

Document:-
A/CN.4/L.384

Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Texts adopted by the Drafting Committee: articles 28 to 32, 34 and 35 - reproduced in A/CN.4/SR.1911 to SR.1913

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:-
1985, vol. I

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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.

3. Mr. AGO said that he appreciated the kind words of welcome by the Chairman, under whose able guidance the Commission could not fail to make substantial progress on the topics it was considering, particularly that of State responsibility. He believed that frequent contacts between the Commission and the ICJ were useful and even necessary, since the Court's task of ruling on particular cases and settling disputes between States on points of law was the counterpart of the Commission's task of defining general rules, and the two tasks were essential for the international community.

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)

4. Mr. PIRZADA commended the Special Rapporteur on his sixth report (A/CN.4/390), in which he had demonstrated flexibility and a willingness to take account of all points of view.

5. Article 16, which provided that the diplomatic courier enjoyed personal inviolability and was not liable to any form of arrest or detention, would not

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.

be enough to prevent the courier from being tried, even *in absentia*, although that might be contrary to the principles of natural justice and equity. He was therefore of the opinion that draft article 23, paragraph 1, which gave the courier immunity from criminal jurisdiction, should be retained, provided that it related only to acts performed by the courier in the exercise of his functions.

6. No serious exception had been taken to paragraphs 2 and 3 of article 23. Paragraph 4 consisted of two sentences, the first of which exempted the courier from giving evidence as a witness "in cases involving the exercise of his functions". That provision would be acceptable if the use of the word "cases" were avoided. In line with article 44, paragraph 3, of the 1963 Vienna Convention on Consular Relations, it should therefore be amended to specify that the diplomatic courier was "under no obligation to give evidence concerning matters connected with the exercise of his functions". It would, however, be difficult for him to agree to the second sentence, which stated that the courier might be "required" to give evidence. The word "required" was too strong and might enable a court to apply coercive measures, or even impose penalties, in the event of failure to give evidence, thereby contravening the provisions of article 16. He therefore suggested that the word "required" should be replaced by "requested". He further suggested that provision should be made for the acceptance of a statement in writing, an affidavit, or of some other means of giving evidence, in lieu of oral evidence.

7. Draft article 36, paragraph 1, provided that the diplomatic bag "shall be inviolable at all times and wherever it may be" and that "it shall not be opened or detained". The use of the word "inviolable" had been criticized on the grounds that it had not been used in article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations or in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations and it had been suggested that it should be replaced by the word "protected", which was more appropriate for the bag. In that connection, he agreed with Mr. Sucharitkul (1910th meeting) that "inviolability" was a generic term which had to be qualified.

8. Although article 27, paragraph 3, of the 1961 Vienna Convention simply stated that the diplomatic bag "shall not be opened or detained", article 24 provided that the archives and documents of the mission "shall be inviolable at any time and wherever they may be" and article 30 specified that the papers and correspondence of a diplomatic agent enjoyed inviolability. Article 1, paragraph 1 (k), of the 1963 Vienna Convention stated that "consular archives" included all the papers, documents and correspondence of a consular post and article 33 provided that "the consular archives and documents shall be inviolable at all times and wherever they may be". The 1975 Vienna Convention on the Representation of States contained almost identical provisions.

9. In view of the definition of the diplomatic bag contained in article 3 as provisionally adopted, draft article 36, paragraph 1, was entirely in keeping with article 33 of the 1963 Vienna Convention and it rightly stated that the diplomatic bag was inviolable

at all times and wherever it might be. The definition contained in article 3 would also make it unnecessary to insert the words "by virtue of its contents" after the words "diplomatic bag", as suggested by Mr. Jagota at the previous meeting.

10. The most important issue with regard to draft article 36 was, however, that of suspect bags. It was dealt with in paragraph 2 and in the proposal made by Sir Ian Sinclair (1906th meeting, para. 7). Experience had shown that abuses of the diplomatic bag were becoming increasingly frequent. There had been instances of bags containing contraband articles, currencies or gold, narcotic drugs, weapons, explosives and even human beings. Consideration might therefore be given to the possibility of providing for the inspection of the bag and for its return to its place of origin in the event that a request for inspection was refused by the authorities of the sending State.

11. He accepted the principle of the inviolability of the diplomatic bag, but was also in general agreement with paragraphs 2, 3 and 4 of Sir Ian Sinclair's proposal. If that proposal were adopted, draft article 43 would no longer need to be a separate provision.

12. During the discussion, it had been said that the draft articles were to be without prejudice to the relevant provisions in other conventions and it had been asked whether the declaration of optional exceptions should cover all or only some articles. The question of a plurality of régimes had also been raised. In his view, those points could all be dealt with in paragraphs 2, 3 and 4 of Sir Ian Sinclair's proposal, whose wording could be amended accordingly.

13. While he agreed with draft article 40, he was inclined to share the concern expressed by some members with regard to the cases of non-recognition of States or Governments referred to in draft article 41.

14. The CHAIRMAN said that the Commission had completed its consideration of draft articles 23 and 36 to 43 as submitted by the Special Rapporteur, who would sum up the discussion at a later meeting.

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (A/CN.4/L.384)

ARTICLES 28 TO 32, 34 AND 35

15. The CHAIRMAN invited the Chairman of the Drafting Committee to present articles 28 to 32, 34 and 35,⁵ as adopted by the Committee (A/CN.4/L.384).

16. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) noted that the articles adopted by the Drafting Committee each had two numbers: the first was the number originally assigned by the Special Rapporteur and the second, which appeared in square brackets, was the new number that would

be used once the article had been included in the set of draft articles provisionally adopted by the Commission.

17. The changes made by the Drafting Committee to the texts of the articles, purely for the purpose of alignment with articles already adopted, included the deletion of the adjective "official" before the word "functions" and the insertion in the appropriate places of the words "or, as the case may be". The Committee had also attempted to bring the different language versions into line with the terminology used in the corresponding provisions of the codification conventions.

ARTICLE 28 [21] (Duration of privileges and immunities)

18. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) presented article 28 [21] as proposed by the Drafting Committee, which read:

Article 28 [21]. Duration of privileges and immunities

1. The diplomatic courier shall enjoy privileges and immunities from the moment he enters the territory of the receiving State or, as the case may be, the transit State in order to perform his functions, or, if he is already in the territory of the receiving State, from the moment he begins to exercise his functions. Such privileges and immunities shall normally cease at the moment when the diplomatic courier leaves the territory of the receiving State or the transit State. However, the privileges and immunities of the diplomatic courier *ad hoc* shall cease at the moment when the courier has delivered to the consignee the diplomatic bag in his charge.

2. When the functions of the diplomatic courier come to an end in accordance with article 11 (b), his privileges and immunities shall cease at the moment when he leaves the territory of the receiving State, or on the expiry of a reasonable period in which to do so.

3. Notwithstanding the foregoing paragraphs, immunity shall continue to subsist with respect to acts performed by the diplomatic courier in the exercise of his functions.

19. The title of article 28 remained unchanged, but the structure of the text was somewhat different.⁶ The article now consisted of three paragraphs instead of two.

20. Paragraph 1 now dealt both with the question of when the diplomatic courier's privileges and immunities began and with that of when they normally ceased. On the basis of the four codification conventions, the Drafting Committee had also decided to refer to the moment when those privileges and immunities began for a courier who was already in the territory of the receiving State, namely the moment when he began to exercise his functions. In the commentary, the Special Rapporteur would explain in greater detail the meaning of the words "from the moment he begins to exercise his functions", which might depend on whether the courier was a professional courier or an *ad hoc* courier. The last sentence of paragraph 1 dealt with the special case of the moment when the privileges and immunities of the diplomatic courier *ad hoc* ceased. The Drafting Committee had deemed it appropriate to take account of article 27, paragraph 6, of the 1961 Vienna Convention on Diplomatic Relations, which dealt with that specific point. That new sentence, to

⁵ Referred to the Drafting Committee after consideration by the Commission at its thirty-sixth session; see *Yearbook ... 1984*, vol. II (Part Two), p. 20, para. 76.

⁶ For the text submitted by the Special Rapporteur and the Commission's consideration thereof, see *Yearbook ... 1984*, vol. I, pp. 65 *et seq.*, 1826th to 1829th meetings.

which one member of the Committee had taken exception, had accordingly been added to reflect the existing law on that question.

21. Paragraph 2 concerned the special case covered in article 11 (b), namely when the functions of the diplomatic courier came to an end upon notification by the receiving State to the sending State that, in accordance with article 12, it refused to recognize the person concerned as a diplomatic courier. In that case, the courier's privileges and immunities ceased at the moment when he left the territory of the receiving State or on the expiry of a reasonable period in which to do so. The Drafting Committee had not found it necessary to refer in paragraph 2 to the situation covered in article 11 (a).

22. Paragraph 3 embodied an idea put forward by the Special Rapporteur in the original text of article 28, but it was now clear that it applied to the situations covered in both paragraph 1 and paragraph 2.

23. He recalled that, when the Commission had provisionally adopted article 12 at the previous session, paragraph 2 of that article had been placed in square brackets pending consideration of article 28.⁷ Having reviewed the matter, particularly in the light of the 1961 Vienna Convention, the Drafting Committee now recommended that the square brackets around paragraph 2 of article 12 should be removed. The commentary would explain the interplay between article 12, paragraph 2, article 11 (b) and article 28.

24. One member of the Drafting Committee had expressed reservations about the need for article 28, since agreement had not yet been reached on whether article 23 should be included in the draft. In that connection, he stressed that the articles were, of course, all being adopted provisionally at the current stage. If any future decision had an impact on articles already provisionally adopted, those articles would of necessity have to be reviewed and amended accordingly.

