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Summary record of the 1746th 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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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.

had already been accepted by the Commission. Nevertheless he still had a few doubts about certain points. The Special Rapporteur's explanations (A/CN.4/359 and Add.1, para. 14) had not convinced him of the need to use the terms "official courier" and "official bag" rather than the terms "diplomatic courier" and "diplomatic bag". The contents had to be distinguished from the container: it was the bag, as a container, not its contents, that had a diplomatic character and justified a particular status. Official correspondence between two States that was not transmitted by bag and was thus not of a diplomatic character did not have the same characteristics as the diplomatic bag. Furthermore, the bag was used not only for official correspondence, but also for the private correspondence of members of a mission, particularly in countries which had censorship and in those where postal communications were difficult. The term "official courier" was also incorrect, because a courier was necessarily official but not always diplomatic. Finally, official status depended on the sending State, not on the agreement of the receiving State; an official of a ministry of foreign affairs travelling to another country in his official capacity need not necessarily be doing so in a diplomatic capacity. His official status derived from the fact that he was officially recognized by the Government that sent him.

2. Several of the articles called for minor drafting changes. The definition of the term "diplomatic courier *ad hoc*" (art. 3, subparagraph 1 (2)) as meaning "an official of the sending State entrusted with the function of diplomatic courier for a special occasion or occasions", did not seem really necessary. A diplomatic courier was always a courier *ad hoc*, since his mission ended once he had performed the functions entrusted to him. The words "for a special occasion or occasions" added nothing to the definition, because a diplomatic courier *ad hoc* was always appointed for one or more special occasions. In the Spanish text of the definition of the term "transit State" (art. 3, subparagraph 1 (6)) the concluding words should be amended to read: "*que deben atravesar para llegar al Estado receptor*". In article 3, paragraph 1, subparagraphs (7) to (12) could be deleted, because the definitions they contained already appeared in multilateral conventions in force and formed part of the vocabulary of diplomatic law.

3. Referring to article 4, paragraph 2, he pointed out that the transit State could facilitate free communication through its territory without necessarily facilitating free passage. He therefore suggested that free passage should be referred to in that provision, which should be amended to read:

"The transit State shall facilitate free passage and free communication through its territory by the diplomatic couriers and diplomatic bags referred to in paragraph 1 of the present article".

4. At the end of article 5, paragraph 1, the words "and the transit State" should be replaced by the words "as well as those of the transit State". Similarly, at the end of paragraph 2 of that article the words "and the transit

State" should be amended to read "or in those of the transit State". Article 6 could be simplified. As the Special Rapporteur had indicated (1745th meeting), it was subject to the principle of reciprocity; paragraph 2 could therefore be amended to read: "However, the provisions of paragraph 1 shall be subject to the principle of reciprocity". Subparagraph 2 (a) could then be deleted, and the words "Discrimination shall not be regarded as taking place ..." could be added at the beginning of what was now subparagraph (b).

5. The Special Rapporteur was right in believing that there was a general trend towards recognition of the absolute nature of the principle of the inviolability of the diplomatic bag. It should be pointed out, however, that that principle was relative, in the sense that modern technical devices, such as certain types of X-rays, made it possible to inspect a bag without jeopardizing its inviolability.

6. In the Spanish text of article 7, it would be better to refer to the number of "*bultos*" or "*piezas*", rather than to the number of "*paquetes*" constituting the diplomatic bag, since the word "*paquetes*" did not apply, for example, to letters, which the bag might contain. The word "*bultos*" had, moreover, been used in several international conventions and agreements.

7. As the Special Rapporteur had pointed out (*ibid.*), the question of the appointment of a diplomatic courier did not come under international law; it was a prerogative of the sending State. Article 8, which related to that question, could be simplified. In the Spanish version, the word "*serán*" should be replaced by the word "*son*". The phrase beginning with the words "and are admitted ..." could be deleted, since the functions of the diplomatic courier were specified in other articles.

