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Summary record of the 1910th meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
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from criminal jurisdiction unnecessary or even inappropriate. It had rightly been answered that, in some diplomatic conventions, the principle of inviolability coexisted with that of immunity from criminal jurisdiction. The mere obligation to appear before a criminal court was, indeed, a disguised form of arrest, for the courier could be sent an enforceable summons and, if he refused to appear, could be charged with contempt of court. Hence immunity from criminal jurisdiction was the corollary of inviolability. But the real problem was whether the courier should enjoy the same status as diplomatic agents, the technical and administrative staff of a mission and certain international officials. Weighty arguments had been advanced on both sides and, all things considered, the options were more political than legal. The choice depended on whether the emphasis was placed on the absolute freedom of communication of the sending State with its missions, or on the legitimate interests of the transit State and the receiving State.

37. In his opinion, none of the interests involved would suffer from a solution limiting the application of the principle of immunity from criminal jurisdiction to acts performed by the courier in the exercise of his functions. Even if the distinction between acts really performed by the courier in the exercise of his functions and acts performed while he was exercising his functions was not easy to make, it was commonly made in internal law and could be dealt with in the commentary. In order to grant the courier functional immunity, the obligation to give evidence could be limited to acts not performed in the exercise of his functions.

38. Referring next to draft article 36, he observed that no one contested the inviolability of official correspondence, and that it was the correspondence that was inviolable, not the diplomatic bag itself. The conventions on diplomatic and consular relations stipulated only that the bag must not be opened or detained; but it was obvious that to say that the correspondence was inviolable was equivalent to recognizing the inviolability of the bag itself. Since the Commission's mandate was to codify international law, it should draft a text capable of attracting a wide consensus; it therefore seemed advisable to keep to the terms used in the codification conventions and provide that the bag must not be opened or detained and that the correspondence was inviolable.

39. The proposal for article 36 made by Sir Ian Sinclair (1906th meeting, para. 7) deserved particular attention. Unfortunately, it did not mention the principle of exemption of the bag from any kind of examination. But if it was accepted that the bag must not be opened, that implied that it was exempt from examination. In internal law, the inviolability of private correspondence meant that it could not be opened. The prohibition of any kind of examination was all the more necessary because modern techniques, if they did not already do so, would make it possible in the foreseeable future to ascertain the exact contents of the packages, including official correspondence, contained in a diplomatic bag. Exemption from any kind of examination should not be understood to include the routine inspections carried out by airlines; but he did not think it necessary to

make express provision for that exception. As to the return of the bag, provided for in paragraph 2 of draft article 36, that might lead to reprisals if the sending State considered that it had acted within its rights and fulfilled its legal obligations, and thus set off a process that would be dangerous to international relations. Sir Ian Sinclair's proposal, in providing for exemption of the bag from any kind of examination, could satisfy the main demands of all the interested parties.

40. Draft article 37, which laid down the rule of exemption from customs inspection, proceeded from the principle of exemption from any kind of examination expressly stated in draft article 36. He approved of draft article 39 in principle, but thought that the Drafting Committee should find a more general formulation to replace the phrase "in the event of termination of the functions of the diplomatic courier". Draft articles 40, 41 and 42 raised no problems of substance, only drafting points; but he would prefer the original text of draft article 42, which was clearer.

41. Draft article 43, paragraph 1, raised difficulties of application and Sir Ian Sinclair's proposal for article 36 provided a more practical and flexible solution. Perhaps the Special Rapporteur could further clarify the real meaning and scope of article 43.

42. Mr. AL-QAYSI said he noted that Mr. McCaffrey interpreted the word "inviolability" in article 40, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations as referring to the courier and the word "protection" as referring to the bag. In the absence of some phrase such as "as the case may be" or some word such as "respectively", however, his own remarks (1906th meeting) on the inviolability of the bag still stood.

43. He had not said that draft article 43 was inconsistent with Sir Ian Sinclair's proposal (*ibid.*, para. 7) for article 36, but had wished rather to raise the following question. If State A, a party to the 1961 Vienna Convention on Diplomatic Relations but not to the 1963 Vienna Convention on Consular Relations, wished to ensure that the latter Convention would not apply and made a declaration under article 43 of the draft under consideration, it would presumably consider the diplomatic bag as being subject to the régime under article 36; but if State B, being a party to both conventions and wishing to apply the régime of the 1963 Vienna Convention to the diplomatic bag, made a declaration under article 36 as proposed by Sir Ian Sinclair, what interrelationship between the two States was to be inferred?

