

Document:-
A/CN.4/SR.1863

Summary record of the 1863rd 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

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

determine the liability of the courier in the light of the circumstances, which would be discussed in the commentary.

101. The relationship between the first and second sentences of paragraph 2 had also been the subject of disagreement in the Drafting Committee. The second sentence had been drafted so as not to prejudge, one way or the other, the various possible interpretations of the relationship. What the Committee had had mainly in mind was the need to protect the victim of a traffic accident who was not at fault, and his right to a remedy.

102. Paragraph 3 of article 23 had been slightly amended to bring the text into line with that of the corresponding provisions of the conventions on diplomatic law. Some members of the Committee had considered the paragraph unnecessary, because it was based on what they considered to be the mistaken theory that, in practice, the courier would be subject to the civil and administrative jurisdiction of the receiving State or the transit State. They had also expressed reservations about the inclusion in the text of a reference to the inviolability of the courier's temporary accommodation.

103. Paragraph 4, which appeared between square brackets, had been left in the form proposed by the Special Rapporteur, since the Committee had been unable to reach agreement on it. Some members of the Committee had opposed that paragraph because it dealt with a purely hypothetical case, was too rigidly drafted and, by implication, contradicted the second sentence of paragraph 2, according to which the courier was not immune from civil and administrative jurisdiction in the case of an accident of the kind referred to in that provision. Other members of the Committee, however, had considered the provision useful, appropriate and fully justified, having regard to the provisions of the conventions on diplomatic law. Lastly, some members thought that paragraph 4 would be more widely acceptable if it was confined, like paragraph 2, to acts connected with the performance of the courier's functions. As in the case of paragraph 1, it was for the Commission to decide what was to be done about paragraph 4.

104. The new paragraph 5 reproduced paragraph 6 of article 23 as submitted by the Special Rapporteur. The Drafting Committee had decided that, in view of the special situation of the courier, it would be wiser to model the text, except in the Spanish version, on article 60, paragraph 5, of the 1975 Vienna Convention, and to say "Any immunity ... does not exempt". Although paragraph 5 had been considered unnecessary by some members, the Drafting Committee had included it in article 23 for the sake of harmony with the corresponding provisions of the conventions on diplomatic law and in order to avoid the argument *a contrario*.

105. Lastly, for the reasons already indicated in connection with individual paragraphs, some members of the Committee had considered that article 23 as a whole was unnecessary and had no place in the draft. He suggested that the Commission should examine article 23 paragraph by paragraph, possibly beginning with the most controversial paragraphs, namely paragraphs 1 and 4.

The meeting rose at 6 p.m.

1863rd MEETING

Tuesday, 17 July 1984, at 10.05 a.m.

Chairman: Mr. Sompong SUCHARITKUL

Present: Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Jacovides, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/L.378, ILC (XXXVI)/Conf. Room Doc.3)

[Agenda item 4]

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

ARTICLE 23 [18] (Immunity from jurisdiction) (*continued*)

1. The CHAIRMAN invited the Commission to consider article 23 [18]¹ paragraph by paragraph.

Paragraph 1

2. Mr. OGISO said that the idea of according immunity from criminal jurisdiction to the diplomatic courier had no support in national legislation, firmly established State practice or judicial decisions. The one isolated case before a Hong Kong court, referred to in the Special Rapporteur's fourth report (A/CN.4/374 and Add.1-4, para. 127), seemed to indicate that immunity of the diplomatic courier from criminal jurisdiction was not an established custom of international law.

3. At the Commission's 1783rd meeting, the Special Rapporteur had said that his approach in drafting article 23 had been a "strictly functional" one.² Given that, under draft article 20, the diplomatic courier was not to be liable to any form of arrest or detention, the functional necessity of providing for him to have immunity from criminal jurisdiction seemed doubtful. Accordingly he was unable to agree to the argument by the Special Rapporteur that at least the same privileges and immunities should be accorded to the diplomatic courier as were accorded to the administrative and technical staff of a diplomatic mission.

