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Summary record of the 2077th meeting

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74. Mr. EIRIKSSON said that, in a discussion on that very question at an expert group meeting within the Council of Europe, it had been assumed that the draft articles would not affect the ability of private air carriers to ensure the security of their own aircraft, but would apply to the activities of State customs officials. In most cases, of course, airport security was ensured by a combination of measures carried out by State authorities and private companies.

75. Mr. BARSEGOV, referring to comments made by other members of the Commission, said that the scope of international air transport regulations extended to private companies, and that he had never heard of unaccompanied air cargo being subjected to scrutiny at airports.

76. Mr. MAHIOU concurred with Mr. Barsegov that air transport was already regulated by a number of instruments which had to be respected by airline companies as well as by States. Even if airports were managed by private companies, they were still subject to State control through regulation. With regard to control mechanisms that operated in both the public and the private sectors, the example could be cited of motor coaches, which were subject to extremely strict regulations in terms of authorization to carry passengers, passenger identity controls, etc., and also that of privately owned data banks, whose use was monitored in many countries by government bodies set up to prevent interference in the private lives of individuals.

77. Mr. ARANGIO-RUIZ said that the Commission's problems with article 28 did not relate to whether regulations could cover both private and public entities, for of course they could. If the future convention incorporated a provision against electronic scanning, both State authorities and private companies would be obliged to ensure that diplomatic bags were not subjected to that scrutiny. The Commission should concentrate on determining how the application of article 28 would affect situations such as those mentioned by Mr. Ogiso.

78. Mr. BENNOUNA, referring to the comments made by the Special Rapporteur, said that, although sniffer dogs were unlikely to read what was in diplomatic bags, they raised a serious problem. Could the evidence provided by their sense of smell, which was not infallible and could easily be misled by tobacco or food products, be used as grounds for opening or returning a diplomatic bag?

79. He had every sympathy with the recommendations made by the International Conference on Drug Abuse and Illicit Trafficking and would welcome any steps taken to combat the drug traffic.

80. Mr. TOMUSCHAT, referring to the comments made by Mr. Barsegov, said that, in his view, the whole problem hinged on the type of obligation the Commission wished to establish. Under human rights law, the prohibition of torture meant that a State could not use torture and must ensure that none took place in its territory. But the guarantee of free speech did not place the State under an obligation to ensure freedom of speech in private relations. There was thus a basic distinction between two types of obligation, and article 28 could be understood in either sense. The commentary could elucidate whether airline companies would be under an obligation to refrain from scanning diplomatic bags.

81. Mr. OGISO said that he had had difficulty understanding the comment made by Mr. Barsegov, because he saw article 28 as applying also to bags carried by diplomatic couriers, not to bags entrusted to the captains of aircraft.

82. Mr. YANKOV (Special Rapporteur) said that the issues raised during the discussion would fuel the Commission's consideration of the topic over the next few days. An interesting point about counterbalance had been raised by Mr. Arangio-Ruiz. The obligation of the sending State was stipulated in article 5, and any abuse by that State of the relevant regulations would be a wrongful act and would thus entail its responsibility. That was one of the legal guarantees about which Mr. Arangio-Ruiz had asked; another was the attempt to strike a balance of interests between various categories of States throughout the draft articles.

83. An additional consideration brought out in the discussion was that the draft articles should apply to all diplomatic bags, whether accompanied or not; they should not create a régime within a régime applicable to private companies or individuals. If a State assumed obligations under an international convention, all legal entities under its jurisdiction or control must respect those obligations: article 27 of the 1969 Vienna Convention on the Law of Treaties had made it clear that internal law could not be invoked as a justification for non-compliance with international obligations.

The meeting rose at 1.05 p.m.

2077th MEETING

Tuesday, 12 July 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

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. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, 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/L.420, sect. F.3)

[Agenda item 4]

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

[2] *Ibid.*

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

CONSIDERATION OF THE DRAFT ARTICLES[3] ON SECOND READING (*continued*)

1. Mr. TOMUSCHAT paid tribute to the Special Rapporteur for the skilful way in which he had dealt in his eighth report (A/CN.4/417) with the often conflicting comments by Governments and succeeded in working out balanced solutions. From the general point of view of establishing a uniform régime, he noted that there was little or no difference between the four types of couriers and bags covered by the codification conventions. In practice, Governments more often than not chose the better protection of diplomatic channels for their consular communications. It was therefore somewhat artificial to maintain that distinction, and it would not be unduly bold for the Commission to propose a single régime corresponding to all four conventions. On the other hand, many States had not yet become parties to the 1969 Convention on Special Missions or the 1975 Vienna Convention on the Representation of States, and it should be explained to the international community that the establishment of a uniform régime was not a veiled attempt to impose the provisions of those two instruments on States that were not prepared to accept them.

