Document:-

A/CN.4/SR.1905

Summary record of the 1905th 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

session,[9] 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.

[9] *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. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Lacleta 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,[1] A/CN.4/390,[2] 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[3] (*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)[4] (*continued*)

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1985*, vol. II (Part One).

[3] 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.

[4] For the texts, see 1903rd meeting, para. 1.

1. Sir Ian SINCLAIR recalled that, like some other members of the Commission, he had expressed reservations at previous sessions about the utility of the topic under consideration. There was no doubt some limited value in a process of consolidation whereby all rights and obligations relating to the courier, however styled, and the unaccompanied bag were brought together in a single text. Save in very exceptional circumstances, however, the process should not go beyond simple consolidation and, in particular, should not be used as a vehicle to give more extensive privileges and immunities to the courier and more absolute protection to the bag than were provided for under currently applicable rules.

2. That general comment apart, he proposed to confine his remarks to draft article 23, reserving the right to speak on the other draft articles at a later stage. The basic question concerning article 23 was whether it was needed at all. He entirely agreed with the view expressed by the Special Rapporteur in his sixth report (A/CN.4/390, para. 28) that the Commission should make an effort to strike a balance between the legal protection of the courier and the bag and the legitimate interests of the States concerned. As shown in the Special Rapporteur's fourth report,[5] however, there had never been a case in State practice where the immunity of the courier, whether from civil or criminal jurisdiction, had been at issue. The only instance cited related to the courier's liability to give evidence.[6] Moreover, as the Special Rapporteur had rightly conceded, there were no provisions on the jurisdictional immunities accorded to the diplomatic courier in existing multilateral or bilateral treaties.[7]

3. It therefore had to be decided whether, as a matter of the progressive development of international law going well beyond the primary goal of consolidation, the Commission should propose that the category of persons enjoying jurisdictional immunity should be extended to include diplomatic couriers. If the criterion was functional necessity, he remained totally unpersuaded of the need for such extension. As had been pointed out many times, the diplomatic courier's activities differed enormously from those of a diplomatic agent, consular officer or member of the administrative or technical staff of a mission. What might be considered necessary by way of jurisdictional immunities for a resident diplomatic agent or part-time resident member of a delegation to an international organization or conference was not strictly necessary for a diplomatic courier making relatively infrequent and fleeting visits to a receiving or transit State. The provisions of article 16 were surely sufficient to ensure that the diplomatic courier would be able to carry out his functions unimpeded. If the diplomatic courier was not liable to any form of arrest or detention, neither the receiving State nor the transit State would be able to interfere with the completion of his task, since his freedom of movement out of the country would remain unimpaired even if he were not accorded any degree of immunity from the criminal or civil jurisdiction of the receiving or transit State.

4. To grant the courier jurisdictional immunities would clearly go beyond the existing law deriving from the four codification conventions. The Commission had to be conscious of the likely reactions of Governments to its proposals: where it was evident that a proposal would encounter strong resistance from a number of Governments, it would surely be wise to refrain from making it.

5. In introducing article 23, the Special Rapporteur (1903rd meeting) had spoken of the far-reaching implications of possible changes and had appealed to the Commission to proceed with caution. In his own view, it was article 23 as presented that constituted a change which would have far-reaching implications. A review recently carried out by the United Kingdom Government on the subject of abuses of diplomatic privileges and immunities had shown that 546 serious offences had allegedly been committed by persons enjoying diplomatic privileges and immunities in London during the previous 10 years. Those figures had, of course, to be viewed in perspective: the scale of abuses of diplomatic privileges and immunities should not be exaggerated, but neither could it be ignored. It was against such a background that the proposal to accord jurisdictional immunity to the diplomatic courier had to be considered.

6. In the current climate of opinion, many Governments could not seriously contemplate conferring upon a completely new category of persons complete immunity from criminal jurisdiction and qualified immunity from civil jurisdiction. He was not suggesting that the terms of the existing codification conventions, particularly those of the 1961 Vienna Convention on Diplomatic Relations, should be weakened in any way, but to go beyond those provisions would be to raise very serious issues and make it doubtful whether the draft articles would be accepted by a number of Governments.

