Document:-
A/CN.4/SR.2080

Summary record of the 2080th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1988, vol. I

ability of the bag had to be respected and even further strengthened. Recent abuses only highlighted the importance of respect for the purposes of the bag and the need for discipline on the part of all States. Cases of abuse of the courier or the bag in order to threaten the security of States were few and far between, and carried little weight compared with other considerations.

44. It was also quite clear that, in practice, States attached the same importance to diplomatic and consular couriers and bags. Diplomatic missions, moreover, could perform consular functions. He therefore fully agreed with what the Special Rapporteur stated in his report: "uniformity in the treatment of diplomatic couriers and consular couriers has acquired general support by States and thus it may be considered as a well-established rule in conventional and customary law" (*ibid.*, para. 22). In any event, abuses which might be committed by extremists could and must be curbed by the other legitimate means available to States for monitoring the activities of missions and their members, which included expelling anyone who might be considered *persona non grata*, reducing the staff of a mission and even severing diplomatic relations.

45. The answer to some of the unfortunate abuses about which States were rightly concerned, at a time when terrorism and drug trafficking had become a threat to mankind, was thus not to restrict the privileges and immunities or the protection and inviolability of the diplomatic and consular courier and bag. It was, rather, to expand mutual co-operation and to emphasize the fact that it was in the common interest of States to combat that threat by co-ordinating their intelligence services, by bringing the criminals to justice, either by prosecuting them in their own courts or by extraditing them, and, above all, by refraining from encouraging their activities for short-term political purposes or for monetary gain. The restrictions that had been proposed would in no way help to combat terrorism and drug trafficking; they would, rather, have the effect of limiting the value of the courier and the bag and of disrupting friendly relations among States by giving rise to doubts and leading to retaliatory measures.

46. The privileges and immunities and protection and inviolability of the courier and the bag were, moreover, governed by other equally well-established principles, such as that of the duty to respect the laws and regulations of the receiving State and the transit State and that of non-discrimination and reciprocity, which were reaffirmed in articles 5 and 6. In that connection, it might be useful to keep a provision in article 5, as the Special Rapporteur had proposed in his fourth report,[5] making it an obligation of the sending State to prosecute and punish any person under its jurisdiction responsible for misuse of the diplomatic bag. Such a provision would enhance the credibility of the draft articles and would be in line with the conclusion the Special Rapporteur had reached in his report:

> . . . it is well established in law and practice that non-compliance with or violation of legal obligations constitute an illicit act which entails responsibility and liability for injury (*ibid.*, para. 87).

From that point of view, the proposal to amend paragraph 2 (*b*) of article 6 by deleting the reference to the rights of third States did not seem advisable; in his view, the earlier version would give better effect to the general principle of non-discrimination. That, however, was a point that would have to be decided by the Special Rapporteur, the Commission itself and the Drafting Committee.

47. With regard to the four main issues identified by the Special Rapporteur (2069th meeting, para. 43), he agreed that the scope of the draft should be extended to international organizations of a universal character. For the sake of consensus, however, he would support the idea that the scope of the draft should not be extended to communications between other international organizations, which could be dealt with in special agreements, as Mr. Reuter had suggested (2070th meeting). In the same spirit, and although he shared Mr. Mahiou's opinion (2078th meeting), he could agree that the draft should not cover communications of national liberation movements. He was also in favour of the retention of article 17, subject to drafting amendments which might improve the text and help to make it generally acceptable.

48. As had been stated, the most important provision was article 28. In that connection, he joined in the broad consensus that had developed in the Commission to the effect that the bag should not be subjected to any direct or indirect examination and, in particular, to any electronic examination, in view of the principles of reciprocity, non-discrimination, inviolability and respect for the confidentiality of the bag. In a spirit of compromise, he therefore supported alternative C proposed by the Special Rapporteur (A/CN.4/417, para. 251).

49. It would be better to discuss the question of the relationship between the draft articles and other conventions on the same subject-matter at a later stage, for it raised complex legal problems concerning the law of treaties. Moreover, if the draft articles were regarded as the outcome of efforts to consolidate the applicable rules in a single instrument, that question would no longer be of any practical significance. The main goal, therefore, must be to have the draft articles accepted by the largest possible number of States, taking account of all the interests at stake.

50. The CHAIRMAN announced that the meeting would rise to enable the Drafting Committee to meet.

The meeting rose at 11.25 a.m.