2. With regard to the new paragraph 2 which the Special Rapporteur proposed to add to article 1 (*ibid.*, para. 60), he shared the view of those who wished to exclude the couriers and bags of international organizations from the scope of the articles. If they were to be included, a great many drafting changes would be necessary; indeed, the entire draft would have to be revised. More importantly, since many States refused to place international organizations on the same footing as States, the extension of the proposed régime to cover those organizations would seriously hamper the chances that the draft articles would one day enter into force. In addition, all the problems that had arisen during the discussions on the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations were bound to arise again: should international organizations be able to become parties to the future convention? Should regional organizations also be able to participate? What weight would an international organization's signature have from the viewpoint of the convention's entry into force? All those problems could probably be resolved if it was really necessary to supplement the 1946 Convention on the Privileges and Immunities of the United Nations, but that did not seem to be the case. For all those reasons, the Commission should refrain from adding one more link to an already complex legal chain.

3. Referring to article 6, he said that he saw no justification for the Special Rapporteur's proposal for the addition of a new paragraph 2 (*b*) (*ibid.*, para. 92), since States enjoyed the sovereign power to arrange their mutual relations as they saw fit. The draft articles were not a kind of *jus cogens*, and it would be ill-advised to prohibit States from deviating from the path traced by the Commission. If States parties to the future instrument wished to enter into arrangements different from those the Commission was proposing, that would be because they had serious reasons for doing so.

4. Article 13 also seemed unnecessary, especially in view of article 30. Under normal circumstances, a courier should be able to discharge his functions independently, and it was only in unforeseen circumstances that he might be in need of help from the authorities of a foreign State. Nevertheless, he was prepared to abide by the view of the majority on that point.

5. Article 17 had been the subject of controversy at the time of its adoption on first reading, and government opinion on it also appeared to be divided. He personally could not see any merit in the provision. The courier already enjoyed the protection of articles 15, 16 and 28. The addition of a new immunity, which was not provided for in existing agreements or customary rules, could only reduce the number of accessions to the future convention. Article 17 might be marginally useful, but it was certainly not necessary and it would be better to dispense with it.

6. Article 18 was not absolutely necessary either, although it did not seriously encroach upon the sovereign rights of the receiving State. The cases it covered were not likely to occur very often because of the short duration of the courier's stay in the territory of the receiving State. As for the possible liability of the courier for motor vehicle accidents (para. 2), the receiving State would undoubtedly make the entry of any vehicle into its territory dependent on insurance coverage for injury to third parties.

7. With regard to article 28, the Special Rapporteur rightly stressed that the aim of the Commission's work should be the establishment of a uniform régime. Alternative B proposed in the report (*ibid.*, para. 247) should therefore be excluded from the outset. However, simply to reproduce article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations ("The diplomatic bag shall not be opened or detained") would not be a viable solution either, for many abuses had occurred in the recent past. The solution proposed by the Government of the Federal Republic of Germany (A/CN.4/409 and Add.1-5) was particularly felicitous. First, it was only when the receiving State believed that the diplomatic bag contained articles which gravely endangered public security or the safety of individuals that the authorities of that State could request that the bag be subjected to examination by electronic or other technical devices; secondly, the sending State would have ample opportunity to dispel suspicions; thirdly, the examination could take place only in the presence of a representative of the sending State; finally, the examination could in no circumstances jeopardize the confidentiality of the diplomatic bag. The various safeguards built into that proposal should allay the fears of all interested parties, since they struck a fair balance between the requirements of confidentiality and the risk of abuse.

8. The new text proposed for article 32 (A/CN.4/417, para. 274) specified that the draft articles "shall complement" the four codification conventions. He was not

[3] For the texts, see 2069th meeting, para. 6.

sure whether that wording was fully adequate to cover the many different situations which could arise from the simultaneous application of the four conventions and of the proposed régime. It was true that, in general, the draft articles were designed to elaborate on the provisions of the four codification conventions, and the word "complement" would therefore seem appropriate. In many respects, however, the draft articles, and in particular article 28, could also be regarded as amendments to the rules in force. The wording of article 32 should take account of that amending effect, which would not be expressed by the word "complement".

9. As the Special Rapporteur indicated (*ibid.*, para. 277), article 33 as it now stood should be deleted: the Commission's work would be pointless if a provision were retained that fragmented the régime that had been so laboriously established. However, States which accepted the future instrument should not be compelled to accept the provisions of a convention which they had not ratified, for example the 1969 Convention on Special Missions. A formula should therefore be devised to ensure that States did not find themselves in that situation.

10. He was in favour of referring the draft articles to the Drafting Committee.

11. Mr. CALERO RODRIGUES said he regretted the fact that the full text of the articles adopted on first reading had not been reproduced either in the eighth report (A/CN.4/417) or in the document containing the comments of Governments (A/CN.4/409 and Add.1-5), for that would have facilitated the discussion. It was also unfortunate that fewer than 30 Governments had deemed it necessary to reply to the request of the General Assembly.

12. In the eighth report, the Special Rapporteur proposed many amendments of form and substance to the draft articles. He himself welcomed the new wording of articles 6 (para. 2), 9, 11, 19, 20, 21, 26 and 31, but he did not agree with the amendments to articles 5 and 27, and doubted the validity of those relating to articles 8, 23 and 32. He would nevertheless confine his statement to the four issues on which the Special Rapporteur had suggested (2069th meeting, para. 43) that the debate should focus.

