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Summary record of the 1913th meeting

Topic:
<multiple topics>

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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.4/382,¹ A/CN.4/390,² A/CN.4/L.382, sect. C, ILC(XXXVII)/Conf.Room Doc.2 and Add.1)

¹ Reproduced in *Yearbook ... 1984*, vol. II (Part One).

² Reproduced in *Yearbook ... 1985*, vol. II (Part One).

[Agenda item 5]

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

ARTICLES 31 to 35

ARTICLE 31 [24] (Identification of the diplomatic bag)

2. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) presented article 31 [24] as proposed by the Drafting Committee, which read:

Article 31 [24]. Identification of the diplomatic bag

1. The packages constituting the diplomatic bag shall bear visible external marks of their character.

2. The packages constituting the diplomatic bag, if unaccompanied by a diplomatic courier, shall also bear a visible indication of their destination and consignee.

3. The article was a shortened version of the original text,³ which had been reduced to two paragraphs. The only change in paragraph 1 was the deletion of the word "official" before the word "character".

4. Originally, paragraph 2 had required that the packages constituting the bag should bear an indication of any intermediary points on the route or transfer points, but that requirement had been deleted in the light of the discussion in the Commission.

5. Paragraph 3 of the original text concerned the maximum size or weight of the bag. It had been deleted in the light not only of the debate, but also of the provisions of article 34, which specified that the conditions established nationally and internationally to govern the use of the postal service should apply to the transmission of the bag by post. It had been thought that the question of the maximum size or weight should be a matter for agreement between the sending and receiving States. On the other hand, the text should omit any reference to such an agreement, which might imply that agreement was necessary; a requirement of that kind could interfere with freedom of communication. The purpose of paragraph 3 had been to limit possible abuse, but the Drafting Committee had taken the view that the question could be solved by bilateral agreement. Moreover, with regard to misuse of the bag, the most important factor was the content rather than the size or weight of the bag.

6. The title had been adjusted in order to reflect more accurately the subject-matter of the article. Lastly, the Drafting Committee had carefully examined all the matters involved in the deletions, which had been made out of a desire to simplify the text but also because the Committee had considered that article 31 would be more effective if it were limited to the essentials.

³ For the text submitted by the Special Rapporteur and the Commission's consideration thereof, see *Yearbook ... 1984*, vol. I, 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.

7. Mr. USHAKOV noted that, under the terms of paragraph 1 of article 31, the packages constituting the diplomatic bag "shall" bear visible external marks of their character and that, under the terms of paragraph 2, they "shall also" bear a visible indication of their destination and consignee. The first obligation, relating to the sending State, was stricter than the second obligation, which could relate equally to the postal service or the transport company concerned. In the absence of the visible external marks mentioned in paragraph 1, a bag did not enjoy the status of a diplomatic bag. On the other hand, if the packages constituting a diplomatic bag not accompanied by a courier did not bear an indication of their destination and consignee, as stipulated in paragraph 2, it could not be reasonably inferred that they did not constitute a diplomatic bag. In due course, the commentary to article 31 could perhaps explain that the obligation under paragraph 2 was not so strict as the obligation set forth in paragraph 1 and that failure to observe it had no effect on the legal status of the diplomatic bag.

8. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the character of the diplomatic bag did not stem from the marks in question. The usual practice was for all bags, whether accompanied or unaccompanied, to bear some visible indication of their destination. It had not been deemed essential to stipulate that requirement, however, when the bag was accompanied by a diplomatic courier.

9. Mr. YANKOV (Special Rapporteur) pointed out that, by virtue of paragraph 1 of article 31, all diplomatic bags had to bear visible external marks of their character. The additional requirement in the case of unaccompanied bags was a visible indication of their destination, in order to permit dispatch to the appropriate consignee. Of course, even when a bag was accompanied by a courier, the destination was normally indicated.

10. Mr. USHAKOV said the fact that the diplomatic bag was not accompanied by a courier did not signify that it was not accompanied by an agent of a transport company, in which case it did not seem really necessary to require an indication of the destination and the consignee of the bag. The most troublesome point was that the absence of the indication mentioned in paragraph 2 might be interpreted as depriving the bag of its diplomatic character.

