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Summary record of the 2079th meeting

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

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general principle of functional immunity from jurisdiction, confined to acts performed in the exercise of the diplomatic courier's functions, seemed to offer an acceptable compromise.

61. Article 28, which was a key provision of part III of the draft and, indeed, of the draft as a whole, introduced a number of innovations, which had not received the unanimous support of States and consequently called for detailed consideration. Paragraph 1, for instance, provided that the bag was "inviolable wherever it may be" and added that it "shall be exempt from examination directly or through electronic or other technical devices". The objections of some States to inviolability of the bag were apparently due to their desire to limit the scope of earlier treaty provisions by omitting any provision prohibiting direct or indirect electronic or technical examination. He could not agree with their position, which was too favourable to the receiving State and contrary to the well-established principles of confidentiality and inviolability of the contents of the bag. Moreover, the fact that some States, especially industrialized States, wished all reference to exemption from electronic or technical examination to be omitted, made it quite clear that those States intended to use such methods when necessary. Third world countries, which did not have such advanced means of inspection, would then be placed at a disadvantage.

62. He believed that the prohibition of electronic devices would not generally apply to security checks at international airports, which were apparently confined to the detection of metal objects. Moreover, the interests of the receiving State were sufficiently covered by article 5, which imposed a duty on the sending State to respect the laws and regulations of the receiving State, and by article 25, which imposed an obligation on the sending State to prevent the dispatch by its diplomatic bag of anything other than official correspondence and documents or articles intended exclusively for official use. Those provisions would help to establish a fair balance between the interests of the States concerned.

63. In paragraph 2 of alternative C proposed for article 28 (A/CN.4/417, para. 251), the Special Rapporteur proposed to extend the procedure applicable to consular bags under the 1963 Vienna Convention on Consular Relations to all bags, including the diplomatic bag. Such controls were to be carried out at the request of the competent authorities of the receiving State, not of the authorities of a transit State through whose territory the diplomatic bag merely passed. A transit State should not have the right to request that the bag be opened or returned to its place of origin. If such a State had doubts about the contents of the bag, it was free to take what security measures it chose and to ask the diplomatic courier to leave its territory immediately. However, should there be a majority in favour of inspection of the bag under the conditions laid down in alternative C, he would gladly support that alternative.

64. With regard to article 32, the Special Rapporteur proposed a revised text (*ibid.*, para. 274) which rightly omitted all reference to bilateral or regional agreements, terms that had a wider connotation than they had in Article 52 of the Charter of the United Nations.

65. Article 33 could seriously disturb the balance of the draft, for optional declarations would multiply the régimes governing the diplomatic courier and the diplomatic bag, thus defeating the object of establishing a coherent and uniform régime. He therefore agreed that the article should be deleted.

66. He did not favour a mandatory procedure for the settlement of disputes, especially as the 1961 and 1963 Vienna Conventions already provided for such procedure in optional protocols.

67. The draft articles should be referred to the Drafting Committee for consideration at the Commission's next session, with a view to adoption of the draft on second reading.

68. The CHAIRMAN announced that, during the week of 4 to 8 July, the Commission had made full use of the time allotted to it by the conference services and had in fact exceeded that time by 35 minutes.

The meeting rose at 1 p.m.

2079th MEETING

Thursday, 14 July 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)
(A/CN.4/409 and Add.1-5,¹ A/CN.4/417,² A/CN.4/L.420, sect. F.3)

[Agenda item 4]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR
(*continued*)

CONSIDERATION OF THE DRAFT ARTICLES³
ON SECOND READING (*continued*)

1. Mr. ROUCOUNAS, after congratulating the Special Rapporteur on his very full report to the Commission (A/CN.4/417), said that the draft articles adopted on first reading, on the basis of what had been

¹ Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

² *Ibid.*

³ For the texts, see 2069th meeting, para. 6.

described as a "comprehensive" approach, called for hardly any comments, except on the few points in respect of which the Commission would have to seek compromise solutions. The Special Rapporteur had moreover prepared the ground by eliminating various contradictions and drafting problems and by proposing certain solutions in the light of the comments made by Governments.

