

Document:-  
**A/CN.4/SR.2078**

**Summary record of the 2078th meeting**

Topic:  
**<multiple topics>**

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

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ing and come back to it once the entire draft had been completed.

63. With regard to article 33, he shared Mr. Calero Rodrigues's views and recalled that the idea of an "optional declaration" had originally been put forward by a member of the Commission in connection with the question now dealt with in article 28; the problem was whether the inviolability of the bag should be absolute, whether the inspection of the bag by electronic means should be allowed and whether the diplomatic bag should be treated in the same way as the consular bag.<sup>6</sup> The Special Rapporteur had taken up that idea, which had been put forward in a very specific context, and had introduced it in the wider context of the applicable legal régime as a whole, thus making it an entirely different idea that was much broader than it had been originally. Moreover, if article 33 was retained, it would give rise to practical problems, for it would be for minor officials to decide which régime to apply according to the option chosen by States and it was not certain that they would be in a position to do so. If article 33 was designed to incite wide acceptance by States of the draft articles as a whole, it should perhaps be retained provisionally, although the possibility of deleting it should not be ruled out in the event that it raised practical problems.

64. As to referral of the articles to the Drafting Committee, he thought that the Commission should proceed without further delay to the finalization of the text. It would nevertheless be better to refer all the articles to the Drafting Committee, and not only those relating to the four main issues referred to by the Special Rapporteur, since all those texts were closely linked.

65. With regard to the question of the settlement of disputes, that might be dealt with later, perhaps in a separate protocol, as Mr. Bennouna had suggested, assuming of course that the question warranted consideration by the Commission, given the modest objectives of the draft articles.

#### Organization of work of the session (continued)\*

[Agenda item 1]

66. Mr. BARSEGOV said that he would like to know what the Commission's programme of work would be from now until the end of the session. There were still two topics to be discussed, namely State responsibility and jurisdictional immunities of States and their property, and he asked whether the special rapporteurs concerned would be able to introduce their reports at the current session, even on a preliminary basis, so that the members of the Commission would have time to study them before the following session.

67. The CHAIRMAN said that the Enlarged Bureau would meet the following day to consider the programme of work up to the end of the session and that he would present the Enlarged Bureau's recommendations at the Commission's next meeting.

*The meeting rose at 1 p.m.*

<sup>6</sup> See *Yearbook . . . 1985*, vol. I, p. 179, 1906th meeting, para. 7 (Sir Ian Sinclair).

\* Resumed from the 2044th meeting.

## 2078th MEETING

*Wednesday, 13 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, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

#### Organization of work of the session (concluded)

[Agenda item 1]

1. The CHAIRMAN announced that the Enlarged Bureau had drawn up a proposed programme of work based on an exchange of views at the meeting it had just concluded. According to the proposed programme, discussion on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier would continue until Friday, 15 July, when the Special Rapporteur would sum up the views expressed by members and debate on the topic would be closed.

2. On Tuesday, 19 July 1988, two Special Rapporteurs, Mr. Ogiso and Mr. Arangio-Ruiz, would introduce their respective reports on the remaining items on the Commission's agenda, namely jurisdictional immunities of States and their property, and State responsibility. There would be no debate on those topics at the current session, but if time permitted, members would be able to ask questions about the introductory statements and reports of the Special Rapporteurs. The discussion of the report of the Drafting Committee on the draft Code of Crimes against the Peace and Security of Mankind would take place from 20 July to 22 July inclusive. The final week of the session (25 to 29 July) would be devoted to discussion of the Commission's report to the General Assembly.

3. In reply to a question by Mr. SEPÚLVEDA GUTIÉRREZ, he said that two meetings a day would be held throughout the final week.

4. If there were no objections, he would take it that the Commission agreed to adopt the programme of work proposed by the Enlarged Bureau.

*It was so agreed.*

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

[Agenda item 4]

<sup>1</sup> Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

<sup>2</sup> *Ibid.*

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR  
(continued)

CONSIDERATION OF THE DRAFT ARTICLES<sup>3</sup>  
ON SECOND READING (continued)

5. Mr. BARSEGOV said that, in his eighth report (A/CN.4/417), the Special Rapporteur had summed up the substantial results achieved by the Commission in its work on the topic, namely completion of consideration of the draft articles on first reading and examination of the articles by Governments. The Special Rapporteur deserved credit for the energy and professional competence he had brought to bear on his task.