2080th MEETING

Friday, 15 July 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues,

[5] See draft article 32 (Content of the diplomatic bag), *Yearbook . . . 1983*, vol. II (Part One), p. 115, document A/CN.4/374 and Add.1-4, para. 289.

Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*concluded*) (A/CN.4/409 and Add.1-5,[1] A/CN.4/417,[2] A/CN.4/L.420, sect. F.3)

[Agenda item 4]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

CONSIDERATION OF THE DRAFT ARTICLES[3] ON SECOND READING (*concluded*)

1. Mr. McCAFFREY said that he had already presented general considerations concerning the Special Rapporteur's excellent eighth report (A/CN.4/417), as well as on the first isssue identified by the Special Rapporteur—that of scope. He would therefore confine his comments to the remaining issues identified by the Special Rapporteur and to certain collateral questions.

2. In article 5, he would be very reluctant to see the second sentence of paragraph 2 deleted, as the Special Rapporteur proposed (*ibid.*, paras. 80-82). Some balance was necessary in the text of the article, and the sentence in question was the only statement that provided a measure of protection for the receiving State.

3. He supported the proposed revised text of article 8 for the practical reasons stated by the Special Rapporteur (*ibid.*, paras. 96-99).

4. He agreed with at least one Government, which had found article 9 unnecessary. He took that view, first, because diplomatic couriers were not analogous to diplomatic agents or consular officers for the purposes of the draft and, secondly, because article 9 seemed to be inconsistent with the relevant provisions on consular couriers set out in article 35, paragraph 5, of the 1963 Vienna Convention on Consular Relations. If the article was to be retained, he would support the amendment proposed by the Special Rapporteur (*ibid.*, para. 111), but in his opinion the matter could best be dealt with in the commentary.

5. He supported the revised text which the Special Rapporteur proposed for article 11 (*ibid.*, para. 119).

6. Article 13 had always presented difficulties for him because of its vagueness and generality. He saw no need for an article that purported to provide extensive and in many cases unnecessary facilities for a courier, especially when it could impose uncertain and possibly burdensome obligations on the receiving State. That was particularly true of paragraph 2, which could lead to disputes between the sending and receiving States, rather than settle any questions that might arise. He therefore agreed with the Austrian Government's proposal (A/CN.4/409 and Add.1-5) that the article should be deleted or, as a second alternative, be confined to a general duty of the receiving and transit States to assist the courier in the performance of his functions.

7. He remained convinced that article 17 was unnecessary and was bound to raise the problems which had caused so much controversy during the elaboration of the Convention on Diplomatic Relations. Such a provision was still less necessary for couriers, even on functional grounds, for there had been no problems in practice, and the article did not require the diplomatic courier to accompany the diplomatic bag in order to qualify for protection. In any event, the courier was amply protected by article 16, and did not need the penumbra that had been created in article 17. The article would also place extremely heavy burdens on the receiving and transit States, some of which would therefore probably find it unacceptable. Paragraph 2 of article 17, although designed to assist the receiving and transit States, could have the opposite effect by imposing even greater burdens upon them. Thus the article as a whole would only weaken the chances of acceptance of the draft and did not meet any practical need.

8. He also remained unconvinced of the need for article 18, some of the provisions of which, including those in paragraph 2, concerning insurance, would be unworkable in certain jurisdictions. The compromise reached in the article combined the worst of both worlds: it did not provide complete protection, yet created difficulties for the receiving and transit States. The Commission should therefore give serious consideration to the need for article 18, particularly in view of the terms of article 16.

9. Article 28, which lay at the heart of the draft, had caused the Commission the most difficulty. He feared that, if an attempt was made to introduce substantive clarifications into its terms, some of the accommodations arrived at through many years' experience with the corresponding provision of the 1961 Vienna Convention on Diplomatic Relations, and even earlier, would be disturbed.

10. In paragraph 1 of the article, he would therefore prefer to adhere to the language of paragraph 3 of article 27 of the 1961 Vienna Convention on Diplomatic Relations, which would allow sniffer dogs, but made no reference to scanning. In his view, remote scanning was not prohibited by international law or State practice, so long as it did not compromise the confidentiality of the official communications contained in the bag. The same was true of the opening of the consular bag with the consent of the receiving State and in the presence of its authorized representative, as provided in paragraph 3 of article 35 of the 1963 Vienna Convention on Consular Relations. It followed from those remarks that he considered paragraph 2 of article 28 unnecessary. If it was to be retained, however, the amendments proposed by the Government of the Federal Republic of Germany (*ibid.*), to which other members had already referred, were worthy of further consideration.

