

Document:-
A/CN.4/SR.1907

Summary record of the 1907th 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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38. Turning to draft article 36, he noted that some members were in favour of deleting the reference to the inviolability of the diplomatic bag. As had already been pointed out, however, article 54, paragraph 3, of the 1963 Vienna Convention on Consular Relations referred to the "inviolability and protection" of consular bags in transit and he saw no reason why the same degree of protection should not be extended to the diplomatic bag. As for the reference to exemption from any kind of examination directly or through electronic or other mechanical devices, he was of the opinion that, in endeavouring to protect the diplomatic bag against abuses, the Commission should be careful not to open the door to such abuses: electronic technology was developing very rapidly and what was not practically possible today might be so tomorrow. The Commission should try to arrive at wording which preserved the full confidentiality of the contents of the diplomatic bag, while permitting the receiving or transit State to satisfy itself as to the nature of the contents.

39. With regard to paragraph 2 of draft article 36, he thought that the provision which applied to the consular bag under article 35, paragraph 3, of the 1963 Vienna Convention should also apply to the diplomatic bag, and that the text of paragraph 2 should be amended accordingly. Sir Ian Sinclair's suggestion that States should be allowed to exercise an option in respect of article 36 might be acceptable as a last resort, but it would, of course, detract from the future convention's precision.

40. He had no objection to draft article 37, although, like some previous speakers, he would find it more logical if the article dealt only with matters relating to taxation and if those relating to customs and other inspections were covered in article 36. Draft articles 39 and 40 appeared reasonable. In article 40, however, the status of a State not initially foreseen as a transit State should, in his view, be assimilated to that of a transit State rather than to that of a receiving State. Draft article 41 was also acceptable, but he agreed with Mr. Laclea Muñoz that care should be taken not to impose obligations on States with regard to the diplomatic bags of countries not recognized by them. In draft article 42, paragraph 2, the words "confirming or supplementing or extending or amplifying" might well be replaced by the word "modifying", in line with article 6, paragraph 2 (b).

41. Although a worthwhile attempt had been made in draft article 43 to solve the problem that would arise if a State was not prepared to apply the articles to all four types of couriers and bags, he agreed with other members of the Commission that paragraph 1 was quite obviously incorrect in stating that a declaration of optional exceptions would be "without prejudice to the obligations arising under the provisions of the present articles". Some prejudice was bound to result from such a declaration and the text of paragraph 1 should therefore be amended accordingly.

The meeting rose at 1 p.m.

1907th MEETING

Thursday, 20 June 1985, at 10 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. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitul, 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 RAPPORTEUR³ (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. Mr. BALANDA said that the draft articles submitted by the Special Rapporteur in his sixth report (A/CN.4/390) revealed his concern to take account of the views expressed in the Commission and in the Sixth Committee of the General Assembly and his desire to reconcile the interests involved.

2. Nearly all the possible arguments regarding draft article 23 had already been advanced. Some speakers thought that the Commission should not go beyond the texts of the codification conventions. It should be noted, however, that the reason why the General Assembly had asked the Commission to study the question of the status of the diplomatic courier and the diplomatic bag was that it considered the subject to be insufficiently regulated by those conventions. They should therefore be supplemented by a set of articles that were autonomous and coherent, but in conformity with the existing texts.

3. The need to strengthen the privileges and immunities of the diplomatic courier derived from the present state of international relations. Both freedom of movement and freedom of communication were being subjected to increasingly numerous obstacles. It sometimes happened that a diplomatic courier could not travel freely throughout the territory of a State and that restrictions were placed on the use of means of communication. It was the growing complexity of the network of interests involved which explained the deterioration of the situation and made it necessary to protect the diplomatic courier more effectively in the exercise of his functions. There could be no doubt that the system established when the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations had been adopted now needed strengthening.

4. The fear of abuse was another argument which had often been advanced in regard to article 23. The many examples of abuse which had been given, however, seemed to involve diplomatic agents, not diplomatic couriers. The Commission should therefore take care not to condemn couriers for their intentions and propose remedies without really knowing what the situation was. Moreover, even if diplomatic couriers were to be blamed for abuses, it could not be concluded, by *reductio ad absurdum*, that diplomatic relations must be discontinued in order to stop abuses. Diplomatic relations met a need, and the diplomatic courier was, after all, only one official agent among others. As some members of the Commission had observed, it would be inappropriate to legislate for exceptions, and abuses were exceptions by definition.

