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Summary record of the 1825th meeting

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

Extract from the Yearbook of the International Law Commission:-
1984, vol. I

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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.

freedom of communication",⁶ an appropriate provision was already contained in the first two clauses of paragraph 2 of draft article 20.

4. Again, abuses of the inviolability of the person of the courier could take different forms. If minor disputes with airport Customs officers or slight delays due to verification of certifying papers were held to be infringements of the dignity and freedom of the diplomatic courier that called for prosecution and punishment by the receiving State, they would give rise to many unnecessary negotiations. Accordingly, it would be preferable to delete the phrase "and shall prosecute and punish persons responsible for such infringements" in paragraph 2 of draft article 20, or, if the Special Rapporteur deemed that provision to be necessary, to insert the words "when appropriate" after the word "shall", thereby providing for some flexibility.

5. Draft articles 21 and 22, which were similar, were meant to protect the diplomatic courier from any intrusion or access by unauthorized persons who might endanger the safety and integrity of the diplomatic bag. These provisions were well founded, but paragraph 3 of draft article 21 and paragraph 2 of draft article 22 rendered meaningless the inviolability originally accorded to the diplomatic courier. Besides, if a diplomatic courier was suspected of carrying articles prohibited or subject to control by the receiving State or transit State, the Customs could carry out an inspection when the courier entered or left the territory of those States. The temporary accommodation and means of transport of the diplomatic courier would not be subjected to inspection or search, but the courier usually stayed at the embassy or mission of the sending State and the "inviolability" granted to him under articles 21 and 22 was not enough to be of any real significance. Further thought should therefore be given to the question of whether those two articles were in fact necessary.

6. He endorsed the method followed by the Special Rapporteur in formulating draft article 23, but noted that, in the case of immunity from civil and administrative jurisdiction, the approach was different from that of the 1961 Vienna Convention on Diplomatic Relations and the 1969 Convention on Special Missions. In view of the diplomatic courier's special functions, the list of exceptions to immunity from jurisdiction proposed by the Special Rapporteur was scarcely appropriate. How was the expression "in the exercise of his official functions", in paragraph 2, to be understood, and who would make the necessary judgment? The Special Rapporteur had considered the matter in detail in his fourth report (*ibid.*, paras. 113-117), taking the view that, in the event of a dispute, the best settlement would be an amicable solution through diplomatic channels. However, before such a solution was found, a court in the receiving State or transit State might well have handed down a judgment that would become enforceable.

7. In respect of paragraph 5 of draft article 23, the Special Rapporteur affirmed (*ibid.*, para. 134) that State practice was not conclusive and that, for practical

reasons, States tended to settle disputes through diplomatic channels. Accordingly, in view of the divergence of opinion, draft article 23 should be studied in greater depth.

8. Mr. JAGOTA, commending the Special Rapporteur's brief but extremely useful fifth report (A/CN.4/382), said that he had been reflecting on whether the work in which the Commission was engaged was useful and, if so, what form the draft should take in order to be generally acceptable. The question of the diplomatic bag and the diplomatic courier was, of course, already covered by a number of conventions and by State practice, but a further attempt to articulate it was being made with a view to promoting harmonious international relations and avoiding any possible abuses. Accordingly, the role and functions of the diplomatic courier and the inviolability of the diplomatic bag should be dealt with in such a way as to foster smooth and friendly relations between the sending State and the receiving State, while at the same time ensuring that the privileges and immunities conferred in that respect were not used to cloak abuse.

9. The point, therefore, was how to achieve a balance between the twin aims of promoting smooth relations between States and avoiding abuse. In that connection, it was necessary to bear in mind the need to develop the functional aspects of the topic and to include in the draft only articles that would serve that end. Furthermore, the functions of the diplomatic courier were necessarily of a temporary nature inasmuch as the courier remained for only short periods in the transit State or receiving State. His privileges and immunities, which were necessary only in connection with the delivery and collection of the diplomatic bag, could not be equated with those of diplomatic agents, who were accredited to a specific Government and whose privileges and immunities were of necessity required for a longer period. The draft, therefore, should not be unduly voluminous: as a general principle, the fewer articles the better, since the more articles there were, the greater the difficulty would be in striking a balance between the two aspects he had mentioned. Where possible, any provisions pertaining to a single matter should be combined in one article rather than be scattered throughout the draft.