6. The creation of a uniform régime for all types of correspondence, bringing together in a single instrument all the relevant rules of international law, would facilitate the smooth flow of communications between States and their representatives and consulates and thereby contribute to the broadening and strengthening of the numerous and varied links between States. The draft articles must therefore incorporate and elaborate rules that extended full international legal protection to diplomatic couriers and thus guaranteed the freedom of diplomatic communications.

7. The text prepared by the Commission constituted, on the whole, an acceptable basis for the adoption of the future instrument; but even though the Commission's work was nearing completion, much remained to be done. A number of the provisions of the draft needed to be refined and made more balanced, in conformity with the purpose they were intended to serve, and he wished to make some remarks on that point.

8. His first remark related to article 17, which was one of the key provisions. In international law, the issue of the inviolability of temporary accommodation was closely linked to that of the inviolability of diplomats, or diplomatic couriers, and of their living accommodation. The venerable tradition of diplomatic relations had been crystallized in the principle of the inviolability of the diplomatic courier's person. Since respect for that principle was in practice contingent on acknowledgement of the inviolability of the courier's accommodation, international law applied the same rule on that matter. The principle of the absolute inviolability of consular premises, which was set out in a number of bilateral conventions, had an even broader basis in international law: article 18 of the 1928 Havana Convention regarding Diplomatic Officers<sup>4</sup> and article 339 of the Bustamante Code<sup>5</sup> came immediately to mind.

9. Article 31 of the 1963 Vienna Convention on Consular Relations, which was usually cited as restricting the scope of the inviolability of the temporary accommodation of a diplomatic courier, did not in fact address the general issue at all. Paragraph 2 of that article covered intrusions into consular premises "in case of fire or other disaster requiring prompt protective action", and indicated that, even in such situations of

*force majeure*, the consent of the ranking consular officer had to be assumed. The restrictive provisions of that article could hardly be considered to be a generally accepted rule, much less to apply to the diplomatic courier. A better correlation could be found between article 17 of the draft and article 30, paragraph 1, of the 1969 Convention on Special Missions, under which the private accommodation of members of a special mission enjoyed "the same inviolability and protection as the premises of the special mission". There would seem to be little justification for refusing to extend to the diplomatic courier rights that were accorded to the members of special missions.

10. The fact that the diplomatic courier remained in the receiving or transit State for only a short time had been cited to justify the denial of absolute inviolability to his temporary accommodation. The logic of that argument—if it existed at all—limped on both legs. Accommodation had to be inviolable, because otherwise the person of the diplomat or of the diplomatic courier could not be inviolable—and that fact was not affected by the length of stay. It was unlikely that recognition of the inviolability of temporary accommodation would plunge the receiving State into a tangle of red tape; the only difficulties that might arise were those resulting from exceptional circumstances of *force majeure*.

11. To ensure a balance between the requirements of human safety in the event of fire or other disaster and the inviolability of the diplomatic courier and the communications entrusted to him, paragraph 1 of article 17 should clearly provide that the agents of the receiving State or the transit State might not enter the diplomatic courier's temporary accommodation without his "clearly expressed" consent. The addition of those two words would clarify the text and make it more logical, thereby preventing misunderstandings.

12. In the last sentence of paragraph 1, which provided that consent might be "assumed in case of fire or other disaster requiring prompt protective action", it should be made clear that entry of the premises could take place "provided that all necessary measures are taken to ensure the protection of the diplomatic bag, as stipulated in article 28, paragraph 1". Paragraph 3 of article 17, which provided for the possibility of inspection or search of the temporary accommodation of the diplomatic courier if there were serious grounds for believing that there were in it articles the possession, import or export of which was prohibited or regulated, should set out the obligation of the receiving State or the transit State, "in the event of inspection or search of the accommodation of the diplomatic courier, to guarantee him the opportunity to communicate with the mission of the sending State so that its representative can be present during such inspection or search".

13. In his report (*ibid.*, paras. 143-144), the Special Rapporteur cited those amendments, suggested by the Soviet Government, but did not make it clear whether he supported them. He expressed the view (*ibid.*, para. 147) that the present text provided "an acceptable compromise solution, striking a reasonable balance between the legitimate interests of the sending State and those of the receiving or transit State", and that drafting amendments could be made with a view to improving the text,

<sup>3</sup> For the texts, see 2069th meeting, para. 6.

<sup>4</sup> League of Nations, *Treaty Series*, vol. CLV, p. 259.

<sup>5</sup> Convention on Private International Law (Havana, 1928), *ibid.*, vol. LXXXVI, p. 111.

but that they should not jeopardize that balance. But where was the line of demarcation between substantive and drafting amendments to be drawn? The amendments to which he had just referred were so straightforward that they could be regarded as drafting amendments. In his opinion, a balance could be struck only through clarifications that reflected absolutely incontrovertible rights and did not jeopardize other interests. If agreement was reached on that point, then article 17 would become acceptable.

