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Summary record of the 1745th meeting

Topic:
Programme of work

Extract from the Yearbook of the International Law Commission:-
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48. The CHAIRMAN said that the members of the Commission were free not to submit written comments to the Special Rapporteur, but that it would be desirable for those who had not sufficiently expressed their views to do so.

49. Mr. DÍAZ GONZÁLEZ said he had nothing against the suggestion that written comments should be submitted to the Special Rapporteur, but pointed out that it was for the Commission, not the Special Rapporteur to make a decision on whether to continue the work. The Commission's report to the General Assembly must in no way allow the seriousness of the Commission to be called in question. It was absolutely essential to present the situation as it appeared from the debates. Several members of the Commission believed that its lucubrations could continue, but others thought they must be ended now that three reports had been examined. It was clear from the schematic outline that the subject did not have a solid foundation. Reverting to the example of the oil company, he said the Commission was most unlikely to find a large deposit. Hence it was important for the General Assembly to have a clear view of the situation, so that it could decide what the Commission was to do.

50. The CHAIRMAN noted that the report should indicate that some members of the Commission believed that further work on the topic could not lead to positive results.

51. Sir Ian SINCLAIR said it was clear that the report would have to indicate that views in the Commission were divided as to the future pursuit of the topic. In the Sixth Committee, he had expressed scepticism concerning the nature and value of the product which might emerge,¹³ but at the current session, after careful study of the Special Rapporteur's three reports, he had come to a conclusion similar to that of the Chairman. The topic did contain something worth pursuing, though it might not yield to the treatment the Commission usually applied to the drafting of articles for eventual incorporation in an international convention. The Commission had a duty, not only to itself, but also to the international community, not to be constrained by past practice into thinking that no other solution existed. He believed there would be injurious consequences for the Commission's reputation in the Sixth Committee and perhaps in the international community as a whole if it concluded at that stage that there was nothing in the present topic to which its work could make a useful contribution.

52. Mr. BARBOZA also believed that the Commission should confine itself to indicating that divergent opinions had been expressed on the viability of the topic, and that the report should faithfully reflect the position of each member. It was necessary to dispel the doubts expressed in the Commission. Sooner or later, members would have to reach agreement on what they intended to do. The Commission could not simply

restrict itself to drafting articles, without knowing whether it was to produce a work of codification or of progressive development of international law, or even prepare a practical guide for States.

53. Mr. KOROMA said he would like some clarification of Mr. Ni's reference (1739th meeting) to private law analogies in the elaboration of the topic under consideration. It was not clear to him whether that observation should be understood as meaning that there were no private law analogies or sources, as it were, on which the topic could be constructed.

54. In his opinion, the Commission should continue to explore the topic; if, at an appropriate stage, it concluded that the work should be discontinued, it could do so. For the moment, however, he believed that sufficient sources did exist, both in private law and in international conventions, to justify further exploration.

55. Mr. USHAKOV urged the need for making a decision. Perhaps the Commission could indicate that some members had doubts about the viability of the topic and that it would take a final decision on that question at its next session. Personally, in the light of his long experience of the Commission, he was convinced that the topic was not viable, but perhaps some new members had not yet fully grasped that point.

56. Mr. RIPHAGEN suggested that the Special Rapporteur should be asked to continue his work along the lines indicated in his third report. In his own view, there was no great difference between a convention, a framework convention and recommended practice. It was a question of degree, which could be decided at the last minute. But the Commission should point out that the topic, as worded by the General Assembly in terms of reparation for injurious consequences, was not one with which it could deal. The Commission could consider the topic only within the framework of a system of prevention and negotiating procedures.

57. The CHAIRMAN said that the Commission now had a complete picture of the situation and would no doubt be able to reproduce it faithfully in its report. It was because their hope factors were not the same that the members of the Commission had different positions.

The meeting rose at 6.05 p.m.

1745TH MEETING

Wednesday, 14 July 1982, at 10.05 a.m.

Chairman: Mr. Paul REUTER

Co-operation with other bodies (concluded)* [Agenda item 11]

¹³ *Ibid.*, 40th meeting, para. 9.

* Resumed from the 1726th meeting.

COMMUNICATION FROM THE ASIAN-AFRICAN
LEGAL CONSULTATIVE COMMITTEE

1. The CHAIRMAN announced that a communication had been received from the Asian-African Legal Consultative Committee expressing the Committee's regret at having been unable to send a representative to the session as was customary, as well as its wish to maintain very close contact with the Commission and follow up the results of its work at an early date.

