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**Summary record of the 1827th meeting**

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

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## 1827th MEETING

Thursday, 24 May 1984, at 10 a.m.

Chairman: Mr. Sompong SUCHARITKUL

*Present:* Chief Akinjide, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jacovides, Mr. Jagota, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (continued)**  
(A/CN.4/374 and Add.1-4,<sup>1</sup> A/CN.4/379 and Add.1,<sup>2</sup> A/CN.4/382,<sup>3</sup> A/CN.4/L.369, sect. E, ILC (XXXVI)/Conf. Room Doc.3)

[Agenda item 4]

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

ARTICLE 24 (Exemption from personal examination, customs duties and inspection)

ARTICLE 25 (Exemption from dues and taxes)

ARTICLE 26 (Exemption from personal and public services)

ARTICLE 27 (Exemption from social security provisions)

ARTICLE 28 (Duration of privileges and immunities) and

ARTICLE 29 (Waiver of immunity)<sup>5</sup> (continued)

1. Mr. McCaffrey, continuing the statement he had begun at the previous meeting and concluding his observations on draft articles 24 to 27, said he had tried to show that, while some of those articles went too far in assimilating the diplomatic courier to diplomatic agents, others were perhaps unnecessary and might not be supported by existing law and practice, for three reasons. First, it had not been demonstrated that there really were problems in the area concerned; secondly, the exemptions in question were generally covered by other articles; and, thirdly, the provisions of the four codification conventions, on which the articles were based, were largely inapposite owing to the fundamental differences

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Arts. 1-8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*

Arts. 9-14, referred to the Drafting Committee at the Commission's thirty-fourth session: *ibid.*, p. 46, footnotes 189 to 194.

Arts. 15-19, referred to the Drafting Committee at the Commission's thirty-fifth session: *ibid.*, pp. 48-49, footnotes 202 to 206.

<sup>5</sup> For the texts, see 1826th meeting, para. 1.

between the functions and length of stay of the diplomatic courier, on the one hand, and of diplomatic agents, on the other. Those conclusions, which counselled a minimalist approach, were borne out by the summary records of the Sixth Committee of the General Assembly and by the Special Rapporteur's own summary of the Sixth Committee's discussion in his fifth report (A/CN.4/382, especially paras. 12 and 13).

2. Turning to draft article 28, he pointed out that, since the duration of the diplomatic courier's privileges and immunities was linked to his functions, the real issue was when those functions came to an end. According to paragraph (a) of draft article 13, the answer was upon "completion of his task to deliver the diplomatic bag to its final destination". However, paragraphs 5 and 6 of article 27 of the 1961 Vienna Convention on Diplomatic Relations cast some doubt upon that notion. The question was whether the provisions of draft article 28, whereby the privileges and immunities of the diplomatic courier continued until he left the receiving or the transit State, even if he had already delivered the bag, in fact gave effect to the "basic assumption that the duration of the diplomatic courier's privileges and immunities was subject to 'the performance of his functions'" (A/CN.4/374 and Add.1-4, para. 183). In other words, should his privileges and immunities continue after delivery of the bag or should they end with delivery? Although, as noted in the fourth report (*ibid.*, para. 184), under article 27, paragraph 6, of the 1961 Vienna Convention the functions, and consequently the protection, of a diplomatic courier *ad hoc* ended with delivery of the bag, paragraphs 5 and 6 of that article, read together, suggested that a professional courier's privileges and immunities did not end when he delivered the bag. A possible reason for that provision was that, after delivering a bag, a professional courier might be on his way to collect another bag, which was also part of his functions, and it was therefore necessary, in order to ensure freedom of communication, that he should not be delayed. The point should, however, be reconciled with draft article 13, paragraph (a); that could perhaps be done in the commentary. He would also suggest that, in the last sentence of article 28, the words "continue to subsist" should be replaced by the words "continue to exist" or simply "subsist".

3. With regard to draft article 29, he noted that, as the immunity in question was *ratione materiae* and not *ratione personae*, the article quite properly provided that the sending State was the one which could waive the immunity. The need for the article was, in his view, directly dependent on whether it was decided to retain draft article 23. It was, however, a good example of a case in which it might not be advisable to regulate the matter in too much detail since that would only create problems.