4. His position was borne out by two facts related by the Special Rapporteur in his fourth report (*ibid.*, para. 50): first, an amendment introduced at the United Nations Conference on Diplomatic Intercourse and Immunities, with a view to providing that the diplomatic courier should enjoy personal inviolability to the same

¹ For the text, see 1862nd meeting, para. 93.

² *Yearbook ... 1983*, vol. I, p. 166, para. 33.

extent as a member of the administrative and technical staff of a diplomatic mission, had not been adopted by the Committee of the Whole; and secondly, an amendment introduced by Switzerland and France, to the effect that the diplomatic courier should be protected by the receiving State only in the performance of his functions, was reflected in paragraph 5 of article 27 of the 1961 Vienna Convention on Diplomatic Relations.

5. Immunity from criminal jurisdiction could have serious implications when the crime committed was of a serious nature, such as drug trafficking or smuggling of arms and explosives for use by terrorists. To introduce a provision, over and above that contained in article 20, giving the diplomatic courier immunity from criminal jurisdiction might have the effect of reducing the deterrents against the kind of crimes that had been witnessed recently. If arms were smuggled into a country for the purpose of assassinating important persons in the receiving State or killing innocent civilians, and if a diplomatic courier was suspected in that connection, it would hardly be acceptable to say that the receiving State could do nothing about it.

6. Paragraph 1 of article 23 could constitute an obstacle for certain countries, including Japan, when it came to adopting the draft convention. In general, any exception to the criminal law had to be provided for under the relevant criminal code; failing that, the exception would have to be interpreted as overriding an established customary rule of international law. In the present case there was no such established rule of international law, and it would be difficult to find judicial authority for holding that it was part of established law. For all those reasons, he was strongly opposed to the inclusion of paragraph 1 of article 23.

7. Sir Ian SINCLAIR said that there was a clear division in the Commission on what was functionally necessary in paragraph 1 of article 23. While the last phrase of article 20 stated that the authorities in the receiving State could not arrest or detain a diplomatic courier and so prevent him from discharging his functions, it did not necessarily follow that freedom from arrest or detention should also involve freedom from the criminal jurisdiction of the receiving or transit State. Much had been made of the equation between the diplomatic courier and the administrative and technical staff of a diplomatic mission, but they really could not be equated because of their differing functions and because administrative and technical staff were resident in the receiving State for a considerable period of time.

8. He had already referred (1845th meeting) to the fact that in the United Kingdom there had been 546 cases over the previous 10 years in which persons enjoying diplomatic privileges and immunities were strongly suspected of having committed serious crimes. That was an indication of the scale of the abuses of immunity. The Special Rapporteur had pointed out that none of those 546 cases had involved a diplomatic courier; but, if so, it was an indication that precisely because the diplomatic courier was present in the receiving State for such a short time there was very little opportunity for him to engage in activities of such a nature.

9. The whole question revolved around the acceptability of what the Commission was endeavouring to do, in which connection paragraph 1 would be highly significant. The United Kingdom Government would have little prospect of gaining the necessary parliamentary approval for the draft articles if it were included.

10. Lastly, while he attached the utmost importance to consensus in the Commission, he believed that, in view of the clear division among its members, it was confronted with one of the rare occasions when it would have to decide the matter by a vote.

11. Mr. NI, paying tribute to the Chairman of the Drafting Committee for his work, said that the diplomatic courier, though not a senior official, had an important function to perform, for which he should be provided with the appropriate protection and facilities. The granting of immunity from criminal jurisdiction would not mean that he was beyond the reach of the law. It would, however, be anomalous if members of the administrative and technical staff of a diplomatic mission, and also members of their families, enjoyed immunity from criminal jurisdiction while the diplomatic courier, who had to travel all over the world and carry the diplomatic bag with its important and often secret contents, did not.