14. He was somewhat concerned, however, about Mr. Ogiso's statement (2070th meeting) that he could accept the amendment to paragraph 3 of article 17 proposed by the Soviet Union provided that the last part was deleted. Surely Mr. Ogiso understood that, without the last part of the sentence, the notification procedure would become a mere formality. The purpose of the proposal was certainly not to say that notifying the mission of a sending State of an impending inspection or search implied obtaining its tacit consent.

15. As the Special Rapporteur pointed out in his report (A/CN.4/417, para. 221), article 28, on protection of the diplomatic bag, was a key provision setting out basic rules. The future instrument must endorse the principle of inviolability not only of the diplomatic courier's person and accommodation, but also of the bag. To that end, it was necessary to remove the square brackets in paragraph 1 of the article. The text would then be in line with the provisions of article 27 of the 1961 Vienna Convention on Diplomatic Relations, which was the most authoritative text on diplomatic law in the light of contemporary conditions.

16. If he had understood the position of the Special Rapporteur correctly, that approach corresponded, on the whole, to the one favoured in the report (*ibid.*, para. 226). As the Special Rapporteur pointed out (*ibid.*, para. 227), a significant number of the written comments and observations on the article had made "serious reservations and objections to the examination of the bag directly or through electronic or other technical devices". It would hardly be logical to proclaim the inviolability of archives and other official documents if that rule were not to apply while such documents were in transit. It should be clearly stated that examination of the diplomatic bag, including examination by means of electronic or other technical devices, was prohibited.

17. The proponents of scanning saw it as something distinct from opening the diplomatic bag, and advanced a number of arguments to support their case. For example, they maintained that there were no rules of customary international law prohibiting the scanning of diplomatic bags or their inspection by means of electronic or other technical devices. It was certainly true that the word "scanning" did not appear in any international convention or textbook on international law; but that should not be taken as tacit approval of such procedures. No one could have foreseen the possibility of the use of such methods, even in the future. As to the absence of a prohibition of inspection, he could not agree: that prohibition was not only established by centuries of practice, but was also written down in black and white. The argument that there was no indication of

how inspections were to be carried out was simply not relevant.

18. It had also been suggested that the practice of scanning diplomatic bags should be applied not generally, but only when there was reason to believe that the bag was being used for inappropriate purposes. A right, however, was a right, and, once the right was granted, all protestations about and calls for self-restraint would become merely pious talk. If the special services of technically advanced countries were granted the right to scan bags, it would be futile to try to limit the scope of that right. There was, after all, a principle at stake: either it was recognized that the diplomatic bag was inviolable and might not be opened, or that old-established principle was frankly repudiated.

19. Not only would scanning and similar means of inspection damage correspondence and other documents transmitted on microfilm, but such inspection could also violate the confidentiality of the bag. Governments in favour of inspection naturally claimed that the control that they would have the possibility of exercising would not permit the reading of the documents, so that the relevant provisions of the Vienna Convention on Diplomatic Relations would be respected; on that point he referred members to the comments received from the Governments of the Netherlands (A/CN.4/409 and Add.1-5) and the United Kingdom (*ibid.*). The good faith of Governments seeking to establish the principle of the scanning of the diplomatic bag must not, of course, be put in doubt. Yet the very fact of raising the issue was contrary to the principle of inviolability *vis-à-vis* the Governments whose diplomatic bags would be scanned, and introduced elements of suspicion and distrust in relations between States.

20. In his report (A/CN.4/417, para. 229), the Special Rapporteur stated that the final decision was to be taken by the authorities of the receiving State or the transit State and would depend upon their satisfaction with the explanations provided by the sending State. He also noted the difficulty of proving that the recourse to scanning would not affect the integrity and secrecy of the documents. There could be no guarantee that, should the principle of scanning be accepted, the special services of Governments having the necessary technical equipment would not take advantage of the opportunity afforded. Technology was developing at such a pace that it would be impossible to establish whether or not a document had been read during inspection by scanning. However, as was pointed out in the report (*ibid.*), that solution would satisfy only the small number of States that possessed the requisite scanning technology.

21. To authorize examination of the diplomatic bag by any means whatsoever would clearly be at variance with the established rules of international law, as reaffirmed in the Vienna Convention on Diplomatic Relations. That was the conclusion reached by a number of Governments, including those of Spain and New Zealand; the latter had expressed the wish that article 28, paragraph 1, should make it clear that the use of electronic screening devices was impermissible (A/CN.4/409 and Add.1-5), and the Special Rapporteur had come to the same conclusion.