4. Paragraph 1 of draft article 29 would clearly extend to waiver of immunity from criminal jurisdiction as well as from civil and administrative jurisdiction. In his view, that was desirable since the sending State's discretion should not be unduly fettered. Paragraph 2 of the article, which provided that waiver must always be express, had presumably been included because it appeared in the

other codification conventions. But since waiver could also be implied, as was apparent from paragraph 3 of draft article 29, he proposed that paragraphs 1 and 2 should be combined, in which case the provision in paragraph 2 should be reworded to read: "This waiver must be express." If, however, paragraphs 1 and 2 were not combined, paragraph 2 should be amended to read: "The waiver provided for in paragraph 1 must be express." Paragraph 3 was, in his view, a necessary and appropriate provision. The wording of paragraph 4 was nearly identical to that of article 32, paragraph 4, of the 1961 Vienna Convention, but he wondered why the exact wording of the latter paragraph had not been used. He also wondered why paragraph 5 of the article had been limited to civil actions. In his view, a provision along the lines of article 41 of the 1963 Vienna Convention on Consular Relations, which provided in paragraph 1 for prosecution and even imprisonment in the case of a "grave crime", should be considered for draft articles 29 and 23.

5. Mr. QUENTIN-BAXTER said that, in common with other members, he had an uneasy feeling that the provisions should take account of a perfectly ordinary factor, namely the willingness of Governments to undertake further obligations. There was no doubt whatever about the place in international law of the major conventions on diplomatic and consular immunities, without which relations between States would be gravely impaired. The field, therefore, was one in which the influence of foreign offices was predominant: other government departments might have practical points to raise, but in the final analysis they had to give way to the manifest need to enable diplomatic and consular life to continue. His uneasiness probably stemmed from the fact that when members returned to their countries with further proposals expressed in conventional provisions they would not necessarily be enthusiastically received. The selfsame officials who had had difficulties with the main conventions on diplomatic and consular relations would regard it as a splendid opportunity to pursue their objections to those conventions with some vigour and to argue against any extension of them. One only had to recall something as apparently simple as making a change in the form required to be filled in by arriving and departing air travellers to realize just how difficult it was to move the body of bureaucracy. Thus it would simply not be possible to get past the starting-post unless foreign offices were firmly convinced of the value of what was being done, which perhaps explained why certain members had adopted a minimalist approach.

6. Rather than discuss in detail points already raised, he would concentrate on the most tenuous aspect of the draft articles: the position of the transit State. From the standpoint of the receiving State, it was quite easy to extend the privileges and immunities granted to diplomatic and consular staff to the diplomatic courier. That was particularly true in the case of countries which had a large diplomatic and consular presence in each other's territories and where couriers travelled fairly regularly; there was then scope to treat the institution of the diplomatic courier as an important accessory to diplomatic and consular relations, and the normal incidents of dip-

lomatic and consular relations applied. For instance, a diplomatic courier could, like any diplomatic official, be declared *persona non grata*. To that extent, therefore, some aspects of the proposed rules were eminently workable. If, however, it was really of importance for States which relied on diplomatic couriers to have the co-operation of States in which they had no diplomatic, consular or other representation—and he was uncertain about that—then the Commission should take a very close look at the proposed rules in the ultimate context of the transit State, as defined under paragraph 1, subparagraph (5), of draft article 3, which was in a far worse position than the receiving State. A transit State, for example, was not invited, under the rules, to declare that any particular diplomatic courier passing through its territory was *persona non grata*. On the other hand, it was required, somewhat unrealistically, by draft article 4, paragraph 2, to model its practice on that of a receiving State, which seemed to be a rather tall order.

7. Assuming, for example, that a courier from a country with which New Zealand had no diplomatic or consular relations was delayed in Auckland, New Zealand was required under article 4, paragraph 2, to accord him the same freedom and protection as was accorded by the receiving State. But which receiving State? The courier was not even required to disclose the destination of the bag he was carrying, although he did have to have a certificate specifying its contents. It might be known that his country had embassies in States that were on his "run", or that his air ticket would take him to those States, but from the viewpoint of the transit State he was simply somebody who arrived in the country and, in due course, left it. The will-o'-the-wisp character of the diplomatic courier was particularly evident in that context.

