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Summary record of the 1906th 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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transit State to comply with the obligation under draft article 40 in the absence of a pre-arranged timetable.

28. With regard to draft article 41, non-recognition of States or Governments, though admittedly rare in practice, could raise important questions in certain jurisdictions. The practice of United States courts in the matter was, for example, very strict. If immunity was claimed on behalf of a State with which the United States did not have diplomatic or consular relations, the court would not recognize the claim, which therefore had to be introduced by the Department of State or by a mission of another country with which the United States did have such relations.

29. While he shared Mr. Riphagen's doubts regarding draft article 42, paragraph 2, he considered that the article would serve as a good means of preparing to upgrade the status of diplomatic couriers and bags. Lastly, he was grateful to the Special Rapporteur for clarifying his understanding of the purpose of article 43.

30. Mr. USHAKOV, congratulating the Special Rapporteur on the clarity of his sixth report (A/CN.4/390), which on the whole proposed appropriate solutions, said that, for the time being, he would comment only on draft article 23, which, together with draft article 36, might be the key provision of the draft.

31. Until now, the status of the diplomatic courier and the diplomatic bag had been governed by provisions such as article 27 of the 1961 Vienna Convention on Diplomatic Relations, but no solution had been found to the problem of whether the diplomatic courier should enjoy immunity from the criminal jurisdiction of the receiving State and the transit State. In his view, there was no doubt that the diplomatic courier should benefit from such immunity because, if he did not, a diplomatic bag accompanied by diplomatic courier would no longer be a medium of communication. Such immunity was therefore a functional necessity.

32. The diplomatic bag sometimes had to be accompanied by diplomatic courier in order to ensure its inviolability; but, if the diplomatic courier was to perform his functions without pressure from the receiving State or transit State, he had to enjoy the same immunity from criminal jurisdiction as diplomatic agents, the administrative and technical staff of missions and members of their families. If the receiving State or the transit State exerted pressure on a member of the family of a diplomatic agent or on the administrative or technical staff of a mission, the sending State would automatically be affected.

33. Although the diplomatic courier might commit abuses, it should be recognized that States could commit even more serious abuses, for example by threatening to implicate a courier in a criminal case or, as had happened in the 1920s, by organizing conspiracies in which a diplomatic courier could be killed. It was quite obviously not enough to provide that the diplomatic courier "shall enjoy personal inviolability and shall not be liable to any form of arrest or detention", as stated in article 27, paragraph

5, of the 1961 Vienna Convention, because the personal inviolability of the courier would not prevent the receiving or transit State from detaining him in its territory so that he could be tried and, possibly, convicted.

34. Some members of the Commission took the view that, since no diplomatic courier had ever been involved in criminal proceedings, draft article 23, paragraph 1, was superfluous; but that argument could also work against them, for it could be stated in favour of that provision and to the credit of diplomatic couriers that none of them had ever committed any criminal offence.

35. Sir Ian SINCLAIR said that, while he fully understood the reasons advanced by Mr. Ushakov, diplomatic couriers had managed without any equivalent of draft article 23 ever since they had been in operation and, despite diligent research, the Special Rapporteur had not unearthed any occasion on which practical problems had in fact arisen. Since the proposal made in article 23 went beyond the four codification conventions, the Commission should examine it very carefully.

36. Draft article 36, on which he would comment more fully at the next meeting, involved a fairly intractable problem. That problem stemmed in part from the differing degrees of protection given to the consular bag under article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations and to the diplomatic bag *stricto sensu* under article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations; and that in turn created a problem when it came to drawing up a uniform régime covering all types of bags. Another aspect of the problem stemmed from the notorious abuses of the diplomatic bag that had been highlighted by recent events. It was therefore necessary to find a *via media* with a view, on the one hand, to ensuring protection of the contents of the bag and, on the other, to dealing at least in part with the problem of abuses.

The meeting rose at 1 p.m.

1906th MEETING

Wednesday, 19 June 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (continued)
(A/CN.4/382,¹ A/CN.4/390,² A/CN.4/L.382, sect. C, ILC(XXXVII)/Conf.Room Doc.2 and Add.1)

[Agenda item 5]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR³ (continued)

- ARTICLE 23 (Immunity from jurisdiction)
ARTICLE 36 (Inviolability of the diplomatic bag)
ARTICLE 37 (Exemption from customs inspection, customs duties and all dues and taxes)
ARTICLE 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag)
ARTICLE 40 (Obligations of the transit State in case of *force majeure* or fortuitous event)
ARTICLE 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations)
ARTICLE 42 (Relation of the present articles to other conventions and international agreements) and
ARTICLE 43 (Declaration of optional exceptions to applicability in regard to designated types of couriers and bags)⁴ (continued)

1. Sir Ian SINCLAIR said that, at the previous meeting, he had sketched out the background against which the problem raised by draft article 36 should be viewed and had pointed out that a way would have to be found to ensure the protection of the contents of the bag, on the one hand, and to go some very limited way towards trying to deal with the problem of abuses of bag facilities, on the other. While he recognized that the Special Rapporteur had made a major effort to tackle the problem in paragraph 2 of the revised text of article 36, he found that that paragraph also posed a problem.