22. Paragraph 2 of article 28 raised an entirely different problem, that of establishing a comprehensive and uniform régime governing the legal status of all categories of bag. In his report (A/CN.4/417, para. 230), the Special Rapporteur expressed himself in favour of a differentiated régime and referred to the "different treatment" provided for by the 1961 Vienna Convention on Diplomatic Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States, on the one hand, and the 1963 Vienna Convention on Consular Relations, on the other. In paragraph 2 of article 28, the consular bag was set aside from the general legal régime governing postal communications between States and was made subject to a special régime, which permitted its examination, *inter alia*, by means of electronic or other technical devices and its return to the place of origin.

23. His reasons for opposing the use of scanning were applicable to the consular bag as much as to the diplomatic bag, and he disagreed with the Special Rapporteur's idea of providing for a differentiated régime solely on the basis of the differences between article 27, paragraph 3, of the 1961 Vienna Convention and article 35, paragraph 3, of the 1963 Vienna Convention. He pointed out that article 33 of the 1963 Convention provided that consular archives and documents should be inviolable at all times and wherever they might be; that article 35, paragraph 1, of the same instrument set out the obligation of the receiving State to permit freedom of communication on the part of the consular post for all official purposes, and, in the following sentence, clearly placed consular posts on the same level as diplomatic missions; and that article 35, paragraph 2, of the same instrument, corresponding to article 27, paragraph 2, of the 1961 Vienna Convention, proclaimed the inviolability of the official correspondence of the consular post.

24. As to article 35, paragraph 3, of the 1963 Vienna Convention, which the Special Rapporteur had singled out, and which authorized examination of the consular bag as an exceptional measure, in specified circumstances, it was contrary to the laws and practice of many States, which strictly upheld the principle of the absolute inviolability of the consular bag. That provision could not therefore be considered to be generally recognized. According to Soviet doctrine, it imposed excessive limitations on the privileges and immunities of the consular service and its officials, thereby infringing the sovereign rights of States. Soviet practice did not take a narrowly functional, predominantly commercial and economic view of consular law, and did not substantially differentiate between the legal régimes governing diplomatic and consular missions, their staff and their correspondence.

25. The consular agreements and practice of the majority of States showed that the scope of consular immunity was tending increasingly to coincide with that of diplomatic immunity. It was surely not the Commission's task to review established rules and standards governing the relations of States with their missions and consular posts; on the contrary, the principal object of the draft under consideration was to standardize ex-

isting international rules with a view to improving the communications of States with their missions abroad. To reduce the status of the diplomatic bag to that of the consular bag would justify the fears expressed by the Government of Greece (A/CN.4/409 and Add.1-5) and other Governments that the adoption of a new status might lead to the undermining of the rules in force.

26. For the reasons he had just stated, he considered that paragraph 2 of article 28 should not be retained. Of the three alternatives proposed by the Special Rapporteur, he preferred alternative A. Alternative B included a paragraph 2 based directly on article 35, paragraph 3, of the 1963 Vienna Convention; that paragraph in fact referred only to the consular bag. The Special Rapporteur stated in his report (A/CN.4/417, para. 248) that "under the four codification conventions only this type of bag could be opened and returned". However, paragraph 2 of alternative B differed from all four codification conventions in a significant respect: the right to request the opening or return of the bag was granted not only to the receiving State but also to the transit State. The transit State would thus be empowered to grant or withhold permission for the free passage of the bag through its territory, and consequently to decide whether or not the sending State should be permitted to communicate freely with its missions abroad. Such a situation would obviously be contrary to the principle of freedom of communication between the State and its delegations and missions.

27. Alternative C had been submitted by the Special Rapporteur as a "compromise provision" and an attempt to achieve a coherent and uniform régime "striking a balance between the requirements for the protection of the confidentiality of the contents of the bag and the legitimate security and other interests of the receiving or transit State" (*ibid.*, para. 252). That alternative was unacceptable inasmuch as, by aiming at a "unity" of régimes, it reduced the régime governing the diplomatic bag to the more restrictive régime imposed on the consular bag under paragraph 3 of article 35 of the 1963 Vienna Convention on Consular Relations. Whereas, under alternative B, the receiving State and the transit State were empowered to request the opening or the return of the consular bag, under alternative C that right was not confined to the consular bag but extended, by implication, to the diplomatic bag. The proposed text differed from the corresponding passage in the 1963 Vienna Convention by providing that, if the request for the opening of the bag was refused by the sending State, the competent authorities of the receiving State might request that the bag be returned to its place of origin. Moreover, according to alternative C, in the event of disagreement concerning the opening of the bag (whether consular or diplomatic), not only the receiving State but also the transit State was empowered to request the return of the bag to its place of origin. The question also arose whether the consequences of the request for the opening of the bag would differ from those envisaged in the 1963 Vienna Convention and, if so, whether the relevant provisions of that instrument should not be revised. There were as yet no answers to that question, and he therefore strongly preferred alternative A as being simpler, straightforward and based on the law in force.