Organization of work (concluded)*

MEMBERSHIP OF THE PLANNING GROUP (concluded)*

2. The CHAIRMAN reminded the Commission that the Planning Group set up at the 1706th meeting consisted of Mr. Díaz González (Chairman), Mr. Castañeda, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam and Mr. Ushakov. All members of the Commission were cordially invited to join in the Group's work.

APPOINTMENT OF SPECIAL RAPPORTEURS (concluded)**

3. The CHAIRMAN invited the Commission to take a formal decision on two appointments which it had decided on privately.

4. He said that, if there were no objections, he would take it that the Commission approved the appointments of Mr. Evensen as Special Rapporteur on the topic of the law of the non-navigational uses of international watercourses and of Mr. Thiam as Special Rapporteur on the topic of the draft Code of Offences against the Peace and Security of Mankind; the appointment of a Special Rapporteur on the latter topic would be in response to paragraphs 1 and 2 of General Assembly resolution 36/106.

It was so decided.

5. The CHAIRMAN said that neither the Special Rapporteur nor the Commission thought it necessary that a working group should be set up at present to study the first topic. However, the Special Rapporteur might make some recommendations on the subject later. In regard to the second topic, it was agreed that a working group should be set up straight away and meet as Mr. Thiam thought best. The group would consist of: Mr. Thiam (Chairman), Mr. Balanda, Mr. Boutros Ghali, Mr. Evensen, Mr. Francis, Mr. Illueca, Mr. Mahiou, Mr. Malek, Mr. Njenga, Mr. Ogiso, Mr. Pirzada, Mr. Riphagen and Mr. Yankov.

6. If there were no objections, he would take it that the Commission approved those arrangements.

It was so decided.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (continued)
(A/CN.4/347 and Add.1 and 2,¹ A/CN.4/359 and Add.1, A/CN.4/L.339, ILC(XXIV)/Conf. Room Doc. 4)

[Agenda item 7]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLES 1 TO 14

7. The CHAIRMAN invited the Special Rapporteur to introduce his third report, which contained draft articles 1 to 14 (A/CN.4/359 and Add.1, paras. 19, 20, 42, 56, 79, 96, 103, 111, 114 and 128), which read as follows:

PART I

GENERAL PROVISIONS

Article 1. Scope of the present articles

The present articles shall apply to communications of States for all official purposes with their diplomatic missions, consular posts, special missions, permanent missions or delegations, wherever situated, and also to official communications of these missions and delegations with the sending State or with each other, by employing diplomatic couriers and diplomatic bags, as well as consular couriers and bags, couriers and bags of the special missions, permanent missions or delegations.

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

1. The present articles shall not apply to couriers and bags used for all official purposes by international organizations.

2. The fact that the present articles do not apply to couriers and bags used for all official purposes by international organizations shall not affect:

(a) the legal status of such couriers and bags;

(b) the application to such couriers and bags of any rules set forth in the present articles with regard to the facilities, privileges and immunities which would be accorded under international law independently of the present articles.

Article 3. Use of Terms

1. For the purpose of the present articles:

(1) "diplomatic courier" means a person duly authorized by the competent authorities of the sending State entrusted with the custody, transportation and delivery of the diplomatic bag to the diplomatic missions, consular posts, special missions, permanent missions or delegations of the sending State, wherever situated;

(2) "diplomatic courier *ad hoc*" means an official of the sending State entrusted with the function of diplomatic courier for a special occasion or occasions;

(3) "diplomatic bag" means all packages containing official correspondence, documents or articles exclusively for official use which bear visible external marks of their character, used for communications between the sending State and its diplomatic missions, consular posts, special missions, permanent missions or delegations, wherever situated, dispatched through diplomatic courier or the captain of a commercial ship or aircraft or sent by postal or other means, whether by land, air or sea;

(4) "sending State" means a State dispatching a diplomatic bag, with or without a courier, to its diplomatic missions, consular posts, special missions, permanent missions or delegations, wherever situated;

* Resumed from the 1706th meeting.