8. Moreover, the feeling of reciprocity which could perhaps be developed in the case of a receiving State, and might justify new provisions, would be hard to achieve in the case of a transit State. The problem was not one of diplomatic passports, which always commanded respect, but of the kind of minimum arrangements that served the actual need and would not build up resistance in Governments: it was a matter that troubled him considerably. States would normally do a lot for the travelling representative of a foreign Government, but it was quite another matter to require them to do so, and in all circumstances. The voices of customs departments, agriculture departments, transport departments and numerous other domestic authorities would be raised to temper any enthusiasm shown by foreign services for new obligations in that regard.

9. He made those general comments in the light of the fact that many Governments attached great importance to the introduction of new provisions and that, in order to fulfil their purpose, such provisions would have to have the support of a number of other Governments which were not nearly so keen on the idea. The practical equation was very difficult and draft articles like the one on social security provisions (art. 27) gave him the feeling that problems of no real substance were being raised.

10. He urged the Commission to limit the issues it re-

ferred to the Drafting Committee. It should, for instance, be possible to arrive at an easy consensus on questions such as whether it was realistic to ask a receiving State to exempt the diplomatic courier from personal searches. The Special Rapporteur might therefore wish, in his summing-up, to redefine his objectives, rather than leave to the Drafting Committee questions which involved no real element of drafting at all.

11. Mr. LACLETA MUÑOZ began by congratulating the Special Rapporteur on the clarity, precision and richness of the documentation he had submitted to the Commission. He particularly appreciated the Special Rapporteur's very wide approach to his subject, because he himself favoured a minimalist position.

12. The application of article 27 of the 1961 Vienna Convention on Diplomatic Relations had not, as far as he knew, raised any particular problems so far, and his country, which admittedly made very little use of professional diplomatic couriers but more use of diplomatic couriers *ad hoc*, had not encountered any. He recognized, however, that problems had arisen in other countries and he therefore agreed with the Special Rapporteur that the status of the diplomatic courier should be assimilated to that of members of the administrative and technical staff of the diplomatic mission of the courier's country in the receiving State. His comments on the draft articles submitted by the Special Rapporteur were thus mainly concerned with drafting and, particularly in the case of draft articles 24 to 29, aimed at simplifying and clarifying them.

13. In regard to draft article 24, he considered that the provisions of paragraph 1 went beyond what was necessary and usual, and also beyond what was required for assimilation of the status of the diplomatic courier to that of members of the administrative and technical staff of a diplomatic mission. Indeed, they went beyond the treatment reserved for the head of the diplomatic mission himself. He did not know of any cases in which diplomatic agents had refused to submit to examination at a distance by electronic devices since such devices had been in general use at airports. In his view, paragraph 1 was not realistic; it was also unnecessary, because other draft articles guaranteed the personal inviolability of the diplomatic courier.

14. The provisions of paragraphs 2 and 3 also went beyond what was necessary. That was particularly true of paragraph 2. Admittedly, that paragraph was based on article 36 of the 1961 Vienna Convention and on the relevant articles of the other three codification conventions, but those articles dealt with a different situation: they gave diplomatic agents the right to import, free of customs duty, articles for the official use of the mission and articles for their personal use, that right being accorded to them as residents of the country where they performed their functions, not as mere travellers like the diplomatic courier. Hence it did not seem necessary to specify that the receiving State or transit State must permit the entry of articles for the personal use of the diplomatic courier, in so far as he brought them with him like any other traveller, without infringing the laws and regulations of those States. The case of members of diplomatic missions who remained for some considerable

time at their place of duty and might be authorized to import further articles duty-free, even after their initial installation, was entirely different.

15. He therefore proposed that paragraph 2 be deleted and that paragraph 3 be amended accordingly, by deleting the reference to exemptions, which would no longer be applicable. The present paragraph 3 could be amended to read:

“The personal baggage of the diplomatic courier shall be exempt from inspection, unless there are serious grounds for believing that it contains articles not intended for his personal use or articles the import or export of which is prohibited by law or controlled by the quarantine regulations of the receiving State of the transit State. In such cases inspection shall be carried out only in the presence of the diplomate courier.”

