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Summary record of the 1824th meeting

Topic:
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opportunity for any brief comments that members might wish to make on that item.

61. Mr. FRANCIS said that his comments, which did not relate to the actual substance of the draft code, could not wait until the draft report was considered.

62. Sir Ian SINCLAIR said that those comments might lead to statements by other members of the Commission.

63. Mr. THIAM (Special Rapporteur) said he was ready to reply to any comment that members might wish to make. In the debate on any agenda item, the Special Rapporteur was entitled to speak last.

64. The CHAIRMAN said that, at the beginning of the next meeting, some time would be devoted to agenda item 5 and hence to the comments by Mr. Francis and any other member, as well as to the Special Rapporteur's replies.

65. Mr. CALERO RODRIGUES said that the Commission would thus have an opportunity to give the Special Rapporteur instructions on how to proceed with his work. The debate thus far had not provided any guidance on that point.

The meeting rose at 1.15 p.m.

1824th MEETING

Monday, 21 May 1984, at 3.05 p.m.

Chairman: Mr. Alexander YANKOV
later: Mr. Sompong SUCHARITKUL

Present: Chief Akinjide, Mr. Balanda, Mr. Calero Rodrigues, Mr. Diaz Gonzáles, Mr. Evensen, Mr. Francis, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Sir Ian Sinclair, Mr. Thiam, Mr. Ushakov.

Draft Code of Offences against the Peace and Security of Mankind¹ (concluded) (A/CN.4/364,² A/CN.4/368 and Add.1, A/CN.4/377,³ A/CN.4/L.369, sect. B)

[Agenda item 5]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. The CHAIRMAN said that the Commission had concluded its discussion on the substance of the item at

¹ For the text of the draft code adopted by the Commission in 1954, see 1816th meeting, para. 1.

² Reproduced in *Yearbook ... 1983*, vol. II (Part One).

³ Reproduced in *Yearbook ... 1984*, vol. II (Part One).

the previous meeting with the Special Rapporteur's summing-up, but the floor had been requested on a matter relating to the manner in which the work on the item should now proceed.

2. Mr. FRANCIS said that he would be speaking on a matter that was unrelated to the substance of agenda item 5 and arose out of the Special Rapporteur's summing-up. He had begun consultations with certain other members and was requesting a brief suspension of the meeting to enable him to complete the consultations.

3. Mr. MALEK said that, in his opinion, the Commission should provide the Special Rapporteur with some guidance regarding the continuation of his work, as Mr. Calero Rodrigues has suggested at the previous meeting. If the Commission's high scientific standards were to be maintained, it was essential to encourage and facilitate personal research by its members, but they could not at the present time gain even a general idea of the content of the Special Rapporteur's next report. For his own part, he was unable to receive the Commission's documents in time, for the reasons he had indicated at the 1816th meeting. Accordingly, he would be deeply interested to know which matters would be dealt with in the Special Rapporteur's third report. Moreover, guidance should be given in the interests not only of the members, but also of the Special Rapporteur himself.

4. The CHAIRMAN speaking as a member of the Commission, said that the future work on the topic could take three main directions: first, further elaboration of the criteria for defining offences against the peace and security of mankind; secondly, consideration of the possible contents of the introductory part of the draft, as indicated in the Special Rapporteur's second report (A/CN.4/377) and in General Assembly resolution 38/132 of 19 December 1983, such as the general principles of criminal law applicable to the subject, together with any other general provisions that the Special Rapporteur might see fit to include in the draft; thirdly, consideration of any additions, mergers or alterations to be made in the Special Rapporteur's excellent catalogue of offences (*ibid.*, para. 79). For all those suggestions, due regard would of course be paid to the views expressed, and to be expressed, by Governments, either in the Sixth Committee of the General Assembly or in written comments.

The meeting was suspended at 3.30 p.m. and resumed at 4.05 p.m.

