Document:-
A/CN.4/SR.1908

Summary record of the 1908th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1985, vol. I

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. Lacleta 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)

[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)

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[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.

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. Mr. USHAKOV, continuing his comments on draft article 36, which he had begun to examine at the previous meeting, said that, if the Commission wished to obtain results, it should suggest to receiving States and transit States which were in danger of being duped by sending States that they systematically open all diplomatic bags. Once a bag had been opened, it should be examined throughly, since an apparently harmless object could have an entirely different use from the one it appeared to have at first sight. Would not the wisest course therefore be to return all diplomatic bags?

2. Having carried that argument to the extreme, he observed that the important point was that the mission should receive the diplomatic bag, the contents of which should be of no concern to the transit State or the receiving State, in so far as they were intended exclusively for the use of the mission's staff. The only real need for the receiving State was to ensure that the contents of the diplomatic bag, whether narcotic drugs or anything else, did not leave the mission. The diplomatic bag should serve the purposes of the mission, whatever they were, and must therefore be inviolable. That guarantee was the counterpart of the prohibition on sending by diplomatic bag articles which would not be used by the mission itself. Once the inviolability of the diplomatic bag was recognized, it was obvious that it must be exempted from all customs examination, as provided in draft article 37.

3. The title of draft article 39 was acceptable, but he had doubts about the meaning to be attached to the words "in the event of termination of the functions of the diplomatic courier". In draft article 40, he thought it sufficient to mention *force majeure*; there was no need to refer to the case of "fortuitous event", a term which might cause difficulties of interpretation. He saw no objection to adopting draft article 41.

4. Draft article 43 was closely connected with article 3, on the use of terms, including the term "diplomatic courier". States which were not parties to the four codification conventions should be allowed to choose between the different types of couriers and bags and to decide which they would like to be covered by the future convention. States should be free not to apply the convention to all the couriers and bags listed in article 3. For the convention to be applicable, it must include a provision such as article 43, which nevertheless required some slight drafting amendments. Lastly, he proposed adding to the draft a provision on non-discrimination between States based on article 83 of the 1975 Vienna Convention on the Representation of States.

5. Mr. DÍAZ GONZÁLEZ commended the Special Rapporteur for having taken into consideration in his sixth report (A/CN.4/390) the comments made at previous sessions of the Commission and in the Sixth Committee of the General Assembly. In introducing his sixth report (1903rd meeting), the Special Rapporteur had evoked the idea already put forward of making the diplomatic courier a kind of "super ambassador". He himself did not think it was necessary to go so far and to give the diplomatic courier more privileges and immunities than a head of mission. As Mr. Flitan had observed in relation to draft article 23 (1904th meeting) the Commission had not received a mandate from the General Assembly to amend the existing conventions, either by stopping short of the provisions of the 1961 Vienna Convention on Diplomatic Relations or by going beyond those of the 1963 Vienna Convention on Consular Relations, especially as article 16 of the draft ensured the protection and personal inviolability of the diplomatic courier. Why should the diplomatic courier need immunity from criminal jurisdiction during the short time that he spent in the transit State or the receiving State? If he entered those States with the intention of committing an offence, he would enjoy the protection provided under article 16.

6. It should also be noted that no diplomatic courier had ever misused the bag, because in most cases he did not know what it contained; and, since no offence had yet been committed by a diplomatic courier, none had had any need of immunity from criminal jurisdiction. That being so, the Commission should remain within the limits laid down by the conventions in force and not include a provision such as article 23, particularly its paragraphs 1 and 4, in the draft. The suggestion made by the Special Rapporteur in his sixth report (A/CN.4/390, para. 29) that "the most appropriate option would perhaps be the adoption of draft article 23 as proposed by the Drafting Committee" was in contradiction with the views expressed in the Sixth Committee (*ibid.*, paras. 16-17), which showed the very clear opposition between two schools of thought, one favouring article 23 and the other categorically opposed to it.