2. He saw no objection to extending the scope of the draft to international organizations of a universal character, but recalled that the draft had originally focused on relations between States. The Special Rapporteur would have to indicate how the two approaches were to be reconciled at the present stage.

3. In making suggestions with a view to improving certain texts, including those of articles 4, 5 and 6, the Special Rapporteur had evidently taken the sensible view that, the less the draft was modelled on the provisions of the codification conventions that had been ratified by only a small number of States, the more chances it would have of being accepted by Governments. Thus the revised text of article 6, in particular paragraph 2, was now based on the text of the 1963 Vienna Convention on Consular Relations, which had been ratified by 116 States, whereas previously it had been modelled on the 1969 Convention on Special Missions, which had been ratified by only 23 States.

4. As for the incorporation in the draft of certain rules of international law which had not given rise to objections on the part of Governments, he agreed that, so long as it did not make the text too cumbersome, it was necessary for the sake of logic and consistency, for example in articles 7 and 10, and in paragraph 2 of article 9.

5. Turning to the controversial provisions, particularly articles 17, 18, 28, 32 and 33, he said that he was not convinced of the need to retain article 17. Paragraphs 1 and 3 of that article, which provided respectively for the inviolability of temporary accommodation and for the possibility of conducting an inspection or search therein, were hardly compatible with the rules enunciated in article 28. As to article 18, in so far as it established a broader régime of protection for the diplomatic courier than that provided for in article 27, paragraph 5, of the 1961 Vienna Convention on Diplomatic Relations, the Commission would have to agree on the official duties of the courier so as to try to reconcile the contradictory positions adopted on that subject by some Governments. A compromise appeared possible if emphasis were placed on the functional nature of the courier's immunities. With regard to articles 19 and 20, he agreed with the Special Rapporteur's suggestion that the provisions on exemption from customs duties and other dues and taxes should be combined in a single article.

6. With regard to article 28, the words in square brackets at the end of paragraph 1 of the text adopted on first reading probably reflected a restrictive interpretation of paragraph 3 of article 27 of the 1961 Vienna Convention on Diplomatic Relations. It should be recalled, however, that the main purpose of both those provisions was to protect the confidentiality of the con-

tent of the diplomatic bag. The lengthy discussion which had taken place in the Commission during the preparation of the draft articles on diplomatic relations, and later at the diplomatic conference, had resulted in the laconic text of paragraph 3 of article 27, and the same solution might have to be adopted as a last resort. In any case, the confidentiality of the diplomatic bag had to be preserved. The solution proposed in paragraph 2 of alternative C suggested by the Special Rapporteur for article 28 (*ibid.*, para. 251) would be satisfactory from the point of view of a uniform régime, whereas paragraph 2 of alternative B dealt only with the consular bag.

7. Turning to articles 31 and 33, concerning which he had raised objections, he took note of the amendments proposed by the Special Rapporteur to article 31; however, he still thought that, since article 33 was likely to introduce undesirable elements of complexity into what was intended to be a uniform régime, it should be deleted.

8. Article 32 should be considered very closely in relation to the four codification conventions, each of which provided for a different régime in that regard. It would be noted that, although none of those four conventions contained a general amending clause, they all included articles on non-discrimination and reciprocity, the two main problems arising in connection with article 32. In some cases, the 1961 Vienna Convention on Diplomatic Relations allowed a more restrictive (or more favourable) treatment than that for which it provided: that was the purpose of its article 47. The 1963 Vienna Convention on Consular Relations contained an article 72 entitled "Non-discrimination", but also an article 73 entitled "Relationship between the present Convention and other international agreements", which paved the way for some differentiation.

