Document:-

A/CN.4/SR.1909

Summary record of the 1909th 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

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.

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. OGISO said that, in his sixth report (A/CN.4/390), the Special Rapporteur had made a commendable effort to take account of the many different views expressed. The report thus provided a good basis for the Commission's consideration of the topic of the diplomatic courier and the diplomatic bag, which raised a number of rather controversial points.

2. He had already expressed his views on draft article 23 at the previous session. At the present session, Sir Ian Sinclair (1905th meeting) had made a strong case for deleting the article, and he himself was also in favour of its deletion. In paragraph 27 of his sixth report, the Special Rapporteur had summarized the three main trends of opinion on article 23. The first favoured retaining the article as submitted by the Special Rapporteur or as amended by the Drafting Committee without the square brackets enclosing paragraphs 1 and 4; the second favoured deleting the article altogether; and the third favoured amending paragraphs 1 and 4 as indicated in paragraph 27 of the report. The Special Rapporteur had gone on to suggest, in paragraph 28, that an effort should be made to strike a balance between the legal protection of the courier and the bag and the legitimate interests of the States concerned. It might therefore have been expected that the Special Rapporteur would propose a formula in line with the third trend of opinion. Rather unexpectedly, however, he had suggested amending only paragraph 4 of the article, leaving paragraph 1 unchanged. But if the intention was to strike the balance referred to, it would be necessary to amend not only paragraph 4, but also paragraph 1, as indicated in paragraph 27 of the report.

3. He remained in favour of deleting article 23 in its entirety, or at least deleting paragraphs 1 and 4. He might, however, find it possible to consider a compromise based on the introduction into paragraphs 1 and 4 of all the amendments advocated by the third trend of opinion on the article, as set out by the Special Rapporteur. Assuming that article 23 would take that form, he would like some clarification from the Special Rapporteur regarding a case recently reported in the Japanese press. A diplomat had been travelling constantly between the State where he was assigned and Japan, sometimes for pleasure, sometimes in the capacity of diplomatic courier, and sometimes on other assignments. The Japanese police had been informed that, in the State where he was accredited, he had been in contact with an individual connected with the organized narcotics traffic. That had given rise to the suspicion that he might be acting as a carrier in the smuggling of narcotic drugs. The diplomat concerned had been recalled by the sending State, but had denied the accusations made against him, which had not been proved. It did seem possible, however, that a courier might carry narcotic drugs in the diplomatic bag at the same time as official documents, and he would like to know how, in a case of that sort, the words "in cases involving the exercise of his functions" in the new paragraph 4 of article 23 would apply. The point was not made clear, either in paragraph 27 of the report or in the new paragraph 4 proposed by the Special Rapporteur.

4. If the answer was that such a case was covered by the formula "involving the exercise of his functions", the provision would be totally unacceptable to him. That interpretation would deprive the receiving State and the transit State of the possibility of requesting the courier to give evidence in doubtful circumstances. If the answer was that such a case would not be regarded as coming within the exercise of official functions, then that should be made clear, preferably in the text itself, but at least in the commentary to the article.

5. The wording of draft article 36 should, he thought, be kept close to that of article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations. Of course, that would introduce a conflict between the provisions of the new convention on the courier and the bag and those of the 1961 Vienna Convention on Diplomatic Relations. He took the view that the new convention, once adopted, must prevail. Even before the new convention was adopted by the majority of States Members of the United Nations, such conflicts might arise. Some States would continue to apply to the diplomatic courier the régime provided in the 1961 Vienna Convention, while others would apply article 36 as reformulated, which was closer to the 1963 Vienna Convention. States which were parties to the 1961 Vienna Convention would, however, be able, on the basis of reciprocity, to apply the régime of inviolability of the diplomatic bag restrictively even before acceding to the new convention. The possibility of such restrictive application was reserved by article 47, paragraph 2 (*a*), of the 1961 Vienna Convention.

