Document:-

A/CN.4/L.432

Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Titles and texts adopted by the Drafting Committee on second reading: articles 1 to 32 & draft Optional Protocols One and Two - in A/CN.4/SR.2128 to 2132

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:-

1989, vol. I

nationalizations as seen from the point of view of cessation and restitution was very relevant and he had taken careful note of it.

57. With regard to the location of the provisions on cessation, he believed that they should come before those on the various forms of reparation, but after part 1 of the draft. He was therefore in favour of Mr. Calero Rodrigues's suggestion that they should be included among the general principles in chapter I of part 2.

58. On the wording of the new draft article 6, he pointed out that he had used the word "remains" rather than "is" in order to stress the permanence of the State's obligation and the lasting nature of the primary rule, which no number of breaches should cause to disappear.

59. The wording proposed by Mr. Graefrath for article 6 (2104th meeting, para. 31), which amounted to saying that the State which was the author of the act was bound by the obligation of cessation subject to a claim by the injured State, would have the defect of weakening the rule stated in the article. He had actually considered, at the time of drafting article 6, a formulation requiring a claim by the injured State. He had set it aside in view of the implications which such a formulation might have on the problem of acquiescence. Would not the adoption of Mr. Graefrath's proposal imply that the silence of the injured State be too easily interpreted as acquiescence? He noted that he could accept the other suggestion which had been made, particularly by Mr. Razafindralambo (2102nd meeting, para. 60), concerning the concept of wrongful acts "extending in time".

60. Referring finally to restitution in kind, he explained that, unlike Mr. Graefrath, Mr. Barboza and Mr. Shi, but like Mr. Calero Rodrigues, Mr. Al-Qaysi, Mr. Hayes, Mr. McCaffrey and Mr. Solari Tudela, he was in favour of the broad interpretation of the concept of restitution. In that connection, draft article 8—to be submitted in his forthcoming second report—made it abundantly clear that reparation was to be understood in the broadest sense, namely in the sense that it should result in the re-establishment of the situation which would have existed if the wrongful act had not been committed. He hoped that misgivings about the various limitations on the obligation of restitution in kind which were provided for in paragraphs 1 and 2 of the new draft article 7 would be dispelled, at least in part, by the subsequent draft articles, and in particular the article on pecuniary compensation. It would then be seen that a State which released itself from its obligation of restitution in kind by invoking one of the reasons set out in article 7, paragraphs 1 and 2, was still bound to repair the damage by means of pecuniary compensation.

61. In reply to Mr. Al-Baharna's suggestion (2122nd meeting) that the Latin expression *restitutio in integrum* should be used in article 7, he explained that that could cause confusion, particularly since that expression did not have exactly the same meaning in Roman law, in civil law and in the common law. In reply to a comment by Mr. Tomuschat, he indicated that the question of damages, as well as interest, would be dealt with in his second report.

62. As to the question of nullity raised by Mr. Al-Khasawneh in connection with paragraph 3 of draft article 7, he said that he failed to see how an international court could directly declare null and void an internal legislative provision or the judgment of a national court. An international court could only declare the international unlawfulness of the presence or the effects—according to the case—of a piece of national law and address an injunction to the State. It would be for the latter to repeal the provision or reverse the judgment which stood in the way of restitution or other forms of reparation.

63. In conclusion and in reply to a question by the CHAIRMAN, he said that he was in favour of referring the new draft articles 6 and 7 to the Drafting Committee.

64. Mr. EIRIKSSON said that he had no objection to referring the articles to the Drafting Committee, but asked what the Committee was expected to do with them.

65. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft articles 6 and 7 as submitted by the Special Rapporteur to the Drafting Committee.

It was so agreed.

The meeting rose at 6.10 p.m.

2128th MEETING

Thursday, 29 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Co-operation with other bodies

[Agenda item 10]

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

1. The CHAIRMAN invited Mr. Njenga, in his capacity as Observer for the Asian-African Legal Consultative Committee, to address the Commission.

2. Mr. NJENGA (Observer for the Asian-African Legal Consultative Committee) said that the Asian-African Legal Consultative Committee greatly valued its traditional links with the Commission, which dated back to the 1960s. As its Secretary-General for the past two years, he was convinced of the commitment of all its members to the strengthening of the ties between the two bodies.

3. The Committee had had the honour of welcoming the previous Chairman of the Commission, Mr. Díaz González, to its twenty-eighth session, held at Nairobi earlier in the year, and had much appreciated the informative statement he had made. Past sessions of the Committee had been attended by a number of distinguished members and former members of the Commission, in accordance with the provision of the Committee's statute requiring it to consider at its sessions the work done in the Commission. Two of those former members, Mr. Elias and the late Nagendra Singh, had at one point themselves been President of the Committee.

4. The Committee greatly appreciated the Commission's role in the progressive development and codification of international law and commended it on its meticulous work on matters of vital importance to the international community. Three items on the Commission's agenda were of particular interest to Governments in the Asian-African region: international liability for injurious consequences arising out of acts not prohibited by international law; jurisdictional immunities of States and their property; and the law of the non-navigational uses of international watercourses. The second and third items, which had been on the Committee's agenda for a long time, were also in its current work programme. Jurisdictional immunities of States had, moreover, been the theme at two meetings of the legal advisers of member Governments of the Committee held in 1984 and 1987. The Committee's interest in the subject, which dated back to the late 1950s, had of course been heightened by the fact that the Commission had begun the second reading of its draft articles on the topic.

5. The item "Law of international rivers" had first been included in the Committee's agenda in 1967 and had since been considered at a number of its sessions. The keen interest of member States in the subject was readily understandable, since many of the world's great rivers, such as the Nile, the Niger, the Indus, the Tigris and the Euphrates, flowed through their territories. At the session held at Arusha in 1985, however, it had been decided to defer further consideration of the item until the Commission had made sufficient progress on the topic. The Committee now considered that, under the able guidance of the Special Rapporteur, Mr. McCaffrey, the Commission had achieved great progress and it therefore hoped to include the item in its own agenda again.

6. Many members of the Committee regarded the transboundary movement and dumping of hazardous and toxic wastes as a vitally important aspect of liability for acts not prohibited by international law. Such concern had been the subject of the recent conference which had adopted the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. It was hoped that the legal advisers of member Governments of the Committee would review that Convention so as to help member States in the region on that issue of great concern.

7. At its twenty-eighth session, the Committee had decided to propose that a seminar on the above-mentioned three topics be organized in co-operation with the Commission during the forty-fourth session of the General Assembly in New York. Such a seminar would be of considerable benefit to both bodies in their future work on those topics. The United Nations Secretariat had agreed to provide facilities for the seminar to be held from 9 to 13 October 1989. He also hoped that the Commission would agree to request the special rapporteurs for the topics in question to represent it at the seminar and that as many members of the Commission as possible would take part in it.

8. Commenting on the Committee's current work programme, he recalled that a study prepared by the Committee in 1985 on promoting wider use by States of the ICJ had been circulated to the General Assembly at its fortieth session.[1] Following the favourable response to that study, a colloquium had been organized in co-operation with the ICJ in 1986 and a follow-up study was to be prepared for consideration at the Committee's next session.

9. Under the programme of co-operation between the United Nations and the Asian-African Legal Consultative Committee, the Committee would again prepare brief notes on the legal aspects of some selected items to be considered by the Sixth Committee at the forty-fourth session of the General Assembly. They would include notes on the Commission's work at the current session, as well as on other items related to the Committee's general work programme.

10. The Committee, which had always attached great importance to the law of the sea, had decided at its twenty-eighth session to reactivate its Sub-Committee on the Law of the Sea and had directed its secretariat to prepare a brief on joint ventures between the mining arm of the International Sea-Bed Authority—the Enterprise—and corporate entities, particularly from developing countries.

11. Other items in the Committee's work programme included the preparation of studies on the dumping of toxic wastes off the coasts of developing countries; the status and treatment of refugees; the deportation of Palestinians in violation of international law; the criteria for distinguishing between international terrorism and national liberation movements; the extradition of fugitive offenders; the debt burden of developing countries; the concept of a "peace zone" in international law; the Indian Ocean as a zone of peace; the legal framework for industrial joint ventures; the elements of a legal instrument of good neighbourly relations among countries of the Asian-African and Pacific regions; international trade law matters; and a feasibility study on the establishment of a centre for research and development of legal régimes applicable to economic activities in developing countries in Asia and Africa.

12. Lastly, he extended an invitation, on behalf of the Committee, to the Chairman of the Commission to represent the Commission at the twenty-ninth session of the Committee, to be held at Beijing in April 1990.

13. The CHAIRMAN thanked the Observer for the Asian-African Legal Consultative Committee for his statement and for his kind invitation to represent the Commission at the Committee's twenty-ninth session. The results of the Committee's discussions on topics such as the jurisdictional immunities of States and international watercourses would undoubtedly contribute to the Commission's work. The proposed seminar in New York had the Commission's full support and he was certain that the special rapporteurs concerned would be happy to take part in it.

[1] See A/40/682.

14. Mr. DÍAZ GONZÁLEZ thanked the Asian-African Legal Consultative Committee, through its Observer, for the warm welcome he had received as the representative of the Commission at the Committee's twenty-eighth session. There was no need for him to dwell on the importance of close co-operation between the Committee and the Commission in further work on the codification of international law.

15. Mr. SHI expressed appreciation to the Observer for the Asian-African Legal Consultative Committee for his very informative statement on the work of the Committee, which was an important organization for consultation among Asian and African States on legal subjects of common interest. Having had the opportunity to attend two of its sessions in the past, he knew from experience that the co-operation between the Commission and the Committee was of mutual benefit. He trusted that that co-operation would increase in the future. He was sure that the people of Beijing would give the Committee a warm welcome when it held its next session there in 1990.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/409 and Add.1-5,[2] A/CN.4/417,[3] A/CN.4/420,[4] A/CN.4/L.431, sect. E, A/CN.4/L.432, ILC(XLI)/Conf.Room Doc.1)

[Agenda item 4]

Draft articles proposed by the Drafting Committee on second reading[5]

Articles 1 to 32 and draft Optional Protocols One and Two

16. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce draft articles 1 to 32 as adopted by the Committee on second reading, as well as draft Optional Protocols One and Two (A/CN.4/L.432).

17. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) expressed appreciation to the members of the Drafting Committee for their co-operation and hard work and to those other members of the Commission who had played an active part in the Committee's discussions. A special tribute was due to the Special Rapporteur for his untiring dedication and constructive spirit. He also thanked the secretariat, and in particular Jacqueline Dauchy, Mahnoush Arsanjani and Manuel Rama-Montaldo, who were a fine example of a secretariat team at its best.

18. At the stage of second reading, the Drafting Committee had been at pains to introduce as few changes as possible in the texts provisionally adopted by the Commission on first reading, while giving due weight to the views expressed by Governments and to the proposals for amendment made by the Special Rapporteur on the basis of those views.

19. In addition to articles 1 to 32, the Drafting Committee's report (A/CN.4/L.432) contained two draft optional protocols dealing, respectively, with the status of the courier and the bag of special missions and the status of the courier and the bag of international organizations of a universal character. He suggested that the Commission consider the articles one by one.

Article 1 (Scope of the present articles)

20. The text proposed by the Drafting Committee for article 1 read:

Part I

GENERAL PROVISIONS

Article 1. Scope of the present articles

The present articles apply to the diplomatic courier and the diplomatic bag employed for the official communications of a State with its missions, consular posts or delegations, wherever situated, and for the official communications of those missions, consular posts or delegations with the sending State or with each other.

21. The Drafting Committee recommended no change in article 1 as adopted on first reading. Paradoxical though it might sound, that did not mean that the scope of the articles themselves remained unchanged.

22. Article 1 provided that the articles would apply to the diplomatic courier and diplomatic bag employed for the official communications of a "State" with its "missions, consular posts" and "delegations" and for the official communications of those missions, consular posts and delegations with the State or with each other. The scope of the articles, as thus defined in general terms, was clarified by article 3 (Use of terms), which, as adopted on first reading, included within the scope of the draft the diplomatic courier and the diplomatic bag within the meaning of the 1961 Vienna Convention on Diplomatic Relations; the consular courier and the consular bag within the meaning of the 1963 Vienna Convention on Consular Relations; the courier and the bag of a special mission within the meaning of the 1969 Convention on Special Missions; and the courier and the bag of a permanent mission, of a permanent observer mission, of a delegation or of an observer delegation within the meaning of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.[6] That scope was, however, far from being general, because article 33 provided for an optional declaration whereby any State could, when expressing its consent to be bound by the articles or at any time thereafter, make a declaration limiting the scope of the articles, so far as it was concerned, by indicating that it would not apply the articles to a given category of courier and bag. Thus, while the scope was wide, each State had the possibility of reducing it by means of a declaration.

23. The optional declaration was designed to meet the view of a number of Governments and members of the Commission that the scope was too wide. They considered that, since some of the four Conventions referred to in article 3 had received only a limited number of ratifications

[2] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[3] *Ibid.*

[4] Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

[5] The draft articles provisionally adopted by the Commission on first reading are reproduced in *Yearbook . . . 1986*, vol. II (Part Two), pp. 24 *et seq.* For the commentaries, *ibid.*, p. 24, footnote 72.

[6] These four conventions are referred to as the "codification conventions". The 1975 Convention is hereinafter referred to as "1975 Vienna Convention on the Representation of States".

or acceptances, States which were not parties to those Conventions and which objected to them might decide not to become parties to the present articles. On the other hand, it had been pointed out that article 33 defeated one of the main purposes of the articles, namely the establishment of a uniform régime for all couriers and bags. In his eighth report (A/CN.4/417, para. 277), the Special Rapporteur had suggested that article 33 be deleted in view of the insignificant support for it, and the substantial reservations and objections to it.

24. The Drafting Committee had decided to recommend the deletion of article 33, as the Special Rapporteur had suggested. It had also decided to recommend that the scope of the articles be reduced by excluding the courier and bag of special missions within the meaning of the 1969 Convention on Special Missions. States wishing to apply the articles to such couriers and bags could do so by becoming parties to an optional protocol, on which he would comment later. The reduction in scope did not call for any change in article 1, but resulted from the deletion of the references to special missions and their couriers and bags in article 3, paragraph 1 (1) (*c*), (2) (*c*) and (6) (*b*).

25. Mr. YANKOV (Special Rapporteur) thanked the Chairman of the Drafting Committee for his kind words and expressed appreciation to the secretariat for its assistance.

26. He agreed with the general interpretation which the Chairman of the Drafting Committee had given concerning the scope of the articles and expressed the hope that the two optional protocols would enhance the prospects for reaching broad agreement.

27. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 1.

Article 1 was adopted.

ARTICLE 2 (Couriers and bags not within the scope of the present articles)

28. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 2, which read:

Article 2. Couriers and bags not within the scope of the present articles

The fact that the present articles do not apply to couriers and bags employed for the official communications of special missions or international organizations shall not affect:

(*a*) the legal status of such couriers and bags;

(*b*) the application to such couriers and bags of any rules set forth in the present articles which would be applicable under international law independently of the present articles.

29. Article 2 was designed to incorporate a reference, in the main instrument being drafted by the Commission, to couriers and bags employed for the official communications of special missions and international organizations, since it had been decided that such entities would be dealt with in detail and separately in the optional protocols.

30. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 2.

Article 2 was adopted.

31. Mr. AL-BAHARNA said that, although he had not opposed the adoption of article 2, he did not think that there was any need for a reminder, either to States that would sign the optional protocols or to those that would not, that there were provisions of international law applicable to the couriers and bags of special missions and international organizations.

32. Mr. YANKOV (Special Rapporteur) said that article 2 was a useful safeguard provision which would provide protection in situations outside the framework of the two protocols, for example for the communications of national liberation movements.

ARTICLE 3 (Use of terms)

33. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 3, which read:

Article 3. Use of terms

1. For the purposes of the present articles:

(1) "diplomatic courier" means a person duly authorized by the sending State, either on a regular basis or for a special occasion as a courier *ad hoc*, as:

(*a*) a diplomatic courier within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(*b*) a consular courier within the meaning of the Vienna Convention on Consular Relations of 24 April 1963; or

(*c*) a courier of a permanent mission, a permanent observer mission, a delegation or an observer delegation within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975; who is entrusted with the custody, transportation and delivery of the diplomatic bag and is employed for the official communications referred to in article 1;

(2) "diplomatic bag" means the packages containing official correspondence, and documents or articles intended exclusively for official use, whether accompanied by diplomatic courier or not, which are used for the official communications referred to in article 1 and which bear visible external marks of their character as:

(*a*) a diplomatic bag within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(*b*) a consular bag within the meaning of the Vienna Convention on Consular Relations of 24 April 1963; or

(*c*) a bag of a permanent mission, a permanent observer mission, a delegation or an observer delegation within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

(3) "sending State" means a State dispatching a diplomatic bag to or from its missions, consular posts or delegations;

(4) "receiving State" means a State having on its territory missions, consular posts or delegations of the sending State which receive or dispatch a diplomatic bag;

(5) "transit State" means a State through whose territory a diplomatic courier or a diplomatic bag passes in transit;

(6) "mission" means:

(*a*) a permanent diplomatic mission within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961; and

(*b*) a permanent mission or a permanent observer mission within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

(7) "consular post" means a consulate-general, consulate, vice-consulate or consular agency within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

(8) "delegation" means a delegation or an observer delegation within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

(9) "international organization" means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or the internal law of any State.

34. Since the courier and bag of special missions were to be excluded from the scope of the articles and dealt with in an optional protocol, all the provisions of article 3 which had referred to such couriers and bags and to special missions themselves had been deleted.

35. Mr. YANKOV (Special Rapporteur), commenting on paragraph 1 (1) (*c*) and (6) (*b*), said that, during the Drafting Committee's work, it had become clear that the 1946 Convention on the Privileges and Immunities of the United Nations and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies were highly relevant to the subject of official communications of States with their permanent and other missions and with delegations to international organizations and international conferences. Since their adoption, those Conventions had constituted the legal basis for such communications, including those carried on using couriers and bags, and they had gained universal recognition by Members and non-members of the United Nations and of specialized agencies. Although they did not contain special provisions on definitions or the use of terms, such definitions could easily be inferred. By way of example, he read out sections 11 and 16 of article IV of the Convention on the Privileges and Immunities of the United Nations, which were most explicit about the sense in which the term "representatives" was to be used.

36. He could accept the omission of references to the 1946 and 1947 Conventions on the grounds that they did not define the concepts of a permanent mission, a delegation or a courier, but, in order to avoid any possible criticism that the Commission had cited only a convention which had not yet entered into force, namely the 1975 Vienna Convention on the Representation of States, he would insist that the statement he had just made be fully reflected in the commentary.

37. Mr. TOMUSCHAT said that the reference in article 3, paragraph 1 (2), to packages "which bear visible external marks of their character" was unnecessary, might be confusing and should be deleted. The phrase seemed to imply that such external marks were a constituent, integral element of the diplomatic bag and that, if they were obliterated by accident or through a criminal act, the bag would no longer have diplomatic status.

38. Mr. MAHIOU, referring to the Drafting Committee's decision to delete the provisions of article 3 dealing with special missions, said he trusted that the commentary would explain the reasons for their deletion.

39. Mr. McCAFFREY said that he had no difficulty with the position adopted by the Special Rapporteur, but reserved the right to react to the specific points that would be made in the commentary when the text was available.

40. The comment made by Mr. Tomuschat was a valid one, although it was also true that something must indicate—to customs officials, for example—that a certain package was a diplomatic bag. Instead of deleting the reference to "visible external marks", it might be preferable to indicate in the commentary that such marks were not a determining factor in the status of the diplomatic bag.

41. Since the numbering of the subparagraphs of article 3 was rather awkward, it might be better to adopt the system of identification used in article 41 of the 1969 Vienna Convention on the Law of Treaties, referring to paragraph 1 (*b*) (ii), for example, instead of to paragraph 1 (2) (*b*).

42. Mr. BENNOUNA said that he was responsive to the comments made by the Special Rapporteur and thought that there was no reason why a reference to the 1946 and 1947 Conventions should not be incorporated in the draft articles. He agreed with Mr. Tomuschat that the phrase "and which bear visible external marks of their character", in paragraph 1 (2) of article 3, gave the impression that showing such marks was an absolute prerequisite if a bag was to have diplomatic status. It might therefore be appropriate to replace that phrase by the words "and which normally bear visible external marks of their character".

43. Mr. DÍAZ GONZÁLEZ said that he would not support any change in the reference to "visible external marks", which were indicative of the fact that a given package was a diplomatic bag.

44. Mr. EIRIKSSON said he endorsed Mr. McCaffrey's suggestion that the subparagraphs of article 3 be renumbered in accordance with the method used in article 41 of the Vienna Convention on the Law of Treaties.

45. Mr. YANKOV (Special Rapporteur), referring to Mr. Tomuschat's comment on the reference to "visible external marks", said he believed that that reference was necessary: otherwise, there would be no way of determining which of a number of packages was a diplomatic bag. It might be worth while, however, to explain in the commentary that if, as a result of exceptional circumstances, the external marks of a diplomatic bag had been destroyed, it should still be considered to be a diplomatic bag if the sending State could provide evidence that it was used for official communications. The purpose of the reference was not only the identification of a package as a diplomatic bag, but the specification of the main constituent features of a diplomatic bag, one of which was visible external marks. The phrase had been taken from article 27, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations.

46. With regard to the suggestion made by Mr. McCaffrey, and supported by Mr. Eiriksson, for the renumbering of the subparagraphs of article 3, he noted that the 1969 Vienna Convention on the Law of Treaties was only one possible model and that different techniques had been used in instruments adopted later. He would, however, have no objection to the proposed renumbering.

47. In reply to Mr. Bennouna's comment on the inclusion in the draft of a specific reference to the 1946 and 1947 Conventions, he said he believed that that point could be made in the commentary, although he would have no objection to the incorporation of such a reference if the Commission so wished. He did not think that Mr. Bennouna's proposal that the word "normally" be added before the word "bear" was an improvement on the text of paragraph 1 (2).

48. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that one of the main reasons for not including in the draft articles references to the 1946 and 1947 Conventions was that they mentioned diplomatic bags

only in passing. The Drafting Committee had concluded that a note in the commentary about the point raised by the Special Rapporteur would be the best solution.

49. With regard to Mr. Tomuschat's proposal for the deletion of the reference in paragraph 1 (2) to "visible external marks", he said that the purpose in article 3 was not to state that the diplomatic bag should have external marks: that was done in article 24. The object of the reference was to draw a distinction between the diplomatic bags of permanent missions or delegations and those of special missions, which would be covered in the proposed optional protocol.

50. Mr. McCaffrey's proposal for the renumbering of the subparagraphs of article 3 had already been discussed in the Drafting Committee and had been rejected.

51. Mr. HAYES said that the words "and which bear visible external marks of their character" in paragraph 1 (2) gave the impression that visible external marks were an essential element of the bag.

52. The basic provision in the matter was article 27, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations, which stated that the packages constituting the diplomatic bag "must bear visible external marks of their character" and "may contain only diplomatic documents or articles intended for official use". Those two conditions were stated clearly in article 24 (Identification of the diplomatic bag) and article 25 (Contents of the diplomatic bag) of the present draft.

53. He believed he was right in saying that article 27, paragraph 4, of the 1961 Vienna Convention was not a definition and that its purpose was to set forth the obligations of the sending State. Article 3 now under discussion was, however, a definitional article on the use of terms for the purposes of the present articles. The obligation with respect to marking was not part of the definition of the diplomatic bag. In fact, even if the marking were omitted, the diplomatic bag would still be a diplomatic bag. For those reasons, he supported Mr. Tomuschat's proposal for the deletion of the words "and which bear visible external marks of their character" in paragraph 1 (2).