---

[1] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[2] *Ibid.*

[3] For the texts, see 2069th meeting, para. 6.

11. He had always considered that article 33, or an equivalent provision, perhaps in the form of a protocol as some members had suggested, was essential for a comprehensive and uniform approach to the topic. States could not be expected to give what was in effect blanket approval to the four codification conventions on which the draft was based, when many of them found two of those conventions unacceptable. Moreover, some States might prefer to continue to make a distinction between diplomatic and consular bags.

12. He was attracted by the idea that the draft should apply only to diplomatic and consular couriers and bags, and that other couriers and bags should be dealt with in an optional protocol. The same requirements would then apply to the kinds of couriers and bags most often used, and one of the main grounds of objection to the draft would be eliminated. But that would be feasible only if an adequate formulation could be found for article 28.

13. The articles should be referred to the Drafting Committee for consideration at the next session, with a view to completion of the second reading of the draft within the Commission's current term of office.

14. Mr. BEESLEY congratulated the Special Rapporteur on his extremely lucid and scholarly report (A/CN.4/417), which showed that the topic, despite reservations on many sides, was worthy of serious consideration by the Commission. He agreed that the draft articles should be referred to the Drafting Committee with a view to the preparation and submission of clear texts to the Commission and to Governments.

15. While he was among those who could have accepted the idea that the topic was more or less adequately covered by the four existing codification conventions, he appreciated that some aspects required clarification. One of the difficulties was to devise rules that would be workable in all the countries concerned, without having to have someone with a doctorate in international law standing by at all stages to give an instant legal opinion. It was necessary to develop rules that were as simple as possible to apply. He noted that the Special Rapporteur had made a serious effort to resolve the problems that still arose in relations between States and to develop acceptable compromises to safeguard all the interests involved, while also harmonizing, and to some extent rationalizing, existing law.

16. On the four main issues raised by the Special Rapporteur (2069th meeting, para. 43), his position was akin to that of Mr. Ogiso, Mr. Hayes and Mr. McCaffrey. First of all, he saw no compelling reason why the régime of the draft should not be extended to international organizations of a universal character, or at least to their communications with their own regional offices. He recognized, however, that more than one article might be needed for that purpose. It had of course been argued that States would never agree to extend the scope of the draft in that way, but he was prepared to leave the matter to debate in the Sixth Committee of the General Assembly and to the comments of Governments, without prejudging the issue. There was considerable merit in Mr. Calero Rodrigues's comments (2077th meeting), particularly in regard to the desirability of implementing the concept through a separate optional protocol, but with the proviso that the fate of the protocol should not be allowed to hold up progress on the rest of the articles.

17. On the question of communications between States *inter se*, he thought the functional approach tended to support the retention of the words "or with each other", in article 1.

18. Another question raised by the Special Rapporteur, and dealt with in article 17, was the inviolability of temporary accommodation. Although the Special Rapporteur had suggested that there might be a lacuna if temporary accommodation was not protected, he himself was unaware of any such problem. His position was that, since the courier and bag were independently protected, there was no need for a specific article of that kind. If the article was retained, however, Mr. Ogiso's proposal (2070th meeting) that the first sentence of paragraph 1 be deleted would be acceptable as reflecting his general approach.

19. The granting of qualified jurisdictional immunity to the courier, under article 18, seemed to be in accord with the functional approach, and he therefore supported that article as drafted.

20. As to article 28, he recognized the need to maintain a very careful balance, so as to ensure that the receiving and transit States had some protection against improper use of the bag. Had the underlying principle of reciprocity been properly observed, the Commission would not have had to deal with that particular problem.

21. Scanning raised the problem of how to make sure that the devices used did not violate confidentiality. He none the less tended to the view that scanning should not be permitted, whether it was legally permissible in theory or not. Sniffer dogs might be permitted as an acceptable compromise if the object was to preserve the inviolability of the bag, while at the same time taking account of the concern about drug trafficking.

22. Some members had suggested that the diplomatic bag did not remain in the territory of transit States long enough to warrant the provision on its protection. However, a State using the bag for improper purposes would not necessarily adhere to its transport schedule. He was not suggesting that the principle to be incorporated in the articles should be based on an assumption of bad faith, but a delicate balance had to be struck between protecting legitimate uses and guarding against abuses. He was therefore in favour of according the same rights to transit States as to receiving States. For the text of article 28, he preferred alternative C (A/CN.4/417, para. 251), as laying the best foundation for a compromise.