13. The first issue was that of the scope of the draft articles. On first reading, the Commission had decided that the draft should deal exclusively with the diplomatic and consular courier and bag and that communications between States and international organizations should not be covered. In doing so, it had followed established practice, under which international organizations were subjected to a kind of *apartheid* régime. In point of fact, those organizations regularly communicated by diplomatic courier and bag, with the consent of the States concerned. Since the main purpose of the draft articles, as the Special Rapporteur recalled in his report (A/CN.4/417, para. 11), was "the establishment of a coherent and, in so far as possible, uniform régime", it had to be ensured that the provisions of the draft also applied to that very real situation. That result could be achieved without great difficulty, inasmuch as all the provisions on the courier and the bag serving in inter-State relations could apply *mutatis mutandis* to communications between international organizations. Of course, as Mr. Tomuschat had pointed out, a great many amendments would have to be made to the text, but the task was not insurmountable.

14. Failing such a course, the Commission might find itself in the same situation as in the case of the law of treaties: once the 1969 Vienna Convention on the Law of Treaties had been elaborated and concluded, work had had to be resumed on a convention on the law of treaties "between States and international organizations or between international organizations" (1986), whereas it would have been just as easy to include some additional provisions in the first convention. If international organizations were not included in the present draft, it was more than likely that the Commission would soon be requested to prepare a new draft relating to them. It might just as well do so now. Incidentally, a reference to "international organizations" would not be enough; it would have to be specified which organizations would be covered, probably starting with those of a universal character, particularly those belonging to the United Nations family.

15. The paragraph 2 which the Special Rapporteur was proposing to add to article 1 (*ibid.*, para. 60) dealt only with relations between international organizations or between international organizations and States, whereas account also had to be taken of communications within the same international organization, for example between its headquarters and its external offices.

16. If the Commission did not wish to broaden the scope of the draft articles in that manner, it could at least add an optional clause concerning international organizations, but with all the advantages and disadvantages of "declarations" of the type referred to in article 33. Better yet, it might consider the possibility of an additional protocol, for, even if States might be reluctant to have international organizations sign the future convention, they might be more ready to agree that they should be able to sign an additional protocol. In any event, the Commission could not simply ignore the question.

17. Turning to the questions of inviolability and immunity dealt with in articles 17 and 18, he recalled that, from the very beginning of work on the topic, the delegations to the Sixth Committee of the General Assembly and the members of the Commission themselves had expressed concern lest the articles might grant too many immunities and privileges. The proposed texts should allay such concern: the approach adopted was purely functional, since the courier was granted only the immunities he required for the proper exercise of his functions. Doubts nevertheless continued to exist, so much so that it had been asked whether the provision on the inviolability of temporary accommodation (art. 17) should be retained and whether the courier should enjoy immunity from jurisdiction (art. 18). His own view was that those articles should be left unchanged and that, if the term "inviolability" seemed too strong, the first sentence of paragraph 1 of article 17 should be deleted and the order of paragraphs 1 and 2 reversed. The same functional approach was apparent in article 18, which gave the diplomatic courier

only the protection he needed for the performance of his functions. Like the Special Rapporteur (*ibid.*, para. 158), he thought that article 18 should be retained as it stood, since it represented a compromise solution, although some drafting changes would be necessary because the text was too long.

18. The protection of the diplomatic bag, dealt with in article 28, was a very controversial issue, and the discussions on the subject appeared to relate primarily to examination by means of electronic devices, and to what should be done when the receiving State had serious reason to believe that the bag contained something unlawful. On the first point, dealt with in paragraph 1 of the article, he was opposed to that paragraph on the grounds that some countries had such sophisticated technical devices that it could never be known whether they were really respecting the confidentiality of the bag. As to the second point, dealt with in paragraph 2, the concerns of receiving States had to be taken into consideration, since there were all too many examples of abuses of diplomatic privileges. It was for that reason that the Special Rapporteur proposed alternatives B and C (*ibid.*, paras. 247 and 251). Alternative C was preferable, since it merely confirmed a practice which was becoming increasingly widespread and which had, moreover, been dealt with in a convention. It also offered the advantage of meeting the concerns of the two States involved in a balanced way. Lastly, it would better safeguard the homogeneity and uniformity of the proposed régime.

19. Article 33 gave States the option of derogating, by means of a declaration, from the provisions of a régime which it was rightly desired to make "coherent and uniform". It had been suggested that the provisions of that article would make it easier for States to sign the future convention. He saw many objections of a legal nature to such an "optional declaration", but, if its inclusion would help to ensure the success of the draft, he would be prepared to accept it.

20. Mr. HAYES said that, in view of the detail and density of the report under consideration (A/CN.4/417), the Commission should now confine itself to considering the four main issues indicated by the Special Rapporteur (2069th meeting, para. 43) and leave a closer study of other parts of the report until the next session. That, he hoped, would make it possible to refer the draft articles relating to those four issues to the Drafting Committee and to ensure that the second reading would be completed during the Commission's current term.

21. A first general question that had to be considered, however, was whether the Commission should prepare draft articles on the topic at all. The majority of the members seemed to agree with the General Assembly that it should. He too believed that, while some of the other topics on the agenda were more important, it would be useful to consolidate the rules on the courier and the bag in a single instrument.

