

Document:-  
**A/CN.4/SR.1904**

**Summary record of the 1904th 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:-  
**1985, vol. I**

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example to all those who worked in the same areas and provided proof of the fruitful co-operation possible between widely differing legal systems. The Commission plainly benefited, directly and indirectly, from the work of AALCC, and he therefore hoped that the links between the two bodies would grow even stronger.

26. Mr. BARBOZA, speaking on behalf of the Latin American members of the Commission, said that Mr. Sen's outline of AALCC activities had afforded the Commission a welcome opportunity to grasp the full breadth of the Committee's task, to realize that the links with the Committee already dated back quite a number of years and to appreciate the affinity between the Committee's work and that of the Commission. Mr. Sen had also given a good insight into the variety of ways and means of action available to bodies engaged in the progressive development of international law, as advisers to Governments in a particular region and to delegations participating in United Nations conferences, as forums for consultation on matters at regional and inter-regional levels and as authors of studies on topics such as economic co-operation and the law of the sea, while at the same time co-operating with the Sixth Committee of the General Assembly in the examination of drafts submitted by the Commission. The latter aspect of the Committee's endeavours also enabled the Commission to move ahead with greater assurance in the elaboration of drafts ultimately intended for acceptance and ratification by States.

27. Mr. THIAM said that the statements by Mr. Sen were always very interesting and fostered a kind of dialogue between AALCC and the Commission. Every year, the Secretary-General of AALCC contributed new thoughts that encouraged the Commission to ponder further on the progressive development of international law and, in return, took away new considerations regarding universal codification. In that way, the relations between the Committee and the Commission were strengthened. It was to be hoped that the Chairman would be able to represent the Commission at the next session of AALCC.

28. Mr. RIPHAGEN, speaking on behalf of the Western European members of the Commission, thanked Mr. Sen for his report on the activities of AALCC. He had always listened to Mr. Sen's statements with great pleasure and appreciated the high intellectual quality and usefulness of the various AALCC publications. He expressed all good wishes for the Committee's continued success in its work.

*The meeting rose at 1.10 p.m.*

## 1904th MEETING

*Monday, 17 June 1985, at 3.05 p.m.*

*Chairman: Mr. Satya Pal JAGOTA*

*Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed,*

*Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.*

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/382,<sup>1</sup> A/CN.4/390,<sup>2</sup> A/CN.4/L.382, sect. C, ILC(XXXVII)/Conf.Room Doc.2 and Add.1)**

[Agenda item 5]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPporteur<sup>3</sup> (*continued*)

- ARTICLE 23 (Immunity from jurisdiction)
- ARTICLE 36 (Inviolability of the diplomatic bag)
- ARTICLE 37 (Exemption from customs inspection, customs duties and all dues and taxes)
- ARTICLE 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag)
- ARTICLE 40 (Obligations of the transit State in case of *force majeure* or fortuitous event)
- ARTICLE 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations)
- ARTICLE 42 (Relation of the present articles to other conventions and international agreements) *and*
- ARTICLE 43 (Declaration of optional exceptions to applicability in regard to designated types of couriers and bags)<sup>4</sup> (*continued*)

1. The CHAIRMAN invited the Special Rapporteur to continue his introduction of the draft articles contained in his sixth report (A/CN.4/390), and specifically of draft articles 37 to 43.

2. Mr. YANKOV (Special Rapporteur) said that the revised text he was proposing for article 37 was an amalgamation of draft article 37 (Exemption from customs and other inspections) and draft article 38 (Exemption from customs duties and all dues and taxes) as originally submitted. The first part of the

<sup>1</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1985*, vol. II (Part One).

<sup>3</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

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

Article 8 (revised) and articles 9 to 17, 19 and 20, and commentaries thereto, provisionally adopted by the Commission at its thirty-sixth session: *Yearbook ... 1984*, vol. II (Part Two), pp. 45 *et seq.*

Articles 24 to 35, referred to the Drafting Committee at the Commission's thirty-sixth session: *ibid.*, pp. 21 *et seq.*, footnotes 84 to 90 and 93 to 97.

Article 23 and articles 36 to 42, submitted at the Commission's thirty-fifth and thirty-sixth sessions: *ibid.*, pp. 21 and 25-27, footnotes 82 and 98 to 104.