23. It had been argued that that approach might constitute a step back from positive international law, but he believed that, on the contrary, it could be part of progressive development towards a more equitable and functional balance. As to the idea that a receiving or a transit State might overuse the exception provided for in paragraph 2 of article 28, he was inclined to think that

reciprocity would be adequate to prevent such overuse and to ensure a viable régime.

24. Some concern had been expressed about the meaning of the revised text of article 32 (*ibid.*, para. 274) and whether the word "complement" adequately conveyed the relationship between the present articles and the codification conventions. It had further been suggested that the provision that "the present articles shall not affect other international agreements in force" might be a deviation from the terms of the 1969 Vienna Convention on the Law of Treaties and from the principle it laid down of the supremacy of later instruments. He believed the Commission should seek to harmonize the present draft articles with those it was developing on other topics, in order to ensure that the same terms were used to mean the same things. He tended to agree with Mr. Bennouna's views (2077th meeting), but was also sure that the Special Rapporteur saw the need for harmony with the approaches adopted in other draft conventions.

25. He supported the proposed deletion of article 33. Although he knew that the article had originally been included in the hope that the loss of uniformity resulting from the creation of a hybrid régime would be compensated by the greater acceptability of the draft articles, he believed it was better to face the issue head-on and try to develop a broadly based set of articles that would attract solid support. He did not object to developing the law to some extent, but too much innovation or deviation from what had already been codified would make it harder to persuade States.

26. The Special Rapporteur had performed a valuable service to the Commission and the international community. He supported the referral of the draft articles to the Drafting Committee.

27. The CHAIRMAN, speaking as a member of the Commission, thanked the Special Rapporteur for his capable and comprehensive summary of the comments made by Governments on the draft articles. The failure of a great many Governments to offer comments could be explained by the fact that they either endorsed the draft articles or were not interested in them. But even though comments had not been received from a representative number of Governments, the Commission could still use the comments it had received (A/CN.4/409 and Add.1-5) to proceed with the fulfilment of its mandate, namely to complete the second reading of the draft articles during the term of office of its present membership.

28. The objective of the draft was comprised in one basic principle: protection of the diplomatic bag and observance of its inviolability, as being essential to respect for the communications of States with their representatives abroad. The main intention was to give the diplomatic courier immunities and privileges equivalent to those of the head of a diplomatic mission. It was perhaps for that very reason that so few comments had been received from developing countries; they rarely used the services of diplomatic couriers because they were too costly, especially in times of economic crisis like the present.

29. In response to the Special Rapporteur's request, he would focus his remarks on a few fundamental issues arising from the comments by Governments.

30. On article 2, he endorsed Mr. Reuter's view (2070th meeting) that the régime provided for in the draft should be extended to international organizations on a case-by-case basis, with the necessary restrictions. The privileges and immunities granted to an international organization should be determined by its functions. Some organizations, such as those working for international peace and security, should enjoy complete confidentiality of their correspondence. But it was generally recognized that all international organizations needed to be able to communicate freely, quickly and in confidence with their member States and regional offices. The right to use diplomatic bags and couriers was recognized in article 10 of the 1946 Convention on the Privileges and Immunities of the United Nations, as well as in a number of individual headquarters agreements, including those between FAO and Italy, IAEA and Austria, UNESCO and France, and WHO and Switzerland. Multilateral relations were now a fundamental part of international life that would surely increase in importance in the future, and extension of the scope of the draft articles to international organizations would promote the progressive development of the rights they enunciated. He agreed with other speakers that the least problematic means of accomplishing that purpose might be to incorporate the relevant provisions in an optional protocol.

31. Article 17 did not seem to be important; since it would create more difficulties than it resolved, it should be deleted. His comments on article 27 could best be made in the Drafting Committee.

32. With regard to article 28, on protection of the diplomatic bag, he observed that anyone who had been a diplomat knew that the inviolability of the bag was something of a myth. Advanced technical devices could easily be used to determine its contents, and unaccompanied bags were often left unguarded for long periods, during which they could be not only scanned but also opened without anyone's knowledge. Those facts should be kept in mind as the Commission proceeded with its work on developing a theoretical foundation for the secrecy of communications between States. He supported alternative C proposed for article 28 (A/CN.4/417, para. 251), as the one which best covered all the possibilities that might arise regarding treatment of the diplomatic bag.

33. He agreed that article 33 should be deleted if the Commission's goal was to create a coherent and unified régime. States were more likely to endorse the draft articles if they expanded and consolidated the various provisions relating to the diplomatic bag than if they added to them.

