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Summary record of the 399th meeting

Topic:
Diplomatic intercourse and immunities

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90. He was in favour of including a definition of the diplomatic bag in the commentary on the article, specifying that the bag should contain only correspondence and printed matter for the purposes of the mission, though in exceptional cases it might include other objects, such as articles transmitted for use as evidence. The practice adopted in the United Kingdom in cases of suspected irregularity seemed quite sound. If a customs officer suspected from external examination of the bag that it contained articles other than papers or printed matter, he asked the protocol department to intervene.

91. Mr. AGO doubted whether it would be possible to frame a definition which would prevent abuse of the diplomatic bag. Faced with a choice of two evils, that of incurring the risk of allowing presents to pass irregularly in the diplomatic bag, and that of consenting to the abuses which might follow free inspection of the diplomatic bag, he would certainly prefer the former. Any exception to the firm rule that diplomatic mail must be immune from inspection would open the door to all sorts of abuses.

92. Sir Gerald FITZMAURICE said that there was no doubt that, in principle, the diplomatic bag should be immune from inspection, but he questioned whether no exception at all should be allowed to that rule. It was common knowledge that diplomatic bags were regularly used for extremely undesirable purposes, illicit traffic in diamonds or in foreign currency, for instance. If no exceptions at all were allowed, such illicit traffic would be encouraged. It would be wiser, therefore, to keep in reserve some check on the contents of diplomatic bags, to be applied only when there were very serious grounds to suspect irregularity, and then only on the highest authority and after communication with the mission concerned.

93. He wondered why the Special Rapporteur had abandoned his original text, which ran:

“The diplomatic pouch shall be exempt from inspection unless there are very serious grounds for presuming that it contains illicit articles. The pouch may be opened for inspection only with the consent of the ministry of foreign affairs of the receiving State and in the presence of an authorized representative of the mission.” (A/CN.4/91).

He, personally, would have preferred that original text, subject to certain amendments.

94. Mr. AMADO said that, while understanding the concern of Mr. Bartos and Sir Gerald Fitzmaurice at the extent to which the privilege was abused, he remained faithful to the rule of absolute immunity of the diplomatic bag from inspection.

95. Mr. FRANÇOIS agreed entirely with Sir Gerald Fitzmaurice. Not only the diplomatic bag itself but a host of packages, and even cases, were brought in under the cover of immunity. Illicit traffic was carried on through the medium of the diplomatic mail, often without the knowledge of the head of the mission. The original text of the Special Rapporteur provided full safeguards against violation of the secrecy of diplomatic correspondence, and he could not see why the contents of diplomatic packages, other than such correspondence, should be treated in the way provided for in the amendment.

96. Mr. EDMONDS urged the Commission to give serious consideration to the consequences of allowing

any exception to the rule of the inviolability of the diplomatic bag. Despite the existence of abuses, he was very much opposed to any whittling away of the principle.

97. The Special Rapporteur's original text, which admitted exceptions, was too general to be acceptable. It established no definite criteria, for the criterion of “very serious grounds” was too subjective. It was significant that neither the Harvard draft nor the Havana Convention provided for any exception to the rule. Should the Commission, nonetheless, decide to allow exceptions, its text would have to be very carefully framed and lay down clear criteria.

98. Mr. MATINE-DAFTARY shared the views of Sir Gerald Fitzmaurice and Mr. François. Absolute exemption from inspection would encourage abuses. He, too, wondered why the Special Rapporteur had abandoned his original text.

99. Mr. PADILLA NERVO declared himself in favour of unconditional immunity from inspection. Despite the dangers of abuse, he did not believe that the receiving State could unilaterally violate another State's diplomatic pouch. That did not mean, however, that the sending State did not owe a duty to use the pouch exclusively for the transmission of diplomatic correspondence. But—and that was the main point—even the non-observance of that duty did not create a right to inspect the diplomatic pouch; any such situation would have to be remedied by other means.