9. In the first place, article 73 reserved other agreements in force between States parties (para. 1), even if they were contrary to the Convention; secondly, it allowed States parties to conclude international agreements "confirming or supplementing or extending or amplifying" the provisions of Convention (para. 2). Read in conjunction with article 41 of the 1969 Vienna Convention on the Law of Treaties, it gave States far-reaching possibilities of modifying their treaty obligations. The 1969 Convention on Special Missions seemed to be stricter, inasmuch as article 49 (Non-discrimination) provided, in paragraph 2 (b), that the modification by States, by custom or agreement, of the extent of facilities, privileges and immunities for their special missions should not be incompatible with the object and purpose of the Convention and should not affect the enjoyment of the rights or the performance of the obligations of third States. Lastly, the 1975 Vienna Convention on the Representation of States permitted, in article 4 (Relationship between the present Convention and other international agreements), the conclusion of other international agreements.

10. It was a striking fact that, while most of the substantive provisions of the draft articles proposed by the Special Rapporteur in the course of the past 10 years or so had changed little in relation to their original content, there had been five different versions of article 32,

on the relationship between the draft articles and other agreements and conventions. The reasons for that were manifold. The first was that the Commission still did not know what form the draft articles would finally take, although, in his own opinion, it should be engaging in codification rather than in consolidation. The second was that very few States had submitted their observations, and that the Special Rapporteur had been obliged to take account of the replies that had been received. However, since it was the general view that the four codification conventions should be preserved in their entirety, he could see only two possibilities: either to delete article 1 of the draft, or to specify that the present articles "complemented" the four existing codification conventions and did not "replace" or "prevail over" them. Even the term "complement" was inappropriate, however, for, while the draft certainly contained some provisions that complemented the four codification conventions, it also contained others that differed from those of at least three of the four instruments; that was the case, for example, of paragraph 2 of article 28, whether in alternative B or in alternative C.

11. That being so, and having carefully analysed the five texts proposed by the Special Rapporteur on the question of the relationship between the present articles and other agreements and conventions, he considered that the best solution was that of article 42 (Relation of the present articles to other conventions and international agreements) proposed in the seventh report.⁴ Paragraph 1 of that article provided that "the present articles shall complement the provisions . . .", which was logical; paragraph 2 stated that the provisions of the present articles were without prejudice to other international agreements in force, even if they were more restrictive; and paragraph 3 gave States the possibility of subsequently concluding agreements on the same subject or of modifying the provisions of existing agreements, on the condition that such modifications were in conformity with the articles of the draft—a reservation to be found in all four codification conventions, as well as in article 41 of the 1969 Vienna Convention on the Law of Treaties. Unless an "open door" solution was adopted, the draft would have to refer to the object and purpose of agreements that might be concluded subsequently, failing which the Commission would be engaging in consolidation instead of codification. The draft should, in his view, contain an article which properly settled the question of the relationship between that text and other agreements.

12. Mr. SEPÚLVEDA GUTIÉRREZ said that the Special Rapporteur was to be commended on his analysis and on his comprehensive treatment of the topic in his report (A/CN.4/417). He fully agreed with all the conclusions the Special Rapporteur has reached and with the proposals he had made. In particular, the Special Rapporteur had taken account of the comments received from Governments, of which there were unfortunately all too few, especially from developing countries.

13. He would confine his remarks to some of the details and finer points of the main issues identified by the Special Rapporteur. The draft met a definite need and therefore deserved support. First, it was intended to combine in a single instrument all the rules that would guarantee the smooth functioning of communications between Governments and their missions and, secondly, it would fill some of the gaps in the four codification conventions. The value of the topic was thus obvious, particularly since the draft submitted by the Special Rapporteur, if it ultimately took the form of a multilateral instrument, would resolve a number of problems of diplomatic law.