34. He also endorsed the idea that the Commission should attempt to elaborate a flexible system for the settlement of disputes; in order that its inclusion in the draft articles might not affect the willingness of States to ratify them, such a provision might take the form of an optional protocol.

35. The draft articles should be referred to the Drafting Committee for review in the light of the comments made by Governments, so that the Commission could consider them on second reading at its next session.

36. Mr. YANKOV (Special Rapporteur), summing up the debate, thanked the members of the Commission for their comments, critical observations and suggestions. The debate had been rich yet streamlined, focusing on the most important issues, and would be of great assistance in future work on the topic, including work in the Drafting Committee and in the Sixth Committee of the General Assembly. All members of the Commission appeared to favour referring the whole set of draft articles to the Drafting Committee. For practical reasons, he would confine his summing-up to the main issues, but wished it to be understood that he would take account of all substantive and drafting comments made during the debate. It might perhaps be useful if he prepared a working paper listing all the suggestions made in order to assist the Drafting Committee, as well as a brief analytical outline of the debate in the Sixth Committee at the forthcoming session of the General Assembly, and, on that basis, submitted revised versions of the articles for the Drafting Committee's consideration.

37. The instructive exchange of views on the purpose and form of the draft, and on methodology, specifically the concept of a comprehensive and functional approach, had resulted in a number of constructive suggestions which he would endeavour to follow.

38. Article 1, as adopted on first reading, had given rise to no substantive comments; it seemed that the concept of the *inter se* character of official communications caused no difficulty. The main discussion had centred on the revised text of paragraph 2 as proposed in the report (A/CN.4/417, para. 60), which extended the scope of the article to intergovernmental organizations. He had considered it his duty to raise that issue again, not only because some Governments had specifically suggested it in their comments, but also, and more particularly, because the Commission, in its commentary to article 2,[4] had expressed the wish that the question should be re-examined before a final decision was taken.

39. The debate had shown that there were two main schools of thought on the subject: the first maintained that the draft articles should apply to the couriers and bags of States, without excluding couriers and bags employed for the official communications of international organizations; the second held that their scope should be extended to international organizations of a universal character, i.e. the United Nations and its specialized agencies, IAEA and similar organizations, as specified in article 1, paragraph 1 (2), of the 1975 Vienna Convention on the Representation of States. Several possible modalities had been suggested for extending the scope of the draft articles, e.g. an optional implementation clause along the lines of article 90 of the 1975 Vienna Convention, or an optional protocol attached to the future convention. While continuing to believe that there were valid reasons in favour of a qualified extension of the scope of the draft articles, he thought the idea required further study; the various options should be considered with great care and the reactions of Governments scrutinized further before a final decision was taken.

40. In regard to the facilities, privileges and immunities accorded to the courier, the debate had concentrated principally on articles 17 and 18, although several members had also made interesting comments on articles 7, 9 and 11; those comments would certainly be taken into consideration in the final drafting of the articles and commentaries.

41. All speakers had commented on article 17, expressing a wide range of views. Some had argued that the text reflected a functional approach and should be retained as it stood; some had been in favour of deleting the article altogether; and others had suggested amending the text, either by strengthening the principle of inviolability and proper protection of the bag, or by deleting the first sentence of paragraph 1. His own view was that the text adopted with no formal reservations on first reading provided a basis for an appropriate provision. The question should be studied further with a view to finding a formulation that might offer better prospects of acceptance.

42. Replying to the questions raised by Mr. Ogiso (2070th meeting) concerning article 18, he observed that the courier's immunity from the jurisdiction of the receiving State and the transit State was in respect of acts performed in the exercise of his functions. That immunity did not extend to an action for damages arising from an accident caused by a vehicle the use of which might have involved the courier's liability, where those damages were not recoverable from insurance. In such a case, a civil action might be brought if the insurance company could not pay the indemnification. It had been suggested that a provision should be added to the effect that the courier was required to have insurance coverage against third-party risks. The article might also be improved by the drafting amendments indicated in the report (A/CN.4/417, paras. 159-161).

43. In reply to Mr. Hayes (2077th meeting), who had expressed some doubt about the need for paragraph 5 of article 18, he pointed out that a safeguard provision of that kind was virtually a standard rule in diplomatic and consular law. In his view, the paragraph served a useful, if modest, purpose.

44. The merger of articles 19 and 20 proposed in the report (A/CN.4/417, para. 168) had not given rise to substantive objections; the revised text might therefore be considered to provide a basis for consideration by the Drafting Committee.