16. Turning to draft articles 25, 26 and 27, he observed that draft article 25, taken literally, quite obviously went too far, in that it would exempt the diplomatic courier from all taxes, dues and charges in whatever country he might be, including his own country. That was certainly not the intention of the provision. He thought that, in trying to simplify or abbreviate article 34 of the 1961 Vienna Convention, the Special Rapporteur had omitted some of the exceptions provided for in that article. The diplomatic courier should enjoy a minimum of privileges, immunities and exemptions, which should be in line with those enjoyed by the administrative and technical staff of the diplomatic mission of the sending State in the receiving State or the transit State.

17. He therefore proposed that draft articles 25, 26 and 27 should be merged in a single article to read as follows:

“The diplomatic courier shall enjoy in the receiving State and in the transit State the same privileges and exemptions relating to taxation, personal services and social security as those enjoyed by the administrative and technical staff of the diplomatic mission of his country in those States.”

That provision would be amply sufficient, since it was difficult to think of a case in which a diplomatic courier had been required to render personal or public services or had been subject to social security legislation in a receiving State or transit State; for it was hardly conceivable that a diplomatic courier could be resident in the receiving State, still less in the transit State, where his stay was normally limited to a few hours or at the most a few days.

18. Draft article 28 raised a problem inasmuch as it did not take account of the special situation of the diplomatic courier *ad hoc*, to which the draft articles were supposed to apply. Normally, a diplomatic courier *ad hoc* was despatched from the diplomatic mission of his country abroad to his own country and his functions began in the territory of the receiving State. It was therefore necessary to specify in paragraph 1 that the functions of the diplomatic courier *ad hoc* began from the moment when he took possession of the diplomatic bag or when he began his journey or when he began to perform his functions. Thus it was insufficient to provide

only that the diplomatic courier enjoyed privileges and immunities from the moment he entered the territory of the receiving State.

19. The wording of paragraph 2 also raised a problem. What would happen if the official functions of a diplomatic courier did not come to an end? The paragraph seemed to be based on the idea that the functions of a professional diplomatic courier were continuous, beginning with his appointment and continuing throughout his journeys and sojourns in various countries. He himself believed that the functions of the diplomatic courier were separate for each journey. There was no need to regard them as being continuous; his privileges and immunities ceased in each case when the diplomatic courier, even if he was a professional courier, left the receiving State. That was in conformity with the provisions of draft article 13. It should therefore be specified that the diplomatic courier enjoyed privileges and immunities from the moment he entered the territory of the receiving State or the transit State and that his privileges and immunities ceased when he returned to his country of origin, not only when his official functions were terminated, but also in the normal case.

20. With regard to draft article 29, he agreed with Mr McCaffrey that the decision the Commission would take must depend on its decision concerning draft article 23. For if the status of the diplomatic courier was assimilated to that of the administrative and technical staff of his country's diplomatic mission in the receiving State or the transit State, he must enjoy immunity from jurisdiction as provided in draft article 23. He therefore approved of the content of draft article 29, except that he thought it would be preferable not to retain in paragraph 1 the enumeration of persons qualified to authorize the waiver of immunity. It would suffice to include the provision of article 32, paragraph 1, of the 1961 Vienna Convention, since it was the sending State which could waive immunity from jurisdiction through the intermediary of the head of the diplomatic mission in the receiving State or the transit State.

21. He pointed out that the draft articles under consideration, at least draft articles 23, 24 and 29, bore on the substance of the topic. He therefore considered it preferable for the Commission itself to take a decision regarding them, at least in the form of directives, rather than to leave that responsibility to the Drafting Committee.

22. Mr. USHAKOV warmly congratulated the Special Rapporteur on the penetrating reports he had submitted to the Commission. On the whole, he had little difficulty with draft articles 24 to 29, except for the fact that they did not deal with the diplomatic courier and his privileges and immunities in cases where he was a national of the receiving State or permanently resident there. It would therefore be useful to add an article along the lines of article 38, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations. The transit State was not concerned because it must grant a diplomatic courier who was a national or a permanent resident in its territory full transit facilities.

