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Summary record of the 1828th meeting

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

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proposed going rather further than the minimalists, it was because, like Mr. Laclea Muñoz, he found that the granting of privileges and immunities to the diplomatic courier was not likely to present major problems for his country. That being so, the Commission should be able to go forward, especially as States which were disinclined to accept the provisions proposed by the Special Rapporteur could always make their application subject to the principle of reciprocity. The misdeeds from which some States had quite recently suffered had caused an emotional reaction in the international community which could not justify the desire to impose restraints on the diplomatic courier which would hinder the performance of his functions.

46. The minimalist position did not appear to be in harmony with the existing conventions, especially the 1961 Vienna Convention on Diplomatic Relations. According to paragraph 1 of article 37 of that Convention, the members of the family of a diplomatic agent enjoyed the same privileges and immunities as the agent himself. Under the terms of paragraph 4 of the same article, private servants of members of the mission, who were not nationals of the receiving State, were exempt from certain taxes, while under paragraph 2 of article 38, certain privileges and immunities were even granted to members of the staff of the mission and to private servants who were nationals of the receiving State. The reason why the Convention went so far as to grant facilities to persons not working directly for the sending State was that it had been established that any impairment of their position could indirectly impair the position of the diplomatic agent. As the same reasoning could be applied to the diplomatic courier, he should be granted the appropriate status to enable him to perform his official functions properly. In supporting a minimalist viewpoint, some members of the Commission appeared to forget that every State could at the same time be a sending State, a transit State and a receiving State.

47. Turning to the draft articles under consideration, he observed first that paragraph 1 of draft article 24 had no counterpart in article 36 of the 1961 Vienna Convention. When that Convention had been adopted, the security of aircraft and their passengers had not raised the same problems as it did at present, and personal searches had not been practised. However, as paragraph 1 of draft article 24 did not seem realistic and diplomatic agents and couriers appeared to submit willingly to examination when boarding aircraft, the provision could be confined to personal searches during customs examination. Paragraphs 2 and 3 of draft article 24 had their counterparts in the existing conventions and did not present any difficulties, although the diplomatic courier's stay in the territory of the transit State or the receiving State was sometimes very brief.

48. Draft article 25, on exemption from dues and taxes, was acceptable in principle. In view of the brevity of the diplomatic courier's stay, he should be exempted from dues and taxes in the interests of satisfactory performance of his official functions.

49. The reason for including draft article 26, on the other hand, was not clear. In his fourth report

(A/CN.4/374 and Add.1-4, para 173), the Special Rapporteur himself observed that, in view of the brevity of the diplomatic courier's sojourn, it was unlikely that he would be called upon to perform personal or public services. Subject to that reservation, he endorsed the content of draft article 26.

50. As for draft article 27, he had more serious reservations. In view of the special nature of the diplomatic courier's functions, it seemed that in practice States were not tempted to make him subject to their social security legislation.

51. With regard to draft article 28, on the duration of privileges and immunities, he emphasized the need to distinguish between the regular diplomatic courier and the diplomatic courier *ad hoc*. The privileges and immunities of the latter ceased when the diplomatic bag was delivered, except in regard to acts performed by the courier *ad hoc* in the exercise of his official functions.

52. Draft article 29, on waiver of immunity, had the merit of specifying, in paragraph 1, which organs of the State were competent to waive immunity. As to paragraph 5, he supported the idea of initiation of proceedings as in the case of special missions. In his view, however, the sending State should not have recourse to judicial proceedings, which might be implied by the words "it shall make every effort to settle the matter justly". It should be specified that such efforts should not include litigation.

The meeting rose at 1.05 p.m.

1828th MEETING

Friday, 25 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. Jagota, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, 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]

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

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

³ *Idem*.

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR⁴ (continued)

ARTICLE 24 (Exemption from personal examination, customs duties and inspection)

ARTICLE 25 (Exemption from dues and taxes)

ARTICLE 26 (Exemption from personal and public services)

ARTICLE 27 (Exemption from social security provisions)

ARTICLE 28 (Duration of privileges and immunities) and

ARTICLE 29 (Waiver of immunity)⁵ (continued)

1. Mr. OGISO said that, since he had already stated his overall view (1825th meeting), his only general comment now would be to stress the aspect of functional necessity, with the emphasis on practical needs rather than on theoretical principles.