10. Those general propositions could be illustrated, first, by draft article 21. He was not certain that a separate article on temporary accommodation was necessary, since the need for such accommodation might only arise in the transit State. If the sending State had a mission in the country for which the diplomatic courier was bound, the mission would in all likelihood take care of any accommodation problems. But if the Commission felt it advisable from a functional point of view to retain draft article 21, he would propose that it be linked to draft article 19 in the following manner: the sole paragraph in article 19, with the addition of a reference to the inviolability of the temporary accommodation, would become paragraph 1 of that article; paragraph 1 of article 21 would become paragraph 2 of article 19; paragraph 2 of article 21 would be deleted; and paragraph 3 of article 21, more briefly worded, would become paragraph 3 of article 19.

⁶ *Yearbook ... 1983*, vol. II (Part Two), p. 51, para. 173.

11. Draft article 22 also seemed unnecessary. Again, the sending State's mission in the receiving State would either receive the diplomatic bag from the diplomatic courier at the airport or would arrange for the courier's transport, in which case the full privileges and immunities enjoyed by the diplomatic mission would apply. Accordingly, paragraph 1 of draft article 22 should be amended to provide that the immunity would last only for the period during which the diplomatic courier performed his functions. He would have no objection, however, if it was felt that such immunity would be useful even in the receiving State.

12. He endorsed the principle embodied in paragraph 1 of draft article 20, but paragraph 2 could give rise to problems of interpretation. Such matters were better left to State practice, and should not be spelt out.

13. Lastly, the basic principle underlying draft article 23 was justified by functional necessity, but in paragraph 1 the scope of the immunity from jurisdiction should be clarified. Possibly, therefore, the phrase "in connection with the performance of his official functions", or the similar wording used in paragraph 2, could be added. Admittedly, the point was covered in draft article 28. (Duration of privileges and immunities), but it was preferable to be explicit about the restriction, rather than rely on cross-references.

14. Mr. RAZAFINDRALAMBO, commending the well-documented reports prepared by the Special Rapporteur, noted that there was a tendency in some quarters to minimize the status of the diplomatic courier. Yet the diplomatic courier was an indispensable link in diplomatic relations, essential to the proper functioning of diplomatic and consular missions. If the courier was to be exposed to intolerable interference merely because he was an alien on the soil of a receiving or transit State, an entire institution might well be placed in jeopardy. If he did not receive adequate protection, his task itself would inevitably be hindered and all the efforts undertaken to expand the scope of the draft to include the couriers of recognized national liberation movements would be meaningless. Again, protection of the diplomatic courier was important for countries unable materially to equip themselves with the most modern means of communication. For that reason, he (Mr. Razafindralambo) took issue with the restrictive trend, which would end up by placing limitations on, or even denying, immunity from jurisdiction for the diplomatic courier. By and large, therefore, he supported the Special Rapporteur's position, as reflected in the draft articles.

15. For the purpose of alignment with previous articles provisionally adopted by the Commission, the word "official" could be deleted from paragraph 1 of draft article 20. Indeed, what function other than "official" could a diplomatic courier have? Consequently, that suggestion was applicable to the draft as a whole. As to paragraph 2, other members had rightly pointed out that the receiving State and the transit State should be required to take appropriate steps to prevent any infringement of the person of the diplomatic courier. Nevertheless, an obligation on the receiving State or transit State to prosecute and punish persons responsible for such in-

fringements was not necessary. In fact, it seemed to run counter to the principle in the legal systems of many countries, including, as noted by Mr. McCaffrey (1824th meeting), systems in which the Government had the power to prosecute and the courts alone had the power to punish. Accordingly, Governments could not punish persons responsible for infringements of the person, freedom or dignity of the diplomatic courier. Besides deletion of the last clause in paragraph 2 would bring the paragraph into line with the wording of article 29 of the Convention on Special Missions. Thus paragraph 2 could simply stipulate that the receiving or transit State should take all appropriate measures to prevent any infringement of the diplomatic courier's person, freedom or dignity.

