bag.

Article 28. Protection of the diplomatic bag

1. The diplomatic bag shall [be inviolable wherever it may be; it shall] not be opened or detained [and shall be exempt from examination directly or through electronic or other technical devices].

2. Nevertheless, if the competent authorities of the receiving [or transit] State have serious reasons to believe that the [consular] bag contains something other than the correspondence, documents or articles referred to in article 25, they may request [that the bag be subjected to examination through electronic or other technical devices. If such examination does not satisfy the competent authorities of the receiving [or transit] State, they may further request] that the bag be opened in their presence by an authorized representative of the sending State. If [either] [this] request is refused by the authorities of the sending State, the competent authorities of the receiving [or transit] State may require that the bag be returned to its place of origin.

Article 29. Exemption from customs duties, dues and taxes

The receiving State or, as the case may be, the transit State shall, in accordance with such laws and regulations as it may adopt, permit the entry, transit and departure of the diplomatic bag and shall exempt it from customs duties and all national, regional or municipal dues and taxes and related charges other than charges for storage, cartage and similar services.

PART IV

MISCELLANEOUS PROVISIONS

Article 30. Protective measures in case of force majeure or other circumstances

1. In the event that, due to *force majeure* or other circumstances, the diplomatic courier, or the captain of a ship or aircraft in commercial service to whom the bag has been entrusted or any other member of the crew, is no longer able to maintain custody of the diplomatic bag, the receiving State or, as the case may be, the transit State shall take appropriate measures to inform the sending State and to ensure the integrity and safety of the diplomatic bag until the authorities of the sending State take repossession of it.

2. In the event that, due to *force majeure*, the diplomatic courier or the diplomatic bag is present in the territory of a State which was not initially foreseen as a transit State, that State shall accord protection to the diplomatic courier and the diplomatic bag and shall extend to them the facilities necessary to allow them to leave the territory.

Article 31. Non-recognition of States or Governments or absence of diplomatic or consular relations

The facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag under the present articles shall not be

affected either by the non-recognition of the sending State or of its Government or by the non-existence of diplomatic or consular relations.

Article 32. Relationship between the present articles and existing bilateral and regional agreements

The provisions of the present articles shall not affect bilateral or regional agreements in force as between States parties to them.

Article 33. Optional declaration

1. A State may, at the time of expressing its consent to be bound by the present articles, or at any time thereafter, make a written declaration specifying any category of diplomatic courier and corresponding category of diplomatic bag listed in paragraph 1 (1) and (2) of article 3 to which it will not apply the present articles.

2. Any declaration made in accordance with paragraph 1 shall be communicated to the depositary, who shall circulate copies thereof to the Parties and to the States entitled to become Parties to the present articles. Any such declaration made by a Contracting State shall take effect upon the entry into force of the present articles for that State. Any such declaration made by a Party shall take effect upon the expiry of a period of three months from the date upon which the depositary has circulated copies of that declaration.

3. A State which has made a declaration under paragraph 1 may at any time withdraw it by a notification in writing.

4. A State which has made a declaration under paragraph 1 shall not be entitled to invoke the provisions relating to any category of diplomatic courier and diplomatic bag mentioned in the declaration as against another Party which has accepted the applicability of those provisions to that category of courier and bag.

7. He recalled further that, by letter dated 29 January 1988 addressed to the Special Rapporteur, the Secretary of the Commission had drawn attention to paragraph 248 of the Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control⁸ adopted by the International Conference on Drug Abuse and Illicit Trafficking, of which the General Assembly had taken note in its resolution 42/112 of 7 December 1987. In that paragraph, the Conference had drawn the attention of the Commission to the use of the diplomatic bag for drug trafficking, so that the Commission could study the matter in the context of its agenda item relating to the status of the diplomatic bag. The Conference had also requested the Secretary-General to follow closely the activities referred to in the Multidisciplinary Outline, and the General Assembly had asked him to submit a report on the implementation of resolution 42/112.

8. In their statements on the present item, members would no doubt wish to take account of that letter and the considerations set forth in it.

9. Mr. YANKOV (Special Rapporteur), introducing his eighth report on the topic (A/CN.4/417), said that his oral presentation would perhaps be more detailed than was customary. That was because he had endeavoured to give due attention to all the comments, whether of a substantive or drafting character, made by Governments—which accounted for the length of his report. Also, as the Commission was embarking on the consideration of the draft articles on second reading, he

thought it would be advisable to have as comprehensive a view as possible of the situation. Again, the eighth report had not been distributed in sufficient time, and members had therefore perhaps been unable to study it properly.

