

Document:-  
**A/CN.4/SR.1783**

**Summary record of the 1783rd meeting**

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

Extract from the Yearbook of the International Law Commission:-  
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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,<sup>1</sup> A/CN.4/372 and Add.1 and 2,<sup>2</sup> A/CN.4/374 and Add.1–4,<sup>3</sup> A/CN.4/L.352, sect. E, ILC(XXXV)/Conf.Room Doc.7)**

[Agenda item 3]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR<sup>4</sup> (*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)<sup>5</sup> (*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.

<sup>1</sup> Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

<sup>3</sup> *Idem*.

<sup>4</sup> 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.

<sup>5</sup> 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),

said that codification of the topic was of the utmost importance for guaranteeing freedom of communication between sending States and their missions abroad: that freedom was a fundamental principle of international law and it was ripe for codification. The fact that the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier was partly dealt with in the four existing codification conventions was no justification for not elaborating a separate convention on it, with a view not only to codification, but also to progressive development of the law. Such a convention would also serve to unify the provisions scattered throughout the four existing conventions, while taking account of State practice.

8. He did not agree with the statement in paragraph 12 of the report that, at this stage of the work on the topic, its scope should be confined to the couriers and bags used by States, as proposed in the third report (A/CN.4/359 and Add.1, paras. 16-18). The practice whereby international organizations sent their official and confidential correspondence in bags was well established. OAU, for example, sent confidential conference documents to Member States by diplomatic courier to ensure expeditious and safe despatch. That was very necessary in Africa, where postal communication was, for the most part, extremely slow. There was thus no reason why the draft articles should not cover such communications between international organizations and their Member States, or even between an international organization and its missions. Admittedly, there was a safeguard clause in draft article 2, but the rules referred to in paragraph 2 (b) of that article did not exist: that point merited careful examination before the draft articles were completed. The scope of the draft should not be unduly restricted, otherwise it might later prove necessary to recast it. He considered that, since the draft articles were concerned with guaranteeing freedom of communication, the fact that an international organization was unable to guarantee reciprocity, as some representatives had stressed in the Sixth Committee (A/CN.4/L.352, para. 193), would not cause States to suffer any injury.

9. He saw much merit in extending the scope of the draft articles to cover communications by recognized liberation movements such as SWAPO, ANC and PLO, which had established diplomatic missions recognized by the United Nations and many of its Member States. So long as adequate measures were taken to ensure that only legitimate objects were conveyed by couriers and bags, he could see no justification for denying the necessary protection of confidentiality to the communications of recognized liberation movements.

10. He fully supported the functional approach adopted by the Special Rapporteur and did not share the view that the draft articles were unduly inclined to assimilate the diplomatic courier to the staff of diplomatic missions. As had already been pointed out on many occasions, the diplomatic courier was himself a diplomat: accordingly, so long as the privileges and immunities related to protection of his mission, there was no reason to curtail the protection given him.

11. As to the commencement and the end of the functions of the diplomatic courier, which were dealt with in draft articles 12 and 13, he accepted the statement made in paragraph 19 of the fourth report concerning the moment at which those functions began, but he did not think that the Special Rapporteur had quite covered the point about the need to extend protection for the return journey, failing which the courier might be subject to intimidation once he had delivered the bag.

12. With regard to draft articles 15 to 19, he agreed that the object of those articles was to ensure that the courier was protected by the receiving or transit State and enjoyed certain rights requiring freedom of movement in their territory. He also believed, however, that the five articles could be combined into one or two articles without losing their thrust; the Drafting Committee might wish to explore that possibility. In draft article 15, it would help to clarify the term "facilities" if the words "and requested" were added after "required". In draft article 17, it should be made clear that such freedom of movement as was accorded would attach to the performance of the courier's functions. He therefore supported Mr. Jagota's proposal (1782nd meeting) that it should be accorded for the purpose of the safe and expeditious delivery of the bag and the courier's return to the country of origin. That, again, was a point for the Drafting Committee to consider.

13. With regard to draft article 18, he agreed that the last part of the text, after the words "as referred to in article 1", should be deleted since it was unduly restrictive. The diplomatic courier might, for instance, need to communicate with a third State; there might be no mission in the transit State and he might be in need of urgent assistance from a mission in a neighbouring country.

14. Lastly, he did not think that the significance of draft article 19 should be underestimated, especially where less affluent cities were concerned. Indeed, he would even be inclined to favour an obligation on the receiving State and the transit State to provide, rather than assist in obtaining, temporary accommodation.

