

Document:-
A/CN.4/SR.1782

Summary record of the 1782nd meeting

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

Extract from the Yearbook of the International Law Commission:-
1983, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

1782nd MEETING

Wednesday, 15 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

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

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/359 and Add.1,¹ A/CN.4/372 and Add.1 and 2,² A/CN.4/374 and Add.1-4,³ A/CN.4/L.352, sect. E, ILC(XXXV)/Conf.Room Doc.7)

[Agenda item 3]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR⁴ (*continued*)

ARTICLE 15 (General facilities)

ARTICLE 16 (Entry into the territory of the receiving State and the transit State)

ARTICLE 17 (Freedom of movement)

ARTICLE 18 (Freedom of communication) *and*

ARTICLE 19 (Temporary accommodation)⁵ (*continued*)

1. Mr. BALANDA said that, in his excellent report (A/CN.4/374 and Add.1-4), notable for its clarity, the Special Rapporteur had been right to apply the same comprehensive and uniform approach to couriers and bags of every kind. The main argument in favour of that approach was that, despite the variety of entities that were likely to use a diplomatic courier or a diplomatic bag, the role of the courier and the bag—namely to act as a safe link—was the same in all cases and justified the establishment of a special régime of protection and the granting of guarantees. The empirical and pragmatic method of work had already proved to be valuable in the study of other topics and appeared to be suited to the formulation of the present draft articles, which to his mind were wholly necessary.

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem*.

⁴ For the texts of draft articles 1 to 14 referred to the Drafting Committee at the Commission's thirty-fourth session, see *Yearbook* . . . 1982, vol. II (Part Two), pp. 115 *et seq.*, footnotes 314, 315, 318 and 320-330.

⁵ For the texts, see 1774th meeting, para. 1.

2. The Special Rapporteur had hinted at the need to engage in the progressive development of international law by stating in paragraph 5 of the report:

. . . In many instances it would be necessary to go beyond the existing rules in an attempt to overcome certain loopholes and suggest new provisions which would more adequately correspond to the dynamics of contemporary official communications.

One area in which that need was apparent was the scope of the draft, which should cover the couriers and bags of international organizations and other entities, such as national liberation movements, which had legal personality in modern international law. There was no sound reason not to take account of the existence of increasingly close links between States and international organizations and between international organizations and of the fact that groups of people had freely embarked on the course of self-determination provided for in the Charter of the United Nations.

3. Since the independent nature of the draft and the comprehensive nature of the status of couriers and bags called for uniform rules, it would not be advisable to follow the example of the different régimes for diplomatic bags and consular bags established in article 27, paragraph 3, of the Vienna Convention on Diplomatic Relations and article 35, paragraph 3, of the Vienna Convention on Consular Relations. Similarly, no distinction should be made between a professional or full-time diplomatic courier and a diplomatic courier *ad hoc*, as the Special Rapporteur noted in paragraph 25 of the report.

4. The Special Rapporteur had rightly pointed out that the privileges and immunities to be accorded to the diplomatic courier and the diplomatic bag, as well as their scope, should be based on a fair balance between the requirements of respect for the confidential nature of the bag and those of the security and other legitimate interests of receiving and transit States.

5. Draft articles 9 and 12, submitted in the third report (A/CN.4/359 and Add.1), related to the appointment of the same person by two or more States as a diplomatic courier and to the commencement of the functions of the diplomatic courier, respectively. Following the example of article 39 of the Vienna Convention on Diplomatic Relations, the Special Rapporteur expressed the opinion in paragraph 19 of the fourth report that, for the receiving or the transit State, the functions of the diplomatic courier should be considered to commence the moment he entered their territory, since it was from that moment on that he enjoyed the facilities, privileges and immunities to which he was entitled. However, in order to extend the scope *ratione temporis* of the diplomatic courier's privileges and immunities, it might well be necessary to consider, as did legal writings, that the enjoyment of privileges and immunities commenced the moment the diplomatic courier left the territory of the sending State or that of the State in which the permanent mission or consular post of departure was located. In diplomatic practice a diplomat could be declared *persona non grata* when he was preparing to return to his post, without being in transit in the territory of any State, simply because it

was implicitly recognized that he enjoyed privileged status as soon as he left his country. Again, the practice whereby the same courier was appointed by more than one State was not widespread, but it did exist and it served as a justification for draft article 9, the scope of which should none the less be expanded in order to take account of the possibility that States might also adopt the economical solution of using one and the same diplomatic bag. In discussing draft article 12, the Drafting Committee should take account of the articles now under consideration.