16. Mr. Jagota was right to say that the objective was not to increase the number of provisions on the status of the diplomatic courier. Draft article 21 might well seem superfluous, particularly in legal systems which recognized the principle of the inviolability of the domicile, even the temporary domicile, of agents of foreign States—a principle protected in criminal law. Nevertheless, paragraphs 1 and 2 would be perfectly acceptable, for it might prove useful to strengthen the idea of the inviolability of the courier's domicile by emphasizing the need for special protection for his temporary accommodation. The terms of paragraph 3 drew on article 25, paragraph 3, of the Convention on Special Missions, and were reproduced virtually word for word in paragraph 2 of draft article 22, which related to the inviolability of the means of transport.

17. The principle of the inviolability of the means of transport of the diplomatic courier dealt with in draft article 22 was acceptable because some national systems evinced a tendency to grant the police exaggerated powers for systematic inspection of the vehicles of private individuals. Despite those considerations, inviolability of the means of transport need not form the subject of a separate article, since it could be covered in article 21 by adding immunity from attachment or execution. By combining the provisions in that way, they would be closer to article 25 of the Convention on Special Missions and could be headed by the same title, namely "Inviolability of the premises".

18. Even though isolated events had induced some people to assimilate the diplomatic courier to any agent of a foreign State, draft article 23, on immunity from jurisdiction, was of special importance in protecting the diplomatic courier. If it was to be effective, however, such immunity must cover all categories of jurisdiction, including criminal jurisdiction. It was all too easy to prosecute in the criminal courts on the most fallacious pretexts. To highlight the fact that the article involved functional immunity, it might be possible, as suggested by Mr. McCaffrey (*ibid.*), to specify that immunity from criminal jurisdiction would apply only in the case of acts performed by the diplomatic courier in the exercise of his functions. Immunity of that kind did pose delicate problems, such as the one noted by the Special Rapporteur in his fourth report (A/CN.4/374 and Add.1-4, para. 112), but they also arose in the case of diplomatic

immunity. Nevertheless, in view of the transient nature of the functions of the diplomatic courier, the Special Rapporteur had been right not to include all the exceptions to immunity allowed in paragraph 2 of article 31 of the Convention on Special Missions, although the exception provided for in paragraph 5 of draft article 23 should be placed after paragraph 2, since the exception was in each case immunity from civil and administrative jurisdiction.

19. Lastly, paragraph 3 of draft article 23 was not very clear, because it was drafted in the negative and in the form of a condition. Perhaps the whole of the paragraph could simply be replaced by a much more concise formulation stipulating, for instance, that no measures of execution could be taken against the diplomatic courier for any acts performed or property used in the exercise of his functions. A formulation of that type left no room for ambiguity. The remaining paragraphs of draft article 23 were acceptable, but to meet the concern expressed by some members of the Commission, it might be possible to add, at the end of paragraph 4, the phrase "in cases involving the exercise of his functions".

20. Chief AKINJIDE, thanking the Special Rapporteur for an excellent report that was a reflection of his industry and scholarship, noted that the debate revealed, broadly speaking, three approaches to the topic. The first advocated what could be termed the maximalist approach and was reflected in the Special Rapporteur's report and in the views expressed by Mr. Ni and Mr. Razafindralambo; the second advocated the minimalist approach and was reflected in the views expressed (1824th meeting) by Sir Ian Sinclair and Mr. McCaffrey; and the third fell between the first two and was reflected in Mr. Jagota's views.

21. The question was which of those three approaches the Commission should adopt, a matter that was not as simple as it might appear. The diplomatic courier and diplomatic bag had been described as a link between diplomatic missions, but he would liken them to the cement that held the bricks together. It could, of course, be argued that the role of the diplomatic courier was no longer what it used to be, but the significance of the topic for the advanced countries and for the developing countries was very different. Developing countries still had to rely on methods in use some 50 to 100 years ago, whereas advanced countries unable for some reason to use the diplomatic bag also had other, highly sophisticated means of communication available to them.

