

Document:-  
**A/CN.4/SR.1912**

**Summary record of the 1912th meeting**

Topic:  
**Status of the diplomatic courier and the diplomatic bag not accompanied by the  
diplomatic courier**

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

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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.

was no question of the inviolability subsisting during a fresh visit of the courier to the receiving State outside the performance of his functions. Moreover, if the diplomatic courier enjoyed personal inviolability when he committed an act giving rise to a legal proceeding in the receiving State and took advantage of his inviolability to leave the country, he would be abusing that privilege to evade his obligation to respect the laws of the receiving State. He was in favour of the diplomatic courier having immunity from jurisdiction for acts performed in the exercise of his functions and thought that paragraph 3 would make sense only if the Commission retained article 23. Hence it was important to make clear, in one way or another, that the final decision on paragraph 3 of article 28 would depend on the position taken on article 23.

8. Mr. SUCHARITKUL said it was his understanding that the word "immunity" in article 28, paragraph 3, did not, and was not intended to, cover inviolability under article 16, since the personal inviolability of the courier would in any event disappear upon the cessation of his functions. If the courier returned to the receiving State or transit State in his capacity as a diplomatic courier, he would be covered by new personal inviolability; on the other hand, if he returned in a private capacity, his earlier personal inviolability could not subsist.

9. Mr. MAHIU said that he interpreted paragraph 3 in the same way as Mr. Lacleta Muñoz. The Commission could adopt paragraphs 1 and 2 of article 28 and indicate that its decision on paragraph 3 would depend on what happened to article 23.

10. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said there seemed to be general agreement that paragraph 3 of article 28 should be referred back to the Drafting Committee, in which event the Committee could at the same time consider whether the term "immunity", in that paragraph, extended to immunity within the meaning of article 23 and inviolability under article 16. The Commission might wish to adopt paragraphs 1 and 2 of article 28 provisionally, as the Chairman had suggested, and leave paragraph 3 pending, on that understanding.

11. Mr. USHAKOV said there could be no doubt that personal inviolability was an immunity, as was shown by article 37, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations, according to which "The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in articles 29 to 36". Article 29 of that Convention established the personal inviolability of the diplomatic agent.

12. Mr. RIPHAGEN said that he did not understand the meaning of the second sentence of paragraph 1 of article 28, since in any event the courier would leave the territory of the receiving State or transit State in the course of his functions. That point could not be clarified in the commentary; it should be made clear in the body of the article.

13. Mr. YANKOV (Special Rapporteur) said that he fully agreed with Mr. Ushakov's interpretation of the relationship between inviolability and the notion

of immunity, which was borne out by State practice.

14. As to the duration of immunities and, more specifically, the use of the word "immunity" in the singular in paragraph 3 of article 28, he reminded members that in the earlier stages of the work it had been proposed that the phrase "during the exercise of" should be used in order to import the more objective criterion of time, thus obviating the need to establish a relationship between the act performed and the immunities, which was difficult in practice. As he understood it, the restrictive approach had been adopted as a further exception, so that only those immunities which related to acts performed by the diplomatic courier during the exercise of his functions would subsist after those functions had come to an end. The same idea was reflected in the second sentence of article 39, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations. Other expressions which could give rise to differing interpretations appeared in that Convention, however, such as "the course of their duties" in article 37, paragraphs 2 and 3. That point would require consideration.

15. In reply to Mr. Riphagen he pointed out that the wording of the second sentence of paragraph 1 of article 28 appeared in article 39, paragraph 2, of the 1961 Vienna Convention and in the corresponding provisions of the other codification conventions. There seemed to be a logic in those provisions, although it might not be immediately apparent. He did not, however, share the view that there was a contradiction between the second sentence of paragraph 1 and paragraph 3 of article 28.