2. With regard to paragraph 1 of draft article 24, he supported the proposal to delete the proviso: "including examination carried out at a distance by means of electronic or other mechanical devices", for it would be going much too far to exempt the diplomatic courier from inspection by such devices. As for the remainder of the article, he even had some doubts as to the need to retain paragraph 1 at all and also agreed with members who had suggested merging paragraphs 2 and 3. All those points, however, were essentially matters of drafting.

3. The wording of draft article 25 should be made more flexible in order to take account of the problems that might arise, particularly with regard to indirect taxes, because the courier normally spent only a short time in the receiving State. An interesting example was provided by the way in which exemption from petrol tax was applied in many countries. A diplomatic agent or consular officer would pay the full price, which included the petrol tax, and subsequently apply for a refund of the tax through the competent authorities of the receiving State. That procedure would be difficult to use in the case of the diplomatic courier. Again, the form of language employed in draft article 25 was much too sweeping and almost seemed to grant tax exemptions greater than for diplomatic agents. The exemption set forth in the opening clause should be qualified by adding a formula such as "as far as possible" or "to the extent practicable". In that way, the article would not impose an unnecessarily difficult requirement upon the receiving State.

4. It would also be noted that draft article 25 and most of the subsequent articles under discussion were couched in terms which implied that the courier was a national of the sending State. It was possible, however, for the

courier to be appointed with the consent of the receiving State, from among the nationals of that State; or he might be a national of the sending State but permanently resident in the receiving State. A national or resident of the receiving State would not normally be accorded tax privileges.

5. As for draft article 26, he agreed that it was not perhaps necessary and that it could create problems, particularly in the case of a courier who was a national or resident of the receiving State. If the Special Rapporteur considered it essential to retain the article, the words "when performing his functions" could be added at the end, so as to obviate difficulties in the case of a courier who was a national or permanent foreign resident of the receiving State.

6. The exemption from social security provisions dealt with in draft article 27 would have very little application in the case of the diplomatic courier. Moreover, it would create unnecessary difficulties with regard to the local staff of missions, which, for reasons of language proficiency, often included nationals of the receiving State or citizens of the sending State permanently resident in the receiving State.

7. The same problem regarding local staff arose in connection with the duration of privileges and immunities, dealt with in draft article 28, since paragraph 1 would be of no assistance if the courier was appointed from among nationals of the receiving State or nationals of the sending State already resident in the receiving State.

8. In draft article 29, dealing with waiver of immunity, the second sentence of paragraph 1 should be deleted. The reference to a "competent member" of the diplomatic mission, consular post or delegation to authorize the waiver of immunity was particularly confusing. The only way to determine the person competent to waive immunity was to refer to the laws and regulations of the sending State. Deletion of the second sentence would mean that the matter would be governed by the internal law of the sending State.

9. As for paragraph 2, the words "and in writing" should be inserted at the end. The formulation "The waiver must always be express" was similar to that in article 32, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations, yet the 1963 Vienna Convention on Consular Relations also specified, in article 45, paragraph 2, that the waiver must "be communicated to the receiving State in writing", a requirement that would obviate disputes as to whether a waiver had actually been express.

10. Paragraphs 3, 4 and 5 dealt with immunity from civil jurisdiction, in which connection he wished to recall the views he had already expressed during the discussion on draft article 23 (Immunity from jurisdiction). From the standpoint of functional necessity, it was sufficient to make it clear that the courier enjoyed immunity from arrest and detention, for the purpose of enabling him to deliver the diplomatic bag to its destination. In view of the courier's short stay in the receiving State, there was no practical need for any greater immunity.

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.

⁵ For the texts, see 1826th meeting, para.1.

11. So far as diplomatic and consular staff were concerned, immunity from jurisdiction had been recognized on the basis of well-established practice and, in claiming immunity for such staff, it was possible to cite abundant case-law to the Ministry of Justice or other competent authority of the receiving State. On the other hand, there was no established practice or consistent case-law in support of a similar claim for the diplomatic courier. The matter of immunity from jurisdiction should therefore be left outside the scope of the present draft. Nothing would be lost by adopting such a course, because no real problems had arisen in that connection for the diplomatic courier. If retained, draft article 23 could well prove to be a stumbling-block to acceptance of the future convention by a number of countries.

12. Mr. CALERO RODRIGUES said that the discussion had revealed a division of opinion that recalled the lack of unanimity among Governments in their comments prior to the General Assembly's decision to invite the Commission to consider the present topic. Some governments had thought the exercise useful, others had had reservations, and yet others had believed that the exercise would be counter-productive and might even affect the application of the existing provisions on the subject of diplomatic couriers contained in the four codification conventions. A decision had none the less been taken to prepare draft articles on the topic, the purpose being threefold: first, to consolidate the existing provisions of the codification conventions dealing with the courier; secondly, to unify the rules so as to ensure the same treatment for all diplomatic couriers; and thirdly, to develop rules to cover practical problems not dealt with in existing provisions. It was on that basis that the Commission should proceed with its work on the item.