25. Mr. USHAKOV, referring to article 28, paragraph 1, said it seemed to him that there was a contradiction between the words "The diplomatic courier shall enjoy privileges and immunities from the moment he enters the territory of the receiving State or, as the case may be, the transit State in order to perform his functions" and the words "or, if he is already in the territory of the receiving State, from the moment he begins to exercise his functions", because it was as a private individual, not as a diplomatic courier, that he might already be in the territory of the receiving State. It would be better to refer to the case where he was already in the territory of the receiving State when he was appointed as a diplomatic courier. Although that question might be settled on second reading, it would be preferable to deal with it immediately.

26. The CHAIRMAN said that Mr. Ushakov's purpose could be achieved by amending the words "if he is already in the territory ..." to read: "if, when appointed, he is already in the territory ...". If that

question were explained in the commentary, there would be no need to change the text of article 28, paragraph 1.

27. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the Special Rapporteur's original text had dealt only with a diplomatic courier who entered the territory of a receiving State or transit State. The present text also dealt with the case of a person who was appointed as a courier when he was already in the territory of a receiving State. The suggestion made by Mr. Ushakov was a useful one and could best be considered during the second reading of the draft articles.

28. Mr. YANKOV (Special Rapporteur) pointed out that, before the second reading, the Commission would have before it a commentary which would make the matter clear.

29. Mr. USHAKOV said that he would not insist that his suggestion be considered immediately.

30. The CHAIRMAN said that he would take it that the Commission agreed that Mr. Ushakov's suggestion should be considered on second reading.

It was so agreed.

31. Mr. RIPHAGEN said that he did not understand the use of the word "normally" in the second sentence of article 28, paragraph 1. His main problem was with the time element and with the question of how long a courier was considered to be a courier. Paragraph 1 indicated that he ceased to be a courier when he left the territory of the receiving State or the transit State.

32. The provisions of article 28 should be read together with those of article 7, on the documentation of the diplomatic courier. The courier needed such documentation in order to be recognized as a courier. There was also the problem of the status of the diplomatic courier between journeys, particularly after he had delivered the diplomatic bag and proceeded to his next destination.

33. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the word "normally" was used in the second sentence of article 28, paragraph 1, in order to draw a distinction between the usual case, which was covered by that sentence, and the exceptional situation dealt with in paragraph 2.

34. As to the question of the cessation of privileges and immunities, he drew attention to the situation of the diplomatic courier *ad hoc*, whose privileges and immunities ceased at the moment when he had delivered the diplomatic bag. That situation was less satisfactory than that of the professional courier, who enjoyed privileges and immunities until he left the territory of the receiving State or the transit State.

35. Mr. YANKOV (Special Rapporteur) pointed out that the word "normally" had been used in the same context throughout the four codification conventions. With regard to the time factor and to Mr. Riphagen's comment that article 28 had to be read in conjunction with article 7, he said that article 1 (Scope of the present articles) and article 10 (Functions of the diplomatic courier) were also relevant. The scope of the functions of a diplomatic courier was quite broad. A courier who was waiting to receive a diplomatic bag was acting in the exercise of

⁷ See paragraph (6) of the commentary to article 12 (*Yearbook ... 1984*, vol. II (Part Two), p. 49).

his functions, which ended only when he had delivered the bag to its final destination.

36. The last sentence of article 28, paragraph 1, relating to the diplomatic courier *ad hoc* was based on the corresponding provisions of the four codification conventions, and in particular those of article 27 of the 1961 Vienna Convention on Diplomatic Relations. The *ad hoc* courier enjoyed less protection than the professional courier. It was of course assumed that, in most cases, the *ad hoc* courier would be a diplomatic agent who already enjoyed diplomatic immunities and had no need for further protection.

37. The lower degree of protection for the *ad hoc* courier was also understandable if it was remembered that a consular courier would enjoy absolute immunity from arrest or detention while carrying out his duties. It would not be appropriate to extend that immunity any further, since the consular courier was normally a consular officer who enjoyed only functional immunity in respect of acts performed in the exercise of his functions. There were a number of precedents from State practice which supported that approach.

38. Mr. USHAKOV said that, under the four codification conventions, the immunity enjoyed by certain persons with respect to acts performed in the exercise of their functions subsisted after their functions had come to an end. Under article 39, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations, for example, an ambassador who returned to the receiving State as a private individual after leaving his post in that State could not be prosecuted for acts performed in the exercise of his functions. That was the rule embodied in paragraph 3 of draft article 28, although that paragraph referred to "the diplomatic courier", not to "a person". It should be explained in the commentary that reference was being made to the diplomatic courier as a private individual.

39. Sir Ian SINCLAIR thanked the Chairman of the Drafting Committee for drawing attention to the reservations that he himself had with regard to article 28. An article on the duration of privileges and immunities had to be included in the draft, since the diplomatic courier had at least one important immunity, namely freedom from arrest and detention. The Commission could, however, not finalize the wording of article 28 on the duration of privileges and immunities until it had reached a decision on article 23, relating to immunity from jurisdiction.

40. Under article 16, a diplomatic courier enjoyed immunity from arrest or detention in respect of all acts performed by him, not only in respect of acts performed in the exercise of his functions. The words "immunity shall continue to subsist" in draft article 28, paragraph 3, might therefore be interpreted to mean that the courier could be arrested, detained or even sued in a civil court in respect of acts performed outside his functions during a previous stay in the receiving State. Much would, of course, depend on the final wording of article 23, if it was retained. He was therefore grateful to the Chairman of the Drafting Committee for his assurance that article 28, and especially its paragraph 3, would be reviewed in the light of the action to be taken with regard to other articles.

41. Mr. SUCHARITKUL said he agreed with Sir Ian Sinclair that article 28, paragraph 3, could not be approved until it had been decided what was meant by "immunity from jurisdiction" under article 23. If article 23, paragraph 1, related only to acts performed by the courier in the exercise of his functions, there would be no immunity *ratione personae*. He recalled that, from the outset, he had advocated that no immunity *ratione personae* should be granted to the courier.

42. Mr. McCAFFREY noted that article 28 tied the duration of privileges and immunities both to the location of the courier in the territory of the receiving State or transit State and to the performance of his functions. The Commission had, however, not yet come to grips with the problem of determining when a courier was actually performing his official functions, which were defined in article 10. Article 11 (b) indicated that the functions of the courier came to an end upon notification by the receiving State of its refusal to recognize the person concerned as a diplomatic courier. Article 11 (a) specified that the courier's functions came to an end when he was recalled by the sending State. In the context of article 28, it was therefore essential to refer to "a person acting as a diplomatic courier". The commentary should explain what was meant by the words "in the exercise of his functions" so that it would, for example, be clear that a courier waiting to pick up a diplomatic bag was performing his official functions.

43. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the opening clause of article 11 showed that the two special cases referred to in that article were not the only ones in which the courier's functions came to an end. Article 10 also indicated that the functions of the courier ended with the delivery of the diplomatic bag. The purpose of paragraph 3 of article 28 was, however, to make it clear that immunity would nevertheless subsist with respect to acts performed by the courier in the exercise of his functions.

44. Mr. REUTER said that he could not adopt a position with regard to article 28, paragraphs 1 and 2, because he did not really understand them; but since they were based on article 39, paragraphs 1 and 2, of the 1961 Vienna Convention on Diplomatic Relations, he would fall in with the Commission's tradition of following the wording of existing conventions.

45. He was, however, unable to accept paragraph 3 of draft article 28, which was based on the second sentence of paragraph 2 of article 39 of the 1961 Vienna Convention and also referred to "immunity" in the singular. If that singular was not meant to be a plural, it would have to be made clear whether or not reference was being made to "immunity from jurisdiction".

46. Mr. ARANGIO-RUIZ, referring to Mr. Ushakov's comments, said that it was also possible for a courier to commence his functions in the territory of a transit State. That might occur, for instance, when a courier moving from country A to country C stopped in country B and had to be replaced for some reason by the diplomatic mission of country A in country B. In such a case, the functions of the second courier would commence in the transit State. To meet

that point, he would suggest that the words “or the transit State” should be added after the words “if he is already in the territory of the receiving State” in the first sentence of paragraph 1 of article 28.

47. Mr. MAHIU said that the replies by the Special Rapporteur and the Chairman of the Drafting Committee to the questions raised by several members of the Commission showed that, if the diplomatic courier was granted privileges and immunities, including immunity from jurisdiction, during the period when he exercised his functions, immunity from jurisdiction had to subsist. Paragraph 3 of article 28 was thus the logical consequence of paragraph 1 and did not give rise to any problems of interpretation. The Chairman of the Drafting Committee had, moreover, explained that a distinction had to be drawn between the status of the courier and his functions, on which his privileges and immunities depended and which could come to an end for a variety of reasons.

48. Sir Ian SINCLAIR had raised the more serious problem of the link between article 28, paragraph 3, and article 23. It was obvious that the immunity in question was immunity from jurisdiction, but whether or not it was necessary to say so was not certain. It was also obvious that article 28, paragraph 3, would be required only if the Commission decided to retain article 23.

49. Mr. AL-QAYSI said that Mr. McCaffrey's misgivings with regard to article 28, paragraph 1, could perhaps be met by defining more closely the criterion for determining the point at which the courier started to exercise his functions, possibly by reference to the moment at which he was appointed.

50. He agreed that article 28, paragraph 3, could not be considered in isolation from article 23 and that, as drafted, it gave rise to a problem. If the paragraph were approved and if some form of immunity from jurisdiction were provided for under article 23, the courier could not possibly be made amenable to the jurisdiction of the receiving State, unless of course he returned to that jurisdiction in a private capacity. The solution would therefore be to indicate, possibly in a footnote to article 28 or by placing its paragraph 3 in square brackets, that it would be necessary to revert to the matter when the Commission took its final decision on article 23.

51. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) suggested that, in order to expedite matters, a decision on article 28, paragraph 3, should be deferred on the understanding that the paragraph would be reviewed by the Drafting Committee at the current session in conjunction with article 23.

52. Mr. KOROMA said he was prepared to agree to the suggestion that the Drafting Committee should reconsider the matter but, if it were agreed—as seemed to some extent to be the case—that the courier should not be amenable to the jurisdiction of the receiving State or the transit State, it followed that article 28, paragraph 3, would have to be accepted. It was necessary first of all to decide whether the courier should enjoy personal as well as functional immunity and that question should therefore be dis-

cussed both in the Drafting Committee and in the Commission itself.

53. Mr. FLITAN said that the fate of article 28, paragraph 3, would not depend on the decision to be taken with regard to article 23, because if the Commission decided not to retain article 23, it would still have article 16. The scope of article 28, paragraph 3, would, however, be broader if article 23 were not deleted. Since the problems raised by article 28, paragraph 3, were of a drafting nature, he agreed with the members of the Drafting Committee who were in favour of basing the wording of that provision on that of article 39, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations. The words “by such a person” would thus be better than the words “by the diplomatic courier” because, at the moment in question, the person concerned would no longer be performing his functions as a courier. Perhaps that point might be explained in the commentary. The expression “in the exercise of his functions” in article 28, paragraph 3, also gave rise to problems because the Commission did not yet know whether immunity from jurisdiction would apply only to acts performed by the courier in the exercise of his functions or also to acts which he performed outside his functions. That expression should therefore be replaced by the words “during the period in which he exercises his functions”. In conclusion, he suggested that article 28, paragraph 3, should have a minimum content, since the Commission had adopted article 16 on first reading without waiting for a decision to be taken on article 23.

54. Mr. LACLETA MUÑOZ said that, in the first sentence of article 28, paragraph 1, a drafting error had been made in referring to a person who was already in the territory of the receiving State and to whom the functions of a courier were entrusted. The words “if he is already in the territory of the receiving State” in the second part of the sentence thus referred to the diplomatic courier *ad hoc*, not to “the diplomatic courier” mentioned at the beginning of the sentence. He therefore suggested that the words “if he is already in the territory of the receiving State” should be replaced by the words “in the case of the diplomatic courier *ad hoc*” or by the words “in the case of a person already in the territory of the receiving State”. What appeared to be a drafting problem also raised the question whether a diplomatic mission could appoint only diplomatic couriers *ad hoc* or whether it could also appoint “professional” couriers.

55. With regard to article 28, paragraph 3, he was of the opinion that the word “immunity” could refer only to immunity from jurisdiction and that that paragraph was therefore closely linked to article 23. It would be absurd to say that the diplomatic courier enjoyed functional immunity only from civil and administrative jurisdiction, and not from criminal jurisdiction. The same problem arose in article 29.

56. Mr. BALANDA said he also thought that article 28, paragraph 3, and article 23 were closely linked and that they should be discussed at the same time. He was not sure whether the Commission would be able to agree on the use of the words “during the period in which he exercises his functions” proposed by Mr. Flitan, which went further

than the words "in the exercise of his functions". The Commission would encounter the same problem in article 29.

57. Mr. DÍAZ GONZÁLEZ said that, before deciding on article 28, paragraph 3, the Commission should first take a decision on article 23. Article 28, paragraphs 1 and 2, had also given rise to a number of objections because of their ambiguity, the fact that they were based on the 1961 Vienna Convention on Diplomatic Relations and the drafting error pointed out by Mr. Laclea Muñoz. In that connection, he agreed with the view expressed by Mr. Reuter. Since article 29 would raise the same problems, the Commission should not take a decision on article 28 as a whole until it had decided what should be done with article 23.

58. Sir Ian SINCLAIR said that it would be acceptable to him to adopt paragraphs 1 and 2 of article 28 and place paragraph 3 in square brackets, with an indication that its wording would be reviewed in the light of any decision the Commission might reach on article 23. The same problem arose in connection with article 29, paragraphs 3, 4 and 5, and those paragraphs should perhaps also be placed in square brackets. If there was any major difficulty he could agree to a lesser solution whereby it was clearly recorded that the Commission provisionally adopted article 28 on the explicit understanding that the wording of paragraph 3 would be reviewed by the Drafting Committee and by the Commission as a whole in the light of any decision the Commission might reach on article 23. The same reservation could also be made in respect of article 29.

59. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he did not favour the suggestion to place paragraph 3 of article 28 in square brackets, since he considered that the Drafting Committee should discuss article 23 at the current session, if possible; it could discuss paragraph 3 of article 28 at the same time.

60. The CHAIRMAN suggested that, in view of the late hour, members should revert to the matter at the next meeting.

The meeting rose at 1.10 p.m.

1912th MEETING

Thursday, 27 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. 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. Tomuschat, Mr. Ushakov, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/L.384, ILC(XXXVII)/Conf.Room Doc.2 and Add.1)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

ARTICLES 28 (*continued*) to 30

ARTICLE 28 [21] (Duration of privileges and immunities)¹ (*continued*)

1. The CHAIRMAN said that, following the detailed discussion held at the previous meeting and on the basis of consultations with the Chairman of the Drafting Committee, the Special Rapporteur and Sir Ian Sinclair, he would suggest that article 28 be provisionally adopted, on the understanding that paragraph 3 would be reviewed in the light of the Commission's decision on article 23. The comments made by members would be taken into account in drafting the commentary to the article.

2. Mr. DÍAZ GONZÁLEZ said that he did not see how the Commission could adopt an article when it did not know what the text would be, since paragraph 3 would be amended according to the decision taken on article 23. Moreover, there had been no consensus on article 28 as a whole, and it could not be considered as being approved. The best course would be to await the Commission's decision on article 23 before pronouncing on article 28 as a whole.

3. The CHAIRMAN said that it was, of course, possible to leave article 28 in abeyance; that was a matter for the Commission to decide. It should be borne in mind, however, that the text of article 28 was based on the corresponding provisions of the four codification conventions, so that any change in that text might raise questions as to the interpretation of those conventions.

4. Mr. McCAFFREY said that, while he would have no difficulty in accepting the Chairman's suggestion, he considered it important to clarify whether the immunity referred to in paragraph 3 of article 28 was qualitatively different from the immunities referred to in paragraphs 1 and 2.

5. Mr. REUTER said that he could not support the interpretation given to article 16 at the previous meeting.

6. Mr. USHAKOV said that, as a member of the Commission, he enjoyed the same immunities as a head of mission. According to article 28, paragraph 3, he could not be arrested or detained even after the conclusion of the session for acts performed during the session. The immunity subsisted, whatever it might be.

7. Mr. LACLETA MUÑOZ said he did not think that paragraph 3 of article 28 could be retained if the Commission deleted article 23, because personal inviolability had a much wider scope than immunity, in so far as it implied protection of the courier. There

¹ For the text, see 1911th meeting, para. 18.

was no question of the inviolability subsisting during a fresh visit of the courier to the receiving State outside the performance of his functions. Moreover, if the diplomatic courier enjoyed personal inviolability when he committed an act giving rise to a legal proceeding in the receiving State and took advantage of his inviolability to leave the country, he would be abusing that privilege to evade his obligation to respect the laws of the receiving State. He was in favour of the diplomatic courier having immunity from jurisdiction for acts performed in the exercise of his functions and thought that paragraph 3 would make sense only if the Commission retained article 23. Hence it was important to make clear, in one way or another, that the final decision on paragraph 3 of article 28 would depend on the position taken on article 23.

8. Mr. SUCHARITKUL said it was his understanding that the word "immunity" in article 28, paragraph 3, did not, and was not intended to, cover inviolability under article 16, since the personal inviolability of the courier would in any event disappear upon the cessation of his functions. If the courier returned to the receiving State or transit State in his capacity as a diplomatic courier, he would be covered by new personal inviolability; on the other hand, if he returned in a private capacity, his earlier personal inviolability could not subsist.

9. Mr. MAHIU said that he interpreted paragraph 3 in the same way as Mr. Lacleta Muñoz. The Commission could adopt paragraphs 1 and 2 of article 28 and indicate that its decision on paragraph 3 would depend on what happened to article 23.

10. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said there seemed to be general agreement that paragraph 3 of article 28 should be referred back to the Drafting Committee, in which event the Committee could at the same time consider whether the term "immunity", in that paragraph, extended to immunity within the meaning of article 23 and inviolability under article 16. The Commission might wish to adopt paragraphs 1 and 2 of article 28 provisionally, as the Chairman had suggested, and leave paragraph 3 pending, on that understanding.

11. Mr. USHAKOV said there could be no doubt that personal inviolability was an immunity, as was shown by article 37, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations, according to which "The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in articles 29 to 36". Article 29 of that Convention established the personal inviolability of the diplomatic agent.

12. Mr. RIPHAGEN said that he did not understand the meaning of the second sentence of paragraph 1 of article 28, since in any event the courier would leave the territory of the receiving State or transit State in the course of his functions. That point could not be clarified in the commentary; it should be made clear in the body of the article.

13. Mr. YANKOV (Special Rapporteur) said that he fully agreed with Mr. Ushakov's interpretation of the relationship between inviolability and the notion

of immunity, which was borne out by State practice.

14. As to the duration of immunities and, more specifically, the use of the word "immunity" in the singular in paragraph 3 of article 28, he reminded members that in the earlier stages of the work it had been proposed that the phrase "during the exercise of" should be used in order to import the more objective criterion of time, thus obviating the need to establish a relationship between the act performed and the immunities, which was difficult in practice. As he understood it, the restrictive approach had been adopted as a further exception, so that only those immunities which related to acts performed by the diplomatic courier during the exercise of his functions would subsist after those functions had come to an end. The same idea was reflected in the second sentence of article 39, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations. Other expressions which could give rise to differing interpretations appeared in that Convention, however, such as "the course of their duties" in article 37, paragraphs 2 and 3. That point would require consideration.