12. The numerous instances of abuses, including the recent somewhat bizarre violations of diplomatic privileges and immunities, were to be deplored and the resentment which they aroused was perfectly understandable. The desire to do something about them was entirely legitimate, and the extent of diplomatic privileges and immunities could be considered in a broader context and at the government level in the appropriate forums. However, in the absence of information to show that most crimes protected by diplomatic immunity were committed by diplomatic couriers, it would be inadvisable to seize on the immunities granted to couriers as the source of all possible abuses and to divest the courier of the immunity generally granted in accordance with most of the codification conventions. Possibly more information was needed, but, for the time being, he would have no objection to the removal of the brackets around paragraph 1 of article 23.

13. Mr. USHAKOV said that, in his view, the arguments put forward against paragraph 1 were not justified. Under article 37 of the Vienna Convention on Diplomatic Relations and the relevant provisions of other conventions, the families of the administrative and technical staff of a mission enjoyed immunity from criminal jurisdiction as well as the members themselves, although they did not perform any official function. They had been given immunity from criminal jurisdiction so that they could not be used to put pressure on the administrative and technical staff. Human nature being what it was, no provision could guarantee that such immunity would not be abused, but it should not be concluded that, for example, all ministers were wrongdoers just because one minister committed abuses. He therefore considered paragraph 1 and article 23 as a whole to be necessary.

14. Mr. McCAFFREY said that, in his view, paragraph 1 of article 23 was neither desirable nor necessary. There was little support for it in State practice, and the one case that bore on the article had gone the other way. Furthermore, given the provisions of article 20, which was very similar to paragraph 5 of article 27 of the Vienna Convention on Diplomatic Relations, paragraph 1 of draft article 23 was largely superfluous: in view of the nature of the diplomatic courier's functions, it was difficult to envisage a situation in which immunity from criminal jurisdiction would be necessary in addition to immunity from arrest and detention. Immunity from criminal jurisdiction was therefore not functionally necessary.

15. The situation of a diplomatic courier was not analogous to that of the administrative and technical staff of a diplomatic mission, not only because of the latter's length of stay in the receiving State, but also because pressure could be exerted on them through their families. In any event, the courier was seldom privy to confidential information unless he was an *ad hoc* courier, in which case he enjoyed the immunities conferred upon him by virtue of his diplomatic status.

16. The legislative initiatives that were being introduced in some countries, including the United States of America, with a view to ascertaining whether diplomatic privileges and immunities should be reduced were a response to the abuses witnessed in recent months. In the light of the current public mood about diplomatic immunities in general, the Commission should be on very sure ground before it extended or appeared to extend existing diplomatic immunities. In his view, paragraph 1 of article 23 would do precisely that, since there was no basis for any such provision in any of the codification conventions. If it were none the less decided to introduce such a measure of immunity, it would also be necessary to make an exception in the case of grave crimes along the lines of article 41 of the Vienna Convention on Consular Relations.

17. Lastly, the Commission owed it to the General Assembly to report its conclusions on items of critical importance with great care and accuracy. In the present case, that would be well nigh impossible unless a roll of the positions of the various members of the Commission were taken, and he therefore supported Sir Ian Sinclair's suggestion that in the exceptional circumstances with which the Commission was faced it would perhaps be necessary to reflect the positions of members by a vote.

18. Chief AKINJIDE said that, in determining its stand on paragraph 1 of article 23, the Commission should bear in mind that its terms of reference were to promote the progressive development of international law. Mention had been made of earlier conventions, with reference to the technical and administrative staff of a diplomatic mission, but some of those conventions dated back 20 years and had been drawn up in the light of the circumstances that had prevailed then. He doubted whether they would now enjoy the same support as they had had then. If the Commission wished to promote the progressive development of international law, it must

take account not only of those circumstances, but also of the practice of States.

19. He wondered why the matter had not been covered in any of the previous conventions, although it might, of course, have been thought that the problem of possible abuses by the diplomatic courier should be left to bilateral arrangements or State practice. Normally, diplomats were assumed to abide by the law of the host country, and if a person who enjoyed diplomatic immunity deliberately broke the law of the receiving or transit State, he was declared *persona non grata* and sent back to his own country. While such practice might have been adequate in earlier times, he had serious doubts whether nowadays such a person ought simply to be declared *persona non grata* and in effect allowed to get off scot-free. That attitude would simply encourage crime.