The meeting rose at 6.10 p.m.

1910th MEETING

Tuesday, 25 June 1985, at 11 a.m.

Chairman: Mr Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arango-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed

Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pirzada, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Ushakov, Mr. Yankov.

Appointment of two new special rapporteurs

1. The CHAIRMAN said that, as a result of the election of Mr. Evensen to the International Court of Justice and the untimely death of Mr. Quentin-Baxter, two vacancies had arisen for the posts of special rapporteur for the topics of the law of the non-navigational uses of international watercourses and international liability for injurious consequences arising out of acts not prohibited by international law. Accordingly, at a meeting held that morning, the Enlarged Bureau had decided to recommend that Mr. McCaffrey should be appointed Special Rapporteur for the first topic and Mr. Barboza for the second.

The recommendation was adopted by acclamation.

2. The CHAIRMAN said that the Enlarged Bureau had further recommended that each new Special Rapporteur should be requested to prepare a paper making an objective appraisal of the status of his topic to date and indicating lines of further action. Those papers could then be considered by the Commission between 17 and 19 July 1985.

It was so agreed.

3. The CHAIRMAN said that he would convey the Commission's decision to Mr. Barboza, who was not present at the meeting.

4. Mr. McCAFFREY said that he was deeply honoured to have such great trust placed in him. He assured members that he would do his utmost to further the work of the Commission on the topic that had been entrusted to him.

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)

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

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)

5. Mr. SUCHARITKUL said that he supported Mr. Ushakov's suggestion (1908th meeting) that the draft articles should perhaps include a provision on non-discrimination along the lines of article 47 of the 1961 Vienna Convention on Diplomatic Relations. In draft article 36, his objection was not to the use of the term "inviolability", but to the words "at all times", for the simple reason that there were occasions on which the bag was empty or contained only other empty bags. "Inviolability", as had already been noted, appeared in the context of the expression "inviolability and protection" in both the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations. It was, however, a generic term and so did not suffice to convey precisely what was involved. The degree of inviolability therefore had to be quantified and the Special Rapporteur had done so in article 36 by providing that the bag should not be opened or detained. Inviolability was distinguishable from immunity because inviolability took two forms. On the one hand, it involved, as did immunity, a negative obligation on the part of the receiving State or transit State not to arrest or detain the courier and not to open or detain the bag. On the other hand, there was a positive obligation of protection, which immunity did not involve, but which was reflected in the provision for the protection of the diplomatic courier by the receiving State made in article 27 of the 1961 Vienna Convention. The basic issue was again one of the extent of the protection to be accorded to the bag and that would vary according to the needs of the mission concerned. The test of reasonableness was also relevant. The obligation of the receiving State was not an obligation of result—in the sense of an obligation to prevent the occurrence of a certain event—but only an obligation to provide protection by taking appropriate measures, and a State could discharge that obligation by exercising due care in the circumstances.

6. Lastly, he would mention for the Special Rapporteur's information that article 1 of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including

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.

Diplomatic Agents,⁵ contained a definition of internationally protected persons which, while it did not extend to the diplomatic courier, did cover, *inter alia*, representatives or officials of a State or officials or other agents of an international organization of an intergovernmental character.

7. Mr. YANKOV (Special Rapporteur) said that Mr. Sucharitkul's first remark was perhaps covered by article 6 on non-discrimination and reciprocity, which had been provisionally adopted by the Commission and was modelled on the relevant provisions of the codification conventions. The Commission might wish to consider whether that article was sufficient to cover the point.