11. The CHAIRMAN said that the matter could well be clarified in the commentary by explaining that the word "also" had been inserted in paragraph 2 in order to emphasize that the unaccompanied bag was subject to the rule in paragraph 1 as well.

12. Mr. KOROMA said that the point could be made clearer by replacing the word "also" by the words "in addition". It would thus be apparent that paragraph 1 applied to all bags and that paragraph 2 contained an additional requirement for unaccompanied bags.

13. Sir Ian SINCLAIR said that there would be little difference in substance between the word "also" and the expression "in addition", although the latter would supply some extra emphasis. The matter could be handled in the commentary by explaining that

paragraph 2 embodied an additional requirement for unaccompanied bags, intended for the practical purpose of enabling the bag to reach its destination. The commentary should also make it plain that the absence of any indication of destination or consignee would not detract from the status of the bag as a diplomatic bag.

14. Mr. FRANCIS said that small countries like his own did not have diplomatic couriers; their diplomatic bags were always unaccompanied, hence the special interest for them of the problems under discussion. His own concern was mainly with the use in paragraph 1 of the formula "The packages constituting the diplomatic bag". The term "packages" could be taken to refer to the actual contents of the bag. If the seal of the diplomatic bag was broken, perhaps accidentally, a serious problem would arise if the individual packages were not properly identified; the contents might even be lost.

15. Mr. FLITAN, referring to the comments made by Mr. Francis, said it was apparent from the definition of the term "diplomatic bag" in article 3, paragraph 1 (2), that the diplomatic bag consisted of packages.

16. Neither Mr. Ushakov nor Mr. Koroma had made a formal proposal to amend article 31 and account might be taken of their concern on second reading of the article, more particularly in the commentary.

17. Chief AKINJIDE explained that the Drafting Committee's main reason for using the words mentioned by Mr. Francis had been the need to harmonize the text of article 31 with the wording of article 27, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations.

18. Mr. EL RASHEED MOHAMED AHMED drew attention to the definition of "diplomatic bag" contained in article 3, paragraph 1 (2), which stated that: "'diplomatic bag' means the packages containing ...". Accordingly, the use of the term "bag" by itself would imply that it could consist of a number of packages. The point could be explained in the commentary.

19. The CHAIRMAN, speaking as a member of the Commission, said that, as a practical matter, if a bag consisted of several packages, each package had to be marked.

20. Mr. REUTER said it was essential to explain clearly that, in the definitions in the draft, which were taken from the 1961 Vienna Convention on Diplomatic Relations, the term "bag" had no physical connotation. It was a legal concept, and since a legal concept could not be opened, it might seem surprising to assert that the bag should not be opened. However, it was a convenient form of language taken from the 1961 Vienna Convention. Specifically, if the bag consisted of a sack, it was in keeping with the concept of a diplomatic bag. On the other hand, if the bag consisted of a number of physical objects, such as a case, sacks and a container, each one formed a separate package and those packages had to be identified in order to form the abstract concept of a diplomatic bag. Just as the physical concept of a bag had become a legal concept, the physical notion of a portfolio had become a theoretical concept in the

case of the leather portfolio formerly handed to members of the French Government and now referred to only in such expressions as "holder of a ministerial portfolio".

21. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he had nothing to add to the explanations given by the Chairman and by Mr. Reuter, who had clarified the matter sufficiently.

22. The CHAIRMAN, speaking as a member of the Commission, said that paragraph 3 of the original text, now deleted by the Drafting Committee, had been intended to avoid misuse of the bag and his own preference would have been to retain it. Admittedly it had stated that the maximum size or weight of the diplomatic bag "shall be determined" by agreement between the sending State and the receiving State, and he would have agreed to tone down the words in question and say "may be determined", so as to indicate that States were free to impose size and weight limitations by agreement. He did not, however, wish to press the point and would be content to see the matter explained in the commentary.

23. Mr. YANKOV (Special Rapporteur) said that the commentary would refer to the practice of certain States, in particular Latin American States, of establishing limits for the size and weight of diplomatic bags. It would also mention the international agreements on the subject and the UPU regulations, which would of course govern the dispatch of unaccompanied bags by post.