7. As he understood it, the adjective "inviolable" had a precise meaning in the context of draft article 36 and referred not to the bag itself, but to its contents, namely the correspondence exchanged between the sending State and its missions. It was thus one thing to open the diplomatic bag, but quite another to read the correspondence it contained. He accepted the idea of exempting the bag from detailed examination, but thought that it could be subjected to an inspection that would enable the authorities of the receiving State or the transit State to make sure that no object carried in the bag could be used for the commission of an offence. The aim should be to ensure a balance between the need to guarantee freedom of communication and the need to protect the receiving State and the transit State, in accordance with the 1961 and 1963 Vienna Conventions. To prohibit all examination would be going too far. The

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

solution would be to provide that the bag could be opened by the receiving State or the transit State or, if the sending State objected, returned to that State. The amendment proposed by Sir Ian Sinclair (1906th meeting, para. 7) was therefore generally acceptable and provided a useful starting-point for recasting article 36, which the Commission should examine carefully in order to reach a consensus. He was convinced that the majority of States would not be willing to accept articles 23 and 36 as they now stood and that the Commission should take account of that fact. The conventions in force offered sufficient safeguards and should not be revised or amended, but only supplemented where necessary, if the Commission found any important gaps.

8. The Spanish text of draft article 37 should be brought into line with the English. The word *promulguen* should be replaced by the words *puedan promulgar* and the words *de los correspondientes a otros servicios determinados prestados,* which made no sense, should be replaced by the words *de los correspondientes a la prestación de otros servicios especiales (o específicos, o particulares)*. In addition, in draft article 40, the words *hecho fortuito* should be replaced by the words *caso fortuito.*

9. Lastly, he did not understand why the Special Rapporteur had included draft article 41 obliging a State to grant facilities to a diplomatic courier or diplomatic bag in the absence of diplomatic or consular relations between that State and the sending State and, consequently, in the absence of a mission of the sending State in that State—unless it was a mission to an international organization, although such a mission would be protected by the headquarters agreement of the organization concerned and by the 1975 Vienna Convention on the Representation of States. That provision would cause more confusion than it would solve problems. It was impossible to imagine that a State would have a diplomatic or consular mission in a State which did not recognize it or with which it had no diplomatic relations. Article 41 should therefore be deleted. He had no objection to draft articles 42 and 43.

10. Sir Ian SINCLAIR said that draft article 40 dealt with what might be called the unintended or unforeseen transit State, as in the case, for example, where an aircraft diverted because of adverse weather conditions was forced to land in a third State not initially envisaged as a transit State. He agreed that such a situation could arise and that it might be necessary to regulate it. In principle, a parallel should be established with the treatment to be accorded not by the receiving State, but by a true transit State, although that might make little difference in practice, since there was little if any distinction under the draft articles between the obligations of those two States. The general question whether there should be a distinction, in particular areas, between the obligations of the transit State and those of the receiving State might, however, have to be re-examined on second reading. Also, he had considerable difficulty with the word "inviolability" used in reference to the diplomatic bag: in his view, article 40 should provide simply for the same protection as the transit State was bound to accord.

11. With regard to draft article 41, he failed to see how paragraph 1 could possibly be applied in the context of bilateral diplomatic or consular relations. In the event that such relations were severed, the normal modern practice was for the sending State to entrust the protection of its interests to a third State acceptable to the receiving State; indeed, specific provision to that effect had been made in article 45 of the 1961 Vienna Convention on Diplomatic Relations. It might be that one or two junior members of the diplomatic mission of the sending State would be attached, by agreement, to the diplomatic mission of the protecting State, but, in that case, communications would be effected through the medium of that State and its diplomatic couriers and bags. It therefore seemed quite wrong, if not actually absurd, to imply that severance of bilateral diplomatic or consular relations between the States concerned would not affect the facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag. Similar considerations applied to non-recognition of the sending State or of its Government by the receiving State, since, almost by definition, bilateral diplomatic relations would not have been established between them.