16. Mr. SUCHARITKUL said he did not dispute the fact that inviolability could consist of a number of immunities. Indeed, the personal inviolability of a diplomatic courier was translated into at least two immunities: immunity from arrest and immunity from detention. Immunity in the sense used in article 28, paragraph 3, however, was a generic term with the connotation of immunity from jurisdiction. It would be misleading to adopt the same formula as that of the 1961 Vienna Convention on Diplomatic Relations if the diplomatic courier did not have the same jurisdictional immunity as a diplomatic agent. As to personal inviolability in the form of immunity from arrest and detention, the question did not arise once the courier had left the country.

17. Mr. USHAKOV warned members of the Commission against any attempt to interpret conventions in force. It would be inconceivable for diplomatic agents to enjoy only immunity connected with the exercise of their functions. An ambassador was performing his functions even when he went for a trip in the country, since part of his mission was to get to know his country of residence. The administrative and technical staff of a mission, on the other hand, such as a gardener, performed their functions only on the mission's premises. Consequently, if an ambassador on holiday in the country was attacked by miscreants whom he wounded in retaliation, he could not be arrested or detained by the receiving State.

18. Mr. McCAFFREY said that Mr. Ushakov's remarks highlighted the importance of the distinction

that would have to be made between immunities, as contemplated in paragraphs 1 and 2 of article 28, and immunity, as contemplated in paragraph 3; that in turn related to his own earlier point (1911th meeting) regarding the ambiguity of articles 10 and 11.

19. His position on paragraph 3 of article 28 was akin to that of Mr. Lacleta Muñoz and Mr. Suchar-itkul. He found it inconceivable that States would agree to an obligation to provide affirmative protection to a former courier returning to the receiving State, since it would be extremely difficult, if not impossible, to determine in advance when such protection would be necessary. Jurisdictional immunity might be necessary for certain diplomatic officials returning to a State in a private capacity to protect them from harassment or attempts to discover matters of State. In that sense, it was the immunity of the State that subsisted, so that the immunity referred to in paragraph 3 must be jurisdictional immunity. But in article 28, language applicable to ambassadors was being applied to couriers. He recognized that, in article 39, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations, the words "every person" covered the members of the family of a diplomatic agent and the members of the technical and administrative staff of the mission, but such persons were normally resident in the receiving State for long periods of time and their immunities were necessary for the functioning of the mission. The crucial issue was whether the same immunities should apply not only during the performance of the courier's functions, but also after he had ceased to be a courier and had returned to the sending State. It seemed to be the view of many members that it would be stretching the tolerance of States too far to expect them to extend to erstwhile couriers the protection that they were bound to accord to former diplomats.

20. The CHAIRMAN, noting that there were no further comments, proposed that the Commission should provisionally adopt paragraphs 1 and 2 of article 28 and refer paragraph 3 back to the Drafting Committee for further consideration in the light of the discussion, with particular attention to be paid to the scope of the word "immunity" and bearing in mind the paragraph's link with the Commission's decision on article 23.

*It was so agreed.*

#### ARTICLE 29 [22] (Waiver of immunities)

21. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) presented article 29 [22] as proposed by the Drafting Committee, which read:

##### *Article 29 [22]. Waiver of immunities*

1. The sending State may waive the immunities of the diplomatic courier.
2. Waiver must always be express, except as provided in paragraph 3 of this article, and shall be communicated in writing.
3. The initiation of proceedings by the diplomatic courier shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.
4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

5. If the sending State does not waive the immunity of the diplomatic courier in respect of a civil action, it shall use its best endeavours to bring about a just settlement of the case.

22. Article 29 followed fairly closely the text originally submitted by the Special Rapporteur,<sup>2</sup> although some minor adjustments had been made to bring it into line with the corresponding provisions of the codification conventions. Paragraph 1 simply provided that it was the sending State which could waive the immunities of the diplomatic courier. Paragraph 2 introduced two new elements, the first of which was that the terms of paragraph 3 would operate as an exception to paragraph 2, and the second that the waiver should be not only express, but also communicated in writing. Thus the only case in which waiver would not be express and in writing would be that provided for in paragraph 3. Paragraph 4 embodied a general principle, and no change had been made to the original wording. Paragraph 5 expressed the same basic idea as had been contained in the text submitted by the Special Rapporteur, but some adjustment of language had been made. An explanation of the relationship between paragraphs 3 and 4 of the article would be made in the commentary. Reservations had again been expressed on the need for all or part of the article, pending a decision on article 23.