6. An article such as draft article 15, on general facilities, was wholly justified because the diplomatic courier required assistance in order to perform his functions in the territory of the transit or receiving State. In paragraph 26 of the report, the Special Rapporteur stated that the diplomatic courier must be able to perform his duties "without undue difficulties". Such precise wording might nevertheless be dangerous, because it could be interpreted to mean that the receiving or transit State did not have to assist a diplomatic courier who encountered difficulties which that State regarded as normal. For all that, a genuine duty to accord general facilities, which as pointed out in paragraph 27 "could be granted by the central or the local authorities", did exist. Although the wording of draft article 15 was more precise than that of article 25 of the Vienna Convention on Diplomatic Relations, he thought that it should contain a few examples of facilities, particularly in connection with entry into the territory of the receiving State and the transit State and freedom of movement and communication.

7. As in the system established by the Conventions on Diplomatic Relations and on Consular Relations, the diplomatic courier's freedom of movement had to be adapted to the security requirements by which such freedom might be restricted. What was stated in paragraph 38 of the report with regard to freedom of communication was inappropriate because it might suggest that such freedom existed only in respect of the diplomatic courier's communications with the authorities of the sending State or its missions on his route or included in his way-bill. Clearly, the diplomatic courier should be able to communicate freely with the authorities of the sending State or with its missions wherever they were located.

8. In the text of draft article 16, which stated a basic requirement, the word "in" in paragraph 1 should be replaced by the words "in connection with". Again, the principle of non-discrimination enunciated in draft article 6 was understood, but it might also be stated in draft articles 15, 17 and 18. The phrase "or when returning to the sending State" at the end of draft article 17 was not necessary. For the sake of symmetry and to avoid any confusion, the word "official" might be added before the word "communications" in draft article 18, since the functions of the diplomatic courier were described as being "official" in all the other articles under consideration. In the case of draft article 19, the question of accommodation should be linked to the status of the

diplomatic courier, not to "the performance of his official functions", as stated in that provision.

9. Lastly, subject to the drafting problems to which he had drawn attention, the substance of the new draft articles was acceptable. He would like the scope of the draft to be expanded to take account of the need for the development of international relations and was in favour of applying a uniform régime to the diplomatic courier and the diplomatic bag, including the diplomatic courier *ad hoc*, subject to reservations which would take account of the particular features of the diplomatic courier *ad hoc*. In view of its autonomous nature, the draft should not make any distinction in the legal régime governing couriers and bags between diplomatic, consular or other relations, for in the final analysis all couriers and bags served the same purpose.

10. Mr. MALEK said that the report under consideration (A/CN.4/374 and Add.1-4) did not call for many comments. It was clear and dealt with a topic involving a set of rules which were very firmly established in international law and did not give rise to any major problems of application, at least in normal circumstances, for which reason doubts had been expressed in the past about the need to codify the topic. Henceforth, that need could not be questioned.

11. Subject to the useful drafting suggestions that had been made, the draft articles under discussion were acceptable but it would be noted that the term "transit State", defined in draft article 3, paragraph 1 (6), as "a State through whose territory the diplomatic courier and/or the diplomatic bag passes *en route* to the receiving State", was used in preference to "third State", the term employed in article 40 of the Vienna Convention on Diplomatic Relations, in article 54 of the Vienna Convention on Consular Relations, in article 42 of the Convention on Special Missions and in article 81 of the Vienna Convention on the Representation of States. He therefore wondered whether the Special Rapporteur had some special reason for using the term "transit State" and whether it might not be interpreted restrictively, thereby giving rise to problems of application.

12. Moreover, draft articles 15 to 19 laid down obligations for the transit State, but the obligations were in fact decided by the sending State. For example, a State could demand a transit visa for its diplomatic courier to enable him to enter the territory of various other States yet disregard its relations with those countries or their location. Normally there would be no difficulty, but if a problem did arise it would not be possible to determine the limits on the obligations set out in those draft articles. Article 42, paragraph 4, of the Convention on Special Missions did set limitations by providing that the third State was bound to comply with its obligations in respect of couriers, among other persons, only if it had been informed in advance, either in the visa application or by notification, of the transit of the courier and had raised no objection. It would be interesting to know the Special Rapporteur's opinion on that point.

13. Mr. JAGOTA said that, unfortunately, he had not been able to attend the meetings at which the topic had

been discussed at previous sessions and he wished first to make comments of a general nature and refer to some of the earlier draft articles.