12. There was the further question, raised by Mr. Díaz González, whether article 41 was needed at all, given that, in the case of host States to international organizations, such matters would be regulated by means of headquarters agreements. Admittedly, the kind of principle incorporated in article 41 could have some value, in the context of the obligations of the host State and the sending State, in the case of missions to international organizations, and that was no doubt why article 82 of the 1975 Vienna Convention on the Representation of States contained a special provision on the point, but the rule could not be generalized to cover more specific problems arising in the context of bilateral relations. If any part of article 41 was to be retained, therefore, some major surgery would have to be done in the Drafting Committee to arrive at a satisfactory text.

13. As to draft article 42, he, like Mr. Tomuschat (1907th meeting), much preferred the original version, since it would be useful to stress that the draft articles were intended to supplement the codification conventions and such a statement could also be helpful in the search for a solution to the problem raised by draft article 36. He would therefore like to know why the Special Rapporteur had rejected what seemed in principle to be a much clearer draft of article 42. He was also not sure to what extent it could be said, as it was in paragraph 1, that the articles were "without prejudice to the relevant provisions in other conventions". In his view, the question warranted further consideration.

14. He shared Mr. Riphagen's reservation (1905th meeting) with regard to the words "confirming or supplementing or extending or amplifying" in draft article 42, paragraph 2. Those words were, admittedly, used in article 73 of the 1963 Vienna Convention on Consular Relations, but they had always puzzled him. They were presumably not designed to prohibit *inter se* modification of the draft articles by two or more States within the limits set by article 41 of the 1969 Vienna Convention on the Law of Treat-

ies, but they could bear that meaning, since paragraph 2 made no mention of modification. He therefore proposed that those words should be deleted, since their interpretation was not clear and they might limit the freedom of two or more States parties to any future convention to agree on *inter se* modification of some of its provisions.

15. With regard to draft article 43, he agreed in large measure with the substance of what Mr. Ushakov had said and, in general, could approve the text of the provision relating to optional exceptions. While he welcomed the introduction of that element of flexibility, he had serious reservations about the use of the words "without prejudice to the obligations arising under the provisions of the present articles" in paragraph 1. What the Special Rapporteur might have had in mind was to preserve the applicability of those provisions of the draft articles that were otherwise binding on the State making the declaration by virtue of a customary rule of international law or of any other international agreement in force for the State concerned. If so, the words in question could be deleted and a new paragraph added along those lines.

16. Mr. MAHIOU commended the Special Rapporteur on his valuable efforts to propose solutions that would be acceptable to all members of the Commission. The sixth report (A/CN.4/390) showed that the Special Rapporteur was willing to take account of all points of view and it even anticipated the Commission's wishes.

17. Referring to draft article 23, he said that, although many States were opposed to the idea of granting the diplomatic courier absolute immunity from criminal jurisdiction, the Commission could not completely rule out that idea, which would meet a particular need. The arguments that had been put forward in favour of not granting such immunity were both valid and inadequate. The instruments in force did not expressly provide for the immunity of the diplomatic courier from criminal jurisdiction, but nor did they exclude it. It could thus be said that they recognized it implicitly.

18. There were, moreover, different interpretations of custom and practice. One view was that it would be enough to guarantee the personal inviolability of the courier in article 16. He was, however, not certain that that was true because article 16 and article 23, paragraph 1, applied to different situations and article 16 would not prevent the courier from being involved in a lawsuit. It had also been stated that those two provisions overlapped; but it should be borne in mind that the 1975 Vienna Convention on the Representation of States contained two provisions that were closely related, namely articles 58 and 60 on personal inviolability and on immunity from jurisdiction respectively. Such overlapping had not appeared to cause the authors of the 1975 Vienna Convention any problems. Draft article 23, paragraph 1, nevertheless differed from article 60, paragraph 1, of the 1975 Vienna Convention in that it did not place any restrictions on the immunity of the diplomatic courier from criminal jurisdiction by linking such immunity to the exercise of the courier's functions. Even if the courier was not regarded as a diplomatic agent, there was some analogy between his functions and those of some members of the staff of a mission. Since he spent only a short time in the receiving State, his functions were also similar to those of a representative to a conference. The solution would therefore be to provide in article 23, paragraph 1, that the diplomatic courier enjoyed immunity from criminal jurisdiction "in respect of all acts performed in the exercise of his official functions".