6. In draft article 42, he would prefer to see paragraph 1 deleted. Draft article 43 should be reformulated so as to make it clear that the option of making the declaration was available only to States acceding to the new convention which had not yet ratified one of the four codification conventions mentioned in paragraph 1 of article 3, as provisionally adopted by the Commission. He was somewhat hesitant about the declaration procedure set out in draft article 43. That procedure could well make treaty relations unnecessarily complicated, particularly when another State objected to a declaration made by a State party under article 43. In such cases it would be necessary to refer to the registration machinery, which would complicate the application and interpretation of the new convention, especially article 36. It should be remembered that, in accordance with ordinary practice, only the text of a treaty was published, not the various declarations or reservations made in connection with it.

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

7. He also had some doubts about the practical application of the text proposed by Sir Ian Sinclair (1906th meeting, para. 7), although he fully understood its purpose. According to that proposal, a declaration could be made by a State when signing, ratifying or acceding to the convention or at any time thereafter; and if a declaration could be made at any time, so could an objection to it. There could be no doubt that that would greatly complicate the interpretation and application of the convention; not, perhaps, for a legal adviser to a ministry of foreign affairs, but for a country's missions abroad and for the other ministries concerned. For those reasons, he would prefer the treaty relationship to be kept on a simpler basis.

8. Most of the points he had intended to make on the remaining articles had been made by previous speakers. He endorsed the objections raised to the term "inspections" in draft article 37. In draft article 39, he had doubts about the reference to "termination of the functions" of the courier and urged that a drafting change should be made. He had no objection to the inclusion of a provision on *force majeure* in draft article 40, although the case would no doubt be rare. It would not be practical, however, to require prior notice, since a situation of *force majeure* necessarily implied unforeseen circumstances. Lastly, as a matter of drafting, he had doubts about the proviso in paragraph 1 of draft article 43, "without prejudice to the obligations arising under the provisions of the present articles". It would seem that any declaration made under article 43 would, to some extent, have the effect of prejudicing the obligations arising under the provisions of the articles.

9. Mr. ROUKOUNAS said that it had been an intellectual pleasure to read the reports of the Special Rapporteur, which were both comprehensive and well documented.

10. Referring to draft article 23, he pointed out that in the 1961 Vienna Convention on Diplomatic Relations the status of the diplomatic courier had been amplified as compared with existing general international law, and that the other three codification conventions adopted during the subsequent two decades had faithfully followed that lead. The draft articles under preparation also emphasized the importance of the diplomatic courier's functions. Some members of the Commission considered that the régime of inviolability provided for in the four codification conventions was sufficient to protect the person of the courier, and that contemporary practice did not call for increased protection. On the other hand, the Special Rapporteur and other members considered that the protection of the diplomatic courier was incomplete, especially as the various régimes applicable under diplomatic and consular law granted immunity from jurisdiction to persons who could not be regarded as representatives of the sending State. The diplomatic courier's immunity from jurisdiction therefore appeared to them to be the corollary of his personal inviolability.

11. On that point, he noted that, apart from the status of the courier, the inviolability of the person was indeed always affirmed, in each of the four conventions, concurrently with immunity from jurisdiction. The difference between the persons protected was at the level of the nature and extent of the immunity, not at that of the immunity itself. Immunity from criminal jurisdiction was general for some persons, whereas for others it covered only acts performed in the exercise of their official functions. It was on that basis that some members thought that immunity from criminal jurisdiction should be accorded only for acts performed by the diplomatic courier in the exercise of his functions. That position was consistent with the wording of article 16 as provisionally adopted by the Commission, which to some extent followed the corresponding provisions of the four conventions. That article first stated the principle that the diplomatic courier must be protected by the receiving State or the transit State in the performance of his functions and then specified that he enjoyed personal inviolability. It remained to be seen whether that inviolability was or was not restricted to the performance of official functions, but the immunity from jurisdiction could only be relative, in view of the principle first stated in article 16. Thus, if the Commission adopted the régime of functional immunity from jurisdiction, article 16 would have to be amplified.

12. Draft article 36 contained two provisions which might appear contradictory, since paragraph 1 provided that the diplomatic bag could not be detained or examined, whereas paragraph 2 provided that in certain conditions it could be returned to its place of origin. It was true that, despite its rigid and unconditional aspect, paragraph 1 of article 36 contained the phrase "unless otherwise agreed by the States concerned", but it was precisely in the absence of agreement that difficulties arose.