** Resumed from the 1699th meeting.

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

(5) "receiving State" means a State on whose territory:

(a) diplomatic missions, consular posts, special missions or permanent missions are situated; or

(b) a meeting of an organ of an international organization or an international conference is held;

(6) "transit State" means a State through whose territory the diplomatic courier and/or the diplomatic bag passes *en route* to the receiving State;

(7) "diplomatic mission" means a permanent mission within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

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

(9) "special mission" means a temporary mission, representing the State, which is sent by one State to another with the consent of the latter, for the purpose of dealing with it on specific questions or performing a special task in relation to it;

(10) "permanent mission" means a mission of permanent character, representing the State, sent by a State member of an international organization to that organization;

(11) "delegation" means the delegation sent by a State to participate on its behalf in the proceedings of either an organ of an international organization or an international conference;

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

2. The provisions of paragraph 1, subparagraphs (1), (2) and (3), on the terms "diplomatic courier", "diplomatic courier *ad hoc*" and "diplomatic bag" may also apply to consular courier and consular courier *ad hoc*, to couriers and couriers *ad hoc* of special missions, permanent missions or delegations, as well as to the consular bag and the bags of special missions, permanent missions or delegations of the sending State.

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

Article 4. Freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags

The receiving State shall permit and protect on its territory free communications on the part of the sending State for all official purposes with its diplomatic missions, consular posts, special missions, permanent missions or delegations as well as between those missions, consular posts and delegations, wherever situated, as provided for in article 1.

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

1. Without prejudice to the facilities, privileges and immunities accorded to a diplomatic courier, it is the duty of the sending State and its diplomatic courier to respect the rules of international law and the laws and regulations of the receiving State and the transit State.

2. The diplomatic courier also has a duty, in the discharge of his functions, not to interfere in the internal affairs of the receiving State and the transit State.

3. The temporary accommodation of the diplomatic courier must not be used in any manner incompatible with his functions as laid down in the present articles, by the relevant provisions of the Vienna Convention on Diplomatic Relations of 1961 or by other rules of international law or by any special agreements in force between the sending State and the receiving State or the transit State.

Article 6. Non-discrimination and reciprocity

1. In the application of the provisions of the present articles, no discrimination shall be made as between States with regard to the treatment of diplomatic couriers and diplomatic bags.

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

(a) where the receiving State applies any of the provisions of the present articles restrictively because of a restrictive application of that provision to its diplomatic couriers and diplomatic bags in the sending State;

(b) where States modify among themselves, by custom or agreement, the extent of facilities, privileges and immunities for their diplomatic couriers and diplomatic bags, provided that it is not incompatible with the object and purpose of the present articles and does not affect the enjoyment of the rights or the performance of the obligations of third States.

PART II

STATUS OF THE DIPLOMATIC COURIER, THE DIPLOMATIC COURIER *AD HOC* AND THE CAPTAIN OF A COMMERCIAL AIRCRAFT OR THE MASTER OF A SHIP CARRYING A DIPLOMATIC BAG

Article 7. Proof of status

The diplomatic courier shall be provided, in addition to his passport, with an official document indicating his status and the number of packages constituting the diplomatic bag as accompanied by him.

Article 8. Appointment of a diplomatic courier

Subject to the provisions of articles 9, 10 and 11, diplomatic couriers and diplomatic couriers *ad hoc* are freely appointed by the competent authorities of the sending State or by its diplomatic missions, consular posts, special missions, permanent missions or delegations, and are admitted to perform their functions on the territory of the receiving State or the transit State.

Article 9. Appointment of the same person by two or more States as a diplomatic courier

Two or more States may appoint the same person as a diplomatic courier or diplomatic courier *ad hoc*.

Article 10. Nationality of the diplomatic courier

1. The diplomatic courier should, in principle, have the nationality of the sending State.

2. Diplomatic couriers may not be appointed from among the persons having the nationality of the receiving State except with the express consent of that State which may be withdrawn at any time.

3. The receiving State may reserve the same right under paragraph 2 with regard to:

(a) nationals of the sending State who are permanent residents of the receiving State;

(b) nationals of a third State who are not also nationals of the sending State.

4. The application of this article is without prejudice to the appointment of the same person by two or more States as a diplomatic courier, as provided in article 9.

Article 11. Functions of the diplomatic courier

The functions of the diplomatic courier shall consist in taking care of and delivering to its destination the diplomatic bag of the sending State or its diplomatic missions, consular posts, special missions, permanent missions or delegations, wherever situated.

Article 12. Commencement of the functions of the diplomatic courier

The functions of the diplomatic courier shall commence from the moment he is crossing the territory of the transit or receiving State, depending upon which of these events occurs first.

Article 13. End of the function of the diplomatic courier

The function of a diplomatic courier comes to an end, *inter alia*, upon:

- (a) the completion of his task to deliver the diplomatic bag to its final destination;
- (b) the notification by the sending State to the receiving State that the function of the diplomatic courier has been terminated;
- (c) notification by the receiving State to the sending State that, in accordance with article 14, it refuses to recognize the official status of the diplomatic courier;
- (d) the event of the death of the diplomatic courier.