14. The subject, although of undoubted importance to the smooth running of international relations, was restricted in scope and it was therefore reasonable to hope that the Commission's objective could be achieved quite speedily. Moreover, much of the subject was already covered in State practice and in existing multilateral conventions in the preparation of which the Commission had played a significant role, namely the Vienna Conventions on Diplomatic Relations and on Consular Relations, the Convention on Special Missions and the Vienna Convention on the Representation of States.

15. However, the General Assembly considered the topic important enough to have assigned the Commission the task of preparing a separate set of draft articles, and the best way of fulfilling that task was to keep the text of the draft articles as simple, clear, brief and functionally oriented as possible. A set of articles that was too long and caused the protocol divisions of foreign ministries too much work might make Governments reluctant to accept the new formulations at all. The central aspects of the topic which had to be borne in mind were, first, the need to ensure freedom of communications between States and their diplomatic missions, consular posts, special missions, missions to international organizations and delegations to international conferences and, second, the question of the inviolability of the diplomatic bag.

16. With regard to the scope of the draft articles, the terms "diplomatic courier" and "diplomatic bag" were not employed in all the relevant international conventions; the Vienna Convention on Consular Relations, for example, referred to the "consular courier" and "consular bag", while the Convention on Special Missions and the Vienna Convention on the Representation of States spoke simply of "the courier" and "the bag". It was now being suggested that the terms "diplomatic courier" and "diplomatic bag" should be used in respect of communications between States and their missions, regardless of category. The first question was whether such a step would constitute a useful and desirable development of present usage and would help to promote the freedom of communication between States and their missions. If that was generally felt to be the case, he would raise no objection.

17. The title of part II of the draft articles implied that there was a difference between the diplomatic courier *ad hoc* and the captain of a commercial aircraft or the master of a ship to whom a diplomatic bag had been entrusted but did not elaborate on the difference. He took it that the question would be clarified in connection with the consideration of further draft articles.

18. Another question relating to the scope of the draft was that, under the terms of article 2, the articles would not apply to communications between international organizations *inter se* or between international organizations and States. Opinions on that score, both within the Commission and in the Sixth Committee of the General Assembly, were divided. Some members of the

Commission and some Governments considered that the scope should be extended to cover not only international organizations but also national liberation movements. Reason and logic, as well as the internal practice of many States, seemed to militate in favour of that view, yet the subject was a delicate one and such a course might make the draft less universally acceptable. As a matter of practical expediency, he was prepared to agree to the more restrictive application; however, he would welcome it if the Commission was to agree that the scope of the draft articles should be expanded.

19. As to the point raised by Mr. Malek about the use of the terms "transit State" and "third State", he took the difference between those terms to be that a third State was one through which the diplomatic courier passed in cases of *force majeure* and fortuitous events. That interpretation was borne out by paragraph 4 of the fourth report (A/CN.4/374 and Add.1-4). In that connection, he was not opposed to paragraph 1 (6) of article 3, but wondered whether the words "*en route*" might not be construed to exclude the return journey. From that point of view, the paragraph might need to be redrafted. The text of article 12 could also be improved by replacing the words "he is crossing the" by the words "he enters" and by deleting the words "depending upon which of these events occurs first". As for paragraph 2 of article 14, he agreed that the meaning would be made clearer if the word "shall" was replaced by "may", although in his opinion the word "shall" was not necessarily mandatory.

20. Draft articles 15 to 19 could perhaps be merged into a single article, in view of the need for concision which he had mentioned earlier. Subject to that possibility, he experienced no difficulty with articles 15, 16 or 19; it did not seem to matter greatly whether article 15 spoke simply of "functions" or of "official functions", since reference had to be made in any case to article 11, defining the functions of the diplomatic courier. Article 17 could be slightly improved along the lines suggested by Sir Ian Sinclair (1781st meeting, para. 7) and others; for his part, he considered that the point made in the last sentence of paragraph 37 of the fourth report could be incorporated by altering the words "courier in the performance" to read "courier for the speedy and efficient performance". Lastly, he shared Sir Ian Sinclair's doubts regarding article 18, which appeared to cover very much the same ground as did paragraph 1 of article 4. If article 18 was maintained, however, he would be in favour of retaining the words "when necessary", the purpose of which was convincingly explained in paragraph 39 of the report.

21. Mr. CASTAÑEDA said that, after studying the excellent fourth report (A/CN.4/374 and Add.1-4), his only criticism was that the Special Rapporteur had drafted too many articles, doubtless out of a concern for perfection. Several members of the Commission had suggested that some articles might be deleted and Mr. Jagota had noted that certain conventions already dealt with related matters and that another international instrument which was too detailed might pose unnecessary difficulties of interpretation for foreign ministries.