54. Mr. KOROMA said that the Special Rapporteur and the Chairman of the Drafting Committee had fully replied to Mr. Tomuschat's point. There were valid practical reasons for retaining the wording on visible external marks. The whole purpose of the rules embodied in the draft articles was to protect the diplomatic bag. In general, when a diplomatic bag arrived at an airport, it would be put in the same place as other bags. Unless it had visible external marks, there would be no way of distinguishing it from the others. It was therefore appropriate to retain the marking requirement in paragraph 1 (2), whose wording was not mandatory but, rather, flexible enough to place both the receiving State and the sending State on notice that it would be helpful for the bag to bear visible external marks of its character.

55. He suggested that, in order to bring the text of paragraph 1 (2) into line with the wording of article 27, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations, the words " 'diplomatic bag' means" should be replaced by "a 'diplomatic bag' shall consist of" and the word "exclusively" should be deleted.

56. Mr. YANKOV (Special Rapporteur) said that Mr. Hayes was right to point out that article 3, which began with the words "For the purposes of the present articles", was a definitional provision. However, he could not agree to the proposal for the deletion of the reference to visible external marks in paragraph 1 (2). One reason was that the word "as" linked the marking requirement to subparagraphs (*a*), (*b*) and (*c*), beginning with the words "a diplomatic bag", "a consular bag" and "a bag of a permanent mission, a permanent observer mission, a delegation or an observer delegation", respectively. In addition, marks enabled the receiving State and the transit State to determine the category of the bag. There were differences between the privileges pertaining to each category and the receiving State or the transit State had to be in a position to know whether to treat the bag as a diplomatic bag, a consular bag or the bag of a mission.

57. With regard to the proposals made by Mr. Koroma (para. 55 above), he said that, since the word "exclusively" had been adopted by the Commission to qualify the concept of "articles intended for official use" for the purpose of preventing cases of abuse by strengthening the requirements in the matter, he did not think that it should be deleted. He also did not think that the word "means" should be replaced by the words "shall consist of". The word "means" was part of the standard language of the traditional article on the use of terms contained in United Nations conventions.

58. Mr. FRANCIS said that he was in favour of retaining the words "and which bear visible external marks of their character" in paragraph 1 (2). They were an essential element, especially since the bag would be handled mainly by laymen: the existence of visible external marks would put them on their guard. Moreover, those words were inextricably linked by the word "as" to subparagraphs (*a*), (*b*) and (*c*).

59. Mr. AL-BAHARNA said that the requirement of visible external marks should be retained. As it now stood, the requirement was merely a recommendation: any failure to observe it would not involve a penalty. It should not be strengthened or be made compulsory. Accordingly, any problems that might arise could be settled amicably by the States concerned.

60. He did not agree with Mr. Koroma's proposal for the deletion in paragraph 1 (2) of the word "exclusively", which qualified "articles intended for official use". The word "only" might, however, be added before the words "official correspondence", in order to bring the definition into line with article 25, paragraph 1.

61. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 3 as proposed by the Drafting Committee.

Article 3 was adopted.

ARTICLE 4 (Freedom of official communications)

62. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 4, which read:

Article 4. Freedom of official communications

1. The receiving State shall permit and protect the official communications of the sending State, effected through the diplomatic courier or the diplomatic bag, as referred to in article 1.

2. The transit State shall accord to the official communications of the sending State, effected through the diplomatic courier or the diplomatic bag, the same freedom and protection as is accorded by the receiving State.

63. No change had been proposed to the wording of article 4 and the Drafting Committee recommended that it be retained as it stood.

64. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 4.

Article 4 was adopted.

ARTICLE 5 (Duty to respect the laws and regulations of the receiving State and the transit State)

65. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 5, which read:

Article 5. Duty to respect the laws and regulations of the receiving State and the transit State

1. The sending State shall ensure that the privileges and immunities accorded to its diplomatic courier and diplomatic bag are not used in a manner incompatible with the object and purpose of the present articles.

2. Without prejudice to the privileges and immunities accorded to him, it is the duty of the diplomatic courier to respect the laws and regulations of the receiving State and the transit State.

66. The Drafting Committee had agreed that the words "as the case may be" were unnecessary, since they added nothing to the understanding of the text, and recommended that they be deleted in paragraph 2 of article 5, as well as in 15 other places in the draft articles adopted on first reading.

67. The Drafting Committee also recommended the deletion of the second sentence of paragraph 2 as adopted on first reading, which read: "He also has the duty not to interfere in the internal affairs of the receiving State or the transit State, as the case may be." Some Governments had considered that sentence to be superfluous and, in his eighth report (A/CN.4/417, para. 82), the Special Rapporteur had taken the view that, in the interests of simplicity and brevity, it could be deleted. His own understanding, which was also that of the Drafting Committee, was that the duty of the courier to respect the laws and regulations of the receiving State and the transit State entailed the obligation not to interfere in the internal affairs of those States.

68. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 5.

Article 5 was adopted.

ARTICLE 6 (Non-discrimination and reciprocity)

69. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 6, which read:

Article 6. Non-discrimination and reciprocity

1. In the application of the provisions of the present articles, the receiving State or the transit State shall not discriminate as between States.

2. However, discrimination shall not be regarded as taking place:

(*a*) where the receiving State or the transit State applies any of the provisions of the present articles restrictively because of a restrictive application of that provision to its diplomatic courier or diplomatic bag by the sending State;

(*b*) where States by custom or agreement extend to each other more favourable treatment with respect to their diplomatic couriers and diplomatic bags than is required by the present articles.

70. The Drafting Committee recommended that paragraph 2 (*b*) as adopted on first reading should be simplified. It had provided that, if the extension of treatment more favourable than that required by the present articles was not to be regarded as discrimination, the modification must not be incompatible with the object and purpose of the articles and must not affect the enjoyment of the rights or the performance of the obligations of third States. In his eighth report (A/CN.4/417, para. 92), the Special Rapporteur had already suggested the deletion of the second condition. The Drafting Committee was now recommending the deletion of the first as well. The Committee had considered that the extension by States of more favourable treatment to their couriers and bags, whether by custom or by agreement, could in no way be incompatible with the object and purpose of the articles and could not affect the enjoyment of the rights or the performance of the obligations of other States.

71. Mr. AL-KHASAWNEH said that he had no objection to the changes proposed by the Drafting Committee. He suggested that the commentary should draw attention to the element of proportionality or symmetry in the operation of the reciprocity referred to in paragraph 2 (*b*).

72. Mr. BENNOUNA said that paragraph 1 referred to "the application of the provisions of the present articles", while paragraph 2 (*a*) referred to "a restrictive application" of a provision of "the present articles". The wording of paragraph 2 (*a*) should therefore be amended to make it clear that reference was being made to articles other than article 6 itself.

73. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the suggestions made by Mr. Al-Khasawneh and Mr. Bennouna could be dealt with by means of an explanation in the commentary.

74. Mr. YANKOV (Special Rapporteur), replying to a question by Mr. REUTER concerning the meaning of the words *par coutume* in the French text of paragraph 2 (*b*), said that the important role of customary law in the field of diplomatic and consular law was well known. Paragraph 2 (*b*) was modelled on article 47, paragraph 2 (*b*), of the 1961 Vienna Convention on Diplomatic Relations and article 72, paragraph 2 (*b*), of the 1963 Vienna Convention on Consular Relations. In the English text, the words "by custom" were used to indicate that the more favourable treatment in question was not necessarily extended on the basis of a written agreement.

75. Mr. REUTER said that the commentary to article 6 should indicate whether the words "by custom" referred to a rule of customary law or to practice as a matter of *comitas gentium*. He suggested that, in the French text of paragraph 2 (*b*), the words *par coutume ou par voie d'accord* should be replaced by *par voie de coutume ou d'accord*.

76. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that that drafting amendment to the French text was acceptable. As to the meaning of the words

"by custom", he believed that the explanations the Special Rapporteur would provide in the commentary would be sufficient.

77. Mr. ILLUECA proposed that the Spanish text be amended along the same lines as suggested for the French.

78. Mr. BENNOUNA said that the words "by custom" covered both customary rules and ordinary practice; their use could thus be said to constitute a case of constructive ambiguity.

79. Mr. YANKOV (Special Rapporteur) said that he agreed with that interpretation and would try to bring the point out in the commentary.

80. Mr. BEESLEY said that it would be preferable not to allow any ambiguity. He wondered whether wording such as "reciprocal" or "mutual" "practice" or "custom" could not be used.

81. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the discussion had made it clear that the words "by custom or agreement" in paragraph 2 (*b*) were intended to cover all possibilities. An explanation would be provided in the commentary. He recommended that article 6 be adopted without change in English and with the drafting change proposed in French.

82. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 6 as proposed by the Drafting Committee, with the amendment to the French text proposed by Mr. Reuter (para. 75 above).

It was so agreed.

Article 6 was adopted.

ARTICLE 7 (Appointment of the diplomatic courier)

83. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 7, which read:

PART II

STATUS OF THE DIPLOMATIC COURIER AND THE CAPTAIN OF A SHIP OR AIRCRAFT ENTRUSTED WITH THE DIPLOMATIC BAG

Article 7. Appointment of the diplomatic courier

Subject to the provisions of articles 9 and 12, the sending State or its missions, consular posts or delegations may freely appoint the diplomatic courier.

84. Purely drafting changes were suggested for article 7, whose wording was now closer to that of similar articles in other instruments, such as article 7 of the 1961 Vienna Convention on Diplomatic Relations. There had been no change in the meaning of the article.

85. Mr. McCAFFREY suggested that the positions of part II (Status of the diplomatic courier and the captain of a ship or aircraft entrusted with the diplomatic bag) and part III (Status of the diplomatic bag) of the draft should be reversed in order to shift the emphasis from the diplomatic courier to the diplomatic bag.

86. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the present sequence had been adopted at the very beginning because it reflected the title of the topic. He recommended that no change be made in the order of the parts of the draft.

87. Mr. KOROMA said that he had no difficulty with the substance of article 7, but would prefer it to be drafted in the passive voice and to read: "Subject to the provisions of articles 9 and 12, the diplomatic courier may be appointed by the sending State or by its missions, consular posts or delegations." That change would, of course, require the deletion of the word "freely".

88. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the matter had been discussed in the Drafting Committee and that the proposed text had been decided on in view of the essential nature of the word "freely".

89. Mr. BARSEGOV said that the expression *de leur choix* in the French text, although not identical with the word "freely", was entirely satisfactory. The same was true of the Russian text.

90. Mr. YANKOV (Special Rapporteur) recalled that the matter had been discussed on first reading; an explanation was to be found in the commentary.

91. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 7 as proposed by the Drafting Committee.

Article 7 was adopted.

ARTICLE 8 (Documentation of the diplomatic courier)

92. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 8, which read:

Article 8. Documentation of the diplomatic courier

The diplomatic courier shall be provided with an official document indicating his status and essential personal data, including his name, official position or rank, as well as the number of packages constituting the diplomatic bag which is accompanied by him and their identification and destination.

93. Article 8 as adopted on first reading had required the official document carried by the diplomatic courier to indicate his status and the number of packages constituting the diplomatic bag accompanied by him. The Drafting Committee had accepted suggestions that more complete information should be included in the document concerning both the courier and the bag. In the case of the courier, the document should not only indicate his status, but also contain essential personal data, such as his name and official position or rank. As to the bag, the document should not only indicate the number of packages constituting it, but also contain elements of identification of the packages, as well as an indication of their destination.

94. Mr. KOROMA suggested that, since, in many cases, the diplomatic courier had no official position or rank, the words "and, where necessary" should be added between the words "his name" and "official position or rank".

95. Mr. YANKOV (Special Rapporteur) said that such an addition would be redundant: it was sheer common sense that no official position or rank had to be indicated where none was held. However, if Mr. Koroma insisted on the amendment, he would prefer the words "and, where appropriate".

96. Mr. KOROMA said that the Special Rapporteur's explanation had confirmed his belief that the proposed addition was necessary. It was never advisable to rely on common sense.

97. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he agreed with the Special Rapporteur, but would have no objection to the addition of the words "and, where appropriate" if the members of the Drafting Committee so agreed.

98. Mr. HAYES suggested that the words "where appropriate" be added after the word "rank".

99. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 8, with the addition of the words "and, where appropriate" between the words "his name" and "official position or rank".

It was so agreed.

Article 8 was adopted.

ARTICLE 9 (Nationality of the diplomatic courier)

100. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 9, which read:

Article 9. Nationality of the diplomatic courier

1. The diplomatic courier should, in principle, be of the nationality of the sending State.

2. The diplomatic courier may not be appointed from among persons having the nationality of the receiving State except with the consent of that State, which may be withdrawn at any time. However, when the diplomatic courier is performing his functions in the territory of the receiving State, the withdrawal of consent shall not take effect until the diplomatic courier has delivered the diplomatic bag to its consignee.

3. The receiving State may reserve the right provided for in paragraph 2 also with regard to:

(*a*) nationals of the sending State who are permanent residents of the receiving State;

(*b*) nationals of a third State who are not also nationals of the sending State.

101. No changes were proposed in the substance of article 9. However, a second sentence—which the Special Rapporteur had proposed in his eighth report (A/CN.4/417, para. 111)—was recommended for paragraph 2. The receiving State had to give its consent for a person having its nationality to be appointed as a diplomatic courier by a sending State. That consent could be withdrawn at any time. As the Special Rapporteur had explained, such withdrawal of consent should not interfere with the normal functioning of official communications and should not prejudice the protection of a diplomatic bag already on its way or its safe delivery to the consignee. The new sentence proposed by the Drafting Committee thus read: "However, when the diplomatic courier is performing his functions in the territory of the receiving State, the withdrawal of consent shall not take effect until the diplomatic courier has delivered the diplomatic bag to its consignee."

102. For stylistic purposes, the word "also" had been included in the introductory clause of paragraph 3 and, in the French text of paragraph 2, the words *en tout temps* had been replaced by *à tout moment* as a translation of the words "at any time".

103. Mr. EIRIKSSON suggested that the first sentence of paragraph 2 should end with the words "consent of that State" and that it be followed by a second sentence reading: "Such consent may be withdrawn at any time; however, when the diplomatic courier . . . ". That change would make the meaning of the paragraph much clearer.

104. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he saw little substantial difference between the text adopted by the Drafting Committee and that proposed by Mr. Eiriksson. As Chairman of the Drafting Committee, he was bound to recommend the former text.

105. Mr. HAYES suggested that a compromise solution would be to delete the word "However".

106. Mr. YANKOV (Special Rapporteur) said that, since the word "However" came immediately after the statement that the consent of the receiving State could be withdrawn at any time, it was an essential introduction to the proviso which followed.

107. Mr. AL-BAHARNA asked why the word "should" was used in paragraph 1 rather than the word "shall".

108. Mr. YANKOV (Special Rapporteur) said that the use of the word "should" in conjunction with the words "in principle" was intended to allow for the practice adopted by many States of employing one courier for missions to more than one country. He recalled that paragraph 1 had been adopted in its present form on first reading.

109. Mr. MAHIOU said that the French text of paragraph 1 as adopted on first reading stated: *Le courrier diplomatique aura en principe* . . . . In the text proposed by the Drafting Committee, the word *aura* had been replaced by the word *a*. He wondered whether that change had any significance.

110. Mr. ILLUECA, supported by Mr. DÍAZ GONZÁLEZ, stressed the importance of bringing all the language versions into line with one another.

111. Mr. McCAFFREY said that the word "should" in paragraph 1 should be replaced by "shall". The optional nature of the paragraph was already implied by the words "in principle".

112. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he was prepared to accept that amendment, since the words "shall, in principle" were also used in article 17, paragraph 1.

113. Mr. YANKOV (Special Rapporteur) said that paragraph 1 of article 9 was modelled on article 8, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations and on article 22, paragraph 1, of the 1963 Vienna Convention on Consular Relations. However, he was inclined to agree with Mr. McCaffrey that the word "should", followed by the words "in principle", placed too much emphasis on the optional nature of the provision. He would therefore not object if it were replaced by the word "shall".

The meeting rose at 1.05 p.m.

2129th MEETING

Friday, 30 June 1989, at 10.05 a.m.

Chairman: Mr. Emmanuel J. ROUCOUNAS

later: Mr. Bernhard GRAEFRATH

later: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/409 and Add.1-5,[1] A/CN.4/417,[2] A/CN.4/420,[3] A/CN.4/L.431, sect. E, A/CN.4/L.432, ILC(XLI)/Conf.Room Doc.1)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE ON SECOND READING[4] (*continued*)

ARTICLE 9 (Nationality of the diplomatic courier)[5] (*concluded*)

1. The CHAIRMAN reminded members that the Commission still had to decide whether the word "should" in paragraph 1 should be replaced by "shall".

2. Mr. YANKOV (Special Rapporteur) said that paragraph 1 was modelled on article 8, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations, as well as on article 22 of the 1963 Vienna Convention on Consular Relations, article 10 of the 1969 Convention on Special Missions and article 73 of the 1975 Vienna Convention on the Representation of States. In those Conventions, the word "should" was used and there were no commas around the words "in principle". In his view, there were no serious reasons why the Commission should depart from that established formula.

3. With regard to paragraph 2, it had been decided, following consultations with the Chairman of the Drafting Committee, to propose replacing the definite article "the", at the beginning of the second sentence, by the indefinite article "a" and the words "until the diplomatic courier", in the same sentence, by "until he"; it was also proposed to delete the word "the" before the word "withdrawal".

4. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he had no definite views about the choice between "should" and "shall".

5. Mr. KOROMA said that he supported the text of paragraph 1 proposed by the Drafting Committee, as orally amended by the Special Rapporteur, namely with the deletion of the two commas. The word "shall" would be too mandatory. It was also necessary to harmonize all the draft articles on that point so as to avoid any future problems of interpretation.

6. Mr. RAZAFINDRALAMBO said that, in his view, the wording used in the four codification conventions should be retained, but the word "should" should be rendered in French by the word *aura*, not the word *a*.

7. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the word *aura*, which appeared in the text adopted on first reading, had been replaced by the word *a* on second reading at the suggestion of the translation services.

8. Mr. REUTER said that it was possible to use either word.

9. The CHAIRMAN said that, since the word *aura* appeared in the four codification conventions, it would be appropriate to retain it. If there were no objections, he would take it that the Commission agreed to delete the commas in paragraph 1 of article 9 and to replace the word *a* in the French text by the word *aura*.

It was so agreed.

10. Mr. REUTER said that he had some doubts about the Special Rapporteur's proposal to replace the word "the" by the word "a" at the beginning of the second sentence of paragraph 2, since the reference was to a particular diplomatic courier, namely a courier who had the nationality of the receiving State and who had been appointed with the consent of that State.

11. Mr. YANKOV (Special Rapporteur) said that Mr. Reuter's reasoning was convincing and he therefore withdrew his suggestion.

12. Mr. ILLUECA said that he preferred paragraph 2 as proposed by the Drafting Committee, since it would avert lengthy debate at the diplomatic conference at which the future convention would be adopted. The replacement of the words "the diplomatic courier" by "he" could, for instance, give rise to criticism from the supporters of sexual equality. It would then be necessary to say "he or she".

13. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) explained that, in the text of a convention, the word "he" referred equally to both sexes. Also, with regard to the French text, he wondered whether the words *de ce consentement*, in the second sentence of paragraph 2, should not be replaced by *du consentement*.

14. Mr. REUTER said that, in French, the word *il* was perfectly correct, whether the courier was a man or a woman. The word *du*, before the word *consentement*, would certainly be more correct.

15. Mr. FRANCIS, agreeing with the Chairman of the Drafting Committee on the use of the masculine and femi-

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[1] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[2] *Ibid.*

[3] Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

[4] The draft articles provisionally adopted by the Commission on first reading are reproduced in *Yearbook . . . 1986*, vol. II (Part Two), pp. 24 *et seq.* For the commentaries, *ibid.*, p. 24, footnote 72.

[5] For the text, see 2128th meeting, para. 100.

nine genders, said that, if Mr. Illueca's suggestion were accepted, the word "his" would also have to be replaced by the words "his or her" throughout the draft, and that would make the text unwieldy.

16. Mr. PAWLAK said that he preferred the text proposed by the Drafting Committee: it was better to be repetitious than ambiguous.

17. Mr. YANKOV (Special Rapporteur), agreeing with Mr. Francis, said that the replacement of the words "the diplomatic courier" by the word "he" would not create any ambiguity. If the Commission pursued the discussion on that point, it risked turning into a working group of the Drafting Committee.

18. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to replace the words "until the diplomatic courier", in the second sentence of paragraph 2, by "until he", to delete the definite article "the" before the word "withdrawal" in the same sentence, and to replace the words *de ce consentement*, in the French text, by *du consentement*.

It was so agreed.

19. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the only change the Drafting Committee proposed in paragraph 3 was the addition of the word "also" in the introductory clause.

20. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 9 proposed by the Drafting Committee, as amended.

Article 9 was adopted.

ARTICLE 10 (Functions of the diplomatic courier)

21. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 10, which read:

Article 10. Functions of the diplomatic courier

The functions of the diplomatic courier consist in taking custody of the diplomatic bag entrusted to him and transporting and delivering it to its consignee.

22. Article 10 defined in a brief and precise manner the functions of the diplomatic courier. The Drafting Committee had made little change to the article. For reasons of style, however, it recommended that the order of the wording be reversed. It had also replaced the words "delivering at its destination" by "delivering it to its consignee", since a "destination" could be understood in geographical terms, whereas a consignee was an entity such as a mission, consular post or delegation.

23. Mr. McCAFFREY said that article 10 was of a crucial nature, since the privileges and duties of a courier derived from his functions. The precise moment at which he assumed those functions was therefore of the utmost importance. The same could be said of the moment at which they ended, which was the subject of article 11, a provision which was lacking in clarity, since it was not clear whether a courier who travelled without a bag to a State in order to pick up a bag was already exercising his functions. Articles 10 and 11 had a repercussion on the content of article 21, which dealt with the beginning and end of privileges and immunities. In his view, therefore, that point should be clarified in the commentary to article 10.

24. Mr. YANKOV (Special Rapporteur) said that article 10 simply supplemented the existing codification conventions, which contained no similar provision. Mr. McCaffrey had, however, been right to stress the importance of defining the functions of the courier, particularly since the Commission had adopted the "functional" approach. The precise modalities for the exercise by the diplomatic courier of his functions would be explained in the commentary.

25. Mr. McCAFFREY pointed out that the Special Rapporteur had originally proposed an article in which the commencement of the functions of the diplomatic courier had been defined. The Commission had deleted that article to make the draft more concise. That was an added reason for clarifying the matter in the commentary to article 10.

26. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 10.

Article 10 was adopted.

ARTICLE 11 (End of the functions of the diplomatic courier)

27. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 11, which read:

Article 11. End of the functions of the diplomatic courier

The functions of the diplomatic courier come to an end, *inter alia*, upon:

(*a*) fulfilment of his functions or his return to the country of origin;

(*b*) notification by the sending State to the receiving State and, where necessary, the transit State that his functions have been terminated;

(*c*) notification by the receiving State to the sending State that, in accordance with paragraph 2 of article 12, it ceases to recognize him as a diplomatic courier.

28. Stylistic changes had been made in subparagraphs (*a*) and (*b*) of the article adopted on first reading and more precision introduced in the present subparagraph (*c*) with the reference to "paragraph 2" of article 12. The Drafting Committee had also added a new subparagraph (*a*), the other subparagraphs being renumbered accordingly.

29. Although the list of cases in which the functions of the diplomatic courier came to an end was not exhaustive, as made clear by the use of the words "*inter alia*", the most frequent and normal reason for the ending of the courier's functions was undoubtedly the fulfilment of his functions or his return to the country of origin. That was worth mentioning even if the addition was not strictly essential.

30. Mr. McCAFFREY said that he was not entirely satisfied with the new subparagraph (*a*). In the first place it struck him as redundant, since what it said was that the functions of the diplomatic courier came to an end when they had been discharged. Secondly, it also said that the courier's functions came to an end upon his return to the country of origin. He therefore assumed that the cessation of functions occurred upon whichever of those two events came later. The point should be clarified in the commentary.