5. Mr. FRANCIS said that he had been uneasy about any possible non-compliance with the General Assembly's instructions, which might create difficulties for the Chairman when he came to represent the Commission at the next session of the General Assembly. His informal discussions with the members from Africa and with Mr. Jagota during the recess, however, had fully allayed his concern and he was convinced that the Assembly's requests would be met with regard to both the introduction envisaged in paragraph 67 of the Commission's report on its thirty-fifth session and the list of offences.

6. Sir Ian SINCLAIR said that there could be no question of the Commission giving instructions to the Special

Rapporteur. He broadly associated himself with the suggestions regarding three guidelines for the Special Rapporteur in his future work, but would not necessarily take them in the same order.

7. It seemed desirable for the Special Rapporteur to cover three areas in his third report: first, the matter of the introductory articles, if any; secondly, further elaboration, in the light of the discussion in the Commission and in the Sixth Committee, of the criteria for identifying the offences to be included in the list; thirdly, indications—in the light of those same discussions—of the possible content of a list of offences. He was not suggesting the formulation of detailed provisions or specific articles, but simply an indication of the extent to which certain categories of offences, including those in the 1954 draft code, could encompass other offences identified in the discussions in the Commission and in the Sixth Committee.

8. Mr. THIAM (Special Rapporteur) said that he had taken note of the statement by Mr. Francis. The comments and suggestions by members were very useful, particularly those regarding the continuation of his work, but did not appear to have been made in the form of strict instructions. It was his intention to continue the private talks he had embarked upon with his colleagues.

9. The CHAIRMAN thanked the Special Rapporteur for his excellent work and conveyed the Commission's best wishes for continued success in his task. There appeared to be general agreement that the three elements he himself had mentioned earlier, as a member of the Commission, could provide general guidance to the Special Rapporteur, who would of course judge to what extent it could be followed.

Mr. Sucharitkul, First Vice-Chairman, took the Chair.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/374 and Add. 1-4,⁴ A/CN.4/379 and Add.1,⁵ A/CN.4/382, ⁶ A/CN.4/L.369, sect. E, ILC (XXXVI)/Conf. Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED
BY THE SPECIAL RAPPORTEUR⁷

FIFTH REPORT OF THE SPECIAL RAPPORTEUR

10. The CHAIRMAN invited the Commission to consider agenda item 4 and called upon the Special Rapporteur to introduce his fifth report (A/CN.4/482).

⁴ Reproduced in *Yearbook ... 1983*, vol. II (Part One).

⁵ Reproduced in *Yearbook ... 1984*, vol. II (Part One).

⁶ *Idem*.

⁷ The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

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

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

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

11. Mr. YANKOV (Special Rapporteur), introducing his fifth report (A/CN.4/382), said that it was essentially a progress report, mainly intended to establish a link between what had been done so far and the work that lay ahead. He had submitted his fourth report (A/CN.4/374 and Add.1-4) at the previous session, when the Commission had discussed one part of it; but consideration of the other parts, particularly of draft articles 20 to 23, had been held over until the present session.

12. In his fifth report, he had endeavoured, first, to set out the present status of work on the draft articles and the stage that had been reached in considering each one, and secondly, to indicate the main points that had arisen with regard to the articles singled out during the discussion in the Sixth Committee of the General Assembly, starting with an account of some of the comments on draft articles 1 to 8, which the Commission had provisionally adopted.

13. As explained in the fifth report (A/CN.4/382, paras. 10-15), no new substantive elements had emerged from the discussion in the Sixth Committee. As on earlier occasions, most of the views expressed had related to the Commission's methods of work and to the Special Rapporteur's approach to the topic, both of which had given rise to certain comments and reservations. The overall view regarding the Commission's progress at the previous session had been favourable and some representatives had even suggested that the Commission might be able to complete consideration of the topic during the present term of office of its members. There had, of course, been some criticism on a number of issues but most, if not all, had related to points of drafting and arrangement.