20. In arriving at its decisions, the Commission should also heed world opinion. Those who called for the inclusion of paragraph 1 of article 23 in the draft should bear in mind the position of those countries whose laws had been deliberately and flagrantly broken. He therefore proposed that paragraph 1 should be deleted or, if it were retained, that States should be able, at their discretion, to bring criminal proceedings against any diplomatic courier who deliberately broke the law of the land.

21. Mr. BALANDA said that, when members of the Commission expressed the fear that there would be abuses, they were simply recognizing the sad state of international society today. He had already had occasion (1845th meeting) to deplore the decline in morality among both individuals and States, which no longer had as much credibility as before. While recognizing the impossibility of avoiding abuses, however, he was in favour of retaining paragraph 1 of article 23.

22. First of all, the paragraph was functional in nature. Throughout the draft articles, the Commission had taken precisely such a functional approach. In the present case, the diplomatic courier's status as an official agent meant that he should be given full protection. In addition, even though the diplomatic courier was not to be equated with the administrative and technical staff of missions, the fact that the families of such staff enjoyed immunity from criminal jurisdiction was an argument in favour of granting the same immunity to the diplomatic courier.

23. Secondly, there was a question of logic. Paragraph 1 of article 31 of the Convention on Special Missions was practically identical with paragraph 1 of the article under consideration. A person undertaking a special mission for a very short period was in a situation similar to that of the diplomatic courier, and such a person enjoyed immunity from criminal jurisdiction. The Commission ought to observe a certain logic in its work of codification. Immunity from jurisdiction could hardly be accepted in one case and refused in a similar one. What was more, if, in article 20, the Commission was going to make the diplomatic courier immune from arrest and detention—measures the host State would have to take before it could exercise its jurisdiction—why not recognize immunity from criminal jurisdiction at the next stage in the procedure?

24. Mr. LACLETA MUÑOZ said that he was in favour of retaining paragraph 1 of article 23 for very simple reasons, and above all because of article 20. If the diplomatic courier was not to be liable to arrest or detention, what was the point of making him subject to the criminal jurisdiction of the host State? When there could be no question of enforcing a rule, it was better to grant the privilege of exemption from that rule. The inviolability recognized in article 20 gave rise to many privileges, but should above all result in immunity from criminal jurisdiction. What would be the consequences of retaining paragraph 1 rather than deleting it? The only difference would be that a diplomatic courier accused of having committed an act for which he could be brought before the local courts would not be able to return either privately or as a diplomatic courier to the host State, which could refuse him admission. The difference was thus not so important. However, to avoid the need for a vote, he would suggest that immunity from criminal jurisdiction should be limited to acts performed by the diplomatic courier in the exercise of his functions, in the strict sense of the word. Thus, once the diplomatic courier had delivered the diplomatic bag to its destination, he would no longer have immunity from criminal jurisdiction.

25. Mr. EL RASHEED MOHAMED AHMED said that it was generally agreed that immunity should be accorded to the diplomatic courier to enable him to carry out his functions. Sometimes, however, a courier might be a national of the receiving State, and in such a case he very much doubted whether it would be logical to accord immunity simply because he was carrying the diplomatic bag of another State. He had no objection to following the functional immunity approach, but he considered that any extension of the personal immunity of the diplomatic courier from criminal jurisdiction would be unpopular and hence unacceptable.

26. Mr. KOROMA said that, while the events that had taken place in London recently were abhorrent to all, it was important not to be swayed by mass feeling. To contend that the diplomatic bag should be done away with because it was abused was an emotional argument, not a reasoned one. The granting of immunity from criminal jurisdiction was not for the greater glory of the courier but to enable him to perform his functions. The number of offences committed by diplomatic couriers over the years was far fewer than the number of violations of diplomatic immunity that had recently come to light. If the immunity of the diplomatic courier was restricted, he would be prevented from performing his duties efficiently, and that was the only reason for retaining paragraph 1 of article 23. It was a matter of functional necessity. It would be unfortunate if the Commission were forced into a vote on such an important matter, particularly since, in his view, the immunity of the diplomatic courier from criminal jurisdiction formed part of customary law.