23. It was self-evident that the privileges and immunities accorded to a diplomatic courier did not attach to his person, but to the sending State. That also followed from draft article 29, which stipulated that it was the sending State which could waive the immunity of the diplomatic courier from jurisdiction.

24. He considered that the draft articles should also be based on the principle of reciprocity, which was at the root of international law, particularly the law relating to diplomatic relations, including communications by diplomatic courier. It would therefore be appropriate to include provisions modelled on article 47 of the 1961 Vienna Convention, in order to avoid any misunderstanding of the principle of reciprocity and the possibility of applying certain rules restrictively, which was recognized by contemporary diplomatic law.

25. Referring to draft article 24, he said that his comments would be confined to paragraph 1, for although paragraphs 2 and 3 might call for comments on drafting, they did not appear to raise any problems of principle. The principle of exemption of the diplomatic courier's personal baggage from inspection, stated in paragraph 3, was indeed established, though it was not a strict rule, for a State entered by the diplomatic courier could inspect his personal baggage if it so desired. But paragraph 1 was new, in that it reflected a situation which had not existed when the four codification conventions had been drawn up. The personal inspection measures now applied for security reasons at airports, and which might later be applied to other means of transport, were designed to prevent terrorist attacks and the hijacking of aircraft. But by applying the rule of courtesy it was possible to exempt accredited diplomatic agents, on the valid presumption that they were neither terrorists nor bandits. In Moscow, for instance, accredited diplomatic agents were not subject to security checks. The diplomatic courier should be exempt from such inspection, not only as a matter of courtesy, but for the obvious reason that he carried an attaché case attached to his wrist by chain, and inspection by ultra-modern methods would compromise the confidential nature of the contents of his attaché case. Paragraph 1 was thus fully justified.

26. In draft article 25 he suggested that the words "in the performance of his functions" should be added after the words "The diplomatic courier", in order to show clearly that the exemption did not apply to any private or personal belongings that he might have in the territory of the receiving State or the transit State, without it being necessary to list all the exceptions stated in the codification conventions.

27. He doubted whether draft article 27 was necessary, since the receiving State and the transit State did not at present claim that persons briefly in their territory, like the diplomatic courier, were subject to their social security legislation.

28. With regard to the duration of privileges and immunities, dealt with in draft article 28, he considered that three different cases should be dealt with in three separate paragraphs: the first paragraph would deal with the professional diplomatic courier, the second with the

diplomatic courier *ad hoc* and the third with a diplomatic courier declared *persona non grata* or not acceptable under draft article 14. Since a diplomatic courier could be a national of the sending State appointed while in the territory of the receiving State and his immunity should apply as from the notification of his appointment, and since a diplomatic courier could return to the territory of the receiving State or the transit State as a private traveller, he proposed that draft article 28 should be amended to read as follows:

“Article 28. *Duration of privileges and immunities*

“1. The diplomatic courier shall enjoy the privileges and immunities to which he is entitled from the moment he enters the territory of the receiving State or the transit State for the purpose of performing his functions or, if he is already in the territory of the receiving State, from the moment his appointment is notified to that State. Such privileges and immunities shall cease at the moment the diplomatic courier leaves the territory of the receiving State or, as the case may be, the transit State. However, in respect of acts performed by the courier in the exercise of his functions, immunity shall continue to subsist.

“2. The privileges and immunities of the diplomatic courier *ad hoc* shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge. However, in respect of acts performed by the courier *ad hoc* in the exercise of his functions, immunity shall continue to subsist.

“3. When the functions of the diplomatic courier have come to an end in accordance with article 14, his privileges and immunities shall cease at the moment he leaves the territory of the receiving State, or on the expiry of a reasonable period in which to do so. However, in respect of acts performed by the courier in the exercise of his functions, immunity shall continue to subsist.”

29. With regard to draft article 29, he shared the view of other members of the Commission that it was not necessary to specify which organs of the sending State were competent to waive immunity from jurisdiction. It would be sufficient to indicate that the sending State could waive that immunity.