31. Mr. EIRIKSSON said that, in the current discussion, the beginning and end of the courier's functions should

not be confused with the beginning and end of his privileges.

32. Mr. HAYES said that article 11 had no obvious linkage with the rest of the draft and could, in his view, be dispensed with altogether. Article 10 indicated clearly enough what the functions of the diplomatic courier were, and article 21 what his privileges and immunities were.

33. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), replying to Mr. Eiriksson, said that, while there might be confusion in the discussion, there was none in the draft, where the beginning and end of the functions of the courier and the beginning and end of his privileges and immunities were dealt with in entirely separate articles. At the present stage in its work, the Commission could do no more than take note of the comment by Mr. Hayes.

34. Mr. YANKOV (Special Rapporteur) recalled that he had originally proposed an article 12 dealing with the beginning of the functions of the diplomatic courier.[6] On the advice of several Governments, the Commission and the Drafting Committee itself, that draft article had been deleted. As Mr. McCaffrey had said, the issue would have to be spelled out very clearly in the commentary because the beginning and end of the diplomatic courier's functions were materially related to his status.

35. Mr. REUTER said that the new subparagraph (*a*) seemed to imply that the diplomatic courier could return to the country of origin without having completed his functions. If such an interpretation was to be avoided, the text should read ". . . or his return to the country of origin after fulfilment of his functions".

36. Mr. AL-BAHARNA said that he, too, thought that subparagraph (*a*) needed clarification. According to article 12, the courier could be recalled, and that meant that he might return to the country of origin without completing his mission.

37. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he understood the second part of subparagraph (*a*) to refer to the case of the courier who came to a country in order to pick up a diplomatic bag and take it back to his country of origin. Subparagraph (*a*) thus covered two distinct situations.

38. Mr. YANKOV (Special Rapporteur) said that very few States employed a diplomatic courier who travelled without a diplomatic bag; the competent authorities knew how to organize itineraries in the most economical way. It was, however, conceivable that a courier might deliver a bag in Bern, for example, pick up another and deliver it in Geneva and then leave Switzerland without a bag to travel via France to Rome in order to pick up another bag. That was the sort of situation covered by subparagraph (*a*): the courier remained protected even if he was travelling without a bag.

39. Mr. REUTER noted that the Special Rapporteur's reply related to the courier's status rather than to his functions as such. He was nevertheless prepared to accept the new subparagraph (*a*) on condition that the commentary made it clear that the provision applied both to situations such as those covered by article 12 and to other circumstances, such as cases of *force majeure* in which the courier returned to the country of origin without having been able to deliver the bag he was carrying.

40. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 11 as proposed by the Drafting Committee.

Article 11 was adopted.

ARTICLE 12 (The diplomatic courier declared *persona non grata* or not acceptable)

41. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 12, which read:

Article 12. The diplomatic courier declared* persona non grata *or not acceptable.

1. The receiving State may, at any time and without having to explain its decision, notify the sending State that the diplomatic courier is *persona non grata* or not acceptable. In any such case, the sending State shall, as appropriate, either recall the diplomatic courier or terminate his functions to be performed in the receiving State. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.

2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1, the receiving State may cease to recognize the person concerned as a diplomatic courier.

42. The Drafting Committee had replaced the words "refuse to recognize", in paragraph 2, by "cease to recognize". The intention was to make the situation clearer: the receiving State notified the sending State that the courier was *persona non grata*; the sending State was then under obligation to recall the courier or to terminate his functions. It was only after the sending State had failed to comply with that obligation that the receiving State could deny recognition to the courier. That was the temporal element which the amendment was designed to bring out.

43. In addition, the Drafting Committee had deleted the words "of this article", which had appeared after the words "paragraph 1" in paragraph 2. The same solution had been adopted throughout the draft; wherever reference was made to another paragraph, it should be understood, unless otherwise indicated, that the paragraph in question was in the same article.

44. Mr. YANKOV (Special Rapporteur), replying to a question by Mr. AL-BAHARNA, explained that, as paragraph 1 of article 12 stated, the diplomatic courier could be declared *persona non grata* or not acceptable. In State practice and throughout the codification conventions, the expression "*persona non grata*" was used with reference to persons holding a diplomatic rank and the expression "not acceptable" was used in the case of technical and administrative staff.

45. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 12.

Article 12 was adopted.

[6] See *Yearbook . . . 1982*, vol. II (Part Two), p. 119, footnote 328.

ARTICLE 13 (Facilities accorded to the diplomatic courier)

46. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 13, which read:

Article 13. Facilities accorded to the diplomatic courier

1. The receiving State or the transit State shall accord to the diplomatic courier the facilities necessary for the performance of his functions.

2. The receiving State or the transit State shall, upon request and to the extent practicable, assist the diplomatic courier in obtaining temporary accommodation and in establishing contact through the telecommunications network with the sending State and its missions, consular posts or delegations, wherever situated.

47. The Drafting Committee had made no change in the text adopted on first reading, except for the deletion of the words "as the case may be" in both paragraphs.

48. Mr. TOMUSCHAT said that he found it difficult to see how the obligation to accord the same facilities could be imposed on the receiving State and the transit State. Whereas the obligations of the receiving State derived from the existence of diplomatic or consular relations between the two countries, it was hard to see the legal basis for the obligations imposed on the transit State, which might be a State with which neither of the two others had any relations. He therefore wished to enter a reservation on that point.

49. Mr. YANKOV (Special Rapporteur) took note of the reservation, adding that the obligations of the transit State derived not only from solidarity and the duty to co-operate, but also from provisions of the 1961 Vienna Convention on Diplomatic Relations, which were reproduced in the other conventions and stated that members of the technical staff of diplomatic and consular missions enjoyed certain facilities even when in transit.

50. Mr. KOROMA, supported by Mr. FRANCIS and Mr. NJENGA, said that he had doubts about the use of the definite article in the expression "the telecommunications network", in paragraph 2.

51. Mr. YANKOV (Special Rapporteur) noted that the question did not arise in connection with either the French or the Russian texts.

52. Mr. BENNOUNA, speaking on a point of order, said that the Commission was not supposed to be discussing linguistic details in plenary; if it were, it would also have to refer, for example, to the Arabic text. He therefore proposed that only such drafting problems as had a bearing on substance should be considered.

53. Mr. TOMUSCHAT, referring to article 40, paragraph 3, of the 1961 Vienna Convention, noted that third States were required to accord privileges to diplomatic couriers to whom they had granted a visa; that suggested that there were some kind of bilateral relations between the transit State and the sending State. In the article under consideration, the transit State was not in the same situation.

54. Mr. YANKOV (Special Rapporteur) said that article 40, paragraph 4, of the 1961 Vienna Convention referred to the obligations of third States in specific cases of *force majeure*. Other situations were regarded as being covered by the general rule. In any event, State practice clearly showed that, even where a transit visa was not required, the State concerned granted facilities—at its airports, for example—to diplomatic agents in transit.

55. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 13.

Article 13 was adopted.

ARTICLE 14 (Entry into the territory of the receiving State or the transit State)

56. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 14, which read:

Article 14. Entry into the territory of the receiving State or the transit State

1. The receiving State or the transit State shall permit the diplomatic courier to enter its territory in the performance of his functions.

2. Visas, where required, shall be granted by the receiving State or the transit State to the diplomatic courier as promptly as possible.

57. He drew attention to the deletion of the words "as the case may be" in paragraph 1.

58. Mr. McCAFFREY, recalling his comments in connection with article 10 (paras. 23 and 25 above), said that it would be most helpful if the Special Rapporteur could include in the commentary a clear explanation of the scope of paragraph 1 of article 14, which manifestly implied that the obligation of the receiving State or the transit State was connected with the performance of the courier's functions. If the courier came to the receiving State or the transit State without a bag because he had to collect one *en route*, the receiving State or the transit State would be required to permit him to enter its territory. It was therefore necessary to specify that the functions of the courier included the relatively common one of going to pick up a bag at a particular place.

59. Mr. AL-BAHARNA, supported by Mr. KOROMA, suggested that the words "in the performance of his functions", in paragraph 1, be replaced by "in the course of the performance of his functions".

60. Mr. McCAFFREY said that that expression appeared in several articles of the draft and that, if the Commission accepted the amendment, it would also have to change those other articles. He wondered whether that was really the plenary Commission's role.

61. Mr. YANKOV (Special Rapporteur) said that the point of Mr. Al-Baharna's proposal was not clear. In discussing the privileges and immunities of technical staff during its preparatory work on the 1961 Vienna Convention on Diplomatic Relations, the Commission had considered whether it should use the expression "during the performance", and the same question had been raised at the diplomatic conference. The suggestion had not been accepted, since it had been thought that the functional approach should be as strict as possible. Article 14 was basically modelled on article 79 of the 1975 Vienna Convention on the Representation of States, which did not include the words in question. However, they were to be found in other conventions, such as the 1963 Vienna Convention on Consular Relations. It was thus clear that what was involved was not the time factor but, rather, the performance of the functions of the courier. If necessary, those explanations could be included in the commentary.

62. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the matter had not been discussed in the Drafting Committee, which would have been the appropriate place to do so, and that he personally saw no need to amend the text.

63. Mr. AL-BAHARNA said that he would be satisfied with an explanation of the matter in the commentary.

64. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 14 as proposed by the Drafting Committee.

Article 14 was adopted.

Mr. Graefrath took the Chair.

ARTICLE 15 (Freedom of movement)

65. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 15, which read:

Article 15. Freedom of movement

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State or the transit State shall ensure to the diplomatic courier such freedom of movement and travel in its territory as is necessary for the performance of his functions.

66. The text of article 15 remained unchanged, except for the deletion of the words "as the case may be". Some doubts had been expressed in the Drafting Committee about the words "shall ensure", which had been viewed as imposing too heavy a burden on the receiving State or the transit State. The Drafting Committee had, however, noted that the article dealt not with the actual travel arrangements of the diplomatic courier, but with the principle of freedom of movement, and that the scope of the obligation placed on the receiving State or the transit State was limited by the opening proviso, "Subject to its laws . . .", as well as by the words "as is necessary for the performance of his functions". It had therefore decided to leave the text unchanged. The Spanish verb *garantizar* was not, however, an adequate equivalent of the term "ensure" and the Spanish text had been amended accordingly.

67. Mr. THIAM suggested that the words "as is necessary for the performance of his functions", which gave the impression that the diplomatic courier did not enjoy freedom of movement and travel for anything but his functions, should be deleted.

68. Mr. YANKOV (Special Rapporteur) said that the main objective of article 15 was to emphasize the functional approach with regard to the entry and freedom of movement of the courier. Naturally, the article should not be interpreted so restrictively as to prevent the courier from living a normal life. The obligation of the receiving State or the transit State was to accord the diplomatic courier the right to enter its territory and to travel in connection with the exercise of his functions, not as part of his leisure activities. The best thing might be not to alter the text of the article and to explain in the commentary how the provision was to be interpreted. Deleting the words in question would mean renouncing the functional approach followed in the entire set of draft articles, which emphasized the fact that, whenever an obligation was imposed on the receiving State or the transit State, it was confined exclusively to the courier's performance of his functions.

69. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), speaking as a member of the Commission, said that he would favour providing the relevant explanation in the commentary. According to article 15, the receiving State or the transit State must grant the diplomatic courier the freedom of movement and travel necessary for the performance of his functions because it was when he was performing his functions that the courier should enjoy more favourable treatment than other individuals. The freedom of movement and travel generally accorded to other persons would naturally be given to him as well. In other words, if the courier experienced difficulties in reaching a city where the consulate of the State of which he was a national was located, he could request assistance from the receiving State. If he wished to take a trip to the mountains at the weekend, however, he would be treated as a tourist.

70. The CHAIRMAN suggested that the words "such freedom of movement and travel in its territory as is necessary for the performance of his functions" might be replaced by "the freedom of movement and travel necessary for the performance of his functions in its territory".

71. Mr. THIAM said that he could accept the original text as long as the Special Rapporteur explained in the commentary that the diplomatic courier enjoyed the same freedom of movement and travel as any other visitor to the country.

72. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 15 as proposed by the Drafting Committee, on the understanding that the explanations requested by Mr. Thiam would be given in the commentary.

It was so agreed.

Article 15 was adopted.

ARTICLE 16 (Personal protection and inviolability)

73. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 16, which read:

Article 16. Personal protection and inviolability

The diplomatic courier shall be protected by the receiving State or the transit State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

74. The text adopted by the Commission on first reading had been left unchanged, except for the deletion, as elsewhere, of the words "as the case may be".

75. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 16.

Article 16 was adopted.

ARTICLE 17 (Inviolability of temporary accommodation)

76. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 17, which read:

Article 17. Inviolability of temporary accommodation

1. The temporary accommodation of the diplomatic courier shall, in principle, be inviolable. However:

(*a*) prompt protective action may be taken if required in case of fire or other disaster;

(*b*) inspection or search may be undertaken where serious grounds exist for believing that there are in the temporary accommodation articles the possession, import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or the transit State.

2. In the case referred to in paragraph 1 (*a*), measures necessary for the protection of the diplomatic bag and its inviolability shall be taken.

3. In the case referred to in paragraph 1 (*b*), inspection or search shall be conducted in the presence of the diplomatic courier and on condition that it be effected without infringing the inviolability either of the person of the diplomatic courier or of the diplomatic bag and will not unduly delay or impede the delivery of the diplomatic bag. The diplomatic courier shall be given the opportunity to communicate with his mission in order to invite a member of that mission to be present when the inspection or search takes place.

4. The diplomatic courier shall, to the extent practicable, inform the authorities of the receiving State or the transit State of the location of his temporary accommodation.

77. Article 17 had been the subject of much discussion in the Commission and of many comments by Governments, basically on two points: whether the temporary accommodation of the diplomatic courier should be said to be inviolable and, if so, to what extent; and under what conditions that inviolability could be put aside.

78. On the first point, the Drafting Committee had come to accept the view that the inviolability of the temporary accommodation of the courier was directly linked to better protection of the inviolability of the diplomatic bag. The proposed text should be approached with that in mind. The inviolability of the diplomatic bag might be affected if the receiving State or the transit State were accorded a general right of access to the temporary accommodation of the courier, with the possibility of conducting inspections or searches. That was why the Drafting Committee had considered that, *in principle*, the temporary accommodation of the diplomatic courier should remain inviolable.

79. As to the second point, the Drafting Committee had taken the view that the matter really boiled down to how to maintain a reasonable balance between respect for the inviolability of the temporary accommodation and the need for the receiving State or the transit State to take protective action in emergency situations, such as fires or other disasters, which threatened the temporary accommodation of the diplomatic courier. There might also be situations where there were reasonable grounds to believe that there were prohibited articles in the courier's temporary accommodation and that a search or inspection would be justified. It was with those considerations in mind that the Drafting Committee had rearranged article 17.

80. Paragraphs 1 and 3 of the text adopted on first reading dealt with the principle of inviolability, the exceptions to it and the conditions attaching to those exceptions. The Drafting Committee had thought that it would be more logical to reorganize the ideas expressed in those two paragraphs in the following way: (i) to state the principle of inviolability; (ii) to state the exceptions to that principle; (iii) to state the conditions attaching to the exceptions.

81. Paragraph 1 of the new text enunciated the general rule that the temporary accommodation of the diplomatic courier was inviolable. The words "in principle", however, immediately introduced an element of flexibility, suggesting the exceptions which appeared in subparagraphs (*a*) and (*b*). Subparagraph (*a*) was basically the final part of paragraph 1 of the text adopted on first reading. It provided that inviolability might be disregarded when fire or other disaster required prompt protective action by the receiving State or the transit State. Subparagraph (*b*) was basically the first part of paragraph 3 of the adopted text. It allowed inspection or search by the authorities of the receiving State or the transit State when there were serious grounds for believing that, in the temporary accommodation of the courier, there were articles whose possession, import or export was prohibited by the law of the receiving State or the transit State or controlled by their quarantine regulations.

82. Paragraphs 2 and 3 of the new text set forth the conditions under which the exceptions stated in paragraph 1 (*a*) and (*b*) were allowed.

83. Paragraph 2 was taken from the former paragraph 1 and paragraph 3 from the former paragraph 3. The second sentence of paragraph 3 was new. Since the situation referred to in paragraph 1 (*b*) was not an emergency and did not normally require the same prompt protective action as was required in emergencies, the diplomatic courier should be given an opportunity to contact his mission in order to invite a member of the mission to be present during the inspection or search. In the Drafting Committee's view, it would be useful to have a member of the mission present when, for example, the diplomatic courier did not speak the language of the receiving State or the transit State. It must be noted, however, that the provision did not require that the inspection or search be delayed until a member of the mission arrived. The matter would be decided according to the circumstances and on the basis of common sense. If a member of the mission could arrive quickly, the authorities of the receiving State or the transit State should wait for him before conducting the inspection or search. If a long wait would be necessary, the inspection or search could take place without waiting for his arrival. The commentary would explain why that provision had not been couched in more clear-cut terms.

84. Paragraph 4 reproduced, without change, paragraph 2 of the text adopted on first reading. The application of article 17 was possible only if the receiving State or the transit State knew where the temporary accommodation of a diplomatic courier was located. It was therefore desirable for the courier to inform the authorities of his accommodation's location. That should not, however, be a hard and fast obligation: it would be governed by the circumstances, as indicated by the expression "to the extent practicable".

85. Mr. McCAFFREY said that he could not accept article 17, although he would not object to its adoption. In the first place, it did not require that the diplomatic courier be in possession of the diplomatic bag, which was the object of the protection in question. Secondly, the article imposed too heavy a burden on the receiving State or the transit State and went far beyond the protection necessary for the diplomatic courier to perform his functions.

86. Mr. OGISO said he did not think that the question was resolved by the codification conventions. He could therefore not support article 17 and, in particular, paragraph 1 and its opening sentence, and thus reserved his position.

87. Mr. TOMUSCHAT said that he was also unable to accept article 17 because it imposed too heavy a burden on the States concerned, and particularly on the transit State, which was not supposed to know that a diplomatic bag

was to be found in the temporary accommodation of the diplomatic courier. The article was, moreover, unnecessary, since article 16 would be more than enough. The inclusion of article 17 in the draft could only hinder acceptance of the future instrument. Nevertheless, he would not oppose the adoption of the article if the majority of the members of the Commission considered it necessary in order to protect the diplomatic courier.

88. Mr. HAYES said that he found article 17 both unnecessary and difficult to apply in practice, but he would not oppose its adoption.

89. Mr. KOROMA said that, although he would not oppose article 17, he thought that, in view of the comments made by Mr. McCaffrey and Mr. Tomuschat, the Commission should perhaps review it in order to specify that its purpose was to protect the diplomatic bag.

90. Mr. BEESLEY said that he had strong reservations about article 17: it was an exception—albeit non-intentional—to the generally practical and functional approach of the other draft articles; there was no precedent for it and it might be dangerous to establish one; it imposed too heavy a burden, and an unnecessary one, on the receiving State or the transit State; it was not needed, because it had nothing to do with the performance of the functions of the diplomatic courier and might even be an obstacle to the acceptance of the future instrument; it would involve many practical problems as regards the application of the draft articles; and it appeared to refer to the protection of the diplomatic courier—paradoxically, even if he was not accompanied by a diplomatic bag—rather than to that of the diplomatic bag itself.

91. Mr. ROUCOUNAS said that he also had reservations about article 17, which, in his view, was superfluous, particularly since it was rather long. The draft contained articles of fundamental importance, such as articles 15 and 16, which, in a few words, fully guaranteed the protection of the diplomatic courier. Article 17, however, with all its subdivisions, exceptions, cross-references to exceptions and explanations, showed how difficult it was to provide for situations that went far beyond what a well-balanced draft could cover. Nevertheless, he would not oppose the adoption of the article.

92. Mr. AL-BAHARNA said that, in view of the strong objections which had been raised, it might be wiser to take some time for reflection. He reserved his position.

93. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), speaking as a member of the Commission, pointed out that the reservations which had been expressed were not new and that, on first reading, the majority of the members of the Commission had stated that they were in favour of an article on the inviolability of temporary accommodation. The article was too long precisely because the Drafting Committee and the Special Rapporteur had tried to draft a flexible provision allowing not for the total inviolability of the temporary accommodation of the diplomatic courier, but only for the necessary inviolability. That was why the article contained so many conditions and so many exceptions. The fact that Governments might or might not accept the future instrument did not justify the deletion of article 17. Governments would have an opportunity to state their position at the diplomatic conference or in the Sixth Committee of the General Assembly. In his view, the Commission should retain the articles which had attracted majority support and he believed that that was the case of article 17.

94. Mr. AL-KHASAWNEH said that he endorsed the comments made by Mr. Calero Rodrigues.

95. Mr. KOROMA said that he also believed the Commission should allow itself some time for reflection and come back to article 17 a little later.

96. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he could agree to that suggestion, but would like to know the Special Rapporteur's opinion.

97. Mr. YANKOV (Special Rapporteur) said that he had no solution to propose at the present stage to take account of the reservations expressed during what had been a lengthy discussion. On the basis of his research, he had not expected article 17 to give rise to objections. In actual fact, the article was only a matter of the good will and common sense of the parties concerned, in the interests of official communications.

98. The CHAIRMAN said that it might be possible to explain in the commentary that article 17 dealt with the diplomatic courier accompanied by a diplomatic bag, although that point seemed to be clear from paragraphs 2 and 3.

99. Mr. KOROMA suggested, along the same lines, that the beginning of paragraph 1 should be amended to read: "The temporary accommodation of the diplomatic courier accompanied by a diplomatic bag shall . . .".

100. Mr. BARBOZA said that now was not the time to reopen the debate on an article which, like the other articles, reflected at least the majority view, if not a consensus. In any event, the different positions would be reflected in the summary record of the meeting.

101. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, although Mr. Koroma's idea was an interesting one, it would be difficult to find wording to express it: who could be sure that a diplomatic bag was in the temporary accommodation of the diplomatic courier? The Special Rapporteur might nevertheless consider the question.

102. The CHAIRMAN requested the Special Rapporteur to study Mr. Koroma's suggestion and inform the Commission of his conclusions at the next meeting.

103. Mr. EIRIKSSON said he hoped that, at the same time, the Special Rapporteur would take another look at the English text of paragraph 3, which was grammatically unsound.

Mr. Sreenivasa Rao, First Vice-Chairman, took the Chair.

Closure of the International Law Seminar

104. Mr. MARTENSON (Director-General of the United Nations Office at Geneva) said that, at the twenty-fifth session of the International Law Seminar, students, young professors specializing in international law and jurists at the start of their careers and dealing with questions of international law had had an opportunity to broaden their

knowledge, follow the Commission's work and familiarize themselves with questions relating to the codification and progressive development of a discipline that was in the throes of change. The Seminar had also provided an opportunity for a constructive confrontation of viewpoints by jurists from different legal and political systems on the topics with which the Commission was dealing. The participants had been able to discover the extraordinary vastness of a discipline which, in a few decades, had become an essential branch of the law. International law, which had for a long time governed only inter-State relations in matters of foreign policy, was now becoming concerned with the many economic, technical, cultural or even humanitarian aspects of human endeavour.

105. One important aspect of such endeavour was the promotion and protection of human rights. In that field, the United Nations had adopted a triangular approach. It had almost completed the legislative phase: the legal infrastructure was now in place (although there was still a great deal to be done in sectors such as development and migrant workers) and it went from the Universal Declaration of Human Rights to the International Covenants to a whole range of instruments, the next of which should be the convention on the rights of the child. The United Nations now had to give priority to the implementation of those instruments, which had to become a reality for everyone. It could not rush 159 sovereign States, but it had given new life to the concept of advisory services and technical assistance and it was helping Member States to build the necessary national infrastructure for the promotion and protection of human rights. In co-operation with the regional organizations, it was engaged in the human rights training of law-enforcement officials, the translation of the relevant international instruments into local languages, the adaptation of domestic legislation and the organization of courses and seminars. Those efforts had been made possible by the generous contributions of Member States to a trust fund. In addition to the legal infrastructure and the implementation of instruments, there had to be a campaign to keep public opinion informed—and that was the third aspect of the activities being carried on by the United Nations. Individuals had to be informed of their rights and of the obligations of the State towards them and learn that they could rely on the United Nations for assistance.