22. The problem was a real one, since the diplomatic courier and diplomatic bag were of crucial importance for exchanges between the diplomatic missions of developing countries. In that connection, he recalled that on one occasion a diplomatic courier from his country, travelling from the Middle East, had been delayed for two days in Khartoum because there had been no flight to Lagos: such a situation would have been unthinkable in Europe or America. Again, anyone in Lagos wanting to telephone Abidjan, which was only an hour and a half away by air, had to make the call via Paris. Consequently, the problem must be viewed not only in the context of advanced or semi-advanced States, but glob-

ally, in other words as it affected all the interests of the members of the United Nations.

23. He very much hoped that it would be possible to arrive at a consensus on the matter, in which connection he recalled that, in drafting the United Nations Convention on the Law of the Sea, a consensus had been defined as a decision that was not a majority decision and that had not been arrived at by a vote.⁷ If the Commission adopted the minimalist approach, it would be very difficult to secure the support of the General Assembly, since such an approach would not reflect the realities of the world situation. The aim should be to reflect the issues as they affected everybody, and hence there had to be an element of give and take. It was his hope that those guiding principles would assist the Special Rapporteur in the approach to adopt.

24. Sir Ian SINCLAIR said he did not necessarily dispute the charge that he was advocating a minimalist approach, but that approach none the less had to take equal account of everybody's interests. So far as the diplomatic courier and diplomatic bag were concerned, every State, whether developed or developing, was both a sending and a receiving State. Furthermore, the Commission was at the present stage discussing not the diplomatic bag, but the diplomatic courier. The bag, of course, was the essential item, the courier—its carrier—being a modern Mercury. The question, therefore, was what immunities were needed, functionally, for the courier, not for the bag. In terms of the balance of interests that affected his own country as well as the developing countries, he took the view that it was not necessary to confer upon the courier—that peripatetic character—the vast range of immunities proposed by the Special Rapporteur. Interference with the bag, however, was quite another matter.

25. Mr. DÍAZ GONZÁLEZ said that he was among those who advocated the minimalist approach. Existing conventions contained adequate provisions concerning the diplomatic courier and, in seeking to elaborate further provisions, the Commission might well create more problems than it would resolve. However, since it had already embarked on its task, the main point now was to balance the interests of the various States—for all of them were sending States and receiving States—and thus arrive at an instrument acceptable to the international community as a whole.

26. As the Special Rapporteur had explained, the principle of the inviolability of the person of the courier was enunciated in draft article 20 because of the official functions performed by the courier. Yet the diplomatic courier's functions, unlike those of a diplomatic agent, were limited in time. Hence care must be taken not to assimilate the diplomatic courier to a diplomatic agent in every respect. Paragraph 2 of draft article 20 could be deleted, since paragraph 1 was enough to afford a compre-

⁷ See *Rules of Procedure of the Third United Nations Conference on the Law of the Sea* (United Nations publication, Sales No. E.81.I.5), p. 17, appendix: "Declaration incorporating the 'Gentleman's Agreement' made by the President and endorsed by the Conference at its 19th meeting on 27 June 1974".

hensive guarantee of the inviolability of the person of the diplomatic courier acting in the exercise of his official functions.

27. Draft article 21, pertaining to the inviolability of temporary accommodation, went far beyond the relevant provisions of the four codification conventions, which were adequate in cases in which the diplomatic courier stayed in the premises of the mission or in the private home of a member of the mission, precisely because inviolability was guaranteed in such instances. On the other hand, if the courier stayed at a hotel, if only for a few hours, it did not seem necessary to guarantee the inviolability of accommodation of that kind. The fact that the person of the diplomatic courier and the bag itself were recognized as inviolable was sufficient. Consequently, draft article 21 appeared to be pointless and might raise problems of interpretation.