14. With regard to the scope of the draft, he agreed with the comments made (2077th meeting) by Mr. Calero Rodrigues and Mr. Bennouna to the effect that the draft should cover international organizations of a universal character and communications between such organizations and their external offices, as well as with their member States. The idea of adding an optional protocol for that purpose seemed reasonable.

15. Article 16 might be supplemented by a clearer definition of the scope of the inviolability enjoyed by the diplomatic courier in the performance of his functions. Some Governments took the view that such protection was already provided for in three of the codification conventions, but the States that signed the future convention would not necessarily be the same as those that were parties to those three instruments. The text of that article should perhaps be improved to take account of recent advances and of the increase in relations between States.

16. He was of the opinion that article 17 should be retained as it stood. That text gave the courier and the bag sufficient legal protection during their stay in the receiving State or in the transit State.

17. According to some members of the Commission, the jurisdictional immunities provided for in article 18 should not be the same as those enjoyed by a diplomatic agent acting in an official capacity. However, such immunities were necessary so that the courier might properly perform his very important functions and, for all practical purposes, the solution proposed by the Special Rapporteur was the only possible one.

18. Article 23 was rather obscure and could probably be improved.

19. Article 28 was obviously the key provision of the draft and the Special Rapporteur had commented on it at length, concluding with some entirely appropriate recommendations. He personally was in favour of alternative C (A/CN.4/417, para. 251), for it represented a compromise solution that would take account of all the interests involved.

20. For the reasons already given by several members of the Commission, article 33 should be deleted.

21. With regard to the question of the settlement of disputes, he agreed with the views expressed by Mr. Bennouna, and also thought that there should be an additional protocol on the subject.

⁴ *Yearbook . . . 1986*, vol. II (Part One), p. 50, document A/CN.4/400, para. 62.