7. Mr AL-QAYSI, referring to draft article 23 and reserving the right to comment on the other articles at a later stage, said that the two sets of interests involved in article 23 were the sending State's interest in maintaining free communications with its diplomatic representatives and the receiving State's interest in preserving its integrity and security, the criterion for a successful balance between the two being the maintenance of smooth and friendly relations and the avoidance of abuses. In his sixth report (A/CN.4/390, para. 28), the Special Rapporteur urged the Commission to make an effort to strike a balance between the legal protection of the courier and the bag and the legitimate interests of the States concerned. Since, however, the States concerned included the sending State and since the legal protection of the courier and the bag unquestionably formed part of the legitimate interests of the sending State, that State's interests appeared to have been taken into consideration twice. The Special Rapporteur also said (*ibid.*) that special attention should be attached to the intrinsic relationship between the principle of personal inviolability of the courier and the latter's immunity from criminal jurisdiction, and

[5] *Yearbook ... 1983*, vol. II (Part One), pp. 80 *et seq.*, document A/CN.4/374 and Add.1-4, paras. 81-138.

[6] *Ibid.*, para. 127.

[7] *Ibid.*, para. 84.

that, in the search for a practical solution, the Commission should take into account the comments made by Member States with a view to achieving wider acceptance of the draft articles. Since the views expressed in the Sixth Committee of the General Assembly had been more or less evenly divided, a nexus had to be found on which a practical solution might be based. In the four codification conventions, that nexus was undoubtedly freedom of communications and it had to serve as the basis for the draft articles under consideration as well.

8. Paragraph 1 of article 4 as provisionally adopted by the Commission referred to "official communications ... effected through the diplomatic courier or the diplomatic bag". It could be argued, however, that the courier carrying or accompanying the bag was not the medium of freedom of communications but only its vehicle. The courier's function was, admittedly, an important one and his performance of that function in a manner which protected freedom of communications should be the measure of the jurisdictional immunity, whether criminal or civil, accorded to him. The only practical solution that would ensure wider acceptance of the draft articles would therefore be to accord the courier functional immunity, as advocated by those holding the third opinion referred to by the Special Rapporteur (*ibid.*, para. 27). The functional limitation which the Special Rapporteur was proposing to introduce in article 23, paragraph 4, could be worded in a general way so as to encompass paragraph 1 as well.

9. In that connection, he said that he disagreed with the view expressed in paragraph 192 of the Commission's report on its thirty-sixth session,[8] namely that confining the courier's immunity from criminal jurisdiction to acts within the performance of his functions would in practice deny him immunity from criminal jurisdiction, since he would have to be subjected to such jurisdiction before a court of the receiving State could decide whether the act concerned was within the performance of his functions. To accept the logic of that argument would be tantamount to equating the functions of a diplomatic courier with those of a diplomatic agent.

10. With regard to Sir Ian Sinclair's point that article 23 went far beyond the limits of the four codification conventions and should therefore be deleted, he said that those conventions, which were general in nature, could not be expected to cover every point relating specifically to the diplomatic courier. If the Commission adopted article 16, as it had done provisionally, it could, in his view, apply the principle of functional jurisdictional immunity to the diplomatic courier without, for all that, going beyond the limits of the legal provisions already in existence.

11. Mr McCAFFREY, referring only to draft article 23, said he agreed with previous speakers that it was extremely important to strike a balance between the interests of the receiving State and those of the sending State and that article 23 had to be considered against the background of a rising tide of public and official discontent with the existing régime. The mere existence of certain instruments, some of which had not even come into force, was no justification for extending the protection accorded under those instruments to a new category of individuals.

12. Associating himself with Sir Ian Sinclair's arguments in favour of deleting article 23, he said that he would confine himself to a brief summary of the main points he had made on the subject at the previous session.[9] First, none of the four codification conventions contained any provision concerning the jurisdictional immunity of the diplomatic courier. Secondly, little support for the jurisdictional immunity, as distinct from the personal inviolability, of the diplomatic courier was to be found in State practice. Thirdly, the necessary degree of protection was already provided in article 16 and any additional provision would be superfluous. Article 23, paragraph 1, was unnecessary in countries like his own, where a person could not be tried *in absentia*. Paragraph 2 was also unnecessary in the light of article 16, since a diplomatic courier, not being liable to any form of arrest or detention, could not be subpoenaed or served process papers.