23. Sir Ian SINCLAIR said that, although no major problems of substance were involved, he wished to enter reservations on paragraphs 3, 4 and 5 of article 29, pending a final decision by the Commission on article 23. If it were decided not to include article 23 or to modify it substantially, the need for those three paragraphs would have to be reviewed. In the circumstances, the Commission might wish to approve paragraphs 1 and 2 provisionally and place asterisks against paragraphs 3, 4 and 5.

24. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, since all the draft articles proposed by the Drafting Committee were intended for provisional adoption, changes arising out of a subsequent decision by the Commission could always be made. At the same time, it was both possible and necessary, in his view, for the Commission to pronounce on article 23 at the current session, so that, if necessary, a decision on paragraphs 3, 4 and 5 of article 29 could be deferred.

25. Mr. RIPHAGEN said that he wished to enter a reservation on paragraph 3 of article 29, the precise meaning of which should be made clear in the commentary.

26. Mr. OGISO asked whether paragraph 5 of article 29 would also apply where the sending State did not waive the immunity of the diplomatic courier in respect of the execution of a judgment as well as in respect of civil proceedings.

27. Mr. YANKOV (Special Rapporteur) said that the substance and, to a great extent, the language of paragraph 5 of article 29 were based on article 31 of the 1975 Vienna Convention on the Representation of States. It was a novel provision and had been discussed at length in the Commission. Basically, the

<sup>2</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.

intention was to provide an assurance that, in the event of damage caused to persons in the receiving State, the sending State would make every effort to bring about a just settlement of the case. Although the question of the execution of a judgment had not been singled out, his understanding was that the terms of paragraph 5 would apply to all steps in the proceedings, including execution of judgment, inasmuch as the ultimate aim was to arrive at a just settlement based on equitable principles. That point could perhaps be brought out in the commentary.

28. The CHAIRMAN proposed that, as suggested by Sir Ian Sinclair, the Commission should provisionally adopt paragraphs 1 and 2 of article 29 and place asterisks against paragraphs 3, 4 and 5 as an indication that those paragraphs would be reviewed in the light of its decision on article 23. He further proposed that the commentary should clarify the points raised by Mr. Riphagen and Mr. Ogiso.

*It was so agreed.*

ARTICLE 30 [23] (Status of the captain of a ship or aircraft entrusted with the diplomatic bag)

29. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) presented article 30 [23] as proposed by the Drafting Committee, which read:

*Article 30 [23]. Status of the captain of a ship or aircraft entrusted with the diplomatic bag*

1. The captain of a ship or aircraft in commercial service which is scheduled to arrive at an authorized port of entry may be entrusted with the diplomatic bag of the sending State or of a mission, consular post or delegation of that State.

2. The captain shall be provided with an official document indicating the number of packages constituting the bag entrusted to him, but he shall not be considered to be a diplomatic courier.

3. The receiving State shall permit a member of a mission, consular post or delegation of the sending State to have unimpeded access to the ship or aircraft in order to take possession of the bag directly and freely from the captain or to deliver the bag directly and freely to him.

30. In an attempt to achieve greater economy and clarity in drafting, the text of article 30 had been considerably simplified, though without any loss of substance.<sup>3</sup> It now consisted of three paragraphs instead of the original four, and the paragraphs had been shortened.