13. He agreed with a number of previous speakers that the paramount question was that of the diplomatic bag, but that in itself did not detract from the importance of protecting the courier and of affording him certain minimum guarantees. Normally, the courier's life was a comparatively easy one, yet difficulties could arise on the journey or even at the destination. Therefore adequate guarantees were needed from both the receiving State and the transit State. The Special Rapporteur might sometimes give the impression of proposing an unduly wide measure of protection for the courier, but it was more an impression than a reality. When privileges and immunities had to be spelled out in detail, solutions had to be proposed in each case and the Special Rapporteur had not unduly broadened those privileges and immunities; what he had proposed was a maximum in that respect. That was revealed by the fact that, during the discussion, no one had suggested any additional privileges and immunities. On the other hand, suggestions had been made for reducing them and he himself could agree on some minor curtailments. His own approach was essentially practical. The Commission should seek to provide the courier simply with the protection required for the performance of his duties, and no superfluous burden should be imposed upon the receiving or transit State.

14. In respect of draft article 24, he supported the proposal to delete from paragraph 1 the proviso: "in-

cluding examination carried out at a distance by means of electronic or other mechanical devices". The inclusion of that element in draft article 36 (Inviolability of the diplomatic bag (see 1844th meeting, para. 21)) was justified because there was some risk that the use of sophisticated devices might breach the confidentiality of the contents of the bag, but no such risk existed in the situation envisaged in draft article 24, paragraph 1, where only the person of the courier was involved. As to paragraphs 2 and 3, he supported the suggestions by Mr. Laclea Muñoz (1827th meeting) and others for simplifying the wording.

15. Draft article 25 should be qualified to make it clear that the exemption applied to taxes incurred in the course of the courier's official activities, for the present wording could conceivably be taken to imply that the courier was exempt from all taxation. Obviously, there was no reason to exempt him from taxes on earnings derived from activities totally unconnected with his functions as a courier.

16. Unlike some members, he considered draft article 26 to be necessary, even though the occasion for applying it might not be frequent. For instance, in an emergency situation arising from a natural catastrophe, the local law might require everyone to render services for disaster relief, which would interfere with the performance of the courier's duties if he was not specifically exonerated from such services. On the other hand, no case was likely to require the application of the provisions of draft article 27, which could safely be deleted.

17. As to draft article 28, various useful suggestions had been put forward to make the provisions clearer. The commencement and end of privileges and immunities should be connected with the commencement and end of the functions of the diplomatic courier, dealt with in draft articles 12 and 13. It was also necessary to allow for cases in which the person appointed as courier was already in the territory of the receiving State, a situation that was not covered by the formula used in paragraph 1, namely "from the moment he enters the territory...".

18. With regard to draft article 29, he endorsed the idea of dispensing with the second sentence of paragraph 1 and also proposed that a gap in the provisions of the article should be remedied. Paragraph 5, relating to civil proceedings, stated that the sending State should either waive the immunity of the diplomatic courier or else "make every effort to settle the matter justly". A parallel provision should be introduced for criminal proceedings against the courier, in which case the sending State, if it did not waive the courier's immunity so as to allow him to be tried by the local courts, was under a duty to have him prosecuted and tried by its own courts.

19. Mr. NI said that the order in which the draft articles were placed should be logical, for it should facilitate an understanding of their substance and meaning. In the codification conventions, the exemptions in question related to social security, to dues and taxes, to personal and public services and, lastly, to customs duties and inspection. Admittedly, the 1963 Vienna Convention on Consular Relations was slightly different in that re-

gard, but the Special Rapporteur had rightly reversed the order of the first and last of those categories of exemptions. The change was significant, since the prime feature of the courier's functions was that he travelled frequently from country to country. Hence, in the performance of his functions, the question of exemption from customs duties and inspection was the first that the courier encountered on entering the receiving or transit State. The other problems, such as exemption from dues and taxes, from personal and public services, and from payment of social security contributions, were not only of little significance to the courier, but rarely applied to him. Accordingly, the change made by the Special Rapporteur in relation to the order followed in the four codification conventions was realistic.