100. He proposed, firstly, that the Commission should lay down the principle of immunity from inspection, and, secondly, that it should stipulate, either in the article or in the commentary, that the sending State had the duty to use the pouch solely for the transmission of diplomatic correspondence and documentation.

The meeting rose at 1.5 p.m.

399th MEETING

Thursday, 16 May 1957, at 9.30 a.m.

Chairman: Mr. Jaroslav ZOUREK.

Diplomatic intercourse and immunities (A/CN.4/91, A/CN.4/98) (continued)

[Agenda item 3]

CONSIDERATION OF THE DRAFT FOR THE CODIFICATION OF THE LAW RELATING TO DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/CN.4/91) (continued)

ARTICLE 16 (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of paragraph 2 of the Special Rapporteur's redraft of article 16 (398th meeting, para. 27).

2. Mr. TUNKIN said that in stipulating, as he had proposed, that the diplomatic bag could not be subject to opening or detention, the Commission would simply be stating an existing rule of international law. Already, when dealing with article 12, the Commission had decided to omit all qualifications of the fundamental principle of the inviolability of the premises of missions, on the ground that to allow exceptions might lead to an abandonment of the general rule. The same considerations applied to paragraph 2 of article 16. Though abuses of the immunity of diplomatic mail were frequent and

serious, he did not think that they justified renouncing the principle of absolute inviolability. The dangers of abuse involved in that absolute rule were not so great as those which might arise if departures from the rule were permitted. He was surprised to hear that some members of the Commission preferred the Special Rapporteur's original text (A/CN.4/91), since acceptance of that text would lead, in practice, to the abandonment of the very principle of inviolability.

3. He understood the Special Rapporteur to be willing to accept his amendment (398th meeting, para. 84), with the exception of the words "in no circumstances whatsoever". In that case, he was willing to delete them.

4. Mr. YOKOTA thought that the best way to preserve intact the rule of the inviolability of the diplomatic bag, while preventing possible abuse, was to give a clear definition of the diplomatic bag. The definition might be based on the statement by Oppenheim that "according to general usage, those parts of their luggage [the luggage of couriers] which contain diplomatic despatches and are sealed with the official seal must not be opened and searched".¹

5. If absolute inviolability were confined to diplomatic mail, not only sealed but also certified by the head of the mission or the foreign minister, there would be little, if any, possibility of abuse. Other diplomatic bags or packages, which were only sealed and not certified, would be subject to opening in the exceptional circumstances and on the special conditions set out in the Special Rapporteur's original text. The Drafting Committee might be asked to prepare a text on those lines.

6. Mr. FRANÇOIS, referring to the grave objection of some members to the system originally proposed by the Special Rapporteur, said that the rule that diplomatic mail could be opened in exceptional circumstances and on special conditions was already applied by some countries, where it was considered to reflect the existing state of international law. Indeed, the Commission could be certain that many countries would refuse to accept the absolute prohibition of the opening of diplomatic bags as a rule of existing international law.

7. Perhaps the two schools of thought could find some common ground. The Commission might, for instance, enunciate the general principle of inviolability of diplomatic bags in the article, but add something on the following lines in the commentary:

"The Commission felt bound to lay down the general principle of the absolute inviolability of diplomatic bags, but in doing so did not wish to stigmatize as contrary to international law the practice in some countries of claiming the right to open such bags in quite special cases and only with the consent of the minister of foreign affairs and in the presence of a representative of the mission."

Such a solution would both provide for exceptions and ensure the necessary safeguards.