106. In conclusion, he said that the Centre for Human Rights was at the service of any of the participants in the Seminar who might wish to contact it.

107. Mr. BULA BULA, speaking on behalf of the participants in the International Law Seminar, said that they had welcomed the opportunity of attending the Commission's instructive debates, from which they had learned valuable lessons that would soon benefit their respective countries. The informal meetings had also given them an opportunity to participate unofficially in the discussion of ideas. They would always remember the moot meeting at which future professors and ambassadors had practised, in the presence of members of the Commission, criticizing a genuine work on the codification and development of international law. It was to be hoped that that initiative would take place again in the future. He thanked the Commission for allowing the participants in the Seminar to benefit from its work and the staff of the Legal Liaison Office of the United Nations Office at Geneva for their assistance. He also thanked the Swiss authorities for their country's hospitality.

The Director-General presented the participants with certificates attesting to their participation in the twenty-fifth session of the International Law Seminar.

The meeting rose at 1.05 p.m.

2130th MEETING

Tuesday, 4 July 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/409 and Add.1-5,[1] A/CN.4/417,[2] A/CN.4/420,[3] A/CN.4/L.431, sect. E, A/CN.4/L.432, ILC(XLI)/Conf.Room Doc.1)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE ON SECOND READING[4] (*continued*)

ARTICLE 17 (Inviolability of temporary accommodation)[5] (*concluded*)

1. The CHAIRMAN invited the Special Rapporteur to report on the results of the consultations held to find a generally acceptable formula for article 17.

2. Mr. YANKOV (Special Rapporteur) said that it was proposed to make certain changes in paragraph 1 in order to take account of the observations made by several members, including Mr. McCaffrey and Mr. Al-Baharna (2129th meeting), who had pointed out that the inviolability of the temporary accommodation of a diplomatic courier was not confined to his person but related principally to

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[1] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[2] *Ibid.*

[3] Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

[4] The draft articles provisionally adopted by the Commission on first reading are reproduced in *Yearbook . . . 1986*, vol. II (Part Two), pp. 24 *et seq.* For the commentaries, *ibid.*, p. 24, footnote 72.

[5] For the text, see 2129th meeting, para. 76.

the bag he was carrying. It was not the person of the courier, but rather his function that was at stake, and his main function was to carry and deliver the diplomatic bag.

3. For those reasons, he now proposed the insertion in paragraph 1, after the words "temporary accommodation of the diplomatic courier", of the additional phrase "carrying a diplomatic bag". The words that followed, "shall, in principle", would be amended to read: "should, in principle", thereby bringing article 17 into line with article 9, paragraph 1, where the same formula had been used.

4. In the first sentence of paragraph 3, a minor drafting change was proposed by altering the words "be effected" to "is effected".

5. Mr. McCAFFREY said that he welcomed the proposed addition to paragraph 1, which was helpful and largely removed his main objection to article 17. In the text proposed initially, the article had focused on the courier and appeared to ignore the bag. Equally, he welcomed the proposed change from "shall" to "should", which made the obligation set forth in the article more flexible. He still believed that article 17 was not really necessary, but he would not oppose it in the form now proposed. Lastly, as a matter of grammar, he preferred the expression "be effected" to "is effected" in paragraph 3.

6. Mr. AL-BAHARNA said that he, too, welcomed the changes proposed for paragraph 1, which made article 17 quite acceptable.

7. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he had a strong preference for the formula "shall, in principle", which the Drafting Committee had adopted after considerable discussion. The words "in principle" made for the necessary flexibility and "shall, in principle" was virtually equivalent to "should". The attempt to combine "should" with "in principle" would introduce an undesirable additional element of flexibility.

8. The CHAIRMAN pointed out that, if the formula "shall, in principle" were retained in article 17, the Commission would have to go back on its decision to use the words "should in principle" in article 9.

9. Mr. FRANCIS said that there was no real parallelism between the use of the expression "should in principle" in article 9 and the proposal for paragraph 1 of article 17. Article 9 dealt with the nationality of the diplomatic courier, and the purpose of the statement in paragraph 1 that the courier "should in principle" be a national of the sending State was to afford the sending State more freedom in the matter. Article 17 dealt with the inviolability of the diplomatic bag in the hands of the courier, for which purpose the courier's temporary accommodation must be inviolable. The relevant rule therefore constituted an absolute norm. Like all rules, it had certain exceptions, which were preceded by the word "However". The existence of the exceptions set forth in paragraph 1 (*a*) and (*b*) did not affect the basic inviolability of the courier's accommodation, his person and the bag. For those reasons, he would strongly urge that the formula "shall, in principle" be retained.

10. Mr. REUTER said that he deplored the tendency—one which had been increasing since the 1982 United Nations Convention on the Law of the Sea—to use the conditional in drafting international conventions. The practice should be discouraged.

11. Mr. BENNOUNA said that he agreed with Mr. Reuter. He was in favour of using the expression *doit en principe* ("shall, in principle"). A formula such as *devrait en principe* ("should, in principle") was unacceptable, for it was far too weak.

12. Mr. YANKOV (Special Rapporteur) pointed out that use of the formula "should, in principle" went back much further than 1982. It was to be found, for example, in article 22 of the 1963 Vienna Convention on Consular Relations. Actually, his own preference was for "shall" rather than "should" in both article 9 and article 17, but the same form of language had to be used in both articles for the sake of consistency.

13. Mr. AL-BAHARNA said he agreed that the same formulation should be used in both articles in the interests of consistency. His own preference was for the word "should".

14. Mr. McCAFFREY said that he would have preferred the word "shall" in article 9, but very great flexibility was necessary for article 17, in view of the comments made by Governments. Choosing between "shall" and "should" was not a drafting matter: it was a point of substance. Furthermore, the words "in principle" made for even greater flexibility and must be retained.

15. Mr. BENNOUNA said he concurred that the discussion was one of substance and not of drafting. The use of the words "in principle" stressed the fact that inviolability was the principle and that the exceptions were those set forth in paragraph 1 (*a*) and (*b*) after the word "However". In that way, it was clear that the cases mentioned were the only exceptions. In all other cases, the principle of inviolability prevailed. If the mandatory "shall" were replaced by the conditional "should", article 17 would not be stating a legal rule at all.

16. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) stressed the difference in the treatment of articles 9 and 17 by the Drafting Committee. For article 9, the Committee had decided to retain the language used in the text adopted on first reading, namely the verb form "should". In the case of article 17, the Committee had introduced the words "in principle" and had naturally felt that the word "shall" must therefore be used instead of "should". Accordingly, he could only recommend that the Commission retain the text adopted by the Drafting Committee, with the formula "shall, in principle".

17. Mr. DÍAZ GONZÁLEZ said that he would not enter into the grammatical subtleties of other languages, but he wished to make the position clear as far as the Spanish text was concerned. The words *es inviolable, en principio* set forth a clear legal rule. The present tense *es* had a mandatory effect. To replace it by the conditional *sería* would suggest that there was no rule of inviolability. The only correct course for the Commission was to retain the words *es inviolable, en principio*, which unequivocally set out the principle of inviolability and were followed, of course, by the exceptions in paragraph 1 (*a*) and (*b*).

18. Mr. MAHIOU said that he shared the views of Mr. Díaz González and Mr. Bennouna. The correct term to use was *doit* ("shall").

19. Mr. ARANGIO-RUIZ said that the words "in principle" provided sufficient flexibility. There was no need to introduce still more by using the word "should". Like other members, he preferred the word "shall".

20. Mr. FRANCIS said he wished to stress that article 9 was intended to give the sending State considerable flexibility in appointing a diplomatic courier; hence the rule set forth in that article was necessarily weak. The position with regard to article 17 was completely different, since the article established the basic rule of inviolability, which had to be expressed in strong terms.

21. Moreover, paragraph 2 of article 17 stated that "measures necessary for the protection of the diplomatic bag and its inviolability shall be taken" in the event of fire or other disaster when prompt protective action could be taken under paragraph 1 (*a*). If the rule in the opening sentence of paragraph 1 were to be weakened by using the words "should, in principle", there would be no need for the provision in paragraph 2.

22. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) explained that there was a difference between the two changes now proposed by the Special Rapporteur to paragraph 1. The first change, namely the introduction of the words "carrying a diplomatic bag" had not been discussed in the Drafting Committee; it had been proposed in the Commission by Mr. Koroma (2129th meeting, para. 99). Personally, he had supported it as a good idea. The other change, namely the replacement of the word "shall" by "should", had been discussed at length in the Drafting Committee and he had strongly opposed it for the reasons already given.

23. Further to a brief discussion on the proposal to replace the words "be effected" by "is effected" in paragraph 3, in which Mr. TOMUSCHAT, Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) and Mr. PAWLAK took part, Mr. HAYES pointed out that, if the correct grammatical form "be effected" were retained, the words "and will not unduly delay", in the same sentence, would have to be amended to read: "and would not unduly delay".

24. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 17 on the understanding, first, that the words "carrying a diplomatic bag" would be inserted after "the diplomatic courier" in the first sentence of paragraph 1, and would be followed by the existing wording: "shall, in principle, be inviolable"; and secondly, that, in paragraph 3, the words "be effected" would be retained and the phrase "will not unduly delay" would be amended to read: "would not unduly delay".

It was so agreed.

Article 17 was adopted.

ARTICLE 18 (Immunity from jurisdiction)

25. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 18, which read:

Article 18. Immunity from jurisdiction

1. The diplomatic courier shall enjoy immunity from the criminal jurisdiction of the receiving State or the transit State in respect of acts performed in the exercise of his functions.

2. He shall also enjoy immunity from the civil and administrative jurisdiction of the receiving State or the transit State in respect of acts performed in the exercise of his functions. This immunity shall not extend to an action for damages arising from an accident involving a vehicle the use of which may have entailed the liability of the courier to the extent that those damages are not recoverable from insurance. Pursuant to the laws and regulations of the receiving State or the transit State, the courier shall, when driving a motor vehicle, be required to have insurance coverage against third-party risks.

3. No measures of execution may be taken in respect of the diplomatic courier, except in cases where he does not enjoy immunity under paragraph 2 and provided that the measures concerned can be taken without infringing the inviolability of his person, his temporary accommodation or the diplomatic bag entrusted to him.

4. The diplomatic courier is not obliged to give evidence as a witness on matters connected with the exercise of his functions. He may, however, be required to give evidence on other matters, provided that this would not unduly delay or impede the delivery of the diplomatic bag.

5. The immunity of the diplomatic courier from the jurisdiction of the receiving State or the transit State does not exempt him from the jurisdiction of the sending State.

26. In dealing with article 18, the Drafting Committee had borne in mind that the text adopted on first reading represented a compromise based on a functional approach leading to qualified immunity from jurisdiction. In order to avoid upsetting the delicate balance achieved in the text, it had kept changes to a minimum. The only substantive modification consisted in adding at the end of paragraph 2 a new sentence, proposed by the Special Rapporteur on the basis of the written comments of a Government, reading: "Pursuant to the laws and regulations of the receiving State or the transit State, the courier shall, when driving a motor vehicle, be required to have insurance coverage against third-party risks."

27. As to drafting changes, the first two applied to both paragraphs 1 and 2 and consisted in the elimination of the phrase "as the case may be" and the deletion of the word "all" before "acts", which the Drafting Committee considered redundant. The Committee had taken the view that the words "caused by", in the second sentence of paragraph 2, were inappropriate inasmuch as the cause of an accident could not be determined *a priori*. They had therefore been replaced by "involving". As a result, and to avoid repetition, the words "may have entailed" had been substituted for "may have involved". The word "where" before the words "those damages", at the end of paragraph 2, had been replaced by the words "to the extent that", bearing in mind the fact that the damages might be partly recoverable from insurance.

28. The Drafting Committee had deleted the words "of this article" in paragraph 3 and, for purely grammatical reasons, had inserted the word "his" before "temporary accommodation".

29. The words "in cases involving", in paragraph 4, had been replaced by "on matters connected with", a phrase which the Drafting Committee found to be more precise and which was borrowed from article 44, paragraph 3, of the 1963 Vienna Convention on Consular Relations. A consequential change had been made in the second sentence of paragraph 4. The word "however" had been introduced after the words "He may", in that sentence, in order to emphasize that the field of application of the first and second sentences and the approach reflected therein were different. Finally, the phrase "cause unreasonable delays

or impediments to" had been replaced by "unduly delay or impede", which seemed simpler and stylistically more elegant.

30. Mr. AL-BAHARNA suggested that, in view of the change which had been made in article 17 and which made inviolability conditional on the courier carrying the bag, a proviso should be inserted in paragraph 3 of article 18 whereby the provisions of that paragraph were subject to those of article 17.

31. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that it was not necessary to introduce such a proviso; paragraph 3 was subject to all of the articles of the draft.

32. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 18 as proposed by the Drafting Committee.

Article 18 was adopted.

ARTICLE 19 (Exemption from customs duties, dues and taxes) *and*

ARTICLE 20 (Exemption from examination and inspection)

33. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the texts proposed by the Drafting Committee for articles 19 and 20, which read:

Article 19. Exemption from customs duties, dues and taxes

1. The receiving State or the transit State shall, in accordance with such laws and regulations as it may adopt, permit entry of articles for the personal use of the diplomatic courier carried in his personal baggage and grant exemption from all customs duties, taxes and related charges on such articles other than charges levied for specific services rendered.

2. The diplomatic courier shall, in the performance of his functions, be exempt in the receiving State or the transit State from all dues and taxes, national, regional or municipal, except for indirect taxes of a kind which are normally incorporated in the price of goods or services and charges levied for specific services rendered.

Article 20. Exemption from examination and inspection

1. The diplomatic courier shall be exempt from personal examination.

2. The personal baggage of the diplomatic courier shall be exempt from inspection, unless there are serious grounds for believing that it contains articles not for the personal use of the diplomatic courier or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or the transit State. Such inspection shall be conducted in the presence of the diplomatic courier.

34. He wished to introduce the two articles together because their positions had been reversed since the first reading and also because a paragraph of the former article 19 had been transferred to the former article 20. He asked for the Commission's indulgence for the very detailed introduction he was about to make: the summary record of the present meeting would be the only place where an extensive explanation of the changes could be found.

35. Members would recall that article 19 as adopted on first reading had dealt with three issues: exemption from personal examination of the courier; customs duties; and inspection of the courier's personal baggage. Article 20 had dealt only with exemption from dues and taxes for which the courier might be liable during his stay in the receiving State or the transit State. In terms of structure, it would be recalled that, at the previous session, the Special Rapporteur had recommended deleting paragraph 1 of the former article 19, concerning personal examination of the courier, or moving it to article 16, on personal protection and inviolability, and had suggested that the remaining paragraphs of articles 19 and 20 be combined in a single article. However, the Drafting Committee had decided to retain the paragraph on personal examination of the courier and, in view of that decision, had deemed it advisable to separate the provisions on personal examination of the courier and inspection of baggage from those on fiscal matters (customs duties, dues and taxes). As a result, paragraph 2 of the former article 19, on customs duties, had become paragraph 1 of the former article 20, on dues and taxes. Since exemption from customs duties, dues and taxes was more closely related to immunity, which was the subject of article 18, the Drafting Committee had decided to move article 20 closer to article 18. Hence the former article 20 was now article 19 and the former article 19 was now article 20.

36. As to substance, the Drafting Committee had made two drafting changes in paragraph 1 of the current article 19 (paragraph 2 of the former article 19). One was the deletion of the phrase "as the case may be" and the other was the replacement of the word "imported" by "carried", which was thought to be more appropriate in the context of items in the courier's personal baggage.

37. Paragraph 2 of article 19 (formerly the sole paragraph of article 20) had not given rise to many comments in the Drafting Committee. Although the courier's stay in the receiving or transit State was usually very short and it was unlikely that he would be subject to taxation, the Committee had considered it advisable to retain the paragraph so as to cover all eventualities. Once again, few drafting changes had been made: the phrase "as the case may be" had been deleted, as had the phrase "for which he might otherwise be liable", which the Committee had thought to be superfluous. The title of the new article 19 had been changed to "Exemption from customs duties, dues and taxes", which described the content of the article more accurately.

38. Paragraph 2 of the current article 20, which was, of course, paragraph 3 of the former article 19, had not attracted much comment: the only drafting change was the deletion of the phrase "as the case may be". As for paragraph 1, opinion in the Drafting Committee had been divided as to whether there should be any provision explicitly dealing with exemption from personal examination of the courier. The difference of opinion had not pertained to the principle involved: all members of the Committee had seemed to agree that the diplomatic courier should be exempt from personal examination. However, some members had taken the view that the provision contained in paragraph 1 was unnecessary because the inviolability of the courier affirmed in article 16 implied exemption from personal examination. After extensive debate, the view had prevailed that, even if the provision was not strictly necessary, it might be useful to underline that aspect of inviolability, which certainly had very practical significance, in article 20.

39. Mr. TOMUSCHAT said that, in his view, article 19 was superfluous and should not be adopted. The diplomatic courier normally stayed only a very short time in the territory of the State to which he was carrying a bag. The provision would create enormous administrative difficulties,

which were no doubt justified in the case of resident diplomats but not in that of persons entering a country for a very short stay.

40. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that Mr. Tomuschat's objection might apply to paragraph 2 of article 19 but it certainly did not apply to paragraph 1, where the fact of entry into the territory of the receiving State or the transit State, rather than the duration of the stay, was the point at issue. The courier might well be subject to customs duties, dues and taxes on items he imported for his personal use.

41. Mr. EIRIKSSON said that he had no objection to the substance of article 20 but thought that the final sentence of the English text should be brought more closely into line with the French and Spanish.

42. The amendment made to article 8, on the documentation of the diplomatic courier (see 2128th meeting, paras. 92-99), did not improve its clarity in English, and the Commission might wish to consider revising it.

43. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt articles 19 and 20, on the understanding that the final sentence of the English text of article 20 would be brought more closely into line with the French and Spanish.

It was so agreed.

Articles 19 and 20 were adopted.

ARTICLE 21 (Beginning and end of privileges and immunities)

44. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 21, which read:

Article 21. Beginning and end of privileges and immunities

1. The diplomatic courier shall enjoy privileges and immunities from the moment he enters the territory of the receiving State or the transit State in order to perform his functions, or, if he is already in the territory of the receiving State, from the moment he begins to exercise his functions.

2. The privileges and immunities of the diplomatic courier shall cease at the moment when he leaves the territory of the receiving State or the transit State, or on the expiry of a reasonable period in which to do so. However, the privileges and immunities of the diplomatic courier *ad hoc* who is a resident of the receiving State shall cease at the moment when he has delivered to the consignee the diplomatic bag in his charge.

3. Notwithstanding paragraph 2, immunity shall continue to subsist with respect to acts performed by the diplomatic courier in the exercise of his functions.

45. Article 21 dealt with the beginning and the end of the diplomatic courier's privileges and immunities and, in order to bring out those two aspects more clearly, the Drafting Committee had modified the title. With the same purpose in mind, it had decided to deal with the two aspects in separate paragraphs.

46. Paragraph 1 corresponded to the first sentence of paragraph 1 of the text adopted on first reading, except, once again, for the deletion of the words "as the case may be". Paragraph 2, on the end of the courier's privileges and immunities, opened with what had been the second sentence of the former paragraph 1, incorporating a few minor editing changes required by the transfer of that sentence to a new position at the beginning of a paragraph. A more substantial modification lay in the addition of the words "or on the expiry of a reasonable period in which to do so" at the end of the sentence. The former text had stated, as a general rule, that the privileges and immunities of a courier "normally" ceased when he left the territory of the receiving or transit State. An exception to the rule, set out in the former paragraph 2, was that, when the courier was declared *persona non grata* or not acceptable, his privileges and immunities ceased when he left the territory or on the expiry of a reasonable period in which to do so. The Drafting Committee had taken the view that the same principle should be applied to all couriers; there was no reason for any courier to continue to enjoy privileges and immunities if he remained in the territory of the receiving or transit State for a long period after the completion of his functions. In such a case, the receiving or transit State should be entitled to give the courier a reasonable period in which to depart, and to cease to accord him privileges and immunities on the expiry of that period. As a result of adding the words "or on the expiry of a reasonable period in which to do so" at the end of the first sentence of paragraph 2, the former paragraph 2 had become pointless and had therefore been deleted.

47. The second sentence of paragraph 2 corresponded to the last sentence of the former paragraph 1 and provided for a second exception to the rule that privileges and immunities ceased at the moment of the courier's departure from the territory of the receiving State. The provision adopted on first reading had established that the privileges and immunities of a courier *ad hoc* ceased at the moment he had delivered the bag to its consignee, the intention being not to discriminate against the courier *ad hoc* but to cover the case of a courier who, being a resident of the receiving State, should not continue to enjoy privileges and immunities after he had delivered the bag. In order to make that point clear, the text now spoke of the courier *ad hoc* "who is a resident of the receiving State".

48. Paragraph 3 was identical to paragraph 3 of the text adopted on first reading, except that the reference to "the foregoing paragraphs" had been replaced by a reference to "paragraph 2".

49. Mr. BENNOUNA asked why the word "immunity" was used in the singular in paragraph 3, whereas paragraphs 1 and 2 and the title of article 21 spoke of "privileges and immunities" in the plural. Secondly, what was the precise relationship between paragraphs 2 and 3 of the article? Surely, once the courier had left the territory of the receiving State, he could perform no further acts in the exercise of his functions.

50. Mr. MCCAFFREY said that he was not raising an objection to article 21 but merely wished to reiterate a point he had made in connection with articles 10 and 11 with regard to the duration of the courier's functions. While it was, of course, impossible to list every possible eventuality, it would be helpful if the commentary could specify that article 21 covered such situations as, for example, when the courier had delivered a bag but had not collected another bag.

51. Mr. YANKOV (Special Rapporteur) said that article 21 was modelled on the corresponding provisions of the codification conventions, namely article 39 of the 1961 Vienna Convention on Diplomatic Relations, article 53 of the 1963 Vienna Convention on Consular Relations,

article 43 of the 1969 Convention on Special Missions and articles 38 and 68 of the 1975 Vienna Convention on the Representation of States. As to Mr. McCaffrey's point, an explanation concerning the functions of the courier would be incorporated in the commentary along the lines suggested. In response to Mr. Bennouna, he said that paragraph 3 was designed to protect the diplomatic courier in respect of acts performed in the exercise of his functions. The commentary to the article as adopted on first reading dealt with the matter at some length.[6]

52. Mr. KOROMA remarked that the functions of the diplomatic courier, as defined in article 10, included taking custody of the diplomatic bag as well as transporting it and delivering it to the consignee. In his view, paragraph 3 of article 21 should be understood to apply only to the second and third of those functions and not to the first.

53. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 21.

Article 21 was adopted.

ARTICLE 22 (Waiver of immunities)

54. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 22, which read:

Article 22. Waiver of immunities

1. The sending State may waive the immunities of the diplomatic courier.

2. The waiver shall, in all cases, be express and shall be communicated in writing to the receiving State or the transit State.

3. However, the initiation of proceedings by the diplomatic courier shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. The waiver of immunity from jurisdiction in respect of judicial proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment or decision, for which a separate waiver shall be necessary.

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

55. The Drafting Committee had considered at some length whether the scope of article 22 should be limited to immunity from jurisdiction and had reached the conclusion that the decision to proceed to a waiver could extend to immunities other than those relating to jurisdiction; accordingly, it had decided to keep the word "immunities" in the plural. The title and paragraph 1 of the article were unchanged.