14. With regard to draft articles 1 to 8 (dealing with the scope of the articles, the use of terms and certain general provisions), the main problem discussed had been the question of whether provision should be made for international organizations and national liberation movements. As to the status of the courier, the main suggestion had been that article 9 should become part of article 8. Actually, since then, the Drafting Committee had decided to delete article 9 and include its content in the commentary to article 8, where reference would be made to the possibility of two or more States using the same person as a diplomatic courier.

15. With regard to draft articles 20 to 23, consideration of which would now be resumed by the Commission, a suggestion had been made to delete, in article 20, on the personal inviolability of the diplomatic courier, the last clause of paragraph 2, "and shall prosecute and punish persons responsible for such infringements", on the grounds that it would be going too far to require the receiving State or the transit State to prosecute and punish the persons in question. As he saw it, however, there was evidence in State practice that such abuses were in fact prosecuted and punished. Nevertheless, he would not insist on retaining the clause in question.

16. Article 21 dealt with the inviolability of temporary accommodation and paragraph 3 had attracted the most criticism, with suggestions to delete it, despite the many

qualifications and restrictions it placed on immunity of temporary accommodation from inspection or search.

17. Some speakers in the Sixth Committee had found that the provisions of article 22, on the inviolability of the means of transport, were adequate, whereas others had suggested deleting paragraph 2 for reasons similar to those advanced in connection with paragraph 3 of article 21.

18. Article 23, on immunity from jurisdiction, was a complex article and had also been the subject of considerable comment. The main criticism had centred on the terms of paragraph 4, namely that the diplomatic courier was not obliged to give evidence as a witness. Some representatives had felt that such an exemption was not consistent with the diplomatic courier's duty, under paragraph 5 of the same article, to assist the competent jurisdiction in a lawsuit arising from an accident caused by a vehicle used or owned by him. Some suggestions had also been made to simplify article 23, more particularly in view of the temporary nature of the courier's presence.

19. Section III of the fifth report (*ibid.*, paras. 40-81) contained a brief analytical survey of State practice, compiled in the interval between the previous session and the present one. He wished to express his gratitude to the Secretariat for its valuable assistance in that regard and to point out that the survey should be read in conjunction with the material on State practice contained in the fourth report (A/CN.4/374 and Add.1-4). The main purpose of the survey was to explain which of his proposals were supported by recent State practice. The position was, quite objectively, that some of his proposals were backed by recent State practice, whereas others were not.

20. Section IV of the fifth report (A/CN.4/382, paras. 82-84) offered brief suggestions on the way in which the Commission should deal with the draft articles at the present session. It should first resume its discussions of articles 20 to 23 before referring them to the Drafting Committee, and then proceed to the consideration of articles 24 to 42. Articles 24 to 30 related basically to the facilities to be granted to the courier and to the *ad hoc* courier, articles 31 to 39 to the status of the bag, and articles 40 to 42 contained miscellaneous provisions.

21. In conclusion, he expressed the hope that the Commission would be able to complete the first reading of the draft articles at the present session and to conclude its consideration of the topic before the present term of office of its members came to an end.

ARTICLES 20 TO 23 *

22. The CHAIRMAN thanked the Special Rapporteur for his valuable introduction. He invited the Commission to discuss the fifth report (A/CN.4/382) and resume its consideration of draft articles 20 to 23, which read:

Article 20. Personal inviolability

1. The diplomatic courier shall enjoy personal inviolability when performing his official functions and shall not be liable to any form of arrest or detention.

2. The receiving State or, as applicable, the transit State shall treat the diplomatic courier with due respect and shall take all appropriate measures to prevent any infringement of his person, freedom or dignity and shall prosecute and punish persons responsible for such infringements.

Article 21. Inviolability of temporary accommodation

1. The temporary accommodation used by the diplomatic courier shall be inviolable. Officials of the receiving State or the transit State shall not enter the accommodation except with the consent of the diplomatic courier.

2. The receiving State or the transit State has the duty to take appropriate measures to protect from intrusion the temporary accommodation used by the diplomatic courier.