15. In reply to Mr. Riphagen he pointed out that the wording of the second sentence of paragraph 1 of article 28 appeared in article 39, paragraph 2, of the 1961 Vienna Convention and in the corresponding provisions of the other codification conventions. There seemed to be a logic in those provisions, although it might not be immediately apparent. He did not, however, share the view that there was a contradiction between the second sentence of paragraph 1 and paragraph 3 of article 28.

16. Mr. SUCHARITKUL said he did not dispute the fact that inviolability could consist of a number of immunities. Indeed, the personal inviolability of a diplomatic courier was translated into at least two immunities: immunity from arrest and immunity from detention. Immunity in the sense used in article 28, paragraph 3, however, was a generic term with the connotation of immunity from jurisdiction. It would be misleading to adopt the same formula as that of the 1961 Vienna Convention on Diplomatic Relations if the diplomatic courier did not have the same jurisdictional immunity as a diplomatic agent. As to personal inviolability in the form of immunity from arrest and detention, the question did not arise once the courier had left the country.

17. Mr. USHAKOV warned members of the Commission against any attempt to interpret conventions in force. It would be inconceivable for diplomatic agents to enjoy only immunity connected with the exercise of their functions. An ambassador was performing his functions even when he went for a trip in the country, since part of his mission was to get to know his country of residence. The administrative and technical staff of a mission, on the other hand, such as a gardener, performed their functions only on the mission's premises. Consequently, if an ambassador on holiday in the country was attacked by miscreants whom he wounded in retaliation, he could not be arrested or detained by the receiving State.

18. Mr. McCAFFREY said that Mr. Ushakov's remarks highlighted the importance of the distinction

that would have to be made between immunities, as contemplated in paragraphs 1 and 2 of article 28, and immunity, as contemplated in paragraph 3; that in turn related to his own earlier point (1911th meeting) regarding the ambiguity of articles 10 and 11.

19. His position on paragraph 3 of article 28 was akin to that of Mr. Lacleta Muñoz and Mr. Suchar-itkul. He found it inconceivable that States would agree to an obligation to provide affirmative protection to a former courier returning to the receiving State, since it would be extremely difficult, if not impossible, to determine in advance when such protection would be necessary. Jurisdictional immunity might be necessary for certain diplomatic officials returning to a State in a private capacity to protect them from harassment or attempts to discover matters of State. In that sense, it was the immunity of the State that subsisted, so that the immunity referred to in paragraph 3 must be jurisdictional immunity. But in article 28, language applicable to ambassadors was being applied to couriers. He recognized that, in article 39, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations, the words "every person" covered the members of the family of a diplomatic agent and the members of the technical and administrative staff of the mission, but such persons were normally resident in the receiving State for long periods of time and their immunities were necessary for the functioning of the mission. The crucial issue was whether the same immunities should apply not only during the performance of the courier's functions, but also after he had ceased to be a courier and had returned to the sending State. It seemed to be the view of many members that it would be stretching the tolerance of States too far to expect them to extend to erstwhile couriers the protection that they were bound to accord to former diplomats.

20. The CHAIRMAN, noting that there were no further comments, proposed that the Commission should provisionally adopt paragraphs 1 and 2 of article 28 and refer paragraph 3 back to the Drafting Committee for further consideration in the light of the discussion, with particular attention to be paid to the scope of the word "immunity" and bearing in mind the paragraph's link with the Commission's decision on article 23.

It was so agreed.

ARTICLE 29 [22] (Waiver of immunities)

21. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) presented article 29 [22] as proposed by the Drafting Committee, which read:

Article 29 [22]. Waiver of immunities

1. The sending State may waive the immunities of the diplomatic courier.
2. Waiver must always be express, except as provided in paragraph 3 of this article, and shall be communicated in writing.
3. The initiation of proceedings by the diplomatic courier shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.
4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

5. If the sending State does not waive the immunity of the diplomatic courier in respect of a civil action, it shall use its best endeavours to bring about a just settlement of the case.

22. Article 29 followed fairly closely the text originally submitted by the Special Rapporteur,² although some minor adjustments had been made to bring it into line with the corresponding provisions of the codification conventions. Paragraph 1 simply provided that it was the sending State which could waive the immunities of the diplomatic courier. Paragraph 2 introduced two new elements, the first of which was that the terms of paragraph 3 would operate as an exception to paragraph 2, and the second that the waiver should be not only express, but also communicated in writing. Thus the only case in which waiver would not be express and in writing would be that provided for in paragraph 3. Paragraph 4 embodied a general principle, and no change had been made to the original wording. Paragraph 5 expressed the same basic idea as had been contained in the text submitted by the Special Rapporteur, but some adjustment of language had been made. An explanation of the relationship between paragraphs 3 and 4 of the article would be made in the commentary. Reservations had again been expressed on the need for all or part of the article, pending a decision on article 23.

23. Sir Ian SINCLAIR said that, although no major problems of substance were involved, he wished to enter reservations on paragraphs 3, 4 and 5 of article 29, pending a final decision by the Commission on article 23. If it were decided not to include article 23 or to modify it substantially, the need for those three paragraphs would have to be reviewed. In the circumstances, the Commission might wish to approve paragraphs 1 and 2 provisionally and place asterisks against paragraphs 3, 4 and 5.

24. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, since all the draft articles proposed by the Drafting Committee were intended for provisional adoption, changes arising out of a subsequent decision by the Commission could always be made. At the same time, it was both possible and necessary, in his view, for the Commission to pronounce on article 23 at the current session, so that, if necessary, a decision on paragraphs 3, 4 and 5 of article 29 could be deferred.

25. Mr. RIPHAGEN said that he wished to enter a reservation on paragraph 3 of article 29, the precise meaning of which should be made clear in the commentary.

26. Mr. OGISO asked whether paragraph 5 of article 29 would also apply where the sending State did not waive the immunity of the diplomatic courier in respect of the execution of a judgment as well as in respect of civil proceedings.

27. Mr. YANKOV (Special Rapporteur) said that the substance and, to a great extent, the language of paragraph 5 of article 29 were based on article 31 of the 1975 Vienna Convention on the Representation of States. It was a novel provision and had been discussed at length in the Commission. Basically, the

² For the text submitted by the Special Rapporteur and the Commission's consideration thereof, see *Yearbook ... 1984*, vol. I, pp. 65 *et seq.*, 1826th to 1829th meetings.

intention was to provide an assurance that, in the event of damage caused to persons in the receiving State, the sending State would make every effort to bring about a just settlement of the case. Although the question of the execution of a judgment had not been singled out, his understanding was that the terms of paragraph 5 would apply to all steps in the proceedings, including execution of judgment, inasmuch as the ultimate aim was to arrive at a just settlement based on equitable principles. That point could perhaps be brought out in the commentary.

28. The CHAIRMAN proposed that, as suggested by Sir Ian Sinclair, the Commission should provisionally adopt paragraphs 1 and 2 of article 29 and place asterisks against paragraphs 3, 4 and 5 as an indication that those paragraphs would be reviewed in the light of its decision on article 23. He further proposed that the commentary should clarify the points raised by Mr. Riphagen and Mr. Ogiso.

It was so agreed.

ARTICLE 30 [23] (Status of the captain of a ship or aircraft entrusted with the diplomatic bag)

29. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) presented article 30 [23] as proposed by the Drafting Committee, which read:

Article 30 [23]. Status of the captain of a ship or aircraft entrusted with the diplomatic bag

1. The captain of a ship or aircraft in commercial service which is scheduled to arrive at an authorized port of entry may be entrusted with the diplomatic bag of the sending State or of a mission, consular post or delegation of that State.

2. The captain shall be provided with an official document indicating the number of packages constituting the bag entrusted to him, but he shall not be considered to be a diplomatic courier.

3. The receiving State shall permit a member of a mission, consular post or delegation of the sending State to have unimpeded access to the ship or aircraft in order to take possession of the bag directly and freely from the captain or to deliver the bag directly and freely to him.

30. In an attempt to achieve greater economy and clarity in drafting, the text of article 30 had been considerably simplified, though without any loss of substance.³ It now consisted of three paragraphs instead of the original four, and the paragraphs had been shortened.

31. In paragraph 1, the references to “the captain of a commercial aircraft” and “the master of a merchant ship” had been combined to read: “The captain of a ship or aircraft in commercial service”. The words “in commercial service” had been preferred as having a broader meaning than the original expression “merchant ship”. That change was reflected in the various language versions, and it was recognized that the corresponding expression in Spanish (*comandante de un buque o una aeronave comerciales*) was not very felicitous. But since the codification conventions used similar expressions and since it would complicate the drafting to try to introduce further distinctions, it had been decided to adopt the

wording proposed. The commentary would explain that the word “captain” was a functional expression and did not have the particular meaning attributed to that word in internal law.

32. The Drafting Committee had decided to delete the reference to “an authorized member of the crew” which had appeared in the original text, because it believed that it would add an unnecessary complication. It was not clear how such a crew member would be authorized and, in any event, the captain of a ship or aircraft was always the highest authority on board. It had been considered more prudent to deal with the matter in the commentary, explaining that the text of the article—which referred only to the captain—was not intended to prejudice State practice with regard to entrusting the bag to an authorized member of the crew.

33. Paragraph 1 also referred to the ship or aircraft as being one “scheduled to arrive at an authorized port of entry”. That phrase had been included to show that what was meant was a ship or aircraft engaged in regular or scheduled service, not one operating on an *ad hoc* basis.