45. The next major group of problems discussed had been those relating to the status of the bag, and article 28 had received particular attention, which showed once again that protection of the diplomatic bag was a key issue. While the adoption of alternative B (*ibid.*, para. 247) was probably the easiest solution, it had been thought that it would be a deviation from the Commission's objective of establishing a coherent and uniform régime for all categories of bags. Although not without

[4] *Yearbook . . . 1983*, vol. II (Part Two), p. 54.

foundation in existing conventional law, alternative B had not received sufficient support at the current session. All the other solutions considered by the Commission—the bracketed text of article 28 considered on first reading, alternatives A and C proposed by the Special Rapporteur, the proposal of the Government of the Federal Republic of Germany (A/CN.4/409 and Add.1-5), and the solutions advanced during the session, including an amendment to alternative C suggested by Mr. Eiriksson (2079th meeting, para. 37)—deserved further meticulous examination. Account should also be taken of any views that might be expressed in the Sixth Committee at the forty-third session of the General Assembly and of any further written comments submitted by Governments. The debate had indicated a trend in favour of alternative C, but it might be advisable to consider the matter further.

46. On the question of the option of the transit State to request the opening of the bag, he noted that the majority of speakers had taken the view that the position of the transit State should not be the same as that of the receiving State. Without overlooking the legitimate interests of the transit State, he agreed that the proposed procedure might lead to unreasonable delays and impede the rapid transit of the bag. Hence the majority view appeared to be justified.

47. With regard to article 26, some speakers had said that protection of the unaccompanied diplomatic bag sent by post or other mode of transport deserved closer attention. While recognizing that the revised text he proposed (A/CN.4/417, para. 215) did not fully meet that genuine concern, he drew attention to the passage in his report (*ibid.*, para. 214) recalling that proposals to obtain favourable treatment of the bag by national postal administrations had been rejected by the competent organs of UPU. That being so, he thought that further attempts might be made to improve the text of the article by including provision for bilateral or multilateral arrangements to ensure safe and rapid transmission of the bag.

48. The revised texts of articles 30 and 31 had elicited no specific comments, but only some drafting proposals and a general comment concerning the need for article 31.

49. As to article 32, both the text provisionally adopted on first reading and the revised text proposed in the report (*ibid.*, para. 274) had been the subject of a most useful discussion. The relationship between the draft articles under consideration and other agreements and conventions was a rather complex one, and further reflection was called for in order to arrive at a fully adequate formulation. Throughout the period of his work on the topic, he had taken into account the relevant provisions of the 1982 United Nations Convention on the Law of the Sea and the 1969 Vienna Convention on the Law of Treaties. In the draft articles under consideration, the doctrine of *lex posterior* or *lex specialis* had to be applied with great caution and prudence, because the draft, while based on the four existing codification conventions, went beyond them in certain respects. A study of some precedents might prove useful, but in conducting such a study it should be recognized that the role of the draft articles was to be very much more modest than that of the United Nations Convention on the Law of the Sea. The latter had been conceived as an umbrella convention constituting the legal basis for special conventions, whereas the draft articles were intended to form a special convention, based on four existing codification conventions. The matter obviously required further consideration, with a view to arriving at a formulation that was as precise as possible and could be widely accepted.

50. The proposal to delete article 33 for the reasons explained in the report (*ibid.*, paras. 275-277) had been widely supported. Arguments in favour of providing grounds for a more general acceptance of the draft should not, however, be overlooked. Further efforts might be made to achieve that purpose through other provisions of the draft.

51. A useful debate had been held on the question of settlement of disputes. The idea of an optional protocol having been advanced, he would remind the Commission that the Optional Protocol concerning the Compulsory Settlement of Disputes appended to the 1961 Vienna Convention on Diplomatic Relations had been ratified by 52 of the 151 States parties; in the case of the Protocol to the 1963 Vienna Convention on Consular Relations, that ratio had been 41 to 116, and in that of the Protocol to the 1969 Convention on Special Missions, 10 to 23. For the 1975 Vienna Convention on the Representation of States, a different course had been adopted by providing for a procedure for the settlement of disputes through consultation (art. 84) and conciliation (art. 85). The question of the approach to be adopted in the present draft should be considered further.

52. Agreeing with the critical comments on the presentation of the eighth report, he said that his main concern had been to produce a document that was not too bulky. He recognized, however, that the report would have been more satisfactory had it included the texts of the draft articles provisionally adopted on first reading as well as the revised texts proposed, and had the written comments and observations of Governments referred to been identified by country. Although the number of written comments received had been rather small, those received in the past on topics that might have been considered more interesting had not been significantly more numerous.