30. Mr. JACOVIDES said he welcomed the efforts being made to harmonize and supplement the existing legal instruments on diplomatic law and looked forward to completion of the work on the important and practical topic under consideration. It was perhaps the only topic which the Commission could hope to finalize within the current term of office of its members; and thanks to the Special Rapporteur’s erudition, objectivity and diligence, it had been possible to go a long way towards achieving that object.

31. Without necessarily adopting a minimalist approach, he shared some of the concern expressed during the discussion about going too far in assimilating the status of a diplomatic courier to that of diplomatic staff or, in some respects, even exceeding that status. The courier should have adequate protection for the proper

exercise of his functions; his personal inviolability, the inviolability of his temporary accommodation and means of transport, his immunity from jurisdiction, his exemption from personal examination and inspection, his exemption from dues and taxes, etc. should also be based on functional necessity so as to avoid abuse.

32. He took that view because of the essential consideration that the Commission’s final draft articles should be acceptable to a large majority of States. A further reason was that his country—and undoubtedly many other small or developing countries—very rarely used regular diplomatic couriers. Those countries were therefore especially sensitive on the subject and naturally somewhat circumspect about extending excessive privileges to the diplomatic couriers of other countries.

33. Those general comments applied not only to draft articles 24 to 29, but also to draft articles 20 to 23, which had been referred to the Drafting Committee, and indeed to the draft as a whole. He welcomed the various substantive and drafting suggestions made during the debate, which went in the direction of his own comments, and trusted that the Special Rapporteur, with his usual open-mindedness, would duly take those suggestions into account and make the appropriate changes, so as to arrive at the best possible result.

34. Chief AKINJIDE said that the Special Rapporteur would derive much benefit from the constructive comments made during the discussion, which were aimed at improving the draft and producing a set of draft articles that could be accepted by the Commission, by consensus at least.

35. He urged the Commission not to try to place the diplomatic courier in a separate compartment of his own. As he saw it, the distinction being made between the diplomatic courier and the diplomatic bag was largely academic. He had three reasons for saying so, the first being the title of the present topic, which showed that the courier was almost inseparable from the diplomatic bag.

36. His second reason related to the position of the diplomatic bag under the 1961 Vienna Convention on Diplomatic Relations. On that point, he read out the following extract from *Satow’s Guide to Diplomatic Practice*:

The diplomatic bag is accorded under the Vienna Convention a more absolute protection than was given under the previous customary law. Previously it was on the whole accepted that the receiving State had a right to challenge a bag which it believed to contain unauthorized articles. If this occurred, the sending State could elect either to return the bag unopened or to open it in the presence of the authorities of the receiving State. This practice of challenge to a suspect bag is still permitted in the case of a consular bag under the Vienna Convention on Consular Relations. But it is no longer permitted in the case of a diplomatic bag. The bag may contain only diplomatic documents or articles intended for official use, but the authorities of the receiving State may not demand that it be returned or opened even if they suspect that it is being used to smuggle arms or other illegal exports or imports. States were fully conscious of the dangers of abuse, but they were even more aware that any right of search could be abused by officials claiming to have grounds to suspect any bag which they wished to investigate. The receiving State or the airline authorities may subject a bag to detector devices designed to show the presence of explosives, metal or drugs, since this does not involve opening or detaining it, and

if this test disclosed grounds for suspicion, the airlines could decline to carry it. In one incident the customs authorities in Rome realized that a large diplomatic bag destined for Cairo was emitting moans. They seized and opened it and found that it contained a drugged Israeli who had been kidnapped. Some members of the Egyptian Embassy were declared *persona non grata* as a result of this discovery.<sup>6</sup>

37. That passage from a well-known authority showed that an examination of the existing law revealed two things. The first was that there was a distinction between the diplomatic bag and the consular bag. The second was that the protection accorded to the diplomatic bag appeared to be absolute. The conclusion which he himself drew from that analysis was that the differences between the status of a courier and that of a diplomatic bag should not be made too wide.