56. In paragraph 2, the Drafting Committee had eliminated the words "except as provided in paragraph 3 of this article". In its opinion, the situation envisaged in paragraph 3 was not a situation of waiver *stricto sensu*; indeed, in article 32 of the 1961 Vienna Convention on Diplomatic Relations, the situation in question was not presented as an exception to the rule that the waiver had to be express in all cases. A second change made by the Drafting Committee in paragraph 2 consisted in adding the phrase "to the receiving State or the transit State", which was intended to clarify the text in keeping with article 45, paragraph 2, of the 1963 Vienna Convention on Consular Relations. The other changes made in paragraph 2, all of which were of a minor nature, concerned the English text only: a definite article had been inserted at the beginning of the paragraph and the word "must" had been replaced by "shall" for reasons of consistency.

57. In paragraph 3, the only change consisted in the insertion of the word "However" at the beginning, so as to make it clear that, although the situation referred to in the paragraph was not, in the Drafting Committee's view, a situation of waiver *stricto sensu*, the rule enunciated therein none the less resulted in the receiving or transit State's exercising its jurisdiction without a formal waiver.

58. With regard to paragraph 4, the Drafting Committee had considered that the requirement of a separate waiver for execution should apply not only in respect of civil or administrative proceedings, but also in respect of criminal proceedings. To make the text comprehensive, it had replaced the words "civil or administrative proceedings" by "judicial proceedings", using the expression *procédure juridictionnelle* in the French text. Consequently, the Committee had replaced the word "judgment" by the more general expression "judgment or decision", taking into account the fact that, under certain legal systems, the outcome of legal proceedings, particularly administrative proceedings, was not necessarily designated by the term "judgment".

59. The Drafting Committee had decided to retain paragraph 5 as adopted on first reading. It had agreed that the possibility of the sending State bringing about a settlement—typically, through the payment of compensation—when immunity was not waived would in most cases arise in the context of a civil action, but it had thought that, if such an issue arose in connection with criminal proceedings, resort to the practical method envisaged in paragraph 5 for arriving at a settlement through negotiation should not be excluded. The point would be elaborated on in the commentary. The Committee had agreed that, given the *ex gratia* nature of the solution envisaged in paragraph 5, the word "just" should be replaced by "equitable", which was also the term used in the French text.

60. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 22.

Article 22 was adopted.

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

61. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 23, which read:

Article 23. Status of the captain of a ship or aircraft entrusted with the diplomatic bag

1. The captain of a ship or aircraft in commercial service which is scheduled to arrive at an authorized port of entry may be entrusted with the diplomatic bag.

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

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

[6] See *Yearbook . . . 1985*, vol. II (Part Two), pp. 43-44, paras. (5)-(6) of the commentary.

62. The Drafting Committee had considered a proposal by the Special Rapporteur, based on comments by Governments, to include the words "or an authorized member of the crew" after the word "captain" in paragraphs 1, 2 and 3. While some members had held that such an addition would take account of the practice followed by certain States, the prevailing view in the Drafting Committee had been that the text adopted on first reading did not preclude such practice and had the advantage of attaching responsibility for the bag to an easily identifiable person. The Committee had therefore agreed to retain that text, subject to a minor change consisting in the deletion of the words "of the sending State or of a mission, consular post or delegation of that State" at the end of paragraph 1, which were redundant in view of the scope of the draft articles as defined in article 1.

63. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 23.

Article 23 was adopted.

ARTICLE 24 (Identification of the diplomatic bag)

64. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 24, which read:

PART III

STATUS OF THE DIPLOMATIC BAG

Article 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 not accompanied by a diplomatic courier, shall also bear visible indications of their destination and consignee.

65. Article 24 was the first of the six articles of part III of the draft, on the status of the diplomatic bag. The article was clear and simple and had attracted no comments by Governments. The Drafting Committee had adopted it with only one minor drafting change in paragraph 2, where the words "bear a visible indication" had been replaced by "bear visible indications", thus bringing the text into line with paragraph 1.

66. Mr. McCAFFREY said that he wished to reiterate the comment he had already made in connection with part II of the draft. He believed that the positions of parts II and III should be reversed, since the main point at issue in the draft as a whole was the diplomatic bag, rather than the diplomatic courier.

67. Mr. TOMUSCHAT, recalling the discussion which had taken place on the subject of the definition of the expression "diplomatic bag" in article 3 (see 2128th meeting, paras. 37 *et seq.*), said that, by stipulating that the diplomatic bag had to bear visible external marks of its character, article 24 seemed to imply that, even without such marks, the bag was none the less a diplomatic bag. He therefore welcomed the article, which proved his own view to be correct.

68. Mr. KOROMA said that, since the packages constituting the diplomatic bag were contained inside the bag, it would be necessary to open the bag in order to verify whether the packages bore visible external marks of their character. In his opinion, article 24 failed to convey the meaning intended.

69. Mr. BENNOUNA proposed that paragraph 1 should read: "The diplomatic bag shall bear visible external marks of its character", and that paragraph 2 should read: "The diplomatic bag, if not accompanied by a diplomatic courier, shall also bear visible indications of its destination and consignee."

70. Mr. YANKOV (Special Rapporteur) said that the practical implications of article 24 were fully explained in the commentary to the article as adopted on first reading,[7] as well as in the commentary to the draft articles on diplomatic intercourse and immunities adopted by the Commission in 1958,[8] which had been the basis for the 1961 Vienna Convention on Diplomatic Relations. As to the point raised by Mr. McCaffrey, the present sequence of articles reflected the order adopted in the title of the topic and approved in the relevant General Assembly resolutions. Actually, no legal significance attached to the structure of an instrument; the *sedes materiae* of a treaty was often to be found in the treaty's fourth chapter. What mattered was the legal content, not the order of the chapters.

71. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 24 as proposed by the Drafting Committee.

Article 24 was adopted.

ARTICLE 25 (Contents of the diplomatic bag)

72. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 25, which read:

Article 25. Contents 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.

73. Article 25 had been discussed extensively on first reading. The formulation seemed acceptable to all members, and the Drafting Committee recommended no changes other than to place the word "Content", in the title, in the plural.

74. Mr. AL-BAHARNA said that the wording of paragraph 1, where it was stated that the diplomatic bag "may contain only" official correspondence, was not strong enough. The phrase "shall contain only" would be more appropriate, particularly as the stringency of the term "only" seemed entirely at variance with the permissiveness implied by the word "may".

75. Mr. YANKOV (Special Rapporteur) said that the term "may" was intended to indicate that, whatever the correspondence, documents or articles in the diplomatic bag, they must in all instances be intended exclusively for official use.

76. Mr. MAHIOU pointed out that the formulation had been taken from, *inter alia*, the 1961 Vienna Convention on Diplomatic Relations.

77. Mr. McCAFFREY said that, in contexts such as that of article 25, paragraph 1, the term "may" could be used in contradistinction to "can". The term "can" referred to that which was in fact possible, whereas "may" covered

[7] *Ibid.*, pp. 47-48.

[8] *Yearbook . . . 1958*, vol. II, pp. 89 *et seq.*, document A/3859, chap. III.

that which was permissible. In the present instance, the meaning was that the diplomatic bag was permitted to contain a number of different articles.

78. Mr. BEESLEY confirmed the interpretation of the word "may". In its present usage, it was intended to prevent a personal letter, for example, from being placed in a diplomatic bag and thereby voiding the bag's diplomatic status.

79. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 25 as proposed by the Drafting Committee.

Article 25 was adopted.

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

80. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 26, which read:

Article 26. Transmission of the diplomatic bag by postal service or 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 in such a manner as to ensure the best possible facilities for the dispatch of the bag.

81. Article 26 recognized the fact that, when the diplomatic bag was transmitted by a particular mode of transport, the international or national rules regulating that mode of transport applied to the transmission of the bag. That was particularly the case with the postal service. The question had been extensively discussed in the Commission. At one point the provision had been far more detailed, but the Commission had come to the conclusion that any specific rules set out in the draft articles could not apply without a change in the general rules governing the relevant modes of transport. It had not seemed possible to modify such rules—particularly the rules of UPU—to make the diplomatic bag a special category. The text of article 26 adopted on first reading had therefore been confined to recognition that the transmission of the diplomatic bag by postal service or any mode of transport would be subject to the conditions governing the use of such service or mode of transport, as set out in international and national rules. Many members of the Commission had expressed the opinion, however, that the article should at least give an indication that the diplomatic bag was to receive the best treatment possible under the rules. To that effect, the Special Rapporteur had proposed an additional phrase for inclusion at the end of the article, reading "under the best possible conditions". Accepting that approach, and elaborating on the suggestion of the Special Rapporteur, the Drafting Committee recommended that the words "in such a manner as to ensure the best possible facilities for the dispatch of the bag" be added at the end of article 26.

82. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 26.

Article 26 was adopted.

ARTICLE 27 (Safe and rapid dispatch of the diplomatic bag)

83. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 27, which read:

Article 27. Safe and rapid dispatch of the diplomatic bag

The receiving State or the transit State shall facilitate the safe and rapid dispatch of the diplomatic bag and shall, in particular, ensure that such dispatch is not unduly delayed or impeded by formal or technical requirements.

84. After having considered longer and more detailed proposals, the Commission had on first reading adopted a very short text for article 27, on the assumption that all that was necessary was to set out for the receiving State and the transit State, in general terms, the obligation to "provide the facilities necessary for the safe and rapid transmission or delivery of the diplomatic bag". The Drafting Committee had considered that it should not depart from that line, and had concentrated its efforts on drafting changes that could bring out the purposes of the provision more clearly.

85. The changes proposed were the following: instead of saying that the receiving or transit State should "provide the facilities necessary for", the article should stipulate that such a State should "facilitate" the safe and rapid transmission or delivery of the bag. Since the obligation was of a general nature, the Drafting Committee believed that the term "facilitate" was a better way of expressing it than the formula "providing the necessary facilities", which might be interpreted as imposing an excessive burden on the receiving or transit State. The qualification "safe and rapid" had been retained, but instead of applying to the "transmission or delivery" of the bag, it would refer to the "dispatch" of the bag. The Committee had felt that "dispatch"—one single word—encompassed the complex of steps that took place between the arrival of the bag and its delivery to the consignee in the case of the receiving State, or between its arrival and departure in the case of a transit State.

86. The Drafting Committee had come to the conclusion that, although the criterion of the brevity of the article was to be maintained, it would be useful to refer to at least one of the modalities through which the obligation to facilitate the safe and rapid dispatch of the bag should be implemented. It therefore recommended adding the following phrase: "and shall, in particular, ensure that such dispatch is not unduly delayed or impeded by formal or technical requirements". That addition would make it clear that the general obligation of the receiving or transit State implied a more specific obligation not to apply to the bag formal or technical requirements that might unduly delay or impede its safe and rapid dispatch.

87. The Drafting Committee also recommended a new title for the article—"Safe and rapid dispatch of the diplomatic bag"—which indicated the article's content better than the previous title, "Facilities accorded to the diplomatic bag".

88. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 27.

Article 27 was adopted.

ARTICLE 28 (Protection of the diplomatic bag)

89. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 28, which read:

Article 28. Protection of the diplomatic bag

1. The diplomatic bag shall be inviolable wherever it may be; it shall not be opened or detained and shall be exempt from examination directly or through electronic or other technical devices.

2. Nevertheless, if the competent authorities of the receiving State or the transit State have serious reason to believe that the consular bag contains something other than the correspondence, and documents or articles, referred to in article 25, they may request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.

90. Article 28 had given rise to differing views which had been difficult to reconcile, as was evidenced by the fact that the text adopted on first reading contained several parts in square brackets. In order to facilitate a solution, the Special Rapporteur had, in his eighth report (A/CN.4/417, paras. 244 *et seq.*), proposed three alternatives, based on the written comments and observations of Governments.

91. For paragraph 1, all three alternatives suggested the same solution, namely deletion of the square brackets around words aimed at expressing two concepts: that the diplomatic bag must be inviolable, wherever it might be; and that the bag must be exempt from examination directly or through electronic or other technical devices. In both cases, the opinions of Governments concorded with the views expressed by the majority of the members of the Commission during the discussion of the article on first reading: the bag should be declared inviolable and should not be subject to examination, either directly or through electronic or other technical devices. The Drafting Committee had therefore decided to recommend acceptance of the proposal by the Special Rapporteur to delete the square brackets in paragraph 1.

92. As to paragraph 2, the choice had been more difficult. The 1963 Vienna Convention on Consular Relations contained a provision—article 35, paragraph 3—which allowed the receiving State to request that the bag be opened when it had serious reason to believe that the bag contained something other than the permitted items. If the request was refused, the bag had to be returned to the State of origin. Such a provision did not appear in the other codification conventions. The three alternatives suggested by the Special Rapporteur for paragraph 2 reflected the three existing possibilities. The first possibility was to delete the paragraph, thus eliminating the special treatment applied to the consular bag. That would have the advantage of establishing a uniform régime covering all bags, but it would be a departure—for the consular bag—from the 1963 Vienna Convention. The second possibility was to retain the paragraph, yet limit its application to the consular bag. That would not go against the 1963 Vienna Convention, but the provision would represent a departure from one of the purposes of the present articles, namely the establishment of a uniform régime for all bags. The third possibility was to extend to all bags the treatment now applied to the consular bag. That would maintain a uniformity of régime, but would be a departure from existing conventions, particularly the 1961 Vienna Convention on Diplomatic Relations.

93. In the Drafting Committee, some members had been in favour of the first alternative: doing away with the possibility of requesting the opening and return of a bag. That possibility, they had argued, was contrary to the principle of the inviolability of the bag and in fact authorized the creation of a significant obstacle to the freedom of official communications. Other members had favoured the third alternative: the possibility of requesting, under special circumstances, the opening of any bag and of having it returned if the request was not accepted. They had maintained that the inviolability of the bag would not be affected, because the bag would be opened only if the sending State agreed. Furthermore, it was impossible to ignore complaints of abuse of the diplomatic bag: the 1987 International Conference on Drug Abuse and Illicit Trafficking had specifically drawn the Commission's attention to the possible misuse of the diplomatic bag for the purpose of drug trafficking.[9]

94. The two viewpoints had seemed impossible to reconcile, and the Drafting Committee had concluded that the second alternative—retaining for the consular bag alone the possibility of requesting its opening, and of returning it if the request was refused—was the only one that could command general acceptance. Paragraph 2 as proposed by the Drafting Committee was therefore basically a reproduction of article 35, paragraph 3, of the 1963 Vienna Convention, but one in which the transit State was granted the same rights formerly accorded only to the receiving State. That extension had already been contemplated in the text adopted on first reading.

95. Mr. KOROMA suggested that, in the interests of concordance with other articles, the title of article 28 might be amended to read "Inviolability of the diplomatic bag".

96. Mr. OGISO said that there were circumstances in which an examination by electronic or other technical devices—one conducted by mutual agreement between the sending State and the receiving State when there was serious reason to suspect that the diplomatic bag had been tampered with—could indeed prevent dangerous articles from being brought into a country in the diplomatic bag. It was therefore desirable for the words "directly or through electronic or other technical devices" to be deleted from paragraph 1. Article 28 would thus be more flexible and the possibility of preventing abuses of the diplomatic bag would be improved. Although that point had been extensively debated, it had not been accepted by a majority, either in the Commission or in the Drafting Committee. He did not intend to reopen the debate at the present stage, but he did wish to re-emphasize the point.

97. Mr. FRANCIS said that, if he had been a member of the Drafting Committee, he would have raised two points during its discussion of paragraph 2. Since the reference in paragraph 1 to the "diplomatic bag" was intended to cover the consular bag as well, he did not understand why paragraph 2 mentioned the "consular", rather than the "diplomatic", bag. He would also prefer the use of the indefinite article "a", rather than "the", before the words "consular bag".

98. Mr. AL-KHASAWNEH recalled that, during the Drafting Committee's discussion of article 28, he had

[9] See *Yearbook . . . 1988*, vol. II (Part Two), p. 91, para. 437.

proposed that, when a sending State complied with a request by a receiving or transit State and a bag was opened, only to show that the suspicions of the receiving or transit State had been unfounded, the receiving or transit State should provide some sort of compensation to the sending State. A better balance would thus be struck between the interests of the receiving or transit State, on the one hand, and those of the sending State, on the other, and such a measure might also help to prevent abuses.

99. He had accordingly proposed that a third paragraph be inserted, reading:

> "3. If, in the situations referred to in paragraph 2, the representative of the sending State complies with the request but the suspicions of the receiving or transit State nevertheless prove unfounded, the receiving or transit State shall make proper amends."

That form of language drew on provisions in the 1958 multilateral conventions on the law of the sea and in the 1982 United Nations Convention on the Law of the Sea, whereby a State had the right to board a ship if it suspected that the ship was involved in drug trafficking; if the suspicions proved unfounded, however, the State must provide compensation. The situation was analogous to the one covered in draft article 28. If consent had been given for the search, the receiving or transit State was not violating any rules, and liability—not responsibility—was involved. The proposal for an additional paragraph had originally been made in the Sixth Committee of the General Assembly by the representative of the Philippines, in 1986.

100. Mr. TOMUSCHAT said that he did not find the régime established under article 28 at all satisfactory. He would have preferred a unitary régime for all kinds of bags, yet now there were two, one for the diplomatic bag and one for the consular bag. The provisions of paragraph 2, which applied only to the consular bag, should have been extended to the diplomatic bag. A comparison of draft article 28 with article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations revealed that it provided more protection, but did not give the receiving or transit State any additional mechanisms for verification if it had good reason for suspicion. Finally, article 28 must not constitute an obstacle to routine security checks at airports.

101. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), replying to the point raised by Mr. Koroma, said that, although inviolability could be said to characterize the diplomatic bag, he would prefer the title "Protection of the diplomatic bag" to "Inviolability of the diplomatic bag" as it was broader and would therefore cover any request for a bag to be opened, as well as the conditions under which such opening took place. The title of an article was, moreover, merely an indication of its content and had no legal effect. He therefore hoped that Mr. Koroma could accept the title of article 28 as it stood.

102. He was unable to accept Mr. Francis's first point, for, if the reference in paragraph 2 to the consular bag were eliminated, it would be tantamount to accepting the broader formula which Mr. Tomuschat and certain other members preferred, but on which a consensus had not been reached in the Drafting Committee. He did not think it would make much difference whether the expression "consular bag" was preceded by a definite or an indefinite article, but possibly one of the English-speaking members of the Commission might wish to offer an opinion on the matter.

103. As to Mr. Al-Khasawneh's proposal for a third paragraph (para. 99 above), the Drafting Committee had endeavoured, in paragraph 2, to follow the 1963 Vienna Convention on Consular Relations as closely as possible and had therefore made no changes or additions. Mr. Al-Khasawneh's suggestion could perhaps have been adopted had it been decided to apply the same system to all bags, but he did not think that it could be incorporated into the existing text of article 28.

104. Mr. ARANGIO-RUIZ said that he shared the concern expressed by Mr. Ogiso and Mr. Tomuschat. He also believed that Mr. Al-Khasawneh had made a wise suggestion.

105. Mr. FRANCIS said that, as he understood it, "the" consular bag would refer to a specific consular bag, for example one sent from Jamaica to London, whereas "a" consular bag could mean any bag. If members wished the text of paragraph 2 to stand, however, he would not press the point.

106. Agreeing with Mr. Tomuschat's remarks, he said that paragraph 2 was very unsatisfactory and called for thorough consideration. Referring to the consular bag alone simply meant shifting the possibility of abuse of the consular bag to the diplomatic bag. He had in mind in particular the drug problem. Was the diplomatic bag to be regarded as sacrosanct even when it was used to carry articles prohibited by law?

107. Mr. RAZAFINDRALAMBO said that the whole system should be aligned with the procedure for inspection of the consular bag.

108. Mr. SOLARI TUDELA said that the safeguard enjoyed by States under paragraph 2 with respect to the consular bag should be extended to the diplomatic bag. He would therefore have preferred not to include the word "consular" in that paragraph, so that the provision would cover both types of bag.

109. Mr. ROUCOUNAS said that his concern with respect to paragraph 2 was that it gave express recognition to the fact that the procedure it laid down would apply only to the consular bag, whereas in the practice of States that procedure also applied in the case of diplomatic bags. Incorporating paragraph 2 in article 28 would therefore certainly not prevent application of the procedure in question to the diplomatic bag as well.

110. Mr. BARSEGOV said that there was a tradition whereby members who participated in the Drafting Committee considered themselves to some extent bound by the decisions it adopted. For his own part, he had adhered to that principle, yielding many of his views in the interests of compromise. It was surprising, therefore, to find that several of those who had spoken in the present discussion—some against the text adopted by the Drafting Committee—were in fact members of that Committee. He wondered whether that might not entail changes in the Commission's methods of work at some point in the future—something which he would not like to happen.

111. Article 28 was a key provision which it had been no simple matter to achieve. Personally, he favoured unifying the legal régimes governing the diplomatic bag and the consular bag—though, of course, giving the consular bag the status of the diplomatic bag and not vice versa. He was prepared to agree that the Commission could confine itself to paragraph 1, deleting paragraph 2. However, the proposal to extend the effects of paragraph 2 to paragraph 1 was totally unacceptable to him, for a number of reasons. In the first place, it would not be consonant with the opinion of the overwhelming majority of members of the Commission and of the Governments which had expressed their views on the matter—and which could not be overlooked. Secondly, it would involve a change in a convention in force and, as jurists, the members of the Commission must know that a convention could, of course, be amended only by the parties to it. Lastly, paragraphs 1 and 2 were quite clear in their terms and it would be wrong to vest them with an arbitrary interpretation that did not follow from those terms.

112. Mr. AL-BAHARNA said that, while he considered that the régime provided for under paragraph 2 should apply also to paragraph 1, he too, as a member of the Drafting Committee, felt bound to accept article 28 as currently drafted, particularly as it had received a broad measure of support.

113. Mr. FRANCIS reiterated that his prime concern was with the drug problem. It behoved the Commission to face up to that problem resolutely.

114. Mr. KOROMA said that all members of the Commission would undoubtedly be at one with Mr. Francis about the need to ensure that the diplomatic bag was not used by drug traffickers. Article 28, however, represented a compromise and should be accepted in that spirit. There was, moreover, an added safeguard in article 25, paragraph 2, which called upon States to "take appropriate measures to prevent the dispatch through its diplomatic bag of articles"—including drugs—"other than those referred to in paragraph 1". In any event, he did not think it could be said that the bulk of drug trafficking was done through the diplomatic bag.

115. Mr. YANKOV (Special Rapporteur) said that, while Mr. Ogiso's point could be mentioned in the commentary, it should be noted that States were free, under bilateral arrangements and in accordance with the principles of equity and reciprocity, to introduce whatever régime they wished. At the same time, most Governments which had expressed their views on the matter had been in favour of the virtually absolute inviolability of the diplomatic bag.

116. If an indefinite article were placed before the words "consular bag" in paragraph 2, as suggested by Mr. Francis, it would convey the idea that any consular bag could be opened automatically rather than, as he would suggest, simply those bags that came under suspicion.

117. With regard to Mr. Francis's other, and more important, point, he had examined the records and documents of the 1987 International Conference on Drug Abuse and Illicit Trafficking and had found no recommendation addressed to the United Nations apart from the one in paragraph 248 of the Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control adopted by the Conference, in which it had drawn the Commission's attention to "possible misuse of the diplomatic bag for illicit drug trafficking, so that the Commission could study the matter under the topic relating to the status of the diplomatic bag".[10] The Conference had also adopted a Declaration requesting the Secretary-General of the United Nations to keep under constant review the activities referred to in the Declaration and in the Comprehensive Multidisciplinary Outline.[11] In paragraph 8 of General Assembly resolution 42/112 of 7 December 1987 on the International Conference on Drug Abuse and Illicit Trafficking, the Secretary-General had been requested to report to the Assembly at its forty-third session on the implementation of that resolution.