31. In paragraph 1, the references to “the captain of a commercial aircraft” and “the master of a merchant ship” had been combined to read: “The captain of a ship or aircraft in commercial service”. The words “in commercial service” had been preferred as having a broader meaning than the original expression “merchant ship”. That change was reflected in the various language versions, and it was recognized that the corresponding expression in Spanish (*comandante de un buque o una aeronave comerciales*) was not very felicitous. But since the codification conventions used similar expressions and since it would complicate the drafting to try to introduce further distinctions, it had been decided to adopt the

wording proposed. The commentary would explain that the word “captain” was a functional expression and did not have the particular meaning attributed to that word in internal law.

32. The Drafting Committee had decided to delete the reference to “an authorized member of the crew” which had appeared in the original text, because it believed that it would add an unnecessary complication. It was not clear how such a crew member would be authorized and, in any event, the captain of a ship or aircraft was always the highest authority on board. It had been considered more prudent to deal with the matter in the commentary, explaining that the text of the article—which referred only to the captain—was not intended to prejudice State practice with regard to entrusting the bag to an authorized member of the crew.

33. Paragraph 1 also referred to the ship or aircraft as being one “scheduled to arrive at an authorized port of entry”. That phrase had been included to show that what was meant was a ship or aircraft engaged in regular or scheduled service, not one operating on an *ad hoc* basis.

34. The reference to the captain being “entrusted” with the diplomatic bag emphasized the fact that he was not considered to be a diplomatic courier, as expressly stated in paragraph 2.

35. The former paragraphs 2 and 3 of article 30 had been combined in the new paragraph 2. The former paragraph 4 had been redrafted as the new paragraph 3, to convey the intended meaning more clearly and precisely. The Drafting Committee had considered it important to stress that members of a mission, consular post or delegation of the sending State must be allowed unimpeded access to the ship or aircraft in order not only to take possession of the bag from the captain, but also to deliver it to him, and that in both cases that should be done directly and freely.

36. The former paragraph 4 had provided that the captain should be accorded “facilities for free and direct delivery” of the bag. The new paragraph 3 referred to the obligation of the receiving State to “permit a member of a mission, consular post or delegation of the sending State to have unimpeded access to the ship or aircraft in order to take possession of the bag directly and freely”. The reason for that inversion was to show that the facilities in question were to be granted to the member of the mission concerned, rather than to the captain.

37. The title of article 30 had been adjusted to correspond to the new drafting.

38. Mr. USHAKOV suggested that, for the sake of clarity, the words “or, as the case may be, a” should be added after the words “a mission”, at the beginning of paragraph 3.

39. Mr. LACLETA MUÑOZ observed that article 30 as originally submitted by the Special Rapporteur in his fourth report had covered the common case in which the diplomatic bag was entrusted not to the captain, but to a member of the crew under his command.<sup>4</sup> That case had been included as a result of

<sup>3</sup> For the text submitted by the Special Rapporteur and the Commission's consideration thereof, *ibid.*, pp. 89 *et seq.*, 1830th meeting (paras. 1-25), pp. 107 *et seq.*, 1832nd meeting (paras. 17 *et seq.*) and pp. 162 *et seq.*, 1842nd and 1843rd meetings and 1844th meeting, paras. 1-20.

<sup>4</sup> *Yearbook ... 1983*, vol. II (Part One), p. 108, document A/CN.4/374 and Add.1-4, paras. 240-243.

comments made not only in the Commission, but also in the Sixth Committee of the General Assembly.

40. Speaking as a member of the Drafting Committee, he drew attention to the fact that, because it had been unable to agree on adequate wording or to settle the question whether it was for the captain or the sending State to decide that the bag could be entrusted to a member of the crew, the Drafting Committee had omitted to mention that case. The reasons for that omission should be stated in the commentary, which should explain that the Commission had not intended to rule out the possibility of the bag being entrusted to a crew member.

41. Mr. RIPHAGEN said that the use of the word "scheduled" in paragraph 1 appeared to restrict the application of its provisions to scheduled air services. In fact, it could well be in the interests of the sending State to entrust the diplomatic bag to the captain of a chartered aircraft.