3. The temporary accommodation of the diplomatic courier shall be immune from inspection or search, unless there are serious grounds for believing that there are in it articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or the transit State. Such inspection or search shall be conducted only in the presence of the diplomatic courier, provided that the inspection or search be taken without infringing the inviolability of the person of the diplomatic courier or the inviolability of the diplomatic bag carried by him and will not cause unreasonable delays and impediments to the delivery of the diplomatic bag.

Article 22. Inviolability of the means of transport

1. The individual means of transport used by the diplomatic courier in the performance of his official functions shall be immune from inspection, search, requisition, seizure and measures of execution.

2. When there are serious grounds for believing that the individual means of transport referred to in paragraph 1 carries articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or the transit State, the competent authorities of those States may undertake inspection or search of that individual means of transport, provided that such inspection or search shall be conducted in the presence of the diplomatic courier and without infringing the inviolability of the diplomatic bag carried by him and will not cause unreasonable delays and impediments to the delivery of the diplomatic bag.

Article 23. Immunity from jurisdiction

1. The diplomatic courier shall enjoy immunity from the criminal jurisdiction of the receiving State or the transit State.

2. He shall also enjoy immunity from the civil and administrative jurisdiction of the receiving State or the transit State in respect of all acts performed in the exercise of his official functions.

3. No measures of execution may be taken against the diplomatic courier, except in cases not covered by paragraph 2 of this article and provided that the measures concerned can be taken without infringing the inviolability of his person, temporary accommodation or the diplomatic bag entrusted to him.

4. The diplomatic courier is not obliged to give evidence as witness.

5. Nothing in this article shall exempt the diplomatic courier from the civil and administrative jurisdiction of the receiving State or the transit State in respect of an action for damages arising from an accident caused by a vehicle used or owned by the courier in question, if such damages cannot be covered by the insurer.

6. Immunity from the jurisdiction of the receiving State or the transit State shall not exempt the diplomatic courier from the jurisdiction of the sending State.

* Resumed from the 1799th meeting, paras. 12-19 (*Yearbook ... 1983*, vol. I, pp. 256-257).

23. Mr. McCaffrey, expressing appreciation for the Special Rapporteur's fifth report (A/CN.4/382), said that it provided the Commission with a very useful set of materials for future work. With regard to draft articles 20 to 23, it was important to adopt a cautious approach. The Commission should not risk a conflict with existing law, and should bear in mind that the latter was not represented by all of the four codification conventions. Since the whole purpose of the present endeavour was to protect and safeguard freedom of communication by means of the diplomatic bag, it was the diplomatic bag that should be the focus of attention, for the diplomatic courier required protection only in so far as protection was absolutely necessary to ensure free communication via the bag. Furthermore, the diplomatic courier was not a diplomatic official and did not need the same degree of privileges and immunities. He was simply the vehicle for the delivery of the bag. Any protection accorded to the courier was intended to facilitate free communication and not to protect the inviolability of the courier as such.

24. The diplomatic courier's degree of importance had been well illustrated in the provision originally submitted to the Commission by the Special Rapporteur for what had later become the 1961 Vienna Convention on Diplomatic Relations (see A/CN.4/374 and Add.1-4, para. 49). The guiding principles, therefore, should be to what extent the protection accorded to the courier was necessary for the performance of all his functions, in the light of the delicate balance between the sending State's interest in maintaining free communication with its missions and the receiving State's interest in preserving its integrity and security. Any protection that resulted in undue interference with the interests of the receiving State was likely to defeat the whole purpose of freedom of communication, namely smooth and friendly relations between the sending and receiving States. In that connection, he noted that most of the problems regarding the privileges and immunities of the diplomatic courier tended to arise in the context of *ultra vires* acts. The question therefore was to what extent the courier, as the vehicle for the transmission of diplomatic communications, should be allowed to wrap himself in the cloak of immunity traditionally reserved for heads of State and their representatives.