27. Mr. FRANCIS said that he would speak only on the procedural question. He felt that it would be wrong to force a vote on the issue of paragraph 1 at the present stage of first reading. He would urge the Commission to

allow itself more time and to give the Sixth Committee of the General Assembly an opportunity to express its views. There were precedents for the provisional adoption by the Commission of texts in square brackets and their submission in that form to the General Assembly. Nothing would be lost by keeping paragraph 1 of article 23 between square brackets for the time being.

28. The CHAIRMAN said that he understood Mr. Francis to have submitted a motion for deferment of the decision on paragraph 1.

29. Mr. THIAM warned members of the Commission against the danger of being too much swayed by recent events and losing their objectivity in the process. He supported the suggestion by Mr. Francis. While a vote did represent a possible way out when positions seemed irreconcilable, it had its drawbacks. There was nothing to rule out the possibility of ultimately arriving at some area of agreement. Furthermore, a vote meant taking a definite position, and often entailed reservations, which were always unfortunate. Every effort should therefore be made to find a solution, particularly since the Commission was giving the draft articles their first reading, and since the Sixth Committee's consideration of legal questions with political implications could place those questions in a new light. In the circumstances, he thought it would be premature to state his own view on the provision under consideration.

30. Mr. STAVROPOULOS asked the Special Rapporteur whether the purpose of paragraph 1 of article 23 was to protect the diplomatic courier or the diplomatic bag.

31. Mr. MAHIU was not surprised that article 23 was giving rise to lengthy discussion in the Commission, considering that the Drafting Committee had devoted six meetings to it out of a total of 19. It might seem that members of the Commission would have to divide for or against the principle stated in paragraph 1 of that article, but there was in fact a whole background that had to be taken into account. Whether it was a matter, as Mr. Stavropoulos had said, of distinguishing between protection of the diplomatic bag and protection of the diplomatic courier, or, as Mr. McCaffrey had suggested, of making an exception along the lines of the Vienna Convention on Consular Relations, there seemed to be more to the situation than the arguments for or against the principle in paragraph 1 might lead one to believe. Personally, he was in favour of the paragraph, but doubted whether it should be put to the vote at the present stage, particularly since recent events might lead members of the Commission to be too categorical in their positions. He therefore supported the views put forward by Mr. Francis and Mr. Thiam.

32. Mr. RAZAFINDRALAMBO noted that all the arguments advanced during the debate had already been put forward in the Drafting Committee, and even in the Commission before article 23 had been referred to the Committee. The views expressed by third world members had been completely objective: although it was mainly the great Powers that made use of diplomatic couriers, some of those members had endorsed the principle stated

in paragraph 1 of article 23. As to the arguments put forward in favour of that principle, it was worth noting that the debate had been more concerned with the abuses that might be committed by the diplomatic courier than with those which the police or prosecuting authorities in the receiving State or the transit State might commit. Plainly, the principle forbidding the arrest or detention of a diplomatic courier stated in article 20 did not prevent the competent authorities of the receiving or transit State from bringing proceedings, particularly in systems where prosecution and the exercise of jurisdiction were clearly separate. Hence it could not be concluded from that principle that immunity from criminal jurisdiction was of no importance. Although he was in favour of such immunity, he had adopted a compromise position both in plenary (1825th meeting) and in the Drafting Committee: he could agree to the principle stated in paragraph 1 of article 23 being qualified so that it applied only to acts committed by the diplomatic courier in the exercise of his functions. As Mr. Francis had proposed, the Commission could refer the problem raised by paragraph 1 of article 23 to the Sixth Committee.