5. In order to define the status of the diplomatic courier, it was necessary to know who the courier was. The courier was an agent sent by a State to provide contact with diplomatic, consular or other missions and was responsible for the safekeeping and transport of the diplomatic bag. Although that was a specific task, he was an official agent just as much as a member of a mission. As the granting of privileges and immunities was based on the functional aspect, which was the same for all such agents, there was no reason to impose limitations on the privileges and immunities accorded to the diplomatic courier.

Moreover, the ultimate beneficiary of privileges and immunities was the State, whoever the official agents might be whose activities had to be facilitated by the granting of privileges and immunities. The diplomatic courier should therefore be accorded all the privileges and immunities necessary for the protection of the State. In that connection, Mr. Ushakov had observed (1905th meeting) that, under article 31, paragraph 1, and article 37, paragraph 1, of the 1961 Vienna Convention, the members of the family of a diplomatic agent enjoyed immunity from the criminal jurisdiction of the receiving State, just as the agent himself did. As that immunity was accorded to them irrespective of any consideration of functional necessity, it should, *a fortiori*, be granted to the diplomatic courier in the interests of the efficient performance of his functions.

6. Since the final object was to protect the State, not to favour the individual, the Commission should not fear being too generous in the granting of privileges and immunities to the diplomatic courier. Besides, draft article 23 contained a safeguard, since under the terms of paragraph 5 a diplomatic courier could be prosecuted by the authorities of his own country. Those authorities could also waive his immunity at any time or take administrative measures against him. The possibility of sanctions thus removed any absolute character from the immunity from jurisdiction.

7. Unlike other members of the Commission, he thought that draft article 23 was justified, even though article 16 established the principle of the inviolability of the person of the diplomatic courier and draft article 36 that of the inviolability of the diplomatic bag. For, in each of the codification conventions, the inviolability of the person, which protected against any form of arrest or detention, was stipulated along with immunity from criminal jurisdiction, the former constituting, as it were, the prerequisite of the latter. Thus in the 1961 Vienna Convention the inviolability of the person of the diplomatic agent and the principle of immunity from criminal jurisdiction were provided for in articles 29 and 31, respectively. The corresponding provisions of the 1975 Vienna Convention on the Representation of States deserved special attention, because they applied to agents whose functions were generally performed within a short time, like those of the diplomatic courier. That instrument specified not only inviolability of the person, but also immunity from criminal jurisdiction. To remain within the logical system of the codification conventions, the status of the diplomatic courier should be aligned with that of other official State agents.

8. Both paragraph 1 and paragraph 4 of the text of article 23 proposed by the Special Rapporteur in his sixth report were justified. Paragraph 4 introduced an important particular, namely that the diplomatic courier was not obliged to give evidence as a witness. That principle, which was stated in article 31, paragraph 2, of the 1961 Vienna Convention, allowed the courier to give evidence if he thought it necessary, provided that his testimony did not involve the exercise of his functions or impair their performance. In his opinion, the succinct wording of paragraph 4 of

the original draft article, which was based on the corresponding provision of the 1961 Vienna Convention, was preferable to the new wording proposed by the Special Rapporteur. He also noted that, under article 44, paragraph 1, of the 1963 Vienna Convention, members of a consular post could be "called upon to attend as witnesses", but no penalty could be imposed on them if they declined to give evidence. Those terms should be interpreted as implying no obligation to testify. Paragraph 5 of draft article 23 should be retained, but the word "any", qualifying immunity, added no shade of meaning and could be deleted.