53. He believed that the existing articles, i.e. those provisionally adopted on first reading and the revised texts submitted in his report, together with the proposals made during the current session, would provide a basis for the Commission's future work, particularly for that of the Drafting Committee.

54. Mr. BARSEGOV asked that a brief summary of Mr. Yankov's statement be circulated as early as possible.

55. The CHAIRMAN suggested that the draft articles, including the texts revised by the Special Rapporteur, should be referred to the Drafting Committee for consideration in the light of the discussion, on the understanding that the Special Rapporteur could submit new texts as appropriate.

It was so agreed.

56. Mr. KOROMA endorsed the Special Rapporteur's statement regarding the number of replies from Governments; the coverage of the present topic had been approximately the same as that of other topics. Hence the fact that the number of comments was small should not influence the Commission in its work.

57. With regard to the presentation of reports, he urged that all footnotes should be placed at the bottom of the page to which they related and not grouped together at the end.

58. The CHAIRMAN pointed out that it was in only one language version of the report on the topic that the footnotes had been placed together at the end.

59. Mr. YANKOV (Special Rapporteur) observed that, for technical reasons, there was now a tendency to group all the footnotes together at the end of a book. He certainly agreed with Mr. Koroma that, in the reports of special rapporteurs, it was preferable to place the footnotes at the foot of the page, so that they could be read together with the passages to which they referred. He hoped that that could be done in all future reports, provided that it did not unduly increase costs.

Programme, procedures and working methods of the Commission, and its documentation (*concluded*)*

[Agenda item 9]

60. Mr. AL-QAYSI said he wished to raise an administrative matter. The summary records of the Commission were being circulated with considerable delay, and he had not yet received the records of meetings at which he had spoken and which had been held a long time previously. The main difficulty, however, would arise when the session ended; summary records which had not been circulated by then would be posted to members, and it would be very difficult for them to observe the time-limit for sending in corrections. Clearly, some leeway was necessary in that situation.

61. Mr. BARSEGOV said he wished to draw the attention of the secretariat and of the conference services to the fact that only one summary record had so far been circulated in Russian, namely the record for the first meeting of the session, which was a very short one. He had received no other summary records in his own working language. In fact, he had not yet received the summary records in Russian for the previous session either. In the circumstances, he must disclaim all responsibility for any inaccuracies that might appear in the summaries of his statements.

62. Mr. KALINKIN (Secretary to the Commission) explained that the original texts of the summary records were produced alternately in English and in French and subsequently translated into the other language, as well as into Arabic, Chinese, Russian and Spanish. The position with regard to distribution was that the last records to appear in English were those of the 2066th and 2068th meetings, and in French those of the 2065th and 2069th meetings. The other language versions lagged behind, and Mr. Barsegov was correct in saying that the only summary record to have appeared in Russian was that of the 2042nd meeting.

63. The secretariat would not fail to bring the remarks of Mr. Al-Qaysi and Mr. Barsegov to the attention of the competent services of the United Nations. Similar problems had arisen in the past and the answer which had been received was that the conference services were understaffed and found it difficult to keep pace with the Commission's meetings. Moreover, the financial position of the United Nations made it difficult to engage more staff.

64. Mr. BEESLEY suggested that the views expressed by Mr. Al-Qaysi and Mr. Barsegov should be recorded as the views of the whole Commission, since the concern of those two members was shared by all the others.

65. Mr. AL-QAYSI said that he had had no intention of criticizing the secretariat of the Commission, which was not responsible for the serious situation to which he had drawn attention. But he asked that some measure of flexibility be introduced in the arrangements for submitting corrections to summary records.

66. Mr. HAYES supported Mr. Al-Qaysi's request and said that much of the difficulty would be removed if the time-limit for sending in corrections were extended.

67. Mr. KALINKIN (Secretary to the Commission) said that the time-limit for corrections had been extended from three days to two weeks. If the Commission so wished, it could ask that the time-limit be extended further, and the secretariat would raise the matter with the appropriate services.

68. Mr. CALERO RODRIGUES said that the most important question was that of summary records received by members at their home addresses after the end of the session; the two-week time-limit might be difficult to observe in that case. It was necessary to ensure that in those circumstances corrections received late would still be accepted. He understood that the services concerned were adopting a flexible attitude.