13. With regard to the arguments advanced by Mr. Al-Qaysi in favour of introducing the notion of functional immunity, he said that, although he had in the past made proposals along the same lines with regard to some paragraphs of article 23, he was now inclined to think that that article should simply be deleted, since it was not clear how functional immunity would be reconciled with article 16. Since States were experiencing serious problems of abuses by diplomatic communities in general, and since existing protection, as reflected in article 16, had not been shown to be inadequate, it would be insensitive to propose that the present immunities—which were already controversial—should be extended even further.

14. Mr. RIPHAGEN said that he entertained the same doubts as the previous speakers with regard to draft article 23, and especially its paragraph 1. A point not previously mentioned concerned the connection between draft article 23, paragraph 1, and draft article 28, paragraph 2, under which the privileges and immunities of the diplomatic courier normally ceased when he left the territory of the receiving State if his official functions had come to an end. Would the diplomatic courier's immunity from criminal jurisdiction extend to acts not performed in the exercise of his functions? Would a diplomatic courier who returned to the receiving State on holiday, having completed his official functions there, enjoy jurisdictional immunity for such offences as he might have committed during the exercise of his functions? Unlike Mr. McCaffrey's country, his own country allowed trials *in absentia*, so that a person tried *in absentia* could be punished upon returning there if he no longer enjoyed diplomatic immunity or enjoyed it only to a limited extent.

15. With regard to draft article 36, paragraph 1, he asked whether the words "other mechanical devices" covered sniffer dogs. He also wondered whether paragraph 1 meant that the diplomatic bag was

[8] *Yearbook ... 1984*, vol. II (Part Two), p. 42.

[9] *Yearbook ... 1984*, vol. I, pp. 57-58, 1824th meeting, paras. 28-30, and p. 294, 1863rd meeting, paras. 14-16.

exempt from the procedures normally applied before an aircraft could be boarded at an international airport. As to the possibility that electronic technology might be used to extract confidential information from the diplomatic bag, as referred to during the discussion in the Sixth Committee of the General Assembly (A/CN.4/L. 382, para. 185) he had been assured by technical experts that no such possibility would exist for at least another 10 years and that, when it did, confidential information could easily be protected by being placed in an envelope provided with a reflective device. In his view, examination of the diplomatic bag by means of electronic or other mechanical devices should not be precluded, provided that it was not used as an excuse for extracting confidential information from the bag.

16. Referring to draft article 37, he asked whether the reference to the exemption of the diplomatic bag from "customs and other inspections" was intended to exclude the application of article 36, paragraph 2. In draft article 39, the words "which prevents him" seemed to refer only to the termination of the diplomatic courier's functions; the wording of the article might be amended to cover other reasons that could prevent the diplomatic bag from being delivered. Draft article 40, as amended by the Special Rapporteur in his introductory statement (1904th meeting, para. 7), might also be redrafted to cover the case, referred to in article 39, of the diplomatic bag being entrusted to the captain of a commercial aircraft or the master of a merchant ship.

17. With regard to draft article 41, paragraph 1, he noted that non-recognition of the sending State by the receiving State would automatically preclude diplomatic relations between the two States; the reference to the receiving State, as distinct from the host State or the transit State, might therefore be deleted. Draft article 42, paragraph 2, referred to international agreements relating to the status of the diplomatic courier and the diplomatic bag "confirming or supplementing or extending or amplifying" the provisions of the present articles, but it did not mention the possibility of limiting them. A drafting change might be required in order to bring that paragraph into line with article 6, paragraph 2 (*b*).

