

Document:-  
**A/CN.4/SR.1914**

**Summary record of the 1914th 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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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. Balandá, Mr. Calero Rodrigues, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Lacleta 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,<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)

<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.

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*)

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.<sup>5</sup> 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.

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

<sup>5</sup> 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.

3. There were precedents in State practice in support of such an understanding of the relationship between the inviolability of the diplomatic bag and that of its contents. For example, the reservations to article 27, paragraph 3, of the 1961 Vienna Convention formulated by four Arab States,<sup>6</sup> which had claimed the right to open the diplomatic bag if there were grounds for presuming that it contained articles whose import or export was prohibited by municipal law, had been formally opposed by a number of States parties to the Convention on the grounds that opening the bag would be contrary to article 27 of the Convention and would constitute an infringement of its inviolability. In 1981, the Government of Australia had sent the Government of Jordan a note protesting about the detention at Amman Airport of an Australian container marked "diplomatic mail" and addressed to the Australian Embassy in Damascus. When the container had been opened, it had been found to contain telex equipment as well as diplomatic mail. The note had stated that the materials carried were entirely in accordance with the 1961 Vienna Convention and that the container should not have been opened or detained.

4. Replying to a point raised by Mr. Lacleta Muñoz (1906th meeting), he said that inviolability applied to the entire contents of the bag, including official correspondence and documents or articles intended exclusively for official use. It was not possible to apply a different approach to articles included in the bag, such as coding and decoding equipment or communications devices, without revealing their specific features and possibly their secret nature.

5. In the light of those considerations, he was of the opinion that the provisions of article 36, paragraph 1, including the requirement that the diplomatic bag should not be opened or detained, were in substance justified. He had no strong feelings as to whether the article should provide for the inviolability of the diplomatic bag "at all times" or "at any time"; the former phrase was to be found in the three conventions adopted after the 1961 Vienna Convention, while the latter phrase was used in the text of that Convention itself.

6. Another major issue raised in connection with article 36 had been the inviolability of the bag and the means of examining it. Several questions had been asked concerning the scope of examination and the admissibility of certain methods and procedures, such as safety checks at airports, the use of sniffer dogs and scanning by means of electronic and other mechanical devices. Some speakers had, moreover, criticized the words "exempt from any kind of examination" in paragraph 1 as being too categorical. A routine identification check of the visible marks, seals and other external features attesting to the bag's official character would obviously not affect its inviolability and the confidential character of its contents, but a close examination of the packages constituting the bag which was carried out in a manner that might reveal their contents or even result in the extraction of confidential information was an entirely different matter. At the time of the drafting of the Vienna Convention on Diplomatic Relations, in

1961, it had been assumed that the only way to reveal the contents of the bag was to open it. Today, however, the use of electronic and other sophisticated technical devices could jeopardize the confidentiality of the diplomatic bag's contents and thus hamper one of its most essential functions as a means of official communication. Since 1961, States had concluded as many as 30 or 40 bilateral consular agreements which explicitly provided that the consular bag was inviolable and should not be subject to examination, but which did not specify the nature of such examination.

7. It had been suggested that scanning might be permitted in strictly controlled conditions. The discretionary character of the use of that type of examination might, however, cause prejudice to the confidentiality of the bag and place economically and technologically less developed States at a disadvantage. Scanning or any inspection capable of revealing the contents of the diplomatic bag should not be permitted under any circumstances, since they might be detrimental to the bag's confidentiality and incompatible with the principle of its inviolability.

8. Various points of substance and of drafting had been raised in connection with the provision embodied in article 36, paragraph 2. Without going into details, he explained that that provision had been based on State practice, as evidenced in a number of bilateral consular agreements, and had also been considered in connection with the declaration of optional exceptions referred to in draft article 43. To apply the régime established in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations to the diplomatic bag without any previously agreed procedure would clearly be to derogate from the régime established in the 1961 Vienna Convention on Diplomatic Relations and in the other two codification conventions. If a special régime were established by way of reciprocity through unilateral declarations of optional exceptions, as envisaged in paragraphs 3 and 4 of the text proposed by Sir Ian Sinclair (1906th meeting, para. 7), then such declarations could, in his own view, also provide for the application of article 27, paragraph 3, of the 1961 Vienna Convention to the consular bag, as was in fact the case with a number of bilateral consular agreements; in other words, the option should be a two-way one.

9. Concluding his remarks on article 36, he said that the Commission and possibly the Drafting Committee might consider the suggestion that article 36 should state as a general rule that the diplomatic bag should be inviolable at all times, or at any time, and wherever situated; that it should not be opened or detained; and that it should be exempt from customs and other similar inspection or examination through electronic or other mechanical devices which might be prejudicial to its inviolability and confidential character. The article might also contain a provision concerning the consular bag and the application of the rule embodied in article 35, paragraph 3, of the 1963 Vienna Convention, as well as a reference to the declaration of optional exceptions provided for in draft article 43.