10. Outlining the historical background to the question, he said that the draft articles were the outcome of a study by a working group appointed to consider the matter in 1978 and of the seven reports which he had submitted thereafter. In paragraph 9 of its resolution 41/81 of 3 December 1986, the General Assembly had urged Governments to respond to the Commission's request for comments and observations. At the time of the drafting of the eighth report, 29 Governments had sent written replies, most of them after the 1 January 1988 deadline (A/CN.4/409 and Add.1-5). In addition to those observations, the discussions in the Sixth Committee at the forty-first and forty-second sessions of the General Assembly⁹ had afforded the representatives of Governments an opportunity to make known their views. The Commission therefore had a substantive body of material for the second reading of the draft articles.

11. Section I of the eighth report contained general observations, in particular on methodology. Section II contained an analysis of the draft articles in the light of the observations received, together with some proposed amendments. Lastly, he had thought it useful to consider the question of settlement of disputes arising out of the interpretation or application of the future treaty, as that question had been raised by two Governments (A/CN.4/417, paras. 280-281).

12. Three questions of methodology were examined under the heading of general observations, bearing in mind the views expressed throughout the Commission's work: the purpose of the draft articles, the concepts of a comprehensive approach and of functional necessity, and the form of the draft.

13. It might seem strange to be talking still of the purpose of the draft articles on second reading. Earlier discussions had, however, revealed certain differences as to the approach to be followed and as to the practical necessity of elaborating special rules governing the legal status of the diplomatic courier and the diplomatic bag. A common ground, if not a consensus, had none the less been established: the draft should lead to a coherent and, in so far as possible, uniform régime governing the status of all kinds of couriers and bags on the basis of the "codification conventions",¹⁰ and of a combination of established methods for the progressive development and codification of international law. The need to introduce a coherent régime was widely acknowledged by Governments, although some maintained that the existing conventions were adequate for the purpose. At all events, the Commission had received a very clear mandate from the General Assembly.

⁸ See A/CN.4/L.410, sect. C, and A/CN.4/L.420, sect. F.3.

¹⁰ 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 (referred to as "1975 Vienna Convention on the Representation of States").

⁹ *Report of the International Conference on Drug Abuse and Illicit Trafficking, Vienna, 17-26 June 1987* (United Nations publication, Sales No. E.87.1.18), chap. I, sect. A.

14. The “comprehensive” approach, aimed at establishing a coherent set of rules, had been accepted by the Commission, on the understanding that it should be applied with caution. The point of departure here was the common denominator constituted by the provisions of the codification conventions, which called for identical treatment for the various kinds of courier. That identity of treatment, which was supported by State practice, led to the conclusion that a coherent and uniform régime governing the status of the courier and the bag represented an established norm of contemporary international law. There was, however, a difference in the treatment accorded to the consular bag, on which point article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations departed from the three other codification conventions. Although, as a general rule, the consular bag could neither be opened nor be detained, it could, under the terms of that paragraph, be opened in certain cases and in accordance with certain procedures. At the same time, that exception did not prevent many States, in their bilateral consular conventions, from applying the general rule set forth in article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations. If, therefore, the intention was that the régime envisaged for the bag should be coherent and uniform, a decision would have to be taken to base it either on the system of the 1961 Convention or on that of the 1963 Convention. The other alternative would be to accept both systems, but that would lead to two distinct régimes, which would therefore be contrary to the basic objective of uniformity.

15. The concept of a comprehensive approach corresponded to the concept of functional necessity. The latter concept, which related to the need to find a balance between the confidentiality of the contents of the bag on the one hand, and the security and other interests of the receiving and transit States on the other, was a basic condition for determining the legal status of the courier and the bag. It should be seen not simply as a means of restricting the facilities, privileges and immunities granted but also as a prerequisite for the effective performance of the official functions of the courier and the bag, involving as it did a complex of rights and obligations.

16. With regard to the final form of the draft, it would be seen that Governments were on the whole in favour of the adoption of a convention, i.e. independent legal instrument, but one that had close links with the four codification conventions. He too favoured that solution. The Commission would have to give its opinion on the matter and to put forward a proposal to the General Assembly.