13. The discussion on the absolute inviolability of the diplomatic bag went back to the preparation of the 1961 Vienna Convention. The formula adopted in article 27, paragraph 3, of that instrument was a compromise which had not brought the discussion to an end. Three attitudes could be adopted on the subject. The provision could be considered as not excluding possible examination of the bag by mechanical or other means; it could be maintained that any inspection must take place in conformity with the provisions of the 1963 Vienna Convention on Consular Relations, that was to say in the presence of a representative of the sending State, and that in case of refusal to have the bag opened, it could be returned to its place of origin; and lastly, it could be maintained that the receiving State was required to accept the bag without being able to examine it, since the sanction of return was not provided for in the 1961 Vienna Convention.

14. In draft article 36, paragraph 1, the Special Rapporteur opted for a rigid régime, extending the prohibition of examination to electronic and mechanical means. He used, among others, the term "inviolable", which was widely used in diplomatic and consular law and applied both to protected persons and protected property. The inclusion of that term in paragraph 1 would therefore meet the needs of the case and the provision could state both that the diplomatic bag was inviolable and that it could not be opened or detained.

15. Referring to the flexible and conditional aspect of paragraph 2 of draft article 36, he observed that,

unlike article 35, paragraph 3, of the 1963 Vienna Convention, which provided for the possibility of opening the bag in the presence of a representative of the sending State and for its possible return to its place of origin, paragraph 2 of draft article 36 mentioned only the second possibility. In that context, Mr. Sucharitkul's observation that the term "diplomatic" appeared three times in the title of the topic under consideration was of particular importance. As they stood, the draft articles seemed to refer to couriers and bags of a different type from those contemplated in the four codification conventions. He therefore understood why Sir Ian Sinclair (1906th meeting) had suggested amending article 36 to keep to the régime provided for the consular bag in the 1963 Vienna Convention. That proposal could solve the problem, at least provisionally, since everything depended on the final orientation which the Commission would give to articles 42 and 43.

16. Draft article 41 appeared to be entirely new, not only because there were no similar provisions in the four codification conventions, but also because, in dealing with the transit State, each of them expressly reserved the case in which a visa was required. But article 41 clearly did not concern visas, since it dealt with an anomalous situation in relations between States. It was possible that a State or a Government that was not recognized could send its diplomatic courier or bag across certain States merely as a provocation. It was also necessary to distinguish between a State or a Government that was not recognized and a State with which diplomatic relations had been broken off. In his oral introduction (1903rd meeting), the Special Rapporteur had explained that the wording of article 41 covered couriers and bags sent to or coming from international organizations. There was, indeed, a gap on that point in the 1975 Vienna Convention on the Representation of States, but not in the headquarters agreements, although they dealt with the receiving State and not with the transit State. He was not sure whether draft article 41 laid down a rule in favour of third States, or whether it would only apply if the unrecognized State or Government was already a party to the future convention. In short, the article did not seem to be necessary.

17. In regard to draft articles 42 and 43, it seemed too late to ask whether the draft was carrying out consolidation, systematization or renovation. It was important, however, not to depart from two imperatives: respect for treaties in force and the possibility of establishing an independent régime. If those two requirements were met, the "*à la carte*" commitments provided for in article 43 could be envisaged. As to respect for treaties in force, he thought that article 42 should specify the relevant treaties and their links with the draft articles. Article 3, on the use of terms, might give the impression of being valid for the four codification conventions, an impression which should be corrected in article 42.

18. Finally, with regard to the system of legal relations provided for in draft article 43, he emphasized that it should not be possible to opt for only one category of courier or bag; that was not clear from paragraph 1. Paragraph 2 created a state of legal uncertainty. It was true that article 298 of the 1982 United Nations Convention on the Law of the Sea[5] established a "revolving door" régime which allowed States to enter the system of settlement of disputes provided by that instrument and then to leave it; but that was not a matter of substantive rules, whereas draft article 43 did apply to substantive rules and not to dispute-settlement machinery.