28. Article 33, concerning the optional declaration, was directly contrary to the object of establishing a coherent and uniform régime for couriers and bags in all the categories listed in article 3 of the draft. To grant the receiving and transit States the right to exclude specific categories of couriers and bags from the application of the articles could lead to serious divergences in State practice and greatly complicate communications, especially where transit was concerned. It was hardly surprising that, as the Special Rapporteur stated (*ibid.*, para. 277), the article had received only “insignificant support” and that “substantial reservations and objections” had been made. He fully endorsed the Special Rapporteur’s conclusion that deletion of article 33 would be advisable (*ibid.*).

29. Mr. KOROMA said that, by mandating the Commission to elaborate a set of coherent and uniform rules governing the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the General Assembly had by implication recognized that the existing rules were not coherent and uniform. Consequently, the first criterion that should be applied to the draft articles under consideration was that of their coherence and uniformity; and in his view they passed that test.

30. The second criterion, of equal importance, was that of the relevance and timeliness of the draft. It would be remembered that incidents involving the status of the diplomatic bag had taken place in Geneva and London some three or four years earlier, focusing the attention of the international community on the Commission’s endeavours. The title of the topic notwithstanding, it seemed obvious that the emphasis should be on the problem of the diplomatic bag. The role of the diplomatic courier was of course an important one, but the protection of the diplomatic bag, its uninterrupted passage and its confidentiality, was essential. In dealing with those problems the draft articles, if they were eventually to become an international convention, must strike the necessary balance between the interests of the sending, transit and receiving States.

31. A point which the Special Rapporteur’s eighth report (A/CN.4/417) did not seem to emphasize sufficiently was that of reciprocity; in achieving the necessary balance between competing interests, the onus should not be on only one category of States.

32. By and large, however, the draft articles before the Commission met present requirements and were ready for second reading. The Special Rapporteur deserved thanks and congratulations for the objectivity and care with which he had brought the text to its present advanced stage. The comprehensive and functional approach he had adopted was valid because it not only did justice to the inviolability of the diplomatic bag and courier, but also provided for observance of the laws and regulations of the receiving and transit States.

33. As to the scope of the draft articles, he believed that for the time being it should be confined to States; to attempt to extend it to international organizations would introduce complications. No two international organizations were alike, and organizations could not enter into reciprocity agreements with States. As ex-

plained by Mr. Reuter (2070th meeting), however, even if international organizations were not parties to the draft articles, they could be invited to implement them. Another possibility was to deal with the matter in the constituent instrument of an organization.

34. In any case, the question of extending the scope of the draft articles to international organizations could not be seriously considered without first making a survey of the volume and nature of the communications of such organizations. Only in that way would it be possible to decide whether there was any justification for giving their couriers and bags the benefit of the future instrument. An important reason for not extending the scope of the draft articles to international organizations was the considerable reluctance of States to grant them privileges and immunities. Any attempt to do so would thus create a further obstacle to acceptance of the draft by States.

35. On the other hand, the proposed régime should be extended to recognize national liberation movements. Those movements performed duties as nascent States, and extending the régime to them would facilitate their diplomatic activities. It should be remembered that many States had recognized the representatives of national liberation movements as diplomatic missions, and the international community could therefore be expected to approve the extension of the draft articles to those movements.

36. Article 11 needed to be reworded. The text should not give the impression that the courier ceased to be a courier when he had delivered the bag at its destination. It should be made clear that a courier’s functions ended only on his departure from the receiving State. Sub-paragraph (b) of article 11, which dealt with the case in which the receiving State refused to recognize the person concerned as a diplomatic courier, would be more appropriately placed in article 12, since that article dealt with cases in which the diplomatic courier was declared *persona non grata* or not acceptable.