8. With regard to the nationality of the diplomatic courier (article 10), it was obvious that each State would follow its own laws and practice. Under the Constitution of Venezuela, no privileges or immunities could be granted to a Venezuelan national, so that a Venezuelan could not be a diplomatic courier of a foreign country. As the Special Rapporteur had pointed out (A/CN.4/359 and Add.1, para. 102), agreements concluded by States played an important part in the matter.

9. For the sake of accuracy, the words "to its destination", in article 11, should be replaced by the words "to its recipient", because a diplomatic courier who only delivered the diplomatic bag to its destination, without delivering it to its recipient, would not have performed his functions.

10. In article 12, the words "depending upon which of these events occurs first" did not appear to be necessary, since the functions of the diplomatic courier began as soon as he entered the territory of the receiving State or that of the transit State, no matter which he entered first. Lastly, in the Spanish text of article 13 and the commentary thereto, the word "*cesación*" should be replaced by the word "*cese*".

11. Mr. STAVROPOULOS, referring to draft article 13, suggested that subparagraph (d) should be deleted. In the event of the death of a diplomatic courier, it was sufficiently obvious that his functions came to an end.

12. Mr. Ni stressed the practical importance of the status of the diplomatic courier and the diplomatic bag. The four major multilateral conventions on diplomatic law, which were, without any doubt, the Commission's main contribution to the codification and progressive development of international law, contained some provisions on the status of the diplomatic courier and the diplomatic bag, but those provisions needed to be supplemented. It should be noted, however, that the frequent violations of diplomatic privileges and immunities were due not so much to a lack of relevant provisions as to the lack of political will to respect those privileges and immunities.

13. As to the relationship between the draft articles in preparation and the four existing conventions, he thought the Commission should only reaffirm the principles embodied in those conventions, without expanding them. The Special Rapporteur had already proposed a plan³ and shown concern to strike a balance between the interests of the receiving State, which the diplomatic bag should reach as rapidly as possible, and those of the sending State, which required safe, unhindered and rapid delivery of the bag.

14. The Commission should not only reaffirm the major principles enunciated in the multilateral conventions on diplomatic law, namely, freedom of communication for all official purposes, observance of the laws and regulations of the receiving State and the transit State, and non-discrimination; it should also take account of customary rules and would need to formulate concise articles covering specific situations without unnecessary repetitions.

15. In his second report (A/CN.4/347 and Add.1 and 2), the Special Rapporteur had proposed six draft articles which were to form part I of the draft, entitled "General provisions". In the report under consideration (A/CN.4/359 and Add.1), he had duly amended those articles, taking account of the comments made in the Commission and in the Sixth Committee of the General Assembly. Thus, in the new version of draft article 1, the Special Rapporteur had deleted the reference to direct communications between the sending State and the receiving State or international organization, and had explained why that amendment had been made (*ibid.*, paras. 17-18).

16. In the definition of the term "transit State" (art. 3, subpara. 1 (6)), the Special Rapporteur had eliminated the requirement of consent of the transit State to the passage of the diplomatic courier or diplomatic bag. The expression "third States" in article 6, subparagraph 2 (b), should either be defined or replaced by the words "other States", which would

mean States not parties to an agreement modifying the extent of facilities, privileges and immunities.

17. According to article 8, diplomatic couriers and diplomatic couriers *ad hoc* were "freely" appointed by the sending State; but since the sending State was bound by the provisions of articles 9, 10 and 11, it did not have absolute freedom. The words "are freely appointed" should therefore be replaced by the words "may be appointed".

18. In article 10, paragraph 1, the word "should", whose interpretation might cause practical difficulties, should be replaced by the word "shall". It should be noted that the principle stated in that provision was becoming increasingly established. For example, article 35, paragraph 5, of the 1963 Vienna Convention on Consular Relations provided that the consular courier must not be a national of the receiving State. It was therefore appropriate for draft article 10, paragraph 1, to state the rule that the diplomatic courier must, in principle, have the nationality of the sending State, even though the deletion of that provision could not affect the trend referred to by the Special Rapporteur in his third report (*ibid.*, para. 102). The wording of article 10, paragraph 3, which was divided into two subparagraphs, might be simplified through the use of the expression "*mutatis mutandis*".