8. With regard to the words "at all times" in draft article 36, paragraph 1, he pointed out that article 24 of the 1961 Vienna Convention on Diplomatic Relations provided that "the archives and documents of the mission shall be inviolable at any time and wherever they may be", and that almost identical provisions were contained in the 1963 Vienna Convention on Consular Relations (article 33), the 1969 Convention on Special Missions (article 26) and the 1975 Vienna Convention on the Representation of States (article 25). If, for instance, a diplomatic mission or consular post was requested by its Government to return archives that had accumulated at the mission or post over the years, those archives would be archives and documents of the mission within the meaning of the provisions to which he had just referred and, accordingly, should be protected at all times, even on the high seas or in an aircraft. The issue at stake was not the philosophical notion of time but, rather, the common-sense interpretation of the words "at all times" or the words "at any time and wherever they may be". He did, however, fully agree with Mr. Sucharitkul's comments concerning the obligation to provide protection. If article 36 was not altogether satisfactory, it was perhaps more a question of language than of concept.

9. Mr. USHAKOV, noting that the discussion which had just taken place had been prompted partly by a suggestion he had made, admitted that, in making his suggestion (1908th meeting), he had forgotten that the Commission had provisionally adopted article 6, entitled "Non-discrimination and reciprocity".

10. The CHAIRMAN, speaking as a member of the Commission, said that, by a combination of scholarship and flexibility, the Special Rapporteur had pointed the way towards the solution of most of the problems that arose with regard to draft articles 23 and 36 to 43, the only ones which remained outstanding now that the Drafting Committee had completed its work on draft articles 28 to 35.

11. Many difficulties with the present topic stemmed from the fact that, if the draft now being prepared became a convention, it would be the fifth convention on the same subject. It would, of course, be restricted to a particular matter, namely freedom of official communications between States and their missions and protection of the means and instruments for facilitating such freedom of communications. Since the four existing conventions contained

varying provisions on that matter, the two main questions that had to be decided were whether the proposed fifth convention could remove or harmonize those variations and what legal effect that convention would have on the four existing ones.

12. The Commission had taken a decision on the first of those questions when it had provisionally adopted the definitions of the terms "diplomatic courier" and "diplomatic bag" contained in article 3, paragraph 1 (1) and (2). For the purposes of the proposed fifth convention, the terms "diplomatic courier" and "diplomatic bag" would thus refer to all couriers and all bags within the meaning of the four existing conventions.

13. That approach provided a solution to the problem of definitions, but not to the problem of harmonization, with which the Special Rapporteur had dealt by drafting uniform provisions and suggesting ways and means by which those provisions could be accepted, with certain qualifications or restrictions that could, for example, be specified in the declaration of optional exceptions provided for in draft article 43. That method would thus solve the problem of a possible conflict between the provisions of the proposed fifth convention and the régimes established in the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations. It would, of course, lead to a plurality of régimes, but it had to be recognized that such plurality already existed.

14. Turning to the individual articles under consideration, he noted that draft article 23 still gave rise to controversy. Its deletion had been suggested on the grounds that it was a new provision which did not exist in any of the four codification conventions. It had also been pointed out that article 16 as provisionally adopted already dealt with the personal inviolability of the diplomatic courier. Under that article, the courier could not be arrested or detained; it had been argued that he could therefore not be tried. Since a courier's stay in a receiving State was very short, it had also been argued that he did not need immunity from criminal jurisdiction.

15. Those in favour of retaining article 23 had pointed out that the provision of article 16 on freedom from arrest or detention was not sufficient. It would not prevent a diplomatic courier from being prosecuted *in absentia*, declared a fugitive criminal or even having extradition proceedings instituted against him. Article 23 thus flowed logically from article 16 and it was therefore essential to grant the courier immunity from criminal jurisdiction, at least for acts performed in the exercise of his official functions. Different views had been expressed with regard to the extent of the immunity to be accorded to the courier. The Special Rapporteur had equated the status of the courier with that of the administrative and technical staff of a diplomatic mission, who enjoyed absolute immunity under article 31 and article 37, paragraph 2, of the 1961 Vienna Convention.

16. It should, however, be remembered that, under article 3 as provisionally adopted by the Commission, the term "diplomatic courier" covered couriers within the meaning of all four codification conventions, not only couriers within the meaning of the

⁵ United Nations, *Treaty Series*, vol. 1035, p. 167.

1961 Vienna Convention. Consequently, a consular courier might be accorded absolute immunity not enjoyed by any consular official, even the head of a consular post. He therefore supported the idea of granting only functional immunity to the courier. That result could be achieved by adding the following words at the end of paragraph 1 of draft article 23: "in respect of acts performed by him in the exercise of his functions". With that qualification, article 23, paragraph 1, could be justified as a logical consequence of article 16 and its wording would obviously then be politically more acceptable than it was now.