37. Article 17, on the inviolability of temporary accommodation, had given rise to some controversy. It was possible that the principle of inviolability of the temporary accommodation of the courier might impose burdens on the receiving or transit State; but those burdens would not be excessive in inter-State relations. The situations in which the inviolability was invoked would arise only occasionally, and, by virtue of the principle of reciprocity, all States would benefit from the provisions of article 17. In the light of all those considerations, he accepted the solution proposed by Mr. Calero Rodrigues (2077th meeting, para. 17), namely deletion of the first sentence of paragraph 1, reading: “The temporary accommodation of the diplomatic courier shall be inviolable.” The second and third sentences were sufficient for the intended purpose.

38. Article 18, on immunity from jurisdiction, was justified by the principle of functional necessity; immunity was an indispensable condition for the efficient performance of the official functions of the diplomatic courier and bag. The provisions of article 18 followed a middle course between full immunity of the courier and bag, and protection of the interests of the receiving and

transit States. He approved of that article, which struck the right balance between the opposing interests and did not give the courier a status to which he was not entitled.

39. Article 25, on the content of the diplomatic bag, dealt with a very sensitive issue. It should be read in the context of the draft articles as a whole. Since paragraph 2 of article 5 stated the duty of the sending State and its courier "to respect the laws and regulations of the receiving State or the transit State", it was quite inappropriate to prescribe in article 25 the permissible contents of the diplomatic bag. The fact that the present international situation had caused alarm in certain States did not justify the adoption of excessive measures which might well defeat the whole purpose of the diplomatic bag.

40. With regard to article 28, on the protection of the diplomatic bag, he was strongly opposed to permitting the search or scanning of the bag, which would defeat the whole purpose of the draft articles. In view of certain abuses which had taken place, it was of course necessary to take account of the concern of receiving and transit States. But the interests of all States must be taken into consideration; they were all concerned that the confidentiality of the bag should be respected.

41. The Special Rapporteur proposed three alternative texts for article 28 (A/CN.4/417, paras. 243-253). In the light of the explanations given by the Special Rapporteur, his own preference was for alternative C, paragraph 2 of which dealt adequately with the case of genuine suspicion that the bag contained unauthorized items. That provision struck the right balance between the interests involved. Clearly, if no inspection was allowed at all, article 28 would prove unacceptable to States.

42. He agreed with Mr. Bennouna (2077th meeting) that article 23 should be dropped. Its provisions would not contribute to a uniform and coherent régime.

43. Mr. MAHIOU congratulated the Special Rapporteur on his objective and scholarly report (A/CN.4/417). Its only defect was the way in which the footnotes were presented in the French version; they had all been placed at the end of the report. He urged that, in future, all footnotes be placed at the foot of the page to which they related.

44. It was a matter for regret that only 29 Governments had sent in written comments on the draft articles. That was not a sufficient number from which to deduce the opinion of the world community. He urged the Commission not to be persuaded by that small body of opinion to alter in any way the delicate balance it had achieved on a number of important points in its draft.

45. He wished to comment on the four main issues indicated by the Special Rapporteur (2069th meeting, para. 43). The first concerned the general approach to the subject. He reiterated his support for the Special Rapporteur's approach, so well explained in his report (A/CN.4/417, paras. 10 *et seq.*). The main purpose of the draft articles, as explained by the Special Rapporteur, was the establishment of a coherent and, as far as possible, uniform régime governing the status of all

kinds of couriers and bags, based on the four codification conventions. It had been objected that the consular bag had certain peculiar features. That problem was adequately dealt with in article 28, and it had proved possible to establish a uniform régime for all types of bag.

46. There was also the problem of the small number of parties to the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States. The position in regard to those two Conventions was very different from that regarding the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, which had been ratified by a large number of States. Any misunderstanding could be avoided by explaining in the commentary to the relevant article that the draft was not intended to create any obligations for States which had not accepted the 1969 or 1975 Conventions.

47. The second issue was that of the scope of application of the draft articles, and in particular whether they should apply to international organizations. In past debates on the subject, he had favoured extending the scope of the draft articles not only to international organizations but also to national liberation movements recognized by the United Nations or by the competent regional organizations. He had not changed his mind on that subject, but he would not press the point in view of the importance of arriving at a generally acceptable draft.

48. So far as international organizations were concerned, he shared the views of Mr. Calero Rodrigues (2077th meeting) and supported the idea of an article providing for optional extension of the future instrument to them. Another possibility would be a separate protocol. Perhaps the Special Rapporteur would state his views on those suggestions.