19. The description of the functions of the diplomatic courier in article 11 contradicted the definition of the term "diplomatic courier" given in article 3, subparagraph 1 (1). According to article 11, the diplomatic courier took care of the diplomatic bag and delivered it to its destination, whereas article 3 provided that the diplomatic courier was entrusted with the custody, transportation and delivery of the diplomatic bag. That difference in wording could be explained by the fact that article 11 was a substantive provision, whereas article 3 was of an expository nature. It would, however, be advisable to harmonize the wording of those two provisions.

20. The text of article 12 required some clarification. Like Mr. Francis (1745th meeting), he believed that for the diplomatic courier himself, his functions commenced when he received the bag, whereas for the receiving State and the transit State, those functions commenced when the courier entered their territory.

21. He was not sure what the status of the bag was in the two cases covered by article 13 subparagraphs (c) and (d). He suggested that it should be made clear, in a provision to be added at the end of article 13, that in the cases referred to in subparagraphs (c) and (d) the end of the functions of the diplomatic courier did not affect the status of the diplomatic bag entrusted to him.

22. Article 14, paragraph 2, seemed unnecessary. According to that provision, the sending State would be obliged to send another diplomatic courier to the receiving State if a diplomatic courier was declared *persona non grata* or not acceptable by the receiving State prior to the commencement of his functions—but it was quite

³ *Yearbook ... 1980*, vol. II (Part One), p. 244, document A/CN.4/335, para. 60.

obvious that, in such a case, the sending State was free to send another diplomatic courier or not to do so.

23. Mr. RIPHAGEN, referring to the words "or with each other", in article 1, said that there had been objections to extending the scope of the article to include communications between diplomatic missions in different countries. In the case of his own country, communications never passed from one diplomatic mission direct to another, but always through the capital. Perhaps the Special Rapporteur could provide further information on the practice of States in that matter.

24. The definition of a "transit State" (art. 3, subpara. 1 (6)) applied equally to the case in which a courier picked up a bag at a diplomatic mission in the receiving State and brought it back to the sending State; perhaps some wording to that effect could be added to the definition. Paragraph 2 of article 3 stated that the provisions of paragraph 1 "may also apply to ...". He was not in favour of the use of the word "may", which was unclear, in legal texts; perhaps another word could be found.

25. The point he had raised in regard to article 1 was equally applicable to article 4, paragraph 1, which also appeared to extend special communications beyond the normal framework.

26. In article 5, paragraph 1, the reference to "the duty of the sending State ... to respect ... the laws and regulations of the receiving State and the transit State" was not appropriate. The courier had that duty, of course, but as applied to the sending State the wording was too strong. With regard to paragraph 2, he did not see how it would be possible for the diplomatic courier to interfere in the internal affairs of the receiving State and the transit State "in the discharge of his functions", which were simply to take care of the bag and deliver it.

27. In article 8, he agreed with Mr. Ni that the word "freely" should be deleted. The last phrase, "and are admitted to perform their functions on the territory of the receiving State or the transit State", was clearly belied by article 14, which provided for cases in which couriers were not admitted; he doubted whether that formulation was quite correct.

28. Article 9 contained nothing about the possible agreement or objection of the receiving State. He wondered whether the stipulation contained in article 6 of the Vienna Convention on Diplomatic Relations, "unless objection is offered by the receiving State", should not also appear in article 9. In article 10, he found paragraph 4 rather too strong, or at least not sufficiently clear. Although two or more States could not normally appoint a national of a third State as a diplomatic courier, paragraphs 2 and 3 would apply even in the case of a person appointed as a diplomatic courier by two or more States.

29. With regard to article 12, the point had already been made that it was not logical for the courier's functions to commence from the moment he was "crossing the territory of the transit or receiving State", though it

was true that the rights and obligations of the transit or receiving State did commence from that moment.