19. Article 23, paragraph 4, reflected what had been said during the discussions at the previous session. Mr. Barboza's suggestion (1906th meeting) that the diplomatic courier might, where necessary, be required to give evidence as a witness before a court of his own country should, however, be given further consideration. Such a course would not affect the courier's immunity from the criminal jurisdiction of the receiving State or the transit State.

20. Draft article 36 was controversial because it was the counterpart of draft article 23. He had some doubts about the need for the distinction which Mr. Díaz González had drawn between the inviolability of the bag and the inviolability of its contents. National constitutions normally embodied the right to confidentiality of personal correspondence and legal decisions showed that opening an envelope was in itself enough to breach that right. He had been most interested in what Mr. Barboza and Mr. Calero Rodrigues (*ibid.*) had had to say with regard to the examination of the bag by electronic devices. If the aim was, as Mr. Barboza had said, to codify for the future, developing countries would be at a disadvantage in relation to developed countries because they would not be able to keep up with technological developments. It would therefore be necessary to rule out any possibility of examining the bag, but there would also have to be a safeguard clause to protect the receiving State and the transit State. He nevertheless noted that no diplomatic courier or diplomatic bag had ever been implicated in the hijacking of an aircraft, for example, and it was the smuggling of narcotic drugs or currency, rather than of weapons, that could be used as an argument in favour of returning a bag to its place of origin. The exemption of the bag from any examination, together with a safeguard clause allowing the transit State and the receiving State to request that the bag should be opened or returned, would thus strike a balance between the rights and duties of the States concerned.

21. Although he agreed in principle with draft articles 37 and 39, he thought that the wording of the latter article should be improved because the phrase "in the event of termination of the functions of the diplomatic courier" might give rise to problems of interpretation. He had no difficulty with draft article 40. He understood that the Special Rapporteur's purpose in draft article 41 had been to guarantee the sending State's freedom of communication, but the wording of the article was too general and might even be dangerous. A State could deliberately send a bag or a courier through a State with which it had no relations in order to create problems for that State. Article 41 would therefore have to be reformulated to avoid any such situations to which States might object and which might prevent the draft articles

from being accepted. He also found that the new wording of draft article 42 was less satisfactory than the original wording. In his view, draft article 43 would be detrimental to the codification of the régime applicable to the diplomatic courier and the diplomatic bag and he therefore had some doubts about it. The problem was not so much one of drafting as one of substance: the draft articles were intended not merely to be residual rules, but to supplement the codification conventions.

22. Mr. AL-QAYSI said that he had earlier advocated the deletion of draft article 43 but, following the statements by Sir Ian Sinclair and Mr. Ushakov, he was beginning to see its underlying purpose in a clearer light. Particularly in view of what Mr. Mahiou had said, however, he was still not convinced of the need for that article. If, for example, the article were retained, Sir Ian Sinclair's proposed text for article 36 (1906th meeting, para. 7) were accepted and a State A declared that it would apply the articles only to diplomatic bags, what would be the relationship between State A and a State B which made a declaration under article 36, paragraph 3, as proposed by Sir Ian, but not under article 43?

Co-operation with other bodies (*continued*)*

[Agenda item 11]

Statement by the Observer for the Inter-American Juridical Committee

23. The CHAIRMAN welcomed Mr. Vieira, Observer for the Inter-American Juridical Committee, and invited him to address the Commission.

24. Mr. VIEIRA (Observer for the Inter-American Juridical Committee) said that he had greatly admired the Commission since the beginning of its work. The Commission and, to a lesser extent, the Inter-American Juridical Committee represented, respectively, the world conscience and the regional conscience of international law. Despite the enormous cultural, social, political, racial and religious differences which divided them, the members of the two bodies were indissolubly united by the strong link of the law.