49. The third issue was the extent of the privileges and immunities to be granted to the diplomatic courier. The Special Rapporteur had invited the Commission to decide the question of the inviolability of temporary accommodation in the light of the observations made by Governments. Some of those observations disregarded the need to strike a balance between the interests of the receiving and transit States on the one hand, and the need for protection of diplomatic communications on the other, which was the underlying theme of article 17. He was opposed to the deletion of that article, although some drafting improvements, on the lines of those suggested by Mr. Ogiso (2070th meeting) and Mr. Calero Rodrigues, could be considered.

50. Article 18, which was based on the functional concept, was a well-balanced and entirely satisfactory provision. Under its terms, the diplomatic courier would enjoy jurisdictional immunity only in respect of acts performed in the exercise of his functions, and there would be no reason to question that immunity. The wording could perhaps be improved by the Drafting Committee.

51. The fourth issue was that of inviolability, more specifically as dealt with in article 28. That article had revealed a divergence of views, particularly on inspection of the diplomatic bag by electronic or other

technical devices. Of the three alternatives proposed by the Special Rapporteur to reflect the different views, he preferred alternative C (A/CN.4/417, para. 251), which endeavoured to strike a balance within the framework of the desired coherent and uniform régime. The text was a genuine compromise between a régime more favourable to the sending State, as exemplified by the relevant provisions of the 1961 Vienna Convention, and a régime more favourable to the receiving and transit States, as exemplified by the relevant provisions of the 1963 Vienna Convention. Any change made in the wording would be at the expense of that balance and would make the article more difficult to accept. It should therefore be retained as it stood.

52. He had opposed article 33, which had been introduced with a view to securing the widest possible acceptance of the future convention, because of the difficulties it would cause. He noted that most of the Governments that had submitted observations had criticized the article. The flexibility it was designed to introduce had become a source of confusion and possible danger for the future convention. He therefore agreed with the Special Rapporteur's proposal that article 33 should be deleted (*ibid.*, para. 277).

53. He had no definite views on the need for a procedure for the settlement of disputes although, as had already been suggested, it might be useful to provide for such a procedure in an annex. He was open to any solution that would be acceptable to the Commission.

54. He suggested that the draft articles as a whole should be referred to the Drafting Committee for examination at the next session, with a view to the completion of a draft convention and the convening by the General Assembly of a diplomatic conference for its adoption.

55. Mr. RAZAFINDRALAMBO congratulated the Special Rapporteur on an exhaustive and erudite report (A/CN.4/417) marked by his characteristic sense of compromise, and expressed continued support for the global approach he advocated.

56. He agreed that it would have been preferable to place the footnotes to the French version of the report at the foot of each page rather than at the end of the document, and would like to know why the names of the various Governments which had sent in observations had been omitted throughout the text. It would also have been helpful, for ease of comparison, if the texts of the articles adopted on first reading had been set out alongside the revised texts.

57. The general conclusion arrived at by most of the Governments which has made observations was that, to a very great extent, the draft achieved the desired objective: establishing a coherent and uniform régime applicable to all types of diplomatic courier and bag. It was regrettable, however, that so few Governments of the third world, and particularly of Africa, had expressed their views. He did not think that that attitude reflected any lack of interest, since the diplomatic courier and, particularly, the unaccompanied diplomatic bag were the only means third world countries had of ensuring the security of their official communications with their diplomatic missions. He was

convinced that they were in favour of the early adoption of the draft by the General Assembly and the convening of a diplomatic conference as soon as possible thereafter.

58. He was not convinced by the arguments against the Special Rapporteur's proposal to extend the scope of the draft to international organizations, and did not see the advantage of rejecting outright the assimilation of international organizations to States, when international law, and the ICJ itself, unequivocally recognized that international organizations, like States, were full subjects of international law. It would have been unnecessary for the Commission to prepare the draft that was the basis for the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which had been modelled exactly on the 1969 Vienna Convention on the Law of Treaties, had international organizations been covered by the 1969 Convention in the first place. But a distinction had to be made between international organizations of a universal character and other organizations; only the former could conclude conventions on privileges and immunities with States, and benefit, without difficulty, from the application of the present articles. If necessary, the possibility of drafting a separate protocol on international organizations could be considered. The same solution could perhaps be adopted for national liberation movements, since unfortunately those movements could not benefit from the régime proposed in the draft, and since any future convention which covered them was unlikely to receive the support of a significant part of the international community.

