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Summary record of the 2128th meeting

Topic:
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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 READING⁵

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. MAHIU, 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. MAHIU said that the French text of paragraph 1 as adopted on first reading stated: *Le courier 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.