25. In recent years, the Committee had gone on from the study of questions of private international law to topics of public international law. During the past decade, the secretariat of OAS had encouraged work on the codification of private international law, which had led to the adoption of 18 treaties. Between August 1984 and January 1985, the Committee had prepared two draft conventions and drafted several documents on essential questions of public international law.

26. In the field of *jus in bello*, noted for the Hague and Geneva Conventions, the Committee had adopted a draft inter-American convention prohibiting the use of certain weapons and methods of combat. It had based its work on the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, concluded under the auspices of the United Nations in 1980.[5] In the preamble to the draft convention, which it had adopted unanimously, the Committee reaffirmed the obligation of all States to refrain from the threat or use of force in their international relations and declared its concern at the proliferation of armed conflicts in which many civilians were victims. In view of the recommendation by the United Nations Conference which had adopted the above-mentioned Convention in 1980 urging States to take measures or conclude regional agreements to prohibit or restrict the use of the weapons in question, the Committee had endeavoured to codify that aspect of *jus in bello*.

27. Under the terms of the draft convention, international law placed limits on the methods of combat which States could choose in armed conflicts, national or international. In addition, States parties undertook to refrain from using certain weapons which might increase suffering unnecessarily or be certain to cause death. Moreover, the draft convention established the obligation to take measures to distinguish between civilian populations and combatants and between civilian or cultural property and military targets. The draft did not contain an exhaustive list of the weapons to which it applied, but referred to the three protocols annexed to the United Nations Convention of 1980. It established the obligation to punish, under internal law, conduct contrary to the convention, which would constitute a sufficient legal basis to apply for the extradition of persons committing offences. The contracting parties also undertook to meet every year at the same time as the OAS General Assembly to consider the application of the convention; special meetings could also be held to consider new weapons. At the request of one third of the contracting parties, the convention could be revised at least five years after its entry into force. It should be noted that article 8 authorized the parties to declare, at any time, in accordance with article 64 of the American Convention on Human Rights,[6] that they recognized the competence of the Inter-American Court of Human Rights for all questions relating to the interpretation of the convention.

28. The second draft convention recently adopted unanimously by the Committee was designed to facilitate disaster relief and was based on a draft prepared by the Inter-American Bar Association. When a disaster occurred, such as the floods which had devastated Brazil and Argentina in 1984, and one State wished to help another, many bureaucratic obstacles were bound to arise at both the national and international levels.

29. According to article 1 of the draft convention, relief occurred when a State provided assistance at the request of another State; the acceptance of the offer of assistance by a State was deemed to be a request for assistance. States were not prevented from agreeing on other procedures. Among the different aspects of the problem treated in the draft

* Resumed from the 1903rd meeting.

[5] United Nations, *Juridical Yearbook 1980* (Sales No. E.83. V.1), p. 113.

[6] The "Pact of San José, Costa Rica", signed on 22 November 1969 (to be published in United Nations, *Treaty Series*, No. 17955).

convention, it should be noted that, although relief personnel were subject to the laws and customs of the assisted State and transit States, they could freely enter the territory of such States without being subject to customs formalities relating to passports, visas or baggage. Means of transport were exempt from payment of charges or taxes and all other formalities. Assisted States were entitled to limit the areas in which relief was provided. They were required to facilitate the work of the relief teams, in particular by giving them information on the extent of the disaster and on infrastructure, including bridges, roads and landing-strips.

30. Relief must, of course, be provided in such a way as to cause the least possible damage. As accidents were inevitable, however, it was provided that assisted States should not claim compensation from other States parties which had provided relief and that they undertook to take the place of those States if actions were brought by third parties. Such renunciation and subrogation applied only to acts directly connected with the provision of relief. Although the relevant article did not expressly say so, he believed that that rule did not apply in the case of fraud. Relief personnel enjoyed immunity from criminal, civil and administrative jurisdiction in respect of acts performed in the exercise of their official functions, unless the State providing relief waived that immunity in writing. The assisted State retained its territorial jurisdiction for all criminal proceedings concerning unlawful acts committed by relief personnel in that State outside the exercise of their official functions.