30. As to article 13, subparagraph (a), he agreed with Mr. Francis (1745th meeting), that the courier was still in function between the delivery of one bag and the issue of another. On subparagraph (d), he agreed with Mr. Stavropoulos that it was somewhat macabre to refer to the death of the courier.

31. In article 14, paragraph 2, the stipulation that the sending State "shall" send another diplomatic courier was too strong, since the sending State was free to do nothing at all or to use another means of communication.

32. Mr. CALERO RODRIGUES expressed his appreciation of the fact that, in redrafting the articles he had previously submitted, the Special Rapporteur had taken account of several observations made in the Commission and in the Sixth Committee. For instance, he had given up the idea (A/CN.4/359 and Add.1, para. 35) that the concept of the diplomatic courier and the diplomatic bag should apply to communications between different States, and was now limiting it to communications between organs of the same State. That was a realistic approach. The rejection of some other ideas was to be regretted, however. For example, it was unfortunate that the Special Rapporteur's suggestion⁴ regarding a general denomination for all couriers and bags had not been adopted. The terms "official courier" and "official bag" would have been a useful innovation. Again, the use of couriers and bags by international organizations would have to be assimilated to their regular use by States. That having been said, articles 1 to 6 as redrafted were in line with what was acceptable in an international convention. The Special Rapporteur had eliminated objections to substance and had also reduced the number of definitions. The Drafting Committee would decide whether all the definitions in the text as it stood were necessary.

33. With regard to the new articles 7 to 14, he agreed in principle with their contents, although some drafting changes were needed. Members had made useful suggestions, which he hoped the Drafting Committee would explore. The structure of the draft articles was generally sound, and the Special Rapporteur had been wise to rely on provisions in existing conventions. Although general objections to the topic had been made on the grounds that matters concerning diplomatic couriers and diplomatic bags were already regulated by other instruments, he agreed with the Special Rapporteur (1745th meeting) that there was some advantage in having a single instrument dealing with those matters. Such an instrument could also fill some gaps, such as the one mentioned by the Special Rapporteur in regard to the unaccompanied bag and the conditions under which it should be taken from the captain of a ship or aircraft. That point would be elaborated later.

⁴ *Ibid.*, p. 245, para. 62.

34. The end of the function of the diplomatic courier dealt with in article 13 was important only in regard to its consequences, such as the effect on privileges and immunities. Mr. Francis had raised an important point in that connection: if the courier had no bag to take back, his functions should not end until he had returned from the receiving State.

35. He agreed with Mr. Ni that article 14, paragraph 2 was unnecessary, since the sending State was not obliged to send another courier. He also shared Mr. Riphagen's views on the word "freely" in article 8 and the lack of clarity in article 10, paragraph 4.

36. Mr. OGISO, referring to the definitions of the "diplomatic courier" and "diplomatic bag" (art. 3, subparas. 1 (1) and (3)) remarked that there were references in other articles to the "consular courier" and "consular bag". If the Special Rapporteur wished to give the same treatment to the two types of bag, it should be made clear that the existing definitions covered both; if not, an additional definition could be needed in article 3.

37. As to articles 5 and 6, he was not familiar with the practice relating to diplomatic couriers and bags in the transit State, but even if there was not a firmly established practice, he believed the draft articles should stipulate that the transit State must give non-discriminatory treatment to diplomatic couriers and bags, irrespective of whether that State had diplomatic relations with the sending State.

38. A number of previous speakers had raised points concerning article 13. If he had understood the Special Rapporteur correctly regarding subparagraph (a), a regular courier's function ended when he returned home after delivering the bag, whereas the function of a courier *ad hoc* ended upon delivery of the bag. In his view, the function should end in both cases when the courier returned home after delivery. The courier would thus retain his facilities, privileges and immunities if he had to pass through transit States on the return journey. He agreed with the views expressed on article 13, subparagraph (d), concerning which Mr. Ni had raised an interesting point: the Special Rapporteur should find a way to make it clear that the status of the bag did not change even after the death of the courier during the exercise of his functions. The same applied to article 14, paragraph 1; the status of the bag should not change when the courier was declared *persona non grata* or not acceptable upon arrival at the frontier of the receiving State. He would appreciate information from the Special Rapporteur concerning such cases.