24. Mr. OGISO endorsed the Special Rapporteur's comment. As to Mr. Ushakov's contention that the wording of paragraph 2 was much too mandatory, the receiving State and the transit State were obliged under article 35 to provide the facilities necessary for the safe and rapid transmission or delivery of the diplomatic bag. Accordingly, if a bag was not accompanied by a courier, it was very useful for the packages to bear a visible indication of the destination and consignee so as to ensure safe delivery.

25. Mr. KOROMA said that, further to Sir Ian Sinclair's comment, he could accept the word "also" in paragraph 2, provided that the commentary explained that its purpose was to indicate that the paragraph embodied an additional requirement in the case of unaccompanied bags.

26. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) drew attention to the definition of the diplomatic bag given in article 3, paragraph 1 (2). The bag could consist of only one package, which would then constitute the diplomatic bag, or it could consist of two or more packages. The terms of article 31 were sufficiently clear to indicate that they covered the packages which constituted the bag, not the contents. Equally clear was the fact that the marks and indications referred to in the article had to be on the outside of the packages.

27. The CHAIRMAN pointed out that paragraph 1 of article 31 had to be interpreted in the light of State practice with regard to the form of language used in article 27, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations.

28. Mr. USHAKOV said that the Russian text of article 31 used a very precise word which corresponded more or less to "pieces".

29. Mr. LACLETA MUÑOZ said that the word *bultos*, in the Spanish text, was equally clear.

30. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 31 [24] on first reading in the form proposed by the Drafting Committee.

Article 31 [24] was adopted.

ARTICLE 32 [25] (Content of the diplomatic bag)

31. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) presented article 32 [25] as proposed by the Drafting Committee, which read:

Article 32 [25]. Content of the diplomatic bag

1. The diplomatic bag may contain only official correspondence, and documents or articles intended exclusively for official use.

2. The sending State shall take appropriate measures to prevent the dispatch through its diplomatic bag of articles other than those referred to in paragraph 1.

32. Paragraph 1 of the original text of article 32⁴ had not been changed; it emphasized that the "documents" and "articles" referred to were those "intended exclusively for official use". There had been lengthy discussion about whether the word "exclusively" should be used. That wording had been taken from article 35, paragraph 4, of the 1963 Vienna Convention on Consular Relations. Moreover, article 3, paragraph 1 (2), as provisionally adopted by the Commission, contained the same form of words. The Drafting Committee had accordingly decided to retain it, but it could, of course, revert to the matter at a later stage.

33. One member of the Committee had expressed reservations regarding paragraph 1 of article 32 because it allowed too much room for possible abuse of the diplomatic bag as a means of transport, for example for the dispatch of inappropriate articles like weapons or furniture without the consent of the receiving State. In that member's view, the bag should be used for communication, not transport.

34. Lastly, in the light of the Commission's discussions and at the suggestion of the Special Rapporteur, the Committee had decided to delete the last phrase of the original text of paragraph 2, which had dealt with the prosecution and punishment of persons responsible for misuse of the bag.

35. Mr. LACLETA MUÑOZ explained that the Chairman of the Drafting Committee had been alluding to him. The reason for his own attitude in the Committee had been that the words "articles ... for official use" in paragraph 1 of article 32 were taken virtually word for word from article 36, paragraph 1 (a), of 1961 Vienna Convention on Diplomatic Relations, a provision which in fact covered articles that could be imported by a mission into the receiving State. When interpreted literally, the words in question encouraged the belief that the bag was not a means to facilitate the mission's communications but a means of transport of any article, regardless of size,

intended for the official use of the mission. However, the word "bag" clearly brought to mind a package of moderate size intended essentially to hold confidential correspondence and documents that were small in format. Since he had held a minority view in the Drafting Committee and consensus had been deemed desirable, he could do no more the express reservations in that regard.

36. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 32 [25] on first reading in the form proposed by the Drafting Committee.

Article 32 [25] was adopted.

ARTICLE 33

37. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the Committee was proposing the deletion of article 33, on the status of the diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew.⁵ It provided that articles 31, 32 and 35 to 39 would apply to a bag entrusted to the persons in question. The Drafting Committee believed that, with one possible exception, those articles did not imply that they would not be applicable if the bag were entrusted to a captain. The one possible exception related to article 36, which had been considered by the Commission. As originally proposed, that article had contained a territorial limitation, but in his oral introduction of his sixth report (A/CN.4/390) the Special Rapporteur had revised the text to eliminate the limitation (1903rd meeting, para. 9). Article 36 would thus apply to a diplomatic bag "at all times and wherever it may be", including on board a ship or aircraft in commercial service, on or over the high seas. Hence it seemed pointless to burden the draft with an unnecessary article whose substance could easily be covered elsewhere and in the commentaries. Of course, in the Commission's consideration of other articles, it might well be deemed advisable to return to the question.

38. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to endorse the Drafting Committee's decision to delete article 33.

Article 33 was deleted.

ARTICLE 34 [26] (Transmission of the diplomatic bag by postal service or by any mode of transport)

39. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) presented article 34 [26] as proposed by the Drafting Committee, which read:

Article 34 [26]. Transmission of the diplomatic bag by postal service or by any mode of transport

The conditions governing the use of the postal service or of any mode of transport, established by the relevant international or national rules, shall apply to the transmission of the packages constituting the diplomatic bag.

⁴ See footnote 3 above.

⁵ See footnote 3 above.

40. The text of article 34 had been reduced to one short paragraph. In the original text,⁶ paragraph 2 had dealt with postal services and paragraph 3 with ordinary means of transportation. The version now being submitted used the terms employed in international conventions and spoke of “mode of transport”. If the packages constituting the bag were transmitted by postal service or by any mode of transport, the conditions established by the relevant international or national rules would apply.

41. Sir Ian SINCLAIR suggested that the words “by the particular means utilized” should be inserted at the end of the article. In its efforts to achieve simplicity, the Drafting Committee had arrived at a text which could lead to misunderstanding. The purpose of his suggestion was to prevent any misinterpretation of article 31 whereby it would be regarded as covering cases in which the bag was accompanied by a diplomatic courier.

42. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the meaning intended by Sir Ian Sinclair was already implicit in article 31, but he had no objection to inserting the additional words, which would make the matter more explicit.

43. Mr. YANKOV (Special Rapporteur) said that he agreed with the Chairman of the Drafting Committee.

44. Mr. TOMUSCHAT expressed concern at the reference to “national rules” and suggested that the commentary should explain that it was not intended to confer some kind of discretion on national legislation.

45. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said it was extremely unlikely that any rules established by national legislation would be in breach of the obligations arising under the articles. The purpose of the reference to the “relevant international or national rules” was to indicate that, if the diplomatic bag were sent by mail, for example, it would naturally be subject to the general rules applicable to the use of postal services, rules which were national and international, in other words the UPU rules.

46. Mr. MAHIU pointed out that article 34 related to the diplomatic bag not accompanied by a courier; hence it might be preferable to make that clear in the article itself by adding, at the end, the words “not accompanied by diplomatic courier”.

47. Mr. USHAKOV said that he endorsed that view.

48. Mr. KOROMA said that Mr. Tomuschat’s point was a very important one. The reference to “national rules” could be interpreted as meaning that national legislation could derogate from the international régime. Inviolability of the diplomatic bag was indispensable and the Commission had agreed that the bag should not be subject to any form of inspection by electronic or other devices. Some national postal administrations had in fact introduced systems of electronic inspection or scanning of material sent

through the post. As a result, the reference to “national rules” could lend itself to abuse.

Mr. El Rasheed Mohamed Ahmed, First Vice-Chairman, took the Chair.

49. Sir Ian SINCLAIR withdrew his suggestion, on the understanding that the matter would be taken up on second reading.

50. Mr. FLITAN, referring to Mr. Koroma’s comments, said that the wording adopted by the Drafting Committee was intended to reserve the rules of international law and internal law specifically governing the postal service and any other mode of transport. It was important for the draft to make no kind of change either in relevant international agreements, such as those concluded under the auspices of UPU, or in national regulations.

51. Mr. RIPHAGEN pointed out that, in air transport, regulations for the safety of passengers and aircraft would always have to be observed.

52. Mr. FRANCIS said that he agreed with Mr. Koroma about the importance of the point raised by Mr. Tomuschat. It should be made clear that national rules could not override the provisions of the draft.

53. Mr. AL-QAYSI said that he failed to see how the reference to “national rules” could be construed as opening the door to the kind of conflict mentioned by Mr. Tomuschat.