8. Mr. SCALLE said that, although in general he favoured Mr. Amado's view that diplomatic immunities should be as absolute as possible, he feared the increasing danger arising out of the absolute inviolability of diplomatic bags. There were already more than eighty independent States in the world, and not all of them were

bound by the same traditions as the older Powers. Were it merely a question of smuggling diamonds or perfume, he would not be so concerned at the prospect of abuse, but he understood from some members of the United Nations Commission on Narcotic Drugs that traffic in dangerous drugs was blatantly conducted under cover of the diplomatic bag. Although the smuggling of the vital parts of atomic bombs in the diplomatic bag was still confined to the realms of fiction, there was nothing to prevent its becoming an actual fact. In view of such considerations, he thought it necessary to permit the opening of the diplomatic bag in exceptional circumstances and with due safeguards. Mr. François's proposal was perfectly sound.

9. Mr. SPIROPOULOS confessed to some misgivings regarding Mr. François's proposal. If certain countries were allowed a comparatively free hand, there would soon be no rule at all. Yet the Commission could not close its eyes to the very real abuses which occurred. A possible solution would be to define the diplomatic bag as a means of conveying diplomatic correspondence and official documents. Such matter, whether in a sealed bag or sealed envelope, would enjoy full immunity. If States wished to send other articles under seal, they must be prepared to submit to their inspection.

10. The text originally proposed by the Special Rapporteur did not, in his opinion, provide adequate safeguards, for the decision to open diplomatic bags was entirely at the discretion of the receiving State. It would be better to stipulate that the diplomatic bag could be opened for inspection only with the consent of the sending State and in the presence of its authorized representative. The Drafting Committee might be asked to frame an article on those lines.

11. Mr. AMADO conceded that abuses of the immunity of diplomatic bags occurred almost daily, and that States had been powerless to prevent them. The Commission should consider, however, whether the abuses were serious enough to justify accepting Mr. François's proposal. The opening of diplomatic bags in exceptional circumstances was admittedly an accepted practice, but it was not sanctioned by any rule of international law.

12. Since it was impossible to define abuses of the diplomatic bag, the Commission might define the diplomatic bag itself and state:

"The diplomatic bag, as a means of conveying diplomatic correspondence between States and their missions, shall be inviolable."

It could then add in the commentary that, if there were serious grounds for presuming that it contained illicit articles, it might be opened with due precautions.

13. Mr. LIANG (Secretary to the Commission) remarked that abuses occurred chiefly in connexion with the baggage accompanying the courier. The diplomatic bag itself, usually sealed by a senior official of the mission or ministry, did not easily lend itself to abuse, and he could recall no instance of illicit articles having been discovered in it.

14. He thought it desirable for the Commission to affirm the inviolability of the diplomatic bag in unequivocal terms. The question of abuse could be settled in other ways. When a receiving State had serious grounds for suspecting some irregularity, it could approach the sending State, which would normally agree to an inspection of the contents. If the sending State clung to its

¹ L. Oppenheim, *International Law—A Treatise*, Vol. I, Peace, 8th ed., ed. H. Lauterpacht (London, Longmans, Green and Co., 1955), p. 813.

technical right to refuse to open the bag, the receiving State would have grounds for lodging a claim against it. He could not, however, recall any case of a sending State's taking such an attitude.

15. Mr. PADILLA NERVO recalled that he had urged at the previous meeting that the Commission, instead of defining the diplomatic bag, should state that it was the duty of the sending State to use the bag only for diplomatic correspondence with its missions (398th meeting, para. 100). Such a statement could be added to Mr. Tunkin's text, or, failing that, included in the commentary. Once their duty was clearly established, any violation would give rise to an international responsibility. Abuses could be remedied by lodging a claim against the State responsible.

16. Mr. MATINE-DAFTARY supported Mr. François's proposal, which enunciated the principle of inviolability in the article but provided remedies for abuse in the commentary. If diplomatic bags had to be opened, the diplomatic correspondence must, of course, be left untouched. In any case, the presence of illicit articles in mail could be detected by X-ray apparatus and other means, without the packages being opened.

17. Mr. BARTOS pointed out that the character of diplomatic bags had changed. Couriers travelling by train had a whole compartment full of diplomatic packages, all sealed, but mostly containing other matter than diplomatic correspondence.