15. Mr. YANKOV (Special Rapporteur), summing up the discussion on draft articles 15 to 19, thanked members for their valuable comments, which would greatly assist him in his work. With regard to the feasibility of codifying the topic, he wished to state for the record that the Commission had followed the recommendations of a series of resolutions of the General Assembly, in particular resolution 31/76 of 13 December 1976, to which he had referred in his preliminary report,<sup>6</sup> and resolutions 33/139 and 33/140 of 19 December 1978, in both of which the General Assembly had noted with appreciation the work done by the Commission. In paragraph 5 of section I of resolution 33/139, the General Assembly also recommended that the Commission "should continue the study, including those issues it has already identified, concerning the status of the diplomatic

<sup>6</sup> *Yearbook* . . . 1980, vol. II (Part One), pp. 232-233, document A/CN.4/335, para. 7.

courier and the diplomatic bag not accompanied by diplomatic courier . . . with a view to the possible elaboration of an appropriate legal instrument . . .”. Those resolutions had provided the basis for General Assembly resolution 37/111 of 16 December 1982 which, in paragraph 3, gave the Commission clear instructions.

16. As to reactions in the Sixth Committee of the General Assembly, his own impression was that, while there had been some reservations, there had been a marked trend in favour of dealing with the topic. Mr. McCaffrey (1782nd meeting) had quoted some extracts from the topical summary of the discussion in the Sixth Committee (A/CN.4/L.352) but they had been taken from the statements of one delegation only; of course, the minority view also had to be respected and he, as Special Rapporteur, had endeavoured to bear that in mind.

17. It had rightly been said that, although the issues involved were fairly well covered by existing law, there was none the less room for some degree of elaboration or amplification. Apart from the comments made on points of drafting, which would assist the passage of the draft articles through the Drafting Committee, a number of matters had been raised, particularly in regard to method, which called for careful consideration. Several members had stressed that codification and development of the law on the topic under study would make an important contribution to international co-operation and understanding. The views expressed by those who did not fully subscribe to that opinion also served a useful purpose, in that they emphasized the need to find a balance and not be over-ambitious in the work of codification. That approach was to be advocated in the task of basing the structure and content of the draft on the solid foundation of the four existing codification conventions, while adopting a flexible and pragmatic attitude that took account of functional necessity. The point had been convincingly argued by a number of speakers.

18. With regard to the uniform approach, he had at first endeavoured to introduce the idea of an “official” courier and an “official” bag, but when that did not find favour he had reverted to the more traditional, and perhaps more reliable, notion of the diplomatic courier. A point had been raised regarding the use of the terms “diplomatic courier” and “diplomatic bag” and the extension of those terms, under draft article 3, paragraph 2, to cover consular couriers and consular bags. It was well known that, if a bag was partly used for a consular mission, States preferred to call it a diplomatic bag because of the difference between the stipulations of article 27 of the 1961 Vienna Convention on Diplomatic Relations and those of article 35 of the 1963 Vienna Convention on Consular Relations. An examination of more than a hundred consular conventions signed by States parties to the 1963 Vienna Convention had shown that the standard provision specifying complete inviolability was usually applied, rather than article 35 of the 1963 Vienna Convention. He intended, however, to introduce a safeguard clause into the draft articles under which, in case of doubt or dispute, the bag would be returned unopened, in accordance with the main trend of State practice.

19. He would appreciate the Commission’s guidance regarding any differentiation of inviolability. In general, however, he believed that the uniform approach would be best, and some further precision could perhaps be introduced into the articles at the Drafting Committee stage. His main concern had been to achieve a balance between the legitimate interests of the sending and receiving States and the Commission must judge how far he had succeeded.

20. With regard to the final form the draft articles should take, as Special Rapporteur he could not comment on the suggestion that they should be embodied in a resolution of the General Assembly; but as a member of the Commission he could not agree that subject-matter of such importance should be consigned to a document which did not have legally binding force.

21. The main question raised during the discussion was that of the scope of the draft articles, in particular whether they should apply to international organizations and entities other than States, such as liberation movements. The general view was that, by the very nature of things, the draft would be incomplete if entities other than States were not covered. As they stood, the draft articles would apply to a bag conveyed between a State and an international organization but not a bag conveyed between two international organizations. There were some customary rules, since communications between international organizations had been operating smoothly up to the present without any multilateral convention, but he would appreciate the Commission’s guidance on the matter. Its opinion could then be put to the General Assembly. In that connection, he noted for the record that, as stated in a footnote to paragraph 11 of his report, the representative of France in the Sixth Committee had said that “any attempt to extend the provisions beyond the diplomatic courier and the unaccompanied diplomatic bag *stricto sensu* might jeopardize the success of an undertaking which his delegation viewed with great favour”.<sup>7</sup> As he had not been present at the meeting at which that statement had been made, he would welcome members’ comments on it.