39. Mr. USHAKOV said that the draft articles proposed in the Special Rapporteur's excellent report (A/CN.4/359 and Add.1) were generally acceptable, subject to drafting changes. It was quite clear that the draft articles should not deal only with the diplomatic courier and diplomatic bag within the meaning of the 1961 Vienna Convention on Diplomatic Relations, but also with all other official couriers and bags, which had, unfortunately, been described in different terms in other

multilateral conventions. For example, article 28 of the 1969 Convention on Special Missions referred to the "bag of the special mission" and to the "courier of the special mission", whereas articles 27 and 57 of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character referred to the "bag of the mission" and the "bag of the delegation", and to the "courier of the mission" and the "courier of the delegation" respectively.

40. Since the draft being prepared was to apply to all couriers and all diplomatic bags, which had the same status under the four conventions on diplomatic law, and the terms "diplomatic courier" and "diplomatic bag" were used in only one of those conventions, the Commission would either have to use new terms, such as "official courier" and "official bag", specifying that they covered all cases, or use the terms "diplomatic courier" and "diplomatic bag", giving them the same broad meaning. The wording which the Special Rapporteur had used so far was not satisfactory. Nothing in the definition of the term "diplomatic courier" (art. 3, subpara. 1 (1)) showed that that term meant all couriers, including those not described as "diplomatic" couriers in various international conventions. It did not seem possible to draft articles that applied only to diplomatic couriers within the meaning of the Vienna Convention on Diplomatic Relations and then provide that they also applied to other couriers. Besides, the Commission would still have to define those other couriers. Ultimately, it would be necessary to work out a comprehensive definition covering all types of courier. All the comments he had made concerning the definition of the term "diplomatic courier" also applied to the definition of the term "diplomatic bag".

41. Commenting more generally on the articles proposed by the Special Rapporteur, he said that article 12, as it stood, was not necessary. In his view, the functions of the diplomatic courier really began in the territory of the sending State, that was to say, when the bag was entrusted to the courier; the same was not true, however, of the facilities, privileges and immunities to which the diplomatic courier was entitled and from which he began to benefit only when he entered the territory of the receiving State or a transit State. Article 12 should therefore deal with the starting point of entitlement to facilities, privileges and immunities and, consequently, be placed elsewhere in the draft.

42. The end of the function of the diplomatic courier, dealt with in article 13, could, of course, take place in the cases provided for in subparagraphs (b), (c) and (d), but not in the case referred to in subparagraph (a), namely, upon completion of the task of delivering the diplomatic bag to its final destination, because the diplomatic courier might be entrusted with another bag to take back and, even if he was not, he must be able to continue to benefit from facilities, privileges and immunities until he had returned to the sending State. Article 13 might therefore be brought into line with article

43 of the Vienna Convention on Diplomatic Relations, and also be placed elsewhere in the draft.

43. Article 14 provided, in paragraph 1, that the receiving State might "at any time" notify the sending State that the diplomatic courier had been declared *persona non grata* or not acceptable. In his view, the diplomatic courier could be declared *persona non grata* or not acceptable prior to the commencement of his functions, but he certainly could not be so declared while he was carrying out the task entrusted to him, which he must be able to complete.

44. He thought that all the articles proposed by the Special Rapporteur could be referred to the Drafting Committee for consideration in the light of the discussion. He looked forward with great interest to the results of the work of Mr. Díaz González on relations between States and international organizations, which should also deal with the official couriers of international organizations.

45. Sir Ian SINCLAIR said that the topic seemed to him to lack glamour, since he had never been entirely convinced of the need to regulate specifically the problems relating to the diplomatic courier beyond what was contained in the four conventions on diplomatic law referred to by the Special Rapporteur. In his view, the topic should be kept within as narrow a framework as possible. The Commission should draft some articles to fill the few existing small gaps, but take care not to create another regime that would overlap with the existing regimes.