Article 14 Persons declared non grata or not acceptable

1. The receiving State may at any time, and without having to explain its decision, notify the sending State that the diplomatic courier of the latter State is declared *persona non grata* or not acceptable. In that event, the sending State shall, as the case may be, either recall the person concerned or terminate his function.

2. In cases when a diplomatic courier is declared *persona non grata* or not acceptable in accordance with paragraph 1 prior to the commencement of his function, the sending State shall send another diplomatic courier to the receiving State.

8. Mr. YANKOV (Special Rapporteur), introducing his third report on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/359 and Add.1), said it was a happy coincidence that he was presenting it on the very day commemorating the French Revolution of 1789, which had deeply influenced all aspects of social, political and cultural life as well as international relations and diplomatic law.

9. His third report had three main purposes: first, to ensure continuity in the consideration of the topic, bearing in mind the Commission's enlarged membership, secondly, to revise the texts of draft articles 1 to 6 in the light of the valuable suggestions made in the Commission and in the Sixth Committee of the General Assembly; and, thirdly, to examine the issues dealt with in chapter II of the report with a view to proposing further draft articles on the status of the diplomatic courier and his official functions.

10. Work on the topic had been greatly facilitated by the early consideration of the comprehensive list of issues set forth in the preliminary report² and by the Commission's subsequent examination and tentative approval of the structure of the draft, which consisted of four main parts. Part I (General provisions) dealt with the scope of the draft articles, definitions, and general principles of diplomatic law such as freedom of communication for all official purposes, the duty to respect international law and the laws and regulations of the receiving and transit States, and non-discrimination and reciprocity. Part II (Status of the diplomatic courier, the diplomatic courier *ad hoc* and the captain of a commercial aircraft or the master of a ship carrying a diplomatic bag) would contain provisions on the status of the courier, his functions, rights and obligations and the facilities, privileges and immunities ac-

corded to him by the receiving and transit States. Part III would deal with the status of the diplomatic bag, including the bag not accompanied by a diplomatic courier. Finally, Part IV would contain other provisions including those relating to the obligations of transit and third States, the relationship of the draft articles to existing multilateral conventions in the field of diplomatic law, and final provisions.

11. Throughout his work on the topic, he had remained aware of its practical character and of the need to approach it empirically. However, it would be wrong because of that to exercise undue restraint in seeking solutions for certain issues which had not been settled adequately by existing rules of law and in attempting to elaborate new rules. As he understood it, the elaboration of a comprehensive set of rules on the status of the diplomatic courier and the diplomatic bag called for a close examination of State practice and an endeavour to meet the needs of the dynamic developments which had taken place in the field of diplomatic communications. He had been encouraged in that understanding by the comments and advice of members.

12. With regard to part I of the draft articles, article 1 continued to be comprehensive in its approach to the question of the scope of the draft. It did not use the global notions of "official courier" and "official bag" which he had suggested in his preliminary report³ but employed instead the wording of an assimilation formula based on the status of the diplomatic courier as defined in the 1961 Vienna Convention on Diplomatic Relations, with adjustments where appropriate. Such a formula had been discussed in his second report (A/CN.4/347 and Add.1 and 2, paras. 42-47), and the revised version of the article continued to exemplify it. The revision of article 1 was twofold. First, the reference to communications between the sending State and other States or international organizations had been deleted. Although there were exceptional cases where, because the sending State had no mission in the receiving State, a courier might deliver an official message from the former State to the latter or to an international organization directly, the Sixth Committee had regarded the provision for such cases in the draft articles as "an undue extension of the concept of diplomatic courier and diplomatic bag" (A/CN.4/L.339, para. 192) and a deviation from the traditional field of communications between States and their missions abroad or between those missions. The second change he had made in the original draft article 1 (A/CN.4/347 and Add.1 and 2, para. 49) was to combine the two paragraphs into one, thus making the text more concise.

13. Draft article 2 was unchanged and continued to provide that the draft articles should not apply to couriers and bags of international organizations; that had been the prevailing view. Some, however, had not agreed that couriers and bags used by international organizations and by certain other entities recognized as

² Reproduced in *Yearbook ... 1980*, vol. II (Part One), p. 244, document A/CN.4/335, para. 60.