10. Turning to draft article 37, he noted that the revised text based on the former draft articles 37 and 38 had received favourable consideration as to its

<sup>6</sup> *Ibid.*, p. 125, para. 340.

substance. Most of the critical comments made and amendments proposed had related to drafting matters. Some speakers had expressed the view that the reference to customs and other inspections should be relegated to article 36, so that article 37 would deal only with exemption from customs duties, dues and taxes. He had no objection to that suggestion, provided that the wording of article 36 was amended accordingly.

11. The main thrust of draft article 39 and the practical significance of the protective measures for which it provided had, generally speaking, met with a positive response. Most of the comments and proposals by members of the Commission had focused on drafting improvements. As to the point raised by Mr. Sucharitkul (1905th meeting) concerning the difficulty of assuming that receiving or transit States would have knowledge of the whereabouts of the diplomatic bag in cases where it went astray, he said that the operation of article 39 would depend on the circumstances of each particular case and that no general prescription could be provided. The sending State should, of course, be notified in such circumstances and the provision to that effect might therefore be worded in a more flexible manner. Several speakers had said that the scope of article 39 should be broadened to include exceptional circumstances other than the termination of the functions of the diplomatic courier. He thought the point well taken and believed that appropriate wording could be found without any great difficulty. The Drafting Committee might also be requested to try to accommodate Mr. Reuter's suggestion (1909th meeting) that draft articles 39 and 40 should be combined into a single article whose paragraph 1 would deal with circumstances in which the courier, the captain of a commercial aircraft or the master of a merchant ship was unable to deliver the bag or in which the diplomatic bag, having gone astray, was found in the territory of the receiving or transit State, while paragraph 2 would cover the obligations of an "unforeseen" transit State in case of *force majeure* or fortuitous event.

12. In his oral introduction (1904th meeting) of his sixth report (A/CN.4/390), as well as in that report itself and in earlier reports, he had made a point of explaining that draft article 41 was specifically intended to ensure the protection of the diplomatic courier and the diplomatic bag in the case where the bag was being dispatched to or by a special mission, a delegation to an international conference or a permanent mission to an international organization. The use of the term "receiving State" might give the impression that the text referred to bilateral relations in the case of non-recognition of a State or Government or in the absence of diplomatic or consular relations, but that would of course be meaningless. It should nevertheless be noted that the term "receiving State" was used in the 1969 Convention on Special Missions, while the 1975 Vienna Convention on the Representation of States employed the term "host State". Some speakers had questioned the practical need for article 41. However, as had been pointed out during the discussion in the Sixth Committee at the thirty-ninth session of the General Assembly (A/CN.4/L.382, para. 197), the provisions of article 41 were necessary to guarantee a State freedom

of communication with its missions abroad. A text consolidating and supplementing existing provisions would, moreover, form part of a coherent legal system of rules governing the status of all kinds of couriers and bags, as set out in article 3 of the draft. In his opinion, it was the wording of article 41, not its substance, that gave rise to problems and efforts should therefore be concentrated on drafting improvements.

13. A number of critical comments had been made with regard to draft article 42. He had, for example, been asked why he had not retained paragraph 1 of the original text.<sup>7</sup> The answer to that question was that he had deleted paragraph 1 in accordance with a proposal made at the Commission's previous session.<sup>8</sup> The use of the words "The provisions of the present articles are without prejudice to the relevant provisions in other conventions" in the new paragraph 1 had also been criticized, but, as he understood them, those words meant that there should be compatibility in object and purpose between the present draft articles and the four codification conventions and other international agreements with a bearing on the status and, especially, the legal protection of the courier and the bag. The same wording was used in article 4 (a) of the 1975 Vienna Convention. He would, however, have no objection if the words "without prejudice" were suitably clarified. With regard to paragraph 2 of article 42, it had been suggested that the words "confirming or supplementing or extending or amplifying" might be replaced by the word "modifying". Although the proposed wording was modelled on article 73, paragraph 2, of the 1963 Vienna Convention, he agreed that the suggested simplification would be an improvement.

14. As to draft article 43, he said that the existence of a plurality of régimes was a result of the régimes established in the four codification conventions and, more specifically, of the difference between the status of the consular bag and that of bags referred to in the three other conventions. Although a plurality of régimes might obviously create highly complex situations, flexibility was undoubtedly needed. Most of the comments made on article 43 had related to its wording. He therefore suggested that paragraph 1 should state that a declaration of optional exceptions could be made without prejudice "to the object and purpose of the present articles". In the same paragraph, the words "or at any time thereafter" should be added after the words "acceding to these articles". A new sentence should be added at the end of paragraph 2 to show that the withdrawal of a declaration had to be made in writing. Special provisions should also be introduced on the application of the régime of article 35, paragraph 3, of the 1963 Vienna Convention to all kinds of bags, or of article 27, paragraph 3, of the 1961 Vienna Convention to the consular bag, through a declaration of optional exceptions and by way of reciprocity.