22. His own suggestion would be to keep a possible extension of the scope of the draft articles in mind, but not to take a decision at the present stage unless the Commission had strong reasons for doing so. It was necessary to proceed with great caution so as to avoid creating any difficulties that might hamper progress. As a member of the Commission, his view was that the scope of the draft articles should be extended to cover entities other than States, but as Special Rapporteur it was his duty to take account of trends and conditions conducive to a solution of that problem.

23. Questions relating to the status and functions of the diplomatic courier had been raised by several members of the Commission in connection with draft articles 1 to 14. He agreed with Mr. Ni, Mr. Castañeda, Mr. Koroma

<sup>7</sup> Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee, 38th meeting, para. 21.

and others that the diplomatic courier was not assimilable to a diplomatic agent or to any other existing category of officials. The only purpose of employing such analogies had been to facilitate the preparation of basic rules applicable to any specific situation.

24. A number of speakers, including Mr. Flitan, Sir Ian Sinclair, Mr. Njenga and Mr. Jagota, had referred to the articles dealing with the commencement and end of the functions of the diplomatic courier. The reason why draft article 12 defined those functions as commencing from the moment the diplomatic courier entered the territory of the transit or receiving State rather than from the moment of his appointment by the sending State was that, from the point of view of the receiving or transit State, the precise moment of that appointment was immaterial.

25. In reply to Mr. Njenga's point concerning the courier's protection on the return journey, he observed that, in practice, a courier rarely returned empty-handed. However, the possibility of his doing so should of course be provided for. His reasoning on the subject was set out in his third report (A/CN.4/359 and Add.1, paras. 116 and 123).

26. As to the question of the difference, if any, between the regular or ordinary diplomatic courier and the diplomatic courier *ad hoc*, raised by Sir Ian Sinclair (1781st meeting), it should be noted that in terms of the volume and significance of their work, couriers *ad hoc* were nowadays no less important than regular couriers; the only difference was that the regular courier whose functions came to an end in a foreign country assumed the status of a diplomatic agent, whereas the courier *ad hoc* in the same situation became an ordinary alien.

27. In regard to the use of the word "shall" in article 14, paragraph 2, he pointed out that when a diplomatic courier was declared *persona non grata*, the sending State generally had no choice but to send another diplomatic courier to the receiving State; that was why he had preferred the stronger word "shall" to the weaker "may". The choice of wording could be left to the Drafting Committee.

28. On the question of multiple appointments dealt with in article 9, his studies had shown instances in which States with very good mutual relations used that method for economic or other practical reasons. In principle, he believed that the article should be retained, but if the Commission decided otherwise he would not insist.

29. On the question of the distinction between the terms "transit State" and "third State", raised by Mr. Malek (1782nd meeting), he observed that the earlier conventions did not employ the concept of "transit State" because they were mainly concerned with permanent missions, so that the basic relationship was between the sending State and the receiving or host State and the role of the transit State was only occasional and incidental. The position with regard to the diplomatic courier was entirely different; he was, by definition, a travelling official and the routine performance of his functions almost always involved a transit State. The reasons why he had chosen to describe as a "transit State" a State through whose territory the diplomatic courier had to

pass when travelling to or from the receiving State were given in his second report.<sup>8</sup> The term "third State" was used exclusively for States which were not included in the courier's original itinerary, but which he had to cross in unforeseen circumstances.

30. As to the comments made by members of the Commission on articles 15 to 19, subject to decisions to be taken by the Drafting Committee he was prepared to accept many of the suggestions made, including Mr. McCaffrey's suggestion (*ibid.*) of the phrase "shall, where appropriate or necessary" for use in article 16, Mr. Ushakov's suggestion (1781st meeting) that the titles of the articles might be improved and Mr. Calero Rodrigues' suggestion (*ibid.*) that the phrase "where necessary and upon the request of the courier" should be employed in articles 18 and 19. He was not opposed to the suggestion made by several speakers that article 15, being extremely short, might be merged with one or several of the articles immediately following it, so long as none of their provisions was dropped or substantially modified.

31. On the other hand, he could not agree with Mr. Flitan (1780th meeting) and Mr. Castañeda (1782nd meeting) that article 18 merely duplicated article 4 and should therefore be deleted. A connection between the two articles certainly existed, but article 18 had a specific practical meaning which should not be lost; one of the matters it covered was the priority postal facilities which might sometimes have to be granted to a courier. All other points raised in the debate could be discussed in the Drafting Committee.

32. The CHAIRMAN proposed that draft articles 15 to 19 be referred to the Drafting Committee.

*It was so agreed.*

ARTICLE 20 (Personal inviolability)

ARTICLE 21 (Inviolability of temporary accommodation)

ARTICLE 22 (Inviolability of the means of transport) *and*

ARTICLE 23 (Immunity from jurisdiction)<sup>9</sup> (*continued*)

33. Mr. YANKOV (Special Rapporteur), supplementing the introductory remarks on articles 20 to 23 which he had made at the previous meeting, referred members to paragraphs 81 *et seq.* of his fourth report, dealing specifically with article 23. The approach he had adopted in drafting the article was a strictly functional one. With regard to measures of execution, full account had been taken of the fact that, while in theory the provisions of article 31 of the Vienna Convention on Diplomatic Relations were applicable to the diplomatic courier, in practice the diplomatic courier could not make full use of the rights available to a diplomatic agent.