³ *Ibid.*, p. 245, para. 62.

subjects of international law, such as national liberation movements, should be excluded from the scope of the draft articles. While he appreciated that view, he thought it best that couriers and bags other than those used by States should be left aside for the time being, so that the Commission could concentrate its attention on the most common type of couriers and bags. It need not, however, lose sight of those used by international organizations, since paragraph 2 of the article safeguarded their legal status. If necessary the Commission could consider that point at a later stage of the work, when the relevant materials would be available.

14. Draft article 3 related to use of terms. A substantial part of the second report (*ibid.*, paras. 50-210) had been devoted to an examination of the various problems which they raised. There had been two broad criticisms, in the Commission and the Sixth Committee, of the article 3 he had originally proposed (*ibid.*, para. 211): first, that the definitions were unnecessarily detailed, and secondly, that the list of definitions was too long. He had given both criticisms very serious consideration and realized that they were indeed justified. The revised version of the article therefore omitted the references to the facilities, privileges and immunities accorded to diplomatic couriers and bags. That left a purely functional definition of couriers and bags. The other elements of the status of the diplomatic courier and bag would be considered in connection with the relevant substantive provisions of the draft.

15. The notion of an "official oral message" which he had included in the original definition of the term "diplomatic courier" (*ibid.*, para. 121) had been recognized by certain States and mentioned in the first report of the Working Group on the topic (see A/CN.4/359 and Add.1, para. 30). However, in view of the doubts expressed on the subject in the Sixth Committee, and in order to avoid possible confusion between a diplomatic courier and a diplomatic envoy, he had decided to delete the notion. In addition, he had deleted the words "and with whose consent" from the definition of the term "transit State", once again in order to meet criticism expressed in the Sixth Committee. Those words were not really necessary in a definition and could appear elsewhere in the draft.

16. In view of the observations on the length of his original list of definitions, the revised version of the article omitted definitions of terms that were either self-explanatory or whose meaning was well established in international law and State practice, as well as terms not yet used in the draft. The extent of the list could be reconsidered as and when the need arose or when the draft articles had been completed. The revised text of the draft article had twelve definitions. Paragraphs 2 and 3 of the draft contained safeguard provisions and were unchanged.

17. Draft articles 4, 5 and 6 laid down the three general principles of freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags, duty to respect international law

and the laws and regulations of the receiving and the transit State, and non-discrimination and reciprocity with regard to the treatment of diplomatic couriers and diplomatic bags. The formulation of certain general principles of international diplomatic law had been suggested in his preliminary and second reports and had been generally endorsed in the discussions on the topic in the Commission and the Sixth Committee, on the ground that even their tentative enunciation might serve as a useful guide to the legal framework on which the rules on the status of the diplomatic courier and diplomatic bag were based.

18. The three principles should be considered as a balanced set of reciprocal rights and obligations of sending, receiving and transit States and, exceptionally, of third States. As he had pointed out in this third report (*ibid.*, para. 45), diplomatic law as a system of legal rules was based on sovereign equality of States and operated predominantly through reciprocity, since every State could be both a sending and a receiving State. The question of freedom of diplomatic communication and the reciprocity which it involved had been discussed quite extensively in his second and third reports. He simply wished to add that the two matters must be considered together and not in isolation one from the other. Paragraph 1 of draft article 4 had been revised to incorporate some minor editorial changes which brought the paragraph into line with the revised draft article 1. Draft article 5 had been redrafted to provide that it was the duty not only of the courier but also of the sending State itself to respect international law and the laws and regulations of the receiving and transit States.

19. Among the points raised during the debates in the Commission and in the Sixth Committee on the general principles embodied in draft articles 4 to 6 had been the question whether the inviolability of the diplomatic bag should be absolute, as provided for *inter alia* in article 27 of the 1961 Vienna Convention on Diplomatic Relations, or relative, as provided for in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations. He had been struck to discover, on examining some hundred bilateral treaties concluded since 1963, that even those States that had ratified the latter Convention preferred for the most part to incorporate in those treaties something similar to the rule on inviolability embodied in article 27 of the 1961 Convention, rather than the one laid down in article 35, paragraph 3, of the 1963 Convention. It seemed clear to him, therefore, that the trend was toward absolute inviolability. The matter should not be regarded as closed, however, and could perhaps be considered more appropriately in connection with the substantive provisions on the status of the bag.