42. Mr. YANKOV (Special Rapporteur) said that the term "scheduled" had been used advisedly, because paragraph 1 covered the regular transport of the bag by sea or air. Other arrangements were, of course, possible on an *ad hoc* basis. Two States could arrange between themselves for the transport of the bag by non-scheduled services, but it was not desirable to derive a general rule from such arrangements, since the result would be to place an excessive burden on the receiving State.

43. Mr. RIPHAGEN said that he saw no reason to exclude the possibility of entrusting the bag to the captain of a chartered aircraft. Charter flights were sometimes just as regular as scheduled flights.

44. Sir Ian SINCLAIR explained that there had been a general feeling in the Drafting Committee that the provisions of paragraph 1 should relate to regular services. Of course, other means were possible; a State might, for example, entrust the diplomatic bag to the captain of a private aircraft. That, however, would be done under an arrangement between the two States concerned. The Drafting Committee had not considered it desirable to include such cases in the facility provided for in paragraph 1.

45. Mr. McCAFFREY agreed with Sir Ian Sinclair. In his view, however, regular charter flights would probably be covered by paragraph 1. A principal reason for using the word "scheduled" was that it would be extremely difficult for receiving States to fulfil their obligations in respect, for example, of the provision of facilities in the case of flights that were not scheduled.

46. Mr. TOMUSCHAT said that the question was of interest to his country. In the summer, there were regular charter flights from the Federal Republic of Germany to certain countries in Africa to which there were no Lufthansa scheduled flights. Those charter flights provided a safe way of conveying the diplomatic bag to the countries concerned, and he saw no reason why such flights should be excluded from the operation of paragraph 1.

47. Mr. DÍAZ GONZÁLEZ said that the word "scheduled" did not present any difficulty and could even be deleted, which would give States more freedom of choice. Under the privileges which they

enjoyed in regard to communications, States could very well entrust the diplomatic bag to the captain of an aircraft on a special flight. Venezuela, for instance, used regular airlines, private aircraft and aircraft of the Venezuelan Air Force for the transport of its couriers and diplomatic bags.

48. Mr. AL-QAYSI suggested that the difficulty might be overcome by referring to a "regular service", instead of using the word "scheduled". In paragraph 3, the meaning might be made clearer by replacing the concluding words "to him" by the words "to the captain".

49. Mr. YANKOV (Special Rapporteur) pointed out that the competent specialized agency—ICAO—drew a clear distinction between charter flights and regular or scheduled flights. Under ICAO rules, special services required special arrangements. The purpose of article 30, paragraph 1, was to state the general rule; it accordingly reflected the prevailing State practice in the matter. The commentary would make that clear and explain that States could act otherwise by arrangement.

50. The CHAIRMAN, speaking as a member of the Commission, said he found the provisions of paragraph 3 unduly strict. The corresponding provisions of the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States all contained a reference to arrangements between the mission of the sending State and the appropriate local authorities. But no such reference was contained in paragraph 3 of draft article 30, which followed the precedent of article 27, paragraph 7, of the 1961 Vienna Convention on Diplomatic Relations.

51. That formulation for paragraph 3 could lead to results contrary to the provisions of draft article 36. He therefore suggested that the words "by prior arrangement", between commas, should be inserted after the words "The receiving State shall" at the beginning of paragraph 3 of article 30. He further suggested that the reference to "unimpeded access to the ship or aircraft" should be deleted. The paragraph would then read:

"3. The receiving State shall, by prior arrangement, permit a member of a mission, consular post or delegation of the sending State to take possession of the bag directly and freely from the captain or to deliver the bag directly and freely to him."

As he saw it, the reference to "unimpeded access" could create unnecessary difficulties; the receiving State might have reasons for not wishing to allow direct access to the ship or aircraft.

52. Mr. YANKOV (Special Rapporteur) said that the Chairman's suggested addition of the words "by prior arrangement" could be accepted. Alternatively, the matter could be explained in the commentary without altering the text of the article.