46. Referring to draft article 1, he echoed Mr. Riphagen's question as to whether the scope of the draft articles should include official communications of missions and delegations not only with the sending State, but also with each other. In his view, a little more should be known about the practice of States in that matter before any final decision was reached.

47. On draft article 2, he tended to share Mr. Calero Rodrigues' regret that couriers and bags used for official purposes by international organizations were excluded from the draft. While he understood the reasons, he feared that the Commission would be confronted at some later date with a request to take up the separate topic of couriers and bags used by international organizations, which could result in a further elaboration of the kind that the Chairman had had to undertake in regard to treaties concluded between States and international organizations or between two or more international organizations.

48. With regard to draft article 3, he considered, first, that the definition of a "diplomatic courier" (subpara. 1 (1)) should be extended to cover a person entrusted with the transportation of the bag not only to the diplomatic missions of the sending State, but also back from the receiving State. He therefore suggested that the words "or from" should be added after the word "to" in the third line of that paragraph. He shared Mr. Riphagen's concern at the way in which subparagraph 1

(2) was drafted, and agreed that it should be closely examined in the Drafting Committee. Furthermore, the terms "diplomatic mission", "consular post", "special mission" and "permanent mission", which were defined in subparagraphs (7), (8), (9) and (10) respectively, were apparently intended to convey exactly the same meaning as that given to them in conventions already adopted. He would therefore suggest, with a view to simplifying the draft, that those four terms should be grouped together in one paragraph reading:

"The terms 'diplomatic mission', 'consular post', 'special mission' and 'permanent mission' shall bear the meanings assigned to them in the ... and ... Conventions, respectively".

49. In draft article 5, paragraph 2, he agreed that the phrase "in the discharge of his functions" was perhaps unnecessary and could be deleted. Paragraph 3 did not seem to add anything to the draft, but he would welcome the Special Rapporteur's observations on that provision.

50. With regard to draft article 7, he appreciated that earlier conventions also referred simply to an "official document". He had himself served as an *ad hoc* diplomatic courier before the institution had been recognized; on that occasion he had been provided by the United Kingdom Government with an official document certifying his status as a diplomatic courier *ad hoc* and also, he believed, with a way-bill showing the number of packages he was carrying. So perhaps the Drafting Committee might wish to consider the addition, in draft article 7, of the words "or documents" after the words "official document". In principle, however, he would be content to rely on State practice.

51. He agreed that the word "freely", in draft article 8, might be unnecessary; he also agreed broadly with the comments made by other members on draft article 10.

52. With regard to draft article 12, he was inclined to agree with Mr. Ushakov in questioning the need for a draft article on the commencement of the functions of a diplomatic courier. Some thought should perhaps be given to whether it was really necessary to make specific provision for the commencement, given that in one sense the diplomatic courier's functions commenced when the bag was entrusted to him in the sending State, yet in another sense his functions began, for the purpose of international acknowledgement of his status, only when he crossed the frontier of the transit or the receiving State.

53. Draft article 13 was an interesting provision, but subparagraph (a) was ambiguous, since although it clearly applied to an *ad hoc* courier it was not certain how it would apply to a regular courier. He would suggest that the article be recast to reflect the distinction between a diplomatic courier *ad hoc*, whose function clearly came to an end when the bag was delivered to its final destination, and a regular diplomatic courier whose task might not be completed until he had collected another bag and returned with it to the sending

State. He also agreed with Mr. Stavropoulos that paragraph (d) could be deleted, since otherwise a peculiar *a contrario* interpretation might be possible in the case of a diplomatic courier who was totally incapacitated.

54. Lastly, he agreed that paragraph 2 of draft article 14 served no useful purpose and could be deleted. If retained, however, it should be made discretionary rather than obligatory.

55. Mr. THIAM said that at the thirty-sixth session of the General Assembly a number of delegations in the Sixth Committee had referred to the field of application of the draft articles under consideration and had raised two important questions. The Special Rapporteur (1745th meeting) had alluded to one of those questions, which concerned international organizations; the other, which was more sensitive, concerned national liberation movements (A/CN.4/L.339, para. 191) and, more particularly, their status under the Geneva Conventions on Humanitarian Law. He would like to know the Special Rapporteur's position on those two points.