22. The Special Rapporteur had naturally based his proposals on the four codification conventions, identifying the twin objectives of consolidating and harmonizing existing rules and developing new rules for situations not fully covered by those conventions. At a time when States, which were beset with serious problems, including security problems, were re-examining those conventions and tending towards divergent interpretations of their less precise provisions, those two objectives were fully justified.

23. It had been argued that the preparation of the draft articles duplicated work already done and that it faced the obstacle that, in many respects, the provisions of the four codification conventions differed, presumably because the situations covered were different and therefore required different solutions. The most obvious example was that of the 1963 Vienna Convention on Consular Relations which, unlike the other conventions, permitted the opening of the bag in certain circumstances. The Special Rapporteur had been right to tackle that difficulty by adopting a functional approach; he had also demonstrated the usefulness of examining State practice to see whether it revealed more uniformity than the provisions of the conventions. The ultimate success of the Commission's endeavours would largely depend on its good judgment in deciding whether harmonization of a particular rule was feasible or acceptable.

24. It had been pointed out that, while the 1961 and 1963 Conventions had been widely supported, the same was not true of the 1969 and 1975 Conventions, and that had raised the question of the scope of the articles. In that connection, he considered that, in the case of divergences between the provisions of the four conventions, less weight should be given to the two last. In short, he thought that it was useful to prepare draft articles on the topic and that the functional approach adopted by the Special Rapporteur was probably the only means of achieving that goal.

25. The first of the main issues identified by the Special Rapporteur was that of the scope of the future convention, dealt with in article 1. In his own view, the articles should cover all couriers and bags coming under the four codification conventions. With regard to international organizations, the draft should cover only organizations of a universal character; other organizations should continue to be covered by specific agreements or arrangements. He also thought that the draft should cover communications between international organizations and their external offices. However, he agreed with the argument put forward by the Special Rapporteur (A/CN.4/417, para. 56) that communications of national liberation movements did not have to be covered in a general legal instrument, particularly since such movements were essentially temporary in nature and it was to be hoped that they would be subsumed into State structures in the not too distant future. Still on the subject of article 1, he said that he was in favour of retaining the words "or with each other", since the 1961 Vienna Convention already acknowledged the use of the courier and the bag for communications between missions. The functional approach supported that position.

26. Turning to the second issue, concerning the inviolability of the courier (arts. 16-20), he said that article 16, which was a faithful restatement of the relevant provisions of the 1961 Vienna Convention, should be retained subject to the minor drafting amendment sug-

gested by the Special Rapporteur (*ibid.*, para. 139). However, he was not convinced of the need for article 17, concerning the inviolability of the courier's temporary accommodation. No such provision was included in any of the codification conventions. So long as the inviolability of the courier and the bag formed the subject of effective provisions, the protection of temporary accommodation, which involved serious practical difficulties, would not be necessary. The functional approach did not call for any new rules in that respect and article 17 could therefore be deleted.

27. Like all important provisions, article 18, on immunity from jurisdiction, was controversial. In general, he supported the text proposed by the Special Rapporteur, who correctly described it as "a compromise based on a functional approach leading to a qualified immunity from jurisdiction" (*ibid.*, para. 149). However, the problem dealt with in the second sentence of paragraph 2, relating to motor vehicle accidents, had to be given further thought before a final position was adopted. He also wondered whether paragraph 5 was really necessary.

28. He doubted the need for paragraph 1 of article 19, which merely elaborated on personal inviolability, as guaranteed in article 16. Paragraphs 2 and 3 of the article, however, were functionally justifiable and should be retained.

29. As to article 20, he found it difficult, in view of the shortness of the courier's stay in the receiving or transit State, to see what national, regional or municipal direct taxes he could be liable for in the performance of his functions. That exemption did not seem to be functionally necessary and could be dropped.

30. The third main issue referred to by the Special Rapporteur was the inviolability of the bag. Article 28 was, in that regard, a key provision which must ensure "an acceptable balance between the confidentiality of the contents of the bag and the prevention of possible abuses" (*ibid.*, para. 221). However, the use of square brackets in paragraph 1 showed that views differed on how that balance should be achieved and even on what the balance should be. The problem was most helpfully summarized by the Special Rapporteur in his report (*ibid.*, para. 222). He personally believed that article 28 should expressly provide for the inviolability of the bag as a logical corollary of the inviolability of the archives, documents and, particularly, the correspondence of the mission to or from which the bag was proceeding. At the time of the preparation of the future 1961 Vienna Convention, it might have been sufficient to provide merely that the bag should not be opened or detained; today, such a rule was clearly not adequate. Hence the functional approach called for an express rule on the inviolability of the bag.