17. As to the observations and proposals by Governments on the draft, he pointed out that the articles were divided into four parts. The first concerned general provisions. With regard to article 1, two Governments were of the view that the official communications covered by the article should be confined to communications between the central government of the sending State and its missions abroad, and that communications between missions, consular posts and delegations of that State should be excluded. In his view, however, communi-

cations of that type met a specific need, and the legal justification for protecting them was to be found in the four codification conventions, in particular in article 27, paragraph 1, of the 1961 Vienna Convention. In earlier reports he had had occasion to cite examples of State practice in that respect. His investigations had also revealed that in many cases the diplomatic courier left the sending State on a combined journey, one of the features of which was to provide a means of communication between that State’s missions, consular posts and delegations. He therefore proposed that the text of article 1 should be retained as it stood.

18. With regard to article 2, it would be recalled that the Commission had stated in its commentary that the fact of having decided, in principle, not to bear in mind the couriers and bags of international organizations or other entities did not preclude the possibility of an examination of their legal régime at a later stage, when a final decision would be taken.¹¹ The moment had perhaps come for a decision in the matter. A number of general observations by Governments deserved special attention in that connection. Some were in favour of confining the scope of the draft articles to diplomatic and consular couriers and bags or even, in the case of two Governments, to diplomatic couriers and bags alone. Others, on the contrary, favoured extending the scope of the draft articles to the couriers and bags of international organizations, taking into account the practice of the United Nations, the specialized agencies and other intergovernmental organizations. In the light of those considerations, and since it was understood that the point had to be reconsidered, he suggested in his report (*ibid.*, para. 60) adding a paragraph 2 to article 1, reading:

“2. The present articles apply also to the couriers and bags employed for the official communications of an international organization with States or with other international organizations.”

19. As for extending the scope of the draft articles to cover couriers and bags of national liberation movements recognized by the competent regional organizations and by the United Nations, he doubted whether the number of such movements was sufficiently great or their official communications sufficiently important to warrant legal regulation in an instrument of a general character. He was therefore of the opinion that the scope of the draft articles should be extended only to include international organizations.

20. No observations or proposals from Governments had been received on the substance of article 3. However, if the Commission accepted his proposal to add a provision on couriers and bags of international organizations to article 1, then paragraphs 1 and 2 of article 3 would have to be changed in the way indicated in the report (*ibid.*, paras. 70-71).

21. Articles 4, 5 and 6, which set forth general principles, had not given rise to general comments except for one Government’s doubts as to the usefulness of articles 4 and 5, and a few drafting suggestions had been made in connection with articles 5 and 6 only. He therefore

¹¹ *Yearbook* . . . 1983, vol. II (Part Two), p. 54.

proposed that the existing text of article 4 should be retained. With regard to article 5, it had been suggested that the second sentence of paragraph 2, reading, "He [the diplomatic courier] also has the duty not to interfere in the internal affairs of the receiving State or the transit State, as the case may be", should be deleted. The suggestion could be accepted, it being understood that the courier's duty to respect the laws and regulations of the receiving State or the transit State also entailed the obligation not to interfere in any way in their internal affairs. One Government had proposed adding the word "sovereignty" to the words "laws and regulations" in the title and in paragraph 2; his own view was that the Government's concern was adequately met by the text as it stood. To simplify paragraph 2, he proposed the deletion of the words "as the case may be". Paragraph 2 was important: modest and temporary in nature as his functions might be, the courier was none the less an agent of another State and, as such, had to respect the laws and regulations of the receiving State and of the transit State.

22. One Government had proposed deleting from paragraph 2 (b) of article 6 the phrase "provided that such a modification [of the extent of facilities, privileges and immunities] is not incompatible with the object and purpose of the present articles and does not affect the enjoyment of the rights or the performance of the obligations of third States", a provision that was modelled on article 49 of the 1969 Convention on Special Missions. He would prefer the text to be simplified along the lines of article 47 of the 1961 Convention and article 72 of the 1963 Convention, and he read out the proposed revised text (*ibid.*, para. 92).