33. Mr. DÍAZ GONZÁLEZ said the debate showed that the Commission ought not to refer draft articles to the Drafting Committee before deciding on their content. As had been the case with other articles, article 23 was now giving rise to a substantive debate for the third time. The whole problem lay in the fact that the Commission was trying to make the diplomatic courier a super-ambassador who would be better protected and enjoy greater privileges and immunities than a permanent diplomatic agent. As Mr. Stavropoulos had pointed out, what really had to be protected was the diplomatic bag and free communication between the sending and receiving States. The fact that the diplomatic bag was being transported by this or that vehicle—and the diplomatic courier was in the end a means of transport like any other—did not entitle that vehicle to privileges and immunities. The diplomatic courier, moreover, was only relatively comparable to members of the administrative and technical staff of a mission, since he did not normally travel with his family. He was not comparable to a permanent agent either, because his functions were by definition temporary. Any analogy with a special mission was also inapplicable because the dispatch of such a mission by a State implied the consent of the receiving State. The authorities of the receiving State thus knew the composition of a special mission before it arrived in their territory, whereas they did not know the identity of a diplomatic courier until he arrived at the frontier.

34. With regard to the idea of a vote, it was a procedure that should be adopted only as a last resort. Mr. Francis's proposal therefore seemed to him logical and acceptable, on the understanding that the Commission could not refer article 23 to the Sixth Committee without giving some explanations on the profound differences between its members. A compromise was not out of the question, but would be hard to achieve.

35. Mr. QUENTIN-BAXTER said that, if paragraph 1 were to be put to the vote, he would have to vote against

it, for the reasons already given by other speakers. He would do so, however, without any satisfaction at all, since that paragraph constituted only one element among many in a draft which the Commission was striving to get into balance. If paragraph 1 were to become the subject of one of the Commission's rare votes, that would give it disproportionate prominence.

36. He had great sympathy for Mr. Francis's motives in endeavouring to find a way out of the present difficulty but felt that the solution proposed by him was perhaps not the best one. In any case, it would be very curious for the Commission to take a vote on a paragraph of article 23 before having discussed all the parts of that article. He could not recall any occasion—either in the Commission on Human Rights or in the Third or Sixth Committees of the General Assembly—in which that had been done. Of course, it was quite common for a text to be voted on paragraph by paragraph, but the Commission should discuss the rest of the article first, in order to see how the various members stood in relation to the whole article. That would not prejudice in any way the right to vote on each paragraph separately.

37. Perhaps, after a full discussion, the Commission might decide to hold back article 23 rather than send it to the General Assembly with a qualified blessing. There were many precedents for sending articles to the General Assembly out of sequence, and it had also become a normal practice for the Commission to send to the General Assembly drafts on which no decision had been taken at all. Nothing would be lost by adopting that course. The Commission's report would give full particulars of the debate for the benefit of the General Assembly and the Sixth Committee. Moreover, since consideration of the draft was not to be completed at the present session, no loss of time was involved.

38. Mr. REUTER said that he would not oppose any of the suggestions put forward, even the idea of a vote, which would at least have the advantage of yielding a clear result. If he felt obliged to state his position, it was because those members who had been against the idea of a vote had stated theirs, and also because members of the Drafting Committee had been asked to give their views. Personally, he was against paragraph 1, considering it pointless. He had never taken the view that article 20 referred only to a preliminary phase of the proceedings or any other action. He interpreted it extensively.

39. If everyone came out in favour of Mr. Lacleta Muñoz's suggestion that the diplomatic courier's immunity from criminal jurisdiction should be limited to acts performed in the strict exercise of his functions, he would not oppose it, although the distinction between such acts and other acts performed by the diplomatic courier was scarcely valid, inasmuch as all acts not concerned with protecting the diplomatic bag from outside interference and delivering it to its destination would come in the latter category. When all was said and done, such a compromise solution would be ambiguous.

40. Logic had been invoked as an argument in support of paragraph 1 of article 23. The basis for that logic had been well put by Mr. Díaz González: although the

diplomatic courier did not have the status of a diplomat, he was treated as equivalent. From that standpoint, paragraph 1 of article 23 was obviously logical. But there was another logic, deriving from the existence of four conventions on diplomatic law, two of which had come into force. Some speakers had even said that it was because abuses could not be prevented that the privileges and immunities should be extended, an argument which he could not accept. He could agree to a compromise, but hoped the day would never come when it would be proposed to extend immunity from criminal jurisdiction to the diplomatic courier's family, on the grounds that they might be subjected to pressure.