28. With regard to draft article 22, no State appeared to make individual means of transport available to diplomatic couriers. Communications between two diplomatic offices inside a country were through means of transport that already enjoyed diplomatic inviolability, namely the vehicles belonging to the missions accredited to that country. Means of transport such as taxis could not be considered as inviolable, but the diplomatic bag and the person of the diplomatic courier were themselves inviolable. As in the case of draft articles 20 and 21, the Commission should confine itself to the minimum in draft article 22.

29. His sole suggestion in connection with draft article 23 was that the words "if such damages cannot be covered by the insurer", in paragraph 5, should be replaced by "if such damages are not covered by the insurer". In virtually all States, a motor vehicle had to be insured. Damages were therefore insured against, but it could well happen that they might not all be covered by the insurer. Subject to that change, draft article 23, for which there was an equivalent in the other codification conventions, was acceptable.

30. Mr. OGISO said that, for the same reasons as a number of other speakers, he too felt that paragraph 2 of draft article 20, especially the concluding phrase "and shall prosecute and punish persons responsible for such infringements", was unnecessary and that paragraph 1 was sufficient to cover the subject.

31. With regard to the inviolability of temporary accommodation, the provisions of draft article 21 went somewhat further than those of the existing conventions. They were, moreover, not altogether in line with the functional approach advocated by the Special Rapporteur himself in his fourth report (A/CN.4/374 and Add.1-4, para. 70). It would not be appropriate to align the courier's privileges and immunities with those of a diplomatic agent, who was stationed for a long time in the same country; a diplomatic courier spent only very short periods in the receiving or transit State. Indeed, the Special Rapporteur had drawn attention to the need for "caution and prudence in order to avoid unwarranted analogies or complete assimilation of the status of the diplomatic courier to that of diplomatic staff" (*ibid.*,

para. 90). Paragraphs 1 and 2 should be deleted because they were unnecessary and the opening words of paragraph 3 should be amended to read: "The temporary accommodation of the diplomatic courier shall not be subject to inspection or search, unless there are serious grounds for believing . . .". The purpose of changing the phrase "shall be immune from" to "shall not be subject to" was, by not making any reference to the concept of "immunity", to avoid the impression that the provision was based on the analogy with the diplomatic agent. Such a formulation would be more in keeping with the functional approach to inviolability of the courier's temporary accommodation.

32. Paragraph 2 of draft article 21 imposed upon the receiving State and the transit State the duty "to take appropriate measures to protect from intrusion" the courier's temporary accommodation, a duty that represented an additional obligation upon those States, and one which was not to be found in any of the existing diplomatic conventions. While he fully recognized that protection of the diplomatic courier was required in order to enable him to exercise his function of delivering the diplomatic bag to its destination, that could be achieved without the provision contained in paragraph 2. His own suggestion would be to reword draft article 15, on general facilities, along the following lines: "The receiving State and the transit State shall accord to the diplomatic courier the facilities and protection necessary for the performance of his official functions." The insertion of the reference to protection and the use of the word "necessary" would avoid giving the impression that there was any intention of establishing an additional duty on the receiving and transit States or of placing too much emphasis on the inviolability of the courier's temporary accommodation.

33. As to draft article 22, the words "shall be immune from inspection, search, requisition, seizure and measures of execution" in paragraph 1 should be replaced by "shall not be subject to inspection or search". "Requisition, seizure and measures of execution" need not be mentioned because those matters were already covered by other conventions.

34. Draft article 23 posed some difficulties, at least in theory. In view of the remarks made by some members, it was apparent that the article, if included in the draft, might deter some Governments from becoming parties to a future convention on the diplomatic courier. When the Commission had prepared its drafts on the privileges and immunities of diplomatic agents and consular officers, it had been able to rely on long standing custom and established practices that had facilitated the work of codification. With regard to diplomatic couriers, however, the Special Rapporteur admitted that the judicial precedents on the subject were very scanty. It would therefore be going too far to try and deduce any customary rule from such a limited body of practice.