18. He agreed with Mr. François that certain States claimed the right to open diplomatic bags in special circumstances; he would even add that the practice was based on the right of States to defend their interests and prevent infringements of their laws. In all cases, the opening of diplomatic bags was attended by adequate safeguards, the consent of the minister of foreign affairs, the intervention of the protocol department, and the presence of the courier and a representative of the mission concerned. Moreover, as Mr. Matine-Daftary had pointed out, illicit matter could be detected without the bag's being opened.

19. He had never opposed the rule of the absolute inviolability of the diplomatic bag, but felt that the Commission could not simply enunciate that general rule and ignore both the notorious abuses and the acknowledged practice of States based on established rights. He was, therefore, in favour of the solution advocated by Mr. François. There should be a further proviso, however, namely, that the practice must not be turned into a means of petty annoyance. He would recommend that proviso to the Drafting Committee for inclusion either in the article or in the commentary.

20. Mr. TUNKIN associated himself with the views of Mr. Spiropoulos and Mr. Amado. He also agreed with Mr. Padilla Nervo's proposal to specify the duties of States with respect to the diplomatic bag, though he would prefer the definition to appear in the commentary.

21. The diplomatic bag, despite the change in its character described by Mr. Bartos, remained a most important means of communication between Governments and their missions. Although the scope and volume of diplomatic correspondence had greatly increased in recent years, he did not consider that the change justified making exceptions to the rule of inviolability.

22. Mr. PAL said that he was in favour of the Special Rapporteur's revised draft of paragraph 2 (398th meet-

ing, para 27). To judge from the discussion, it was not States themselves that were accused of abusing the immunity of the diplomatic bag but their individual officials. The Commission, however, was codifying rules for States. As the Secretary had pointed out, the abuses complained of could be remedied in another way, and were not in themselves any justification for qualifying the rule of absolute inviolability.

23. The question of abuses could be dealt with by a note in the commentary specifying the legitimate contents of a diplomatic bag, leaving it to the States to deal with the illegitimate use of such a bag by their officials. The abuses complained of had insignificant consequences, but the proposed qualifications of the privilege would open the door to abuses which could have serious consequences affecting the whole diplomatic relationship. Moreover, one qualification led to others, with the inevitable result that the entire privilege would be obscured.

24. Mr. KHOMAN thought it was necessary to draw a distinction between diplomatic bags accompanied by couriers and those sent unaccompanied.

25. The question was whether the Commission should affirm the rule of the inviolability of the diplomatic bag without qualification, as it had done in the case of the premises of the mission. It would be more logical to enunciate the general principle in the article and deal with abuses in the commentary by means of a text on the lines of the proposals made by Mr. François and Mr. Padilla Nervo.

26. Mr. AMADO suggested that it be made clear in the commentary that inviolability extended only to the courier's baggage and not to the baggage of members of diplomatic missions or articles carried by them.

27. The CHAIRMAN, speaking as a member of the Commission, said that he supported the principle of absolute inviolability as formulated by Mr. Tunkin, Mr. Amado and Mr. Padilla Nervo.

28. Since it was the absence of any definition of the diplomatic bag which made abuses possible, he was in favour of including a definition in the commentary on the article. He agreed with the Secretary that disputes regarding alleged abuses could be settled by the normal means available. The question of unaccompanied diplomatic packages also needed to be covered.

29. Mr. SANDSTRÖM, Special Rapporteur, explaining why he had abandoned his original text, said that it was drafted before he had been able to study the municipal laws on the subject. On discovering that none of the many municipal laws dealing with the question of the diplomatic bag provided for any exception to the principle of inviolability, he had come to the conclusion that it would be better to state the bare principle in the article, and see whether the Commission wished to include in the commentary qualifications on the lines of those made in his original text.

30. He naturally supported Mr. François's proposal, but thought it would also be useful to include a definition of the diplomatic bag in the article; that would make it easier to draft the text of the commentary.