<sup>4</sup> For the texts, see 1903rd meeting, para. 1.

article, namely the exemption of the diplomatic bag from customs and other inspections, was not provided for in any of the four conventions codifying diplomatic and consular law,<sup>5</sup> but had long been recognized as a rule of customary international law. It was not only to be inferred from the general principle of the inviolability of the diplomatic bag, but was also supported by State practice, by the *travaux préparatoires* relating to article 27 of the 1961 Vienna Convention on Diplomatic Relations and by a number of bilateral instruments. The rule encompassed both exemption from customs inspection and exemption from inspection by public health, veterinary and plant authorities, and it therefore deserved to be recognized for its practical significance.

3. It had been suggested that, in view of the provisions on the inviolability of diplomatic couriers and bags, the whole of article 37 was redundant. It should none the less be borne in mind that customs and other border authorities acted not on a logical basis, but solely in accordance with specific regulations, which were usually founded on international rules. Hence the provision in question was necessary and should be retained in the article. It might also furnish the justification for national laws and regulations, since practice had shown that, following the adoption of the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, a number of countries had enacted legislation along those lines. As to the scope of inspection, he considered that, in the light of State practice, the exemption should not be confined to customs inspections *stricto sensu* but should extend to other forms of inspection carried out upon the arrival or departure of the diplomatic bag. In that connection, it would be noted that, under regulations introduced by the Government of Argentina, customs authorities were required to give clearance to closed and sealed packages containing diplomatic correspondence brought in by a diplomatic courier. Similar procedures had been adopted by many other countries, including Austria, Finland, Mexico, Norway and the United Kingdom.

4. The second provision of draft article 37, the exemption of the diplomatic bag from customs duties and/or other dues and taxes, was based on the sovereign equality of States and the immunities accorded to official State agents. The point had been made that there was no need for an express rule, since by definition the diplomatic bag should not contain articles that were subject to dues or taxes. There again, he considered that such a rule would provide the legal foundation for national rules and regulations and for bilateral agreements. The only exception, as stated in the provision itself, related to "charges for storage, cartage and other specific services rendered", which in general had to be paid.

5. The main purpose of draft article 39 was to protect the diplomatic bag when, in exceptional cir-

cumstances, it was no longer in the custody or control of a person authorized by the sending State. The article, which stipulated that in such instances the receiving State or transit State was required to take protective measures, was designed to cover the possibility of the functions of the diplomatic courier being terminated before the diplomatic bag had been delivered to its final destination, as a result, for example, of the incapacitation, illness or death of the courier. The same provision would apply to a diplomatic bag entrusted to the captain of a commercial aircraft or the master of a merchant ship. The article was not intended to cover cases of *force majeure* or fortuitous event, although situations very similar to them could well arise. Rather, the obligation on the receiving State or transit State under article 39 was to be regarded as falling within the régime of international co-operation and solidarity of States in the matter of diplomatic communications. Two main categories of measures could be envisaged: first, protective measures to ensure the safety and integrity of the bag, and secondly, notification either of the mission of the sending State on the territory of the receiving State or transit State or, if there was no such mission, of the diplomatic mission of the State that represented the interests of the sending State. There was no change in the substance of draft article 39, and it had been revised simply to take account of comments made in the Commission and in the Sixth Committee of the General Assembly.

6. Draft article 40 was largely modelled on article 40, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations, article 54 of the 1963 Vienna Convention on Consular Relations, article 42 of the 1969 Convention on Special Missions and article 81 of the 1975 Vienna Convention on the Representation of States. Those instruments did not refer specifically to a transit State, as defined in article 3, paragraph 1 (5), of the draft articles under consideration, but to the notion of a third State, which was in effect equated with a transit State. That meaning of the term did not, however, accord the meaning of "third State" under article 2, paragraph 1 (h), of the 1969 Vienna Convention on the Law of Treaties. Accordingly, to avoid any misunderstanding it would be preferable to use the term "transit State", which would also be more relevant in view of the itinerant nature of the diplomatic courier's duties.

7. The main obligations under draft article 40 were based on the rule *jus transitus innoxii*, which had received general recognition only with the adoption of article 40 of the 1961 Vienna Convention. The provisions of the draft article had found general support in the Sixth Committee and he had therefore reintroduced it in his sixth report (A/CN.4/390), with one slight amendment consisting of the addition of the words "to the diplomatic courier or the diplomatic bag" between the words "shall accord" and "the inviolability". The obligation of a transit State in the event of *force majeure* or fortuitous event was to assure the protection and inviolability of the courier and the bag, something for which the receiving State was normally responsible, and to make available the necessary facilities for the continuation of the journey.