54. Chief AKINJIDE said that he agreed with Mr. Al-Qaysi. Article 34 stated simply that, if the diplomatic bag was sent by post, the rules governing the national postal service and the UPU rules would have to be observed.

55. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 34 [26] on first reading in the form proposed by the Drafting Committee.

Article 34 [26] was adopted.

ARTICLE 35 [27] (Facilities accorded to the diplomatic bag)

56. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) presented article 35 [27] as proposed by the Drafting Committee, which read:

Article 35 [27]. Facilities accorded to the diplomatic bag

The receiving State or, as the case may be, the transit State shall provide the facilities necessary for the safe and rapid transmission or delivery of the diplomatic bag.

57. Article 35 had been modified only slightly⁷ and had been brought into line with article 13, on facilities accorded to the diplomatic courier. The words “transportation and delivery” had been replaced by “transmission or delivery” and such transmission was required to be “safe and rapid”, instead of “safe and speedy”. The word “general” had been deleted from the title, consistent with article 13, already provisionally adopted, which bore the title “Facilities” not “General facilities”.

⁶ See footnote 3 above.

⁷ See footnote 3 above.

58. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 35 [27] on first reading in the form proposed by the Drafting Committee.

Article 35 [27] was adopted.

Mr. Jagota resumed the Chair.

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR⁸ (*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)⁹ (*continued*)

59. The CHAIRMAN invited the Special Rapporteur to sum up the Commission's debate on draft articles 23 and 36 to 43.

60. Mr. YANKOV (Special Rapporteur) thanked members for their suggestions and comments, which would receive close attention.

61. In connection with the topic under consideration, certain general considerations relating to the nature and purpose to the work had to be borne in mind. In the first place, it was necessary to be clear whether the Commission was involved simply in the codification of international law, within the meaning of article 15 of its statute, or in the progressive development of international law, also within the meaning of article 15 of its statute. It had always been his understanding that the Commission's work on the present topic fell somewhere between codification and progressive development in that it contained an element of codification *stricto sensu* but was also concerned with the amplification and development of certain rules.

62. It had rightly been said that the Commission's task was sometimes complicated by the need to follow established rules. The 1961 Vienna Convention

on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations had now been ratified by approximately 140 and 110 States, respectively, and thus formed part of international law. Although the two other main codification conventions had still not been ratified by the requisite number of States, in their respective areas they too represented international law in many respects. It was therefore important, so far as possible, to abide by those instruments.

63. Another general point was the need for a comprehensive and uniform approach to couriers and bags, in which connection he had endeavoured to devise in draft articles 42 and 43 some mechanism for adaptation to legal realities.

64. Yet another factor was the importance of the principle of reciprocity, both as a general rule and as it related to specific provisions concerning the facilities, privileges and immunities accorded to the courier and bag, including the inviolability of the diplomatic bag. There were few areas of international law in which the principle of reciprocity was of such significance as in diplomatic and consular law. A sending State, it should be remembered, was also a receiving State and, very often, a transit State as well. The need for a viable balance between the sovereign rights and legitimate interests of the receiving or transit State, on the one hand, and those of the sending State, on the other, therefore had to be viewed in the context of a two-way legal relationship.

65. As to draft article 23, the diplomatic courier had been variously described in the course of the discussions as a vehicle, an instrument and a messenger. All such designations were apposite, but the legal status of the courier had to be evaluated by reference to the main features of his duties. First of all, the courier was an official of the sending State who carried out a confidential mission on behalf of that State in the field of diplomatic communications. In doing so, he performed a task that was indispensable to the external functions of the sending State. The diplomatic courier was only one of many official agents of the State, but his significance was that he carried particularly sensitive information and documents to their destination; bags containing less confidential material were sent by the ordinary postal services or other means of commercial transport. Thus professional couriers normally belonged to the communications service of the ministry of foreign affairs, whereas couriers *ad hoc* were usually members of the diplomatic, administrative or technical staff of the mission.

66. Secondly, a diplomatic courier, unlike a diplomatic agent or consular officer, did not exercise representative functions. The significance of his duties lay not in any representative capacity, but in the official and confidential character of the mission assigned to him. The protection of the courier and the facilities, privileges and immunities accorded to him were an important element in the external functions of the State, and all the immunities, including the jurisdictional immunities, were vested in the State. From the standpoint of functional necessity, the scope of the personal inviolability of the diplomatic courier was akin to that of a member of the

* Resumed from the 1911th meeting.