35. The purpose of the draft articles under consideration was to meet the practical necessity of securing freedom of official communication, and thus it was desirable to avoid any legal stumbling-block which might induce some Governments to reject a future draft

convention. It should always be remembered that a diplomatic courier stayed only for a very short time in one place. Provisions such as those included in draft article 23 were unlikely to have much practical effect and could well create difficulties when it had to be determined whether an act performed by a diplomatic courier was part of his functions. Despite the arguments advanced in support of draft article 23, he felt that it would have comparatively little usefulness and that the issue of immunity from jurisdiction should be left outside the scope of the draft. Of course, if the diplomatic courier was actually a member of a diplomatic mission, he would already enjoy diplomatic immunity, but it was preferable not to touch upon the question of any immunity from criminal as well as civil jurisdiction that might be conferred on a diplomatic courier as such.

36. The CHAIRMAN, speaking as a member of the Commission, observed that the concept of functional necessity lay behind most of the comments regarding the extent of the privileges and immunities of a diplomatic courier and that draft articles 20 to 23 were limited in scope by that concept. Fortunately, the Special Rapporteur's well-balanced approach took account of the interests of all States and suggested the right measure of privileges and immunities.

37. The concept of inviolability was a dual one, imposing as it did two types of obligations upon the receiving State: negative obligations, namely to refrain from certain acts, and positive obligations, namely to afford protection. Draft articles 20, 21 and 22 properly covered the negative obligations of the receiving State. Paragraph 1 of draft article 20 specified that the diplomatic courier was not liable to any form of arrest or detention when performing his official functions. Paragraph 1 of draft article 21 stated the obligation not to enter the courier's temporary accommodation, and paragraph 1 of draft article 22 stated that the courier's means of transport must not be inspected or searched.

38. As to the positive obligation to afford protection, draft article 20 specified that appropriate measures must be taken to prevent any infringement of the courier's person, freedom or dignity, and the concluding phrase spelled out the duty of prevention and prosecution. The duty of prevention constituted an obligation of vigilance. Again, draft article 21 specified a similar duty with respect to the courier's temporary accommodation.

39. Immunity from jurisdiction, dealt with in draft article 23, was of a different nature from the immunity enjoyed by diplomatic agents. In that connection, it was appropriate to remember that an ambassador enjoyed personal immunity only for the duration of his mission in the receiving State. One could not confer personal immunity of the same kind upon a diplomatic courier; if he returned to the same country, he would not be a former diplomat, but he would still be a courier.

40. Mr. YANKOV (Special Rapporteur), summing up the discussion, expressed his appreciation to the members who had spoken both at the previous session and at the present session for their constructive criticisms and concrete suggestions. Before considering those remarks

in detail, he had some comments to make in reply to certain general observations relating to the nature and scope of the privileges, facilities and immunities of the diplomatic courier.

41. In the first place, he appreciated the warnings and counsels of caution regarding possible government reactions to the draft, but wished to stress that he had adopted an empirical approach, taking into account in the process not only the four existing conventions codifying diplomatic law, but also current State practice on the subject. Admittedly, the case-law was not very abundant, but that was not because of any lack of cases, or indeed of practice in the matter. It was due, in fact, to the delicacy of the subject, for in most cases Governments preferred to settle problems through diplomatic channels instead of referring them to the courts. Hence the existing practice was not readily apparent.

42. He wished to reiterate that his intention was to apply the functional approach throughout the draft and to avoid assimilating the status of the courier to that of a diplomat. In that connection, he had endeavoured to take into consideration what could be regarded as the law now in force: the 1961 Vienna Convention on Diplomatic Relations, which had been ratified or acceded to by 141 States, and the 1963 Vienna Convention on Consular Relations, with 108 States parties. In addition, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, which were not yet in force, provided models closer to the subject-matter under discussion.

43. The important point to remember was that, in the draft, the treatment accorded to the diplomatic courier was not better than that granted to a member of the administrative and technical staff of a mission or delegation. In practice, there was little difference between administrative and technical staff of a special mission or delegation who stayed in a country for a few days and a diplomatic courier, who might well stay much longer if he was required to take back some correspondence after delivering the bag. It was therefore appropriate to grant the courier, as a minimum degree of protection, status similar to that of administrative and technical staff. After all, a courier's task was much more delicate than that of most clerks in a mission, since the courier was called upon to convey instructions to a head of delegation or to carry confidential documents. For his own part, he had in no way suggested that the status of the courier should be modelled on that of a diplomat or even a consul; he was simply proposing that the courier should be granted the same status as a clerk in an embassy or mission.