<sup>5</sup> 1961 Vienna Convention on Diplomatic Relations, 1963 Vienna Convention on Consular Relations, 1969 Convention on Special Missions and 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (hereinafter referred to as "1975 Vienna Convention on the Representation of States").

8. The purpose of draft article 41 was to ensure the necessary facilities, privileges and immunities for the diplomatic courier and diplomatic bag even in the absence of diplomatic relations between the sending State and the receiving or transit State or in the absence of formal recognition of a Government or State. At a time when international conferences were often held in countries with which not all the participating States had diplomatic or official relations, it was important for the diplomatic courier and diplomatic bag to enjoy the requisite legal protection and facilities. Paragraph 1 was based on State practice and was supported by certain bilateral arrangements, but such a provision had first been formulated in express terms in the 1975 Vienna Convention on the Representation of States. The Commission would remember that, during the preparation of the draft articles on special missions, it had affirmed that the rights and obligations of the host and sending States were not dependent on recognition or the existence of diplomatic or consular relations at the bilateral level.<sup>6</sup> A number of Governments placed special importance on the provision in article 41 because they did not always have diplomatic relations with the host country of an international organization. The article proposed in the sixth report therefore reproduced the text submitted originally. As was clear from paragraph 2, the article was limited to the protection and facilities to be accorded to the diplomatic bag and had no other legal implications, particularly with regard to the recognition of a State or Government.

9. The general reaction to draft article 42, both in the Commission and in the Sixth Committee, had been that a provision was required on the relationship between the draft articles and other conventions and international agreements. The article was modelled on article 4 of the 1975 Vienna Convention on the Representation of States, but it would in fact encompass all aspects of matters pertaining to diplomatic couriers and diplomatic bags covered in the four codification conventions, and hence it was perhaps both more necessary and more justified. In its present form, however, it had a very modest function and could be said to state the obvious. The Commission might therefore wish to consider whether a new paragraph should be added to define in more explicit terms the position of the draft *vis-à-vis* other conventions so far as the status of the diplomatic bag and the diplomatic courier was concerned.

10. Draft article 43 was new and was being submitted in the light of earlier suggestions. The four codification conventions contemplated different régimes so far as the inviolability of the diplomatic courier and diplomatic bag was concerned and only two of those conventions were in force. The other two might eventually enter into force, but that would simply add to the plurality of régimes. He had therefore drafted a provision intended to achieve a measure of flexibility. In so doing, he had drawn on articles 19,

22 and 23 of the Vienna Convention on the Law of Treaties and had also found some support in article 298 of the 1982 United Nations Convention on the Law of the Sea,<sup>7</sup> concerning optional exceptions to the applicability of compulsory procedures entailing binding decisions. That article was in turn perhaps influenced to some extent by article 22 of the Vienna Convention on the Law of Treaties.

11. Against that background, he had sought to reflect three main ideas: (a) the right to make a declaration of optional exceptions to applicability in regard to designated types of couriers and bags, together with the legal consequences of such a declaration; (b) the right to formulate the declaration and the right to withdraw it; (c) the procedural matter of making such a declaration in writing. In that connection, while it was implicit in paragraph 2 that withdrawal of a declaration should be in writing, it would perhaps be better to say so expressly and also to stipulate that the declaration should be communicated to the other contracting parties. The article proposed might call for improvement, but the intention behind it was to facilitate accession to the instrument that would emerge from the draft. If, as he believed, the draft articles were meant to provide a uniform approach to the status of the diplomatic courier and the diplomatic bag and to be applied within the framework of the four codification conventions, modalities should be devised to ensure that the régime established operated flexibly and without prejudice to the main principles.

12. Lastly, the Commission had stated at its thirty-sixth session that it might be in a position to complete the first reading of the draft articles before the end of the present term of office of its members.<sup>8</sup> With that intention in mind, members might wish to consider whether they should deal with draft articles 23 and 36 to 43 together or in three separate stages, namely article 23, articles 36 to 39, and articles 40 to 43.

13. After a procedural discussion in which Sir Ian SINCLAIR, Mr. FLITAN and Mr. AL-QAYSI took part, the CHAIRMAN said that members were free to speak on draft articles 23 and 36 to 43 either separately or by grouping them, as they preferred. However, in view of the close connection between the question of the immunity from jurisdiction of the diplomatic courier, dealt with in article 23, and that of the inviolability of the diplomatic bag, which was the subject of article 36, members might consider it useful to make all their comments in one statement. No decision to refer any of the draft articles to the Drafting Committee would be taken before the end of the discussion on the item as a whole. He hoped the flexible procedure he had outlined would be used effectively by all.