31. One of the most interesting aspects of the draft convention was that it contained a rule of interpretation according to which relief work must be encouraged and facilitated in the event of a disaster and relief personnel must be given the best possible support and protection. The draft convention also provided that national and international organizations, both governmental and non-governmental, which provided disaster relief could, by agreement with the assisted State, invoke the provisions of the convention, with the exception of those relating to immunity from criminal jurisdiction.

32. The Committee was competent to give opinions on points of international law at the request of the OAS General Assembly or any other OAS organ. The General Assembly had decided to carry out a study with a view to the possible amendment of the OAS Charter,[7] the Pact of Bogotá[8] and the Inter-American Treaty of Reciprocal Assistance.[9] The secretariat had been asked to prepare a draft and to request the views of Governments and the Committee had then suggested that the Permanent Council should convene a special conference during the last quarter of 1985, which he personally considered to be too soon.

33. The OAS General Assembly had consulted the Committee on the form of the coercive measures of an economic character referred to in article 19 of the OAS Charter. Mr. MacLean, a member of Peruvian nationality, had been appointed Special Rapporteur, in which task he had been assisted by Mr. Galo Leoro, the present Chairman of the Committee, and other members. The document adopted by the Committee on that question gave an outline of the work done on economic coercion in the American continent, beginning with the Eighth Inter-American Conference, held at Lima in 1938, and going on to discuss the Conference of Chapultepec on problems of war and peace, held at Mexico City in 1945, and the Ninth Inter-American Conference, held at Bogotá in 1948. The latter conference had drafted article 16 —which later became article 19—of the OAS Charter in the same terms as article 8 of the Economic Agreement of Bogotá. Article 19 provided that no State could use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind. The document also mentioned the Charter of Economic Rights and Duties of States, adopted in 1974,[10] and the work of a special committee set up to study the inter-American system and propose means of restructuring it. After referring to various consultative meetings of the Ministers of Foreign Affairs of the States of the inter-American system, the Committee had reached the provisional conclusion that article 19 of the OAS Charter contained sufficient substantive criteria to give a general idea of unlawful coercive measures. The Committee also considered that the application of coercive economic measures was an urgent problem of concern to all American States which justified the convening of a consultative meeting, without prejudice to the setting up of *ad hoc* machinery.

34. In 1983, the OAS General Assembly had instructed the Secretary-General of OAS to study, with the assistance of the Committee, the procedures for the peaceful settlement of disputes provided for in the OAS Charter, as well as additional measures for their promotion, updating and extension. It was those measures that the Committee had taken up. It had drawn attention to a number of ways in which the system of peaceful settlement of disputes could be strengthened: the right of members of OAS to use the machinery provided for in the Charter of the United Nations; a study of the Pact of Bogotá showing why certain States had made reservations to that instrument or had not ratified it, with a view to forming an idea of the viability of the Pact, subject to certain reforms; the possible establishment of one or more dispute-settlement bodies which would operate at the request of an American State (the statute of the Inter-American Peace Committee might be revised for that purpose); the preparation of fact-finding guidelines; the preparation of a guide to the means available to States under both the OAS system and that of the United Nations; the preparation of a study on the possibility of amending the relevant articles of the OAS Charter to enable any State to request the good offices of the Permanent Council or

[7] Signed at Bogotá on 30 April 1948 (United Nations, *Treaty Series*, vol. 119, p. 3); amended by the Protocol of Buenos Aires of 27 February 1967 (*ibid.*, vol. 721, p. 324).

[8] American Treaty on Pacific Settlement, signed at Bogotá on 30 April 1948 (*ibid.*, vol. 30, p. 55).

[9] Signed at Rio de Janeiro on 2 September 1947 (*ibid.*, vol. 21, p. 77).