20. Turning to part II of the draft, with particular reference to the proposed articles 7 to 14, he said that the third report discussed the status of the courier *stricto sensu*, in regard to matters such as proof of status, appointment of the courier, his nationality and functions, as well as *lato sensu*, in respect of the courier's rights and obligations, including his privileges and im-

munities. The main question with regard to proof of the courier's status was the requirement of an identifying document or credentials. The term "courier's passport" had always caused confusion. In some cases it was used solely in the sense of a travel document, but in many others, in that of a special or official document which indicated the status of the courier and the number of packages that constituted the diplomatic bag. He had examined the matter in detail, and on that basis he proposed, in draft article 7, that the courier should be required to carry a passport, like all other travellers—it could be a diplomatic, service or ordinary passport—and also an official document stating that the bearer was a diplomatic courier. That document might possibly indicate the destination of the bag and, as required under the four multilateral conventions on diplomatic law, the number of packages of which it consisted.

21. Draft article 8 dealt with an essential element in the legal status of the courier, namely, his appointment. That was an act of the competent authorities of the sending State or of its mission abroad, and was freely exercised at its discretion; it therefore fell within the internal jurisdiction of the sending State. The act of appointment defined the category of the courier—professional or *ad hoc*. The designation of a diplomatic courier *ad hoc* differed from the act of appointment of a professional courier. Although the appointment of a courier was primarily a matter of the internal law of the sending State, it might have international implications; for instance, where a courier was refused a visa on the ground that he was not acceptable. Draft article 8 had accordingly been worded to reflect both the internal-law nature of the act of appointment and the need to take the possible international implications into account.

22. Draft article 9 dealt with the appointment of the same person as a courier by two or more States. That practice had been introduced on grounds of economy by neighbouring States, States in the same region or States that enjoyed a special relationship, particularly where long journeys by the courier were involved. Draft article 9 had been designed to reflect the practice and was based on article 6 of the 1961 Vienna Convention and article 18 of the 1963 Vienna Convention. The modalities of such a joint appointment needed to be spelt out. The courier's passport should be issued by one of the States concerned; his official document might either be issued jointly or consist of separate documents issued by the individual sending States. A joint courier should in principle be a national of one of the States concerned.

23. Draft article 10 dealt with the related question of nationality. It was based on State practice, supported by article 35, paragraph 5, of the 1963 Vienna Convention. The nationality of diplomatic agents had been a problem which dated back to the latter part of the nineteenth century. It was now the general rule that admission to a country's diplomatic service was confined to persons of that country's nationality. He concluded that the same rule applied to professional couriers, on the

ground of the need to avoid a conflict of duties. When preparing the drafts of the diplomatic conventions, the Commission had not considered the question of the nationality of the courier. However, article 8 of the 1961 Convention had provided that members of the diplomatic staff of the mission should in principle be nationals of the sending State, but might exceptionally be nationals of the receiving State, although only with the consent of that State, which could be withdrawn at any time. Article 38 of that Convention had provided, in paragraph 1, that the latter kind of diplomatic agent "shall enjoy only immunity from jurisdiction and inviolability, in respect of official acts performed in the exercise of his functions". Subsequently article 35, paragraph 5, of the 1963 Vienna Convention had provided that, save with the consent of the receiving State, a consular courier should be neither a national of the receiving State nor, unless he was a national of the sending State, a permanent resident of the receiving State. That paved the way for the proposed article 10, which allowed for an exception to the general rule on practical grounds.

24. The last part of the third report concerned the scope, content and duration of the functions of the diplomatic courier, including the declaration of a diplomatic courier as *persona non grata*, or not acceptable. The significance of those matters in defining the status of the courier was obvious. The functions of the courier were instrumental to the exercise by the State of its right to freedom of official communication. As had been pointed out on many occasions, the right of a diplomatic mission to free and secure communication for official purposes was perhaps, in practical terms, the most important of all diplomatic privileges and immunities; without the right to send messages in code and without being able to rely on the inviolability of the diplomatic bag, a mission could not usefully perform its functions of observing, reporting and receiving confidential instructions. The main subject of legal protection was the mission's official correspondence—in other words, the contents of the bag. The courier was the person entrusted with the custody, transport and delivery of the bag; his legal status therefore derived from the status of the bag itself, which was a corollary to the principle of inviolability of the official correspondence of the mission. Modern diplomatic law and practice had adopted that functional need as an explanation and justification for diplomatic privileges and immunities.