23. With reference to part II of the draft (Status of the diplomatic courier and the captain of a ship or aircraft entrusted with the diplomatic bag), he said that article 7 had elicited only one general remark, to the effect that it was unnecessary. After reading out the arguments set out in his report (*ibid.*, para. 95) in favour of retaining the article, he added that the conditions of the diplomatic courier's appointment also had some importance from the point of view of the duration of the functions entrusted to the courier and the bag, as well as from that of the facilities, privileges and immunities granted to the courier.

24. On article 8, one Government had expressed the view that the official documents should indicate essential personal data on the courier as well as particulars of the packages constituting the bag. He thought that the official documents might not only indicate the courier's status but also contain some particulars about him and details concerning the packages, such as the serial number and destination. The discussion in the Commission and in the Sixth Committee appeared to preclude any limitation of the size and weight of the bag, except by mutual agreement between Governments, as was the case in a number of multilateral conventions. Article 8 might be revised as indicated in the report (*ibid.*, para. 102).

25. One Government had commented that article 9 should be deleted because the subject it dealt with raised few practical problems. Another had suggested the deletion of paragraphs 2 and 3 of article 9 on the grounds

that they were "unrealistic". The arguments that appeared to justify maintaining those provisions were set out in the report (*ibid.*, paras. 105-106). Some observations had also been made concerning the possible consequences on the performance of the diplomatic courier's mission of withdrawal of consent by a receiving State where the diplomatic courier was a national of the receiving State, a national of the sending State who was a permanent resident of the receiving State, or a national of a third State. He had taken that point into account in the revised text of paragraph 2 of article 9 which he proposed in the report (*ibid.*, para. 111).

26. Since article 10 had elicited no specific comments, he proposed that the text adopted on first reading should be retained.

27. With reference to article 11, it would be recalled that the initial text, submitted in 1982 (*ibid.*, para. 115), had indicated that the functions of a diplomatic courier came to an end, *inter alia*, upon completion of his task and also in the event of his death. Those provisions, deemed unnecessary by the Commission and by the Drafting Committee, had later been deleted. Since, however, some Governments had reverted to the issue, he proposed that article 11 should be expanded in the manner indicated in his report (*ibid.*, para. 120).

28. No substantive or drafting changes had been proposed for articles 12, 13, 14, 15 or 16. The comments and criticisms made in connection with those provisions were set out in the report (*ibid.*, paras. 121-138). One Government, in particular, had expressed the view that article 16 was unnecessary, since the problem it dealt with had already been resolved by the Vienna Conventions of 1961 and 1963. However, the Commission's commentary contained convincing arguments in favour of maintaining the article, which, he thought, held an important place in a coherent set of rules on the status of the diplomatic courier. Accordingly, he proposed that the present wording of the five articles in question should be maintained, but with a slight drafting change, namely, deletion of the words "as the case may be" in articles 13, 14, 15 and 16, because they were unnecessarily cumbersome.

29. Article 17 was one of the most controversial of the whole draft, as demonstrated by the summary of observations by Governments (*ibid.*, paras. 140-148). Two main trends had emerged: one in favour of deleting the article as unnecessary, unrealistic and excessive, the other recognizing its practical significance and favouring the strengthening of the principle of the inviolability of temporary accommodation, which paragraph 3 appeared to call into question by allowing inspection of the accommodation in certain cases. The amendments which had been proposed to strengthen that principle were indicated in the report (*ibid.*, paras. 143-144). It would now be for the Commission to make its choice. Deletion of article 17 would create a lacuna in the legal régime governing the courier and bag, and the problems which would arise in connection with the protection of temporary accommodation would then be resolved only on a case-by-case basis. On the other hand, strengthening the principle of inviolability would involve the risk of upsetting the fair balance which had to be maintained between the interests of the sending State and those of

the receiving State. Accordingly, he was in favour of keeping the present text, a compromise formula that was perhaps the most generally acceptable.

30. Article 18 had also given rise to extensive discussion and to many observations and proposals, which were set forth in detail in the report (*ibid.*, paras. 152-157). It had been argued by some, on the strength of the transitory character of the courier's functions and also of the greater importance attached to the bag than to the courier, that only very limited immunities should be granted to the courier, and perhaps none at all. Several Governments, however, supported the functional approach adopted in the present text, which granted the courier partial immunity from the criminal, civil and administrative jurisdiction of the receiving and transit States—namely immunity for acts performed in the exercise of his functions. Those Governments agreed that the present text provided a possible middle ground; others considered paragraph 1 of article 18 as superfluous, because the courier enjoyed personal inviolability by virtue of article 27, paragraph 5, of the 1961 Vienna Convention as well as of article 16 of the present draft; yet others considered that the courier should, on the contrary, be granted full immunity from the criminal jurisdiction of the receiving and transit States (*ibid.*, paras. 152-154).