The Commission should therefore confine itself to drafting strictly complementary provisions.

22. The five draft articles under consideration dealt with the extent of freedom to be enjoyed by the diplomatic courier and with his status, which depended more on the functions he performed than on his rank in the professional hierarchy. A diplomatic courier should enjoy facilities that closely resembled those of an ambassador, to the extent required for the performance of his functions.

23. Because of its general nature, draft article 15 was essential, but it should prove possible to include in it the contents of the articles that followed, for he was not sure that the matters covered in those other articles warranted separate provisions. From the point of view of legislative technique, it would probably be preferable to expand draft article 15.

24. Article 16, paragraph 1, related to one of the facilities, namely entry into the territory of the receiving State and the transit State, which had to be accorded to the diplomatic courier in order to enable him to perform his official functions. Equally obvious was the obligation established for the receiving State and the transit State in article 16, paragraph 2, to issue entry or transit visas to the diplomatic courier. Hence it was questionable whether those facilities really needed to be dealt with in a separate article.

25. The same comment held true in respect of article 17, on freedom of movement. The reservation concerning “zones where access is prohibited or regulated for reasons of national security” would not necessarily prevent the contents of article 17 from being included in article 15.

26. Sir Ian Sinclair (1781st meeting) and Mr. Jagota had expressed the view that article 18 might not be necessary. The question of communication by the diplomatic courier with the sending State and its missions was of course essential, but article 18 might not be indispensable in the light of article 4, which could, if required, be amended. If, for all that, article 18 was to be retained, the words “as referred to in article 1” should be deleted, as Mr. Calero Rodrigues (*ibid.*) had suggested.

27. Lastly, the issue of temporary accommodation dealt with in article 19 was regarded by some members as so obviously a part of the general facilities to be accorded that, despite its importance, it did not have to be dealt with in a separate article.

28. Mr. MAHIOU said that he agreed with the method of work set out in paragraph 4 of the report (A/CN.4/374 and Add.1-4) and endorsed the Special Rapporteur’s functional approach. That approach took account of developments in international communications and technological advances that facilitated the diplomatic courier’s communications yet also made it possible to monitor them and breach the requisite confidentiality. The Special Rapporteur was also concerned to strike a balance between the requirements of the confidential nature of the bag and the safety of the courier, on the one hand, and the security requirements of the receiving State and the transit State, on the other.

29. Although he fully supported the principles enumerated in paragraph 23 of the report, on which the Special Rapporteur had based the wording of his draft articles, he was not sure that it was necessary to draft so many detailed provisions. Some members had indicated that one or another of the articles overlapped with provisions in another part of the draft or with the provisions of conventions governing relations among States or relations between States and international organizations. A distinction should none the less be made between provisions which were self-evident and provisions which had to be spelt out in the draft now being prepared. Moreover, codification inevitably involved some repetition and it could well be useful to restate some existing provisions. The Special Rapporteur also drew attention in paragraph 5 of his report to the need to go beyond existing rules and try to eliminate certain loopholes and suggest new provisions. Hence it was from the standpoint of progressive development of international law that decisions had to be made on whether the proposed articles were justified. In his own opinion, great care must be taken before combining some of the proposed provisions.

30. Like other members of the Commission, he did not think it logical to deal separately with the couriers of international organizations. International organizations differed from States, but their diplomatic couriers and bags should not be dealt with in a separate draft convention, particularly since the current draft appeared to require some consolidation and related to a subject that was actually rather limited. Moreover, article 27 of the Vienna Convention on the Representation of States might not be enough to cover all possible cases.

31. Polemics must be avoided in dealing with the question of other entities, particularly national liberation movements, which did exist, were recognized by the United Nations and maintained relations not only with international organizations but also with the States that had recognized them. Accordingly, there could be no question of forcing other States to accord special privileges to those movements.

32. Draft articles 15 and 16 were acceptable and he could endorse article 17, since the diplomatic courier’s freedom of movement was of a functional nature only and could not be likened to that of a diplomatic agent who was posted in the receiving or host State. Draft articles 18 and 19 raised a dual problem of harmonization. First, it would be necessary to bring article 18 into line with article 4, and second, to harmonize articles 18 and 19 with each other, for they contained the words “when necessary” and “when requested”, respectively. With regard to temporary accommodation, as dealt with in draft article 19, diplomatic couriers usually solved that problem themselves, but the difficulties they might encounter in some cities at certain times of the year were not to be underestimated.