[10] General Assembly resolution 3281 (XXIX) of 12 December 1974.

of the Inter-American Committee on Peaceful Settlement, to introduce the notions of equity and justice as precepts to be respected, and to empower the Secretary-General of OAS to call the attention of its organs to any question which, in his opinion, might endanger the maintenance of peace. In addition to those proposals, the Committee had stated the opinion that, in conformity with Article 103 of the Charter of the United Nations, article 137 of the OAS Charter and article 10 of the Inter-American Treaty of Reciprocal Assistance, a balanced system had been set up under which a member of the inter-American system could rely on the competence of the Security Council. That opinion had, however, not been unanimously approved.

35. The Committee had also adopted, at its January 1985 session, a document in which it had defined and developed the principles—other than those stated in the OAS Charter—which should govern relations between States. That document had been presented as a memorandum addressed to the secretariat, to be brought to the notice of the contracting parties. The Committee believed that the revision of the basic instruments of the inter-American system would entail the strengthening of the regional body and it had put forward various considerations, some of which dealt with the facts and others with the legal aspects of the matter. It had, for instance, suggested that the Inter-American Treaty of Reciprocal Assistance, as amended in 1975, should come into force and that periodic official meetings should be held by the member States of OAS to discuss current problems; it had also stressed the problem of economic aggression and the need for an agreement on economic security and an *ad hoc* application instrument. The Committee had further indicated that it was necessary to draft an inter-American agreement on internal development.

36. The document had also dealt with the difficult problem of non-intervention, regarding which the Committee had suggested a study of cases of intervention as it had characterized them in a 1959 resolution. A study of the sources of international law and of the impact of the resolutions of international bodies on the establishment of a new legal order had also been contained in the document. The Committee had suggested establishing the principle of economic security and the principle that international law constituted a norm of conduct in international relations, as well as recognizing the development of international law, especially with regard to developing countries, including ideological plurality; it had also suggested that aggression should be regarded as generating American solidarity, but only for States which had ratified the Inter-American Treaty of Reciprocal Assistance—a reservation about which he had doubts. In addition, the Committee had proposed recognition of the principles relating to the environment, education and the participation of everyone in political, economic, social and cultural life. It had also studied the relationship between the problem of reservations to multilateral treaties and that of the functions of a depositary performed by the secretariat. It had recommended the unification of the texts of international instruments relating to reservations.

37. Lastly, the Committee had requested the secretariat to prepare a catalogue on the interpretation and application of the provisions of the OAS Charter by the organs of OAS; it had adopted a resolution by which it urged the OAS General Assembly to request member States to take part in the campaign against drug abuse; it had asked the secretariat for information on the progress made by member States in improving their judicial system and had appointed rapporteurs on that subject to submit a report and recommendations to the Committee. In that connection, he pointed out that, unlike the Commission, the Committee could take up the study of a subject at the request of an individual member State.

38. The course in international law had been a great success, as it was every year, and a tribute had been paid to the United Nations in the form of a special vote to mark the fortieth anniversary of the signing of the Charter of the United Nations on 26 June.

39. In conclusion, he stressed that co-operation between the Commission and the Inter-American Juridical Committee was extremely valuable, not only as an opportunity for the presentation of their respective activities, but also at the level of personal contacts.

40. The CHAIRMAN thanked the Observer for the Inter-American Juridical Committee for providing the Commission with a comprehensive survey of his organization's activities in so many fields of interest to the international community.

41. Mr. YANKOV speaking also on behalf of Mr. Flitan and Mr. Ushakov, expressed his appreciation for the statement by the Observer for the Inter-American Juridical Committee. When visiting the Committee on behalf of the Commission, he had been deeply impressed by the Committee's accomplishments in many fields and by the high intellectual and professional level at which its activities were conducted. The Commission and the Committee pursued common objectives and had much to learn from each other; in particular, the Committee's working methods, while similar to those of the Commission, were less formal, creating an atmosphere propitious to productive work. He requested Mr. Vieira to convey his personal thanks to the Committee for the warm hospitality it had extended to him.