59. The purpose of part II of the draft was to provide the diplomatic courier with freedom and security to perform his mission. The Special Rapporteur had simply codified the rules set out in the four diplomatic conventions. In aligning the status of the diplomatic courier with that of a diplomatic agent in so far as possible, he had not gone beyond his mandate, which was to draft provisions to ensure the protection of the diplomatic courier. That applied in particular to the rules on personal protection and inviolability laid down in article 16, and to the rules on inviolability of temporary accommodation in article 17. The latter form of inviolability could be no less than the guarantee provided by national penal codes, which treated any intrusion into private homes as unlawful entry. Yet that inviolability was not absolute, for paragraph 3 of article 17 laid down rules for inspection and search of temporary accommodation. He was therefore unable to support article 17.

60. The functional approach to immunity from jurisdiction, as adopted by the Special Rapporteur in article 18, was apparently designed to achieve a fair balance between the interests of the sending, transit and receiving States and to ensure the confidentiality of diplomatic communications. Codification could not be achieved without wide acceptance of the provisions by States, and the principle of absolute inviolability would not be favourably received by the international community; recent history provided too many examples of abuse of diplomatic privileges and immunities. A



general principle of functional immunity from jurisdiction, confined to acts performed in the exercise of the diplomatic courier's functions, seemed to offer an acceptable compromise.

61. Article 28, which was a key provision of part III of the draft and, indeed, of the draft as a whole, introduced a number of innovations, which had not received the unanimous support of States and consequently called for detailed consideration. Paragraph 1, for instance, provided that the bag was "inviolable wherever it may be" and added that it "shall be exempt from examination directly or through electronic or other technical devices". The objections of some States to inviolability of the bag were apparently due to their desire to limit the scope of earlier treaty provisions by omitting any provision prohibiting direct or indirect electronic or technical examination. He could not agree with their position, which was too favourable to the receiving State and contrary to the well-established principles of confidentiality and inviolability of the contents of the bag. Moreover, the fact that some States, especially industrialized States, wished all reference to exemption from electronic or technical examination to be omitted, made it quite clear that those States intended to use such methods when necessary. Third world countries, which did not have such advanced means of inspection, would then be placed at a disadvantage.

62. He believed that the prohibition of electronic devices would not generally apply to security checks at international airports, which were apparently confined to the detection of metal objects. Moreover, the interests of the receiving State were sufficiently covered by article 5, which imposed a duty on the sending State to respect the laws and regulations of the receiving State, and by article 25, which imposed an obligation on the sending State to prevent the dispatch by its diplomatic bag of anything other than official correspondence and documents or articles intended exclusively for official use. Those provisions would help to establish a fair balance between the interests of the States concerned.

63. In paragraph 2 of alternative C proposed for article 28 (A/CN.4/417, para. 251), the Special Rapporteur proposed to extend the procedure applicable to consular bags under the 1963 Vienna Convention on Consular Relations to all bags, including the diplomatic bag. Such controls were to be carried out at the request of the competent authorities of the receiving State, not of the authorities of a transit State through whose territory the diplomatic bag merely passed. A transit State should not have the right to request that the bag be opened or returned to its place of origin. If such a State had doubts about the contents of the bag, it was free to take what security measures it chose and to ask the diplomatic courier to leave its territory immediately. However, should there be a majority in favour of inspection of the bag under the conditions laid down in alternative C, he would gladly support that alternative.

64. With regard to article 32, the Special Rapporteur proposed a revised text (*ibid.*, para. 274) which rightly omitted all reference to bilateral or regional agreements, terms that had a wider connotation than they had in Article 52 of the Charter of the United Nations.

65. Article 33 could seriously disturb the balance of the draft, for optional declarations would multiply the régimes governing the diplomatic courier and the diplomatic bag, thus defeating the object of establishing a coherent and uniform régime. He therefore agreed that the article should be deleted.

66. He did not favour a mandatory procedure for the settlement of disputes, especially as the 1961 and 1963 Vienna Conventions already provided for such procedure in optional protocols.

67. The draft articles should be referred to the Drafting Committee for consideration at the Commission's next session, with a view to adoption of the draft on second reading.

68. The CHAIRMAN announced that, during the week of 4 to 8 July, the Commission had made full use of the time allotted to it by the conference services and had in fact exceeded that time by 35 minutes.

*The meeting rose at 1 p.m.*

## 2079th MEETING

*Thursday, 14 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, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

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

[Agenda item 4]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR  
(*continued*)

CONSIDERATION OF THE DRAFT ARTICLES<sup>3</sup>  
ON SECOND READING (*continued*)

1. Mr. ROUCOUNAS, after congratulating the Special Rapporteur on his very full report to the Commission (A/CN.4/417), said that the draft articles adopted on first reading, on the basis of what had been

<sup>1</sup> Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

<sup>2</sup> *Ibid.*

<sup>3</sup> For the texts, see 2069th meeting, para. 6.