118. Although there were good reasons for pursuing the point raised by Mr. Al-Khasawneh, it was necessary to be very careful. Only if the bag was unduly delayed or some other damage occurred did the question of responsibility arise. In that connection, he would refer members to article 235 of the 1982 United Nations Convention on the Law of the Sea, concerning protection of the marine environment, under the terms of which no responsibility was incurred in respect of the exercise of a legitimate right, and also to article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations, whereby it was legitimate to request that the bag be opened and for it to be returned in the event of refusal. If the Commission could reach agreement along those lines, the point could be elaborated on in the commentary.

119. Mr. EIRIKSSON recalled that, at the previous session, he had proposed an amended text for paragraph 1 of article 28.[12] It had not, however, been accepted.

120. As a drafting matter, the formula "correspondence, and documents or articles, referred to in article 25", in the English and French texts of paragraph 2, should be brought into line with the corresponding provision of the 1963 Vienna Convention on Consular Relations. Only the Spanish text conformed entirely in that respect to that Convention.

121. Mr. YANKOV (Special Rapporteur) informed the Commission that that question had been discussed on first reading and, although the text before the Commission did not conform strictly to the 1963 Vienna Convention, it was an improvement.

122. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 28 as proposed by the Drafting Committee.

Article 28 was adopted.

123. Mr. FRANCIS said that he wished to enter a reservation with respect to paragraph 2 of article 28. Indeed, had he been apprised earlier of the facts to which the Special Rapporteur had referred, he would have taken an even firmer line and would possibly have proposed an amendment. His main concern, of course, was to broaden the application of paragraph 2 to cover diplomatic bags in general.

The meeting rose at 1 p.m.

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[10] *Ibid.*

[11] *Ibid.*, para. 438.

[12] *Ibid.*, pp. 92-93, para. 448.

2131st MEETING

Wednesday, 5 July 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/409 and Add.1-5,[1] A/CN.4/417,[2] A/CN.4/420,[3] A/CN.4/L.431, sect. E, A/CN.4/L.432, ILC(XLI)/Conf.Room Doc.1)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE ON SECOND READING[4] (*continued*)

ARTICLE 28 (Protection of the diplomatic bag)[5] (*concluded*)

1. Mr. OGISO said that, although he realized that the Commission had adopted article 28 at the previous meeting, he wished to come back to it to recall that he had expressed a reservation on the text because of the retention, at the end of paragraph 1, of the words "directly or through electronic or other technical devices", whose deletion he had proposed. In the explanation he had given, the Special Rapporteur had indicated that article 6 (Non-discrimination and reciprocity) would enable States to agree on various procedures and, in particular, procedures which could have the same effect as the deletion of the words in question. He assumed that the Special Rapporteur had been referring to article 6, paragraph 2 (*b*), which he himself interpreted—perhaps wrongly—to mean that a State could, by custom or agreement, extend to another State more favourable treatment, but not more restrictive treatment. In that connection, he would welcome clarifications on two points.

2. In the first place, if State A proposed to State B a procedure which allowed the examination of the diplomatic bag through electronic or other technical devices, could that be interpreted as more favourable treatment for State A? Even if the answer was affirmative, such treatment might not be more favourable for State B, with the result that article 6, paragraph 2 (*b*), which authorized only more favourable treatment, would not apply. Secondly, he was also not certain that paragraph 2 (*b*) could apply in cases where two States decided by mutual agreement not to apply certain provisions or, as in the present case, decided by custom or agreement to conduct an examination of their respective diplomatic bags through electronic or other technical devices. It was his understanding that article 6 was based on article 47 of the 1961 Vienna Convention on Diplomatic Relations and, in that connection, he quoted paragraphs (3) and (4) of the commentary to the corresponding provision (then article 44 on non-discrimination) in the draft articles on diplomatic intercourse and immunities adopted by the Commission at its tenth session, in 1958, which had been the basis for that Convention.[6] As he saw it, the application of the rule of reciprocity basically and primarily meant complying with the provision in question itself. Moreover, article 47 of the 1961 Vienna Convention lent itself to several different interpretations, but the most generally accepted one was that more favourable treatment could be extended by agreement, or more restrictive treatment on the basis of reciprocity. That general interpretation was also valid for article 6 of the present draft. The explanations which the Special Rapporteur had given at the previous meeting with regard to article 28 were much more liberal than he had expected.

3. Mr. YANKOV (Special Rapporteur) thanked Mr. Ogiso for giving him a further opportunity to explain the interaction between the principles of non-discrimination and reciprocity, on the one hand, and the various obligations provided for in the draft articles, on the other. The principle of reciprocity operated in two ways: either in a restrictive manner, in the interpretation and application of provisions; or in a positive manner, when the States concerned decided by agreement to extend to each other more favourable treatment. For example, the wealth of State practice in respect of consular relations showed that the régime applied to the consular bag was not that of article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations, but that of article 27 of the 1961 Vienna Convention on Diplomatic Relations, as a result of which the consular bag enjoyed absolute inviolability, in other words more favourable treatment than that provided for in the 1963 Vienna Convention. That confirmed that States were free, by agreement and on the basis of reciprocity, to adopt the régime they wished rather than the one provided for.

4. It was true that article 6, paragraph 2 (*a*) and (*b*), enabled States to apply to each other a régime that was either more restrictive or more favourable than the one provided for in the draft articles, and that exempting the diplomatic bag from any examination through electronic or other technical devices would mean extending more favourable treatment than if the bag were subject to such an examination. States could, however, either explicitly by agreement or implicitly by custom, exempt each other from that type of examination—even though that was precisely the general rule stated in article 28, paragraph 1, for normal situations. In that sense, he did not see any contradiction between the provisions of article 47 of the 1961 Vienna Convention or the corresponding provisions of the 1963 Vienna Convention and, for example, the practice of States which extended to the consular bag more favourable treatment than that provided for in the 1963 Convention.

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[1] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[2] *Ibid.*

[3] Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

[4] The draft articles provisionally adopted by the Commission on first reading are reproduced in *Yearbook . . . 1986*, vol. II (Part Two), pp. 24 *et seq.* For the commentaries, *ibid.*, p. 24, footnote 72.

[5] For the text, see 2130th meeting, para. 89.

[6] See *Yearbook . . . 1958*, vol. II, p. 105, document A/3859, chap. III.

5. Conversely, the treatment extended could be more restrictive and State practice also showed that the diplomatic bag was sometimes made subject by agreement to the régime of the consular bag provided for in article 35, paragraph 3, of the 1963 Vienna Convention.

6. In either case, the Commission had to take account of the way in which States interpreted the principle of reciprocity in relation to the provisions of the existing instruments.

ARTICLE 29 (Exemption from customs duties and taxes)

7. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 29, which read:

Article 29. Exemption from customs duties and taxes

The receiving State or the transit State shall, in accordance with such laws and regulations as it may adopt, permit the entry, transit and departure of the diplomatic bag and grant exemption from customs duties, taxes and related charges other than charges for storage, cartage and similar services rendered.

8. The Drafting Committee had made only one substantial change to the text adopted on first reading: it had deleted the reference to "all national, regional or municipal dues and taxes", in order to make it clear that the exemption related only to the duties, taxes and charges which could be applied to the diplomatic bag on its entry into the country. The Committee had also amended the English text in order to indicate clearly that permission for the entry, transit and departure of the bag, as well as its exemption from customs duties, taxes and related charges, were subject to the laws and regulations of the receiving State or the transit State.

9. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 29.

Article 29 was adopted.

ARTICLE 30 (Protective measures in case of *force majeure* or other exceptional circumstances)

10. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 30, which read:

PART IV

MISCELLANEOUS PROVISIONS

Article 30. Protective measures in case of* force majeure *or other exceptional circumstances

1. Where, because of *force majeure* or other exceptional circumstances, the diplomatic courier, or the captain of a ship or aircraft in commercial service to whom the diplomatic bag has been entrusted, or any other member of the crew, is no longer able to maintain custody of the bag, the receiving State or the transit State shall inform the sending State of the situation and take appropriate measures with a view to ensuring the integrity and safety of the bag until the authorities of the sending State recover possession of it.

2. Where, because of *force majeure* or other exceptional circumstances, the diplomatic courier or the unaccompanied diplomatic bag is present in the territory of a State not initially foreseen as a transit State, that State, where aware of the situation, shall accord to the courier and the bag the protection provided for under the present articles and, in particular, extend facilities for their prompt and safe departure from its territory.

11. *Force majeure* or other exceptional circumstances could give rise to two situations in which the diplomatic bag, or the courier and the bag, would need special protection. The first situation, which was dealt with in paragraph 1, was that in which the courier, or the captain of a ship or aircraft in commercial service entrusted with the bag, was no longer able to maintain custody of the bag and left it unprotected. It should be noted that, in order not to impose unnecessary obligations on the receiving or transit State, paragraph 1 specified that the bag was not considered to be unprotected if a member of the crew of the ship or aircraft could take custody of it. The receiving State or the transit State then had two obligations: (i) to inform the sending State of the situation; (ii) to take appropriate measures with a view to ensuring the integrity and safety of the bag until the authorities of the sending State had recovered possession of it.

12. Primarily for the sake of clarity, the Drafting Committee had introduced a few changes in the wording of those two obligations. First, instead of saying that the receiving State or the transit State "shall take appropriate measures to inform the sending State", the article now specified that it "shall inform the sending State of the situation". The words "take appropriate measures" had been considered unnecessary. Secondly, the words "to ensure" had been replaced by "with a view to ensuring", in order to indicate that the obligation of the receiving or transit State to ensure the integrity and safety of the bag was somewhat flexible, since, in that type of situation, it was possible that the receiving or transit State might not be in a position to fulfil that obligation. Thirdly, the words "take repossession" had been replaced by "recover possession". Fourthly, the words "as the case may be" had been deleted, as had been done elsewhere.

13. The second situation, which was dealt with in paragraph 2, was that in which the courier and the bag, or the unaccompanied bag, were present in the territory of a State not initially foreseen as a transit State. In such a case, the State concerned, when aware of that situation, was bound to accord to the courier and the bag the protection provided for in the present articles and, in particular, extend to them facilities for their prompt and safe departure from its territory.

14. Again with a view to clarity, the Drafting Committee had made a few changes in the text adopted on first reading. First, the new text referred to "other exceptional circumstances" in addition to cases of *force majeure*, as in paragraph 1. Secondly, the words "the diplomatic courier or the diplomatic bag" had been replaced by "the diplomatic courier or the unaccompanied diplomatic bag". Thirdly, the Committee had decided to indicate expressly that the obligations of a State would arise only "where" that State was "aware of the situation". Fourthly, it had given the content of the obligations of the State concerned greater precision by adding the words "provided for under the present articles" after the word "protection" and by replacing the words "and shall extend to them the facilities necessary to allow them to leave the territory" by the words "and, in particular, extend facilities for their prompt and safe departure from its territory".

15. Lastly, in paragraph 1 of the Spanish text, the words *al que se haya confiado* had been replaced by *a quien se haya confiado* and the words *vuelvan a tomar posesión de ella* had been replaced by *la recuperen*.

16. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 30.

Article 30 was adopted.

ARTICLE 31 (Non-recognition of States or Governments or absence of diplomatic or consular relations)

17. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 31, which read:

Article 31. Non-recognition of States or Governments or absence of diplomatic or consular relations

The State on whose territory an international organization has its seat or an office or a meeting of an international organ or a conference is held shall grant the facilities, privileges and immunities accorded under the present articles to the diplomatic courier and the diplomatic bag of a sending State directed to or from its mission or delegation, notwithstanding the non-recognition of one of those States or its Government by the other State or the non-existence of diplomatic or consular relations between them.

18. The fact that two States did not recognize each other or did not maintain diplomatic or consular relations did not prevent one of them from having a mission or delegation in the territory of the other if an international organization had its seat or an office in that territory or if a conference was held there. In that case, the sending State-receiving State relationship provided for in the present articles would apply.

19. The Drafting Committee believed that the wording now proposed for article 31 made the intention of its provisions clear. The articles could no longer be interpreted as meaning that two States had to apply the present articles even if they did not recognize each other or did not maintain diplomatic or consular relations—an interpretation which, though illogical, had nevertheless been possible. The text now clearly indicated that that situation of non-recognition or absence of relations did not exempt a State in whose territory an international organization had its seat or an office or in whose territory an international conference was held from having the obligation to act as a receiving State towards any State which had a mission to the organization or sent a delegation to the conference. However, that obligation concerned only couriers and bags exchanged between the sending State and its mission or delegation. That point was made clear by the words "the diplomatic courier and the diplomatic bag of a sending State directed to or from its mission or delegation".

20. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 31.

Article 31 was adopted.

ARTICLE 32 (Relationship between the present articles and other agreements and conventions)

21. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 32, which read:

Article 32. Relationship between the present articles and other agreements and conventions

1. The present articles shall, as between Parties to them and to the conventions listed in subparagraphs (1) and (2) of paragraph 1 of article 3, supplement the rules on the status of the diplomatic courier and the diplomatic bag contained in those conventions.

2. The provisions of the present articles are without prejudice to other international agreements in force as between parties to them.

3. Nothing in the present articles shall preclude Parties thereto from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, provided that such agreements do not result in discrimination within the meaning of article 6.

22. The text adopted on first reading had been considered by a number of Governments to call for further clarification and a revised text submitted by the Special Rapporteur at the previous session had not been considered fully satisfactory by members of the Commission. The Drafting Committee had deemed it advisable to go further in developing the approach taken by the Special Rapporteur in his eighth report (see A/CN.4/417, para. 274) and had accordingly agreed to deal in three separate paragraphs with three categories of agreements, namely: (i) the conventions on diplomatic and consular law referred to in article 3 of the draft; (ii) other international agreements on the same subject in force as between the parties; (iii) agreements which might be concluded in the future.

23. Paragraph 1 dealt with the relationship between the present articles and the codification conventions referred to in article 3. The word "supplement" indicated that the draft articles elaborated on the provisions of those conventions and did not purport to amend them, since only the States parties to the conventions in question could do that. That point would be developed in the commentary. In order to bring it out as clearly as possible in the text of the article, the Drafting Committee had decided to refer to "the rules . . . contained" in the three conventions rather than to the provisions of those conventions. The Committee had furthermore inserted the words "as between Parties to them and to the conventions listed in subparagraphs (1) and (2) of paragraph 1 of article 3" in order to make it clear that the supplementary nature attributed to the articles applied only when the States concerned were parties to the conventions listed in article 3.

24. Paragraph 2 reproduced the text of article 73, paragraph 1, of the 1963 Vienna Convention on Consular Relations, except that, following the model of article 4 of the 1975 Vienna Convention on the Representation of States, the words "are without prejudice to" had replaced "shall not affect". In the Drafting Committee's view, the words "are without prejudice to" had the advantage of giving the States parties to agreements other than those referred to in article 3 of the draft some leeway with regard to the effects of the present articles on their mutual relations.

25. Paragraph 3 was modelled on article 4 of the 1975 Vienna Convention and recognized the sovereign right of States to conclude international agreements on the subject-matter of the present articles, provided that such agreements did not result in discrimination within the meaning of article 6.

26. Mr. YANKOV (Special Rapporteur) said he thought that the reference in paragraph 1 should be only to subparagraph (1) of paragraph 1 of article 3. The same conventions were listed in subparagraph (6) of paragraph 1 of that article and that subparagraph would also have to be mentioned if reference were made to subparagraph (2). He therefore proposed that, for the sake of logic and brevity, the reference to subparagraph (2) be deleted.

27. Mr. ILLUECA recalled that, during the debate in the Sixth Committee at the forty-third session of the General Assembly, it had been stated that article 32 was not fully in keeping with the provisions of article 30 of the 1969 Vienna Convention on the Law of Treaties, in particular with regard to the application of the doctrine of *lex posterior* or *lex specialis*. Furthermore, while the word "supplement" could be used to define the relationship between compatible rules, it was not suitable for defining the relationship between rules whose content was different. On the basis of the wording of article 73, paragraph 2, of the 1963 Vienna Convention on Consular Relations and the debate in the Sixth Committee, he proposed that the first part of paragraph 1 of article 32 should be amended to read: "The present articles shall . . . confirm, supplement, extend or amplify . . .". He would also prefer the title of the article to read: "Relationship between the present articles and other international agreements".

28. Mr. EIRIKSSON said that he agreed with the Special Rapporteur's suggestion concerning paragraph 1, but thought that, for the sake of clarity, it would be still better to spell out what conventions were being referred to, using the conjunction "or". The text as it stood might give the impression of referring to States parties to the present articles and to *all* the conventions in question.

29. With regard to substance, he said that article 32 had a very pronounced legal character which called for scrupulously careful drafting. Whatever explanations the commentary might contribute, however, paragraph 1 was not very clear about the relationship between the present articles and the conventions referred to. In particular, it should be noted that, even in the absence of that paragraph, the régime provided for in the present articles would apply to bags of missions of States, whether or not they were parties to the 1975 Vienna Convention on the Representation of States; paragraph 1 merely cast doubt on that point. In fact, unless the Commission's intention was to provide a definitive definition of the legal relationship between the present articles and the conventions in question, paragraph 1 was unnecessary.

30. Referring to paragraph 2, he said that it was superfluous to reproduce the words "in force as between parties to them" from the texts of the conventions on which the draft was modelled; he had never seen the point of those words in those conventions.

31. As to the safeguard clause at the end of paragraph 3, he said that he could not imagine a case in which an agreement might have the result which that clause was designed to prevent. The only possibility was a case where two or three parties to the present articles decided to have an agreement which resulted in a less favourable relationship between them, causing other States to complain, but a relationship freely entered into by States could be of no relevance to third States.

32. Mr. McCAFFREY said he also thought that paragraph 1 was unclear. It had been proposed in the Drafting Committee that the word "supplement" be replaced by the words "shall prevail" if the intention was that, in the event of incompatibility between the present articles and the provisions of the conventions in question, it was the present articles that should prevail. If the opposite was the case, then it had to be stated that the provisions of those conventions would prevail. And if, as had been pointed out in the Drafting Committee, incompatibility between the two sets of provisions was not possible, then paragraph 1 was unnecessary. By implying an addition, the word "supplement" suggested that there might be some incompatibility or inconsistency. However, he would not oppose the adoption of article 32.

33. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that Mr. Eiriksson and Mr. McCaffrey had both participated in the Drafting Committee's work and their views had been taken into consideration. However, the majority of the members of the Committee had decided to retain paragraph 1. The word "supplement" had been discussed at length in the Committee. To add the words "confirm", "extend" and "amplify", as Mr. Illueca had suggested, would be to add a great deal; as it now stood, paragraph 1 meant that, if the articles of the future instrument supplemented the provisions of the conventions in question, they were applicable and that, in the opposite case, they were not.

34. Mr. YANKOV (Special Rapporteur), replying to Mr. Illueca, recalled that article 32 as originally proposed had been modelled on article 73 of the 1963 Vienna Convention on Consular Relations and article 4 (*a*) of the 1975 Vienna Convention on the Representation of States. When the Commission had considered the article on first reading, it had concluded that simpler wording was preferable. He had therefore suggested very simple wording from which the present text derived. From the very outset, the purpose of the draft articles had been precisely to supplement the various codification conventions concerning the diplomatic bag and the diplomatic courier, because those conventions contained some gaps, for example in connection with the unaccompanied bag, the bag forwarded by mail and the status of the courier and the bag.

35. With regard to the word "supplement" in paragraph 1, he said that he had proposed the word "complement", but the Drafting Committee had preferred the word "supplement". He personally was in favour of Mr. McCaffrey's proposal to replace the word "supplement" by the words "shall prevail", because the present articles would, in fact, prevail; there again, however, the Drafting Committee had agreed on the word "supplement".

36. As to Mr. Eiriksson's comment on the safeguard clause in paragraph 3, he could, unlike Mr. Eiriksson, imagine cases where the clause would be of some use. States could, for example, conclude agreements among themselves which would affect transit States. It was, moreover, necessary to place some limits on the discretionary power of States to conclude agreements in the present field, since the practice of States was often innovative.

37. Mr. REUTER said that the problem with article 32 was the same as the one the Commission had encountered when drafting the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations; in other words, it was a matter of "codifying codification". The present text might not be entirely logical in some ways, but it offered definite practical advantages. He fully supported it and stressed that the work done on it by the Special Rapporteur and the Drafting Committee was irreproachable.

38. Referring to Mr. Ogiso's comments on article 6, he said that the point at issue was the meaning of the words "more favourable treatment" in paragraph 2 (*b*) of that

article. Did they mean more favourable to the integrity of the bag or to the fact that it was as it should be? The Special Rapporteur had said that, in some cases, State practice favoured the bag's integrity, by providing for the absolute inviolability of the consular bag, and, in others, emphasized the importance of its being as it should be. The expression "more favourable treatment" used in article 6 was not absolutely explicit in that regard, but that was to be welcomed.

39. Mr. KOROMA said that, if he had been present in the Drafting Committee during the consideration of article 32, he would have argued in favour of the word "complement". The word "supplement" in paragraph 1 suggested that the main substantive rules were to be found in other conventions. In view of the autonomous nature of the present articles, the word "complement" was more correct. Moreover, the French text used the word *complètent* and the Spanish text the word *completarán*.

40. Mr. BENNOUNA recalled that he had already expressed his opinion on article 32 at the previous session. While he did not intend to call in question the compromise solution that had been adopted, he did wish to state his views again.

41. When the General Assembly entrusted a particular topic to the Commission, it simultaneously gave it full competence to codify and possibly develop the law relating to that topic. Some members had said that the Commission could not revise earlier conventions. That view was disputable to say the least. The Commission was, of course, required by its statute to take account of existing law. That did not mean, however, that it was bound by earlier instruments which covered the topic only partially. If it were, the situation would be like the one in which the Commission found itself at present, where the text on which it was working would have to be interpreted in the light of the conventions on diplomatic and consular relations and where it would have to be assumed that there could be no contradiction between the conventions referred to in article 3 of the draft and the draft itself. That was, however, only an assumption and there was no way of showing that it was true. The fact was that the Commission had found it expedient to pass the difficulty on to States themselves and to the third parties which would be called upon to interpret the text—an approach which was probably politically advisable, but which was contrary to the concept of legal rigour. If the point at issue had been simply to supplement the existing conventions, a few additional provisions would have been enough. But that was not the case, since the Commission had started afresh and had tried to draft an exhaustive instrument. The word "supplement" in paragraph 1 of article 32 was therefore inappropriate and would certainly give rise to problems in the future. It would have been better to take account of the time sequence of the various instruments and to rely on the fact that a State was unlikely to invoke an earlier convention in order to challenge the provisions of a more complete and more recent instrument.

42. He was thus prepared to accept article 32 as proposed by the Drafting Committee, because it safeguarded the future of the draft in political terms. He nevertheless maintained the reservations he had on technical points.

43. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) explained that the Drafting Committee had regarded the word "supplement" as the best possible compromise. He nevertheless agreed that there was a terminology problem in the French and Spanish texts, where he was not sure that the words *complètent* and *completarán* expressed the same idea.

44. Replying to Mr. Eiriksson's suggestion that the codification conventions referred to in article 3 should be listed again in article 32, he said that the Drafting Committee had followed the normal practice of using cross-references to other texts.

45. Mr. MAHIOU said that it was because of its flexibility that paragraph 1 would give rise to problems of interpretation. In the event of conflict between the present articles and the existing codification conventions, the solution would be found not in that provision, but, rather, in article 30, paragraph 3, of the 1969 Vienna Convention on the Law of Treaties, which stated the rules governing successive treaties. The technical problem which was worrying Mr. Bennouna was thus not legally insurmountable.

46. Mr. FRANCIS said that paragraph 1 lent itself to a variety of interpretations. Although he was prepared to accept it as proposed by the Drafting Committee, he thought that the Commission should allow itself time for further reflection. It could come back to the issue once it had completed the consideration of the draft as a whole and had a complete overview of the text.