2. As he had explained at the thirty-sixth session,⁵ had the Commission been starting with a clean slate, the solution advocated by the Special Rapporteur would have been the one he would have preferred. He had, however, conceded at the time that such a solution might appear to involve a modification of article 27, paragraph 3, of the 1961 Vienna Convention

¹ Reproduced in *Yearbook ... 1984*, vol. II (Part One).

² Reproduced in *Yearbook ... 1985*, vol. II (Part One).

³ The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

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

Article 8 (revised) and articles 9 to 17, 19 and 20, and commentaries thereto, provisionally adopted by the Commission at its thirty-sixth session: *Yearbook ... 1984*, vol. II (Part Two), pp. 45 *et seq.*

Articles 24 to 35, referred to the Drafting Committee at the Commission's thirty-sixth session: *ibid.*, pp. 21 *et seq.*, footnotes 84 to 90 and 93 to 97.

Article 23 and articles 36 to 42, submitted at the Commission's thirty-fifth and thirty-sixth sessions: *ibid.*, pp. 21 and 25-27, footnotes 82 and 98 to 104.

⁴ For the texts, see 1903rd meeting, para. 1.

⁵ *Yearbook ... 1984*, vol. I, p. 184, 1845th meeting, paras. 30-31.

on Diplomatic Relations. For that reason and for the reasons advanced by Mr Flitan (1904th meeting), he therefore felt unable to go so far as to apply the consular régime as a general rule to the régime governing the diplomatic bag *stricto sensu*. The problem was exacerbated by the terms of draft articles 42 and 43 submitted by the Special Rapporteur in his sixth report (A/CN.4/390). Under article 43, it would be open to a State to declare that it would apply the provisions of the articles to the diplomatic courier and diplomatic bag *stricto sensu*, but not to any other type of courier or bag. That State could then invoke article 36, paragraph 2, to claim entitlement to challenge a suspect diplomatic bag and to request that the bag should be returned to its place of origin. That, again, might be thought to be inconsistent with the unqualified principle embodied in article 27, paragraph 3, of the 1961 Vienna Convention, which provided that "The diplomatic bag shall not be opened or detained". It was by no means clear that draft article 42, paragraph 1, would restore the primacy of the rule stated in article 27, paragraph 3, of the 1961 Vienna Convention. If it did so, however, that would completely destroy whatever value draft article 36, paragraph 2, might otherwise be thought to have. The root of the problem lay in the fact that, given the difference in treatment accorded under existing conventions to the consular bag and to the diplomatic bag *stricto sensu*, it was extremely difficult to establish a uniform rule that applied to all bags.

3. One solution would be to differentiate in article 36 itself between the consular bag and other types of bag and then to provide States with an option to apply to all bags the more qualified régime applicable to the consular bag. That would not, in his view, conflict with existing conventions. Such an option could be regarded as falling within the scope of article 47, paragraph 2 (a), of the 1961 Vienna Convention, which provided for an exception to the rule of non-discrimination, since any State exercising the option would have to accept that the qualified régime applicable to the consular bag would be applied to all its bags.

4. He did not think that the solution he had in mind would be covered by draft article 43, as, judging from the sixth report, the Special Rapporteur seemed to think. All article 43 did was to allow a State to apply the articles as a whole to certain types of couriers and bags only. It did not offer an option which was confined to article 36 alone and which, in his view, was what was required in order to provide the kind of solution that would be acceptable to all members of the Commission.

5. As to article 36, paragraph 1, he was of the opinion that the notion of inviolability should be avoided in any formal text. As Mr. Sucharitkul had rightly pointed out (1905th meeting), it was not so much the bag as the contents of the bag that were inviolable. It would be advisable to avoid inflated language and to use the wording of the existing conventions to indicate the degree of protection to be accorded, which was extensive.