22. He had a few comments, but no specific proposal, to make on article 26. Since most diplomatic bags were transmitted by couriers or by parcel delivery services, neither the bags themselves nor their contents could be subject to supervision. The normal practice was to send the diplomatic bag once every two weeks, so that there might be as many as 10,000 diplomatic bags moving around the world at any one time. That was thus a real problem and it should be given serious consideration. There were many examples of diplomatic bags lost in the midst of passengers' luggage. As for the postal services, their shortcomings in many countries were all too well known and cases where diplomatic bags were misplaced or even lost for good were not at all uncommon. It was true that private parcel delivery companies could offer better service than official postal services, but in such cases it was not certain that diplomatic packages would not be examined by electronic or other means or that the contents of the bags would not be violated. Article 28, however, did not offer the kind of protection the Commission was so laboriously trying to provide for.
23. Of the 29 Governments which had complied with the General Assembly's request, only two, namely the Federal Republic of Germany and the United Kingdom, had referred to article 26, the former only in passing. Did that mean that States paid no attention to that problem or that they implicitly admitted that it could not be resolved?
24. He regarded the physical safety of the bag as a matter of some concern, but he was sure that the Special Rapporteur would be able to allay his fears.
25. Mr. EIRIKSSON said that he personally would never have suggested that the international community and the Commission should deal with the topic under consideration. The General Assembly's instructions nevertheless had to be complied with and work on the topic had to be completed as soon as possible. The Special Rapporteur's eighth report (A/CN.4/417) would bring the Commission closer to that goal and the changes proposed in it were generally acceptable.
26. In the light of the doubts expressed by many members of the Commission about the need for the work in progress, he did not think that the Commission had to stake its reputation on whether the end product would be acceptable or not. He therefore understood why the Special Rapporteur had not taken advantage of the opportunity provided by the comments of some Governments to eliminate various elements of the draft that were not absolutely vital to the States which were in favour of the Commission's work on the topic and objectionable to those which opposed it.
27. Certain changes, however, might make the draft more acceptable. To return to the main issues to which the Special Rapporteur had referred in his oral introduction (2069th meeting, para. 43), it would be necessary to restrict the scope of the articles as much as possible; to reduce the privileges and immunities of the courier to the minimum necessary for the performance of his functions; and to adopt a pragmatic compromise formulation for article 28.
28. His views on articles 32 and 33 were linked to his considerations on the scope of the draft. He nevertheless thought that the question of the settlement of disputes should be dealt with not as part of the draft, but in a draft optional protocol that would be submitted separately to the body to which the draft would be sent for final consideration, whether the General Assembly or a diplomatic conference.
29. As to the scope of the draft articles, it would be unrealistic not to make a distinction between the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, on the one hand, and the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States, on the other. The couriers and bags referred to in the two latter Conventions should be dealt with in two separate optional protocols, not in article 33.
30. He agreed with Mr. Calero Rodrigues (2077th meeting) that, if the Commission excluded the couriers and bags of international organizations from the present draft, it might at some future time be requested to formulate a régime relating to them. He was therefore in favour of the solution of an optional protocol dealing exclusively with intergovernmental organizations of a universal character.
31. Since the body of the text would thus be confined to diplomatic and consular couriers and bags, terminology problems could be avoided by adopting provisions on diplomatic couriers and bags *stricto sensu* and then applying them to consular couriers and bags in a separate article. It would moreover be necessary to delete the reference to article 1 contained in paragraphs 1 and 2 of article 3.
32. Article 32 should be reworded to make it clear that, with regard to diplomatic and consular couriers and bags, the draft articles would replace, as between the parties, the relevant provisions of the 1961 and 1963 Conventions. Similar provisions would be found in the optional protocols relating to the 1969 and 1975 Conventions.
33. Such a limitation on the scope of the articles would ensure uniformity of the régime, at least for the most widely used couriers and bags, and would not prejudice the situation with regard to the others. The draft articles might thus be entitled "Draft articles on the courier and the bag" or, better yet, "Draft articles on the courier and the bag employed for the official communications of States and international organizations".
34. Similarly, the new wording proposed by the Special Rapporteur (A/CN.4/417, para. 92) for paragraph 2 (b) of article 6 should be amended to read:
- "(b) where States by custom or agreement extend to each other more favourable treatment with respect to their diplomatic couriers and diplomatic bags than is required by the present articles."
35. Turning to the status of the diplomatic courier, he proposed the deletion of the second sentence of paragraph 2 of article 5; of articles 7, 9, 10, 13 and 17; of paragraphs 2, 3 and 4 of article 18; of paragraph 1 of article 19; and of articles 20 and 22. Those were mostly

pro forma provisions based on existing conventions, or provisions dealing with unlikely situations.

36. The reasons for deleting articles 13 and 17, however, were more substantive. With regard to article 13, on facilities accorded to the diplomatic courier, he noted that the corresponding articles of the 1961 Convention, such as articles 21 and 25, and of the 1963 Convention, had given rise to problems because of uncertainty about those facilities. If anything, the Commission's commentary had added to those problems. Article 27 should be deleted for the same reasons. As to article 17, the comments made by some Governments and the views expressed by members of the Commission showed that the text was impracticable. In addition, the Special Rapporteur had stated that he was prepared to delete the second sentence of paragraph 2 of article 5 (*ibid.*, para. 82) and to combine articles 19 and 20 by deleting paragraph 1 of article 19 (*ibid.*, para. 168).

37. Referring to article 28, he said that he was in favour of alternative C (*ibid.*, para. 251), although some major changes would have to be made. First, the use of the term "inviolable", in paragraph 1, would have to be linked to the specific obligations referred to in that paragraph. Secondly, those specific obligations should be expressly limited in paragraph 2. Thirdly, the possibility of non-intrusive or other external examination of the bag should be maintained. Fourthly, the possibility of causing the bag to be opened should be confined to the most serious cases, such as those referred to in the comments by the Government of the Federal Republic of Germany (A/CN.4/409 and Add.1-5). Those changes would involve the following amendments: in paragraph 1, the comma at the end of the first phrase should be replaced by a colon; the words "subject to the provisions of paragraph 2" should be added after the words "opened or detained"; and the words "its contents" should be inserted before the words "shall be exempt from examination", in order to make it clear that external examination, by sniffer dogs, for example, would be allowed; in paragraph 2, the word "Nevertheless" should be deleted; and the words "and which seriously endanger the public security of the receiving State or transit State or the safety of individuals" should be added after the words "referred to in article 25".