9. Draft article 36, paragraph 1, provided for effective protection of the confidential nature of the contents of the diplomatic bag. He was anxious not to restrict such protection and was therefore opposed to the use of any means of inspection at a distance. Moreover, the use of such means, if authorized, would place the developing countries at a disadvantage, since they would often be unable to afford such devices to use by way of reciprocity. Article 36, paragraph 2, gave too much power to the authorities of the receiving State or the transit State, for if they had serious reason to believe that the bag contained prohibited articles, they could request that it be returned to its place of origin. As such a provision was open to abuses, it should be recast on the model of article 35, paragraph 3, of the 1963 Vienna Convention, according to which the opening of the bag could be requested and, if that request was refused, the bag must be returned to its place of origin. It was true that such a provision might be difficult to apply in view of the short time the diplomatic courier remained in the territory of the receiving State or the transit State, but it was important not to give those States the power to decide at their discretion that the bag must be returned to its place of origin.

10. Draft article 37 called for no comments except that the wording should be aligned with that of the corresponding provisions of the other codification conventions. In draft article 39, the words "in the event of termination of the functions of the diplomatic courier, which prevents him" could be replaced by the words "in the event of circumstances which prevent the diplomatic courier", and in order to conform with the terminology of the other conventions, the word *capitaine* in the French text should be replaced by *commandant*.

11. The application of draft article 40 should be facilitated by providing, if not in the text of the article, at least in the commentary, for an obligation to notify the State concerned of the presence in its territory of a diplomatic courier or diplomatic bag compelled to remain there for some time as a consequence of *force majeure* or fortuitous event. Lastly, he considered that draft article 41, concerning non-recognition of States or Governments or absence of diplomatic or consular relations, was a useful reminder which strengthened the protection due to the diplomatic courier.

12. Mr. EL RASHEED MOHAMED AHMED said that the discussions in the Sixth Committee of the General Assembly and in the Commission pointed to broad agreement on the topic and to the

emergence of an acceptable text. The question of the diplomatic courier's jurisdictional immunity, dealt with in draft article 23, was none the less one on which views still diverged, with the majority of representatives in the Sixth Committee preferring limited, or functional, immunity to absolute immunity. In recognition of the force of that current of opinion, the Special Rapporteur had amended paragraph 4 so as to reconcile the opposing views, without, however, amending paragraph 1 in a similar way.

13. The article had to be viewed as a whole, and since the intention was to accommodate the two sets of interests referred to at the previous meeting by Mr. Al-Qaysi, to which a third set of interests—those of the transit State—should also be added, the logical conclusion was that paragraph 1 should likewise be amended by adding at the end the words "in cases involving the exercise of his functions". It would be odd, to say the least, to bestow upon the diplomatic courier—who was not even accredited to the receiving or transit State—privileges which neither heads of mission nor even heads of State enjoyed. The argument that criminal proceedings could be taken against the courier *in absentia* after the termination of his functions was inapplicable in countries such as his own, which did not allow such proceedings. In any case, as some members had pointed out, the diplomatic courier's stay in the receiving or transit State was so brief that, even if his jurisdictional immunity were limited, there would be no time to institute proceedings against him. The fact that, under paragraph 5, the courier was not exempt from the jurisdiction of the sending State and that, in addition, there was a possibility of the immunity being waived should also be taken into account. On the whole, therefore, he was inclined to regard article 23 as acceptable, subject to the suggested amendment to paragraph 1.

14. With regard to draft article 36, he agreed that the reference to the inviolability of the diplomatic bag was justified, especially in view of the corresponding provisions of the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States. As to the exemption of the diplomatic bag from electronic scanning, in the light of the government study carried out in the United Kingdom he now tended to take the view that scanning constituted a form of inspection and should be carried out only with the consent of the sending State and in the presence of its authorized agent. In the absence of such consent the diplomatic bag should, if there was serious reason to believe that it contained prohibited articles, be returned to its place of origin. The commentary, if not the article itself, should make it clear that, in such an event, the sending State was not allowed to refuse to take back the diplomatic bag.

15. In connection with draft article 40, the Special Rapporteur was right to affirm that the concept of "transit State" was preferable to that of "third State". Lastly, he disagreed with Mr. Riphagen's observation (1905th meeting) regarding paragraph 2 of draft article 42 that the list of changes to the provisions of the draft articles which could be made

by international agreement should be extended to include the possibility of limiting those provisions. The fact that the paragraph as it stood was something of a one-way street was quite appropriate.