6. According to a literal interpretation of article 27, paragraph 3, of the 1961 Vienna Convention, scanning, as referred to at the end of draft article 36,

paragraph 1, was not precluded. The real question, however, was whether it was an effective safeguard against abuse. The United Kingdom, in the course of its recent review of diplomatic privileges and immunities, had given close consideration to the question of the examination of bags. A White Paper issued in April 1985, from which he quoted extracts, stated that the United Kingdom Government had decided against the introduction of scanning as a matter of routine, but accepted that there might be specific circumstances when the grounds for suspicion were sufficiently strong to justify scanning. Accordingly, he was opposed to the retention of any absolute prohibition, which would not only be inconsistent with the view taken by a number of Governments regarding the legal position under the existing conventional régimes, but also preclude scanning, under certain strictly controlled conditions, as a possible, though not decisive, safeguard against abuse. He could, however, agree to the inclusion of some reference to scanning in the commentary, together with an indication that it should be carried out only under strictly controlled conditions.

7. In the light of the above considerations, he proposed that draft article 36 should be reformulated along the following lines:

“1. The diplomatic bag shall not be opened or detained.

“2. However, in the case of a consular bag within the meaning of article 35 of the Vienna Convention on Consular Relations, the competent authorities of the receiving State may, if they have serious reason to believe that the bag contains something other than the official correspondence, documents or articles referred to in article 32 of these articles, request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.

“3. Notwithstanding paragraph 1 of this article, a State may, when signing, ratifying or acceding to these articles or at any time thereafter, make a written declaration that it will apply to the diplomatic bag the rule applicable to the consular bag by virtue of paragraph 2 of this article.

“4. In relation to other States Parties to these articles, a State which has made a written declaration under paragraph 3 of this article shall not be entitled to raise objection to the application to its diplomatic bags of the rule stipulated in paragraph 2 of this article.”

That proposal was entirely consistent with the terms of existing conventions and with the economy of the draft as a whole. It had always been his understanding that the draft articles were intended as a complement to the 1961 Vienna Convention, the 1963 Vienna Convention and the corresponding provisions of the other codification conventions; indeed, such a provision had been included at an earlier stage, but had not been retained in the revised draft. In his view, there were grounds for reinstating it.

8. He welcomed the proposal to combine draft articles 37 and 38 in a single provision, but considered that, in the light of the link between draft article 36

and the revised draft article 37, the Drafting Committee would have to consider such drafting points as the meaning of the words “and other” appearing in the expression “customs and other inspections”.

9. He could agree in principle with the substance of draft article 39, although its wording might give rise to misinterpretation and would therefore require close attention. In particular, he considered that the absolute requirement regarding notification of the sending State in the event of termination of the functions of the diplomatic courier would have to be qualified. Those functions could be terminated either by the sending State itself, in which case there would obviously be no need for the receiving State to notify the sending State, or upon the diplomatic courier being declared *persona non grata*, in which case the receiving State would in any event notify the sending State. Notification would be required only in rare cases of illness or accident, for example, where the circumstances were known to the receiving State but not to the sending State, or where some special purpose would be served by notification. The obligation to notify the sending State might therefore be appropriate in some, but certainly not all cases.

10. Mr. LACLETA MUÑOZ thanked the Special Rapporteur for having taken account, in his reports, of the views expressed in the Commission and in the Sixth Committee of the General Assembly; he welcomed that method of work, which was helpful to the members of the Commission.

11. Referring first to draft article 23, he said it was his opinion that the immunity from the criminal jurisdiction of the receiving State and the transit State accorded to the diplomatic courier in paragraph 1 should be strictly limited to activities connected with the performance of his official functions. He did not share the opinion of those who disagreed with that provision because they thought that granting such immunity expressly to the diplomatic courier would amount to modifying previous conventions or that it was sufficient to grant him personal inviolability. It was not necessarily true that immunity from criminal jurisdiction would follow directly from the personal inviolability of the diplomatic courier. He had always been opposed to the idea of treating the diplomatic courier as a member of the diplomatic staff of a mission, but thought that, in the performance of his functions and in regard to privileges and immunities, the courier could be assimilated to a member of the administrative or technical staff. A person instructed by a diplomatic mission to collect a diplomatic bag entrusted to the captain of a commercial aircraft or the master of a merchant ship was in fact always a member of the diplomatic, administrative or technical staff of the mission concerned and he thus performed functions which were normally those of a diplomatic courier; but a mission would never entrust a diplomatic bag to a person who was not protected at least by the privileges and immunities enjoyed by its administrative and technical staff. Hence the necessity of granting such immunities to the diplomatic courier, who was not, moreover, a mere carrier, since his functions were, *inter alia*, to guarantee the transport and delivery of the bag as required and to ensure its safety. He could, however,

agree with the idea of not completely exempting the diplomatic courier from the obligation to give evidence as a witness, as suggested by the Special Rapporteur in paragraph 4 of article 23.