34. The reference to the captain being “entrusted” with the diplomatic bag emphasized the fact that he was not considered to be a diplomatic courier, as expressly stated in paragraph 2.

35. The former paragraphs 2 and 3 of article 30 had been combined in the new paragraph 2. The former paragraph 4 had been redrafted as the new paragraph 3, to convey the intended meaning more clearly and precisely. The Drafting Committee had considered it important to stress that members of a mission, consular post or delegation of the sending State must be allowed unimpeded access to the ship or aircraft in order not only to take possession of the bag from the captain, but also to deliver it to him, and that in both cases that should be done directly and freely.

36. The former paragraph 4 had provided that the captain should be accorded “facilities for free and direct delivery” of the bag. The new paragraph 3 referred to the obligation of the receiving State to “permit a member of a mission, consular post or delegation of the sending State to have unimpeded access to the ship or aircraft in order to take possession of the bag directly and freely”. The reason for that inversion was to show that the facilities in question were to be granted to the member of the mission concerned, rather than to the captain.

37. The title of article 30 had been adjusted to correspond to the new drafting.

38. Mr. USHAKOV suggested that, for the sake of clarity, the words “or, as the case may be, a” should be added after the words “a mission”, at the beginning of paragraph 3.

39. Mr. LACLETA MUÑOZ observed that article 30 as originally submitted by the Special Rapporteur in his fourth report had covered the common case in which the diplomatic bag was entrusted not to the captain, but to a member of the crew under his command.⁴ That case had been included as a result of

³ For the text submitted by the Special Rapporteur and the Commission's consideration thereof, *ibid.*, pp. 89 *et seq.*, 1830th meeting (paras. 1-25), pp. 107 *et seq.*, 1832nd meeting (paras. 17 *et seq.*) and pp. 162 *et seq.*, 1842nd and 1843rd meetings and 1844th meeting, paras. 1-20.

⁴ *Yearbook ... 1983*, vol. II (Part One), p. 108, document A/CN.4/374 and Add.1-4, paras. 240-243.

comments made not only in the Commission, but also in the Sixth Committee of the General Assembly.

40. Speaking as a member of the Drafting Committee, he drew attention to the fact that, because it had been unable to agree on adequate wording or to settle the question whether it was for the captain or the sending State to decide that the bag could be entrusted to a member of the crew, the Drafting Committee had omitted to mention that case. The reasons for that omission should be stated in the commentary, which should explain that the Commission had not intended to rule out the possibility of the bag being entrusted to a crew member.

41. Mr. RIPHAGEN said that the use of the word "scheduled" in paragraph 1 appeared to restrict the application of its provisions to scheduled air services. In fact, it could well be in the interests of the sending State to entrust the diplomatic bag to the captain of a chartered aircraft.

42. Mr. YANKOV (Special Rapporteur) said that the term "scheduled" had been used advisedly, because paragraph 1 covered the regular transport of the bag by sea or air. Other arrangements were, of course, possible on an *ad hoc* basis. Two States could arrange between themselves for the transport of the bag by non-scheduled services, but it was not desirable to derive a general rule from such arrangements, since the result would be to place an excessive burden on the receiving State.

43. Mr. RIPHAGEN said that he saw no reason to exclude the possibility of entrusting the bag to the captain of a chartered aircraft. Charter flights were sometimes just as regular as scheduled flights.

44. Sir Ian SINCLAIR explained that there had been a general feeling in the Drafting Committee that the provisions of paragraph 1 should relate to regular services. Of course, other means were possible; a State might, for example, entrust the diplomatic bag to the captain of a private aircraft. That, however, would be done under an arrangement between the two States concerned. The Drafting Committee had not considered it desirable to include such cases in the facility provided for in paragraph 1.

45. Mr. McCAFFREY agreed with Sir Ian Sinclair. In his view, however, regular charter flights would probably be covered by paragraph 1. A principal reason for using the word "scheduled" was that it would be extremely difficult for receiving States to fulfil their obligations in respect, for example, of the provision of facilities in the case of flights that were not scheduled.

46. Mr. TOMUSCHAT said that the question was of interest to his country. In the summer, there were regular charter flights from the Federal Republic of Germany to certain countries in Africa to which there were no Lufthansa scheduled flights. Those charter flights provided a safe way of conveying the diplomatic bag to the countries concerned, and he saw no reason why such flights should be excluded from the operation of paragraph 1.

47. Mr. DÍAZ GONZÁLEZ said that the word "scheduled" did not present any difficulty and could even be deleted, which would give States more freedom of choice. Under the privileges which they

enjoyed in regard to communications, States could very well entrust the diplomatic bag to the captain of an aircraft on a special flight. Venezuela, for instance, used regular airlines, private aircraft and aircraft of the Venezuelan Air Force for the transport of its couriers and diplomatic bags.

48. Mr. AL-QAYSI suggested that the difficulty might be overcome by referring to a "regular service", instead of using the word "scheduled". In paragraph 3, the meaning might be made clearer by replacing the concluding words "to him" by the words "to the captain".

49. Mr. YANKOV (Special Rapporteur) pointed out that the competent specialized agency—ICAO—drew a clear distinction between charter flights and regular or scheduled flights. Under ICAO rules, special services required special arrangements. The purpose of article 30, paragraph 1, was to state the general rule; it accordingly reflected the prevailing State practice in the matter. The commentary would make that clear and explain that States could act otherwise by arrangement.

50. The CHAIRMAN, speaking as a member of the Commission, said he found the provisions of paragraph 3 unduly strict. The corresponding provisions of the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States all contained a reference to arrangements between the mission of the sending State and the appropriate local authorities. But no such reference was contained in paragraph 3 of draft article 30, which followed the precedent of article 27, paragraph 7, of the 1961 Vienna Convention on Diplomatic Relations.

51. That formulation for paragraph 3 could lead to results contrary to the provisions of draft article 36. He therefore suggested that the words "by prior arrangement", between commas, should be inserted after the words "The receiving State shall" at the beginning of paragraph 3 of article 30. He further suggested that the reference to "unimpeded access to the ship or aircraft" should be deleted. The paragraph would then read:

"3. The receiving State shall, by prior arrangement, permit a member of a mission, consular post or delegation of the sending State to take possession of the bag directly and freely from the captain or to deliver the bag directly and freely to him."

As he saw it, the reference to "unimpeded access" could create unnecessary difficulties; the receiving State might have reasons for not wishing to allow direct access to the ship or aircraft.

52. Mr. YANKOV (Special Rapporteur) said that the Chairman's suggested addition of the words "by prior arrangement" could be accepted. Alternatively, the matter could be explained in the commentary without altering the text of the article.

53. He could not accept the Chairman's other proposed amendment, however, because it was essential to make provision for the right of unimpeded access to the ship or aircraft by a member of the sending State's mission. There had been cases in which the captain of a ship or aircraft had been made to carry a bag to a specified place, leaving it there for the

mission to collect. Such an arrangement was clearly not satisfactory from the point of view of the sending State.

54. Chief AKINJIDE supported the text of article 30 as it stood and the position taken by the Special Rapporteur.

55. The CHAIRMAN, speaking as a member of the Commission, said that he could accept the text as it stood, subject to a satisfactory explanation in the commentary. His main concern was that article 30 should not provide an easy escape from the provisions of article 36.

56. Mr. RIPHAGEN said that, if a reference to a prior arrangement was needed, it must be made in the text of the article, not in the commentary.

57. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the requirement of a prior arrangement had been discussed in the Drafting Committee, but it had been considered that such a requirement would constitute a limitation on unimpeded access to the ship or aircraft. The two points raised by the Chairman had also been extensively discussed in the Drafting Committee.

58. Sir Ian SINCLAIR said that the general feeling in the Drafting Committee had been that to insert the formula "by prior arrangement" in the article itself could be considered as limiting the right given to the sending State. There had been instances of access being refused by the authorities of the receiving State, relying on the argument that no prior arrangement had been made.

59. He did not share Mr. Riphagen's reservations about making the reference in the commentary. Practical arrangements could be made for the exercise of the rights of the sending State, and it would therefore be perfectly appropriate for the commentary to mention them. Of course, the commentary should also stress the great importance of unimpeded access to the ship or aircraft.

60. Mr. USHAKOV said that the reason why an "arrangement" was mentioned in article 28, paragraph 8, of the 1969 Convention on Special Missions and in article 27, paragraph 7, of the 1975 Vienna Convention on the Representation of States was simply in order that the receiving State or host State might be informed of the situation, so that it could be required to allow free access to the ship or aircraft. The idea of an arrangement was in no way restrictive in that case. Moreover, an arrangement could also be necessary for the member of the mission, consular post or delegation of the sending State who was authorized to take possession of the bag from the captain or deliver it to him. Those details should be included in the commentary.

61. Mr. TOMUSCHAT, referring to the relationship between article 30 and article 36, suggested that the commentary should explain that the rules in article 30 were subject to those in article 36.

62. He felt strongly that the question of using regular charter flights for the transport of the bag should not be left to individual agreements between States. Charter flights were in fact just as regular as scheduled flights and differed from them only in respect of the booking system. The distinction

between the two was not relevant to the rules in article 30.

63. The CHAIRMAN said that that point could be clarified in the commentary.

64. Mr. KOROMA urged that the point be settled in the article itself, not merely in the commentary. He suggested that the wording of paragraph 1 should be broadened to include regular charter flights, which were widely used. The qualification "by prior arrangement" should be inserted in the text of paragraph 3. It was not enough to refer to the matter in the commentary, which would not be disseminated as widely as the future convention.

65. The CHAIRMAN proposed that article 30 should be adopted on first reading, on the understanding that the commentary would clarify the various points which had been raised. In particular, it would indicate that the term "scheduled" was to be understood as including regular charter flights. It would also make clear that prior arrangement would be necessary for the exercise of the right of access provided for in paragraph 3.