14. Mr. FLITAN congratulated the Special Rapporteur on his comprehensive sixth report (A/CN.4/390) and said that draft articles 23 and 36, concerning the diplomatic courier's immunity from

<sup>6</sup> See article 7 (Non-existence of diplomatic or consular relations and non-recognition) of the draft articles on special missions, and the commentary thereto, adopted by the Commission at its nineteenth session (*Yearbook ... 1967*, vol. II, p. 350, document A/6709/Rev.1, chap. II, sect. D).

<sup>7</sup> *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

<sup>8</sup> *Yearbook ... 1984*, vol. II (Part Two), p. 105, para. 387.

jurisdiction and the inviolability of the diplomatic bag, respectively, had raised the same problems both in the Sixth Committee of the General Assembly and in the Commission.

15. Unquestionably, the difficulties regarding article 23, and more particularly paragraphs 1 and 4, lay in the different possible conceptions of the diplomatic courier and his task. If it was acknowledged that, in many cases, the courier's mission was not confined to one destination and that the courier had to provide communications in both directions, the inevitable conclusion was that the justification for protection of the courier against arrest and detention in conformity with article 16 of the draft also entitled him to immunity from the criminal jurisdiction of the receiving State and the transit State and to exemption from the obligation to give evidence as a witness. In his opinion, without article 23, paragraphs 1 and 4, the sending State would suffer considerable injury if its messenger was forbidden to continue his mission in order to remain available to the courts of a transit State, or even the receiving State. Those two provisions were therefore essential as a matter of functional necessity.

16. Various trends had emerged from the discussions in the Commission and the Sixth Committee. Suggestions had been made to maintain the text of article 23 as proposed by the Drafting Committee, but to delete the square brackets around paragraphs 1 and 4 or to add, at the end of paragraph 1, the words "except for serious offences" or "in respect of all acts performed in the exercise of his functions" and, at the end of paragraph 4, the words "in cases involving the exercise of his functions" or "except in the case envisaged in paragraph 2". The latter wording seemed difficult to accept, for it would raise some practical problems. Again, another proposal had been to delete draft article 23 entirely, a solution to which he was not completely opposed, provided suitable clarification was made in the commentary.

17. The Special Rapporteur, wishing to find a compromise formulation, was proposing that the square brackets around paragraph 1 should be deleted and that paragraph 4 should stipulate that the diplomatic courier was not obliged to give evidence as a witness in cases involving the exercise of his functions but might be required to give evidence in other cases, provided that that would not cause unreasonable delays or impediments to the delivery of the diplomatic bag. The arguments put forward by the advocates of the different theories had not been decisive and had resulted in a stalemate. Some had sought to assimilate the diplomatic courier to other State officials, especially members of diplomatic missions, an argument rejected by others on the grounds that the diplomatic courier performed a very particular function.

18. In his opinion, the debate called for a different approach. The situation of the diplomatic courier should be examined in terms of the international instruments in force. Obviously, the draft articles under preparation should not weaken or strengthen either of the régimes laid down in the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, or again

in the two other codification conventions which had not yet entered into force. If States, jurists, or even members of the Commission did not agree with those international instruments, the idea of modifying them might well be considered. In the circumstances, it seemed that the only solution was to model the diplomatic courier's immunity from jurisdiction on the immunity provided for in the 1961 Vienna Convention. Hence it was not by changing article 23 as proposed by the Special Rapporteur, in other words by drawing to some extent on the 1963 Vienna Convention, that the Commission would emerge from the impasse.

19. Draft article 43 reflected a desire for flexibility, since it allowed States to choose one of the legal régimes provided for in the codification conventions. Nevertheless, it must be borne in mind that the Commission could not, in drafting the present instrument, either weaken the régime in the 1961 Vienna Convention or strengthen the régime in the 1963 Vienna Convention. In that respect, paragraph 2 of draft article 36, whereby the receiving State or the transit State could, in certain cases, request that the bag be returned to its place of origin, was not satisfactory. It could sometimes be in the interest of the sending State to have the bag opened. Therefore, it was necessary to keep to the régime in the 1961 Vienna Convention or to adopt the régime in the 1963 Vienna Convention, but, in the latter case, paragraph 2 of article 36 should be altered so as to cover, in addition to cases in which the bag would be returned to its place of origin, cases in which the bag would be opened with the consent of the sending State.