38. In conclusion, he said he was convinced that, if his proposals were adopted, the draft articles could be accepted by the vast majority of States.

39. Mr. Sreenivasa RAO, commending the Special Rapporteur on the useful historical review of the question he had provided for the benefit of new members of the Commission, like himself, said that the eighth report (A/CN.4/417) was an attempt to improve on draft articles which had already been well received on first reading. The fact that there had been so few replies from Governments might, moreover, be an indication of approval by a majority of States, particularly since the trend in the discussions in the Sixth Committee of the General Assembly attested to the value of the work being done on the progressive development and codification of the law on the subject.

40. With regard to the doubts or even objections that had been expressed, the Commission must not lose sight of the objectives of the draft, which were: first, to limit and eventually eliminate the increasing number of violations of diplomatic and consular law; secondly, to reaffirm the international community's common interest in protecting the inviolability of the diplomatic and consular bag, whether or not it was accompanied by a courier; thirdly, to accommodate the sending State's concern for the confidentiality of communications with respect for the legitimate interests of the receiving State; and, fourthly, to harmonize and unify the existing rules and to develop more specific rules for situations not fully covered by the existing conventions, taking account of developments since 1961. One such development was the international community's growing recognition of the legal personality of international organizations, as illustrated by the 1969 Convention on Special Missions, the 1975 Vienna Convention on the Representation of States, and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Accordingly, and in the light of the mandate which the General Assembly had entrusted to the Commission, there appeared to be every reason to press ahead to complete a set of draft articles that would be as comprehensive and as universally acceptable as possible.

41. The draft under consideration had benefited from an extensive analytical survey of State practice and would serve to strike a careful balance between all the practical and policy considerations involved. The Special Rapporteur was to be commended for having focused on the harmonization and progressive development of the law and, at the same time, for having displayed caution; by proposing alternatives for various draft articles, he had refrained from expressing his own preferences and had merely indicated the merits of one approach or another.

42. Once the draft had been adopted, it would be of immense value to government officials in their day-to-day dealings with diplomatic and consular couriers and bags, and consequently to diplomatic and consular relations in general. The protection and inviolability of the courier and the bag were indeed an extension of the protection and inviolability of the premises of diplomatic and consular missions, of the various exemptions from which they benefited and of the inviolability of their archives and documents. Such protection and inviolability were thus essential to the proper exercise of the functions of those missions: to negotiate with the Government of the receiving State and with the Governments of other member States of international organizations; to protect the interests, in the receiving State, of the sending State and its nationals; to follow developments in the situation in the receiving State and to report thereon to the Government of the sending State; and to promote friendly relations between the receiving State and the sending State and among nations in general.

43. In view of the importance of those functions and of customary and conventional recognition of the principle of the protection and inviolability of the courier and the bag, as well as of their privileges and immunities, States unanimously agreed that the inviol-

ability of the bag had to be respected and even further strengthened. Recent abuses only highlighted the importance of respect for the purposes of the bag and the need for discipline on the part of all States. Cases of abuse of the courier or the bag in order to threaten the security of States were few and far between, and carried little weight compared with other considerations.

44. It was also quite clear that, in practice, States attached the same importance to diplomatic and consular couriers and bags. Diplomatic missions, moreover, could perform consular functions. He therefore fully agreed with what the Special Rapporteur stated in his report: "uniformity in the treatment of diplomatic couriers and consular couriers has acquired general support by States and thus it may be considered as a well-established rule in conventional and customary law" (*ibid.*, para. 22). In any event, abuses which might be committed by extremists could and must be curbed by the other legitimate means available to States for monitoring the activities of missions and their members, which included expelling anyone who might be considered *persona non grata*, reducing the staff of a mission and even severing diplomatic relations.