25. Paragraph 1 of draft article 20 was acceptable in that it was based on the rights of diplomatic couriers as laid down in article 27, paragraph 5, of the 1961 Vienna Convention. However, to make it clear that the inviolability applied to both clauses of the paragraph, the latter should be reworded to read: "The diplomatic courier shall enjoy personal inviolability, and shall not be liable to any form of arrest or detention, when performing his official functions." In that respect, one practical problem concerned the courier's personal baggage, which was not covered by the way-bill. What, for instance, would be the position if a courier refused to open a large brief-case of the kind referred to in the Special Rapporteur's fourth report (*ibid.*, footnote 62)? Interpreted in the light of the second sentence of article 27, paragraph 5, of the 1961 Vienna Convention, such a provision would probably allow inspection of personal baggage if there were reasonable grounds

for suspecting unauthorized activity on the part of the courier.

26. Paragraph 2 of draft article 20 could be deleted without any harm to the principle stated in paragraph 1. An obligation to prosecute and punish was not only an unwarranted extension of existing law, but also clearly incompatible with the domestic law of many countries, since it purported to impose two obligations of result: to prosecute and to punish. In the United States of America such an obligation would run foul of the due process requirements imposed by the federal Constitution.

27. He very much doubted the need for draft articles 21 and 22. The occasions on which a courier accompanied by the bag would stay in a hotel or use a personal means of transport would be so rare that a separate draft article was unnecessary and might even irritate receiving and sending States. Moreover, as none of the four codification conventions contained such a provision, the legal basis for the article was questionable. An interesting question, however, was the interplay between draft articles 22 and 23. In his fourth report (*ibid.*, para. 112), the Special Rapporteur had pointed out that the courier would not be immune from jurisdiction in an action brought by a car-rental company to recover the amount of the rental from a courier who had hired a car. The point was whether paragraph 1 of draft article 22, which referred to "seizure and measures of execution", would in fact operate to prevent the company from repossessing the vehicle; if so, it would be a rather curious result. Moreover, there was nothing in draft articles 21 and 22 to the effect that the bag had to be with the courier in order for his temporary accommodation or personal means of transport to be inviolable.

28. With regard to draft article 23, the Commission should use the guiding principle of what was functionally necessary for the protection of the courier in the light of the balance of interests of the sending and receiving States and ask itself whether it was strictly necessary, according to that standard, for the courier to be immune from the jurisdiction of the receiving State. The fact that the Special Rapporteur had not cited a single case in which immunity from jurisdiction for the courier had been recognized could itself be an indication that such immunity was not necessary, although it might also mean that any disputes had been settled through political and diplomatic channels. In the only two cases discussed in relation to jurisdictional immunity, *Juan Ysmael & Co. v. S.S. "Tasikmalaja"* (1952) (*ibid.*, para. 127) and *Laterrade v. Sangro y Torres* (1951) (*ibid.*, para. 135), the Honk Kong courts and the French courts had held that the couriers concerned had not been immune. At the very least that should counsel the utmost caution in determining the jurisdictional immunities applicable to the diplomatic courier.

29. Moreover in its present formulation draft article 23 was perhaps too broad, given the assimilation in article 3 as provisionally adopted of all types of couriers to the diplomatic courier. Uniform treatment of that kind should again urge the need for caution. A large number of States, including some major receiving States, among them the United States, had not accepted one or more

of the codification conventions, such as the Convention on Special Missions.

30. As to paragraph 1 of draft article 23, he wondered whether the courier should be immune from criminal jurisdiction in the case of acts not performed in the exercise of his official functions. For instance, if a courier committed rape or murder in the receiving State, should he be completely immune from that State's jurisdiction? Recent events suggested that complete immunity would make for friction between the sending and receiving States. The Commission might therefore wish to consider restricting immunity from criminal jurisdiction to acts performed in the exercise of the courier's official functions. That would preserve the balance of interests between sending States and receiving States, would not affect the bag, and would not unduly interfere with the sending State's interest in freedom of communication, since the bag could easily be delivered to its destination by another courier. In his view, the Special Rapporteur's conclusion that the courier should have full immunity from criminal jurisdiction in receiving and transit States did not withstand close scrutiny.