⁸ 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.

⁹ For the texts, see 1903rd meeting, para. 1.

administrative and technical staff of a mission who, while enjoying diplomatic privileges and immunities, was not entitled to exercise any representative function.

67. A third feature of the diplomatic courier was his mobility and the short duration of his stay in a given country. That aspect of the courier's functions, which had been stressed by a number of speakers, could not be considered in isolation from the other, official and confidential, aspects of his functions. Adequate legal protection and appropriate facilities, including personal inviolability and jurisdictional immunities, were a functional necessity no matter how long they were required, and they should always be available.

68. Those comments brought him to the main issue in the debate on draft article 23, namely the relationship between the personal inviolability of the courier under article 16 and immunity from jurisdiction under article 23, paragraph 1. Two main questions had arisen. The first was whether the provision in article 16 to the effect that the diplomatic courier would not be liable to any form of arrest or detention afforded sufficient legal protection, or whether there should be an additional provision on the jurisdictional immunities to be accorded to the courier as a logical consequence of personal inviolability. The second question was whether, if an additional provision were inserted, the immunity from criminal jurisdiction should be unqualified or confined to acts performed by the courier in the exercise of his functions.

69. Some members had considered that the provision in article 16 was sufficient, bearing in mind the nature of the courier's functions and his short stay in the receiving or transit State, and they argued that to grant jurisdictional immunity to the courier would be to go beyond the existing law under the four codification conventions. Other speakers had taken the view that article 16 alone would not provide the courier with adequate legal protection and had maintained that immunity from criminal jurisdiction was a logical consequence of personal inviolability. Personal inviolability could not be separated from jurisdictional immunity, for, in the absence of a provision on jurisdictional immunity, criminal proceedings could be instituted against the courier *in absentia*.

70. Article 16 was virtually identical with the last sentence of article 27, paragraph 5, of the 1961 Vienna Convention on Diplomatic Relations, and a broad interpretation of the scope of the personal inviolability of the diplomatic courier was supported by legislative history. As early as 1957, the Commission had adopted a draft provision reading: "The diplomatic courier shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to arrest or detention, whether administrative or judicial."¹⁰ That formulation had later been replaced by the more general "any form of arrest or detention", which was the wording used in article 27, paragraph 5, of the 1961 Vienna Convention with reference to the courier, and in article 29 of that Convention with reference to a diplomatic agent.

It was thus apparent that, so far as inviolability was concerned, the 1961 Vienna Convention accorded the same treatment to the diplomatic courier as to the staff of the mission. The same wording was also used in article 35, paragraph 5, of the 1963 Vienna Convention on Consular Relations with reference to the personal inviolability of the consular courier, although the personal inviolability of the consular officer was circumscribed by article 41, paragraph 1, of that Convention.

71. In that regard, it was interesting to note that, at the United Nations Conference on Consular Relations in 1963, the Japanese representative had proposed that a provision should be included in the Convention whereby the consular courier would be accorded the same protection as consular staff. Many representatives had opposed that proposal and the United Kingdom representative had stated that it was essential for couriers to enjoy complete inviolability, not the limited inviolability accorded to consular officers.¹¹ That uniform approach had been adopted by the Conference and was abundantly reflected in State practice. The two later codification conventions had also adopted the same stance. On that basis, he had concluded that there was a uniform régime applicable to all types of couriers, one which provided for their unqualified inviolability, including exemption from any form of arrest or detention.

72. A further argument in support of a special provision on jurisdictional immunities of the courier was that all four codification conventions contained an express provision on personal inviolability and jurisdictional immunity. It had been said that those conventions did not contain any provision specifically on the jurisdictional immunities of couriers. On the other hand, they did not exclude such immunities, and it might be an appropriate moment to fill the lacuna.

73. As to the extent of the jurisdictional immunities of the courier, from his own reading of the relevant provisions of the four codification conventions he had come to the conclusion that a consistent system supported by State practice did exist. Many members had been in favour of functional immunity from criminal jurisdiction, confined to acts performed by the courier in the exercise of his functions. The opposing view had been that, in order to ensure safe and unimpeded delivery of the bag, the courier should be free from any pressure or coercion that might interfere with the performance of his official duties.