18. In the title of draft article 43, the adjective "optional" should apply to the word "declaration" rather than to the word "exceptions". In paragraph 1 of that article, it was not entirely accurate to state that a declaration of exceptions could be made "without prejudice to the obligations arising under the provisions of the present articles", since some prejudice to those obligations was bound to occur. The words "types of couriers and bags" in the same paragraph required further clarification: the Special Rapporteur might specify in the commentary whether the intended reference was to the four types of diplomatic couriers and of diplomatic bags defined in article 3 or whether a State becoming a party to the future convention would be entitled to specify that a diplomatic bag should be of a certain size or material. Lastly, he noted that paragraph 1 referred to the possibility of making a declaration only when signing, ratifying or acceding to the articles; some States, especially those acting as host States to international organizations, might prefer to be allowed to make a declaration at any time after signature, ratification or accession. Such a possibility existed, for example, under article 298 of the 1982 United Nations Convention on the Law of the Sea.[10]

19. Mr. YANKOV (Special Rapporteur) said that, while he intended to take up points relating to the substance and drafting of the articles when he summed up the debate, he was prepared now to provide any clarifications that might be of assistance to the members of the Commission in their consideration of the draft articles. In reply to one of Mr. Riphagen's questions, he said that the words "types of couriers and bags" in draft article 43, paragraph 1, referred to the definitions provided in article 3 corresponding to the four codification conventions. They did not refer to the physical type, appearance or other characteristics, external or otherwise, of the diplomatic bag. The object of the provision was to cover the case of States which were parties to one or some, but not all, of the four conventions. That explanation could either be included in the commentary to article 43 or be incorporated in the text.

20. Mr. SUCHARITKUL, congratulating the Special Rapporteur on his sixth report (A/CN.4/390), said the point had been reached at which the closest attention should be paid to the degree of immunity from jurisdiction to be accorded to the diplomatic courier under article 23 and to the extent of the inviolability to be accorded to the diplomatic bag under article 36. The two elements were interlinked and could not be separated in any discussion of the topic under consideration. A choice would also have to be made between a number of competing criteria and the various categories of immunities—diplomatic, consular and others—would have to be compared and assessed with a view to adopting the best yardstick by which to measure the degree of immunity to be accorded to the diplomatic courier.

21. One particularly important aspect was the time factor. Diplomatic agents were accorded jurisdictional immunities *eundo, morando et redeundo* and were allowed a certain amount of time in which to wind up their affairs when leaving a post. If they returned to the country in an unofficial capacity, they became amenable to its jurisdiction. A distinction also had to be made between acts performed in the exercise of diplomatic functions and acts of a personal or unofficial nature. For example, in *The Empire* v. *Chang and others* (1921),[11] the Supreme Court of Japan had confirmed the conviction of former employees of the Chinese Legation in respect of offences committed during their employment as attendants, but unconnected with their official duties. Two contrasting Swiss decisions, both arising out of a paternity suit, demonstrated the same point: the court had declined jurisdiction in the first case, on the ground that the defendant was still protected by diplomatic privileges, but in a second action brought by the mother of the child, the court had assumed jurisdiction because the defendant, having been replaced by his Government, was no longer entitled to diplomatic immunities. Former diplomats had likewise been held amenable to the jurisdiction of the

[10] See 1904th meeting, footnote 7.

[11] *Annual Digest of Public International Law Cases, 1919-1922* (London), vol. 1 (1932), p. 288, case No. 205.

French courts: in *León* v. *Díaz* (1892),[12] a Uruguayan Minister in France had been held amenable to jurisdiction on the grounds that his diplomatic functions had come to an end and that his dispute with León was of a purely private nature. Similarly, in *Laperdrix et Penquer* v. *Kouzouboff et Belin* (1926),[13] a former secretary at the Embassy of the United States of America in Paris had been ordered to pay compensation for the injury sustained by two persons in a car accident.

22. United Kingdom and United States practice seemed to support the same proposition. In *Dupont* v. *Pichon* (1805),[14] the court had held that the departing chargé d'affaires was entitled to diplomatic privileges *eundo, morando et redeundo* only. Again, in *Magdalena Steam Navigation Co.* v. *Martin* (1859),[15] Lord Campbell had suggested that a former ambassador could be sued in England in respect of acts performed during his mission if the action was brought after the reasonable time required for closing his official transactions. Other cases in point were *In re Suarez, Suarez* v. *Suarez* (1917),[16] *Rex* v. *A.B.* (*R.* v. *Kent*) (1941)[17] and *District of Columbia* v. *Paris* (1939).[18]

23. The status of personal sovereigns with regard to their public, as opposed to their private, acts was also relevant. Thus, in *Carlo d'Austria* v. *Nobili* (1921),[19] the Court of Cassation in Rome had assumed jurisdiction over the Emperor of Austria in respect of a private act unconnected with his sovereign functions. Although, in *Héritiers de l'empereur Maximilien* v. *Lemaitre* (1872),[20] the court had declared itself incompetent on the ground that the Emperor of Mexico was a reigning sovereign of a foreign State, in *Mellerio* v. *Isabelle de Bourbon* (1872),[21] the same court had assumed jurisdiction on the ground that the defendant, formerly Queen of Spain, no longer held that public office and that the order of jewels from Mellerio was for her own personal use.