41. From the outset, he had argued in favour of texts which took into account the difference, first, between the receiving State and the transit State and, secondly, between the diplomatic bag, regarded as the essential element, and the diplomatic courier, regarded as subsidiary. The Commission had preferred another logic, to which he would bow, but which now prevented him from agreeing to paragraph 1 of article 23.

42. Mr. MALEK said that he had been wrong on an earlier occasion to support the idea of a vote. He now realized that it would be very difficult for him to take a position on the present issue. He therefore supported Mr. Francis's proposal.

43. Chief AKINJIDE opposed the idea of passing on the problem to the Sixth Committee of the General Assembly, without any conclusion having been reached by the Commission. The outcome could well be to destroy all the valuable work done by the Special Rapporteur on the present topic, simply because of the controversy over paragraph 1 of article 23. For his part, he was convinced that, if paragraph 1 of article 23 were included in the draft, the effect would be to deter a great many States from ratifying the final instrument. For that reason, he favoured the views expressed by Mr. Reuter and Mr. Quentin-Baxter, which would have the effect of setting the matter aside for the time being, thereby providing an opportunity to arrive at a compromise.

44. Mr. RIPHAGEN said that, if a vote was taken on paragraph 1 of article 23, he would have to vote against it. He believed, however, that there was still room for compromise. The best course would therefore be to refer article 23 back to the Drafting Committee, in the hope that it might come up with a solution by the next session.

45. Sir Ian SINCLAIR said that paragraph 1 was not the only controversial element in article 23. Paragraph 4 had also had to be placed between square brackets, and several members had expressed reservations on parts of paragraphs 2, 3 and 5 as well. Some members had even suggested the deletion of article 23 altogether. In the circumstances, he suggested that the Commission should not at the present stage adopt any part of article 23, but should set aside the whole of the article. The text would be reproduced in the Commission's report with the statement that it would examine it again in 1985 in the light of the discussion in the Sixth Committee. If that course of action were adopted, the article would not necessarily go back to the Drafting Committee.

46. Mr. McCAFFREY joined those speakers who had supported the idea of exercising some restraint with regard to paragraph 1, or indeed the whole of article 23, so as to avoid a vote if possible. Action on the article should be postponed because it was not ripe even for provisional adoption. In the mean time, the Special Rapporteur might well put forward a compromise which would result in a generally acceptable text. In conclusion, he supported the suggestion to delay a decision on the whole of article 23, on the understanding that the debate would be fully recorded in the Commission's report to the General Assembly.

47. Mr. STAVROPOULOS said it would not serve any useful purpose to refer article 23 to the Sixth Committee. The result would only be a report to the effect that a number of delegations had supported paragraph 1 and that a number of other delegations had opposed it; that customary formula would not give the Commission much guidance. He favoured setting aside article 23 until the next session.

48. The CHAIRMAN, speaking as a member of the Commission, said that the Commission should perhaps examine whether there was any likelihood of the diplomatic courier being defined as a diplomatic agent. It was worth noting that, in a matter of civil and administrative jurisdiction, paragraph 2 of article 23 gave only functional immunity to the diplomatic courier. No immunity *ratione personae* existed in those matters. With regard to criminal jurisdiction, however, paragraph 1 of the article purported to give the courier an immunity *ratione personae*. Lastly, there was an important difference between a diplomatic courier and a member of a diplomatic mission. The courier was not appointed for a fixed period of time, like a member of a mission. He was constantly entering a particular country and leaving it, completing one mission at a time.

The meeting rose at 1.05 p.m.

1864th MEETING

Wednesday, 18 July 1984, at 10 a.m.

Chairman: Mr. Sompong SUCHARITKUL

Present: Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (concluded)
(A/CN.4/L.378, ILC (XXXVI)/Conf. Room Doc.3)

[Agenda item 4]