56. Mr. LACLETA MUÑOZ observed that draft article 1 was now much better than the text originally proposed (A/CN.4/347 and Add.1, para. 49), because paragraphs 1 and 2 had been merged. He, too, was uncertain, however, to what extent it was the normal practice of State missions abroad to communicate among themselves by diplomatic courier and bag. Nevertheless, that possibility was provided for in the four major codification Conventions on diplomatic law, and he would have no express objection if the practice, although exceptional, were reflected in the draft articles.

57. With regard to article 2, it was a matter of concern to him that the draft articles under consideration would not apply to international organizations, though he understood why the Special Rapporteur had, for the time being, excluded organizations from the field of application of the draft. Few international organizations had their headquarters in his country, Spain, but he supposed that the largest of them must have the right to receive and send bags for their communications. He assumed that there were provisions to that effect in many of the headquarters agreements concluded between host States and international organizations, and it might be useful if the Special Rapporteur could examine them.

58. Article 3 raised many questions. It had already been simplified and it could be simplified much more, which would also make it possible to remove some of the difficulties, such as those raised by the definitions given in paragraph 1, subparagraphs (7) and (9), of the "diplomatic mission" and the "special mission". In his view, special missions were diplomatic missions, which they had, indeed, preceded in the history of diplomatic practice; there was thus no need to draw a distinction between those two types of mission. Moreover, he thought the word "diplomatic" could be used to describe any bag sent to a diplomatic mission, a special

mission, a permanent mission or a delegation—and perhaps also to a consular post, as was the case at least in Spanish practice. The suggestions made by Sir Ian Sinclair would make it possible to solve that problem of terminology.

59. He had some doubts about the distinction between a professional "diplomatic courier" and a "diplomatic courier *ad hoc*". He believed that a diplomatic courier was an official of the State permanently entrusted with the function of transporting diplomatic bags, but his function was permanent only as seen by the internal law of the State which had appointed him, not in regard to his activities outside that State. It was that quality of permanence that made the difference between a professional diplomatic courier and a diplomatic courier *ad hoc*, since their functions were exactly the same. With regard to the diplomatic courier *ad hoc*, the problem was not so much his status as whether he already benefited from facilities, privileges and immunities, as was often the case. Special attention should therefore be given to the status of the bag and to the case of the diplomatic courier *ad hoc* who did not already benefit from facilities, privileges and immunities, which he should do from the moment he received the bag until he delivered it to its destination. The case of the professional diplomatic courier and that of the diplomatic courier *ad hoc* should not, therefore, be dealt with together, as they were, for example, in article 12.

60. He had no comments to make on article 4. Like some other members of the Commission, he had doubts about article 5, particularly paragraphs 2 and 3. It was quite clear to him that there was no need to refer specifically in paragraph 3 to the use of the "temporary accommodation" by the diplomatic courier. The four codification conventions referred only to the premises of missions, and the general principle stated in paragraph 1 should therefore be sufficient.

61. He also had some doubts about article 8 (Appointment of a diplomatic courier) and article 10 (Nationality of the diplomatic courier). It seemed rather dangerous and excessive to refer to the nationality of the diplomatic courier and to the possibility that States might influence the appointment of a courier. The functions of a diplomatic courier abroad could be said to commence only from the moment he left the sending State or, in the case of the diplomatic courier *ad hoc*, from the moment his mission was entrusted to him. The Special Rapporteur should therefore place greater emphasis on the receiving State's right not to accept a particular diplomatic courier than on its right to object to the appointment of a diplomatic courier, at least in the case of a professional courier.

62. There was no doubt that the functions of the diplomatic courier, dealt with in article 11, consisted in taking care of the diplomatic bag and transporting it, in other words, accompanying it. It was the latter term that should be used in the draft articles. As to the question whether reference should be made to the "recipient" or to the "destination", he was in favour of the

term "destination", used by the Special Rapporteur, because in most cases, although the diplomatic bag was addressed to an ambassador or a head of mission, it was rarely delivered to him personally.