47. Mr. EIRIKSSON said that he found the wording of paragraph 3 awkward because it could be interpreted to mean that no agreement which went beyond the scope of the present articles could be concluded between States. Read in that way, the provision was far too strict. It was possible to imagine a very simple situation which might be regarded as discrimination within the meaning of article 6: State A and State B, both of them parties to the future convention, agreed reciprocally to apply a stricter régime of inspection of the bag than provided for by the convention. As that régime would be less favourable, there would be a breach of paragraph 3 and yet no third State would have reason for complaint. He therefore proposed that further thought be given to the words "provided that such agreements do not result in discrimination within the meaning of article 6", which complicated the situation and which did not, moreover, appear in the corresponding provision of the 1963 Vienna Convention on Consular Relations (art. 73).

48. Mr. ROUCOUNAS said that, when working on a codification convention, it was necessary to determine the relationship between the new instrument and those which were in force or would come into force. Paragraph 1 of article 32, whose purpose was precisely that, was worded in such a way that reference had to be made to article 30, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties. It was true that the Commission had avoided saying that the new text "prevailed" over existing conventions and had preferred to use the term "supplement", which was much more cautious, but the future convention would have a life of its own, independently of the earlier codification conventions, and States would be able to become parties to it without having signed the others. The situation then would be unclear and he would like an explanation of the way in which paragraph 1 should be interpreted in such a case.

49. Paragraph 3 was designed to give some flexibility to the obligations which States would assume by signing the future convention. However, since the paragraph referred to article 6, on non-discrimination, whose content was also to be found in article 47 of the 1961 Vienna Convention on Diplomatic Relations, States parties to that Convention would already have assumed that obligation. As to article 73 of the 1963 Vienna Convention on Consular Relations, its scope was far broader than that of draft article 32, inasmuch as its paragraph 2 stated that "Nothing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof". In the circumstances, it was open to question whether the restriction imposed in draft article 32, paragraph 3, by the reference to article 6 would have any real importance in the future. The restriction was, however, a sensible one and it should not stand in the way of the adoption of article 32 as it now stood. The point at issue was not to prevent States from concluding any agreements they might wish to conclude; the very logic of codification, in which the Commission was engaged at present, called for limits and restrictions.

50. Mr. Sreenivasa RAO said that the problem of compatibility between a text in the process of elaboration and agreements already in force was a constantly recurring one. In the case in point, it arose in simple terms. The purpose of the draft under consideration was to bring together, without mutual contradiction, all existing provisions on the subject of the immunities of the diplomatic courier and the diplomatic bag. The Commission had taken advantage of the present exercise to add some new provisions, and it was those new passages which were additional to the existing conventions and which would "supplement" them, as paragraph 1 of article 32 very aptly stated. However, if two States accepted those new provisions, there would not normally be any problem between them; and third States would not be affected. The problem of non-discrimination could arise only between those two States, namely the States which had accepted the new provisions and, by so doing, had undertaken to abide by them in accordance with article 32.

51. In his view, article 32 was entirely acceptable in its present form.

52. Mr. TOMUSCHAT said that the word "supplement" clearly reflected the general thrust of the draft articles. If there was an inconsistency between the future convention and the instruments listed in article 3, then article 30, paragraph 3, of the 1969 Vienna Convention on the Law of Treaties would apply, as Mr. Mahiou had pointed out.

53. On the other hand, paragraph 3 of draft article 32 seemed to elevate the article to a kind of *jus cogens*. The words "provided that such agreements do not result in discrimination within the meaning of article 6" referred specifically to those situations where discrimination might be allowed, and that was somewhat illogical. He would nevertheless not oppose the adoption of the text proposed by the Drafting Committee.

54. Mr. BEESLEY said that, while not wishing to repeat what had been said, he agreed with Mr. Mahiou and Mr. Tomuschat as to the interaction between the present articles and article 30 of the 1969 Vienna Convention on the Law of Treaties. He also agreed with Mr. Sreenivasa Rao that the present articles were of a supplementary nature. Hence he foresaw difficulties when States realized that, despite the exceptions incorporated in article 6, the supplementary provisions being offered for their signature would prevent them from proceeding as they had formerly done, because they would make their actions discriminatory. In that connection, a reading of articles 17 and 28, in the light of articles 32 and 6, could give an unforeseen impression. Thus there was a cumulative effect in the Commission's work on the present articles such that, at various stages, results had been achieved that were different from those expected, although it was impossible to identify the stage at which the initial intention had been diverted. Article 32, which sought to prevent future signatory States from abusing the régime that was to be set up, might actually open the door to such abuse by jeopardizing the chances of States accepting the draft articles.

55. No one was trying to block the adoption of a text which was the result of arduous negotiations and serious legal drafting efforts, but it remained to be seen how Governments, which were political bodies, would react to the proposed instrument and whether they would let it operate for very long.

56. Mr. ARANGIO-RUIZ said that he, too, was afraid the text proposed by the Drafting Committee might meet with heavy resistance from Governments during the diplomatic conference at which it was to be adopted. In an ideal world, the Commission would have started on the topic with a clean slate and drafted all the relevant rules, instead of trying to supplement existing codification conventions. That was why it was faced with the problem raised by paragraph 1 of article 32.

57. As to paragraph 3, he believed that the situation described by Mr. Eiriksson was entirely hypothetical. In practice, two States could always come to an agreement to give each other treatment different from that provided for by the present articles. Paragraph 3 reflected what might be called the real situation: two States could agree to give the diplomatic courier and the diplomatic bag more favourable treatment than the rules provided for, or even less favourable treatment, if they so wished.

58. Mr. BENNOUNA requested that the commentary to article 32 should explain that consistency between the present articles and the existing codification conventions was assumed, but that, if an inconsistency should develop, the 1969 Vienna Convention on the Law of Treaties would apply.

59. Mr. YANKOV (Special Rapporteur) said that paragraph 3 of article 32 must be read in the light of articles 30 and 41 of the 1969 Vienna Convention on the Law of Treaties. In his fourth report, he had originally proposed an article with much more substance to it, based on article 73 of the 1963 Vienna Convention on Consular Relations.[7] The article had subsequently been shortened to a single sentence, which had read: "The provisions of the present articles shall not affect bilateral or regional agreements in force as between States parties to them." When adopting that text on first reading, the Commission had incorporated the following explanation in paragraph (5) of the commentary:

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[7] *Yearbook . . . 1983*, vol. II (Part One), p. 134, document A/CN.4/374 and Add.1-4, para. 403.

(5) There was a consensus in the Commission to the effect that the provision in article 6, paragraph 2 (*b*), of the present draft made it possible to dispense with the adoption of an additional paragraph to cover the relationship between the present articles and future agreements relating to the same subject-matter, particularly if account was taken of article 41 of the 1969 Vienna Convention on the Law of Treaties. It should therefore be understood that, in accordance with article 6, paragraph 2 (*b*), nothing in the present articles shall preclude States from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag, confirming, supplementing, extending or amplifying the provisions thereof, provided that such new provisions are not incompatible with the object and purpose of the present articles and do not affect the enjoyment of the rights or the performance of the obligations of third States.[8]

That explanation had replaced the provision he had originally proposed.

60. He understood the reference to article 6 to mean that the international agreements in question must not defeat the object and purpose of the present articles, taking into account the general rules contained in the 1969 Vienna Convention.

61. The provisions of article 32 left the States concerned free to conclude agreements as long as there was no discrimination within the meaning of article 6 and the agreements did not infringe the rights of third States, which, in some cases, might be transit States.

62. Mr. EIRIKSSON said that he could not accept the solution suggested by Mr. Arangio-Ruiz. He would have preferred article 32 to be drafted on the basis of the wording used in paragraph (5) of the commentary to the article, which the Special Rapporteur had just read out. Such a provision would certainly have received the Commission's endorsement. It was unfortunate that the Commission had begun to consider article 32 only at the current meeting.

63. Mr. BEESLEY said he was not convinced that the text under consideration reflected the Special Rapporteur's position as he had just explained it. He therefore had the same reservations as Mr. Eiriksson concerning article 32.

64. The CHAIRMAN asked whether the Commission would be able to accept the substitution of the text just read out by the Special Rapporteur for the safeguard clause in paragraph 3.

65. Mr. EIRIKSSON said that the Commission could achieve the same result by deleting the safeguard clause from paragraph 3 and including in the commentary to article 32 the explanation that had been incorporated in the commentary to the article when it had been adopted on first reading, namely that States which were bound by the régime of the law of treaties could not conclude agreements that would affect the rights of other States or defeat the object and purpose of the present articles. Such a text would not prevent States which so desired from concluding agreements that instituted less favourable treatment in their mutual relations and third States would then have no reason to object.

66. Mr. YANKOV (Special Rapporteur) explained that he had not been proposing an amendment. He had no objection to the idea of replacing the reference to non-discrimination in paragraph 3 of article 32 by the reproduction in the commentary of the last phrase of the commentary to the article as adopted on first reading in 1986, namely: "provided that such new provisions are not incompatible with the object and purpose of the present articles . . .". He was afraid, however, that the Commission was getting into a debate on substance.

67. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the text of article 32 had in fact been before the members of the Commission for several days. The problem was basically that agreements concluded in the future must not result in discrimination. It was now proposed to replace the wording that expressed that idea by that used at the end of the 1986 commentary. Since it was when the rights of other States were affected that discrimination occurred, however, to state that agreements concluded in the future must not affect the rights of third States amounted to the same thing as saying that there must be no discrimination against third States. And if discrimination was to be mentioned, it should be made clear that it was discrimination "within the meaning of article 6".

68. He was not convinced that it would be appropriate to mention the idea of not defeating the object and purpose of the present articles. Since the object and purpose of the articles was to facilitate communications, it could be assumed that States which concluded additional agreements on the same subject might wish to modify, but not necessarily to defeat, the object and purpose of the articles.

69. In conclusion, he said that he did not oppose the amendment of paragraph 3, although, judging from the intensive work done by the Drafting Committee, he was not sure that the Commission could redraft the paragraph without a lengthy discussion, something which he would advise against. In his opinion, the best approach might be to retain paragraph 3 as it stood and to incorporate in the commentary the additional explanation given by the Special Rapporteur.

70. Mr. EIRIKSSON said that the commentary to the text adopted on first reading would be irrelevant if paragraph 3 were adopted as it now stood: it would be relevant only if the safeguard clause were omitted. Because of the existence of the 1969 Vienna Convention on the Law of Treaties, moreover, the Commission could obtain the same result by deleting paragraph 3.

71. Mr. McCAFFREY said that, while it might be a departure from usual practice, the Commission could consider adopting paragraph 3 in its present form provisionally and inviting further comments on article 32 when it took up the commentary thereto during its consideration of its draft report.

72. Mr. BENNOUNA said he agreed with Mr. Eiriksson that paragraph 3 was unnecessary. Nothing, except the peremptory rules of international law, prevented States from concluding among themselves international agreements that did not infringe the rights of third States. He therefore had some reservations about the idea of restricting the ability of States to enter into agreements by invoking an indefinite rule, namely the principle of non-discrimination, which was indeed referred to, but not defined, in article 6.

73. Mr. YANKOV (Special Rapporteur) said that he had difficulty seeing how article 32 could be adopted provisionally, but it went without saying that members of the Commission were free to express their views on its provisions during the consideration of the commentary. Personally, he thought it would be unfortunate to delete paragraph 3, even though the text was somewhat ambiguous. It

[8] *Yearbook . . . 1986*, vol. II (Part Two), pp. 32-33.

might require further interpretation, but was that not the case with all treaties? Indeed, that was why provisions on the settlement of disputes were so useful.

74. Mr. EIRIKSSON suggested that the Commission resume its consideration of article 32 at its next meeting. The Special Rapporteur might then submit a text in which the safeguard clause was replaced by the relevant part of the commentary to the text adopted on first reading, although he believed that it would be enough to incorporate that language in the new commentary.

75. The CHAIRMAN proposed that the Commission should adopt paragraph 1 of article 32 as amended by the Special Rapporteur (para. 26 above), and paragraph 2 as proposed by the Drafting Committee, and that the consideration of paragraph 3 be deferred until the next meeting to enable members to hold consultations on the text.

It was so agreed.

Paragraphs 1 and 2 of article 32 were adopted.

DRAFT OPTIONAL PROTOCOL ONE ON THE STATUS OF THE COURIER AND THE BAG OF SPECIAL MISSIONS

76. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for draft Optional Protocol One, which read:

DRAFT OPTIONAL PROTOCOL ONE ON THE STATUS OF THE COURIER AND THE BAG OF SPECIAL MISSIONS

The States Parties to the present Protocol and to the articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, hereinafter referred to as "the articles",

Have agreed as follows:

Article I

The articles also apply to a courier and a bag employed for the official communications of a State with its special missions within the meaning of the Convention on Special Missions of 8 December 1969, wherever situated, and for the official communications of those missions with the sending State or with its diplomatic missions, consular posts, delegations or other special missions.

Article II

For the purposes of the articles:

(*a*) "mission" also means a special mission within the meaning of the Convention on Special Missions of 8 December 1969;

(*b*) "diplomatic courier" also means a person duly authorized by the sending State as a courier of a special mission within the meaning of the Convention on Special Missions of 8 December 1969 who is entrusted with the custody, transportation and delivery of a diplomatic bag and is employed for the official communications referred to in article I;

(*c*) "diplomatic bag" also means the packages containing official correspondence, and documents or articles intended exclusively for official use, whether accompanied by a courier or not, which are used for the official communications referred to in article I and which bear visible external marks of their character as a bag of a special mission within the meaning of the Convention on Special Missions of 8 December 1969.

Article III

1. The present Protocol shall, as between Parties to it and to the Convention on Special Missions of 8 December 1969, supplement the rules on the status of the diplomatic courier and the diplomatic bag contained in that Convention.

2. The provisions of the present Protocol are without prejudice to other international agreements in force as between parties to them.

3. Nothing in the present Protocol shall preclude Parties thereto from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, provided that such agreements do not result in discrimination within the meaning of article 6.

77. As he had explained when introducing article 1, on the scope of the present articles (2128th meeting), the Drafting Committee had decided to recommend, in addition to the deletion of article 33 (Optional declaration), that the courier and the bag of special missions be dealt with, not in the draft articles, but in a separate optional protocol. It was a very simple protocol. Article I defined its object and purpose: the application of the draft articles to the courier and the bag employed for the official communications of a State with its special missions, within the meaning of the 1969 Convention on Special Missions, and for the communications of those missions with the sending State or with other special missions, diplomatic missions, consular posts or delegations of that State.

78. Article II contained definitions supplementing article 3 of the draft articles and was aimed at extending their scope—as between parties to the articles and the protocol—to missions, couriers and bags within the meaning of the 1969 Convention.

79. Article III was based on article 32 of the draft articles and supplemented the rules on the status of the diplomatic courier and the diplomatic bag contained in the 1969 Convention on Special Missions. Paragraphs 2 and 3 established exactly the same relationship between the protocol and present and future agreements as did article 32, paragraphs 2 and 3.

80. The CHAIRMAN suggested that the Commission proceed in the same way for article III as it had for article 32 (see para. 75 above).

81. Mr. EIRIKSSON said that, in order to avoid confusion in the French text between article 1 of the draft articles and article I of the draft optional protocols, the formula *article premier* should be replaced by *article I* in the protocols.

82. He further proposed that the last phrase of article I be amended to read: "or with the other missions of that State, its consular posts or its delegations".

83. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) proposed instead the following wording: "or with its other missions, consular posts or delegations".

84. Mr. ROUCOUNAS said that, since the very reason for the presence of article III in both draft optional protocols was that article 32 of the draft articles did not refer to all the relevant conventions, it might be better to extend the scope of the draft articles in such a way that article 32 would also apply to special missions and international organizations.

85. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, if the provisions of article III were not retained, the applicability of article 32 to the types of couriers and bags to which the protocols referred would be open to question.

86. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article I of draft Optional Protocol One as amended by Mr. Eiriksson and the Chairman of the Drafting

Committee (paras. 81 and 83 above), as well as article II and paragraphs 1 and 2 of article III, and to defer the consideration of paragraph 3 until the next meeting.

It was so agreed.

Articles I and II and paragraphs 1 and 2 of article III of draft Optional Protocol One were adopted.

The meeting rose at 1 p.m.

2132nd MEETING

Thursday, 6 July 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*concluded*) (A/CN.4/409 and Add.1-5,[1] A/CN.4/417,[2] A/CN.4/420,[3] A/CN.4/L.431, sect. E, A/CN.4/L.432, ILC(XLI)/Conf.Room Doc.1)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE ON SECOND READING[4] (*concluded*)

ARTICLE 32 (Relationship between the present articles and other agreements and conventions)[5] (*concluded*)

and

DRAFT OPTIONAL PROTOCOL ONE ON THE STATUS OF THE COURIER AND THE BAG OF SPECIAL MISSIONS[6] (*concluded*)

1. The CHAIRMAN recalled that, at the previous meeting, paragraph 3 of article 32 of the draft articles and paragraph 3 of article III of draft Optional Protocol One had been left in abeyance, pending consultations between the Chairman of the Drafting Committee, the Special Rapporteur and members of the Commission (see 2131st meeting, paras. 75 and 86). He invited the Special Rapporteur to report on the outcome of those consultations.

2. Mr. YANKOV (Special Rapporteur) said his own view was that paragraph 3 of article 32 as proposed by the Drafting Committee was satisfactory. He was convinced that the threefold approach adopted in that article was absolutely necessary to provide for the relationship, first, between the draft articles and the codification conventions; secondly, between the draft articles and existing agreements; and, thirdly, between the draft articles and future agreements. In the light of the comments made at the previous meeting, however, he had endeavoured to express those relationships in more explicit terms, on the basis of the form of language used in the 1969 Vienna Convention on the Law of Treaties. He therefore proposed that paragraph 3 of article 32 and, *mutatis mutandis*, paragraph 3 of article III of draft Optional Protocol One should be amended to read:

> "3. Nothing in the present articles shall preclude the Parties thereto from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, confirming, supplementing, extending or amplifying the provisions thereof, provided that such new provisions are not incompatible with the object and purpose of the present articles and do not affect the enjoyment by the other Parties to the present articles of their rights or the performance of their obligations under the present articles."

3. One minor drafting change concerned the title of article 32, which he suggested should be amended to read: "Relationship between the present articles and other conventions and agreements". That would be in line with the general structure of the draft articles.

4. Mr. EIRIKSSON said that the new text was completely in accord with the suggestions he had made at the previous meeting. Since the subject-matter of the draft articles was quite clear, however, he saw no need for the phrase "relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier" and would suggest that it be deleted. Such a change would have the added advantage of shortening the text somewhat.

5. Mr. FRANCIS said that he would have preferred the Drafting Committee's original formulation, but with the deletion of any reference to discrimination and with the addition of a provision concerning incompatibility with the draft articles. The new text had, however, been agreed by the persons concerned and took account of all the material elements. He could therefore accept it. Mr. Eiriksson's suggestion none the less merited consideration.

6. Mr. BARBOZA said that the wording of the proposed new text was unduly cumbersome and might have the effect of excluding the possibility of doing anything under the terms of other treaties other than "confirming, supplementing, extending or amplifying the provisions" of the draft articles. That phrase added nothing to paragraph 3, in his view. The main point was that new agreements should not be incompatible with the object and purpose of the draft articles. Accordingly, the phrase "confirming, supplementing, extending or amplifying the provisions thereof" should be deleted and the words "such new provisions" should be replaced by "the provisions of those agreements".

7. Mr. ARANGIO-RUIZ said he considered that paragraph 3 served no useful purpose and was not worth the time and effort being spent on it. In particular, to what were the words "extending or amplifying" meant to apply?

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[1] Reproduced in *Yearbook ... 1988*, vol. II (Part One).

[2] *Ibid.*

[3] Reproduced in *Yearbook ... 1989*, vol. II (Part One).

[4] The draft articles provisionally adopted by the Commission on first reading are reproduced in *Yearbook ... 1986*, vol. II (Part Two), pp. 24 *et seq.* For the commentaries, *ibid.*, p. 24, footnote 72.

[5] For the text, see 2131st meeting, para. 21.

[6] For the text, *ibid.*, para. 76.

All treaties embodied provisions—both positive and negative—which could be either extended or restricted, or again, amplified or narrowed. The best course would be to delete any such qualifying phrase and leave it to the parties to do as they wished, under bilateral arrangements, so long as the provisions they adopted were not incompatible with the object and purpose of the draft articles.

8. The expression "new provisions" was also obscure. Why use the term "new"? Such provisions might in fact have existed for years, as for instance when two States had already agreed to follow rules that differed from those of the future convention, yet were compatible with it.

9. Mr. BEESLEY said that he could accept the text proposed by the Special Rapporteur provided that it was amended along the lines suggested by Mr. Barboza and Mr. Arangio-Ruiz. It was preferable to retain the words "relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier", and a suitable expression that would refer back to the international agreements mentioned in the first part of the provision should be found to replace the words "such new provisions". He took the point implicit in Mr. Arangio-Ruiz's remarks that an agreement obviously should not be incompatible with the object and purpose of the draft articles. He also considered that the last part of the new text was a more elegant way, from the legal standpoint, of referring to non-discrimination.

10. On a more general question, he would point out that, although it was generally agreed that the object of the draft articles was to facilitate communication among States and other entities by means of the diplomatic bag and the consular bag, whether or not accompanied by a courier, there was some difference of view as to whether the régime should be subjected to further restrictions or be made more liberal. That point did not cause any difficulty, however, for it could be settled as and when a diplomatic conference was convened to adopt the various texts.

11. Mr. YANKOV (Special Rapporteur) said that he could agree to delete the phrase "confirming, supplementing, extending or amplifying the provisions thereof", although it appeared in other conventions, including the 1963 Vienna Convention on Consular Relations. He would also suggest, to meet Mr. Beesley's point, that the words "such new provisions" be replaced by "such new agreements".

12. Mr. BENNOUNA, agreeing with Mr. Arangio-Ruiz, said that the discussion on paragraph 3 put him in mind of the famous play "Much Ado About Nothing". He was certain that, if asked, very few members of the Commission would speak in favour of retaining the paragraph, which, despite the Special Rapporteur's commendable efforts, added nothing to traditional treaty practice. Moreover, he was not sure what was meant by provisions "incompatible with the object and purpose" of the draft articles. The ambiguity implicit in the original reference to article 6 thus persisted. Again, he saw no need for the provision that a treaty must not affect "the enjoyment by the other Parties to the present articles of their rights", which in effect was a stipulation in favour of a third party. For all those reasons, paragraph 3 served no useful purpose. However, he would not stand in the way of its adoption.

13. Mr. ILLUECA said that he could agree to the text proposed by the Special Rapporteur.

14. Mr. BARSEGOV thanked the Special Rapporteur for proposing a text that was not verbose, but concise. Each word had a firm legal basis and was in its rightful place.

15. Dreadful labour pains were attending the convention's birth, despite the fact that it had a solid legal foundation in both customary and written rules of international law. Paradoxically, more objections were being voiced to the present articles than to any other drafts, some of which had been less well grounded in existing rules of international law.

16. He could understand that there would be different approaches among members of the Commission and among States: indeed, that was why members of the Drafting Committee had always tried to reconcile opposing viewpoints.

17. Great concessions had been made in the Drafting Committee's work: for example, the régime of the future convention had been made not binding, but optional, for the diplomatic bags and diplomatic couriers of special missions and international organizations. He, too, was in favour of unifying the régime applicable to couriers and bags, but felt that that result should be achieved by bringing the régime applicable to consular bags and couriers to the level of that provided for diplomatic bags and couriers.

18. The concessions had been made with a view to achieving wide ratification of the convention, but it now appeared that those efforts to ensure that the greatest possible number of States became parties to it, and that it had a wide impact, had been in vain. It seemed that efforts were being made to counterpose a different régime to the convention, even before it had entered into force.