38. His third reason was that the courier was a servant of the sending State who was performing official functions. He therefore saw no reason to protect the diplomatic bag and not the diplomatic courier. It had been suggested that the protection extended to the courier should be curtailed, on the grounds that he only spent a short time in the receiving or transit State. But the length of his stay seemed hardly relevant. What mattered was that a courier could be carrying communications of vital importance for the maintenance of peace or for dealing with a grave economic situation. In view of the critical character of the papers he carried, a courier could be exposed to attacks or to blackmail. He therefore urged that the protection extended to him should not be weakened.

39. Reference had been made during the discussion to the possibility of abuse. He considered that since abuses could be committed not only by a courier, but also by a receiving State, it was necessary to strike a balance between the two sets of interests concerned.

40. The problems raised by draft article 25 related not so much to substance as to drafting. The wording seemed to him much too open-ended and he suggested that it should be restricted so as to cover only matters pertaining to the courier's functions. He also endorsed the suggestions made by Sir Ian Sinclair (1826th meeting) and by Mr. Ushakov, which were intended to prevent abuse. Mr. Lacleta Muñoz had suggested that the provisions of article 25 should be made acceptable to foreign ministries. For his part, he thought the Commission's aim should rather be to persuade the General Assembly.

41. That being said, he supported the Special Rapporteur's general approach, subject to adoption of the various proposals made to improve the drafting. He himself had two drafting suggestions. The first, relating to draft article 28, paragraph 2, was to replace the first word "If" by the word "When", subject to the other English-speaking members being in agreement. Secondly, in draft article 29, paragraph 1, he found the concluding formula "in the territory of the receiving State or transit State" unduly narrow and suggested that the language should be broadened so as to cover the sending State's missions, consulates or delegations elsewhere.

42. Mr. Balanda said that he wished to make some general comments before discussing the articles under consi-

deration. First of all, he regretted that the footnotes relating to the mimeographed text of the Special Rapporteur's fourth report (A/CN.4/374 and Add.1-4) were not placed at the foot of the page but at the end of each document, which made it more difficult to read an otherwise excellent report.

43. It seemed that the members of the Commission who supported the minimalist approach were once again calling into question the usefulness of studying the topic and wished to reduce the privileges granted to the diplomatic courier to practically nothing. If the Commission followed their line it would not be doing what the General Assembly expected of it, namely to define the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The diplomatic courier played a very important part in international relations, since his main function was to carry the diplomatic bag, and by putting the sending State and the receiving State in contact he helped to bring peoples and nations closer together.

44. The Special Rapporteur had been more or less directly reproached for a tendency in his draft articles to assimilate the position of the diplomatic courier to that of the members of diplomatic missions. That reproach did not seem to be justified. The practice of States bore witness to such an assimilation, as the Special Rapporteur had pointed out in his fifth report (A/CN.4/382, sect. III), although that practice might not perhaps extend to all States, particularly developing countries. Besides, even if the Special Rapporteur's proposals were not based strictly on practice, he could not be blamed for that, since the Commission could contribute to the progressive development of international law, as it had done, for instance, by giving a mandatory character, in its draft articles on diplomatic intercourse and immunities, to exemptions which had previously been based only on courtesy and reciprocity. Moreover, it should not be forgotten that a diplomatic courier could at the same time be a member of a diplomatic mission. If the draft articles gave the diplomatic courier a status entirely different from that of a diplomatic agent, one and the same person might enjoy greater or lesser privileges according to the functions he was performing. Consequently, in view of the specific nature of the diplomatic courier's functions, it would be advisable to depart as little as possible from what was provided in the codification conventions regarding diplomatic agents.

45. With regard to the minimalist thesis, he emphasized that the purpose of granting privileges and immunities was not to benefit the persons enjoying them, but to facilitate the performance of their official functions in the ultimate interests of States. In that respect, the fact that the diplomatic courier's functions were performed during a rather short time should not influence his status. Reasoning *a contrario*, it could be held that if no privilege or immunity was granted to the diplomatic courier, that would not allay the fears expressed by some people regarding the danger to which the political and economic security of States could be exposed by the traffic in arms, drugs, gold or precious stones. Abuses were always possible in that sphere and the emphasis should be placed on sanctions, particularly the waiving of immunity. If he

<sup>6</sup> *Op. cit.* (see 1826th meeting, footnote 5), p. 117, para. 14.30.

proposed going rather further than the minimalists, it was because, like Mr. Laclea Muñoz, he found that the granting of privileges and immunities to the diplomatic courier was not likely to present major problems for his country. That being so, the Commission should be able to go forward, especially as States which were disinclined to accept the provisions proposed by the Special Rapporteur could always make their application subject to the principle of reciprocity. The misdeeds from which some States had quite recently suffered had caused an emotional reaction in the international community which could not justify the desire to impose restraints on the diplomatic courier which would hinder the performance of his functions.