66. If there were no further comments, he would take it that the Commission agreed to adopt article 30 [23] on first reading, on that understanding.

It was so agreed.

Article 30 [23] was adopted.

The meeting rose at 1.05 p.m.

1913th MEETING

Friday, 28 June 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

later: Mr. Khalafalla EL RASHEED MOHAMED AHMED

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arango-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, 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. Tomuschat, Mr. Ushakov, Mr. Yankov.

Visit by a member of the International Court of Justice

1. The CHAIRMAN extended a warm welcome to Mr. Evensen, a Judge of the International Court of Justice and a former member of the Commission.

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)

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

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

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING
COMMITTEE (*continued*) (A/CN.4/L.384)

ARTICLES 31 to 35

ARTICLE 31 [24] (Identification of the diplomatic
bag)

2. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) presented article 31 [24] as proposed by the Drafting Committee, which read:

Article 31 [24]. Identification of the diplomatic bag

1. The packages constituting the diplomatic bag shall bear visible external marks of their character.

2. The packages constituting the diplomatic bag, if unaccompanied by a diplomatic courier, shall also bear a visible indication of their destination and consignee.

3. The article was a shortened version of the original text,³ which had been reduced to two paragraphs. The only change in paragraph 1 was the deletion of the word "official" before the word "character".

4. Originally, paragraph 2 had required that the packages constituting the bag should bear an indication of any intermediary points on the route or transfer points, but that requirement had been deleted in the light of the discussion in the Commission.

5. Paragraph 3 of the original text concerned the maximum size or weight of the bag. It had been deleted in the light not only of the debate, but also of the provisions of article 34, which specified that the conditions established nationally and internationally to govern the use of the postal service should apply to the transmission of the bag by post. It had been thought that the question of the maximum size or weight should be a matter for agreement between the sending and receiving States. On the other hand, the text should omit any reference to such an agreement, which might imply that agreement was necessary; a requirement of that kind could interfere with freedom of communication. The purpose of paragraph 3 had been to limit possible abuse, but the Drafting Committee had taken the view that the question could be solved by bilateral agreement. Moreover, with regard to misuse of the bag, the most important factor was the content rather than the size or weight of the bag.

6. The title had been adjusted in order to reflect more accurately the subject-matter of the article. Lastly, the Drafting Committee had carefully examined all the matters involved in the deletions, which had been made out of a desire to simplify the text but also because the Committee had considered that article 31 would be more effective if it were limited to the essentials.

³ For the text submitted by the Special Rapporteur and the Commission's consideration thereof, see *Yearbook ... 1984*, vol. I, pp. 89 *et seq.*, 1830th meeting (paras. 1-25), pp. 107 *et seq.*, 1832nd meeting (paras. 17 *et seq.*) and pp. 162 *et seq.*, 1842nd and 1843rd meetings and 1844th meeting, paras. 1-20.

7. Mr. USHAKOV noted that, under the terms of paragraph 1 of article 31, the packages constituting the diplomatic bag "shall" bear visible external marks of their character and that, under the terms of paragraph 2, they "shall also" bear a visible indication of their destination and consignee. The first obligation, relating to the sending State, was stricter than the second obligation, which could relate equally to the postal service or the transport company concerned. In the absence of the visible external marks mentioned in paragraph 1, a bag did not enjoy the status of a diplomatic bag. On the other hand, if the packages constituting a diplomatic bag not accompanied by a courier did not bear an indication of their destination and consignee, as stipulated in paragraph 2, it could not be reasonably inferred that they did not constitute a diplomatic bag. In due course, the commentary to article 31 could perhaps explain that the obligation under paragraph 2 was not so strict as the obligation set forth in paragraph 1 and that failure to observe it had no effect on the legal status of the diplomatic bag.

8. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the character of the diplomatic bag did not stem from the marks in question. The usual practice was for all bags, whether accompanied or unaccompanied, to bear some visible indication of their destination. It had not been deemed essential to stipulate that requirement, however, when the bag was accompanied by a diplomatic courier.

9. Mr. YANKOV (Special Rapporteur) pointed out that, by virtue of paragraph 1 of article 31, all diplomatic bags had to bear visible external marks of their character. The additional requirement in the case of unaccompanied bags was a visible indication of their destination, in order to permit dispatch to the appropriate consignee. Of course, even when a bag was accompanied by a courier, the destination was normally indicated.

10. Mr. USHAKOV said the fact that the diplomatic bag was not accompanied by a courier did not signify that it was not accompanied by an agent of a transport company, in which case it did not seem really necessary to require an indication of the destination and the consignee of the bag. The most troublesome point was that the absence of the indication mentioned in paragraph 2 might be interpreted as depriving the bag of its diplomatic character.

11. The CHAIRMAN said that the matter could well be clarified in the commentary by explaining that the word "also" had been inserted in paragraph 2 in order to emphasize that the unaccompanied bag was subject to the rule in paragraph 1 as well.

12. Mr. KOROMA said that the point could be made clearer by replacing the word "also" by the words "in addition". It would thus be apparent that paragraph 1 applied to all bags and that paragraph 2 contained an additional requirement for unaccompanied bags.

13. Sir Ian SINCLAIR said that there would be little difference in substance between the word "also" and the expression "in addition", although the latter would supply some extra emphasis. The matter could be handled in the commentary by explaining that

paragraph 2 embodied an additional requirement for unaccompanied bags, intended for the practical purpose of enabling the bag to reach its destination. The commentary should also make it plain that the absence of any indication of destination or consignee would not detract from the status of the bag as a diplomatic bag.

14. Mr. FRANCIS said that small countries like his own did not have diplomatic couriers; their diplomatic bags were always unaccompanied, hence the special interest for them of the problems under discussion. His own concern was mainly with the use in paragraph 1 of the formula "The packages constituting the diplomatic bag". The term "packages" could be taken to refer to the actual contents of the bag. If the seal of the diplomatic bag was broken, perhaps accidentally, a serious problem would arise if the individual packages were not properly identified; the contents might even be lost.

15. Mr. FLITAN, referring to the comments made by Mr. Francis, said it was apparent from the definition of the term "diplomatic bag" in article 3, paragraph 1 (2), that the diplomatic bag consisted of packages.

16. Neither Mr. Ushakov nor Mr. Koroma had made a formal proposal to amend article 31 and account might be taken of their concern on second reading of the article, more particularly in the commentary.

17. Chief AKINJIDE explained that the Drafting Committee's main reason for using the words mentioned by Mr. Francis had been the need to harmonize the text of article 31 with the wording of article 27, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations.

18. Mr. EL RASHEED MOHAMED AHMED drew attention to the definition of "diplomatic bag" contained in article 3, paragraph 1 (2), which stated that: "'diplomatic bag' means the packages containing ...". Accordingly, the use of the term "bag" by itself would imply that it could consist of a number of packages. The point could be explained in the commentary.

19. The CHAIRMAN, speaking as a member of the Commission, said that, as a practical matter, if a bag consisted of several packages, each package had to be marked.

20. Mr. REUTER said it was essential to explain clearly that, in the definitions in the draft, which were taken from the 1961 Vienna Convention on Diplomatic Relations, the term "bag" had no physical connotation. It was a legal concept, and since a legal concept could not be opened, it might seem surprising to assert that the bag should not be opened. However, it was a convenient form of language taken from the 1961 Vienna Convention. Specifically, if the bag consisted of a sack, it was in keeping with the concept of a diplomatic bag. On the other hand, if the bag consisted of a number of physical objects, such as a case, sacks and a container, each one formed a separate package and those packages had to be identified in order to form the abstract concept of a diplomatic bag. Just as the physical concept of a bag had become a legal concept, the physical notion of a portfolio had become a theoretical concept in the

case of the leather portfolio formerly handed to members of the French Government and now referred to only in such expressions as "holder of a ministerial portfolio".

21. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he had nothing to add to the explanations given by the Chairman and by Mr. Reuter, who had clarified the matter sufficiently.

22. The CHAIRMAN, speaking as a member of the Commission, said that paragraph 3 of the original text, now deleted by the Drafting Committee, had been intended to avoid misuse of the bag and his own preference would have been to retain it. Admittedly it had stated that the maximum size or weight of the diplomatic bag "shall be determined" by agreement between the sending State and the receiving State, and he would have agreed to tone down the words in question and say "may be determined", so as to indicate that States were free to impose size and weight limitations by agreement. He did not, however, wish to press the point and would be content to see the matter explained in the commentary.

23. Mr. YANKOV (Special Rapporteur) said that the commentary would refer to the practice of certain States, in particular Latin American States, of establishing limits for the size and weight of diplomatic bags. It would also mention the international agreements on the subject and the UPU regulations, which would of course govern the dispatch of unaccompanied bags by post.

24. Mr. OGISO endorsed the Special Rapporteur's comment. As to Mr. Ushakov's contention that the wording of paragraph 2 was much too mandatory, the receiving State and the transit State were obliged under article 35 to provide the facilities necessary for the safe and rapid transmission or delivery of the diplomatic bag. Accordingly, if a bag was not accompanied by a courier, it was very useful for the packages to bear a visible indication of the destination and consignee so as to ensure safe delivery.

25. Mr. KOROMA said that, further to Sir Ian Sinclair's comment, he could accept the word "also" in paragraph 2, provided that the commentary explained that its purpose was to indicate that the paragraph embodied an additional requirement in the case of unaccompanied bags.

26. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) drew attention to the definition of the diplomatic bag given in article 3, paragraph 1 (2). The bag could consist of only one package, which would then constitute the diplomatic bag, or it could consist of two or more packages. The terms of article 31 were sufficiently clear to indicate that they covered the packages which constituted the bag, not the contents. Equally clear was the fact that the marks and indications referred to in the article had to be on the outside of the packages.