25. The determination of the scope and content of the courier's functions also provided the legal criteria for the distinction between functions inherent in the status of the courier and necessary for the accomplishment of his official task, and activities extraneous to those functions. A generally agreed definition of the scope and content of the courier's functions could therefore play an important role in preventing abuse of the inviolability of the diplomatic bag and unjustified recourse to restrictions, including the right to declare a courier *persona non grata*, or not acceptable. It might also provide the legal foundation for the rights and obligations of the

courier, including the facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag by the receiving or transit State.

26. Article 27 of the 1961 Vienna Convention on Diplomatic Relations provided some indication of the scope and content of the official functions of the courier, but did not specify all the important elements involved. Briefly, the courier's main function was his care of the bag, which involved its safe transportation, delivery and collection. That function had acquired considerable significance with the growing use of *ad hoc* couriers from both developing and developed countries, and also when the bag was entrusted to the pilot of an aircraft or the captain of a ship. The text proposed as draft article 11 attempted to indicate as concisely as possible the main functions of the diplomatic courier.

27. Draft article 12 dealt with the commencement of those functions, an important moment in regard to determining the beginning of the facilities, privileges and immunities accorded to the courier. From the point of view of the receiving or transit State, the courier's functions commenced at the moment when the courier entered its territory. However, in the case of a diplomatic courier *ad hoc* appointed by a mission to carry an outgoing diplomatic bag from the territory of the State where the mission was accredited, the function of the courier would probably not manifest its legal effect until the courier's exit from the territory of the receiving State.

28. In the Sixth Committee, there had been some discussion as to whether captains of commercial aircraft or ships should have privileges and immunities similar to those accorded to diplomatic couriers. In view of the functional approach that had been adopted to the question of the status of diplomatic couriers, he did not believe that would be justified. The captain of a ship was not supposed to carry the bag outside the ship; authorized mission personnel should have direct access to the ship for the purpose of taking possession of the bag. Parenthetically, he wished to point out that in the present draft articles the word "ship", used in the earlier portion of the recent Convention on the Law of the Sea,⁴ had been preferred to the word "vessel", which was used in parts XII, XIII and XIV of that text. Also, rules were needed about admission to ships and aircraft, and the Commission might help to formulate them. In many instances, national rules and regulations were either non-existent or took the form of a circular issued by the port authority for temporary use. The existence of positive international guidelines on the matter would help to overcome those drawbacks and enhance the proper functioning of diplomatic communications.

29. Reverting to the draft articles, he said that the four codification conventions in the field of diplomatic law adopted under the auspices of the United Nations contained no specific provisions on the end of the courier's functions. A comprehensive, though not exhaustive, set

of rules on that point was needed. Useful analogies could be made with the termination of the function of diplomatic agents, but not without great caution and a detailed scrutiny of the specific issues involved. Article 43 of the 1961 Vienna Convention might be of assistance in that connection. It singled out for specific mention two circumstances in which the function of a diplomatic agent ended: notification by the sending State to the receiving State that the function of the diplomatic agent had come to an end; and notification by the receiving State to the sending State that, a diplomatic agent of the sending State having been declared *persona non grata* or not acceptable and the sending State having failed to recall that agent, the receiving State refused to recognize the agent as a member of the mission. However, as the article itself made clear, those two conditions were not exhaustive, and in fact the Convention contained other provisions that referred implicitly to the termination of functions, for example, in the event of the death of the agent, the severance of diplomatic relations between the sending State and the receiving State, or the permanent or temporary recall of the mission.

30. On the basis of an examination of State practice and having regard to the analogies which could be drawn with the position of diplomatic agents, he suggested that two categories of factors might be considered for the termination of a courier's functions: first, acts of the sending and the receiving or the transit State, such as recall, dismissal or suspension of the courier, non-extension of his visa or declaration of the courier to be *persona non grata* or not acceptable; and secondly, events or facts such as the completion of the courier's function, namely, the delivery to final destination of the bag or bags entrusted to him, or the death of the courier. Article 13 was drafted accordingly.

31. The legal features of the institution of *persona non grata*, or not acceptable, deserved special consideration and were dealt with in paragraphs 124 to 127 of the third report. The rules were laid down in the four multilateral conventions, especially in the 1961 Convention on Diplomatic Relations. There should not be any confusion about the term "not acceptable", which in the Conventions was used both *ratione temporis* and *ratione personae*. In the former sense, it could involve a sequence of events; in the latter, it was usually applied to persons without diplomatic rank, the term *persona non grata* being reserved for persons having diplomatic rank. It was necessary to consider the applicability of the basic rules with regard to diplomatic couriers *ad hoc* as well as professional diplomatic couriers; in either case, the courier might or might not be a diplomatic agent. If he was not—for instance, when he was a member of the mission's technical staff or a member of such a person's family, as an *ad hoc* courier might be—the pertinent factor was his function and the commencement and duration of his functions were very important. All those elements were embodied in draft article 14.