46. The minimalist position did not appear to be in harmony with the existing conventions, especially the 1961 Vienna Convention on Diplomatic Relations. According to paragraph 1 of article 37 of that Convention, the members of the family of a diplomatic agent enjoyed the same privileges and immunities as the agent himself. Under the terms of paragraph 4 of the same article, private servants of members of the mission, who were not nationals of the receiving State, were exempt from certain taxes, while under paragraph 2 of article 38, certain privileges and immunities were even granted to members of the staff of the mission and to private servants who were nationals of the receiving State. The reason why the Convention went so far as to grant facilities to persons not working directly for the sending State was that it had been established that any impairment of their position could indirectly impair the position of the diplomatic agent. As the same reasoning could be applied to the diplomatic courier, he should be granted the appropriate status to enable him to perform his official functions properly. In supporting a minimalist viewpoint, some members of the Commission appeared to forget that every State could at the same time be a sending State, a transit State and a receiving State.

47. Turning to the draft articles under consideration, he observed first that paragraph 1 of draft article 24 had no counterpart in article 36 of the 1961 Vienna Convention. When that Convention had been adopted, the security of aircraft and their passengers had not raised the same problems as it did at present, and personal searches had not been practised. However, as paragraph 1 of draft article 24 did not seem realistic and diplomatic agents and couriers appeared to submit willingly to examination when boarding aircraft, the provision could be confined to personal searches during customs examination. Paragraphs 2 and 3 of draft article 24 had their counterparts in the existing conventions and did not present any difficulties, although the diplomatic courier's stay in the territory of the transit State or the receiving State was sometimes very brief.

48. Draft article 25, on exemption from dues and taxes, was acceptable in principle. In view of the brevity of the diplomatic courier's stay, he should be exempted from dues and taxes in the interests of satisfactory performance of his official functions.

49. The reason for including draft article 26, on the other hand, was not clear. In his fourth report

(A/CN.4/374 and Add.1-4, para 173), the Special Rapporteur himself observed that, in view of the brevity of the diplomatic courier's sojourn, it was unlikely that he would be called upon to perform personal or public services. Subject to that reservation, he endorsed the content of draft article 26.

50. As for draft article 27, he had more serious reservations. In view of the special nature of the diplomatic courier's functions, it seemed that in practice States were not tempted to make him subject to their social security legislation.

51. With regard to draft article 28, on the duration of privileges and immunities, he emphasized the need to distinguish between the regular diplomatic courier and the diplomatic courier *ad hoc*. The privileges and immunities of the latter ceased when the diplomatic bag was delivered, except in regard to acts performed by the courier *ad hoc* in the exercise of his official functions.

52. Draft article 29, on waiver of immunity, had the merit of specifying, in paragraph 1, which organs of the State were competent to waive immunity. As to paragraph 5, he supported the idea of initiation of proceedings as in the case of special missions. In his view, however, the sending State should not have recourse to judicial proceedings, which might be implied by the words "it shall make every effort to settle the matter justly". It should be specified that such efforts should not include litigation.

*The meeting rose at 1.05 p.m.*

## 1828th MEETING

*Friday, 25 May 1984, at 10.05 a.m.*

*Chairman:* Mr. Sompong SUCHARITKUL

*Present:* Chief Akinjide, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Jagota, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)**  
(A/CN.4/374 and Add.1-4,<sup>1</sup> A/CN.4/379 and Add.1,<sup>2</sup> A/CN.4/382,<sup>3</sup> A/CN.4/L.369, sect. E, ILC (XXXVI)/Conf. Room Doc.3)

[Agenda item 4]

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol.II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol.II (Part One).

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