31. He also considered that the scanning of the bag should not be permitted. In view of technological advances, current or future, an obligation to accept scanning, even under exceptional circumstances, could not be regarded as consistent with respect for the confidentiality of the bag's contents. During the exchange of views which had taken place at the preceding meeting on the question of the examination of bags by airport or airline personnel using metal detectors, the Special Rapporteur had indicated that, according to the information available to him, it could not be guaranteed that such equipment would not become even more sophisticated. Sending States might have to make special arrangements in that regard, but they should not be placed in the disadvantageous position of being obliged by law to accept scanning. Moreover, the draft articles should apply a uniform régime in respect of all bags. Although the provisions of the 1963 Vienna Convention differed from those of the other conventions, the evidence suggested that States had applied a uniform régime both prior to and since 1963. The functional approach did not furnish any substantial grounds for different régimes for different types of bag.

32. As for the type of régime to be applied, he considered that it should be based on the approach taken in the 1963 Vienna Convention, as the exception provided for therein was necessary in order to ensure a proper balance between the concern of the sending State and of the receiving State in the light of recent examples of abuses of the inviolability of the bag. However, that exception should be more narrowly defined than in article 35 of the 1963 Convention. The conditions set out in paragraph 2 of article 28 proposed by the Government of the Federal Republic of Germany (A/CN.4/409 and Add.1-5) illustrated the approach which the Commission might adopt, without, however, allowing scanning.

33. On the other hand, he was not convinced that that exception should be available to the transit State. Since the transit State could return the bag to its place of origin, and since the bag would, in all likelihood, leave the territory of the transit State at least as soon by proceeding normally on its way, the exception would be of very limited value to the transit State it was thus unjustifiable on functional grounds.

34. He was therefore in favour of retaining paragraph 1 of article 28 *in toto* and of deleting all the square brackets. As for paragraph 2, alternative C proposed by the Special Rapporteur (A/CN.4/417, para. 251) could serve as a starting-point, but the text would have to be amended to omit any reference to the transit State and to incorporate the conditions set out in the text proposed by the Federal Republic of Germany, with the exception of examination through electronic means.

35. Since the draft articles as a whole covered the accompanied bag as much as the unaccompanied bag, he wondered whether the title of the draft should not be amended.

36. Turning to the fourth main issue mentioned by the Special Rapporteur, he reiterated the view that the draft articles should apply to all couriers and bags, with rare exceptions. However, as many States had not become parties to at least two of the codification conventions and seemed unwilling for the present to be bound by their rules, they would probably not accept a new convention which would bind them to the same rules. In those circumstances, article 33 was necessary if there was to be any hope of early and wide acceptance of the draft articles in the form of a convention. It could of course be asked what purpose a consolidated convention would serve if many of its provisions were to remain a dead letter. His own response was that the con-

vention would be particularly useful to States that accepted it in full and also, if less so, to States that availed themselves of article 33. Moreover, the convention would contribute towards a future consensus and a uniform régime.

37. The only practical alternative seemed to be to limit the draft articles to diplomatic and consular bags. A consolidated instrument would not in any case eliminate the plurality of régimes in existence at present, but, with a provision such as article 33, it might help to do so in the not too distant future. Naturally, that reasoning was valid only if the draft articles as a whole were regarded as potentially constituting a legally binding instrument; if that were not the case, there would be no need for article 33, at least in its present form. The nature of the instrument that would be adopted was another problem that would have to be resolved at a later stage during the second reading, at the same time as the fate of article 32.

38. He was in favour of referring to the Drafting Committee the articles dealing with the four main issues on which he had spoken and of leaving the other articles for consideration in greater detail at the next session.

39. Mr. AL-BAHARNA, after briefly reviewing the background of the topic under consideration, suggested that it might be worth while to look at what Governments had had to say about the draft articles (A/CN.4/409 and Add.1-5). Only 29 Governments had transmitted their comments and observations, however, and, even if additional replies were received before the end of 1988, they would still be too few to enable general conclusions to be drawn. Those comments and observations thus represented the opinions of States that held strong views one way or the other. His intention was not to analyse those comments, but to highlight the major points which had a bearing on the codification of the law.

40. Several Governments had argued that the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, as well as customary international law, were sufficient for the purpose and that it would be unnecessary to embark upon the codification of the topic. That argument seemed to show that the Governments concerned were opposed either to the approach adopted by the Commission or to the content of the draft articles. Whatever the reason, however, it was too late to question the need for codification. Inasmuch as the draft articles consolidated existing rules in a single instrument and removed any loopholes in those rules, they must be welcomed. That was why he believed that basic opposition to the draft articles was unsustainable. Nevertheless, the Commission might wish to consider some of the points made in the replies by Governments that might improve the draft articles.

41. The Governments of the Nordic countries, Austria, Greece, the Netherlands and Spain had raised a number of objections to the upgrading of the status of the courier. In his view, the general argument against treating the diplomatic courier in the same way as the diplomatic agent should be reconsidered, as should article 17, which went beyond the criterion of "functional necessity". The reconsideration should cover other articles as well, including article 18. He agreed with the comments made by the Greek Government concerning paragraph 1 of article 18, which could also apply to paragraph 2.

42. The Governments of the Nordic countries, the Netherlands and the United Kingdom had objected to article 19 for a number of reasons. The Commission should examine the ramifications of those arguments and remove the lacunae, if any, in the article.

43. Article 25, on the content of the diplomatic bag, was obviously a key provision. The Government of the United Kingdom was in favour of strengthening it in order to prevent the import or possession of articles prohibited by the law of the receiving State or the transit State. That argument appeared to be reasonable, and the Commission should take it into account in re-examining the text.