12. Draft article 36 was a compromise between the two positions taken by members of the Commission. Like Sir Ian Sinclair, he had some doubts about the effect that such a text would produce. The words "unless otherwise agreed by the States concerned" in paragraph 1 and the words "they may request that the bag be returned to its place of origin" in paragraph 2 raised two questions in his mind. First, would the agreement between the States concerned be an agreement *ex ante*, a general agreement or a special agreement establishing a régime that would apply to all diplomatic bags and be applicable in case of difficulties? Secondly, what would happen if the bag was not returned to its place of origin, as the competent authorities of the receiving State or the transit State had requested? Like other members of the Commission, he had often said that he was worried about the possibilities of abuse of privileges and immunities in general and of the diplomatic bag in particular, and he was therefore in favour of adopting wording such as that suggested by Sir Ian Sinclair.

13. Unfortunately, absolute inviolability of the diplomatic bag was not appropriate. Abuses were so flagrant, so frequent and so dangerous for the receiving State that it was the Commission's duty to find a remedy, especially as, with the form the draft was assuming, it seemed that it would not be possible to distinguish, by their external appearance only, between two bags with entirely different contents. In referring to the legitimate contents of a bag, the Commission meant all kinds of articles intended for official use, which might represent a considerable volume, for example furniture for a mission. That being so, how could a receiving State be asked to recognize enormous packing-cases as diplomatic bags, without having been previously notified of their contents?

14. As to electronic means of detection, he thought that a State intending to misuse a diplomatic bag could easily protect the objects it wished to pass through fraudulently so that they would not be detected. On the other hand, a receiving State or a transit State could easily ascertain by such means the legitimate contents of the bag of a sending State acting in good faith, the confidential nature of which it ought to respect. It had been suggested at the previous meeting that, in a few years time, it would be possible to read documents contained in a diplomatic bag, and impressive results could already be obtained with a scanner. For those reasons, he was not in favour of the bag being examined by electronic means, though the Commission should not categorically prohibit all means of examination, since some of them appeared to be perfectly justified and even necessary; that applied, for instance, to dogs trained to find narcotic drugs. Lastly, the receiving State and the transit State must be permitted to open a suspect bag with the consent and in the presence of a representative of the sending State and they should have the right not to request, but to demand that the bag be returned to its place of origin.

15. The text of draft article 37 proposed by the Special Rapporteur to replace draft articles 37 and 38 as originally submitted improved the draft as a whole, but he doubted whether the phrase "in accordance with such laws and regulations as it may adopt", which was taken from the 1961 Vienna Convention on Diplomatic Relations where it referred to the duty-free import of all sorts of articles for the use and consumption of diplomatic agents and missions, was acceptable in the case of the diplomatic bag. It was obvious that the receiving State would adopt provisions to regulate the quantity and frequency of duty-free imports. The reference to the laws and regulations of the receiving State was therefore superfluous in the context of article 37.

16. Draft article 39 raised no particular difficulties. With regard to draft article 40, however, he wondered why the obligations of an unforeseen transit State were assimilated to those of a receiving State rather than to those of a transit State. As to draft article 41, he had some doubts: non-recognition of States or Governments naturally did not affect the entry into the territory of the host State of a conference of a diplomatic bag from a State which had not been recognized by the host State, but the situation was different in the case of bilateral relations. It would, of course, be exceptional for a State to send a diplomatic bag to a temporary mission accredited to an unrecognized State, even though it was conceivable that a mission might have been sent precisely in order to negotiate recognition of the State in question. In any event, a transit State could not be required to admit in transit a diplomatic bag coming from a State which it had not recognized.

17. He shared Sir Ian Sinclair's opinion with regard to draft article 42, paragraph 1, which should be carefully examined; and he emphasized that he had serious doubts about the possible interpretation of the words "without prejudice to the obligations", in draft article 43, paragraph 1. In designating by written declaration those types of couriers and bags to which it wished the provisions of the articles to apply, a State would inevitably modify the obligations arising from the articles as a whole. Hence different wording would have to be found.

18. Mr. AL-QAYSI, referring to draft articles 36 to 43, said that the main issue with regard to article 36 was how to strike a balance between the freedom and confidentiality of official communications between the sending State and its diplomatic missions abroad, on the one hand, and the interest of receiving and transit States in security and the prevention of abuse, on the other. One school of thought favoured absolute inviolability, as provided for in the 1961 Vienna Convention on Diplomatic Relations, and held that there should be no right of verification or examination by electronic or other means. The other opted for relative inviolability, as provided for in the 1963 Vienna Convention on Consular Relations, which allowed for a right of verification by the receiving or transit State.