24. Jurisprudence and the practice of States was therefore quite clear: even ambassadors, kings and heads of State were, once divested of office, subject to the jurisdiction of territorial courts. In the case of a diplomatic courier, however, the cause of action might well not survive his term of office, since it was inherent in the very nature of that office that, upon return from one mission, he would normally be protected immediately by the immunities afforded to him in respect of the next mission.

25. To his mind, all jurisdictional immunities were vested in the State, and the diplomatic courier, lacking representative capacity, could not possibly claim to be entitled to the type of immunities accorded to the representatives of Governments or States. Nor could he claim to be entitled to the type of immunities accorded to senior officials of international organizations, since such immunities were clearly of a functional character, being accorded not for the personal benefit of the individual, but in the interests of the organization concerned. Moreover, under article V, section 20, of the 1946 Convention on the Privileges and Immunities of the United Nations,[22] the Secretary-General was required to waive the immunity of "any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations". That provided a safeguard against possible abuse while ensuring a proper balance between the interests of the sending State, on the one hand, and those of the receiving or transit State, on the other. In the light of the foregoing considerations, he feared that article 23 as drafted might go somewhat further than was warranted in practice.

26. Draft article 36 responded effectively to the functional need for protection and would enable the diplomatic courier to perform his task. As a Buddhist, however, he found it somewhat difficult to understand the words "shall be inviolable at all times" in paragraph 1, for all things came to an end. It was, moreover, the contents of the bag, not the bag itself, that were being protected and that should therefore be inviolable. At the same time, he recognized the link between draft articles 36 and 37 and considered that Mr. Reuter's point (1879th meeting) had been well taken. The contents of a diplomatic bag could and, indeed, sometimes did consist of drugs. Where, therefore, there were reasonable grounds for suspecting that that was the case, the principle of good faith dictated that the diplomatic mission or consular post receiving the bag should allow it to be examined in the presence of its officials. In such cases, waiver of immunity was not unreasonable and it was not an infringement of the sovereignty of States. Indeed, in line with the practice which had been adopted by the United Nations under the Convention on the Privileges and Immunities of the United Nations and which was increasingly being followed elsewhere, waiver should, when necessary, be recommended in cases where immunity would impede the course of justice and could be waived without interfering in any way with the performance of official functions.

27. As to draft article 39, it was difficult to assume that the receiving or transit State would have knowledge of the whereabouts of the diplomatic bag before its delivery and, without such knowledge, it was difficult to impute any kind of obligation to such State. It would, in his view, also be difficult for a

[12] *Journal du droit international privé* (Clunet) (Paris), vol. 19 (1892), p. 1137.

[13] *Ibid.*, vol. 53 (1926), pp. 64-65.

[14] A. J. Dallas, *Reports of Cases Ruled and Adjudged in the Several Courts of the United States and of Pennsylvania*, vol. IV, 3rd ed. (New York, 1912), p. 321.

[15] T. F. Ellis and F. Ellis, *Reports of Cases ... in the Court of Queen's Bench* (1858-1861) (London), vol. 2, p. 94.

[16] *The Law Reports, Chancery Division, 1917*, vol. II, p. 131.

[17] *The Law Reports, King's Bench Division, 1941*, vol. I, p. 454.

[18] See M. M. Whiteman, *Digest of International Law* (Washington (D.C.), U.S. Government Printing Office, 1970), vol. 7, pp. 443-444.

[19] *Giurisprudenza Italiana* (Turin), vol. I (1921), p. 472; summary and translation in *Annual Digest ..., 1919-1922*, vol. 1 (1932), p. 136, case No. 90.