16. Chief AKINJIDE said that draft article 23 was a logical consequence of article 16 and he was not persuaded by the arguments against retaining it. The main thrust of the article must be preserved. However, as already suggested, paragraph 1 could be amended so as to limit the diplomatic courier's immunity from criminal jurisdiction to cases involving the exercise of his functions as defined in article 10. Paragraph 4 of article 23 as originally submitted by the Special Rapporteur was acceptable and the square brackets added by the Drafting Committee should be removed.

17. Draft article 36 was much more problematical. At the previous meeting, Mr. Al-Qaysi had spoken of two sets of interests and Mr. El Rasheed Mohamed Ahmed had just mentioned a third set of interests, those of the transit State. Yet it would be wrong to overlook a fourth set of interests, namely those of the international community at large. Since the adoption of the four codification conventions, the world had entered a new phase of violence. Terrorism, whether by individuals or sponsored by a State, had become a common phenomenon, one which article 36 must take into account. As everyone was aware, misuse of the diplomatic bag could involve the illegal transport of gold, drugs or currencies. Although the number of countries actually involved in such abuses was very small, the effect on the international community at large was devastating. A connection between acts of terrorism and misuse of the diplomatic bag was very difficult to establish; what was beyond question, however, was the fact that vast sums were being spent on measures to prevent and control terrorism. Consequently he had reached the conclusion that article 36 as proposed was inadequate; for one thing, airlines over which the Governments of receiving or transit States had no control might well refuse to carry diplomatic bags unless they could be examined. Serious consideration should be given to Sir Ian Sinclair's proposals (1906th meeting) so as to combine them with the terms of article 36 in its present form.

18. Mr. TOMUSCHAT said that, by placing the diplomatic courier on a level similar to that of the diplomatic agent and higher than that of consular officers, draft article 23 undoubtedly embodied some progressive development of the rules currently in force. It had been argued that denial of total immunity from jurisdiction to the diplomatic courier was inconsistent with the basic principles of inter-State relations or even with the principle of the sovereign equality of States. Yet the courier, unlike the diplomatic agent, was no more than an instrument ensuring a free flow of information between the sending State and its outposts abroad. Consequently, only functional necessity would appear to warrant restricting the territorial sovereignty of the receiving or transit State. Functional necessity, however, had to be assessed in real terms. When it proposed an extension of the immunities accorded to the courier, the Commission should be able to point to some specific

deficiency in the law. For his own part, he was at a loss to perceive any such deficiency: in the absence of any complaints about interference with the diplomatic courier's work, there would appear to be no need to modify the law.

19. The crucial difference between a diplomatic courier and a diplomatic agent posted to the receiving State on a long-term, short-term or *ad hoc* basis was, quite simply, the length of their stay abroad. If a diplomatic agent was protected only against arrest or detention but remained subject to criminal jurisdiction, his ability to perform his functions could be seriously impaired by having to appear in court in order to defend himself. However, as a resident of the receiving State he could not ignore proceedings instituted against him. The diplomatic courier's situation was entirely different. Under article 16, the courier enjoyed full personal inviolability. If the receiving State none the less tried to initiate unjustified court proceedings against him, he could simply leave the country. The receiving State had no means of bringing pressure to bear upon the diplomatic courier. In such circumstances, court proceedings would only be a hollow threat.

20. However, since inviolability almost amounted to immunity from criminal jurisdiction, he was inclined to agree with Chief Akinjide that paragraph 1 of draft article 23 followed logically upon article 16, and he was not in principle opposed to it. Restricting the diplomatic courier's immunity from criminal jurisdiction to acts performed in the exercise of his functions would be difficult to reconcile with the absolute prohibition in article 16 on subjecting him to any form of arrest or detention. Moreover, there was no justification, in the case of the diplomatic courier, for singling out specific acts as demanding a higher degree of protection. The diplomatic courier was, after all, only a messenger.

21. Again, it was difficult to identify specific acts performed in the exercise of the courier's functions. Unlike a diplomatic agent or consular officer, both of whom were vested with authority by the sending State and acted as representatives of that State, the courier did not, when travelling in the territory of the receiving or transit State, exercise the public authority of the sending State, nor did he represent it when concluding contracts in connection with the fulfilment of his mission. His sole task was to deliver the bag to its destination and, in completing that task, he often used facilities that were the same as those used by any private citizen or ordinary tourist. Hence there was no real basis for granting preferential status to the courier in respect of acts performed in the exercise of his functions, since those functions were not performed in the capacity of a representative of the sending State.