20. In the case of waiver of immunity, however, dealt with in draft article 29, the corresponding articles of the four codification conventions related essentially to immunity from jurisdiction and judicial procedures and, with the exception of the Convention on Special Missions, which was somewhat different, the article on waiver of immunity closely followed the article on jurisdictional immunities. In his fourth report (A/CN.4/374 and Add.1-4, para. 192), the Special Rapporteur pointed out that waiver of jurisdictional immunity was based on the fundamental concept of such immunity as an expression of the principle of the sovereignty and sovereign equality of states. Accordingly, placing the article on waiver of immunity immediately after the article on immunity from jurisdiction, as did the 1961 Vienna Convention on Diplomatic Relations, was quite logical.

21. In the same report (*ibid.*, para. 190), the Special Rapporteur maintained that waiver of jurisdictional immunity could be regarded as a form of suspension or termination of diplomatic immunities, so that the article on waiver of immunity should be placed after draft article 28, concerning the duration of privileges and immunities. Such a sequence was questionable. Waiver of immunity had a specific meaning and legal consequences and had no bearing on the question of the commencement and end of privileges and immunities, since immunities could be waived from the outset, in which case the question of suspension or termination would not arise. Consequently, draft article 29 should be placed directly after draft article 23, on immunity from jurisdiction, as in the codification conventions, so as to ensure that waiver was not regarded as one specific case falling within the broader area of termination of immunities.

22. Turning to the content of the articles under consideration, the concept of exemption from personal examination, dealt with in paragraph 1 of draft article 24, was already covered by draft article 20, on the personal inviolability of the diplomatic courier. Hijacking of aircraft and cases of smuggling were becoming increasingly serious, and exemption from personal examination carried out at a distance by electronic devices ran counter to the security requirements of international travel. Furthermore, an examination of that kind involved no contact with the person of the courier, nor did it affect him in the performance of his functions. Accordingly, an ex-

aggerated emphasis on the confidentiality of the official functions of the diplomatic courier, which meant departing from the provisions of the codification conventions and formulating articles on more absolute immunities, seemed neither practical nor necessary.

23. In draft article 25 the Special Rapporteur enunciated the principle of exemption from dues and taxes, in view of the specific features of the official functions of the diplomatic courier, his short sojourn in the territory of the receiving or transit State and the relative scope of his contractual or other relations concerning property rights. The article contained only two of the six exceptions provided for in the corresponding articles of the four codification conventions, something which seemed reasonable at first sight; but in cases not covered by the two exceptions the question arose as to whether a diplomatic courier enjoyed more privileges than those enjoyed by a diplomatic agent. For that reason, all six exceptions should be enumerated in draft article 25, a solution which was not ideal but was relatively safe. In its present formulation, draft article 25 seemed to signify that the diplomatic courier was exempt from taxes in his own country, a point which obviously called for clarification.

24. As to draft articles 26 and 27, it was highly unlikely that the courier would be required to render personal and public services or pay social security contributions. The special aspects of the courier's functions differed from the duties of ordinary diplomatic or consular personnel. Both draft articles could be deleted, or if the Commission considered that it would be better to retain them, they should be merged into a single article.

25. Draft article 28, on the duration of privileges and immunities, was worded along the lines of the corresponding articles of the codification conventions, but paragraph 1 did not provide for instances in which diplomatic couriers were already in the receiving or transit State, a situation which could well occur. The following sentence should therefore be added at the end of the paragraph: "In cases where the diplomatic courier is already in the receiving State or the transit State, the privileges and immunities he should enjoy as a diplomatic courier commence when his appointment is transmitted to the competent authorities of the receiving State or the transit State." In addition, the 1961 and 1963 Vienna Conventions and the Convention on Special Missions included a provision whereby, even in the event of an armed conflict, the privileges and immunities subsisted until the beneficiary left the territory of the receiving State, or until the expiry of a reasonable period in which to leave. International tension and the frequency of armed conflicts were such that a provision of that kind should be included in paragraph 2 of draft article 28, in order to afford better protection of the courier's safety.

26. In connection with draft article 29, concerning waiver of immunity, the Special Rapporteur had rightly cited (*ibid.*, para. 192) the preamble to the 1961 Vienna Convention on Diplomatic Relations, which stated that

... the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.