44. Article 28 was also a key provision and one of the most controversial, as shown by the number of bracketed portions of the text adopted on first reading. Governments had expressed diametrically opposed views on the subject, and the Commission now faced the task of reconciling them. In so doing, it had to bear in mind not only the impact of technological progress on institutions, but also the purpose of codification, which, in the present instance, was to establish an acceptable balance between the interests of sending States and those of receiving or transit States.

45. An analysis of the comments by Governments revealed sharp differences of views on three questions. The first was whether the diplomatic bag should be subjected to electronic examination: some Governments were firmly opposed, while others were favourable, but one of them under certain conditions. It seemed to him that the Governments of the Nordic States had taken the most balanced position on that delicate problem: they had indicated that further study and discussion of the question were required in order to reach a broadly acceptable solution. The second controversial question was whether the rule enunciated in paragraph 2 of article 28 should apply only to the consular bag or be extended to the diplomatic bag; he preferred the second solution, which was the most logical. Paragraph 2 was in the nature of a qualification to paragraph 1, which dealt with the diplomatic bag; it therefore stood to reason that the scope of paragraph 2 should be extended to the diplomatic bag. As to the third question, concerning the extension to the transit State of the privileges accorded to the receiving State in respect of examination of the bag, he believed that it should be given an affirmative answer.

46. Article 31, which established the rule that the immunities of the diplomatic courier and the diplomatic bag were not affected by non-recognition of a sending State or its Government, had been criticized by the few Governments that had submitted comments on it. He himself was not sure whether the article was absolutely necessary and believed in any case that it should be reformulated to limit its scope.

47. Article 32, on the relationship between the articles and existing bilateral and regional agreements, had likewise been heavily criticized. It was true that ar-

ticle 32 did not deal adequately with the question of successive treaties, for it said nothing about the relationship with the four codification conventions; nor did it seem to be in keeping with article 30 of the 1969 Vienna Convention on the Law of Treaties. In his view, it would be best to leave the matter to the operation of existing law rather than to prescribe a half-way solution.

48. Article 33, which would enable States to designate the categories of couriers and bags to which they did not intend to apply the articles, might indeed introduce an element of flexibility in the text, thereby facilitating wider acceptance; but it also resulted in a fragmentation of the legal rules governing the status of the diplomatic courier and bag, and a number of Governments had therefore criticized it. He himself saw it as being contrary to the central purpose of codification, which was to produce uniform rules. It should either be deleted altogether or amended to mitigate its undesirable effects.

49. Mr. BENNOUNA said that, in accordance with the suggestion made by the Special Rapporteur, he would refer only to four of the most controversial articles of the draft, reserving the right to express his views on the other provisions at the appropriate time, either in the Drafting Committee or in plenary.

50. With regard to article 1, the proposal made by the Special Rapporteur in his report (A/CN.4/417, para. 60), which would have the effect of equating international organizations with States in respect of the status of the courier and the bag, called for a number of comments. First, the unitary legal status of the State contrasted with the multiplicity of legal régimes of international organizations; secondly, the privileges and immunities of international organizations at present depended on the headquarters agreements concluded between those organizations and the host countries; thirdly, those headquarters agreements permitted the facilities granted to international organizations to be adapted to their objectives, functions and size. Before a decision was taken to establish a uniform régime for the couriers and bags of international organizations, a great deal of thought should therefore be given to the problem, which was more complex than it might seem. For example, a State which agreed to grant certain immunities to the bag of an international organization's office in its territory might not want that office to enjoy the same immunities in communicating directly with other countries, or even with organizations which the State regarded as being hostile to it. In drafting a headquarters agreement, moreover, a State had the option of ranking the privileges and immunities granted to the bag of an organization according to the guarantees which that organization was prepared to offer and according to the level of responsibility it had acquired. It would be difficult, especially on second reading, to do away with that system and simply to extend the application of the articles, which were intended to cover States, to all international organizations. It might, however, be possible, as Mr. Calero Rodrigues had proposed (para. 16 above), to draft an optional protocol on the status of the couriers and bags of organizations belonging to the United Nations system. He would be interested to hear the Special Rapporteur's opinion on that proposal.

51. In order to succeed in reconciling views on article 28, which was, as had been pointed out, a key provision of the draft, account had to be taken of the objective stated by the Special Rapporteur (A/CN.4/417, para. 221), namely to establish an acceptable balance between the confidentiality of the content of the bag and the prevention of possible abuses, bearing in mind that sending States could become receiving States and vice versa. He agreed with the Special Rapporteur's proposal that the adjective "inviolable" should be retained in paragraph 1 of the article (*ibid.*, para. 226). Even if that word was not used in the existing conventions, it could well be incorporated in a special convention on the diplomatic courier and bag, for the inviolability of the courier and the bag was a corollary of the inviolability of archives and other official documents of diplomatic missions. Consequently there must be exemption from all examination, whether direct or by electronic or other means. He was therefore in favour of the deletion of all the square brackets in paragraph 1, as the Special Rapporteur proposed (*ibid.*). Although security of transport, especially air transport, continued to be a problem, he had taken the Special Rapporteur's point that there was no way of ensuring that existing metal detection methods would not be used for other purposes; that problem, which was linked to technological advances, was still unresolved.