31. Mr. AMADO withdrew his proposal in favour of that of Mr. Padilla Nervo.

32. The CHAIRMAN put to the vote the following text proposed by Mr. Padilla Nervo:

“The diplomatic bag shall be used only for the transmission of diplomatic correspondence.”

The decision whether to insert the text in article 16, paragraph 2, or in the commentary on the article could be left to the Drafting Committee.

The text was adopted by 17 votes to none with 4 abstentions.

33. Mr. FRANÇOIS said that, although in favour of the text, he had been forced to abstain from voting because his approval depended on the nature of the text to be included in the commentary.

34. Mr. SCELLE said that he had abstained because the text did not give a clear idea of the principle on which the Commission was voting.

35. Mr. MATINE-DAFTARY said that his vote in favour of the text did not mean that he ruled out Mr. François's proposal.

36. Mr. BARTOS said that he had voted for the text because it represented at least a step towards qualification of the principle.

37. Mr. PADILLA NERVO pointed out that Mr. Tunkin's text (398th meeting, para. 84) in its existing form did not deal with unaccompanied diplomatic mail.

38. Mr. TUNKIN agreed to delete the words “carried by diplomatic messengers” from the English version and the words “*du courrier*” from the French, in order to meet Mr. Padilla Nervo's point.

39. The CHAIRMAN put Mr. Tunkin's amendment to the vote in the following revised French version: “*La valise diplomatique ne peut être ouverte ni retenue.*”

The amendment was adopted by 14 votes to 3 with 2 abstentions.

40. Mr. BARTOS said that he had abstained from voting because, although in favour of the principle, he felt that it needed some qualification in the way of exceptions, in order to help prevent abuses of the principle from the outset.

41. Mr. MATINE-DAFTARY said that he had abstained from voting, although he accepted the principle of inviolability of diplomatic mail, because some provision was essential for the prevention of abuses.

42. Mr. GARCIA AMADOR said that, although he had voted for Mr. Tunkin's amendment, he had serious doubts as to whether it was compatible in theory and practice with Mr. Padilla Nervo's text, for which he had also voted. Logically, if the Commission enunciated the duty of the sending State to see that the diplomatic bag contained only diplomatic correspondence, it must recognize the right of the receiving State to ensure that the condition was complied with. The general principle just voted deprived the receiving State of that right. He therefore reserved the right to vote against the final text submitted by the Drafting Committee, if the contradiction was not resolved, and to move that the existence of the contradiction be pointed out in the commentary on the article.

43. Mr. EDMONDS said that he had not voted for Mr. Tunkin's amendment because of the duplication involved.

44. Mr. PADILLA NERVO, referring to Mr. García Amador's problem, said that Mr. Tunkin's text enunciated the right of the sending State to have its diplomatic

bag treated as inviolable, while his own text established the duty corresponding to that right, namely to use the bag for diplomatic purposes only. There was no contradiction between the two texts.

45. Mr. EL-ERIAN said that he had voted for Mr. Tunkin's amendment in order to associate himself with the principle of the inviolability of the diplomatic bag, which was fundamental to the law of diplomatic intercourse and immunities. In doing so, however, he had borne in mind the point added by Mr. Padilla Nervo for inclusion in the commentary, and other provisions of the draft which would form the necessary counterpart to those dealing with diplomatic immunities.

46. Mr. PADILLA NERVO said that, although he could agree to his text that had been adopted being included either in the article or in the commentary, he would prefer it to be included in the article, since in that way the Commission would establish a clear legal obligation, on the basis of which it could give whatever explanations were necessary in the commentary. Moreover, once a clear legal obligation had been established, the Commission could expect ministers of foreign affairs to exercise greater vigilance in ensuring that the diplomatic pouch was used only for the purpose for which it was intended.