53. He could not accept the Chairman's other proposed amendment, however, because it was essential to make provision for the right of unimpeded access to the ship or aircraft by a member of the sending State's mission. There had been cases in which the captain of a ship or aircraft had been made to carry a bag to a specified place, leaving it there for the

mission to collect. Such an arrangement was clearly not satisfactory from the point of view of the sending State.

54. Chief AKINJIDE supported the text of article 30 as it stood and the position taken by the Special Rapporteur.

55. The CHAIRMAN, speaking as a member of the Commission, said that he could accept the text as it stood, subject to a satisfactory explanation in the commentary. His main concern was that article 30 should not provide an easy escape from the provisions of article 36.

56. Mr. RIPHAGEN said that, if a reference to a prior arrangement was needed, it must be made in the text of the article, not in the commentary.

57. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the requirement of a prior arrangement had been discussed in the Drafting Committee, but it had been considered that such a requirement would constitute a limitation on unimpeded access to the ship or aircraft. The two points raised by the Chairman had also been extensively discussed in the Drafting Committee.

58. Sir Ian SINCLAIR said that the general feeling in the Drafting Committee had been that to insert the formula "by prior arrangement" in the article itself could be considered as limiting the right given to the sending State. There had been instances of access being refused by the authorities of the receiving State, relying on the argument that no prior arrangement had been made.

59. He did not share Mr. Riphagen's reservations about making the reference in the commentary. Practical arrangements could be made for the exercise of the rights of the sending State, and it would therefore be perfectly appropriate for the commentary to mention them. Of course, the commentary should also stress the great importance of unimpeded access to the ship or aircraft.

60. Mr. USHAKOV said that the reason why an "arrangement" was mentioned in article 28, paragraph 8, of the 1969 Convention on Special Missions and in article 27, paragraph 7, of the 1975 Vienna Convention on the Representation of States was simply in order that the receiving State or host State might be informed of the situation, so that it could be required to allow free access to the ship or aircraft. The idea of an arrangement was in no way restrictive in that case. Moreover, an arrangement could also be necessary for the member of the mission, consular post or delegation of the sending State who was authorized to take possession of the bag from the captain or deliver it to him. Those details should be included in the commentary.

61. Mr. TOMUSCHAT, referring to the relationship between article 30 and article 36, suggested that the commentary should explain that the rules in article 30 were subject to those in article 36.

62. He felt strongly that the question of using regular charter flights for the transport of the bag should not be left to individual agreements between States. Charter flights were in fact just as regular as scheduled flights and differed from them only in respect of the booking system. The distinction

between the two was not relevant to the rules in article 30.

63. The CHAIRMAN said that that point could be clarified in the commentary.

64. Mr. KOROMA urged that the point be settled in the article itself, not merely in the commentary. He suggested that the wording of paragraph 1 should be broadened to include regular charter flights, which were widely used. The qualification "by prior arrangement" should be inserted in the text of paragraph 3. It was not enough to refer to the matter in the commentary, which would not be disseminated as widely as the future convention.

65. The CHAIRMAN proposed that article 30 should be adopted on first reading, on the understanding that the commentary would clarify the various points which had been raised. In particular, it would indicate that the term "scheduled" was to be understood as including regular charter flights. It would also make clear that prior arrangement would be necessary for the exercise of the right of access provided for in paragraph 3.

66. If there were no further comments, he would take it that the Commission agreed to adopt article 30 [23] on first reading, on that understanding.

*It was so agreed.*

*Article 30 [23] was adopted.*

*The meeting rose at 1.05 p.m.*

## 1913th MEETING

*Friday, 28 June 1985, at 10.05 a.m.*

*Chairman:* Mr. Satya Pal JAGOTA

*later:* Mr. Khalafalla EL RASHEED MOHAMED AHMED

*Present:* Chief Akinjide, Mr. Al-Qaysi, Mr. Arango-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Flitan, 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.

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

1. The CHAIRMAN extended a warm welcome to Mr. Evensen, a Judge of the International Court of Justice and a former member of the Commission.

**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)**

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

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