17. The other controversial provision in article 23 was its paragraph 4, the revised text of which proposed by the Special Rapporteur he found acceptable. He nevertheless suggested that the Drafting Committee should consider replacing the words "in cases", in the first sentence, by the words "in respect of acts or facts". Paragraphs 2, 3 and 5 of article 23 were acceptable subject to minor drafting changes.

18. Draft articles 36 and 43 were the heart of the matter with regard to the second main question which the Commission had to decide, namely what legal effect the proposed fifth convention would have on the four existing ones. In that connection, draft article 36 gave rise to three problems. Should the term "inviolable" be used to refer to the diplomatic bag or would it be better to use the wording of article 27 of the 1961 Vienna Convention? Should it be provided that the bag could be inspected or scanned? Lastly, was it possible for the bag to be returned to its place of origin in the event of suspicion as to its contents and, if so, on what terms?

19. The declaration of optional exceptions provided for in draft article 43 might be of some assistance in finding a solution to those problems. A State could thus make a declaration to the effect that it would apply to all bags the provision contained in article 35, paragraph 3, of the 1963 Vienna Convention. In the event of suspicion, the receiving State could then request that the bag be opened in the presence of an authorized representative of the sending State and, if the request were refused, the bag would be returned to its place of origin. Another possible solution to those problems might be to adopt the reformulation of article 36 proposed by Sir Ian Sinclair (1906th meeting, para. 7). Paragraph 1 of that new text stated: "The diplomatic bag shall not be opened or detained"; it thus reproduced the wording of article 27, paragraph 3, of the 1961 Vienna Convention. Paragraph 2 referred to the case of a consular bag within the meaning of article 35 of the 1963 Vienna Convention. Paragraph 3 provided that, notwithstanding paragraph 1, a State which became a party to the articles might "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". That new text thus established a restrictive régime based on the 1963 Vienna Convention.

20. There were three possible options that the Commission could choose with regard to draft articles 36 and 43. One would be to retain article 36 with paragraph 1 reworded simply as paragraph 3 of article 27 of the 1961 Vienna Convention, which stated: "The diplomatic bag shall not be opened or detained." The

possibility of restrictive application and the manner of such application would then be covered in article 43, to which the substance of Sir Ian Sinclair's proposal would be transferred.

21. The second option would be to retain article 36 as proposed by the Special Rapporteur and to allow for restrictive application by including in article 43 a provision based on paragraphs 2 and 3 of Sir Ian's proposal. That approach would create a plurality of régimes, but article 36 itself would provide for a uniform régime. If a State made no declaration under article 43, article 36 would then apply.

22. The third option would be to provide in article 36 for the possibility of a declaration of optional exceptions concerning the diplomatic bag, as in paragraphs 2 and 3 of Sir Ian's proposal. Article 43 would then refer only to a declaration concerning the diplomatic courier. If article 23 were retained, a State could make a declaration under article 43 stating that it would apply the articles to the diplomatic courier only. If article 23 were deleted, there would be no need for article 43.

23. His own preference would be for the Commission to choose between the first and second options. If article 36 was to be retained as it now stood, however, paragraph 1 should be amended to read: "The diplomatic bag, by virtue of its contents, shall be inviolable ...". The end of paragraph 2 should also be amended to read: "... the bag shall, at their request, be returned to its place of origin".

24. Subject to amendments of form by the Drafting Committee, he agreed generally with draft articles 37, 39 and 40. He also agreed with the substance of draft article 41, which was a matter of usual practice, but its wording went too far and was tilted against the receiving State and the transit State. The obligations of those States should, in his view, be left to State practice and to negotiations, if need be through the protecting State. The substance of article 41 might therefore be included in article 40, since a provision concerning the non-recognition of States or Governments or the absence of diplomatic or consular relations could be useful in dealing with the problems arising with regard to the obligations of an unforeseen transit State in case of *force majeure* or fortuitous event.

25. The main question that arose in connection with draft article 42 was that of the relationship between the draft articles and the four codification conventions. That question should be clarified both in the text of the draft articles and in the commentary and it had to be explained whether the proposed fifth convention would prevail over the earlier ones or not. Lastly, he said that he preferred the wording of paragraph 3 of article 42 as originally submitted to its new version, namely paragraph 2 of the revised article 42.