Hence it was for the sending State to decide on waiver of immunity, but the codification conventions did not specify which authorities of the sending State were competent in that regard. The Special Rapporteur had pointed to the divergence in legal theory and in State practice on this question (*ibid.*, para. 194). The matter should be viewed in close conjunction with the laws and rules of procedure in the receiving State or transit State. In view of the specific functions of the diplomatic courier, it seemed necessary to add an express provision in paragraph 1 regarding the authority that could exercise waiver of immunity from jurisdiction. The terms of paragraph 4, whereby waiver of immunity from jurisdiction for the purposes of civil or administrative proceedings would not be deemed to imply waiver of immunity in respect of execution of the judgment, were included in the codification conventions and were recognized by the internal law of many countries. Paragraph 5, on the other hand, was modelled on the terms of article 31, paragraph 5, of the 1975 Vienna Convention on the Representation of States, which were not to be found in the other codification conventions. Such a provision merited consideration, but would be difficult to implement and called for further study.

27. Mr. DÍAZ GONZÁLEZ said that the General Assembly had requested the Commission to consider, by a pragmatic method, what privileges and immunities should be accorded to the diplomatic courier so that he could properly exercise his official functions. Yet the Commission now gave the impression of departing occasionally from a pragmatic method. It seemed to take as its starting-point the idea that the diplomatic courier could be assimilated to a diplomatic agent and it was tending to grant the courier the same privileges and immunities as a diplomatic agent. Such an approach overlooked the fact that the question of the status of the diplomatic courier was dominated by two considerations, namely the courier's functions and their transient nature. Two schools of thought were apparent from the discussion. Some members regarded the courier as a "super-diplomat", whereas others were of the opinion that the existing codification conventions afforded sufficient guarantees for free movement of the courier and that accordingly, as few rules as possible were required in order to protect him. He himself was among the members in that latter category and therefore did not intend to make any special comments on the articles under consideration, for the discussion had amply demonstrated that the diplomatic courier's functions, and more particularly their fleeting character, were such that the privileges and immunities of the courier should be kept to a minimum. In any event, the Commission should not go so far as to grant privileges and immunities that the diplomatic agent did not enjoy.

28. Draft article 29, however, did call for a brief comment. Under the terms of the first sentence of paragraph 1, it was the sending State that was competent to waive the courier's immunity from jurisdiction. The sending State was accorded such immunity, in the person of its diplomatic courier, and hence that State itself should obviously be the one to authorize waiver of immunity. The person who was to communicate such waiver to the

authorities of the transit or receiving State should plainly be the head of the mission, regardless of his rank. In that regard, the second sentence of paragraph 1 seemed superfluous and could be deleted. Any provision that departed from article 41, paragraph 1, of the Convention on Special Missions and article 31, paragraph 1, of the 1975 Vienna Convention on the Representation of States would do no more than raise difficulties of interpretation.

29. Lastly, for all the topics it considered, the Commission must decide on the substance of each draft article before referring it to the Drafting Committee. For some time, the practice had emerged of referring articles to the Drafting Committee without any instructions as to how they were to be drafted in the light of the Commission's discussion. The Commission should not make it necessary for the Drafting Committee to re-examine the substance of articles in order to determine how they were to be recast or reworded, or even whether some provisions were to be deleted or replaced by others. If the Drafting Committee was compelled to look into the substance of draft articles referred to it, the Commission would have to do the same when the articles were referred back to it by the Committee.

30. The CHAIRMAN assured Mr. Díaz González that, in the final analysis, it was the Commission that took the decision whether or not to adopt draft articles. It had been the practice, after a preliminary exchange of views by members, for the Special Rapporteur to sum up and make any changes he deemed necessary. The draft articles were then referred to the Drafting Committee, but were transmitted with, and subject to, the observations made by the Commission. Only when draft articles were returned by the Drafting Committee was a decision taken by the Commission.

31. Mr. NJENGA noted that the Special Rapporteur had from the outset recognized that he was engaged in the progressive development of international law and, as was clear from his fourth report (A/CN.4/374 and Add.1-4, para. 149), had placed the subject of the diplomatic courier in its proper perspective. The basis for the privileges and immunities granted to the diplomatic courier was the need to ensure safe, speedy and unimpeded transmission of official and confidential communications. Such privileges and immunities were therefore to be regarded as a functional necessity, not as a further unwarranted extension of the exemptions from local jurisdiction accorded to an ever-increasing number of privileged individuals. While it was true that the effect of the 1961 Vienna Convention on Diplomatic Relations had been to transform into binding rules of international law privileges that were accorded to diplomatic missions and their personnel as a matter of courtesy and on the basis of reciprocity, reciprocity none the less remained the bedrock on which such privileges and immunities were based, a fact stressed in an editorial in *The Times* of London of 16 May 1984. It was a sobering thought for maximalists and minimalists alike that, when it came to diplomatic couriers, every State was potentially not only a sending State, but also a receiving State or, indeed, a transit State.