69. Mr. BARSEGOV said he wished to make it clear that he was not complaining about the work of the Secretariat. He recognized the difficulties involved and believed that a flexible approach should be adopted. Perhaps his own statements could be made available to him without delay so that he could correct them?

70. He appreciated that the matter was not one for the Commission's secretariat, but for the conference services. He urged that the final text of his statements in English, French and other languages should not be issued until he had been able to correct the Russian text. He needed to have an assurance on that point; otherwise he must disclaim all responsibility for the passages appearing under his name in the summary records.

71. Mr. Sreenivasa RAO associated himself with the comments of members on the need for more time to send in corrections to summary records. He noted that, when he sent in a correction to a record, he did not receive a corrected version.

72. The CHAIRMAN pointed out that all the corrections communicated by members were incorporated in

* Resumed from the 2046th meeting.

the summary records of the session, which appeared in final form in volume I of the Commission's *Yearbook*.

73. He suggested that the secretariat should inform the conference services of the Commission's wish to receive the summary records punctually during its sessions. In the event of some summary records not being circulated by the end of the session, the competent services would be urged to adopt a flexible approach regarding the time-limit for corrections. Those services would also be asked to take due account of corrections submitted by members in their own working languages before finalizing the records in the other languages.

74. Mr. KALINKIN (Secretary to the Commission) said that the best way for the secretariat to deal with the matter would be to insert an appropriate paragraph in the Commission's report on the current session. That paragraph would reflect the views expressed during the present discussion on the problem of the circulation of summary records and the submission of corrections to them.

75. Mr. BEESLEY said that perhaps matters should be brought to the attention of the Economic and Social Council, which was at present meeting in Geneva and was responsible for co-ordination in the United Nations.

76. Mr. KALINKIN (Secretary to the Commission) pointed out that, since the Commission was a subsidiary body of the General Assembly, the appropriate way to deal with organizational matters was to record the views of members in the Commission's report to the Assembly. The Legal Counsel would then be in a position to make representations to the Under-Secretary-General having responsibility for all the conference services of the United Nations.

77. The CHAIRMAN suggested that the Commission should adopt that course, and request its Rapporteur and the Chairman of the Planning Group to draft a paragraph for inclusion in the report. The Commission would have an opportunity of discussing the text of that paragraph when it considered its draft report. If there were no objections, he would take it that the Commission agreed to adopt that suggestion.

It was so agreed.

The meeting rose at 1 p.m.

2081st MEETING

Tuesday, 19 July 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

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

Jurisdictional immunities of States and their property (A/CN.4/410 and Add.1-5,[1] A/CN.4/415,[2] A/CN.4/L.420, sect. F.2)

[Agenda item 3]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his preliminary report on the topic (A/CN.4/415).

2. Mr. OGISO (Special Rapporteur), after giving a brief account of the history of the topic, recalled that, at its 1972nd meeting, on 20 June 1986, the Commission had provisionally adopted on first reading a complete set of draft articles on jurisdictional immunities of States and their property,[3] and that the draft articles had been transmitted, through the Secretary-General, to Governments, with a request for them to submit their comments and observations by 1 January 1988.

3. By 24 March 1988, comments and observations had been received from 23 Member States and Switzerland.[4] In his preliminary report (A/CN.4/415), he analysed those comments and recommended some amendments to the draft articles which would enable a consensus to be reached on the texts. In preparing his report, he had also taken into consideration national and international instruments on State immunity and the diverse views expressed in the Sixth Committee of the General Assembly.

4. The previous Special Rapporteur had submitted to the Commission eight reports based upon the idea that there were two kinds of acts of States, namely *acta jure imperii*, to which immunity from jurisdiction applied, and *acta jure gestionis*, to which it did not apply. On that point, the discussion in the Sixth Committee, as well as written comments by Governments, revealed certain basic differences of opinion between those who favoured the so-called "restrictive" theory of State immunity and those who supported the theory of "absolute" immunity. Thus Belgium, the Federal Republic of Germany, the United Kingdom and Switzerland believed that there was a tendency in international law to limit the immunity of a State from the jurisdiction of the courts of another State and therefore held that recent international and national practice should be reflected in the draft articles. It should be noted that the legal position in question was not confined to theoretical writings and court decisions; it was also reflected in legal instruments, such as the 1972 Euro-

---

[1] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[2] *Ibid.*

[3] See *Yearbook . . . 1986*, vol. II (Part Two), pp. 8 *et seq.*

[4] These comments and observations, together with those received from five other Member States during the present session, are reproduced in document A/CN.4/410 and Add.1-5.