47. He therefore formally proposed that his text, which had been adopted, should be included in article 16 itself.

48. With regard to Mr. François's proposal, that the Commission should state in the commentary that the diplomatic pouch could be inspected if there were very serious grounds for presuming that it contained illicit articles, Mr. Padilla Nervo pointed out that a similar exception to the rule that the personal baggage of members of missions should be exempt from inspection was proposed in article 23, paragraph 2 of the draft (A/CN.4/91). It was, of course, too early to say whether the Commission would retain that provision, but, in practice, customs officials never did open the personal baggage of members of missions. It would hardly be proper to exercise greater caution when dealing with parcels sent by ministries of foreign affairs than with the baggage of an ordinary member of a diplomatic mission.

49. Mr. SPIROPOULOS agreed that Mr. Padilla Nervo's text which had just been adopted should be included in article 16 itself, since that would give it greater force. There was nothing new about it; it expressed only what was universally recognized and might, indeed, be thought to be self-evident.

50. Mr. TUNKIN said that, in his view, the rule itself should be stated in the article but if the Commission wished to include what was, in fact, a definition of the diplomatic pouch, what it contained and what it was for, that should be done in the commentary. If the Commission included a definition in the text of article 16 itself, that might give rise to considerable confusion and even result in violation of the rule.

51. Mr. YOKOTA said that, although he was not, in principle, opposed to Mr. Padilla Nervo's proposal, he saw no need to include his text in the article itself, as the Commission had decided to give a definition of the diplomatic pouch in the commentary.

52. The CHAIRMAN put to the vote Mr. Padilla Nervo's proposal that his text be included in article 16 itself.

The proposal was adopted by 11 votes to 6 with 3 abstentions.

53. The CHAIRMAN recalled that various members of the Commission had suggested that a definition of the diplomatic bag be inserted in the commentary; so far no objection had been raised to that suggestion, and the Chairman proposed that the Commission should adopt it.

It was so agreed.

54. The CHAIRMAN also recalled that Mr. Spiropoulos had suggested, as a compromise between Mr. François's proposal (para. 7 above) and the views of other members, that in cases where there were very serious grounds for presuming that the diplomatic bag contained illicit articles, it could be inspected by agreement between the sending and the receiving State (para. 10 above).

55. Mr. SPIROPOULOS withdrew his suggestion, since it really went without saying that the diplomatic bag could be inspected if the sending State agreed.

56. Mr. MATINE-DAFTARY, having formally requested during the discussion that a vote should be taken on Mr. François's proposal to insert in the commentary a provision that the diplomatic pouch could be opened in exceptional circumstances and on certain conditions, the CHAIRMAN called for a vote on that proposal (para. 7 above), on the understanding that a final vote could not be taken until the commentary on all the draft was put before the Commission.

The proposal was adopted by 12 votes to 7 with 1 abstention.

57. Mr. AMADO expressed the opinion that by its vote the Commission had just buried the principle of the inviolability of the diplomatic bag.

58. Mr. GARCIA AMADOR agreed that inviolability of the diplomatic bag was a sacred principle. That did not mean, however, that it was not open to abuse. The only way in which the Commission could guard against such abuse was by giving the receiving State certain clearly circumscribed rights, as Mr. François had proposed. In his view, Mr. François's proposal took the interests of both sides into account, and left the principle of the inviolability of the diplomatic bag intact; he had therefore voted for it.

59. Mr. TUNKIN said that, in his view, rules of law should be stated in the articles themselves, not in the commentary. In general, therefore, he did not regard the commentary as binding.

60. Mr. SPIROPOULOS observed that, if the commentary had no binding force, it was difficult to see why the Commission troubled to adopt it. In his view, it had some value as an interpretation of the articles, and if it had some value, it necessarily had some force.

61. He agreed that the right which Mr. François's proposal conferred on the receiving State was circumscribed, but it was none the less deplorable that the Commission should have agreed to something in the commentary which it had just refused to agree to in the text.