32. Furthermore, it was generally accepted that privileges and immunities were granted not for the personal convenience of the courier himself but for the benefit of the sending State, in which connection the Special Rapporteur had adopted as a yardstick the privileges and immunities extended to the administrative and technical staff of a diplomatic mission. It was important not to glamorize the role of the diplomatic courier, who had been variously referred to as "peripatetic" or as a "will-o'-the-wisp", yet the importance of his role should not be minimized in an era of technological progress which had brought snooping to such a fine art that official seals and codes were sometimes no more than a laughing matter.

33. It was against that background that he wished to comment on the draft articles, and first of all draft article 24. The Special Rapporteur had provided abundant evidence of the State practice that was reflected in article 36 of the 1961 Vienna Convention and the corresponding articles of the other three conventions codifying diplomatic law. There were thus compelling reasons to include a similar provision to cover the diplomatic courier, and that had been done in paragraphs 2 and 3 of draft article 24. The main difference compared with the 1961 Vienna Convention, however, was that, under paragraph 1, the courier's exemption from personal examination was extended to examination "carried out at a distance by means of electronic or other mechanical devices". Scanning of air passengers and their personal effects by electronic devices had, of course, been introduced to combat hijacking, but the fact that diplomatic agents, irrespective of rank, submitted to such scanning in the general interests of safe air travel did not mean it was not an invasion of the immunity guaranteed under the 1961 Vienna Convention. In that connection, he recalled that at a recent meeting of the council of Ministers of OAU, some Ministers who had refused to undergo electronic scanning had not been admitted to the conference halls until the Minister of Foreign Affairs of the host country had intervened. The latter had subsequently apologized for the incident and had undertaken to ensure that there would be no recurrence.

34. Hence the problem was a real one and it affected not only the traveller, but also his personal baggage. As Mr. Ushakov had pointed out (1827th meeting), the bag could even be chained to the diplomatic courier's wrist and its contents might therefore be photographed by highly sophisticated electronic devices. For all those reasons, paragraph 1 of draft article 24, suitably amended to include a reference to the official nature of the effects carried by the diplomatic courier, should have a place in the draft.

35. With regard to draft article 25, the Special Rapporteur argued in his fourth report (A/CN.4/374 and Add.1-4, para. 168) that, in the case of exemption from taxation, the diplomatic courier should not be placed in a position that was inferior by comparison with members of a diplomatic mission. As worded, however, the draft article actually placed the courier in a superior position, since it incorporated only two of the six exceptions provided for under the 1961 Vienna Convention. In his

view, all six exceptions should apply to the diplomatic courier *mutatis mutandis*. In any event, the fact that the courier stayed in the territory of the receiving or transit State only for short periods, and also the nature of his mission, meant that there was no justification for exempting him from real taxes, dues or charges. Draft article 25 should therefore be amended accordingly.

36. The rationale for draft article 26, which was modelled on article 35 of the 1961 Vienna Convention, was convincingly stated in the fourth report (*ibid.*, para. 173, second sentence) and, since demands on the diplomatic courier in terms of personal and public services would seriously hamper the performance of the courier's duties, he fully endorsed the terms of that draft article.

37. While he had no difficulty with draft article 27, he believed that it could be omitted, since it was somewhat far-fetched to believe that any State would wish to subject to its social security laws anybody who was as much a bird of passage as was a diplomatic courier.

38. He saw no problem either with draft article 28, in which connection the Special Rapporteur had provided a very useful analysis of the evolution of the rules embodied in article 39, paragraphs 2 and 3, of the 1961 Vienna Convention (*ibid.*, para. 187). In particular, the saving clause with respect to acts performed by the courier in the exercise of his official functions was fully justified.

39. Draft article 29 gave rise to three questions: (a) who was entitled to waive immunity? (b) how was the waiver to be exercised? (c) what was the scope of the waiver? The answer to the first question was clear: since the immunities were granted for the benefit of the State and not the courier, and since they were an attribute of the sovereignty of the State, only the sending State could waive them. Moreover, the manner in which the waiver was communicated to the authorities of the receiving or transit State was a matter exclusively for the jurisdiction of the sending State, and he therefore saw no need for the second sentence of paragraph 1 of the draft article.

40. With regard to the second question, namely how the waiver was to be exercised, in practice and under the four codification conventions waiver normally had to be express; but there was also a generally recognized practice of implied waiver, which was reflected in paragraph 3 of draft article 29. Strictly speaking, therefore, paragraph 2 of the draft article should be amended accordingly.