20. The words "unless otherwise agreed by the States concerned", in paragraph 1 of draft article 36, could be deleted, for under article 6, paragraph 2 (b), States could modify among themselves "by custom or agreement, the extent of facilities, privileges and immunities for their diplomatic couriers and diplomatic bags".

21. The Special Rapporteur was right to propose a new draft article 37 to replace former draft articles 37 and 38, but the words "as appropriate" should be inserted between "The receiving State or" and "the transit State", in order to make it clear that the words "the entry, transit or exit of the diplomatic bag" did not apply equally to the receiving State and the transit State.

22. Draft article 39 was acceptable, but it would gain in clarity if it were drafted in keeping with the legislative method, which consisted in stating the case and then the obligation. The article should therefore begin with the words "In the event of termination of the functions of the diplomatic courier ...". Also, he was not quite convinced that mention should be made of "circumstances preventing the captain of a commercial aircraft or the master of a merchant ship from delivering the diplomatic bag to an authorized member of the diplomatic mission of the sending State", since another member of the crew could always be found to replace the captain.

23. Draft article 40 was also acceptable as to substance, and as had been pointed out at the previous

session,<sup>9</sup> there was no reason to use the term "third State" because the definition of a transit State under article 3, paragraph 1 (5) drew no distinction between an intended transit State and a State not initially foreseen as a transit State. With regard to form, the words "remain for some time in the territory of a State" should be replaced by "pass through the territory of a State", since that was what actually happened when a diplomatic courier or diplomatic bag was compelled to deviate from his or its normal itinerary. In addition, the receiving State itself was a transit State and therefore the words "the receiving State is bound to accord" could be replaced by "any transit State is bound to accord". Lastly, the words "or to return to the sending State", at the end of the article, could be deleted: the preceding words, namely "to continue his or its journey to his or its destination", covered all possibilities, including that of an *ad hoc* diplomatic courier sent to his own State, in which case the return would be not to the sending State but to the receiving State.

24. Draft article 41, on the non-recognition of States or Governments or absence of diplomatic or consular relations, related to a problem which must be settled. It posed no difficulties regarding substance, but the expression "host State", which was not defined in the draft articles, appeared four times. The Commission could either define that expression in article 3, on "Use of terms", or insert a *renvoi* in article 41 to an existing definition, such as that appearing in the 1975 Vienna Convention on the Representation of States.

25. With regard to draft article 42, on the relation of the draft articles to other conventions and international agreements, the content of paragraph 2 seemed to be already covered by paragraph 2 (b) of article 6 as provisionally adopted by the Commission.

26. To facilitate consideration of draft article 43, it would be useful if the secretariat distributed the text of article 298 of the 1982 United Nations Convention on the Law of the Sea. With reference to paragraph 1 of article 43, it would be noted that the signature and ratification of a convention, as well as accession to a convention, entailed a number of obligations under the 1969 Vienna Convention on the Law of Treaties. While he appreciated that the purpose of paragraph 1 was to give States the opportunity of choosing a legal régime from among those established by the four codification conventions, paragraph 2, which stipulated that such a choice could be withdrawn at any time, could well be a source of instability in international relations. He therefore proposed that that paragraph should be deleted.

27. The CHAIRMAN said that an unofficial document containing the text of article 298 of the United Nations Convention on the Law of the Sea would be distributed to members of the Commission in accordance with Mr. Flitan's suggestion.

*The meeting rose at 6 p.m.*

<sup>9</sup> *Yearbook ... 1984*, vol. I, p. 197, 1847th meeting, para. 50 (Special Rapporteur).

## 1905th MEETING

*Tuesday, 18 June 1985, at 10.05 a.m.*

*Chairman:* Mr. Satya Pal JAGOTA

*Present:* Chief Akinjide, Mr. Al-Qaysi, Mr. Arango-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Diaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)**  
(A/CN.4/382,<sup>1</sup> A/CN.4/390,<sup>2</sup> A/CN.4/L.382, sect. C, ILC(XXXVII)/Conf.Room Doc.2 and Add.1)

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### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR<sup>3</sup> (*continued*)

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- ARTICLE 43 (Declaration of optional exceptions to applicability in regard to designated types of couriers and bags)<sup>4</sup> (*continued*)

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