62. Mr. PADILLA NERVO said that he had voted against Mr. François's proposal because it was incompatible with Mr. Tunkin's amendment to paragraph 2 (para. 39 above), which the Commission had already adopted. The only useful purpose which its inclusion

in the commentary could serve was to draw attention to the fact that the Commission had been in some perplexity; but the contradiction between the article and the commentary would have to be removed before the draft was presented to Governments for signature, and that could logically only be done by making the commentary compatible with the provisions of the article.

63. Mr. MATINE-DAFTARY said that he saw no contradiction between Mr. Tunkin's amendment and Mr. François's proposal, especially if it was borne in mind that the former was qualified to some extent by Mr. Padilla Nervo's amendment. The safeguards included in Mr. François's proposal were, in his view, perfectly sufficient: inspection would be directed solely towards finding illicit articles, and the authorities of the receiving State would have no excuse and no chance to peruse the diplomatic documents contained in the bag.

64. Mr. AGO said that he had voted against Mr. François's proposal, which he regarded as a dangerous departure from the principle of the inviolability of diplomatic correspondence—perhaps the most important of all diplomatic immunities. Moreover, he thought that the adoption of Mr. Padilla Nervo's amendment already provided a sufficiently adequate safeguard where Mr. François's misgivings were concerned.

65. Mr. LIANG (Secretary to the Commission) pointed out that, according to article 20 of the Commission's Statute, a commentary should contain:

“(a) Adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine;

“(b) Conclusions relevant to:

“(i) The extent of agreement on each point in the practice of States and in doctrine;

“(ii) Divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution.”

66. It was true that the Commission had previously included in its commentaries passages which did not fall within any of those three categories, but never one which bore such a close resemblance to what was normally inserted in the articles as that which was now to be included on Mr. François's proposal. It gave the impression of a detailed regulation enacted for the purpose of putting a particular law into effect. The position would no doubt be reconsidered later.

67. Mr. TUNKIN thought the Commission should be grateful to the Secretary for reminding it of the proper purpose of the commentary, which was not to introduce new rules—especially if they were inconsistent with those already contained in the articles, as he believed was the case in the present instance.

68. Mr. SCALLE said that he fully agreed with the Secretary. If there was a contradiction between the articles and the commentary, it must be removed. The Commission should not take it on itself to lay down absolute rules; there was in fact no such thing as an absolute rule. Every rule was subject to exceptions, and if the exceptions were not recognized, the rule was not workable. The decision as to whether particular departures from the rule were recognized exceptions or infringements must be left to an independent organ of absolute impartiality.

69. Mr. BARTOS said that he had voted in favour of Mr. François's proposal as he saw no conflict between

it and Mr. Tunkin's. The commentary did not formulate a new rule, but simply stated what should happen in the event of grave suspicion that the rule stated in the article itself had been violated. It was becoming much more common for international law to deal with such cases of abuse or violation of rights, and with good reason, since they were a fruitful source of disputes.

70. Mr. HSU said he had voted for all three proposals, Mr. Tunkin's, Mr. Padilla Nervo's and Mr. François's. In his view they were complementary rather than contradictory.

71. Faris Bey EL-KHOURI said he had voted in favour of Mr. François's proposal because the purpose of the recognized rule was to confer immunity on the diplomatic communications themselves, and not on any articles illicitly included with them. He fully agreed with Mr. Matine-Daftary that, under the text proposed by Mr. François, the authorities of the receiving State would have neither the excuse nor the chance to read the diplomatic communications.

72. Mr. KHOMAN said he had voted for Mr. François's proposal because he thought it was in accordance with existing practice. Its sole purpose was to lay down the procedure to be followed in what was clearly an exceptional case. He quite agreed with Mr. Scelle that there were no absolute rules, and that all rules must be considered in their relation to each other. In the case under consideration there was undoubtedly some conflict of rights. The sending State's right could not be regarded as overriding the receiving State's. In Mr. François's proposal the rights of both States were respected. He agreed with Mr. Matine-Daftary and Faris Bey El-Khoury that there was no reason why the sanctity of the documents contained in the pouch should be violated.