31. In addition, a number of drafting changes had been proposed to make the text of the article more broadly acceptable. One Government had suggested that paragraph 2 should be amended to take into account the rule in certain national legislations whereby, in a traffic accident, it was the driver and not the owner of the vehicle who was held liable. He proposed the adoption of that amendment, which would consist in adding the following sentence at the end of the paragraph:

“Pursuant to the laws and other legal regulations of the receiving or transit State, the courier when driving a motor vehicle shall be required to have insurance coverage against third-party risks.”

He also proposed the adoption of the amendments indicated in his report, namely the deletion, in paragraphs 1 and 2, of the word “all” before “acts” and of the words “as the case may be” (*ibid.*, paras. 159-161). On the other hand, there seemed to be no need to add the word “official” before “acts”, since the provision specified that the acts were performed in the exercise of the courier's functions. Subject to those changes, the present compromise formula embodied in article 18 should be retained, bearing in mind that the courier was an official of his Government, that he was performing an official mission and that, in that capacity, he should enjoy facilities, privileges and immunities identical with those granted to the administrative and technical personnel of diplomatic missions.

32. He proposed further the merger of articles 19 and 20, in order to take account of the observations by Governments. Some Governments had proposed the deletion of the two articles, on the grounds that the courier's personal inviolability under article 16 made the exemption from personal examination unnecessary, and that article 20 was redundant because of the short duration and transitory nature of the courier's stay (*ibid.*,

para. 163). In view of the Commission's explanations in its commentary, it could be agreed that the protection afforded under article 16 rendered the exemption from personal examination unnecessary. On the other hand, the short duration of the courier's stay was not a valid argument for doing away with exemptions intended to facilitate customs formalities and hence help the courier perform his official functions. For the reasons stated in his report (*ibid.*, para. 165), he suggested that the Commission should adopt as a new single article 19 the text proposed in the report (*ibid.*, para. 168).

33. One Government had proposed the deletion of article 21 on the grounds that the content was already implicit, for example, in articles 12 and 16 of the draft, or expressly stated in the provisions of the 1961 and 1963 Vienna Conventions. His own view was that, while the wording of article 21 could be improved, it was not possible, on so important a question as the duration of the functions of the diplomatic courier, to be content with rules that might be deduced by implication from the provisions on the declaration of a courier *persona non grata* (art. 12) or on the protection and inviolability of the diplomatic courier (art. 16). As for the 1961 and 1963 Conventions, they contained no express provision on the duration of the privileges and immunities granted to the courier. True, article 21 drew on the provisions of the codification conventions, but it was especially focused on the peculiar legal features of the status of the courier and on the transitory nature of his functions. For that very reason, it was important to establish the precise moment or event which determined the entry into operation or the cessation of the privileges and immunities of the courier, as well as the duration of the privileges and immunities accorded to a courier *ad hoc*; otherwise there would be no difference between the treatment granted to the courier and that granted to a courier *ad hoc*. He had taken into account the observations by Governments on that point (*ibid.*, paras. 175-180) in the revised version of paragraph 1 which he proposed (*ibid.*, para. 184). Since paragraphs 2 and 3 had elicited no comments, he proposed that they should be kept in their present form.

34. Article 22 had attracted the reservations of one Government, which was opposed to granting any jurisdictional immunity to the diplomatic courier, although it admitted that, if provision was made for immunities, a provision on waiver of immunities was also necessary. An observation of a general nature had also been made on paragraph 5 of the article, but without any suggested text. He therefore proposed that the present wording of article 22 should be retained.

35. With regard to article 23, two Governments had proposed that the captain of a ship or aircraft to whom the diplomatic bag had been entrusted should be granted the same status as a courier *ad hoc*. He did not believe that that was warranted either by practical necessities or by the law in force. The captain of a ship or aircraft had well-defined professional responsibilities and did not have direct custody of the bag during the journey; his only duty was to deliver it on arrival to an authorized representative of the sending State. Moreover, the four codification conventions explicitly stipulated that the captain was not considered to be a

diplomatic courier. As for the possibility of entrusting the bag to a member of the crew other than the captain of the ship or aircraft, since the question had been extensively discussed both in the Commission and in the Drafting Committee, and since the Commission had indicated in its commentary to paragraph 1 of article 23 that there was nothing to preclude that practice, he proposed that it should be given explicit form. The amendments he was suggesting for that purpose appeared in his report (*ibid.*, para. 200).