22. It seemed to him that the term "jurisdiction", in the context of administrative jurisdiction, had a much broader meaning than the French term *jurisdiction*. It was an important point, because the term could be taken to refer to the courts alone or to the jurisdiction of the administrative authorities. The manner in which the term was interpreted under article 23

would therefore determine the extent to which the courier came under the jurisdiction of the receiving State.

23. The compromise formulation in paragraph 4 of draft article 23 was acceptable, since there was no fundamental reason why the courier should not give evidence provided that the performance of his mission was not delayed. It should, however, be made absolutely clear that the courier could not be prevented from leaving the territory of a foreign State and returning to the sending State, perhaps by adding an express provision to that effect either in article 15 or in article 16.

24. In the case of draft article 36, it would be preferable for paragraph 1 to retain the wording of the codification conventions. Although that would result in a dual régime, it would be unwise at the present stage to increase the guarantees accorded to the diplomatic bag. The best course might be to place a full stop after the word "detained" and delete the remainder of the paragraph. It had been said that it was not advisable to legislate on the basis of a limited number of cases of abuse, although abuses that were insignificant in statistical terms could well have far-reaching and devastating consequences. Another point was that the prohibition on examination of the diplomatic bag by electronic or other devices could be held to extend to airlines, as a result of which they might refuse to take on board any bag not accompanied by a courier. It was necessary to be quite clear whether the intention was in fact to extend the prohibition beyond the scope of purely inter-State relations to cover third parties, particularly airlines. With regard to paragraph 2, he would prefer the approach adopted in the 1963 Vienna Convention on Consular Relations, one which could possibly be used along the lines suggested by Sir Ian Sinclair (1906th meeting).

25. He appreciated that the reference to "other inspections" in draft article 37 had been included to cover the case of border controls carried out for sanitary purposes or to prevent art treasures from leaving the country. Yet it would perhaps be preferable, as had been suggested, for article 36 to cover all kinds of control and inspection, and for article 37 to refer solely to taxation.

26. From the point of view of drafting, he agreed that draft article 39 was at once too broad, since it could also cover cases in which the sending State had terminated the functions of the courier, and too narrow, since other situations might arise in which the receiving or transit State should ensure the safety of a diplomatic bag, provided it had knowledge of a mishap to the courier.

27. He had some doubt about the need for draft article 40. According to his reading of the draft, there was no requirement that a transit State had to be informed beforehand that a courier or bag was to pass through its territory. Consequently, a third State which was not originally foreseen as a transit State would automatically assume the obligations of a transit State if, as a result of *force majeure* or fortuitous event, a courier or bag entered its territory. If that interpretation was correct, the provisions of ar-

ticle 40 would be relevant only in cases in which a State made the entry of a courier dependent upon a visa.

28. The rule stated in draft article 41 was right and proper, and any problems in that connection stemmed merely from its all-encompassing nature. Obviously, if there were no diplomatic relations between a sending State and a receiving State, there could be no diplomatic bag *stricto sensu*. However, there might be consular relations, in theory at least, and a consular bag was a diplomatic bag within the meaning of article 3, paragraph 1 (2) (b), and article 41 of the draft. Only at first sight, therefore, did the provision appear to be too broad.

29. Draft article 42 posed serious problems and, in its present form, contained a statement that was simply not true in the light of the terms of articles 23 and 36, which purported to modify the existing legal régime. He preferred the original text, which stated that the draft articles supplemented the four codification conventions. Again, the drafting of paragraph 2 would be simplified if the phrase "or supplementing or extending or amplifying" were replaced by "or modifying".

30. Lastly, with regard to draft article 43, paragraph 1, he agreed that the phrase "without prejudice to the obligations arising under the provisions of the present articles" was misleading and should be deleted.

31. Mr. KOROMA, thanking the Special Rapporteur for a well-structured sixth report (A/CN.4/390), said that, in the light of the discussion and particularly Mr. Balanda's comprehensive statement, which he endorsed, few comments were required.