19. Those who espoused the former viewpoint could rest assured that it was largely corroborated by well-established legal rules set forth in the main codification conventions. Accordingly, it was for those

who held the latter view to show that some limitation was required in the interests of security and integrity. One argument advanced in support of their contention was the prevalence of abuse. Admittedly, abuse did exist and it was most unfortunate. It was, however, highly doubtful whether it was good policy to legislate solely on the ground of abuse if such abuse was not in fact prevalent, since that would be tantamount to predicating that the legislation was enacted on a negative premise. Why should abuse as such, if not prevalent, detract from the validity of a legal principle? Another argument adduced by those who stipulated for limitation concerned the question whether or not the concept of inviolability applied to the bag or only to the contents of the bag. That seemed to him to be a somewhat spurious argument, for he failed to see how the bag and its contents could be dissociated. Yet another argument put forward by those who favoured limitation was that the régime prior to the 1961 Vienna Convention had been more in line with the safeguard régime under the 1963 Vienna Convention than with that of absolute protection under the 1961 Vienna Convention. That might be so, but it did not alter the fact that the 1961 Vienna Convention had been almost universally accepted as law.

20. As to the text of draft article 36, he noted that paragraph 1, which enshrined the principle of inviolability, differed in certain marked respects from the 1961 and 1963 Vienna Conventions. It might be advisable, in the first place, to provide that the diplomatic bag was inviolable "by virtue of its contents" so as to meet some of the objections raised, although those objections would, in his view, require close scrutiny. A more important difference perhaps was that, whereas the 1961 and 1963 Vienna Conventions provided categorically that the diplomatic or consular bag should not be opened or detained, that principle was qualified in draft article 36, paragraph 1, by the phrase "unless otherwise agreed by the States concerned". In other words, the rule laid down in paragraph 1 was of a residual character and, while the phrase in question undoubtedly softened the rigidity of the basic rule, it could also affect the fundamental principle of the inviolability of the bag and its contents.

21. With regard to scanning, it was generally recognized that acceptance of the personal inviolability of the diplomatic agent was in no way affected by pre-flight security procedures. It might be said by way of analogy that the same applied to the diplomatic bag. The analogy was not complete, however, since in the case of the bag scanning could compromise the confidential nature of its contents. Also, scanning might not always be effective. Was it really possible, for instance, to scan a diplomatic bag that took the form of something as large as a container? Sir Ian Sinclair had provided information regarding United Kingdom practice, under which, if he had understood correctly, scanning was permitted under strictly controlled conditions. What, however, would be the legal responsibility of the receiving State towards the sending State if the bag was scanned under those conditions, but nothing suspicious was found? The situ-

ation would, of course, be different if scanning were regarded as a preliminary step taken before the bag was actually examined.

22. With a view to flexibility, the Special Rapporteur had introduced in paragraph 2 of draft article 36 a further measure, which seemed to have been conceived as a compromise, bearing in mind the terms of the former paragraph 2. Clearly, the new provision did not follow the régime of the 1963 Vienna Convention inasmuch as article 35, paragraph 3, of that Convention struck a balance between the request to inspect and the obligation to return the bag if the request was refused, whereas, under draft article 36, paragraph 2, the right to request related specifically to the return of the bag. What, however, would be the position if the sending State offered to allow inspection? Would that point be covered by the residual character of paragraph 1 of the article? In his view, it would be better to clarify the matter in paragraph 2.

23. Furthermore, paragraph 2 of draft article 36 seemed to leave the way open for undue harassment of the sending State, since the competent authorities not only of the receiving State, but also of the transit State were entitled to request that the bag should be returned: that was another marked difference from the corresponding provisions of the 1963 Vienna Convention. Another question that might arise was that of the persons to whom the competent authorities of the receiving State should address their request if the sending State had no diplomatic mission in the transit State. All those questions should perhaps be taken up in the Drafting Committee, but the basic question as to the relationship between the draft articles and the 1961 and 1963 Vienna Conventions remained. In that connection, he favoured the idea of an optional declaration, as suggested by Sir Ian Sinclair. That would permit the States involved to regulate their mutual obligations according to the principle of reciprocity and would obviate the need to grapple with the principle of the relativity of treaty obligations.

24. He agreed that it would be necessary to reconsider the wording of draft article 37, and in particular the phrase "customs and other inspections", in the light of the decision reached in respect of draft article 36. He also agreed with Sir Ian Sinclair's remarks concerning draft article 39, particularly the word "termination". The Drafting Committee might also wish to decide whether it was grammatically correct to state, as did draft article 40, that the diplomatic bag was "compelled to deviate" from its normal itinerary. He shared the doubts expressed with regard to the fact that draft article 41 was intended to apply in the context of bilateral diplomatic relations and even in the case of non-recognition. In fact, the article could apply only in relation to host States of international organizations and international conferences.