52. The Special Rapporteur had proposed three alternatives for paragraph 2 of article 28. Alternative C would be a step backwards in the development of positive law and he preferred alternative B, which reproduced the existing rules and would perhaps obviate the need for the provisions of article 33. It could also be argued that the secrecy of correspondence transmitted through the consular bag had less need of protection than that of correspondence transmitted through the diplomatic bag, and that the host country could therefore have broader powers vis-à-vis the consular bag.

53. Article 32 raised a number of thorny legal problems which should perhaps have been dealt with in greater detail. The Special Rapporteur indicated (*ibid.*, para. 271) that the main purpose of the draft articles was to establish a coherent régime governing the status of all categories of couriers and bags through the harmonization of existing provisions in the codification conventions and the further elaboration of additional concrete rules. The Special Rapporteur also proposed the deletion of the word "regional" in the title and the text of article 32, since it was ambiguous; he supported that proposal. With regard to the relationship with the four codification conventions, the Special Rapporteur believed that it was enough simply to stipulate in article 32 that the provisions of the articles would complement the conventions listed in article 3, paragraphs 1 and 2, without mentioning the possibility of conflicts between the articles and the codification conventions.

54. Should the conclusion then be drawn that the draft was intended to complement the codification conventions as and where they did not conflict with it? If so, the main objective, that of harmonizing the existing provisions, might be left by the wayside. Since article 30, paragraph 3, of the 1969 Vienna Convention on the Law of Treaties clearly indicated that a later treaty

took precedence over an earlier treaty in relations among States which were parties to both instruments, and since the Commission's draft articles constituted a *lex specialis* that should take precedence over the general conventions in most cases, he believed that article 32 should be amended by reversing the order of the proposal made by the Special Rapporteur (*ibid.*, para. 274) and stating, for example:

> "Bilateral agreements in force, including the conventions listed in article 3, paragraphs 1 and 2, shall be applicable in so far as they do not conflict with the provisions of the present articles."

Article 311 of the 1982 United Nations Convention on the Law of the Sea, which provided that that Convention prevailed over earlier codification conventions and stipulated that individual agreements were applicable in so far as they did not conflict with it, might also serve as a model.

55. With regard to article 33, he endorsed the Special Rapporteur's proposal for its deletion. As he had pointed out during the discussion in the Sixth Committee,[4] even if the article did not constitute a reservation *per se*, since it provided for an option, it had the effect of enabling States to make a general reservation—a procedure which was contrary to the purposes of the articles as stated in article 1 of the draft and which was prohibited by article 19 of the Vienna Convention on the Law of Treaties. Although the commentary to article 33[5] indicated that that article was based on article 298 of the United Nations Convention on the Law of the Sea, the analogy had no foundation in the present case, for the optional exceptions provided for in article 298 applied only to section 2 of part XV of the Convention, dealing with the settlement of disputes. The optional nature of dispute settlement was recognized in treaty law practice, but that was not at all the case in the present instance. Article 33 might even have the effect of weakening the existing customary rules, and should therefore be deleted.

56. The Special Rapporteur had expressly requested the Commission to indicate whether there was any need for providing for procedures for the settlement of disputes. Like Mr. Shi (2076th meeting), he personally believed that the most suitable approach would be to deal with the question in an optional protocol.

57. Mr. AL-QAYSI, after commending the Special Rapporteur on the quality of his eighth report (A/CN.4/417), said that he would merely endorse the views expressed by Mr. Calero Rodrigues and add a few comments of his own.

58. The general observations made by the Special Rapporteur at the beginning of his report (*ibid.*, para. 11) deserved support, although account must be taken of the Commission's overall objective of relative if not absolute acceptability. With regard to the argument put forward by some members that the draft articles should not be based either on the 1969 Convention on Special Missions or on the 1975 Vienna Convention on the Representation of States, which many States had not accepted, he pointed out that the topic under consideration related to only one element of those Conventions, namely the courier and the bag, and that the aim was to consolidate the rules in force, to supplement them and to prevent abuses, as the Special Rapporteur had explained. If some of the provisions of those two Conventions would in fact make it possible to consolidate and supplement the rules in force and to prevent abuses, he could not see why they should not be reproduced.

59. Referring to the scope of the articles, he endorsed the comments made by Mr. Calero Rodrigues, noting, however, that the application of the articles to international organizations would be all the more justified in that the international community had provided, in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, for the possibility that international organizations could conclude treaties. The application of the articles to international organizations would thus be not only appropriate but also legally well founded.

60. As to the extent of the privileges, immunities and facilities, a proper balance had to be maintained in all cases between the various factors referred to by the Special Rapporteur (*ibid.*, paras. 29-31), while guarding against selectivity and, above all, taking account of functional necessity, having regard to the interests of the sending State, the receiving State and the transit State. For example, the concern for unification and harmonization could not prevail over a State's interest in protecting itself against abuses. Similarly, the formulation of more detailed and precise rules could not be required without some functional necessity, for such rules would create unnecessary obligations for States. Some articles therefore had to be trimmed, while others would have to be strengthened.