19. Mr. REUTER commended the Special Rapporteur for the patience and open-mindedness he had shown as the difficulties of an apparently easy subject had come to light. Before taking up three important questions, he wished to make two preliminary remarks. First, he approved of the new draft article 37 which replaced the former draft articles 37 and 38. Secondly, he hoped that the Special Rapporteur would consider combining draft articles 39 and 40, or in any case harmonizing them in regard to their substance and titles. For article 40 dealt with *force majeure* and fortuitous event, while article 39 dealt with prevention by circumstances which seemed also to constitute *force majeure*. The significance of those concepts in international law should be made clear, at least in the commentary to the articles, since it must not depend on internal law.

20. Turning to questions of substance, he referred first to the diplomatic bag, making a comparison with the matter covered by article 110 of the 1982 United Nations Convention on the Law of the Sea, namely verification of the flag. Under the law of the sea, a ship was protected by a sign—the flag—which determined the jurisdiction of States. But appearances could be deceptive and, in well-defined cases, if there were serious suspicions, a warship could check whether a vessel was really entitled to fly a certain flag; in case of error, compensation had to be paid for loss or damage. The diplomatic bag was in a similar situation, since it, too, was protected by a sign, namely the certificate by which the sending State guaranteed that it was a diplomatic bag. If another State had serious reason to believe that the bag contained prohibited articles, the situation was more serious than under the law of the sea, since a certificate given by a State was involved, not a mere presumption. There was thus a dispute between two States and the legal situation would differ according to whether or not the solution provided in the 1963 Vienna Convention on Consular Relations was adopted. When such a situation of conflict arose, the means of verifying the contents of the bag were really very limited.

21. It seemed hardly conceivable that a treaty provision would be sufficient to prevent the carrying of prohibited articles in the bag. In that regard, the view expressed by small countries was particularly significant: those countries were even less inclined than others to accept the danger of asserting that a great Power did not respect international law. Yet, certain particularly heavy bags, or bags consisting of a convoy of heavy vehicles, were bound to cause some astonishment and raise questions. But such cases appeared less frequently in law reports than in the press.

22. In his opinion, it did not make such difference in practice, whether the 1961 Vienna Convention on

[5] See 1904th meeting, footnote 7.

Diplomatic Relations or the 1963 Vienna Convention on Consular Relations was applied. A State which caused a diplomatic bag to be opened, whether that bag was governed by the provisions of one or the other Convention, might be obliged to pay compensation to the sending State. Perhaps the Special Rapporteur had not gone far enough in his attempted reconciliation and Sir Ian Sinclair's proposal (1906th meeting, para. 7) might be preferable. After all, it might be wiser for the Commission to confine itself to a text providing that the bag should not be opened or detained. As Mr. El Rasheed Mohamed Ahmed had suggested (1907th meeting), it might then be explained in the commentary that the provision was without prejudice to the positions adopted. In his own view, the 1961 Vienna Convention did not exclude what was provided in the 1963 Vienna Convention.

23. While he agreed that examination of the bag by means of electronic or mechanical devices should be ruled out, as most members of the Commission maintained, the fact remained that the luggage of all airline users could be subjected to such examination. It was quite normal that a diplomatic bag which a diplomatic courier carried with him in an aeroplane should be subject to ordinary law: the safety of the other passengers depended on it. It should also be noted that, under the terms of draft article 36, paragraph 1, the diplomatic bag was inviolable "in the territory of the receiving State or the transit State", which seemed to exclude its location elsewhere. But following an air disaster or shipwreck, the bag might be on the high seas in a place beyond the jurisdiction of any State.

24. The second question of substance was that of immunity from jurisdiction, which, as regulated by the codification conventions, called to mind the protective veil of Salambo. It was in fact the bag which, by its inviolability, protected the courier, not vice versa. In each of the conventions, the inviolability of the bag was treated as an immunity which gave protection against all measures of execution, legal or physical. It was held by some that that immunity did not extend to jurisdiction, whereas others proposed that immunity from jurisdiction should be limited to functional necessity. Personally, he was opposed to immunity from criminal jurisdiction, whatever its extent. Indeed, he believed that the diplomatic courier should perform his task quickly, in the official interests of the diplomatic bag and the receiving State. Moreover, that was the solution which had been adopted when each of the four codification conventions had been drawn up. Consequently, he thought it would not be wise to retain paragraph 1 of draft article 23. On the other hand, he believed that, as provided in paragraph 4, the diplomatic courier should not be obliged to give evidence as a witness, since that might delay the performance of his task.