33. Mr. McCAFFREY said that the Special Rapporteur’s fourth report (A/CN.4/374 and Add.1-4), like his earlier reports, was extremely readable and well researched and had succeeded in awakening interest in

the topic. The fact that the Sixth Committee of the General Assembly had been divided as to the feasibility of preparing draft articles on the topic seemed to dictate a cautious approach and the Commission would perhaps be advised to keep three general criteria in mind. Was there a gap in the existing law? Was there a need to fill that gap? Was there general agreement on the law as manifested by State practice? Clearly, the scope of the draft articles should be kept within manageable proportions and he agreed with the view expressed in the Sixth Committee that the topic was one of the areas least in need of immediate attention or codification (A/CN.4/L.352, para. 188).

34. Again, bearing in mind that the law in that area was relatively well settled, it might be appropriate for the Commission to recommend that the draft articles should ultimately take the form of a General Assembly resolution, something which would have the advantage of avoiding any possible conflict with the existing codification conventions. The main problem appeared to be not a lack of law but rather an abuse of existing rules that were accepted almost universally, if only in principle. That point was recognized in paragraphs 7-8 of the report. Accordingly, one of the main tasks would be to ascertain whether the abuses could be minimized by elaborating draft articles that would complement the existing law.

35. He had considerable doubts as to whether the Special Rapporteur's uniform approach was desirable or indeed warranted by the existing state of the law as accepted by State practice. In paragraph 25, for instance, the Special Rapporteur stated that the "examination of the facilities, privileges and immunities should be carried out in accordance with the already established concept of a comprehensive and uniform treatment of all kinds of couriers and couriers *ad hoc*". Although the Special Rapporteur had plainly decided to opt for that approach, the extent to which it had been accepted by the Sixth Committee was uncertain. For example, some representatives were of the view that

... whereas the current draft articles apparently assimilated diplomatic and consular communications, at least for some purposes, the applicable standards for the protection of those communications were treated separately in the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. It was stressed therefore that the recognized different standards of treatment should not be undermined by their treatment in a draft on the status of the diplomatic bag. (*Ibid.*, para. 191.)

The Special Rapporteur had pointed out in that respect that the different standards applied principally to the diplomatic bag. It would none the less be advisable for the Commission to consider the degree to which similar considerations should apply to different types of courier or whether all couriers could justifiably be lumped together. The need for action in that respect was underlined, first of all, by the fact that the standards of protection for different types of courier varied because the balance between the sending State's need for secrecy and the receiving State's interest in security could also differ, depending on the case involved. In that instance, the functional approach was indeed required. Moreover, if it was true that different standards might apply in respect of

the régime covering the bag, there was all the more reason to follow the same course in relation to the different kinds of courier. Secondly, the law in that area had not been uniformly developed and accepted. For example, in the case of special missions, the Convention on Special Missions was not yet in force. Although 21 States out of the requisite 22 were now parties to the Convention, ultimately some degree of broader acceptance, such as that enjoyed by the Conventions on Diplomatic Relations and on Consular Relations, would be required. Once again, it was necessary to be cautious about treating the courier of a special mission in the same way as, for example, a diplomatic courier. The Commission should thus consider whether the different types of courier should enjoy only the privileges and immunities that were necessary for the performance of their respective functions.

36. In the matter of whether the topic should be extended to cover entities other than States, he agreed with the suggestion in paragraph 12 of the report that, at the present stage, the draft should be confined to couriers and bags used by States. There was good reason for that approach for, as pointed out in the Sixth Committee (*ibid.*, para. 193), international organizations were not in a position to guarantee reciprocity, which was one of the most important elements of diplomatic law. Furthermore, if the Commission extended the scope of the topic it would be venturing into uncharted waters, which meant that it would take longer to reach its ultimate destination, namely completing the task in hand. For that reason, the draft articles should be kept simple and within manageable bounds in terms of number and scope.

37. It should be noted that paragraph 2 of article 3 might also apply to such persons as a consular courier, which would amount to an extension of the existing law. That point merited careful consideration by the Drafting Committee. As for paragraph 2 of article 14, he appreciated the purpose of that provision but considered that the Drafting Committee should clarify the last phrase of the English text, which was ambiguous.

38. Much of the difficulty with the wording of draft articles 15 to 19 stemmed from a lack of clarity as to whether they involved obligations of conduct or obligations of result, within the meaning of articles 20 and 21 of part 1 of the draft on State responsibility.⁶ Clarification of that point would make it easier to use an appropriate form of language. There was clearly an obligation of conduct on the part of the receiving State to co-operate and make a reasonable effort to ensure that the facilities in question were available. It was not, in his opinion, an obligation of result. Two basic principles were involved: (a) the receiving State and the transit State should not obstruct the courier, and (b) they should co-operate and assist him so far as was reasonable in the light of his functions. There again, the functional approach was indicated.