61. Turning to article 28, he said that, although the proposal by the Government of the Federal Republic of Germany (A/CN.4/409 and Add.1-5) was an interesting one, it would require further discussion. When the receiving State requested that the diplomatic bag should be examined by electronic means, that could be only an intermediate step, coming between the request for the opening of the bag and the return of the bag to its place of origin, and which, in the event of a refusal, would in any case lead to one of those two solutions. Such a step would probably allay concerns, but it would at the same time jeopardize the principle of the confidential nature of the bag. He was therefore of the opinion that the examination of the bag by electronic means should either be made a general rule or eliminated altogether. In any event, he agreed with Mr. Calero Rodrigues that it would be better to state the principle of inviolability in pararaph 1, that paragraph to be followed by paragraph 2 of alternative C.

62. Article 31, as amended by the Special Rapporteur, now applied only to situations that seemed to be governed by general principles. It might therefore not really be necessary. As to article 32, it raised thorny problems, and the comments made in that regard by Mr. Bennouna should be given careful consideration. The best solution might be to leave that text aside for the time be-

[4] *Official Records of the General Assembly, Forty-first Session, Sixth Committee*, 32nd meeting, para. 62.

[5] *Yearbook . . . 1986*, vol. II (Part Two), pp. 33-34, para. (1) of the commentary.

ing and come back to it once the entire draft had been completed.

63. With regard to article 33, he shared Mr. Calero Rodrigues's views and recalled that the idea of an "optional declaration" had originally been put forward by a member of the Commission in connection with the question now dealt with in article 28; the problem was whether the inviolability of the bag should be absolute, whether the inspection of the bag by electronic means should be allowed and whether the diplomatic bag should be treated in the same way as the consular bag.[6] The Special Rapporteur had taken up that idea, which had been put forward in a very specific context, and had introduced it in the wider context of the applicable legal régime as a whole, thus making it an entirely different idea that was much broader than it had been originally. Moreover, if article 33 was retained, it would give rise to practical problems, for it would be for minor officials to decide which régime to apply according to the option chosen by States and it was not certain that they would be in a position to do so. If article 33 was designed to incite wide acceptance by States of the draft articles as a whole, it should perhaps be retained provisionally, although the possibility of deleting it should not be ruled out in the event that it raised practical problems.

64. As to referral of the articles to the Drafting Committee, he thought that the Commission should proceed without further delay to the finalization of the text. It would nevertheless be better to refer all the articles to the Drafting Committee, and not only those relating to the four main issues referred to by the Special Rapporteur, since all those texts were closely linked.

65. With regard to the question of the settlement of disputes, that might be dealt with later, perhaps in a separate protocol, as Mr. Bennouna had suggested, assuming of course that the question warranted consideration by the Commission, given the modest objectives of the draft articles.

Organization of work of the session (*continued*)*

[Agenda item 1]

66. Mr. BARSEGOV said that he would like to know what the Commission's programme of work would be from now until the end of the session. There were still two topics to be discussed, namely State responsibility and jurisdictional immunities of States and their property, and he asked whether the special rapporteurs concerned would be able to introduce their reports at the current session, even on a preliminary basis, so that the members of the Commission would have time to study them before the following session.

67. The CHAIRMAN said that the Enlarged Bureau would meet the following day to consider the programme of work up to the end of the session and that he would present the Enlarged Bureau's recommendations at the Commission's next meeting.

The meeting rose at 1 p.m.

[6] See *Yearbook . . . 1985*, vol. I, p. 179, 1906th meeting, para. 7 (Sir Ian Sinclair).

* Resumed from the 2044th meeting.

2078th MEETING

Wednesday, 13 July 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Organization of work of the session (*concluded*)

[Agenda item 1]

1. The CHAIRMAN announced that the Enlarged Bureau had drawn up a proposed programme of work based on an exchange of views at the meeting it had just concluded. According to the proposed programme, discussion on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier would continue until Friday, 15 July, when the Special Rapporteur would sum up the views expressed by members and debate on the topic would be closed.

2. On Tuesday, 19 July 1988, two Special Rapporteurs, Mr. Ogiso and Mr. Arangio-Ruiz, would introduce their respective reports on the remaining items on the Commission's agenda, namely jurisdictional immunities of States and their property, and State responsibility. There would be no debate on those topics at the current session, but if time permitted, members would be able to ask questions about the introductory statements and reports of the Special Rapporteurs. The discussion of the report of the Drafting Committee on the draft Code of Crimes against the Peace and Security of Mankind would take place from 20 July to 22 July inclusive. The final week of the session (25 to 29 July) would be devoted to discussion of the Commission's report to the General Assembly.

3. In reply to a question by Mr. SEPÚLVEDA GUTIÉRREZ, he said that two meetings a day would be held throughout the final week.

4. If there were no objections, he would take it that the Commission agreed to adopt the programme of work proposed by the Enlarged Bureau.

It was so agreed.

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/L.420, sect. F.3)

[Agenda item 4]

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

[2] *Ibid.*