41. As for the scope of the waiver, it seemed only right that, in the case of immunity from civil and administrative jurisdiction, a State should not be subjected to compulsory enforcement measures simply because it consented to the jurisdiction of another sovereign State. Waiver of immunity from the criminal jurisdiction of the receiving or transit State was an entirely different matter, however. For obvious reasons, it was very rare for a State to waive diplomatic immunity, even for criminal offences; but once it had decided to do so, of its own volition, there should not be any question as to the consequences, since the State concerned must already have decided that there was at least a *prima facie* case to

answer. He therefore had some difficulty in accepting the statement made by the Special Rapporteur to the effect that, even when immunity from criminal jurisdiction was waived, a judgment imposing arrest, detention or other measures against the inviolability of a member of a diplomatic mission could not be executed (*ibid.*, para. 205). He would appreciate it if the Special Rapporteur could shed some light on the matter.

42. Mr. MAHIOU said that the approach adopted in draft articles 24 to 29 bore witness to the Special Rapporteur's concern to strike a balance between the privileges and immunities necessary for freedom of communication, on the one hand, and the interests of the receiving and transit States, on the other. The divergent views regarding that balance—quantitative, in terms of the number of articles to be incorporated in the draft, and qualitative, in terms of the scope of the immunities and privileges to be granted—had led to minimalist, maximalist and intermediate positions among members. In some instances he was a minimalist, wishing to simplify or even delete certain provisions, and in others a maximalist, wishing to add yet more provisions. In any event, his own analysis of the subject-matter was based on the functional necessities of the courier's task and a comparison—by analogy, not by assimilation—with the other codification conventions. Plainly, the difficulties of the courier and the possible risks to the receiving and transit States should be neither exaggerated nor minimized.

43. Paragraph 1 of draft article 24 posed a problem, since it might well appear to go beyond the provisions of the codification conventions and accord excessive privileges, more particularly in the matter of exemption from examination carried out at a distance by means of electronic or mechanical devices. If the diplomatic courier and the diplomatic bag were two separate elements, the difficulty was seemingly easy to resolve: even if the courier himself were not exempt from personal examination, the diplomatic bag would not be subject to inspection and there would be no infringement of its confidential character. Yet it was sometimes difficult to establish such a distinction between the courier and the bag. The courier himself could well be subjected to personal examination, but ultra-modern electronic or mechanical devices in current use were capable of checking the contents of a bag and even determining them with great precision. Cases in which the courier and the bag could not be dissociated from each other called for further reflection and the Commission should give the Drafting Committee clear instructions in that regard. Paragraphs 2 and 3 of draft article 24 were acceptable with a few minor changes of form that could be taken up in the Drafting Committee.

44. In theory, draft article 25 gave rise to no difficulties, for the diplomatic courier should enjoy the same exemptions from dues and taxes as did diplomatic staff, including the administrative and technical staff of missions. From the practical standpoint, however, it was difficult to see how the courier's short stay in the receiving or transit State could make him liable to various taxes. Admittedly, some taxes were payable immediately, such as local taxes levied in the City and State of New York, for example on hotel rooms, and diplomatic agents, even

those passing through New York, were exempt from them. It would also be desirable for the courier to be exempt from taxes of that kind. On the other hand, draft article 25, as now worded, seemed to introduce a general absolute exemption for any diplomatic courier in any circumstances and in any country, even if he was a national of the receiving or transit State. The article must therefore specify that exemption from dues and taxes related only to activities performed by the courier in the exercise of his official functions, and not to taxes and dues payable in connection with activities performed outside those functions in the receiving or transit State.

45. The provision in draft article 26 served some purpose, but did not warrant a separate article and could well be inserted as an additional paragraph in draft article 25.

46. Draft article 27, on the other hand, was of questionable value. It was not readily apparent how the diplomatic courier, in view of his time-limited functions in the receiving or transit State, could be subjected to social security provisions. The draft article appeared to be excessively cautious and was hardly likely to be applied because no occasion to apply it would arise.

47. Draft article 28 was acceptable, but called for clarification. Paragraph 1 should indicate precisely when the courier's functions commenced, for they did not necessarily start when the courier entered the territory of the transit State or receiving State. A courier might well move on from the territory of the receiving State with another diplomatic bag and another member of the diplomatic, consular or special mission might be required to accompany a diplomatic bag to the sending State, in which case his functions commenced when he left the receiving or transit State, rather than when he entered it. Paragraph 2 was satisfactory, particularly in that it specified that the courier's privileges and immunities subsisted in connection with acts performed in the exercise of his official functions, even if, in an intervening period at some later time, he had to return to the receiving or transit State in a private capacity.