⁴ See 1699th meeting, footnote 7.

32. In conclusion, he expressed his appreciation to the Codification Division for the work they had done in providing materials on the topic. He asked the Secretariat to continue assisting the Special Rapporteur in that respect in the following ways: by updating the collection of treaties and related materials in the field of diplomatic and consular relations in general and of official communications exercised through couriers and bags in particular; by seeking further information from Governments on national laws, regulations, other enactments, procedures, recommended practices, judicial decisions, arbitral awards and diplomatic correspondence in the field of diplomatic law, with particular respect to the treatment of couriers and bags; by preparing a preliminary analytical survey of State practice on the subject, including the *travaux préparatoires* of the four multilateral conventions on diplomatic law elaborated under United Nations auspices and the practice evidenced by bilateral and multilateral treaties and national laws, regulations and procedures, in accordance with the tentative list of issues and the structure of the draft articles proposed by the Special Rapporteur,⁵ and in accordance with the guidelines and draft articles which he intended to submit on part II of the topic, covering the status of the courier, and part III, dealing with the status of the bag; and by updating the information on the status of the above-mentioned four conventions, bearing in mind that, in order to enter into force, the 1969 Convention on Special Missions needed two ratifications, and the 1975 Convention on the Representation of States in Their Relations with International Organizations of a Universal Character twelve or thirteen ratifications.

33. The CHAIRMAN thanked the Special Rapporteur for his third report and for the excellent statement he had made in presenting it. Mr. Yankov's broad culture went hand in hand with his constant concern to keep abreast of all aspects of the subject. His great experience was particularly useful in dealing with a topic that involved considerable practical problems. The draft articles would certainly be of great value if they brought to a somewhat uncertain area of the law elements which would promote the observance of the right of communication, which was fundamental for bringing unity to international society.

34. Speaking in his personal capacity, he thanked the Special Rapporteur for his kind reference to the commemoration of the French Revolution. As the Special Rapporteur had rightly indicated, the Revolution had had a significant effect on international law; that was particularly the case in regard to inland navigation and diplomatic privileges and immunities.

35. Mr. FRANCIS said that generally he had no contention with the principles embodied in the fourteen draft articles. In connection with article 3, on use of terms, he wished to stress the importance of the oral message; given the fact that some States made use of that as a means of communication, it might not over-

burden the article to add an extra term, "communication", the definition of which would include an oral message. He saw a contradiction between article 3, paragraph 3, which stated that the provisions of paragraphs 1 and 2 were without prejudice to the use of the terms in question in other international instruments, and article 3, subparagraphs (7) and (8), which defined "diplomatic mission" and "consular post" according to the 1961 and 1963 Vienna Conventions respectively. That could be corrected by defining "diplomatic mission" in subparagraph (7) in general terms that referred to its function, and by using in subparagraph (8) the definition of "consular post" which appeared in the 1963 Vienna Convention, but with the reference to the Convention itself relegated to a footnote.

36. Article 12 should indicate that a courier's functions commenced the moment the bag was entrusted to him, but that in regard to receiving and third States they commenced once he entered the jurisdiction of such a State. He wondered whether the stipulation that the courier should be "crossing the territory" of the transit or receiving State should not be replaced by a reference to jurisdiction. In a case where State A dispatched its bag from State B by State B's national airline, he was not sure that the airline had any responsibility for the bag until the bag left the jurisdiction of State B.

37. Finally, subparagraph (a) of draft article 13 did not cover the situation in which a courier had delivered one bag and was awaiting another. In the case in which a bag had been delivered and no other bag was expected, there should be a provision safeguarding the courier's privileges and immunities until he returned from the receiving State.

The meeting rose at 1 p.m.

1746th MEETING

Thursday, 15 July 1982, at 10 a.m.

Chairman: Mr. Paul REUTER

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/347 and Add.1 and 2,¹ A/CN.4/359 and Add.1, A/CN.4/L.339, ILC(XXXIV)/Conf. Room. Doc. 4)

[Agenda item 7]

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

ARTICLES 1 TO 14² (*continued*)

1. Mr. DÍAZ GONZÁLEZ said he fully agreed with the three principles that underlay the draft articles and

⁵ See footnote 2 above.

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² For the text, see 1745th meeting, para. 7.