31. Paragraph 2 of draft article 23, relating to immunity from civil and administrative jurisdiction, was properly restricted to acts performed in the exercise of the courier's official functions. In that connection, he agreed with the Special Rapporteur's remarks in his fourth report regarding obligations pertaining to purchases made by and services rendered to the diplomatic courier (*ibid.*, para. 112), and with the opinion which he quoted (*ibid.*, para. 116) that it was for the courts of the host or receiving State to make the distinction between official and private acts.

32. Turning to paragraph 5, which was the logical sequel to paragraph 2, he proposed that, in addition to vehicles used or owned by the courier, a reference should be included to vessels or aircraft, in line with article 60, paragraph 4, of the 1975 Vienna Convention on the Representation of States, on which draft article 23 was modelled. Paragraph 5 also limited the courier's amenability to jurisdiction to cases in which the loss in question was not covered by insurance. In that regard, the language of article 60, paragraph 4, of the same Convention should be used and some consideration should be given to including in the draft a provision along the lines of article 56 of the 1963 Vienna Convention on Consular Relations whereby couriers would be required to comply with any applicable laws of the receiving or transit States regarding insurance coverage.

33. Paragraph 3 of draft article 23, relating to measures of execution, was acceptable in so far as it was necessary. Once again, the purpose was apparently to ensure that the courier was not unduly hindered in the performance of his functions. Yet the courier was unlikely to have sufficient assets in a foreign State against which execution could be levied, although he might, for instance, be required to post a bond. If the phrase "except in cases not covered by paragraph 2 of this article" was intended to allow execution in cases where a judgment had been validly rendered under paragraph 2 of the article, it might be clearer to spell that out. Furthermore, the

clause starting with the words "and provided that ..." should be deleted. The exception in the first clause already restricted jurisdiction to acts outside the official functions of couriers, so execution would presumably not interfere unduly with such functions. He doubted whether, in practical terms, a measure of execution would infringe the courier's personal inviolability.

34. As to paragraph 4, he shared the concern voiced in the Sixth Committee of the General Assembly that it seemed contrary to the decision in *Juan Ysmael & Co. v. S.S. "Tasikmalaja"* (1952) (*ibid.*, para. 127) and to article 44 of the 1963 Vienna Convention on Consular Relations. If it were not deleted, a provision could perhaps be added along the lines of that article to allow the receiving or transit State to call upon a courier to give evidence as a witness, but specifying that the authorities should avoid interfering with the performance of the courier's official functions.

35. Lastly, paragraph 6 of article 23 was a sensible provision and should have a place in the draft.

36. Sir Ian SINCLAIR paid tribute to the Special Rapporteur for his fifth report (A/CN.4/382), and particularly section III, which contained a very useful compilation of recent State practice.

37. For the reasons he had stated at the previous session of the Commission,⁸ he considered that articles 21 and 22 should be omitted from the draft. With regard to draft article 23, he was in full agreement with many of Mr. McCaffrey's remarks, but had not come to precisely the same conclusion. Although he had suggested in 1983 that there might be a case for including some provision along the lines of article 23, on reflection he was now persuaded that it would be wrong to do so. First of all, it was unnecessary. The Special Rapporteur's lengthy commentary (A/CN.4/374 and Add.1-4, paras. 81-138) gave no real instance of any attempt having been made to arrest or serve process on a diplomatic courier. Hence the Commission's basic approach should be to seek to regulate such problems as had arisen in practice rather than to try to solve all the theoretical difficulties. It was important to bear constantly in mind the fleeting presence of the diplomatic courier in the transit or receiving State. Indeed, it was the fleeting nature of that presence which explained why no case could be found of any attempt having been made to serve legal process on a diplomatic courier. Accordingly, there appeared to be no functional need to go beyond article 27, paragraph 5, of the 1961 Vienna Convention on Diplomatic Relations, which established that a diplomatic courier was not liable to any form of arrest or detention.