25. Thirdly, it might not be too late to try to solve the problems which some members had wanted the Commission to solve earlier. As to whether the draft articles under preparation were to become a treaty, the Commission had always considered that it was not called upon to pronounce on that question, but that it should proceed on the assumption that a draft would become a treaty. As to whether the future treaty would amend the four codification conventions, it should be pointed out that those instruments did not contain any special provisions concerning their amendment, and that they were therefore subject to the rules of the 1969 Vienna Convention on the Law of Treaties. If the Commission's draft was to be an independent convention, it must not be forgotten that the codification conventions contained provisions which considerably limited the freedom of the contracting parties. For instance, under the terms of article 47, paragraph 2 (*b*), of the 1961 Vienna Convention, discrimination was not regarded as taking place where, by custom or agreement, States extended to each other more favourable treatment than was required by the provisions of that Convention. But if the text proposed by Sir Ian Sinclair (1906th meeting, para. 7), were adopted, would it be compatible with that provision, in so far as the treatment of the diplomatic bag would be not more favourable, but more severe? Under the terms of article 73, paragraph 2, of the 1963 Vienna Convention, nothing in that instrument precluded States from concluding international agreements "confirming or supplementing or extending" its provisions. Lastly, under article 49, paragraph 2 (*b*), of the 1969 Convention on Special Missions, States could modify among themselves the extent of facilities, privileges and immunities provided for in that instrument, provided that such modification was not incompatible with the object and purpose of the Convention and "does not affect the enjoyment of the rights or the performance of the obligations of third States". Such provisions raised a whole series of difficult problems. That being so, if the Commission decided to retain the various provisions of the codification conventions, it would be inviting complications. He would therefore prefer it, as far as possible, to adopt simple texts and give the necessary explanations in the commentary.

26. Mr. YANKOV (Special Rapporteur), referring to draft article 36, said he had suggested (1903rd meeting, para. 9) that the words "in the territory of the receiving State or the transit State" in paragraph 1 should be deleted because they were too restrictive and would not cover, for instance, the inviolability of the bag when carried in a ship on the high seas or in an aircraft.

27. Mr. McCAFFREY said that he had objected (1906th meeting) to the use of the word "inviolable" in draft article 36 on the ground that it was not used in any of the four codification conventions in reference to the bag. A number of speakers had pointed out, however, that the word "inviolable" was in fact used in that context in certain articles of those conventions, and that article 40, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations—the wording of which was reproduced in the corresponding provisions of the other codification conventions—did indeed provide that diplomatic couriers who had been granted a passport visa, if such visa was necessary, and diplomatic bags in transit would be accorded "the same inviolability and protection" as the receiving State was bound to accord. It seemed to him, on a plain reading of the wording of that provision, that the term "inviolability" applied to the first item—diplomatic couriers—and the term "protection" to the second item—diplomatic bags. According to his interpretation, the wording of draft

article 36 added nothing new to that of the 1961 provision, and the two were entirely compatible.

28. Draft article 41 appeared, on the face of it, to imply a routine right of transit for the courier, who would be enveloped in the protective veil in which the draft articles clothed him. Such a proposition, which seemed to have no basis in law or practice, would be unacceptable to many States, including his own. The article required close scrutiny and he would welcome the Special Rapporteur's clarification of its purpose. He doubted whether article 41 as a whole was necessary; if it was to be retained, it should perhaps be confined to communications between States and their missions to international organizations, as implied in the Special Rapporteur's sixth report (A/CN.4/390, para. 55).

29. He shared the doubts about draft article 42 expressed by a number of speakers and fully agreed on the need to be clear as to the function of the draft articles. As he saw it, the fundamental problem in regard to both draft article 42 and draft article 43 arose from the uniform approach in article 3, which defined the diplomatic courier and the diplomatic bag by reference to the four codification conventions. The treatment of couriers and bags under those conventions varied, however, and questions would inevitably arise as to the relationship between the draft articles and the conventions. He would therefore like to know, first, what was the true function of the draft, and secondly whether, in the light of that function, an article such as article 42 could really stand. He would be grateful if the Special Rapporteur could clarify those two points.

30. So far as paragraph 1 of article 42 was concerned, it was possible that a provision along the lines of that contained in the original text of the article was the most that would be acceptable, although even that provision was somewhat vague. The word "complement" presumably meant that the articles did not derogate from the relevant provisions of the four codification conventions; but did it also mean that, if the draft articles provided for additional protections, those protections would stand, even though they were not provided for in the codification conventions? The question that arose in regard to paragraph 1 of article 42, therefore, was whether the draft articles were indeed "without prejudice to the relevant provisions in other conventions". As to paragraph 2 of the article, he agreed that a reference should be included to enable States to modify, as well as confirm, supplement, extend or amplify, the provisions of the articles.

31. If the uniform approach were retained, some provision on the lines of draft article 43 would clearly be essential, to allow States to distinguish between the four codification conventions as to the manner in which the draft articles would ultimately apply. But if that approach were abandoned in favour of distinctions between different types of couriers and bags, the need for article 43 would obviously disappear.

32. He agreed that article 43, paragraph 1, seemed to be prejudicial, rather than without prejudice, to the obligations arising under the draft articles; the Drafting Committee should examine that point. He further agreed that the phrase "or at any time thereafter", or some similar wording, should be added to paragraph 1 to enable States to designate couriers and bags not only when they signed, ratified or acceded to the articles, but at any time. That would bring the wording of article 43 into line with article 298 of the 1982 United Nations Convention on the Law of the Sea,[6] on which it was modelled.

33. He did not agree with those members who believed that article 43 was inconsistent with Sir Ian Sinclair's proposal (1906th meeting, para. 7) to provide States with an option under article 36 to apply the consular régime to the diplomatic bag. In his view, if a State made a declaration under article 43 that it would apply the provisions of the draft articles to diplomatic couriers and bags only, that declaration would presumably exclude any option the State might have exercised under article 36, including the option to apply the consular régime to diplomatic bags.

34. Lastly, he expressed the hope that it would be possible to complete at least the first reading of the draft articles before the expiry of the Commission's current mandate.

35. Mr. RAZAFINDRALAMBO said that the opinions expressed at the current session were not such as to persuade him to change his position on the draft articles under consideration. At the previous session, draft article 23 had been exhaustively discussed both in the Commission and in the Drafting Committee, which had been unable to reach a final decision on paragraphs 1 and 4. As to paragraph 1, the word "jurisdiction" should be understood to cover both trial courts and examining magistrates, since the preliminary examination of criminal cases could be carried out by a court or by a magistrate. That brought out the link between immunity from criminal jurisdiction and exemption from the obligation to give evidence in a criminal case. In the absence of the provisions proposed by the Special Rapporteur, a courier could be called upon to give evidence either before an examining magistrate or before a court. But under certain legal systems, the fact that evidence was given before an examining magistrate without a lawyer being present might present a real danger and lead to an immediate charge against the witness; consequently, the usual obligation of the courier to give evidence would have the effect of allowing the competent authorities to bring charges against him without his enjoying the normal safeguards associated with the rights of defence. He believed that some conventions on diplomatic law established a parallel between the provisions relating to immunity from criminal jurisdiction and those exempting the courier from the obligation to give evidence. The application of the principle of immunity from criminal jurisdiction logically implied exemption of the courier from the obligation to give evidence before a criminal court. But should the courier really enjoy immunity from criminal jurisdiction?

36. Some members believed that the personal inviolability of the courier provided for in article 16 accorded sufficient protection and made immunity

[6] *Ibid.*

from criminal jurisdiction unnecessary or even inappropriate. It had rightly been answered that, in some diplomatic conventions, the principle of inviolability coexisted with that of immunity from criminal jurisdiction. The mere obligation to appear before a criminal court was, indeed, a disguised form of arrest, for the courier could be sent an enforceable summons and, if he refused to appear, could be charged with contempt of court. Hence immunity from criminal jurisdiction was the corollary of inviolability. But the real problem was whether the courier should enjoy the same status as diplomatic agents, the technical and administrative staff of a mission and certain international officials. Weighty arguments had been advanced on both sides and, all things considered, the options were more political than legal. The choice depended on whether the emphasis was placed on the absolute freedom of communication of the sending State with its missions, or on the legitimate interests of the transit State and the receiving State.

37. In his opinion, none of the interests involved would suffer from a solution limiting the application of the principle of immunity from criminal jurisdiction to acts performed by the courier in the exercise of his functions. Even if the distinction between acts really performed by the courier in the exercise of his functions and acts performed while he was exercising his functions was not easy to make, it was commonly made in internal law and could be dealt with in the commentary. In order to grant the courier functional immunity, the obligation to give evidence could be limited to acts not performed in the exercise of his functions.

38. Referring next to draft article 36, he observed that no one contested the inviolability of official correspondence, and that it was the correspondence that was inviolable, not the diplomatic bag itself. The conventions on diplomatic and consular relations stipulated only that the bag must not be opened or detained; but it was obvious that to say that the correspondence was inviolable was equivalent to recognizing the inviolability of the bag itself. Since the Commission's mandate was to codify international law, it should draft a text capable of attracting a wide consensus; it therefore seemed advisable to keep to the terms used in the codification conventions and provide that the bag must not be opened or detained and that the correspondence was inviolable.

39. The proposal for article 36 made by Sir Ian Sinclair (1906th meeting, para. 7) deserved particular attention. Unfortunately, it did not mention the principle of exemption of the bag from any kind of examination. But if it was accepted that the bag must not be opened, that implied that it was exempt from examination. In internal law, the inviolability of private correspondence meant that it could not be opened. The prohibition of any kind of examination was all the more necessary because modern techniques, if they did not already do so, would make it possible in the foreseeable future to ascertain the exact contents of the packages, including official correspondence, contained in a diplomatic bag. Exemption from any kind of examination should not be understood to include the routine inspections carried out by airlines; but he did not think it necessary to make express provision for that exception. As to the return of the bag, provided for in paragraph 2 of draft article 36, that might lead to reprisals if the sending State considered that it had acted within its rights and fulfilled its legal obligations, and thus set off a process that would be dangerous to international relations. Sir Ian Sinclair's proposal, in providing for exemption of the bag from any kind of examination, could satisfy the main demands of all the interested parties.

40. Draft article 37, which laid down the rule of exemption from customs inspection, proceeded from the principle of exemption from any kind of examination expressly stated in draft article 36. He approved of draft article 39 in principle, but thought that the Drafting Committee should find a more general formulation to replace the phrase "in the event of termination of the functions of the diplomatic courier". Draft articles 40, 41 and 42 raised no problems of substance, only drafting points; but he would prefer the original text of draft article 42, which was clearer.

41. Draft article 43, paragraph 1, raised difficulties of application and Sir Ian Sinclair's proposal for article 36 provided a more practical and flexible solution. Perhaps the Special Rapporteur could further clarify the real meaning and scope of article 43.

42. Mr. AL-QAYSI said he noted that Mr. McCaffrey interpreted the word "inviolability" in article 40, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations as referring to the courier and the word "protection" as referring to the bag. In the absence of some phrase such as "as the case may be" or some word such as "respectively", however, his own remarks (1906th meeting) on the inviolability of the bag still stood.

43. He had not said that draft article 43 was inconsistent with Sir Ian Sinclair's proposal (*ibid.*, para. 7) for article 36, but had wished rather to raise the following question. If State A, a party to the 1961 Vienna Convention on Diplomatic Relations but not to the 1963 Vienna Convention on Consular Relations, wished to ensure that the latter Convention would not apply and made a declaration under article 43 of the draft under consideration, it would presumably consider the diplomatic bag as being subject to the régime under article 36; but if State B, being a party to both conventions and wishing to apply the régime of the 1963 Vienna Convention to the diplomatic bag, made a declaration under article 36 as proposed by Sir Ian Sinclair, what interrelationship between the two States was to be inferred?

The meeting rose at 6.10 p.m.

1910th MEETING

Tuesday, 25 June 1985, at 11 a.m.

Chairman: Mr Satya Pal JAGOTA

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