42. Mr. EL RASHEED MOHAMED AHMED, speaking on behalf of the African members of the Commission, said that there were many similarities between problems and developments in Africa and Latin America. Both continents possessed vast resources that had not yet been fully tapped and, in both, military régimes were now being replaced by democratic Governments. His own country had learned a great deal from Latin America: for example, the tradition which it had inherited from the United Kingdom whereby embassies were not regarded as foreign enclaves was now giving way to the Latin American principle of treating foreign embassies as sanctuaries which the police could not enter. That was undoubtedly a positive development, for it helped to save the lives of persecuted persons. Another example was the principle of *uti possidetis*. In the field of international law, as in many others, Latin America had a great deal to offer to mankind.

43. Mr. DÍAZ GONZÁLEZ, speaking on behalf of the Latin American members of the Commission, thanked Mr. Vieira for his outstanding statement on the activities of the Inter-American Juridical Committee, which was the regional counterpart of the Commission. As Mr. Vieira had pointed out, both represented the conscience of the law.

44. America has always been regarded as the continent of law and it had tried to be the continent of peace, although external events had not always permitted peace to be maintained. Since the beginning of relations between America and Europe, America had attracted the concern and consideration of European jurists, in particular the founders of international law. It had first been necessary to establish the legal capacity of the indigenous populations of the American continent and then to organize their protection. A whole body of law adopted for that purpose showed Spain's concern to protect the indigenous peoples of America and organize social life in the New World, where the American, European and African civilizations had come together as one.

45. America had been the subject of the first international arbitration, for Spain and Portugal had agreed to submit their dispute on the delimitation of their zones of influence to the arbitration of Pope Alexander VI. It should also be noted that, at the end of the wars of independence, Bolívar had had recourse to the law to defend the new States. It was then that the Congress of Panama had been held, in 1826, in an attempt to organize peace within a legal framework by establishing the principles of the inviolability of the territory of States and the defence of each by the whole community of States in the event of attack. The Congress of Panama had been the progenitor not only of OAS, but also of the League of Nations.

46. The Inter-American Juridical Committee, which was an organ of OAS, reflected the concern of the people of America to be governed by law and to regulate their relations within a legal framework. The list of the Committee's recent activities was an impressive one and the Commission could benefit greatly by it. As Mr. El Rasheed Mohamed Ahmed had pointed out, moreover, the Committee's activities in furtherance of the law were not confined to America, but had repercussions in Africa and in Asia as well.

47. Mr. LACLETA MUÑOZ, speaking on behalf of the members from Mediterranean countries and of Mr. McCaffrey, expressed his admiration for the work of the Inter-American Juridical Committee, which was characterized not only by its value, but also by its intensiveness.

48. Mr. SUCHARITKUL, speaking also on behalf of Mr. Al-Qaysi and Mr. Ogiso, thanked Mr. Vieira for his excellent account of the Committee's activities. Having had the honour, some years previously, to represent the Asian-African Legal Consultative Committee at a session of the Inter-American Juridical Committee, he had been able to observe that the two Committees shared the same ideals and were interested in the same problems. Both of them were composed of developed countries, such as the United States of America, Japan, Australia and New Zealand, and developing countries.

49. The Commission, which always paid the greatest attention to the work of the Inter-American Juridical Committee, could only benefit from even closer co-operation with that Committee and the other regional committees, in the interests of the codification and progressive development of international law.

50. Mr. BARBOZA said that, as a national of a country which was a neighbour and friend of Mr. Vieira's country and as one who enjoyed excellent personal relations with him, he wished to thank him for attending a meeting of the Commission and congratulate him on his masterly account of the activities of the Inter-American Juridical Committee.

The meeting rose at 1.15 p.m.

1909th MEETING

Monday, 24 June 1985, at 3.05 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. McCaffrey, Mr. Ogiso, Mr. Pirzada, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, 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)

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[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.