34. In conclusion, as several speakers had emphasized the need for concision in connection with articles 15 to 19,

<sup>8</sup> *Yearbook* . . . 1981, vol. II (Part One), p. 187, document A/CN.4/347 and Add.1 and 2, paras. 198-200.

<sup>9</sup> For the texts, see 1782nd meeting, para. 47.

he wished to point out that the texts of articles 20 to 23, given the complexity of the matters dealt with, were already as brief as possible.

*The meeting rose at 1 p.m.*

## 1784th MEETING

*Friday, 17 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. McCaffery, Mr. Ni, Mr. Njenga, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stravropoulos, Mr. Sucharitkul, Mr. Thiam, 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,<sup>1</sup> A/CN.4/372 and Add.1 and 2,<sup>2</sup> A/CN.4/374 and Add.1-4,<sup>3</sup> A/CN.4/L.352, sect. E, ILC(XXXV)/Conf.Room Doc.7)**

[Agenda item 3]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR<sup>4</sup> (*continued*)

ARTICLE 20 (Personal inviolability)

ARTICLE 21 (Inviolability of temporary accommodation)

ARTICLE 22 (Inviolability of the means of transport) *and*

ARTICLE 23 (Immunity from jurisdiction)<sup>5</sup> (*continued*)

1. Mr. USHAKOV said that he had no comments to make on draft article 20, which was based on the corresponding provisions of the four conventions on codification of diplomatic and consular law adopted under the auspices of the United Nations.

2. On the other hand, there was little justification for paragraph 3 of draft article 21 or paragraph 2 of draft article 22, which derogated, respectively, from the

principle of inviolability of the temporary accommodation of the diplomatic courier and from that of inviolability of the individual means of transport used by the diplomatic courier. Apart from the diplomatic bag, the only objects which would normally be found in the diplomatic courier's temporary accommodation or in his private vehicle were his personal effects. In the event of grave suspicion, those effects could be inspected or searched when the courier entered the territory of a State, as provided in the case of diplomatic agents. Thereafter, the diplomatic courier was free to acquire other property in the territory of the State he had entered and no further inspection or search should take place.

3. He found draft article 23 entirely satisfactory, and particularly welcomed paragraph 5, waiving immunity from civil and administrative jurisdiction in respect of an action for damages arising from a traffic accident caused by the courier's vehicle, if such damages were not covered by insurance.

4. Mr. LACLETA MUÑOZ said that the inviolability of the diplomatic courier was not in doubt, since it was provided for in all the four codification conventions. In paragraphs 63-64 of his report (A/CN.4/374 and Add.1-4), the Special Rapporteur mentioned two incidents in which Spain had been involved. One of them raised a problem not dealt with in the draft articles—that of the diplomatic courier's baggage not covered by the certificate relating to the diplomatic bag. It was clear from the context, however, that in the event of grave suspicion the diplomatic courier's personal baggage could be inspected. Far from suggesting that a statement to that effect be incorporated in articles 21 and 22, he would prefer those articles to be condensed. All the provisions relating to the inviolability of the diplomatic courier's person, his temporary accommodation and his means of transport derived from the inviolability of diplomatic correspondence. It was that inviolability, above all, which should be safeguarded. Furthermore, it should be noted that paragraph 3 of article 21 and paragraph 2 of article 22 were identical in scope.

5. As to immunity from jurisdiction, it was true that it was not provided for in the conventions on codification of diplomatic and consular law, but the Special Rapporteur's analysis of those instruments and the conclusions he had drawn from it were convincing. It was right to provide for that immunity, which was based largely on the inviolability of the diplomatic courier, in a provision such as article 23. Moreover, the Special Rapporteur had been right to proceed on the basis of article 60 of the Vienna Convention on the Representation of States, though in his own view the result would have been the same if the diplomatic courier had been treated as a member of the administrative or technical staff of a mission. From a purely presentational point of view, paragraph 5 of article 23 should perhaps appear as paragraph 3 of the article. Lastly, in regard to paragraph 4, according to which the diplomatic courier was not obliged to give evidence as a witness, he wondered whether it would not be useful to provide that in the event of a traffic accident the diplomatic courier nevertheless

<sup>1</sup> Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

<sup>3</sup> *Idem*.

<sup>4</sup> 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.

<sup>5</sup> For the texts, see 1782nd meeting, para. 47.