26. Sir Ian SINCLAIR said that it was the problem of the relationship between draft article 36 and draft articles 42 and 43 that had led him to propose a new text for article 36. Under article 43 as it now stood, the only available option was to apply the uniform provisions of the draft articles to designated types of couriers and bags.

27. If, for example, paragraph 1 of article 36 provided simply that the diplomatic bag must not be opened or detained and a State then used article 43 to declare that it would apply the articles to the consular bag and the consular courier only, would that State be bound to apply the régime of article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations without any possibility of challenging a suspicious bag, notwithstanding the provision to that effect contained in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations? He had been trying to work out the answer to that kind of question and he did not think that the option in draft article 43 was wide enough to take account of the fact that different régimes applied to the various types of bags, particularly the consular bag and the diplomatic bag.

28. He had proposed a possible solution to that problem in his reformulation of article 36 (1906th meeting, para. 7), but the same result could be achieved by widening the scope of article 43, which, as it now stood, would not cover the kind of case under consideration. He was, of course, assuming that there was a material difference between the régime established in the 1961 Vienna Convention and that provided by the 1963 Vienna Convention. In any event, the question whether it was appropriate to make all the options available in a single article was a matter that would best be left to the Drafting Committee.

29. At the previous meeting, Mr. Ogiso had expressed doubts about the declaration procedure which he (Sir Ian) had advocated in his proposed reformulation of article 36 and had stated that it would give rise to complex treaty relations. He could only say that, since the problem at issue was a complex one, complex provisions would be needed to solve it. Mr. Ogiso had also raised the question of possible objections to a declaration. On that point, he wished to make it clear that the type of declaration which he had in mind was an option that would be contained in the draft articles themselves. Such an option would be accepted in advance by the negotiating States and there could be no question of any objection to it. Under general international law, objections were possible only to a unilateral reservation, not to a declaration accepted in advance by all the negotiating States.

30. The question whether the type of option he had in mind would be compatible with the existing conventions had been raised by Mr. Reuter (1909th meeting). That was a very difficult question, but he recalled that, with regard to article 27, paragraph 3, of the 1961 Vienna Convention, a number of States parties had already made a series of unilateral reservations to which no objection had been taken and which in effect opened up the possibility of applying to the diplomatic bag the régime provided for the consular bag. Thus, within the framework of the 1961 Vienna Convention, there were already different types of régimes that were applicable as between parties to that Convention.

31. Lastly, he said that he preferred the text originally submitted by the Special Rapporteur for ar-

ticle 42, which would be more helpful than the revised text in providing a solution to the problem raised by article 36.

32. The CHAIRMAN, speaking as a member of the Commission, said he did not think that the example referred to by Sir Ian Sinclair would give rise to any inconsistency, because a State making such a declaration would be applying a more liberal régime to the consular bag, not a more restrictive régime. Such a possibility was, moreover, provided for in article 73 of the 1963 Vienna Convention on Consular Relations, which had been taken by the Special Rapporteur as the basis for draft article 42. An agreement to modify the provisions of the latter Convention was thus permissible. If a State encountered any difficulties because it had made that choice, such difficulties could easily be overcome, because draft article 43, paragraph 2, allowed a declaration to be withdrawn.

The meeting rose at 1.05 p.m.

1911th MEETING

Wednesday, 26 June 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

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

Fortieth anniversary of the United Nations

1. The CHAIRMAN recalled that the Charter of the United Nations had been opened for signature 40 years previously, on 26 June 1945. The fortieth anniversary of the United Nations would be celebrated in 1985 by the General Assembly and by the Sixth Committee; and, since the Commission had been created by the United Nations, it was appropriate for it to join in that celebration. The Commission's task was to promote the progressive development and codification of international law and it had always performed that task in the conviction that the world community should be governed by international law, however inadequate it might be.

Visit by a member of the International Court of Justice

2. The CHAIRMAN welcomed Mr. Ago, a Judge of the International Court of Justice and a former member of the Commission. It was under the guidance of Mr. Ago, as Special Rapporteur, that part 1 of the draft articles on State responsibility had been adopted on first reading.