73. Mr. SANDSTRÖM, Special Rapporteur, said that, in voting for Mr. François's proposal, he had not overlooked the points made by various speakers; he had felt, however, that the proposal was compatible with the text of the article as amended by Mr. Padilla Nervo.

74. He agreed with the Secretary of the Commission that the commentary should not contain detailed regulations, but he was confident that such a contingency could be avoided, and the commentary drafted in such a way as not to give the impression of rules inconsistent with the provisions of the article.

75. Mr. EL-ERIAN said that, despite the fact that he had voted for Mr. Tunkin's amendment, he had also voted for Mr. François's, although he had been in some doubt before doing so. On consideration, however, it had seemed that there was not necessarily any inconsistency between expressing the principle of inviolability of the diplomatic bag in the text of the article itself, and stating in the commentary that the bag could be opened in extremely exceptional circumstances and subject to certain clearly defined safeguards.

76. The CHAIRMAN, speaking as a member of the Commission, said that he had voted against Mr. François's proposal, since he thought it was incompatible with the text of paragraph 2 as adopted, and contrary to current international law. Moreover, it might give rise to serious abuses such as could demolish the whole principle of the inviolability of diplomatic correspondence, one of the three great principles on which diplomatic intercourse was based: the inviolability of premises, the in-

violability of correspondence, and the immunity of the person.

77. Nowhere else in its draft had the Commission attempted to lay down what should happen if its provisions were violated; it had always proceeded on the assumption that any violations would be dealt with in the same way as any other breach of international law.

78. The Chairman invited the Commission to consider paragraph 3 of the Special Rapporteur's redraft (398th meeting, para. 27).

79. Mr. TUNKIN proposed that the following words be added at the end of the text:

"He shall enjoy personal inviolability and shall not be liable to arrest or detention of an administrative or judicial nature."

80. Mr. SANDSTRÖM, Special Rapporteur, accepted Mr. Tunkin's amendment.

81. Mr. KHOMAN suggested that the phrase "The messenger carrying the despatches" be brought into conformity with the remainder of the text. The point could be left to the Drafting Committee.

It was so agreed.

82. Mr. FRANÇOIS pointed out that, if the captain of an aircraft was entrusted with a diplomatic bag, as frequently happened, he would, under Mr. Tunkin's amendment, enjoy personal inviolability and not be liable to detention or arrest.

83. Mr. TUNKIN said that that had certainly not been his intention. He had only had regular diplomatic couriers in mind. A bag entrusted to the captain of an aircraft should be regarded as unaccompanied.

84. Mr. BARTOS thought that, in the case referred to by Mr. François, the captain of an aircraft ought not to be liable to arrest until he had delivered the bag, since otherwise there would be a danger of its being mislaid.

85. The CHAIRMAN agreed with Mr. Tunkin that no difficulty would arise if the Commission adhered firmly to the well-established idea of a diplomatic courier as someone who carried special papers showing his official status as a courier.

86. Mr. PADILLA NERVO agreed. In his view the confusion arose from the use of the phrase "the messenger carrying the despatches". If that were replaced by some such phrase as "the person accredited as diplomatic courier" no difficulty would arise.

87. Sir Gerald FITZMAURICE said that, as far as he knew, diplomatic immunity had never been accorded to any messenger who was not employed as a diplomatic courier, either on a regular or on an *ad hoc* basis. Anyone so employed was usually given special papers, and sometimes a badge or some other mark of recognition. The pilot of an ordinary commercial aircraft carrying passengers or freight could not be regarded as employed as a diplomatic courier simply because he was entrusted with a diplomatic bag. Consequently, the fact that he did not enjoy diplomatic immunity meant that a small element of risk was involved, but Governments deliberately accepted the risk in view of the great practical convenience of sending diplomatic bags in that way.

The meeting rose at 1 p.m.