[20] Dalloz, *Recueil périodique et critique de jurisprudence, 1873* (Paris), part 2, p. 24.

[21] *Ibid., 1872*, part 2, p. 124.

[22] United Nations, *Treaty Series*, vol. 1, p. 15.

transit State to comply with the obligation under draft article 40 in the absence of a pre-arranged timetable.

28. With regard to draft article 41, non-recognition of States or Governments, though admittedly rare in practice, could raise important questions in certain jurisdictions. The practice of United States courts in the matter was, for example, very strict. If immunity was claimed on behalf of a State with which the United States did not have diplomatic or consular relations, the court would not recognize the claim, which therefore had to be introduced by the Department of State or by a mission of another country with which the United States did have such relations.

29. While he shared Mr. Riphagen's doubts regarding draft article 42, paragraph 2, he considered that the article would serve as a good means of preparing to upgrade the status of diplomatic couriers and bags. Lastly, he was grateful to the Special Rapporteur for clarifying his understanding of the purpose of article 43.

30. Mr. USHAKOV, congratulating the Special Rapporteur on the clarity of his sixth report (A/CN. 4/390), which on the whole proposed appropriate solutions, said that, for the time being, he would comment only on draft article 23, which, together with draft article 36, might be the key provision of the draft.

31. Until now, the status of the diplomatic courier and the diplomatic bag had been governed by provisions such as article 27 of the 1961 Vienna Convention on Diplomatic Relations, but no solution had been found to the problem of whether the diplomatic courier should enjoy immunity from the criminal jurisdiction of the receiving State and the transit State. In his view, there was no doubt that the diplomatic courier should benefit from such immunity because, if he did not, a diplomatic bag accompanied by diplomatic courier would no longer be a medium of communication. Such immunity was therefore a functional necessity.

32. The diplomatic bag sometimes had to be accompanied by diplomatic courier in order to ensure its inviolability; but, if the diplomatic courier was to perform his functions without pressure from the receiving State or transit State, he had to enjoy the same immunity from criminal jurisdiction as diplomatic agents, the administrative and technical staff of missions and members of their families. If the receiving State or the transit State exerted pressure on a member of the family of a diplomatic agent or on the administrative or technical staff of a mission, the sending State would automatically be affected.

33. Although the diplomatic courier might commit abuses, it should be recognized that States could commit even more serious abuses, for example by threatening to implicate a courier in a criminal case or, as had happened in the 1920s, by organizing conspiracies in which a diplomatic courier could be killed. It was quite obviously not enough to provide that the diplomatic courier "shall enjoy personal inviolability and shall not be liable to any form of arrest or detention", as stated in article 27, paragraph 5, of the 1961 Vienna Convention, because the personal inviolability of the courier would not prevent the receiving or transit State from detaining him in its territory so that he could be tried and, possibly, convicted.

34. Some members of the Commission took the view that, since no diplomatic courier had ever been involved in criminal proceedings, draft article 23, paragraph 1, was superfluous; but that argument could also work against them, for it could be stated in favour of that provision and to the credit of diplomatic couriers that none of them had ever committed any criminal offence.

35. Sir Ian SINCLAIR said that, while he fully understood the reasons advanced by Mr. Ushakov, diplomatic couriers had managed without any equivalent of draft article 23 ever since they had been in operation and, despite diligent research, the Special Rapporteur had not unearthed any occasion on which practical problems had in fact arisen. Since the proposal made in article 23 went beyond the four codification conventions, the Commission should examine it very carefully.

36. Draft article 36, on which he would comment more fully at the next meeting, involved a fairly intractable problem. That problem stemmed in part from the differing degrees of protection given to the consular bag under article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations and to the diplomatic bag *stricto sensu* under article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations; and that in turn created a problem when it came to drawing up a uniform régime covering all types of bags. Another aspect of the problem stemmed from the notorious abuses of the diplomatic bag that had been highlighted by recent events. It was therefore necessary to find a *via media* with a view, on the one hand, to ensuring protection of the contents of the bag and, on the other, to dealing at least in part with the problem of abuses.

The meeting rose at 1 p.m.

1906th MEETING

Wednesday, 19 June 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.