39. In draft article 15, the word "necessary" was preferable to the word "required", since the former would

⁶ Yearbook . . . 1980, vol. II (Part Two), p. 32.

avoid the implication that it was for the courier to decide what was required. Also, it might be useful to define in the commentary what was meant by “facilities”, for it was not altogether clear what the term referred to.

40. In paragraph 2 of draft article 16, the expression “if necessary” would be more accurate than “if required”. The words “shall be granted” also seemed questionable and should be examined by the Drafting Committee; and Mr. Ni (1781st meeting) had been right to say that the word “quickly” should be replaced by the term “expeditiously”, which conveyed the idea more accurately.

41. He agreed with Sir Ian Sinclair (*ibid.*) that the phrase in draft article 17 reading “zones where access is prohibited or regulated for reasons of national security” should be brought into line with the corresponding phrase in the codification conventions referred to in paragraph 36 of the report. In addition, the phrase “shall ensure freedom of movement” sounded almost like an obligation of result and he would like to know if that was in fact the intention.

42. In general, he wondered whether so many articles were really needed to cover the area of facilities. That was particularly true in the case of draft articles 18 and 19, which seemed to be self-evident. Possibly the principles they set out could be embodied in one of the preceding articles. Lastly, quite apart from questioning the need for draft articles 18 and 19, he would agree on the desirability of harmonizing their language and that article 18 and article 4, both of which dealt with freedom of communication, should be brought into line with each other.

43. Mr. LACLETA MUÑOZ, speaking in his personal capacity and not as the Chairman of the Drafting Committee, said that the Special Rapporteur had dealt thoroughly with the topic assigned to him and had drafted articles in clear and precise terms. The Special Rapporteur had also been receptive to the comments made by members of the Commission and the Sixth Committee.

44. He shared the concern of other members who feared that there might be a temptation to make the set of draft articles excessively lengthy and suggested that the Commission should reduce the number of articles and concentrate more on the problems that had a direct bearing on the status of the diplomatic courier and bag. It was not necessary to settle every single detail of cases that might lend themselves to erroneous interpretations merely in order to ward off bad faith. Nevertheless, there was no doubt that the draft articles would be useful, particularly if the political will existed to apply them and if, for example, the text took the form of an additional protocol to an existing instrument.

45. In regard to the excessively detailed provisions of the draft articles, there was no need to deal with the appointment of the diplomatic courier. Contrary to the procedure in the case of diplomatic staff, the receiving State and the transit State were not notified of the appointment of a courier. It was enough for the courier to have an official document attesting to his status. In order to indicate that the receiving State and the transit State had to assist the courier, the Commission might use

wording along the following lines: “When necessary, the receiving State and the transit State shall accord appropriate facilities.”

46. In his opinion, it could well be possible to combine articles 15 to 19 into one or two articles. No problem arose in the case of articles 18 and 19, or even article 17, because it was obvious that if the courier could not reach the place at which he was to hand over the bag he could not perform his functions. That was one of the problems with which the Drafting Committee should deal.

ARTICLES 20 to 23

47. The CHAIRMAN invited the Special Rapporteur to introduce draft articles 20 to 23, which read:

Article 20. Personal inviolability

1. The diplomatic courier shall enjoy personal inviolability when performing his official functions and shall not be liable to any form of arrest or detention.

2. The receiving State or, as applicable, the transit State shall treat the diplomatic courier with due respect and shall take all appropriate measures to prevent any infringement of his person, freedom or dignity and shall prosecute and punish persons responsible for such infringements.

Article 21. Inviolability of temporary accommodation

1. The temporary accommodation used by the diplomatic courier shall be inviolable. Officials of the receiving State or the transit State shall not enter the accommodation except with the consent of the diplomatic courier.

2. The receiving State or the transit State has the duty to take appropriate measures to protect from intrusion the temporary accommodation used by the diplomatic courier.

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

Article 22. Inviolability of the means of transport

1. The individual means of transport used by the diplomatic courier in the performance of his official functions shall be immune from inspection, search, requisition, seizure and measures of execution.

2. When there are serious grounds for believing that the individual means of transport referred to in paragraph 1 carries articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or the transit State, the competent authorities of those States may undertake inspection or search of that individual means of transport, provided that such inspection or search shall be conducted in the presence of the diplomatic courier and without infringing the inviolability of the diplomatic bag carried by him and will not cause unreasonable delays and impediments to the delivery of the diplomatic bag.