19. He was grateful to Mr. Arangio-Ruiz for pointing out that the intention behind the comments made on the new text of paragraph 3 proposed by the Special Rapporteur was to provide for the possibility not only of "confirming, supplementing, extending or amplifying" the provisions of the convention, but also of limiting them. That phrase brought up the whole question of what the legal interrelationship between the convention and others that would subsequently be adopted should be. The wording of the proposed text had been taken from article 73, paragraph 2, of the 1963 Vienna Convention on Consular Relations, which was the only convention to contain such wording. Neither the 1969 Convention on Special Missions, nor the 1975 Vienna Convention on the Representation of States, nor the 1961 Vienna Convention on Diplomatic Relations incorporated such a provision. However, since there was a trend towards including such language, he was prepared to go along with it, but was concerned about the submission of amendments to what was already an amendment. The proposed formulation permitted extension, but not restriction, of the provisions of the future convention, and was in conformity with the law of treaties in general and with the object and purpose of the draft articles in particular.

20. One proposal, Mr. Eiriksson's (para. 4 above), would only confuse the interrelationship between the convention and conventions that would subsequently be adopted. To remove the reference to "the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier" would be to fail to specify the convention's very subject-matter in the text, and to delete the phrase taken from the 1963 Vienna Convention would be to expunge any mention of the possibility of interrelationships with subsequent conventions. Such deletions were proposed

because the text was "too wordy": but if wordiness brought precision, then he was in favour of wordiness.

21. He urged the Commission to adopt the text proposed by the Special Rapporteur if it wished to avoid creating a conflict of régimes with other, future conventions. The Commission was now considering the very last paragraph of the very last article, and should make no more changes, for the text met the requirements of international law in the matter.

22. Mr. ARANGIO-RUIZ said he wished to point out that his attitude was prompted not by opposition to the future convention, but by technical considerations. If two States believed their diplomats might be involved in drug trafficking and decided to abolish the use between themselves of the inviolable diplomatic bag, undertaking to inspect all diplomatic bags exchanged between them, there was nothing to prevent them from concluding such an agreement, either prior to or subsequent to the convention's entry into force. That was why he saw no need for the inclusion of paragraph 3.

23. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the proposal submitted by the Special Rapporteur was acceptable as a compromise text, and that some of the changes suggested during the meeting constituted improvements and should also be adopted. The provision's purpose being to prevent discrimination, what mattered most was that new agreements entered into by States parties to the present articles should not affect the enjoyment by other parties of the rights provided for in the articles. The provision was well founded, it was necessary, and it added an element of clarity.

24. Mr. Barboza's suggestion to delete the phrase "confirming, supplementing, extending or amplifying the provisions thereof", and to retain the phrase that Mr. Eiriksson thought should be deleted (see paras. 4 and 6 above), was a good one: future agreements should not be limited to "confirming, supplementing, extending or amplifying" the provisions of the articles. He would therefore endorse the text proposed by the Special Rapporteur, as amended by Mr. Barboza. Personally, he would also delete the words "are not incompatible with the object and purpose of the present articles and", but would not press for such a change.

25. Since the idea expressed in article III, paragraph 3, of both draft optional protocols was the same as that stated in article 32, paragraph 3, he hoped that the same text would be adopted, *mutatis mutandis*, for the protocols as well.

26. Mr. YANKOV (Special Rapporteur) said that he was duty-bound as Special Rapporteur, as a member of the Commission and as a lawyer to say that he did not agree with the statement that the words "are not incompatible with the object and purpose of the present articles" were unclear. The phrase might be subject to varying interpretations, but it was a standard formula, and he was surprised that doubts should be raised about it, especially in the Commission. It appeared in the 1969 Vienna Convention on the Law of Treaties, not only in article 19, on reservations, but also in article 18, which dealt with something much more important than reservations: the obligation of States, after signing and before ratifying a treaty, not to take any action that was not compatible with the object and purpose of the treaty. The formulation was also used in numerous treaties concluded recently.

27. The text now proposed for paragraph 3, incorporating the amendments suggested by Mr. Barboza and by himself, read:

"3. Nothing in the present articles shall preclude the Parties thereto from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, provided that such new agreements are not incompatible with the object and purpose of the present articles and do not affect the enjoyment by the other Parties to the present articles of their rights or the performance of their obligations under the present articles."

28. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the title and paragraph 3 of article 32 as amended by the Special Rapporteur and Mr. Barboza (paras. 3 and 27 above). The latter text would also be adopted, *mutatis mutandis*, for paragraph 3 of article III of draft Optional Protocol One.

It was so agreed.

The title and paragraph 3 of article 32 were adopted.

Article 32 was adopted.

Paragraph 3 of article III of draft Optional Protocol One was adopted.

Article III of draft Optional Protocol One was adopted.

Draft Optional Protocol One was adopted.

29. Mr. FRANCIS said that he wished to express his support for what the Special Rapporteur had said about the propriety of incorporating a reference to incompatibility. Article 47 of the 1969 Convention on Special Missions contained a similar provision.

30. There had been many comments about the need for paragraph 3. Actually, it was essential, because the diplomatic courier and diplomatic bag were covered by other conventions in which there were provisions that were identical, in substance, to the content of paragraph 3. To omit the facility that such provisions afforded States would clearly not be in the spirit of the other codification conventions.

Draft Optional Protocol Two on the Status of the Courier and the Bag of International Organizations of a Universal Character

31. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for draft Optional Protocol Two, which read:

DRAFT OPTIONAL PROTOCOL TWO ON THE STATUS OF THE COURIER AND THE BAG OF INTERNATIONAL ORGANIZATIONS OF A UNIVERSAL CHARACTER

The States Parties to the present Protocol and to the articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, hereinafter referred to as "the articles",

Have agreed as follows:

Article I

The articles also apply to a courier and a bag employed for the official communications of an international organization of a universal character:

(*a*) with its missions and offices, wherever situated, and for the official communications of those missions and offices with each other;

(*b*) with other international organizations of a universal character.

Article II

For the purposes of the articles:

(*a*) "diplomatic courier" also means a person duly authorized by the international organization as a courier who is entrusted with the custody, transportation and delivery of the bag and is employed for the official communications referred to in article I;

(*b*) "diplomatic bag" also means the packages containing official correspondence, and documents or articles intended exclusively for official use, whether accompanied by a courier or not, which are used for the official communications referred to in article I and which bear visible external marks of their character as a bag of an international organization.

Article III

1. The present Protocol shall, as between Parties to it and to the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 or the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947, supplement the rules on the status of the diplomatic courier and the diplomatic bag contained in those Conventions.

2. The provisions of the present Protocol are without prejudice to other international agreements in force as between parties to them.

3. Nothing in the present Protocol shall preclude Parties thereto from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, provided that such agreements do not result in discrimination within the meaning of article 6.

32. International organizations did use couriers and bags, and in some cases they were expressly authorized to do so by international conventions of a general character. The 1946 Convention on the Privileges and Immunities of the United Nations said that the United Nations had the right "to dispatch and receive its correspondence by courier or in bags, which shall have the same immunities and privileges as diplomatic couriers and bags" (art. III, sect. 10). The 1947 Convention on the Privileges and Immunities of the Specialized Agencies recognized the right of the specialized agencies "to dispatch and receive correspondence by courier or in sealed bags, which shall have the same immunities and privileges as diplomatic couriers and bags" (art. IV, sect. 12). Not only was the right to use couriers and bags admitted, but it was also recognized that such couriers and bags must have the same immunities and privileges as diplomatic couriers and bags of States.

33. The question of including couriers and bags of international organizations in the scope of the draft articles had been discussed almost from the beginning of the consideration of the topic. Opinions had been divided. At the time of the adoption of the draft articles on first reading, the view had prevailed that couriers and bags of international organizations should be left outside the articles, which should deal only with couriers and bags of States. In view of the comments and observations received from States, the Special Rapporteur had, in his eighth report (A/CN.4/417, para. 60), proposed adding a paragraph 2 to article 1 (Scope of the present articles), reading:

> "2. The present articles apply also to the couriers and bags employed for the official communications of an international organization with States or with other international organizations."

Article 2 would then have been deleted.

34. The Special Rapporteur's proposal had received support from a number of members of the Commission, although some of them had pointed out that the text did not cover communications between an international organization and its offices or agencies located away from headquarters. The Drafting Committee had considered that it would be overstepping its authority if it recommended such a fundamental change in the scope of the draft articles at the present stage. However, it had decided to recommend that States be afforded the possibility of applying the articles to couriers and bags of international organizations. To that end, it had prepared draft Optional Protocol Two.

35. The protocol was as straightforward as Optional Protocol One and followed the same structure. Article I defined the object and purpose: the application of the draft articles to couriers and bags employed for the official communications of international organizations of a universal character. It had been deemed prudent to speak only of international organizations of a universal character. The official communications in question were those which took place, first, within an organization, i.e between headquarters and missions and offices of the organization, or between those missions and offices; and, secondly, between the organization and other international organizations of the same universal character.

36. Article II defined the expressions "diplomatic courier" and "diplomatic bag". In the case of a "diplomatic courier", it supplemented article 3 of the draft articles by saying that that expression, as used in that article and throughout the draft, also meant a person duly authorized by an international organization as a courier, namely one entrusted with the custody, transportation and delivery of a bag and employed for the official communications of the organization, as defined in article I. Article II spoke only of "international organizations", without adding "of a universal character". The omission of the latter expression had no substantial significance and had been done for drafting reasons: otherwise, the text would have been unnecessarily cumbersome. As for the expression "diplomatic bag", the language used had been taken from article 3, paragraph 1 (2), of the draft articles.

37. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the same text, *mutatis mutandis*, for paragraph 3 of article III as it had for paragraph 3 of article 32 and for paragraph 3 of article III of Optional Protocol One (see paras. 27-28 above).

It was so agreed.

38. Mr. MAHIOU pointed to a discrepancy in the French texts of article III, paragraph 2, of the two optional protocols. In Optional Protocol One, the words *dans les relations* appeared between the words *en vigueur* and *entre les parties*, but in Optional Protocol Two they did not. As an advocate of linguistic concision, he would propose that Optional Protocol One be aligned with Optional Protocol Two.

It was so agreed.

39. Mr. KOROMA asked whether the words "the international organization", rather than "an international organization", were used in article II (*a*) because the reference was not to an international organization in the abstract, but to a particular organization that might have authorized a person to serve as a courier.

40. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he had no objection if Mr. Koroma preferred the words "an international organization".

41. Mr. YANKOV (Special Rapporteur) said that, in connection with a question on article 28, paragraph 2, he had explained (2130th meeting) that the use of the word "the" rather than "a" before the words "consular bag" was indispensable, because not every consular bag should be subjected to the procedure envisaged in that article. Draft Optional Protocol Two involved a different case, however, and the reference should be as general as possible. He could therefore agree to replacing the word "the" by "an" before the words "international organization" in article II (*a*). The Secretariat would, in any case, carefully review all the texts adopted, with a view to ensuring consistency of language and correct use of definite and indefinite articles.

42. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt draft Optional Protocol Two, with the amended text of paragraph 3 of article III already adopted (para. 37 above).

It was so agreed.

Draft Optional Protocol Two was adopted.

43. Mr. YANKOV (Special Rapporteur), replying to queries by Mr. Eiriksson, said that the relevant part of article 8, as amended (see 2128th meeting, paras. 92 *et seq.*), read: ". . . indicating his status and essential personal data, including his name and, where appropriate, his official position or rank . . ."; and that the final sentence of the English text of article 20, as amended (see 2130th meeting, paras. 33 *et seq.*), read: "An inspection in such a case shall be conducted . . .". As for article 30 (see 2131st meeting, paras. 10 *et seq.*), he proposed that the beginning of paragraphs 1 and 2 be amended in English to read: "Where, because of reasons of *force majeure* . . .".

It was so agreed.

44. Mr. EIRIKSSON proposed that the words "referred to in article 25", in paragraph 2 of article 28 (see 2130th meeting, paras. 89 *et seq.*), be replaced by "referred to in paragraph 1 of article 25". Pointing out that the word "articles" in paragraph 2 of article 25 (*ibid.*, paras. 72 *et seq.*) was employed in a sense which differed from that attached to the same word in paragraph 1 of the same article, he suggested that the end of paragraph 2 of article 25 be amended to read: ". . . other than the correspondence, documents or articles referred to in paragraph 1."

45. Mr. YANKOV (Special Rapporteur) said that he could accept the proposal regarding paragraph 2 of article 28. As to paragraph 2 of article 25, Mr. Eiriksson's point could be met more simply by replacing the word "articles" by "items".

46. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) associated himself with those observations and, accordingly, proposed that the relevant part of paragraph 2 of article 28 be amended to read: ". . . other than the correspondence, documents or articles referred to in paragraph 1 of article 25 . . .". In paragraph 2 of article 25, he proposed that the word "articles" be replaced by "items".

It was so agreed.

47. Mr. PAWLAK said that, at the end of the consideration of the topic, he wished to revert briefly to the question of the relationship between the draft articles and optional protocols just adopted and customary law. Although the Special Rapporteur and all members of the Commission had done their best to complete and supplement the existing conventions, they had failed to cover all aspects of questions relating to the topic. He had raised the matter during the work of the Drafting Committee and now wished, for the sake of consistency, to place on record that the Commission had discussed the issue and that one member had recommended that the problem be taken up at the future diplomatic conference and be reflected in the preambular part of the future convention on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

48. Mr. SEPÚLVEDA GUTIÉRREZ said that, as the present draft was the first set of articles to be adopted by the Commission since he had become a member, he wished to testify to so important an occasion and, in particular, to express his personal admiration of the Special Rapporteur and the Chairman of the Drafting Committee for their tireless efforts to steer the Commission's work on the topic towards a successful conclusion.

49. Mr. HAYES, reverting to Mr. Koroma's suggestion concerning article II (*a*) of Optional Protocol Two (para. 39 above), which had been accepted by the Chairman of the Drafting Committee and the Special Rapporteur, said that he did not disagree with replacing the word "the" by "an" before the words "international organization", but he was bound to point out that the same problem arose in article II (*b*) of Optional Protocol One, in article 3, paragraph 1 (1), of the draft articles, and in numerous other parts of the text. He was in favour of leaving article II of Optional Protocol Two unchanged in the interests of consistency, and therefore appealed to Mr. Koroma to withdraw his suggestion.

50. Before concluding his remarks, he wished to take the opportunity to associate himself with the tribute paid by Mr. Sepúlveda Gutiérrez to the Special Rapporteur and the Chairman of the Drafting Committee.

51. Mr. YANKOV (Special Rapporteur), emphasizing that English was not his mother tongue, said that the question of the use of the definite or indefinite article could safely be left to the Secretariat assisted by experts. As a general comment, he remarked that drafting changes of a cosmetic nature frequently defeated their purpose.

52. The CHAIRMAN suggested that the matter be left to the Secretary to the Commission, with instructions to ensure consistency throughout the draft.

It was so agreed.

53. Mr. OGISO said that, in response to a reservation he had expressed (2130th and 2131st meetings) in connection with article 28, the Special Rapporteur had explained that the provision in paragraph 1 exempting the diplomatic bag from examination "directly or through electronic or other technical devices" did not prevent two or more parties to the future convention from using such techniques by agreement amongst themselves. The Special Rapporteur had also said that he would provide the necessary clarification in the commentary. In view of the new wording of article 32, paragraph 3 (para. 27 above), he wished to request the Special Rapporteur to indicate in the same part of the commentary that such an agreement should not be regarded as being incompatible with the object and purpose of he future convention. The commentary should, of course, make it clear that that was the opinion of one member.

54. Mr. BARSEGOV said that he, for one, took the view that such an agreement would be incompatible with the future convention.

55. Mr. YANKOV (Special Rapporteur), reiterating the comments he had made at the previous meeting in connection with article 28, said that it was for the States concerned to establish a régime between themselves on the basis of reciprocity and in the exercise of their sovereign rights. More than 130 bilateral agreements making the diplomatic bag subject to the régime of the consular bag or vice versa were already in existence. The matter of electronic and other technical devices would seem to be one for the future, rather than for the present. He intended to follow the time-honoured practice of prefacing opinions reflected in the commentary with the words "A view was expressed to the effect that . . .".

ADOPTION OF THE DRAFT ARTICLES ON SECOND READING

56. The CHAIRMAN, noting that the second reading of the draft articles on the topic had been completed, suggested that the Commission should adopt the whole set of draft articles and the draft Optional Protocols thereto.

The draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier were adopted on second reading, together with the draft Optional Protocols thereto, unanimously.

57. Mr. SOLARI TUDELA said that, in the Drafting Committee, he had suggested that a provision be included in the draft articles to cover the exchange of consular bags between two consular posts headed by honorary consular officers. In reply, the Special Rapporteur had drawn attention to paragraph 4 of article 58 of the 1963 Vienna Convention on Consular Relations, which stated: "The exchange of consular bags between two consular posts headed by honorary consular officers in different States shall not be allowed without the consent of the two receiving States concerned." He had accordingly withdrawn his suggestion. The point he had raised was none the less valid where one or both of the two receiving States concerned was not a party to the 1963 Vienna Convention. He would therefore request the Special Rapporteur to include a passage in the commentary to deal with the question of the exchange of consular bags between honorary consuls.

58. Mr. EIRIKSSON said that, with the exception of one article, he had refrained from discussing the substance of the various draft articles when they had been adopted. He had done so in order to save time and also because he had had the opportunity to discuss his proposals for amendments in the Drafting Committee. He had been given a fair hearing both by the Drafting Committee and by the Special Rapporteur and was convinced that there was no majority view in favour of those of his proposed amendments which had not been accepted by the Committee. Hence he wished to place on record his reservations regarding a few of the articles finally adopted by the Commission.

59. His proposals at the previous session had been designed to make the draft more generally acceptable by keeping the provisions on the status of a courier to a minimum so as to avoid assimilating such status to that of diplomatic staff. In the first place, the draft should be entitled "Draft articles on the diplomatic courier and the diplomatic bag", bearing in mind that the articles dealt not only with the status of the unaccompanied bag but also with that of the accompanied bag. He could also support Mr. McCaffrey's suggestion to reverse, both in the title and in the articles themselves, the order in which the courier and the bag were mentioned.

60. Article 2 could well be deleted. He had a distaste for "do not prejudice" clauses in general. Article 7 could also be deleted, for it stated a self-evident fact. Paragraph 1 of article 9 was couched in terms that were far too indefinite for inclusion in a legal text. Admittedly, the same was true of the comparable articles in the codification conventions, but it was doubtful whether States in practice had any views at all on the nationality of couriers. Those that did have such views could express them to the States involved. The cases described in paragraphs 2 and 3 were much too detailed. As for those mentioned in paragraph 3, he failed to see why they should have been selected out of all the possible permutations of nationality. The codification conventions did not specify all of those categories. Plainly, article 9 could be deleted.

61. Articles 10 and 11 served no useful purpose. They would have been helpful if the Special Rapporteur's earlier draft articles on the commencement of functions had been retained. As matters now stood, the important point about privileges and immunities was covered in article 21. Article 13 could also be dispensed with, since "facilities" were not defined in paragraph 1 and since paragraph 2 was qualified by the phrase "to the extent practicable".

62. Article 17 placed an unnecessary burden on both the receiving State and the transit State and should not have been included. In the case of article 18, the immunity could have been confined to immunity from criminal jurisdiction, as set forth in paragraphs 1 and 5. In article 19, paragraph 2 was unnecessary, being a *de minimis* clause. Again, paragraph 1 of article 20 was a corollary of the inviolability enunciated in article 16 and could therefore have been dispensed with.

63. As to article 28, he would merely refer again to his proposal at the previous session, which had been reflected in the Commission's report.[7] His comments on article 32 had been made at the previous meeting.

DRAFT RECOMMENDATION OF THE COMMISSION

64. The CHAIRMAN proposed that, in accordance with article 23 of its statute, the Commission should recommend to the General Assembly that it convene an international conference of plenipotentiaries to consider the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and to conclude a convention and protocols on the subject. Since one of the optional protocols adopted by the Commission concerned the couriers and bags of international organizations of a universal character, the General Assembly would also have to decide whether to permit such organizations to participate in the conference. The conference would also have to deal with the final clauses of the convention, including the clauses on the settlement of disputes.

65. He invited the Commission to adopt the substance of that draft recommendation, leaving the final wording to the Secretariat.

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[7] See 2130th meeting, footnote 12.

66. Mr. YANKOV (Special Rapporteur) said that the form the draft articles should ultimately take would be the subject of a passage for inclusion in the Commission's report on its present session. In the relevant General Assembly resolution, the Commission had been instructed to formulate "an appropriate legal instrument". The question had been discussed on a number of occasions, more particularly in connection with the consideration of his eighth report (see A/CN.4/417, paras. 32-38), and the Commission had then agreed that the draft articles would take the form of a draft convention.

67. Mr. TOMUSCHAT pointed out that, in certain cases, such as that of the 1969 Convention on Special Missions, draft articles adopted by the Commission on a particular topic had been referred not to a diplomatic conference, but to the Sixth Committee of the General Assembly for adoption as a convention. That procedure spared Governments the expense of sending representatives to a conference. The matter was of particular importance to developing countries. He would suggest that the General Assembly could decide whether to convene a conference of plenipotentiaries or to have the future convention adopted within the framework of the Sixth Committee.

68. The CHAIRMAN said that, under the draft recommendation he had proposed, it was indeed the General Assembly that would decide how the future convention would be adopted. The main point of the recommendation was that the draft articles should become a convention.

69. Mr. DÍAZ GONZÁLEZ drew attention to article 23, paragraph 1 (*c*), of the Commission's statute, whereby the Commission was empowered to recommend to the General Assembly "To recommend the draft to Members with a view to the conclusion of a convention". Under paragraph 1 (*d*), the Commission could recommend to the General Assembly "To convoke a conference to conclude a convention". Pursuant to those provisions, it could be left to the General Assembly to decide which body would adopt the future convention.

70. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the draft recommendation he had proposed.

The draft recommendation was adopted.

DRAFT RESOLUTION OF THE COMMISSION

71. Mr. REUTER, speaking as the longest-serving member of the Commission, said that, in conformity with tradition, on the conclusion of the work on a topic, it was appropriate for the Commission to express its gratitude and appreciation to the Special Rapporteur. He accordingly proposed the following draft resolution, on the understanding that the final wording could be adjusted by the Secretariat in the light of the appropriate precedents:

"*The International Law Commission,*

"*Having adopted* the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier,

"*Desires to express* to the Special Rapporteur, Mr. Alexander Yankov, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft by his tireless efforts and devoted work and for the results achieved in the elaboration of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier."

72. As the senior member of the Commission, he felt he could add a few words to express the hope that members would do their best to be present in the Commission and the Drafting Committee when a matter of interest to them was being discussed. The Commission suffered from an over-abundance of talent, which meant that some members were often called away to other important duties. As a result, their statements did not always take place at the most appropriate moment for the Commission.

73. Mr. McCAFFREY and Mr. FRANCIS said that they heartily endorsed the tribute paid by Mr. Reuter to the Special Rapporteur.

74. Mr. THIAM said that members who did not take the floor also shared the feelings of gratitude and admiration for the Special Rapporteur and would be expressing those feelings by supporting the draft resolution proposed by Mr. Reuter.

75. The CHAIRMAN said that the draft resolution proposed by Mr. Reuter would be considered together with the corresponding part of the Commission's draft report. At that time, there would be an opportunity for members to pay a well-deserved tribute to the Special Rapporteur.

76. He proposed that the Commission should adjourn to allow the Planning Group to meet.

It was so agreed.

The meeting rose at 12.10 p.m.

2133rd MEETING

Friday, 7 July 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Relations between States and international organizations (second part of the topic) (A/CN.4/401,[1] A/CN.4/424,[2] A/CN.4/L.383 and Add.1-3,[3] A/CN.4/L.420, sect. E, ST/LEG/17)

[Agenda item 8]

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[1] Reproduced in *Yearbook ... 1986*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1989*, vol. II (Part One).

[3] Reproduced in *Yearbook ... 1985*, vol. II (Part One)/Add.1.