48. Paragraph 1 of draft article 29 could be simplified by retaining only the first sentence. The second sentence involved a matter that was covered by the internal law of the country concerned. The beneficiary of the immunity was the sending State, in the person of its diplomatic courier, and it was for the sending State to decide whether to waive the courier's immunity from jurisdiction and also to decide which person was empowered to do so. As to paragraph 2, some members had suggested, on the basis of the 1963 Vienna Convention on Consular Relations, that the waiver must not only be express, but also be communicated in writing. However, paragraph 2 was taken word for word from the corresponding provisions in the other codification conventions and posed no problems. Hence it could be retained in its present form.

49. Paragraphs 3 and 4 had their place in the draft article, but he wondered whether, in the case of paragraph 5, waiver should be confined to a civil suit and should preclude criminal proceedings. The sending State, in view of its sovereign rights, could obviously waive jurisdictional immunity and could undoubtedly waive immunity not

only from civil, but also from criminal jurisdiction. Indeed, it was for the sending State to decide on the actual type and scope of the waiver. Yet, by analogy with the codification conventions, particularly the 1975 Vienna Convention on the Representation of States, it was perhaps wise to limit the waiver of jurisdictional immunity to civil suits. The important thing was that, when the sending State decided that proceedings should not be taken against its diplomatic courier, it should none the less compensate any persons affected by the acts or conduct of the courier. It would be remembered that the idea of civil damages existed in criminal proceedings, since any criminal proceedings involved a civil suit when damages were being claimed. All in all, it might be best to maintain paragraph 5 in its present form.

The meeting rose at 1 p.m.

1829th MEETING

Monday, 28 May 1984, at 3 p.m.

Chairman: Mr. Sompong SUCHARITKUL

Present: Chief Akinjide, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, 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 24 (Exemption from personal examination, customs duties and inspection)

ARTICLE 25 (Exemption from dues and taxes)

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 26 (Exemption from personal and public services)

ARTICLE 27 (Exemption from social security provisions)

ARTICLE 28 (Duration of privileges and immunities) *and*

ARTICLE 29 (Waiver of immunity)⁵ (concluded)

1. Mr. JAGOTA said that, in codifying and developing the law on the topic under study, the Commission should emphasize the functional rather than the doctrinal aspects. In particular, it should bear in mind that the prime object was safe and speedy communication between sending States and their missions, which was of the utmost importance for the conduct of international relations.

2. Referring to draft article 24, he noted that the main point at issue was the provision in paragraph 1 that the diplomatic courier should be "exempt from personal examination, including examination carried out at a distance by means of electronic or other mechanical devices". None of the four codification conventions contained a similar provision and views on the need for it differed. In view of that difference, he wished to propose a modified form of wording which he trusted would resolve the difficulty. He proposed that the phrase "including examination carried out at a distance by means of electronic or other mechanical devices" should be deleted, since that part of the provision could be taken care of by State practice and the principle of reciprocity. The first part of the provision could then be justified on the grounds of functional necessity and on the ground that the diplomatic courier would be carrying a diplomatic bag of a different kind from those entrusted to the captains of aircraft or masters of ships. On that basis, the paragraph could read: "The diplomatic courier, when accompanied by a diplomatic bag, shall be exempt from personal examination in the receiving State and the transit State."

3. The problem raised by draft article 25 was clearly one of drafting. The Special Rapporteur had made it quite clear in his fourth report (A/CN.4/374 and Add.1-4, para. 167) that it was not intended that the diplomatic courier should be exempt from any taxes on private income arising from real estate in the receiving State or transit State. There was, however, a *lacuna* in the provision: it made no reference to the receiving or transit State or, indeed, to whether the exemption would apply in the sending State. He therefore proposed that the reference to "personal or real" taxes be deleted, so as to allow for a broader interpretation; that a reference to the receiving and transit States be added; and that the exemption be related to the services rendered by the diplomatic courier for the sending State. The first part of the article would then read: "The diplomatic courier shall, in the receiving State and the transit State, be exempt from taxes, dues and charges, national, regional and municipal, in respect of services rendered for the sending State, except for indirect taxes...". Alternatively, if it was thought necessary to specify the exception to the exemption from personal or real taxes, the following phrase could

⁵ For the texts, see 1826th meeting, para. 1.