74. It had been noted quite properly that the sending State would be severely prejudiced if its messenger were forbidden to continue his mission in order to remain at the disposal of the courts of the transit State or receiving State. While on mission a courier had to be in permanent physical contact with the bag and needed the protection provided by the four conventions. Whether or not express reference was made to the exercise of his functions, the ultimate objective should always be the same, namely protection of the courier as an official of the sending State acting in the performance of the task assigned to him. Any limitation of immunity from criminal jurisdiction would,

¹⁰ See the fourth report of the Special Rapporteur, *Yearbook ... 1983*, vol. II (Part One), p. 74, document A/CN.4/374 and Add. 1-4, para. 49.

¹¹ *Ibid.*, p. 75, para. 53.

therefore, be a derogation from the system of inviolability provided for under the codification conventions. The final decision obviously lay with the Commission, but his own view was that qualified immunity from criminal jurisdiction would create more problems than it would solve: quite apart from any other impediment, the courts would be required to determine the relationship between the act committed by the courier and his official functions in each individual case.

75. With regard to paragraph 2 of draft article 23, a question had been raised regarding the meaning of the term "administrative jurisdiction". In his opinion, the term related to administrative proceedings and not to any wider notion of jurisdiction, at least in the case in point, since the other powers that the administration and the police could exercise fell within the context of the courier's personal inviolability and exemption from arrest or detention.

76. It had been suggested, in connection with paragraph 4 of article 23, that written evidence could be provided for to facilitate the administration of justice. The matter could be considered together with certain other drafting points by the Drafting Committee.

The meeting rose at 1.15 p.m.

1914th MEETING

Monday, 1 July 1985, at 12.10 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-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. Riphagen, Mr. Sucharitkul, Mr. Yankov.

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

[Agenda item 5]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR³ (continued)

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 23 (Immunity from jurisdiction)

ARTICLE 36 (Inviolability of the diplomatic bag)

ARTICLE 37 (Exemption from customs inspection, customs duties and all dues and taxes)

ARTICLE 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag)

ARTICLE 40 (Obligations of the transit State in case of *force majeure* or fortuitous event)

ARTICLE 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations)

ARTICLE 42 (Relation of the present articles to other conventions and international agreements) *and*

ARTICLE 43 (Declaration of optional exceptions to applicability in regard to designated types of couriers and bags)⁴ (continued)

1. Mr. YANKOV (Special Rapporteur), continuing his summing-up, said that one of the main substantive issues raised in connection with draft article 36 had been the inviolability of the bag and its contents. Several members of the Commission had said that reference should be made to the inviolability of the bag's contents rather than to that of the bag itself. In the opinion of other speakers, the inviolability of the bag, namely the packages constituting the bag, and that of their contents were intrinsically linked and could not be dissociated. He shared the latter view. The term "inviolability", whether it related to physical objects or to abstract legal concepts or rules, entailed an obligation to keep those objects, concepts or rules intact and undisturbed. That was the sense in which the term was used in the four codification conventions and other international agreements in the field of diplomatic and consular law. The rule that the diplomatic bag should not be opened or detained had been regarded as an important component of the general principle of freedom of official communications and respect for their confidential character. In that connection, he referred to article 24, article 27, paragraphs 2 and 4, and article 40, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations, which constituted a coherent system of rules relating to the inviolability of the bag. Similar provisions were contained in the other codification conventions.

2. During its work on those conventions, the Commission had emphasized the overriding importance it attached to observance of the principle of the inviolability of the diplomatic bag and of the consular bag.⁵ The concept of unqualified inviolability of the diplomatic bag implied that opening the bag, detaining it or examining its contents would be an infringement of its inviolability and thus prejudicial to the secret and confidential character of its contents. In that connection, the point made by Mr. Mahiou (1908th meeting) and Mr. Razafindralambo (1909th meeting) concerning the inviolability of personal correspondence under constitutional law had been well taken.

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

⁵ See the fourth report of the Special Rapporteur, *Yearbook ... 1983*, vol. II (Part One), pp. 123-124, document A/CN.4/374 and Add.1-4, paras. 328-337.