36. With regard to part III of the draft (Status of the diplomatic bag), one Government considered that article 24 should include more specific rules, but no clear-cut proposal had accompanied that extremely general observation. In his own view, the revised text of article 8, together with article 25, could provide the legal basis for identification of the bag, and article 24 should therefore be retained in its present form.

37. Article 25 had elicited a number of general observations as well as several drafting proposals which deserved careful consideration, but did not appear to justify a revision of the existing text (*ibid.*, paras. 204-211).

38. With respect to article 26, a number of general observations had been made concerning the need for rapid transmission of the bag and for avoiding lengthy delays and cumbersome procedures. In that connection, it would be recalled that the UPU Congress held at Rio de Janeiro in 1979 had rejected a proposal to introduce a new category of postal items under the name of "diplomatic bags" in the international postal service by amending the Union's international regulations.¹² At present, favourable treatment for diplomatic bags could be secured only through bilateral, regional or multilateral agreements between national postal services; a number of bilateral agreements along those lines had already been concluded. On the basis of the observations and proposals submitted by Governments, he was offering for the Commission's consideration a revised text of article 26 (*ibid.*, para. 215).

39. On article 27, he would refer members of the Commission to his report (*ibid.*, paras. 216-220), and point out that the revised text he proposed placed the sending State under the obligation to make adequate arrangements for ensuring the rapid transmission or delivery of its diplomatic bags.

40. Article 28 was one of the most controversial; it had been discussed extensively and divergent points of view had been expressed on it throughout the Commission's work on the topic. It was indeed, as had been pointed out, a key provision which raised a wide range of political, legal and methodological problems, to which he referred in his report (*ibid.*, para. 222). The diversity and the differences of opinion of Governments on that article (*ibid.*, paras. 225-242) had led him to submit three alternatives, A, B and C, for the article, accompanied by comments on them (*ibid.*, paras. 244-253).

41. The comments by Governments revealed that most States were opposed to examination of the bag through electronic devices. Moreover, the International Conference on Drug Abuse and Illicit Trafficking, to which the Chairman had referred (para. 7 above) and which was also referred to in the report (A/CN.4/417, paras. 235, 239 and 240), had concluded that measures to combat illicit drug trafficking through misuse of the diplomatic bag should be taken in strict conformity with the provisions of the four codification conventions. But that would be tantamount to having two different régimes: one for consular bags, and another for the other three types of bag. The Nordic countries had suggested in their observations the use of specially trained dogs to detect the presence of illicit drugs in bags. In his opinion, that method would have the advantage of not violating the confidential nature of the bag's contents. Moreover, in view of the severity of the drug-trafficking problem, it was likely that no State would oppose such a measure.

42. The remaining articles had been the subject of proposals relating primarily to drafting, except in the case of article 33, which most Governments suggested should be deleted on the grounds that it might create a plurality of régimes. Two Governments had also considered that it might be desirable to incorporate provisions on the settlement of disputes: he would welcome the opinions and advice of the Commission on that matter.

43. Lastly, he said that the Commission could adopt a number of approaches in considering his report: it could do so article by article, or section by section, or it could focus the discussion on the most controversial matters. If it adopted the third approach, he would suggest that it concentrate on the following issues: (a) the scope of the draft articles, and specifically the possibility of extending it to the couriers and bags of special missions and of international organizations; (b) the inviolability of the courier and the scope and content of the facilities, privileges and immunities granted to him (particularly arts. 17 and 18); (c) the contents and inviolability of the bag (art. 28); (d) the relationship between the draft articles and other conventions (art. 32), the optional declaration (art. 33), and the settlement of disputes.

The meeting rose at 1 p.m.

2070th MEETING

Wednesday, 29 June 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

¹² See in this connection the Special Rapporteur's fourth report, *Yearbook . . . 1983*, vol. II (Part One), p. 121, document A/CN.4/374 and Add.1-4, paras. 316-317.