44. During the discussion, reference had been made to the distinction between the diplomatic courier and the diplomatic bag. He appreciated the reasoning behind that distinction but cautioned that an attempt to dissociate the status of the courier from that of the bag entrusted to the courier should not be taken too far. The facilities, privileges and immunities were granted to the courier not *ad personam*, but precisely because of his functions. Consequently, if the courier was not afforded proper

protection, the result would be to defeat the whole purpose of the diplomatic bag.

45. A number of drafting proposals had been made for draft article 20, paragraph 1, which should be referred to the Drafting Committee. As for paragraph 2, he would be prepared to accept the suggestion to delete the concluding phrase "and shall prosecute and punish persons responsible for such infringements", or alternatively to accept Mr. Ni's proposal to insert the words "when appropriate" after the word "shall".

46. The drafting proposals regarding article 21 should also be referred to the Drafting Committee and careful consideration should be given to the suggestions for harmonizing draft article 21 with draft article 15 or for combining draft articles 21 and 19. However, the substance of article 21 had to be retained; otherwise, there would be a gap in the draft, since the courier, more particularly in view of the difficult conditions in which he had to work, needed protection for his temporary accommodation.

47. The observations made in connection with draft article 22 were similar to those concerning draft articles 20 and 21. With regard to draft 23, on the subject of immunity from jurisdiction, he stressed that the Commission would not be fulfilling its task properly if it failed to provide for immunity from jurisdiction for the diplomatic courier. It must be emphasized that the degree of immunity specified in draft article 23 was the same as that for a member of the administrative and technical staff of a delegation. There was no justification for depriving the courier of the immunity from criminal jurisdiction enjoyed by staff in that grade. As for immunity from civil and administrative jurisdiction, it followed the pattern of the existing codification conventions.

48. Apart from the various drafting suggestions made on individual articles, the Drafting Committee would also deal with the suggestions for reordering the various provisions.

49. Mr. USHAKOV proposed that draft articles 20 to 23 should be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*⁸

The meeting rose at 1.05 p.m.

⁸ For consideration of draft articles 20 and 21 as proposed by the Drafting Committee, see 1862nd meeting, paras. 69-90; for draft article 22, see the decision by the Commission, *ibid.*, para. 92; for consideration of draft article 23 as proposed by the Drafting Committee, see 1863rd meeting and 1864th meeting, paras. 1-22.

1826th MEETING

Wednesday, 23 May 1984, at 10 a.m.

Chairman: Mr. Sompong SUCHARITKUL

Present: Chief Akinjide, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz Gonzáles, 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*)

ARTICLES 24 TO 29

1. The CHAIRMAN invited the Special Rapporteur to introduce draft articles 24 to 29, which read:

Article 24. Exemption from personal examination, customs duties and inspection

1. The diplomatic courier shall be exempt from personal examination, including examination carried out at a distance by means of electronic or other mechanical devices.

2. The receiving State or the transit State shall, in accordance with such laws and regulations as it may adopt, permit the entry of articles for the personal use of the diplomatic courier and grant exemption from all customs duties, taxes and related charges other than charges for storage, cartage and similar services.

3. The personal baggage of the diplomatic courier shall be exempt from inspection, unless there are serious grounds for believing that it contains articles not covered by the exemptions referred to in paragraph 2 of this article, or articles the import or export of which is prohibited by law or controlled by the quarantine regulations of the receiving State or the transit State. In such cases inspection shall be carried out only in the presence of the diplomatic courier.

Article 25. Exemption from dues and taxes

The diplomatic courier shall be exempt from taxes, dues and charges, personal or real, national, regional and municipal, except for indirect taxes of a kind which are normally incorporated in the price of goods or services and charges levied for specific services rendered.

Article 26. Exemption from personal and public services

The receiving State or the transit State shall exempt the diplomatic courier from all personal and public services of any kind.

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.