15. Reverting to draft article 23, which he had discussed at the previous meeting, he said that he personally would prefer paragraph 1 to remain unchanged. It might, however, contain an additional provision stipulating that the diplomatic courier's

<sup>7</sup> Yearbook ... 1984, vol. II (Part Two), p. 27, footnote 104.

<sup>8</sup> Ibid., pp. 36-37, para. 150.

immunity from the criminal jurisdiction of the transit State was confined to acts performed in the exercise of his functions. Paragraphs 2 and 3 could remain unchanged. Apart from the necessary drafting changes, paragraph 4 should also contain a provision stating that the diplomatic courier might be requested to give written evidence. The word "Any" at the beginning of paragraph 5 should be replaced by the word "The".

16. In conclusion, he thanked members of the Commission for their helpful and constructive criticism and suggestions and proposed that draft articles 23 and 36 to 43 should be referred to the Drafting Committee, which should try to consider draft article 23 before the end of the current session.

17. The CHAIRMAN thanked the Special Rapporteur for his statement and for his proposals with regard to particular articles. The Special Rapporteur would undoubtedly agree that the Drafting Committee's consideration of the articles should be based on all the views expressed during the debate and on his proposals and that it should make such changes as it might consider appropriate. The Drafting Committee should also bear in mind the Commission's decision that draft articles 28 and 29 should be reviewed in the light of the conclusion reached with regard to draft article 23.

18. Mr. SUCHARITKUL said he was not sure that the Drafting Committee would have time to consider draft article 23 at the current session, as the Special Rapporteur has suggested, without detriment to the urgent consideration of other topics.

19. Mr. CALERO RODRIGUES, speaking as Chairman of the Drafting Committee, said that, without prejudice to any work it might have to do on the topic of "Jurisdictional immunities of States and their property", the Drafting Committee would make every effort to deal with draft article 23 at the current session, so that articles 1 to 35 might be submitted in their entirety to the General Assembly at its fortieth session.

20. The CHAIRMAN suggested that draft articles 23 and 36 to 43 should be referred to the Drafting Committee on the understanding that draft article 23 would be considered at the current session if that were possible without prejudice to the consideration of other topics.

*It was so agreed.<sup>9</sup>*

*The meeting rose at 1.05 p.m.*

<sup>9</sup> For consideration of draft article 23 as proposed by the Drafting Committee, see 1930th meeting, paras. 27-49.

## 1915th MEETING

*Monday, 1 July 1985, at 3.05 p.m.*

*Chairman:* Mr. Satya Pal JAGOTA

*Present:* Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balandra, Mr. Calero Rodrigues, Mr. Diaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Mahiou, Mr. Malek, Mr.

McCaffrey, Mr. Ogiso, Mr. Pirzada, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

**Jurisdictional immunities of States and their property  
(A/CN.4/376 and Add.1 and 2,<sup>1</sup> A/CN.4/  
388,<sup>2</sup> A/CN.4/L.382, sect. D, ILC(XXXVII)/  
Conf.Rom Doc.1 and Add.1)**

[Agenda item 4]

### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR<sup>3</sup>

**ARTICLE 19 (Ships employed in commercial service)  
and**

**ARTICLE 20 (Arbitration)\***

**SEVENTH REPORT OF THE SPECIAL RAPPORTEUR and  
ARTICLES 21 to 28**

1. The CHAIRMAN recalled that, at its previous session, the Commission had decided<sup>4</sup> to resume at the present session its consideration of draft articles 19 and 20, which completed part III of the draft articles on jurisdictional immunities of States and their property.

2. Draft article 19, submitted by the Special Rapporteur in his sixth report (A/CN.4/376 and Add.1 and 2, paras. 232-233), consisted of two alternatives, A and B. At the conclusion of the Commission's debate, the Special Rapporteur withdrew alternative A and submitted the following revised text<sup>5</sup> of article 19:

\* Resumed from the 1841st meeting (*Yearbook ... 1984*, vol. I, pp. 156 *et seq.*).

<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:

*Part I* of the draft: (a) article 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (b) article 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—paragraph 1 (a) and commentary thereto: *ibid.*, p. 100; paragraph 1 (g) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), pp. 34-35; (c) article 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; paragraph 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 35-36; (d) articles 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

*Part II* of the draft: (e) article 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (f) articles 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (g) article 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22 *et seq.*

*Part III* of the draft: (h) article 11: *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised texts: *ibid.*, p. 99, footnote 237, and *Yearbook ... 1984*, vol. II (Part Two), p. 59, footnote 200; (i) article 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (j) articles 13 and 14 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 63 *et seq.*; (k) article 15 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 36-38; (l) articles 16, 17 and 18 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 67 *et seq.*

<sup>4</sup> *Yearbook ... 1984*, vol. II (Part Two), p. 59, para. 205.

<sup>5</sup> A/CN.4/L.380.