25. He failed to understand the purpose of draft article 43 and, although he welcomed the Special Rapporteur's desire to introduce a measure of flexibility, he thought that, in the present case, such flexibility would be inconsistent with the underlying objective of the draft articles and would result in

uncertainty as to their application. Since the Special Rapporteur had indicated that the types of couriers and bags referred to were diplomatic and consular bags and diplomatic and consular couriers, considerable inconsistency would ensue if a State made a declaration, under article 43, to the effect that it applied the régime to the consular courier and the consular bag. In his view, it should therefore be possible to do without article 43 and to provide for such flexibility as was required in the context of the articles that had proved most controversial.

26. Mr. BARBOZA said he was glad to note that the Special Rapporteur had taken into consideration the comments made during previous discussions and had shown some flexibility.

27. In the case of draft article 23, the Commission had several options. It could delete the article; adopt the original text and remove the square brackets; approve the Special Rapporteur's amended text; or adopt other amendments. He was in favour of the last option, since he believed that the purpose of the draft was to explain and give a structure to the principles embodied in the four codification conventions. In so doing, the Commission could, if necessary, go beyond what was provided in those instruments or, on the contrary, remain within the present régime. The solution proposed by the Special Rapporteur with regard to the inviolability of the diplomatic bag was more restrictive than the 1961 Vienna Convention on Diplomatic Relations. He understood the position of some members of the Commission who were in touch with public opinion in their countries, which had been sensitized by certain incidents; but he warned them against being influenced by recent events. The Commission was trying to draft a text applicable to situations which occurred regularly, not occasionally, in international life. While it should not ignore recent events, it should not attach undue importance to them either.

28. Two ideas, whose interaction had been described by Mr. Al-Qaysi at the previous meeting, were associated in draft article 23, paragraph 1: the personal inviolability of the diplomatic courier and his immunity from criminal jurisdiction. The first idea was so firmly established in draft article 16 and in article 27 of the 1961 Vienna Convention that, if paragraph 1 of draft article 23 were deleted, the diplomatic courier would, in practice, still enjoy immunity from criminal jurisdiction. Although the receiving State could neither arrest nor detain the diplomatic courier, there was nothing to prevent a prosecution *in absentia*. If a diplomatic courier were sentenced *in absentia*, the receiving State would be able to apply for his extradition; but if the courier continued to reside in his own country, he would obviously not be extradited—and that would amount to his enjoying immunity from criminal jurisdiction. If he went to live in a different country, however, he might be handed over to the competent authorities of the receiving State. If the Commission was looking for a concrete result, it had to propose means by which that result could be achieved directly and not be satisfied with roundabout means.

29. He was opposed to the principle of absolute immunity, but agreed with Mr. Lacleta Muñoz and

Mr. Al-Qaysi that a possible solution would be to adopt the principle of the functional immunity of the diplomatic courier for acts performed in the exercise of his functions. That compromise would not diminish the prestige of the courier and would meet real needs.

30. The Commission had given little attention to draft article 23, paragraph 4, on which he would like the Special Rapporteur to provide further clarifications. The first sentence exempted the diplomatic courier from the obligation to give evidence as a witness in cases involving the exercise of his functions. The courier should not, however, be required, to appear before a court of the receiving or transit State in any circumstances and it should not be provided that he was not obliged to give evidence as a witness only in cases involving the exercise of his functions. The diplomatic courier could be clearly distinguished from a diplomatic agent, who lived in the country where the case was being tried, but was not required to appear in court for functional reasons. The courier would remain for only one or two days in the receiving or transit State and then return to his own country and, unless he did so voluntarily, would not give evidence in court because of the time constraints involved. He might, however, be called upon by a rogatory commission from the competent authorities of the receiving State to those of the sending State to give evidence before the court of the district in which he was permanently domiciled in the sending State. There was thus nothing to prevent the diplomatic courier from giving evidence, whether or not the circumstances involved the exercise of his functions. For the reasons he had already given, he did not see, either, how the second part of paragraph 4 could be applied. The obligation to give evidence was bound to cause "unreasonable delays or impediments to the delivery of the diplomatic bag".

31. When he had referred to draft article 36 in a previous discussion,⁶ he had said that, although measures should be taken against manifest abuses of the diplomatic bag, there was no reason to adopt the principle of the absolute inviolability of the bag. He had expressed his preference for the solution in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations, according to which the authorities of the receiving State could request that the bag be opened in their presence by an authorized representative of the sending State if they had serious reason to believe that it contained something other than correspondence, documents or articles intended exclusively for official use; that paragraph also provided that, if that request was refused by the authorities of the sending State, the bag should be returned to its place of origin. It was thus for the sending State to decide whether the bag should be opened or returned to its place of origin. That solution was logical, since the sending State was the owner of the bag; it was preferable to the solution which had been proposed by the Special Rapporteur in draft article 36, paragraph 2, clearly with a view to conciliation, and which gave the receiving State and

⁶ *Ibid.*, pp. 193-194, 1847th meeting, paras. 19-23.

the transit State direct power over the bag, since they could decide that it should be returned to its place of origin.