63. He considered paragraph 2 of article 14 unnecessary, mainly because it was very difficult to see how a diplomatic courier could be declared *persona non grata* prior to the commencement of his functions.

64. He believed that the draft articles would inevitably have to be based on provisions relating to professional diplomatic couriers and on specific provisions concerning diplomatic couriers *ad hoc* or any other persons who might transport a diplomatic bag.

The meeting rose at 1.05 p.m.

1747th MEETING

Friday, 16 July 1982, at 10 a.m.

Chairman: Mr. Paul REUTER

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (concluded) (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 (concluded)

ARTICLES 1 TO 14² (concluded)

1. Mr. McCaffrey expressed particular appreciation of the summary of the Commission's work on the topic given by the Special Rapporteur in his third report (A/CN.4/359 and Add.1, paras. 3 *et seq.*), which had been of great value to him personally as a new member. He congratulated the Special Rapporteur on his heroic endeavour to breathe life into a subject which to himself was virtually inanimate. Like other members, he saw the advantage of having a single set of rules on the matter and of filling gaps in existing conventional law. However, he was not entirely convinced that the project was so pressing as to justify running any risk of setting up contradictions with existing conventional regimes. It was therefore necessary to proceed very cautiously indeed. That was particularly true in areas where the rules on the status of the diplomatic courier and the diplomatic bag were either very general or non-existent.

2. He noted that the Special Rapporteur had referred in paragraph 3 of his third report to the desirability of

elaborating such rules through codification and progressive development of international law and to the importance of elaborating rules on the status of the diplomatic courier *ad hoc* and the unaccompanied diplomatic bag. To the extent that the Commission was seeking to fill gaps or render existing rules more specific, it should take great care to investigate existing practice thoroughly and not to make unwarranted generalizations on the basis of bilateral regimes.

3. He approved the general structure of the draft articles that was set out in paragraph 10 of the third report. He noted however that the term "third State" was used in referring to the provisions of part IV of the draft. That term had an accepted meaning in treaty law, and it might therefore be best to replace it by a term such as "treaty State".

4. Turning to the draft articles, he said that the use of the words "or with each other" in article 1 implied a fairly broad scope for the draft. In his view, the Commission needed more information as to whether that was warranted.

5. With regard to draft article 2, he agreed with Mr. Calero Rodrigues (1746th meeting) that it seemed inappropriate to exclude international organizations from the draft articles. He believed the Commission should give some consideration to the extent to which the draft articles might apply to them.

6. As far as draft article 3 was concerned, he agreed with Sir Ian Sinclair's suggestion (*ibid.*, para. 48) that the word "to" in subparagraph 1 (1) should be replaced by the words "to or from". Subparagraph 1 (3) should perhaps include a reference to the diplomatic courier *ad hoc*. The definition of "receiving State" in subparagraph 1 (5) would be clearer if the words "and which is the destination of the diplomatic bag" were added at the end of the definition. He too thought that the definition of "transit State" in subparagraph 1 (6) should cover the passage of a diplomatic bag *en route* from the receiving State. He agreed with Sir Ian Sinclair's suggestion (*ibid.*) that subparagraphs 1 (7) to 1 (10) should be combined. In regard to paragraph 2, he shared Mr. Riphagen's view (1746th meeting) that the word "may" should be avoided; a phrase including the words "except as otherwise provided in the present articles" might perhaps be used at that point. He had spoken of the need for caution; the Commission should take particular care in deciding what couriers and bags the draft should cover, despite the trend of opinion which favoured an all-embracing formula of the kind referred to by the Special Rapporteur in paragraph 15 of his report.

7. For instance, in draft article 4, paragraph 1, the words "as well as between those missions" might be too broad for the scope of the draft. He agreed with Mr. Díaz González (*ibid.*) that passage as well as communication should be referred to in paragraph 2 of the article.

¹ Reproduced in *Yearbook ... 1980*, vol. II (Part One).

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