Article 23. Immunity from jurisdiction

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

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

3. No measures of execution may be taken against the diplomatic courier, except in cases not covered by paragraph 2 of this article and provided that the measures concerned can be taken without infringing the inviolability of his person, temporary accommodation or the diplomatic bag entrusted to him.

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

5. Nothing in this article shall exempt the diplomatic courier from the civil and administrative jurisdiction of the receiving State or the transit State in respect of an action for damages arising from an accident caused by a vehicle used or owned by the courier in question, if such damages cannot be covered by the insurer.

6. Immunity from the jurisdiction of the receiving State or the transit State shall not exempt the diplomatic courier from the jurisdiction of the sending State.

48. Mr. YANKOV (Special Rapporteur) drew attention to section II.B of his report (A/CN.4/374 and Add.1-4), which was subdivided into two parts, one dealing with the inviolability of the diplomatic courier and the other with immunity from jurisdiction. In the light of the functional approach which underlay the whole draft, it had been decided in the matter of inviolability to concentrate on three main points: the personal inviolability of the courier in the performance of his functions (art. 20), the inviolability of the temporary accommodation of the diplomatic courier (art. 21) and the inviolability of the means of transport used by the diplomatic courier (art. 22).

49. The personal inviolability of the diplomatic courier stemmed from a long-standing rule of international customary law, and a brief survey of the history of its development was given in paragraphs 48-62 of the report. As stated in paragraph 47, there were three main constituent elements: (a) the person concerned was not liable to arrest, detention or any other form of restriction on his freedom; (b) the receiving State should treat him with due respect and take all appropriate measures to prevent any attack on his person, freedom or dignity; (c) persons who committed such attacks should be prosecuted and punished by the receiving or the transit State. The third of those three elements was possibly a new one and had been suggested as a measure of prevention and enforcement. It was the logical outcome of the application of the basic rule of freedom of communication, which was supported by State practice, and of the obligation on the receiving or transit State to protect the person of the courier. The latter point was amplified in paragraphs 63-67 of the report. Functional necessity was the underlying principle of the personal inviolability of the diplomatic courier and it was reflected in the terms of draft article 20.

50. With reference to the inviolability of the temporary accommodation of a diplomatic courier and of his personal means of transport, it would be noted that article 30 of the Vienna Convention on Diplomatic Relations provided that the private residence of a diplomatic agent should enjoy the same inviolability as the premises of the mission, and that article 37, paragraph 2, of the same convention extended that immunity to members of the administrative and technical staff of the mission who were not nationals of the receiving State. There seemed to be no compelling reason why such treatment should not be accorded to the diplomatic courier. In that connection, paragraph 73 of his report mentioned the three essential elements of the rule of inviolability of the temporary accommodation of the courier, elements on the basis of which draft articles 21 and 22 were proposed, and paragraph 78 dealt with exceptions to the third element, namely immunity from inspection and search. The rules

applying to the vehicles used by the diplomatic courier were the same as those which applied to his temporary accommodation and had been embodied in draft articles 21 and 22 with a view to securing a proper balance between confidentiality, inviolability, security and public order.

51. The bulk of the report was, of course, concerned with immunity from jurisdiction, which included immunity from criminal, civil and administrative jurisdiction. In that connection he had endeavoured, as stated in paragraph 81, to follow the guidelines adopted for the topic of jurisdictional immunities of States and their property, so as to ensure harmony between the main trends of the two topics.

52. Under article 31 of the Vienna Convention on Diplomatic Relations, the immunity of the diplomatic agent from criminal jurisdiction was absolute, but certain exceptions to immunity from civil and administrative jurisdiction had been determined by functional necessity. In that connection, however, he would suggest that, for the reasons stated in paragraphs 90-91 of the report, the Commission should be guided by article 60 of the Vienna Convention on the Representation of States, which was based on article 31 of the Vienna Convention on Diplomatic Relations.

53. With regard to the expression "in respect of all acts performed in the exercise of his official functions" in paragraph 2 of draft article 23, which was based on paragraph 1 of article 60 of the Vienna Convention on the Representation of States, he pointed out that, as stated in paragraph 110 of the report, the functional approach presupposed that immunity was accorded to the courier not *in propria persona* but by reason of his function; it was therefore limited to official acts. The method of distinguishing between an official act *per se* and an act which, though performed by an official of the sending State, did not come within the scope of his official functions was dealt with in paragraphs 111-112. Paragraphs 113-116 discussed the question of who was entitled to determine the nature of the act and considered the various doctrines in that connection.