32. With regard to article 36, paragraph 1, he said that, like other members of the Commission, he did not think it possible to prohibit “any kind of examination” of the bag. Such a prohibition would not only exclude olfactory examination by dogs, but would prevent external visual examination of the bag. The use of electronic devices should not be authorized, for it could be very dangerous to permit States to penetrate a container in order to examine its contents. In view of the rapid rate of technical progress, the development of means of reading documents inside a bag could not be ruled out. In that connection, it would be well to remember Mr. Al-Qaysi’s comment that, in the last analysis, it was the diplomatic bag that was inviolable, even though its inviolability depended on that of its contents. With regard to the rate of technical progress, the 1958 Convention on the Continental Shelf⁷ might serve as a lesson. That instrument had defined the outer limit of the continental shelf according to the possibilities of exploiting natural resources; yet, a few years later, such possibilities had been extended to the bed of the high seas.

33. Mr. McCaffrey, speaking on draft articles 36 to 40 and reserving the right to refer to the remaining articles at a later stage, said that, in dealing in draft article 36 with the question of the inviolability of the diplomatic bag, the Commission had to make sure that the advantages to be derived from its proposals were not outweighed by the disadvantages. He had some sympathy with the view expressed by previous speakers, and in particular by Mr. Flitan (1904th meeting), that it was dangerous to tamper with the régime established by the 1961 Vienna Convention on Diplomatic Relations or by later instruments. At the same time, the existence of serious and widespread abuses of the diplomatic bag and of diplomatic immunities in general could not be ignored. Sir Ian Sinclair’s proposal (paragraph 7 above) that States should be allowed to exercise an option in respect of draft article 36 therefore warranted serious consideration, especially in the light of Mr. Al-Qaysi’s point concerning the fact that the customary-law régime existing prior to the 1961 Vienna Convention allowed a similar challenge procedure. He was not yet in a position to support Sir Ian Sinclair’s proposal, since it was open to question whether an attempt to modify the régime established by the 1961 Vienna Convention would really represent an improvement, but he strongly urged that the proposal should be discussed both in the Commission and in the Sixth Committee of the General Assembly.

34. The idea of an option apart, he would prefer the wording of article 36 to be modelled more closely on that of the 1961 Vienna Convention, which did not refer to the inviolability of the diplomatic bag. The provision contained in the first part of paragraph 1 was novel and unnecessary and should be deleted. As for the second part of the paragraph, he had no

strong objection to it at the present stage, but noted that a number of speakers had expressed dissatisfaction with its wording, and in particular with the phrase “exempt from any kind of examination directly or through electronic or other mechanical devices”, which seemed to exclude routine examination by means of metal detectors and, possibly, even the use of sniffer dogs. The question of remote screening raised by Sir Ian Sinclair was a debatable one; some countries, including his own, did not regard remote screening as a permissible practice. However, since the provision in question appeared to be inconsistent with the views and practice of many countries, it might be inadvisable to retain it. With regard to paragraph 2 of draft article 36, he agreed with previous speakers that it would be more acceptable to use wording closer to that of article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations, which provided that, if a request for the opening of the bag was refused by the sending State, the bag “shall” be returned to its place of origin.

35. In draft article 37, a greater degree of precision might be achieved by the insertion of the word “similar” between the words “other” and “inspections” and of the word “free” between the words “the” and “entry”. Draft article 39, as some other speakers had pointed out, failed to take account of the fact that the diplomatic courier might be prevented from delivering the diplomatic bag to its destination by circumstances other than the termination of his functions. As Mr. Sucharitkul (1905th meeting) had correctly noted, moreover, the Commission should exercise restraint in imposing additional obligations on the receiving State and the transit State, which could, after all, not be expected to know exactly where the diplomatic bag was at all times. With regard to draft article 40, he agreed with Mr. Lacleta Muñoz that the obligations imposed on a State not initially foreseen as a transit State should not be the same as those imposed on a receiving State. In conclusion, he said that he would submit some drafting points concerning articles 36 to 40 directly to the Drafting Committee.

36. Mr. CALERO RODRIGUES said that, of all the draft articles before the Commission, article 23 occupied a special place in that it had been referred to the Drafting Committee and returned to the Commission with two paragraphs in square brackets. He hoped that the discussion of that article could be brought to a successful conclusion without further referral to the Drafting Committee; exceptionally, minor drafting matters might be settled in plenary.