27. The CHAIRMAN pointed out that paragraph 1 of article 31 had to be interpreted in the light of State practice with regard to the form of language used in article 27, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations.

28. Mr. USHAKOV said that the Russian text of article 31 used a very precise word which corresponded more or less to "pieces".

29. Mr. LACLETA MUÑOZ said that the word *bultos*, in the Spanish text, was equally clear.

30. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 31 [24] on first reading in the form proposed by the Drafting Committee.

Article 31 [24] was adopted.

ARTICLE 32 [25] (Content of the diplomatic bag)

31. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) presented article 32 [25] as proposed by the Drafting Committee, which read:

Article 32 [25]. Content of the diplomatic bag

1. The diplomatic bag may contain only official correspondence, and documents or articles intended exclusively for official use.

2. The sending State shall take appropriate measures to prevent the dispatch through its diplomatic bag of articles other than those referred to in paragraph 1.

32. Paragraph 1 of the original text of article 32⁴ had not been changed; it emphasized that the "documents" and "articles" referred to were those "intended exclusively for official use". There had been lengthy discussion about whether the word "exclusively" should be used. That wording had been taken from article 35, paragraph 4, of the 1963 Vienna Convention on Consular Relations. Moreover, article 3, paragraph 1 (2), as provisionally adopted by the Commission, contained the same form of words. The Drafting Committee had accordingly decided to retain it, but it could, of course, revert to the matter at a later stage.

33. One member of the Committee had expressed reservations regarding paragraph 1 of article 32 because it allowed too much room for possible abuse of the diplomatic bag as a means of transport, for example for the dispatch of inappropriate articles like weapons or furniture without the consent of the receiving State. In that member's view, the bag should be used for communication, not transport.

34. Lastly, in the light of the Commission's discussions and at the suggestion of the Special Rapporteur, the Committee had decided to delete the last phrase of the original text of paragraph 2, which had dealt with the prosecution and punishment of persons responsible for misuse of the bag.

35. Mr. LACLETA MUÑOZ explained that the Chairman of the Drafting Committee had been alluding to him. The reason for his own attitude in the Committee had been that the words "articles ... for official use" in paragraph 1 of article 32 were taken virtually word for word from article 36, paragraph 1 (a), of 1961 Vienna Convention on Diplomatic Relations, a provision which in fact covered articles that could be imported by a mission into the receiving State. When interpreted literally, the words in question encouraged the belief that the bag was not a means to facilitate the mission's communications but a means of transport of any article, regardless of size,

⁴ See footnote 3 above.

intended for the official use of the mission. However, the word "bag" clearly brought to mind a package of moderate size intended essentially to hold confidential correspondence and documents that were small in format. Since he had held a minority view in the Drafting Committee and consensus had been deemed desirable, he could do no more the express reservations in that regard.

36. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 32 [25] on first reading in the form proposed by the Drafting Committee.

Article 32 [25] was adopted.

ARTICLE 33

37. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the Committee was proposing the deletion of article 33, on the status of the diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew.⁵ It provided that articles 31, 32 and 35 to 39 would apply to a bag entrusted to the persons in question. The Drafting Committee believed that, with one possible exception, those articles did not imply that they would not be applicable if the bag were entrusted to a captain. The one possible exception related to article 36, which had been considered by the Commission. As originally proposed, that article had contained a territorial limitation, but in his oral introduction of his sixth report (A/CN.4/390) the Special Rapporteur had revised the text to eliminate the limitation (1903rd meeting, para. 9). Article 36 would thus apply to a diplomatic bag "at all times and wherever it may be", including on board a ship or aircraft in commercial service, on or over the high seas. Hence it seemed pointless to burden the draft with an unnecessary article whose substance could easily be covered elsewhere and in the commentaries. Of course, in the Commission's consideration of other articles, it might well be deemed advisable to return to the question.

38. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to endorse the Drafting Committee's decision to delete article 33.

Article 33 was deleted.

ARTICLE 34 [26] (Transmission of the diplomatic bag by postal service or by any mode of transport)

39. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) presented article 34 [26] as proposed by the Drafting Committee, which read:

Article 34 [26]. Transmission of the diplomatic bag by postal service or by any mode of transport

The conditions governing the use of the postal service or of any mode of transport, established by the relevant international or national rules, shall apply to the transmission of the packages constituting the diplomatic bag.

⁵ See footnote 3 above.

40. The text of article 34 had been reduced to one short paragraph. In the original text,⁶ paragraph 2 had dealt with postal services and paragraph 3 with ordinary means of transportation. The version now being submitted used the terms employed in international conventions and spoke of “mode of transport”. If the packages constituting the bag were transmitted by postal service or by any mode of transport, the conditions established by the relevant international or national rules would apply.

41. Sir Ian SINCLAIR suggested that the words “by the particular means utilized” should be inserted at the end of the article. In its efforts to achieve simplicity, the Drafting Committee had arrived at a text which could lead to misunderstanding. The purpose of his suggestion was to prevent any misinterpretation of article 31 whereby it would be regarded as covering cases in which the bag was accompanied by a diplomatic courier.

42. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the meaning intended by Sir Ian Sinclair was already implicit in article 31, but he had no objection to inserting the additional words, which would make the matter more explicit.

43. Mr. YANKOV (Special Rapporteur) said that he agreed with the Chairman of the Drafting Committee.

44. Mr. TOMUSCHAT expressed concern at the reference to “national rules” and suggested that the commentary should explain that it was not intended to confer some kind of discretion on national legislation.

45. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said it was extremely unlikely that any rules established by national legislation would be in breach of the obligations arising under the articles. The purpose of the reference to the “relevant international or national rules” was to indicate that, if the diplomatic bag were sent by mail, for example, it would naturally be subject to the general rules applicable to the use of postal services, rules which were national and international, in other words the UPU rules.

46. Mr. MAHIU pointed out that article 34 related to the diplomatic bag not accompanied by a courier; hence it might be preferable to make that clear in the article itself by adding, at the end, the words “not accompanied by diplomatic courier”.

47. Mr. USHAKOV said that he endorsed that view.

48. Mr. KOROMA said that Mr. Tomuschat’s point was a very important one. The reference to “national rules” could be interpreted as meaning that national legislation could derogate from the international régime. Inviolability of the diplomatic bag was indispensable and the Commission had agreed that the bag should not be subject to any form of inspection by electronic or other devices. Some national postal administrations had in fact introduced systems of electronic inspection or scanning of material sent

through the post. As a result, the reference to “national rules” could lend itself to abuse.

Mr. El Rasheed Mohamed Ahmed, First Vice-Chairman, took the Chair.

49. Sir Ian SINCLAIR withdrew his suggestion, on the understanding that the matter would be taken up on second reading.

50. Mr. FLITAN, referring to Mr. Koroma’s comments, said that the wording adopted by the Drafting Committee was intended to reserve the rules of international law and internal law specifically governing the postal service and any other mode of transport. It was important for the draft to make no kind of change either in relevant international agreements, such as those concluded under the auspices of UPU, or in national regulations.

51. Mr. RIPHAGEN pointed out that, in air transport, regulations for the safety of passengers and aircraft would always have to be observed.

52. Mr. FRANCIS said that he agreed with Mr. Koroma about the importance of the point raised by Mr. Tomuschat. It should be made clear that national rules could not override the provisions of the draft.

53. Mr. AL-QAYSI said that he failed to see how the reference to “national rules” could be construed as opening the door to the kind of conflict mentioned by Mr. Tomuschat.

54. Chief AKINJIDE said that he agreed with Mr. Al-Qaysi. Article 34 stated simply that, if the diplomatic bag was sent by post, the rules governing the national postal service and the UPU rules would have to be observed.

55. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 34 [26] on first reading in the form proposed by the Drafting Committee.

Article 34 [26] was adopted.

ARTICLE 35 [27] (Facilities accorded to the diplomatic bag)

56. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) presented article 35 [27] as proposed by the Drafting Committee, which read:

Article 35 [27]. Facilities accorded to the diplomatic bag

The receiving State or, as the case may be, the transit State shall provide the facilities necessary for the safe and rapid transmission or delivery of the diplomatic bag.

57. Article 35 had been modified only slightly⁷ and had been brought into line with article 13, on facilities accorded to the diplomatic courier. The words “transportation and delivery” had been replaced by “transmission or delivery” and such transmission was required to be “safe and rapid”, instead of “safe and speedy”. The word “general” had been deleted from the title, consistent with article 13, already provisionally adopted, which bore the title “Facilities” not “General facilities”.

⁶ See footnote 3 above.

⁷ See footnote 3 above.

58. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 35 [27] on first reading in the form proposed by the Drafting Committee.

Article 35 [27] was adopted.

Mr. Jagota resumed the Chair.

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR⁸ (*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)⁹ (*continued*)

59. The CHAIRMAN invited the Special Rapporteur to sum up the Commission's debate on draft articles 23 and 36 to 43.

60. Mr. YANKOV (Special Rapporteur) thanked members for their suggestions and comments, which would receive close attention.

61. In connection with the topic under consideration, certain general considerations relating to the nature and purpose to the work had to be borne in mind. In the first place, it was necessary to be clear whether the Commission was involved simply in the codification of international law, within the meaning of article 15 of its statute, or in the progressive development of international law, also within the meaning of article 15 of its statute. It had always been his understanding that the Commission's work on the present topic fell somewhere between codification and progressive development in that it contained an element of codification *stricto sensu* but was also concerned with the amplification and development of certain rules.

62. It had rightly been said that the Commission's task was sometimes complicated by the need to follow established rules. The 1961 Vienna Convention

on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations had now been ratified by approximately 140 and 110 States, respectively, and thus formed part of international law. Although the two other main codification conventions had still not been ratified by the requisite number of States, in their respective areas they too represented international law in many respects. It was therefore important, so far as possible, to abide by those instruments.