45. The answer to some of the unfortunate abuses about which States were rightly concerned, at a time when terrorism and drug trafficking had become a threat to mankind, was thus not to restrict the privileges and immunities or the protection and inviolability of the diplomatic and consular courier and bag. It was, rather, to expand mutual co-operation and to emphasize the fact that it was in the common interest of States to combat that threat by co-ordinating their intelligence services, by bringing the criminals to justice, either by prosecuting them in their own courts or by extraditing them, and, above all, by refraining from encouraging their activities for short-term political purposes or for monetary gain. The restrictions that had been proposed would in no way help to combat terrorism and drug trafficking; they would, rather, have the effect of limiting the value of the courier and the bag and of disrupting friendly relations among States by giving rise to doubts and leading to retaliatory measures.

46. The privileges and immunities and protection and inviolability of the courier and the bag were, moreover, governed by other equally well-established principles, such as that of the duty to respect the laws and regulations of the receiving State and the transit State and that of non-discrimination and reciprocity, which were reaffirmed in articles 5 and 6. In that connection, it might be useful to keep a provision in article 5, as the Special Rapporteur had proposed in his fourth report,⁵ making it an obligation of the sending State to prosecute and punish any person under its jurisdiction responsible for misuse of the diplomatic bag. Such a provision would enhance the credibility of the draft articles and would be in line with the conclusion the Special Rapporteur had reached in his report:

... it is well established in law and practice that non-compliance with or violation of legal obligations constitute an illicit act which entails responsibility and liability for injury (*ibid.*, para. 87).

⁵ See draft article 32 (Content of the diplomatic bag), *Yearbook* ... 1983, vol. II (Part One), p. 115, document A/CN.4/374 and Add.1-4, para. 289.

From that point of view, the proposal to amend paragraph 2 (b) of article 6 by deleting the reference to the rights of third States did not seem advisable; in his view, the earlier version would give better effect to the general principle of non-discrimination. That, however, was a point that would have to be decided by the Special Rapporteur, the Commission itself and the Drafting Committee.

47. With regard to the four main issues identified by the Special Rapporteur (2069th meeting, para. 43), he agreed that the scope of the draft should be extended to international organizations of a universal character. For the sake of consensus, however, he would support the idea that the scope of the draft should not be extended to communications between other international organizations, which could be dealt with in special agreements, as Mr. Reuter had suggested (2070th meeting). In the same spirit, and although he shared Mr. Mahiou's opinion (2078th meeting), he could agree that the draft should not cover communications of national liberation movements. He was also in favour of the retention of article 17, subject to drafting amendments which might improve the text and help to make it generally acceptable.

48. As had been stated, the most important provision was article 28. In that connection, he joined in the broad consensus that had developed in the Commission to the effect that the bag should not be subjected to any direct or indirect examination and, in particular, to any electronic examination, in view of the principles of reciprocity, non-discrimination, inviolability and respect for the confidentiality of the bag. In a spirit of compromise, he therefore supported alternative C proposed by the Special Rapporteur (A/CN.4/417, para. 251).

49. It would be better to discuss the question of the relationship between the draft articles and other conventions on the same subject-matter at a later stage, for it raised complex legal problems concerning the law of treaties. Moreover, if the draft articles were regarded as the outcome of efforts to consolidate the applicable rules in a single instrument, that question would no longer be of any practical significance. The main goal, therefore, must be to have the draft articles accepted by the largest possible number of States, taking account of all the interests at stake.

50. The CHAIRMAN announced that the meeting would rise to enable the Drafting Committee to meet.

The meeting rose at 11.25 a.m.

2080th MEETING

Friday, 15 July 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues,