

Document:-  
**A/CN.4/SR.1911**

**Summary record of the 1911th meeting**

Topic:  
**<multiple topics>**

Extract from the Yearbook of the International Law Commission:-  
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27. If, for example, paragraph 1 of article 36 provided simply that the diplomatic bag must not be opened or detained and a State then used article 43 to declare that it would apply the articles to the consular bag and the consular courier only, would that State be bound to apply the régime of article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations without any possibility of challenging a suspicious bag, notwithstanding the provision to that effect contained in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations? He had been trying to work out the answer to that kind of question and he did not think that the option in draft article 43 was wide enough to take account of the fact that different régimes applied to the various types of bags, particularly the consular bag and the diplomatic bag.

28. He had proposed a possible solution to that problem in his reformulation of article 36 (1906th meeting, para. 7), but the same result could be achieved by widening the scope of article 43, which, as it now stood, would not cover the kind of case under consideration. He was, of course, assuming that there was a material difference between the régime established in the 1961 Vienna Convention and that provided by the 1963 Vienna Convention. In any event, the question whether it was appropriate to make all the options available in a single article was a matter that would best be left to the Drafting Committee.

29. At the previous meeting, Mr. Ogiso had expressed doubts about the declaration procedure which he (Sir Ian) had advocated in his proposed reformulation of article 36 and had stated that it would give rise to complex treaty relations. He could only say that, since the problem at issue was a complex one, complex provisions would be needed to solve it. Mr. Ogiso had also raised the question of possible objections to a declaration. On that point, he wished to make it clear that the type of declaration which he had in mind was an option that would be contained in the draft articles themselves. Such an option would be accepted in advance by the negotiating States and there could be no question of any objection to it. Under general international law, objections were possible only to a unilateral reservation, not to a declaration accepted in advance by all the negotiating States.

30. The question whether the type of option he had in mind would be compatible with the existing conventions had been raised by Mr. Reuter (1909th meeting). That was a very difficult question, but he recalled that, with regard to article 27, paragraph 3, of the 1961 Vienna Convention, a number of States parties had already made a series of unilateral reservations to which no objection had been taken and which in effect opened up the possibility of applying to the diplomatic bag the régime provided for the consular bag. Thus, within the framework of the 1961 Vienna Convention, there were already different types of régimes that were applicable as between parties to that Convention.

31. Lastly, he said that he preferred the text originally submitted by the Special Rapporteur for ar-

ticle 42, which would be more helpful than the revised text in providing a solution to the problem raised by article 36.

32. The CHAIRMAN, speaking as a member of the Commission, said he did not think that the example referred to by Sir Ian Sinclair would give rise to any inconsistency, because a State making such a declaration would be applying a more liberal régime to the consular bag, not a more restrictive régime. Such a possibility was, moreover, provided for in article 73 of the 1963 Vienna Convention on Consular Relations, which had been taken by the Special Rapporteur as the basis for draft article 42. An agreement to modify the provisions of the latter Convention was thus permissible. If a State encountered any difficulties because it had made that choice, such difficulties could easily be overcome, because draft article 43, paragraph 2, allowed a declaration to be withdrawn.

*The meeting rose at 1.05 p.m.*

## 1911th MEETING

*Wednesday, 26 June 1985, at 10.05 a.m.*

*Chairman: Mr. Satya Pal JAGOTA*

*Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arango-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pirzada, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Ushakov, Mr. Yankov.*

### Fortieth anniversary of the United Nations

1. The CHAIRMAN recalled that the Charter of the United Nations had been opened for signature 40 years previously, on 26 June 1945. The fortieth anniversary of the United Nations would be celebrated in 1985 by the General Assembly and by the Sixth Committee; and, since the Commission had been created by the United Nations, it was appropriate for it to join in that celebration. The Commission's task was to promote the progressive development and codification of international law and it had always performed that task in the conviction that the world community should be governed by international law, however inadequate it might be.

### Visit by a member of the International Court of Justice

2. The CHAIRMAN welcomed Mr. Ago, a Judge of the International Court of Justice and a former member of the Commission. It was under the guidance of Mr. Ago, as Special Rapporteur, that part 1 of the draft articles on State responsibility had been adopted on first reading.

3. Mr. AGO said that he appreciated the kind words of welcome by the Chairman, under whose able guidance the Commission could not fail to make substantial progress on the topics it was considering, particularly that of State responsibility. He believed that frequent contacts between the Commission and the ICJ were useful and even necessary, since the Court's task of ruling on particular cases and settling disputes between States on points of law was the counterpart of the Commission's task of defining general rules, and the two tasks were essential for the international community.

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

[Agenda item 5]

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

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

4. Mr. PIRZADA commended the Special Rapporteur on his sixth report (A/CN.4/390), in which he had demonstrated flexibility and a willingness to take account of all points of view.

5. Article 16, which provided that the diplomatic courier enjoyed personal inviolability and was not liable to any form of arrest or detention, would not

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

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

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

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

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

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

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

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

be enough to prevent the courier from being tried, even *in absentia*, although that might be contrary to the principles of natural justice and equity. He was therefore of the opinion that draft article 23, paragraph 1, which gave the courier immunity from criminal jurisdiction, should be retained, provided that it related only to acts performed by the courier in the exercise of his functions.

6. No serious exception had been taken to paragraphs 2 and 3 of article 23. Paragraph 4 consisted of two sentences, the first of which exempted the courier from giving evidence as a witness "in cases involving the exercise of his functions". That provision would be acceptable if the use of the word "cases" were avoided. In line with article 44, paragraph 3, of the 1963 Vienna Convention on Consular Relations, it should therefore be amended to specify that the diplomatic courier was "under no obligation to give evidence concerning matters connected with the exercise of his functions". It would, however, be difficult for him to agree to the second sentence, which stated that the courier might be "required" to give evidence. The word "required" was too strong and might enable a court to apply coercive measures, or even impose penalties, in the event of failure to give evidence, thereby contravening the provisions of article 16. He therefore suggested that the word "required" should be replaced by "requested". He further suggested that provision should be made for the acceptance of a statement in writing, an affidavit, or of some other means of giving evidence, in lieu of oral evidence.

7. Draft article 36, paragraph 1, provided that the diplomatic bag "shall be inviolable at all times and wherever it may be" and that "it shall not be opened or detained". The use of the word "inviolable" had been criticized on the grounds that it had not been used in article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations or in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations and it had been suggested that it should be replaced by the word "protected", which was more appropriate for the bag. In that connection, he agreed with Mr. Sucharitkul (1910th meeting) that "inviolability" was a generic term which had to be qualified.

8. Although article 27, paragraph 3, of the 1961 Vienna Convention simply stated that the diplomatic bag "shall not be opened or detained", article 24 provided that the archives and documents of the mission "shall be inviolable at any time and wherever they may be" and article 30 specified that the papers and correspondence of a diplomatic agent enjoyed inviolability. Article 1, paragraph 1 (k), of the 1963 Vienna Convention stated that "consular archives" included all the papers, documents and correspondence of a consular post and article 33 provided that "the consular archives and documents shall be inviolable at all times and wherever they may be". The 1975 Vienna Convention on the Representation of States contained almost identical provisions.

9. In view of the definition of the diplomatic bag contained in article 3 as provisionally adopted, draft article 36, paragraph 1, was entirely in keeping with article 33 of the 1963 Vienna Convention and it rightly stated that the diplomatic bag was inviolable

at all times and wherever it might be. The definition contained in article 3 would also make it unnecessary to insert the words "by virtue of its contents" after the words "diplomatic bag", as suggested by Mr. Jagota at the previous meeting.

10. The most important issue with regard to draft article 36 was, however, that of suspect bags. It was dealt with in paragraph 2 and in the proposal made by Sir Ian Sinclair (1906th meeting, para. 7). Experience had shown that abuses of the diplomatic bag were becoming increasingly frequent. There had been instances of bags containing contraband articles, currencies or gold, narcotic drugs, weapons, explosives and even human beings. Consideration might therefore be given to the possibility of providing for the inspection of the bag and for its return to its place of origin in the event that a request for inspection was refused by the authorities of the sending State.

11. He accepted the principle of the inviolability of the diplomatic bag, but was also in general agreement with paragraphs 2, 3 and 4 of Sir Ian Sinclair's proposal. If that proposal were adopted, draft article 43 would no longer need to be a separate provision.

12. During the discussion, it had been said that the draft articles were to be without prejudice to the relevant provisions in other conventions and it had been asked whether the declaration of optional exceptions should cover all or only some articles. The question of a plurality of régimes had also been raised. In his view, those points could all be dealt with in paragraphs 2, 3 and 4 of Sir Ian Sinclair's proposal, whose wording could be amended accordingly.

13. While he agreed with draft article 40, he was inclined to share the concern expressed by some members with regard to the cases of non-recognition of States or Governments referred to in draft article 41.

14. The CHAIRMAN said that the Commission had completed its consideration of draft articles 23 and 36 to 43 as submitted by the Special Rapporteur, who would sum up the discussion at a later meeting.

#### DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (A/CN.4/L.384)

##### ARTICLES 28 TO 32, 34 AND 35

15. The CHAIRMAN invited the Chairman of the Drafting Committee to present articles 28 to 32, 34 and 35,<sup>5</sup> as adopted by the Committee (A/CN.4/L.384).

16. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) noted that the articles adopted by the Drafting Committee each had two numbers: the first was the number originally assigned by the Special Rapporteur and the second, which appeared in square brackets, was the new number that would

be used once the article had been included in the set of draft articles provisionally adopted by the Commission.

17. The changes made by the Drafting Committee to the texts of the articles, purely for the purpose of alignment with articles already adopted, included the deletion of the adjective "official" before the word "functions" and the insertion in the appropriate places of the words "or, as the case may be". The Committee had also attempted to bring the different language versions into line with the terminology used in the corresponding provisions of the codification conventions.

ARTICLE 28 [21] (Duration of privileges and immunities)

18. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) presented article 28 [21] as proposed by the Drafting Committee, which read:

#### *Article 28 [21]. Duration of privileges and immunities*

1. The diplomatic courier shall enjoy privileges and immunities from the moment he enters the territory of the receiving State or, as the case may be, the transit State in order to perform his functions, or, if he is already in the territory of the receiving State, from the moment he begins to exercise his functions. Such privileges and immunities shall normally cease at the moment when the diplomatic courier leaves the territory of the receiving State or the transit State. However, the privileges and immunities of the diplomatic courier *ad hoc* shall cease at the moment when the courier has delivered to the consignee the diplomatic bag in his charge.

2. When the functions of the diplomatic courier come to an end in accordance with article 11 (b), his privileges and immunities shall cease at the moment when he leaves the territory of the receiving State, or on the expiry of a reasonable period in which to do so.

3. Notwithstanding the foregoing paragraphs, immunity shall continue to subsist with respect to acts performed by the diplomatic courier in the exercise of his functions.

19. The title of article 28 remained unchanged, but the structure of the text was somewhat different.<sup>6</sup> The article now consisted of three paragraphs instead of two.

20. Paragraph 1 now dealt both with the question of when the diplomatic courier's privileges and immunities began and with that of when they normally ceased. On the basis of the four codification conventions, the Drafting Committee had also decided to refer to the moment when those privileges and immunities began for a courier who was already in the territory of the receiving State, namely the moment when he began to exercise his functions. In the commentary, the Special Rapporteur would explain in greater detail the meaning of the words "from the moment he begins to exercise his functions", which might depend on whether the courier was a professional courier or an *ad hoc* courier. The last sentence of paragraph 1 dealt with the special case of the moment when the privileges and immunities of the diplomatic courier *ad hoc* ceased. The Drafting Committee had deemed it appropriate to take account of article 27, paragraph 6, of the 1961 Vienna Convention on Diplomatic Relations, which dealt with that specific point. That new sentence, to

<sup>5</sup> Referred to the Drafting Committee after consideration by the Commission at its thirty-sixth session; see *Yearbook ... 1984*, vol. II (Part Two), p. 20, para. 76.

<sup>6</sup> For the text submitted by the Special Rapporteur and the Commission's consideration thereof, see *Yearbook ... 1984*, vol. I, pp. 65 *et seq.*, 1826th to 1829th meetings.

which one member of the Committee had taken exception, had accordingly been added to reflect the existing law on that question.

21. Paragraph 2 concerned the special case covered in article 11 (b), namely when the functions of the diplomatic courier came to an end upon notification by the receiving State to the sending State that, in accordance with article 12, it refused to recognize the person concerned as a diplomatic courier. In that case, the courier's privileges and immunities ceased at the moment when he left the territory of the receiving State or on the expiry of a reasonable period in which to do so. The Drafting Committee had not found it necessary to refer in paragraph 2 to the situation covered in article 11 (a).

22. Paragraph 3 embodied an idea put forward by the Special Rapporteur in the original text of article 28, but it was now clear that it applied to the situations covered in both paragraph 1 and paragraph 2.

23. He recalled that, when the Commission had provisionally adopted article 12 at the previous session, paragraph 2 of that article had been placed in square brackets pending consideration of article 28.<sup>7</sup> Having reviewed the matter, particularly in the light of the 1961 Vienna Convention, the Drafting Committee now recommended that the square brackets around paragraph 2 of article 12 should be removed. The commentary would explain the interplay between article 12, paragraph 2, article 11 (b) and article 28.

24. One member of the Drafting Committee had expressed reservations about the need for article 28, since agreement had not yet been reached on whether article 23 should be included in the draft. In that connection, he stressed that the articles were, of course, all being adopted provisionally at the current stage. If any future decision had an impact on articles already provisionally adopted, those articles would of necessity have to be reviewed and amended accordingly.

25. Mr. USHAKOV, referring to article 28, paragraph 1, said it seemed to him that there was a contradiction between the words "The diplomatic courier shall enjoy privileges and immunities from the moment he enters the territory of the receiving State or, as the case may be, the transit State in order to perform his functions" and the words "or, if he is already in the territory of the receiving State, from the moment he begins to exercise his functions", because it was as a private individual, not as a diplomatic courier, that he might already be in the territory of the receiving State. It would be better to refer to the case where he was already in the territory of the receiving State when he was appointed as a diplomatic courier. Although that question might be settled on second reading, it would be preferable to deal with it immediately.

26. The CHAIRMAN said that Mr. Ushakov's purpose could be achieved by amending the words "if he is already in the territory ..." to read: "if, when appointed, he is already in the territory ...". If that

question were explained in the commentary, there would be no need to change the text of article 28, paragraph 1.

27. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the Special Rapporteur's original text had dealt only with a diplomatic courier who entered the territory of a receiving State or transit State. The present text also dealt with the case of a person who was appointed as a courier when he was already in the territory of a receiving State. The suggestion made by Mr. Ushakov was a useful one and could best be considered during the second reading of the draft articles.

28. Mr. YANKOV (Special Rapporteur) pointed out that, before the second reading, the Commission would have before it a commentary which would make the matter clear.

29. Mr. USHAKOV said that he would not insist that his suggestion be considered immediately.

30. The CHAIRMAN said that he would take it that the Commission agreed that Mr. Ushakov's suggestion should be considered on second reading.

*It was so agreed.*

31. Mr. RIPHAGEN said that he did not understand the use of the word "normally" in the second sentence of article 28, paragraph 1. His main problem was with the time element and with the question of how long a courier was considered to be a courier. Paragraph 1 indicated that he ceased to be a courier when he left the territory of the receiving State or the transit State.

32. The provisions of article 28 should be read together with those of article 7, on the documentation of the diplomatic courier. The courier needed such documentation in order to be recognized as a courier. There was also the problem of the status of the diplomatic courier between journeys, particularly after he had delivered the diplomatic bag and proceeded to his next destination.

33. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the word "normally" was used in the second sentence of article 28, paragraph 1, in order to draw a distinction between the usual case, which was covered by that sentence, and the exceptional situation dealt with in paragraph 2.

34. As to the question of the cessation of privileges and immunities, he drew attention to the situation of the diplomatic courier *ad hoc*, whose privileges and immunities ceased at the moment when he had delivered the diplomatic bag. That situation was less satisfactory than that of the professional courier, who enjoyed privileges and immunities until he left the territory of the receiving State or the transit State.

35. Mr. YANKOV (Special Rapporteur) pointed out that the word "normally" had been used in the same context throughout the four codification conventions. With regard to the time factor and to Mr. Riphagen's comment that article 28 had to be read in conjunction with article 7, he said that article 1 (Scope of the present articles) and article 10 (Functions of the diplomatic courier) were also relevant. The scope of the functions of a diplomatic courier was quite broad. A courier who was waiting to receive a diplomatic bag was acting in the exercise of

<sup>7</sup> See paragraph (6) of the commentary to article 12 (*Yearbook ... 1984*, vol. II (Part Two), p. 49).

his functions, which ended only when he had delivered the bag to its final destination.

36. The last sentence of article 28, paragraph 1, relating to the diplomatic courier *ad hoc* was based on the corresponding provisions of the four codification conventions, and in particular those of article 27 of the 1961 Vienna Convention on Diplomatic Relations. The *ad hoc* courier enjoyed less protection than the professional courier. It was of course assumed that, in most cases, the *ad hoc* courier would be a diplomatic agent who already enjoyed diplomatic immunities and had no need for further protection.

37. The lower degree of protection for the *ad hoc* courier was also understandable if it was remembered that a consular courier would enjoy absolute immunity from arrest or detention while carrying out his duties. It would not be appropriate to extend that immunity any further, since the consular courier was normally a consular officer who enjoyed only functional immunity in respect of acts performed in the exercise of his functions. There were a number of precedents from State practice which supported that approach.

38. Mr. USHAKOV said that, under the four codification conventions, the immunity enjoyed by certain persons with respect to acts performed in the exercise of their functions subsisted after their functions had come to an end. Under article 39, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations, for example, an ambassador who returned to the receiving State as a private individual after leaving his post in that State could not be prosecuted for acts performed in the exercise of his functions. That was the rule embodied in paragraph 3 of draft article 28, although that paragraph referred to "the diplomatic courier", not to "a person". It should be explained in the commentary that reference was being made to the diplomatic courier as a private individual.

39. Sir Ian SINCLAIR thanked the Chairman of the Drafting Committee for drawing attention to the reservations that he himself had with regard to article 28. An article on the duration of privileges and immunities had to be included in the draft, since the diplomatic courier had at least one important immunity, namely freedom from arrest and detention. The Commission could, however, not finalize the wording of article 28 on the duration of privileges and immunities until it had reached a decision on article 23, relating to immunity from jurisdiction.

40. Under article 16, a diplomatic courier enjoyed immunity from arrest or detention in respect of all acts performed by him, not only in respect of acts performed in the exercise of his functions. The words "immunity shall continue to subsist" in draft article 28, paragraph 3, might therefore be interpreted to mean that the courier could be arrested, detained or even sued in a civil court in respect of acts performed outside his functions during a previous stay in the receiving State. Much would, of course, depend on the final wording of article 23, if it was retained. He was therefore grateful to the Chairman of the Drafting Committee for his assurance that article 28, and especially its paragraph 3, would be reviewed in the light of the action to be taken with regard to other articles.

41. Mr. SUCHARITKUL said he agreed with Sir Ian Sinclair that article 28, paragraph 3, could not be approved until it had been decided what was meant by "immunity from jurisdiction" under article 23. If article 23, paragraph 1, related only to acts performed by the courier in the exercise of his functions, there would be no immunity *ratione personae*. He recalled that, from the outset, he had advocated that no immunity *ratione personae* should be granted to the courier.

42. Mr. McCAFFREY noted that article 28 tied the duration of privileges and immunities both to the location of the courier in the territory of the receiving State or transit State and to the performance of his functions. The Commission had, however, not yet come to grips with the problem of determining when a courier was actually performing his official functions, which were defined in article 10. Article 11 (b) indicated that the functions of the courier came to an end upon notification by the receiving State of its refusal to recognize the person concerned as a diplomatic courier. Article 11 (a) specified that the courier's functions came to an end when he was recalled by the sending State. In the context of article 28, it was therefore essential to refer to "a person acting as a diplomatic courier". The commentary should explain what was meant by the words "in the exercise of his functions" so that it would, for example, be clear that a courier waiting to pick up a diplomatic bag was performing his official functions.

43. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the opening clause of article 11 showed that the two special cases referred to in that article were not the only ones in which the courier's functions came to an end. Article 10 also indicated that the functions of the courier ended with the delivery of the diplomatic bag. The purpose of paragraph 3 of article 28 was, however, to make it clear that immunity would nevertheless subsist with respect to acts performed by the courier in the exercise of his functions.

44. Mr. REUTER said that he could not adopt a position with regard to article 28, paragraphs 1 and 2, because he did not really understand them; but since they were based on article 39, paragraphs 1 and 2, of the 1961 Vienna Convention on Diplomatic Relations, he would fall in with the Commission's tradition of following the wording of existing conventions.

45. He was, however, unable to accept paragraph 3 of draft article 28, which was based on the second sentence of paragraph 2 of article 39 of the 1961 Vienna Convention and also referred to "immunity" in the singular. If that singular was not meant to be a plural, it would have to be made clear whether or not reference was being made to "immunity from jurisdiction".

46. Mr. ARANGIO-RUIZ, referring to Mr. Ushakov's comments, said that it was also possible for a courier to commence his functions in the territory of a transit State. That might occur, for instance, when a courier moving from country A to country C stopped in country B and had to be replaced for some reason by the diplomatic mission of country A in country B. In such a case, the functions of the second courier would commence in the transit State. To meet

that point, he would suggest that the words “or the transit State” should be added after the words “if he is already in the territory of the receiving State” in the first sentence of paragraph 1 of article 28.

47. Mr. MAHIU said that the replies by the Special Rapporteur and the Chairman of the Drafting Committee to the questions raised by several members of the Commission showed that, if the diplomatic courier was granted privileges and immunities, including immunity from jurisdiction, during the period when he exercised his functions, immunity from jurisdiction had to subsist. Paragraph 3 of article 28 was thus the logical consequence of paragraph 1 and did not give rise to any problems of interpretation. The Chairman of the Drafting Committee had, moreover, explained that a distinction had to be drawn between the status of the courier and his functions, on which his privileges and immunities depended and which could come to an end for a variety of reasons.

48. Sir Ian SINCLAIR had raised the more serious problem of the link between article 28, paragraph 3, and article 23. It was obvious that the immunity in question was immunity from jurisdiction, but whether or not it was necessary to say so was not certain. It was also obvious that article 28, paragraph 3, would be required only if the Commission decided to retain article 23.

49. Mr. AL-QAYSI said that Mr. McCaffrey's misgivings with regard to article 28, paragraph 1, could perhaps be met by defining more closely the criterion for determining the point at which the courier started to exercise his functions, possibly by reference to the moment at which he was appointed.

50. He agreed that article 28, paragraph 3, could not be considered in isolation from article 23 and that, as drafted, it gave rise to a problem. If the paragraph were approved and if some form of immunity from jurisdiction were provided for under article 23, the courier could not possibly be made amenable to the jurisdiction of the receiving State, unless of course he returned to that jurisdiction in a private capacity. The solution would therefore be to indicate, possibly in a footnote to article 28 or by placing its paragraph 3 in square brackets, that it would be necessary to revert to the matter when the Commission took its final decision on article 23.

51. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) suggested that, in order to expedite matters, a decision on article 28, paragraph 3, should be deferred on the understanding that the paragraph would be reviewed by the Drafting Committee at the current session in conjunction with article 23.

52. Mr. KOROMA said he was prepared to agree to the suggestion that the Drafting Committee should reconsider the matter but, if it were agreed—as seemed to some extent to be the case—that the courier should not be amenable to the jurisdiction of the receiving State or the transit State, it followed that article 28, paragraph 3, would have to be accepted. It was necessary first of all to decide whether the courier should enjoy personal as well as functional immunity and that question should therefore be dis-

cussed both in the Drafting Committee and in the Commission itself.

53. Mr. FLITAN said that the fate of article 28, paragraph 3, would not depend on the decision to be taken with regard to article 23, because if the Commission decided not to retain article 23, it would still have article 16. The scope of article 28, paragraph 3, would, however, be broader if article 23 were not deleted. Since the problems raised by article 28, paragraph 3, were of a drafting nature, he agreed with the members of the Drafting Committee who were in favour of basing the wording of that provision on that of article 39, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations. The words “by such a person” would thus be better than the words “by the diplomatic courier” because, at the moment in question, the person concerned would no longer be performing his functions as a courier. Perhaps that point might be explained in the commentary. The expression “in the exercise of his functions” in article 28, paragraph 3, also gave rise to problems because the Commission did not yet know whether immunity from jurisdiction would apply only to acts performed by the courier in the exercise of his functions or also to acts which he performed outside his functions. That expression should therefore be replaced by the words “during the period in which he exercises his functions”. In conclusion, he suggested that article 28, paragraph 3, should have a minimum content, since the Commission had adopted article 16 on first reading without waiting for a decision to be taken on article 23.

54. Mr. LACLETA MUÑOZ said that, in the first sentence of article 28, paragraph 1, a drafting error had been made in referring to a person who was already in the territory of the receiving State and to whom the functions of a courier were entrusted. The words “if he is already in the territory of the receiving State” in the second part of the sentence thus referred to the diplomatic courier *ad hoc*, not to “the diplomatic courier” mentioned at the beginning of the sentence. He therefore suggested that the words “if he is already in the territory of the receiving State” should be replaced by the words “in the case of the diplomatic courier *ad hoc*” or by the words “in the case of a person already in the territory of the receiving State”. What appeared to be a drafting problem also raised the question whether a diplomatic mission could appoint only diplomatic couriers *ad hoc* or whether it could also appoint “professional” couriers.

55. With regard to article 28, paragraph 3, he was of the opinion that the word “immunity” could refer only to immunity from jurisdiction and that that paragraph was therefore closely linked to article 23. It would be absurd to say that the diplomatic courier enjoyed functional immunity only from civil and administrative jurisdiction, and not from criminal jurisdiction. The same problem arose in article 29.

56. Mr. BALANDA said he also thought that article 28, paragraph 3, and article 23 were closely linked and that they should be discussed at the same time. He was not sure whether the Commission would be able to agree on the use of the words “during the period in which he exercises his functions” proposed by Mr. Flitan, which went further

than the words "in the exercise of his functions". The Commission would encounter the same problem in article 29.

57. Mr. DÍAZ GONZÁLEZ said that, before deciding on article 28, paragraph 3, the Commission should first take a decision on article 23. Article 28, paragraphs 1 and 2, had also given rise to a number of objections because of their ambiguity, the fact that they were based on the 1961 Vienna Convention on Diplomatic Relations and the drafting error pointed out by Mr. Laclea Muñoz. In that connection, he agreed with the view expressed by Mr. Reuter. Since article 29 would raise the same problems, the Commission should not take a decision on article 28 as a whole until it had decided what should be done with article 23.

58. Sir Ian SINCLAIR said that it would be acceptable to him to adopt paragraphs 1 and 2 of article 28 and place paragraph 3 in square brackets, with an indication that its wording would be reviewed in the light of any decision the Commission might reach on article 23. The same problem arose in connection with article 29, paragraphs 3, 4 and 5, and those paragraphs should perhaps also be placed in square brackets. If there was any major difficulty he could agree to a lesser solution whereby it was clearly recorded that the Commission provisionally adopted article 28 on the explicit understanding that the wording of paragraph 3 would be reviewed by the Drafting Committee and by the Commission as a whole in the light of any decision the Commission might reach on article 23. The same reservation could also be made in respect of article 29.

59. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he did not favour the suggestion to place paragraph 3 of article 28 in square brackets, since he considered that the Drafting Committee should discuss article 23 at the current session, if possible; it could discuss paragraph 3 of article 28 at the same time.

60. The CHAIRMAN suggested that, in view of the late hour, members should revert to the matter at the next meeting.

*The meeting rose at 1.10 p.m.*

## 1912th MEETING

*Thursday, 27 June 1985, at 10.05 a.m.*

*Chairman:* Mr. Satya Pal JAGOTA

*Present:* Chief Akinjide, Mr. Al-Qaysi, Mr. Arango-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Francis, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pirzada, 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/L.384, ILC(XXXVII)/Conf.Room Doc.2 and Add.1)

[Agenda item 5]

#### DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

#### ARTICLES 28 (*continued*) to 30

#### ARTICLE 28 [21] (Duration of privileges and immunities)<sup>1</sup> (*continued*)

1. The CHAIRMAN said that, following the detailed discussion held at the previous meeting and on the basis of consultations with the Chairman of the Drafting Committee, the Special Rapporteur and Sir Ian Sinclair, he would suggest that article 28 be provisionally adopted, on the understanding that paragraph 3 would be reviewed in the light of the Commission's decision on article 23. The comments made by members would be taken into account in drafting the commentary to the article.

2. Mr. DÍAZ GONZÁLEZ said that he did not see how the Commission could adopt an article when it did not know what the text would be, since paragraph 3 would be amended according to the decision taken on article 23. Moreover, there had been no consensus on article 28 as a whole, and it could not be considered as being approved. The best course would be to await the Commission's decision on article 23 before pronouncing on article 28 as a whole.

3. The CHAIRMAN said that it was, of course, possible to leave article 28 in abeyance; that was a matter for the Commission to decide. It should be borne in mind, however, that the text of article 28 was based on the corresponding provisions of the four codification conventions, so that any change in that text might raise questions as to the interpretation of those conventions.

4. Mr. McCAFFREY said that, while he would have no difficulty in accepting the Chairman's suggestion, he considered it important to clarify whether the immunity referred to in paragraph 3 of article 28 was qualitatively different from the immunities referred to in paragraphs 1 and 2.

5. Mr. REUTER said that he could not support the interpretation given to article 16 at the previous meeting.

6. Mr. USHAKOV said that, as a member of the Commission, he enjoyed the same immunities as a head of mission. According to article 28, paragraph 3, he could not be arrested or detained even after the conclusion of the session for acts performed during the session. The immunity subsisted, whatever it might be.

7. Mr. LACLETA MUÑOZ said he did not think that paragraph 3 of article 28 could be retained if the Commission deleted article 23, because personal inviolability had a much wider scope than immunity, in so far as it implied protection of the courier. There

<sup>1</sup> For the text, see 1911th meeting, para. 18.