37. With regard to paragraph 4 of article 23, he hoped that the new text proposed by the Special Rapporteur would prove acceptable. On the other hand, he did not consider paragraph 1 to be strictly necessary in view of article 16, already adopted on first reading, and therefore suggested that it should be deleted. If a strong trend emerged in favour of according the diplomatic courier functional immunity from criminal jurisdiction, he would have no objection to paragraph 2 being amended in an appropriate manner, for example by deleting the words “civil and administrative” in the first sentence.

⁷ United Nations, *Treaty Series*, vol. 499, p. 311.

38. Turning to draft article 36, he noted that some members were in favour of deleting the reference to the inviolability of the diplomatic bag. As had already been pointed out, however, article 54, paragraph 3, of the 1963 Vienna Convention on Consular Relations referred to the "inviolability and protection" of consular bags in transit and he saw no reason why the same degree of protection should not be extended to the diplomatic bag. As for the reference to exemption from any kind of examination directly or through electronic or other mechanical devices, he was of the opinion that, in endeavouring to protect the diplomatic bag against abuses, the Commission should be careful not to open the door to such abuses: electronic technology was developing very rapidly and what was not practically possible today might be so tomorrow. The Commission should try to arrive at wording which preserved the full confidentiality of the contents of the diplomatic bag, while permitting the receiving or transit State to satisfy itself as to the nature of the contents.

39. With regard to paragraph 2 of draft article 36, he thought that the provision which applied to the consular bag under article 35, paragraph 3, of the 1963 Vienna Convention should also apply to the diplomatic bag, and that the text of paragraph 2 should be amended accordingly. Sir Ian Sinclair's suggestion that States should be allowed to exercise an option in respect of article 36 might be acceptable as a last resort, but it would, of course, detract from the future convention's precision.

40. He had no objection to draft article 37, although, like some previous speakers, he would find it more logical if the article dealt only with matters relating to taxation and if those relating to customs and other inspections were covered in article 36. Draft articles 39 and 40 appeared reasonable. In article 40, however, the status of a State not initially foreseen as a transit State should, in his view, be assimilated to that of a transit State rather than to that of a receiving State. Draft article 41 was also acceptable, but he agreed with Mr. Laclea Muñoz that care should be taken not to impose obligations on States with regard to the diplomatic bags of countries not recognized by them. In draft article 42, paragraph 2, the words "confirming or supplementing or extending or amplifying" might well be replaced by the word "modifying", in line with article 6, paragraph 2 (b).

41. Although a worthwhile attempt had been made in draft article 43 to solve the problem that would arise if a State was not prepared to apply the articles to all four types of couriers and bags, he agreed with other members of the Commission that paragraph 1 was quite obviously incorrect in stating that a declaration of optional exceptions would be "without prejudice to the obligations arising under the provisions of the present articles". Some prejudice was bound to result from such a declaration and the text of paragraph 1 should therefore be amended accordingly.

The meeting rose at 1 p.m.

1907th MEETING

Thursday, 20 June 1985, at 10 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arango-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Diaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitul, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (continued)
(A/CN.4/382,¹ A/CN.4/390,² A/CN.4/L.382, sect. C, ILC(XXXVII)/Conf.Room Doc.2 and Add.1)

[Agenda item 5]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR³ (continued)

- ARTICLE 23 (Immunity from jurisdiction)
- ARTICLE 36 (Inviolability of the diplomatic bag)
- ARTICLE 37 (Exemption from customs inspection, customs duties and all dues and taxes)
- ARTICLE 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag)
- ARTICLE 40 (Obligations of the transit State in case of *force majeure* or fortuitous event)
- ARTICLE 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations)
- ARTICLE 42 (Relation of the present articles to other conventions and international agreements) *and*
- ARTICLE 43 (Declaration of optional exceptions to applicability in regard to designated types of couriers and bags)⁴ (continued)

¹ Reproduced in *Yearbook ... 1984*, vol. II (Part One).

² Reproduced in *Yearbook ... 1985*, vol. II (Part One).

³ The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

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

Article 8 (revised) and articles 9 to 17, 19 and 20, and commentaries thereto, provisionally adopted by the Commission at its thirty-sixth session: *Yearbook ... 1984*, vol. II (Part Two), pp. 45 *et seq.*

Articles 24 to 35, referred to the Drafting Committee at the Commission's thirty-sixth session: *ibid.*, pp. 21 *et seq.*, footnotes 84 to 90 and 93 to 97.

Article 23 and articles 36 to 42, submitted at the Commission's thirty-fifth and thirty-sixth sessions: *ibid.*, pp. 21 and 25-27, footnotes 82 and 98 to 104.

⁴ For the texts, see 1903rd meeting, para. 1.