63. Another general point was the need for a comprehensive and uniform approach to couriers and bags, in which connection he had endeavoured to devise in draft articles 42 and 43 some mechanism for adaptation to legal realities.

64. Yet another factor was the importance of the principle of reciprocity, both as a general rule and as it related to specific provisions concerning the facilities, privileges and immunities accorded to the courier and bag, including the inviolability of the diplomatic bag. There were few areas of international law in which the principle of reciprocity was of such significance as in diplomatic and consular law. A sending State, it should be remembered, was also a receiving State and, very often, a transit State as well. The need for a viable balance between the sovereign rights and legitimate interests of the receiving or transit State, on the one hand, and those of the sending State, on the other, therefore had to be viewed in the context of a two-way legal relationship.

65. As to draft article 23, the diplomatic courier had been variously described in the course of the discussions as a vehicle, an instrument and a messenger. All such designations were apposite, but the legal status of the courier had to be evaluated by reference to the main features of his duties. First of all, the courier was an official of the sending State who carried out a confidential mission on behalf of that State in the field of diplomatic communications. In doing so, he performed a task that was indispensable to the external functions of the sending State. The diplomatic courier was only one of many official agents of the State, but his significance was that he carried particularly sensitive information and documents to their destination; bags containing less confidential material were sent by the ordinary postal services or other means of commercial transport. Thus professional couriers normally belonged to the communications service of the ministry of foreign affairs, whereas couriers *ad hoc* were usually members of the diplomatic, administrative or technical staff of the mission.

66. Secondly, a diplomatic courier, unlike a diplomatic agent or consular officer, did not exercise representative functions. The significance of his duties lay not in any representative capacity, but in the official and confidential character of the mission assigned to him. The protection of the courier and the facilities, privileges and immunities accorded to him were an important element in the external functions of the State, and all the immunities, including the jurisdictional immunities, were vested in the State. From the standpoint of functional necessity, the scope of the personal inviolability of the diplomatic courier was akin to that of a member of the

* Resumed from the 1911th meeting.

⁸ 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.

⁹ For the texts, see 1903rd meeting, para. 1.

administrative and technical staff of a mission who, while enjoying diplomatic privileges and immunities, was not entitled to exercise any representative function.

67. A third feature of the diplomatic courier was his mobility and the short duration of his stay in a given country. That aspect of the courier's functions, which had been stressed by a number of speakers, could not be considered in isolation from the other, official and confidential, aspects of his functions. Adequate legal protection and appropriate facilities, including personal inviolability and jurisdictional immunities, were a functional necessity no matter how long they were required, and they should always be available.

68. Those comments brought him to the main issue in the debate on draft article 23, namely the relationship between the personal inviolability of the courier under article 16 and immunity from jurisdiction under article 23, paragraph 1. Two main questions had arisen. The first was whether the provision in article 16 to the effect that the diplomatic courier would not be liable to any form of arrest or detention afforded sufficient legal protection, or whether there should be an additional provision on the jurisdictional immunities to be accorded to the courier as a logical consequence of personal inviolability. The second question was whether, if an additional provision were inserted, the immunity from criminal jurisdiction should be unqualified or confined to acts performed by the courier in the exercise of his functions.

69. Some members had considered that the provision in article 16 was sufficient, bearing in mind the nature of the courier's functions and his short stay in the receiving or transit State, and they argued that to grant jurisdictional immunity to the courier would be to go beyond the existing law under the four codification conventions. Other speakers had taken the view that article 16 alone would not provide the courier with adequate legal protection and had maintained that immunity from criminal jurisdiction was a logical consequence of personal inviolability. Personal inviolability could not be separated from jurisdictional immunity, for, in the absence of a provision on jurisdictional immunity, criminal proceedings could be instituted against the courier *in absentia*.

70. Article 16 was virtually identical with the last sentence of article 27, paragraph 5, of the 1961 Vienna Convention on Diplomatic Relations, and a broad interpretation of the scope of the personal inviolability of the diplomatic courier was supported by legislative history. As early as 1957, the Commission had adopted a draft provision reading: "The diplomatic courier shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to arrest or detention, whether administrative or judicial."¹⁰ That formulation had later been replaced by the more general "any form of arrest or detention", which was the wording used in article 27, paragraph 5, of the 1961 Vienna Convention with reference to the courier, and in article 29 of that Convention with reference to a diplomatic agent.

It was thus apparent that, so far as inviolability was concerned, the 1961 Vienna Convention accorded the same treatment to the diplomatic courier as to the staff of the mission. The same wording was also used in article 35, paragraph 5, of the 1963 Vienna Convention on Consular Relations with reference to the personal inviolability of the consular courier, although the personal inviolability of the consular officer was circumscribed by article 41, paragraph 1, of that Convention.

71. In that regard, it was interesting to note that, at the United Nations Conference on Consular Relations in 1963, the Japanese representative had proposed that a provision should be included in the Convention whereby the consular courier would be accorded the same protection as consular staff. Many representatives had opposed that proposal and the United Kingdom representative had stated that it was essential for couriers to enjoy complete inviolability, not the limited inviolability accorded to consular officers.¹¹ That uniform approach had been adopted by the Conference and was abundantly reflected in State practice. The two later codification conventions had also adopted the same stance. On that basis, he had concluded that there was a uniform régime applicable to all types of couriers, one which provided for their unqualified inviolability, including exemption from any form of arrest or detention.

72. A further argument in support of a special provision on jurisdictional immunities of the courier was that all four codification conventions contained an express provision on personal inviolability and jurisdictional immunity. It had been said that those conventions did not contain any provision specifically on the jurisdictional immunities of couriers. On the other hand, they did not exclude such immunities, and it might be an appropriate moment to fill the lacuna.

73. As to the extent of the jurisdictional immunities of the courier, from his own reading of the relevant provisions of the four codification conventions he had come to the conclusion that a consistent system supported by State practice did exist. Many members had been in favour of functional immunity from criminal jurisdiction, confined to acts performed by the courier in the exercise of his functions. The opposing view had been that, in order to ensure safe and unimpeded delivery of the bag, the courier should be free from any pressure or coercion that might interfere with the performance of his official duties.

74. It had been noted quite properly that the sending State would be severely prejudiced if its messenger were forbidden to continue his mission in order to remain at the disposal of the courts of the transit State or receiving State. While on mission a courier had to be in permanent physical contact with the bag and needed the protection provided by the four conventions. Whether or not express reference was made to the exercise of his functions, the ultimate objective should always be the same, namely protection of the courier as an official of the sending State acting in the performance of the task assigned to him. Any limitation of immunity from criminal jurisdiction would,

¹⁰ See the fourth report of the Special Rapporteur, *Yearbook ... 1983*, vol. II (Part One), p. 74, document A/CN.4/374 and Add. 1-4, para. 49.

¹¹ *Ibid.*, p. 75, para. 53.

therefore, be a derogation from the system of inviolability provided for under the codification conventions. The final decision obviously lay with the Commission, but his own view was that qualified immunity from criminal jurisdiction would create more problems than it would solve: quite apart from any other impediment, the courts would be required to determine the relationship between the act committed by the courier and his official functions in each individual case.

75. With regard to paragraph 2 of draft article 23, a question had been raised regarding the meaning of the term "administrative jurisdiction". In his opinion, the term related to administrative proceedings and not to any wider notion of jurisdiction, at least in the case in point, since the other powers that the administration and the police could exercise fell within the context of the courier's personal inviolability and exemption from arrest or detention.

76. It had been suggested, in connection with paragraph 4 of article 23, that written evidence could be provided for to facilitate the administration of justice. The matter could be considered together with certain other drafting points by the Drafting Committee.

The meeting rose at 1.15 p.m.

1914th MEETING

Monday, 1 July 1985, at 12.10 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pirzada, Mr. Razafindralambo, Mr. Riphagen, Mr. Sucharitkul, 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)

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.

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. Mr. YANKOV (Special Rapporteur), continuing his summing-up, said that one of the main substantive issues raised in connection with draft article 36 had been the inviolability of the bag and its contents. Several members of the Commission had said that reference should be made to the inviolability of the bag's contents rather than to that of the bag itself. In the opinion of other speakers, the inviolability of the bag, namely the packages constituting the bag, and that of their contents were intrinsically linked and could not be dissociated. He shared the latter view. The term "inviolability", whether it related to physical objects or to abstract legal concepts or rules, entailed an obligation to keep those objects, concepts or rules intact and undisturbed. That was the sense in which the term was used in the four codification conventions and other international agreements in the field of diplomatic and consular law. The rule that the diplomatic bag should not be opened or detained had been regarded as an important component of the general principle of freedom of official communications and respect for their confidential character. In that connection, he referred to article 24, article 27, paragraphs 2 and 4, and article 40, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations, which constituted a coherent system of rules relating to the inviolability of the bag. Similar provisions were contained in the other codification conventions.

2. During its work on those conventions, the Commission had emphasized the overriding importance it attached to observance of the principle of the inviolability of the diplomatic bag and of the consular bag.⁵ The concept of unqualified inviolability of the diplomatic bag implied that opening the bag, detaining it or examining its contents would be an infringement of its inviolability and thus prejudicial to the secret and confidential character of its contents. In that connection, the point made by Mr. Mahiou (1908th meeting) and Mr. Razafindralambo (1909th meeting) concerning the inviolability of personal correspondence under constitutional law had been well taken.

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

⁵ See the fourth report of the Special Rapporteur, *Yearbook ... 1983*, vol. II (Part One), pp. 123-124, document A/CN.4/374 and Add.1-4, paras. 328-337.