32. The Commission's mandate was to elaborate rules on the status of the diplomatic courier and the diplomatic bag that would represent a development of the four codification conventions, and he agreed that no attempt should be made to disentangle those conventions. Once it was accepted that article 16, which provided for the personal inviolability of the diplomatic courier, was relevant to the endeavour to elaborate rules on the courier and the diplomatic bag, it followed logically that article 23, which stipulated the immunity of the courier from criminal jurisdiction, had a place in the draft. No argument had been advanced to the contrary or to the effect that article 23 was not predicated on the four codification conventions. He was ready to endorse the idea that the courier's immunity should be confined to acts performed in the exercise of his official functions, for that would meet the concern of those States which took the view that immunity should not be extended to a new category of individuals, even though their arguments were not very persuasive. Couriers were a limited group of individuals and, invariably, persons of the highest integrity. There was simply no evidence to suggest that couriers in particular had been abusing their positions. In order to facilitate their task, therefore, and in the light of both customary international law and the relevant multilateral treaties in the matter, article 23, which was well-founded, should be retained.

33. The purpose of draft article 36 was to protect official diplomatic communications. Regrettably, the diplomatic bag had recently been misused and something would have to be done about it. There had been a tendency in the past to concentrate on narcotics smuggling, but the issue was much wider, even universal in nature. It included the smuggling of currencies, with the resulting destabilization of the economies of the developing countries; of precious stones such as diamonds, on which the viability of the economies of some countries largely depended; and also of works of art. The developing countries, which stood to lose most, were faced with a dilemma, for most of them could not afford to instal expensive scanning equipment.

34. Accordingly, he supported Sir Ian Sinclair's proposal (1906th meeting, para. 7), subject to certain modifications. In the first place, at the end of paragraph 1 of that proposal, the phrase "by the representatives or authorities of the receiving State or the transit State" should be added for the sake of greater clarity. Secondly, given the realities of the modern world, he could accept the compromise proposal in paragraph 2; if there was serious reason to believe that the bag contained something other than official correspondence, documents or certain specified articles, it would be entirely proper for the competent authorities of the receiving State to request that the bag be opened in their presence by an authorized representative of the sending State. Should that request be refused, however, return of the bag to its place of origin would not resolve the matter, particularly in the case of an attempt to smuggle currency or precious stones; in such a case, the attempt would probably be renewed. He had no ready solution to offer, but urged the Commission to give its attention to that and other matters which had been raised.

35. It had been said that steps should be taken to ensure that the diplomatic bag was not misused by States themselves. In that connection, he wished to point out that there was a tendency on the part of the popular press to sensationalize abuses and to try and to judge people without a full investigation. Even if a retraction was made by a newspaper, the harm had already been done. There were, of course, some abuses by diplomats, but matters should be kept in perspective.

36. Mr. USHAKOV said that, according to draft article 36, the diplomatic bag was inviolable at all times and wherever it might be in the territory of the receiving State or the transit State: it was therefore exempt from any kind of examination, whether by electronic or by other means. Any inspection of the bag would infringe its inviolability. Several members of the Commission had spoken of abuses which could be committed by the receiving or transit State and by the sending State. How was the term "abuse" to be understood in law? In the first case, the abuse would consist in examining the diplomatic bag despite its inviolability, which provided legal protection for the sending State; in the second case, the abuse would be to introduce into the receiving or transit State, in the diplomatic bag, articles subject to an import prohibition, which provided legal protection for the receiving State or transit State. In both cases, the State

violating its obligation committed an internationally wrongful act, which could be a delict or a crime and which engaged its international responsibility.

37. Many violations were possible, as had been shown by the statements of previous speakers. For instance, examination of a diplomatic bag by X-rays could render films contained in the bag completely useless. Such a measure could elicit countermeasures by the sending State, which would try to ensure better protection of the contents of its bag. There would then be an escalation of measures and countermeasures.

The meeting rose at 1 p.m.

1908th MEETING

Friday, 21 June 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: 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. Laclea Muñoz, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, 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)

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DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPporteur³ (*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)

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