38. Secondly, a provision such as draft article 23 would also be undesirable. Governments were highly reluctant to confer privileges and immunities upon additional categories of persons, particularly when, as recent events had amply demonstrated, such privileges and immunities could be gravely abused. The Commission should be realistic, for there was no point in preparing far-reaching proposals on the basis of a particular doctrinal approach

⁸ *Yearbook ... 1983*, vol. I, p. 168, 1784th meeting, para. 8.

if it was convinced that the proposals would not be accepted by the majority of Governments. He had no objection in principle to the Special Rapporteur making comparisons with other codification conventions; indeed, it was his duty to do so. But it was highly dangerous to equate the diplomatic courier with other diplomatic or consular agents who lived a more settled life in the receiving State. The Commission was not engaged in a wholesale review of diplomatic law, although many would argue that such a review was essential because of the increasing evidence of grave abuses of the immunities accorded to diplomatic agents and diplomatic premises. Rather, it was considering the status of the diplomatic courier, and he for one was convinced that, in the present climate of opinion, most Governments would not be prepared, at least so far as the courier was concerned, to go beyond the exemption from arrest and detention provided for under article 27, paragraph 5, of the 1961 Vienna Convention.

The meeting rose at 5.45 p.m.

1825th MEETING

Tuesday, 22 May 1984, at 10.05 a.m.

Chairman: Mr. Sompong SUCHARITKUL

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

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

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR⁴ (continued)

ARTICLE 20 (Personal inviolability)

¹ Reproduced in *Yearbook ... 1983*, vol. II (Part One).

² Reproduced in *Yearbook ... 1984*, vol. II (Part One).

³ *Idem.*

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

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

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

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

ARTICLE 21 (Inviolability of temporary accommodation)

ARTICLE 22 (Inviolability of the means of transport) and

ARTICLE 23 (Immunity from jurisdiction)⁵ (concluded)

1. Mr. NI, congratulating the Special Rapporteur on his remarkable and scrupulously researched work, said that draft articles 20 to 23 constituted an entity in themselves and were based on the very nature of the functions of the diplomatic courier, which were eminently confidential, transitory and mobile. Hence the diplomatic courier could not be ranked with diplomatic or consular agents or the administrative and technical staff of a diplomatic mission; but although the courier did not hold a high position, he must benefit from a high degree of protection, in the interests not only of the sending State, but also of the furtherance of relations between the sending State and the receiving State. The draft must be in keeping with the express provisions concerning the diplomatic courier and diplomatic bag contained in the four codification conventions, and must supplement them to some extent.

2. It was essential for the diplomatic courier to enjoy personal inviolability, respect and immunity from jurisdiction in the light of the treatment accorded to diplomatic agents and for him to be protected against any infringement of his person, freedom or dignity. However, the last clause of paragraph 2 of draft article 20 stipulated that the receiving State or the transit State should "prosecute and punish persons responsible for such infringements", a provision that was not only absent from the four codification conventions, but also involved many other problems. To cite an example, paragraph 4 of draft article 23, which stated that "the diplomatic courier is not obliged to give evidence as witness", contradicted paragraph 2 of draft article 20, which required prosecution and punishment of persons responsible for infringements of the person, freedom or dignity of the courier. In such circumstances, how could any effective trial take place if the diplomatic courier did not give evidence in court? Moreover, if draft article 20 in its present form was to become part of a convention, the question arose as to whether States parties would have to enact new laws in order to fulfil the obligation laid down in that article.

3. In the Sixth Committee of the General Assembly, some delegations had pointed out that questions of that kind did not fall within the scope of diplomatic law and consular law but touched upon the question of State responsibility (see A/CN.4/L.369, para. 344). In that regard, the two cases cited by the Special Rapporteur in his fourth report (A/CN.4/374 and Add.1-4, paras. 63-64) indicated that the requests made by one side had not been met by the other. Admittedly, the unfortunate incidents in question had occurred before the adoption of the codification conventions. Yet if the new provision proposed by the Special Rapporteur was to be regarded as "a measure of prevention and enforcement, being the logical outcome of the application of the basic rule of

⁵ For the texts, see 1824th meeting, para. 22.