54. Immunity from measures of execution was dealt with in paragraphs 118-123 and was reflected in paragraph 3 of draft article 23. Another element of immunity was exemption from the obligation to give evidence as a witness. A provision to that effect had been included in paragraph 4 of draft article 23, having regard to the fact that a courier remained in the receiving or transit State for a short period only and that his main task was speedy delivery of the bag; any measures involving an obligation to give evidence could hamper his function.

55. The question of an action for damages arising from an accident caused by a vehicle used or owned by the courier was dealt with in paragraphs 128-135 of the report and was reflected in paragraph 5 of draft article 23. It was an important issue and he would appreciate advice and comments on it.

56. Paragraph 6 of draft article 23, which dealt with the sending State's jurisdiction over its own courier, stated the obvious but it had been included in all other similar

conventions. The rationale behind it was both legal and practical, the main purpose being to protect any possible victims who might wish to have recourse to the jurisdiction of the sending State in order to protect their legitimate interests.

The meeting rose at 1.15 p.m.

1783rd MEETING

Thursday, 16 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Calero Rodrigues, Mr. Castañeda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stravropoulos, Mr. Sucharitul, Mr. Ushakov, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/359 and Add.1,¹ A/CN.4/372 and Add.1 and 2,² A/CN.4/374 and Add.1–4,³ A/CN.4/L.352, sect. E, ILC(XXXV)/Conf.Room Doc.7)

[Agenda item 3]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR⁴ (*continued*)

ARTICLE 15 (General facilities)

ARTICLE 16 (Entry into the territory of the receiving State and the transit State)

ARTICLE 17 (Freedom of movement)

ARTICLE 18 (Freedom of communication) *and*

ARTICLE 19 (Temporary accommodation)⁵ (*concluded*)

1. Mr. SUCHARITKUL said that the Special Rapporteur was to be congratulated on his flexible and practical approach to a topic which, though it might at first sight appear to be unimportant, proved on reflection to merit the Commission's close attention.

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem*.

⁴ For the texts of draft articles 1 to 14 referred to the Drafting Committee at the Commission's thirty-fourth session, see *Yearbook* . . . 1982, vol. II (Part Two), pp. 115 *et seq.*, footnotes 314, 315, 318 and 320–330.

⁵ For the texts, see 1774th meeting, para. 1.

2. The history of the diplomatic courier and diplomatic bag was by no means confined to modern times. He would remind members that, as far back as the thirteenth century, Thailand, or Siam as it had then been known, had exchanged missions and technical co-operation with China; later, in the early seventeenth century, it had sent diplomatic missions to the Netherlands and subsequently to France. At one time the developing countries of Asia and Africa had made less use of couriers than the more affluent countries, but there had since been a reversal of that trend and many countries now used diplomats and even ambassadors to carry diplomatic mail.

3. The Special Rapporteur had struck the right balance in his draft articles between the interests of the sending State in protecting the confidentiality of its documents and the need of the receiving State to keep the immunities and privileges it granted to a minimum. The topic needed codification even though some parts of it were governed by the four existing codification conventions and even though there was some duplication where privileges and immunities were concerned.

4. In that area of the law, two opposing trends were discernible. On the one hand, there was the ever-growing list of beneficiaries of State immunity and the ever-widening scope of privileges and immunities. In that connection, the Special Rapporteur had rightly advocated that, even though the contents of the diplomatic bag and the consular bag might differ, the treatment accorded to the diplomatic courier and the consular courier should be the same as far as the performance of their functions and the inviolability of the bag were concerned. On the other hand, there was a tendency to restrict privileges and immunities by confining them to what was justified by functional necessity. On that basis, a diplomatic courier would not be entitled to the same privileges and immunities as a diplomatic agent, the difference in treatment being partly due to the temporary nature of the courier's immunity. It was essential, however, to take account of the principle of reciprocity, which would serve to protect the proper functions of the diplomatic courier.

5. The Special Rapporteur had rightly adopted a cautious approach and had sought to prevent any improper use of privileges and immunities by including in the draft such provisions as those contained in article 14 (Persons declared *non grata* or not acceptable) and in article 23, paragraph 5, under which the diplomatic courier would not be exempt from the civil and administrative jurisdiction of the receiving or transit State in respect of an action for damages arising from an accident caused by a vehicle used or owned by him.

6. The draft articles were clear and concise; it remained for the Commission and the Sixth Committee of the General Assembly to make such adjustments as might be necessary to render them more generally acceptable. On the whole, they were acceptable to him except for certain points of drafting which could be dealt with by the Drafting Committee.

7. Mr. NJENGA, thanking the Special Rapporteur for his comprehensive report (A/CN.4/374 and Add. 1–4),