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Summary record of the 2129th meeting

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2129th MEETING

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

Chairman: Mr. Emmanuel J. ROUCOUNAS

later: Mr. Bernhard GRAEFRATH

later: Mr. Pemmaraju Sreenivasa RAO

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

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

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
ON SECOND READING⁴ (continued)

ARTICLE 9 (Nationality of the diplomatic courier)⁵ (concluded)

1. The CHAIRMAN reminded members that the Commission still had to decide whether the word "should" in paragraph 1 should be replaced by "shall".
2. Mr. YANKOV (Special Rapporteur) said that paragraph 1 was modelled on article 8, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations, as well as on article 22 of the 1963 Vienna Convention on Consular Relations, article 10 of the 1969 Convention on Special Missions and article 73 of the 1975 Vienna Convention on the Representation of States. In those Conventions, the word "should" was used and there were no commas around the words "in principle". In his view, there were no serious reasons why the Commission should depart from that established formula.
3. With regard to paragraph 2, it had been decided, following consultations with the Chairman of the Drafting Committee, to propose replacing the definite article "the", at the beginning of the second sentence, by the indefinite article "a" and the words "until the diplomatic courier", in

the same sentence, by "until he"; it was also proposed to delete the word "the" before the word "withdrawal".

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

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

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

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

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

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

It was so agreed.

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

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

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

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

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

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

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

² *Ibid.*

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

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

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

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

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

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

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

It was so agreed.

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

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

Article 9 was adopted.

ARTICLE 10 (Functions of the diplomatic courier)

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

Article 10. Functions of the diplomatic courier

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

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

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

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

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

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

Article 10 was adopted.

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

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

Article 11. End of the functions of the diplomatic courier

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

39. Mr. REUTER noted that the Special Rapporteur's reply related to the courier's status rather than to his functions as such. He was nevertheless prepared to accept the

new subparagraph (a) on condition that the commentary made it clear that the provision applied both to situations such as those covered by article 12 and to other circumstances, such as cases of *force majeure* in which the courier returned to the country of origin without having been able to deliver the bag he was carrying.

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

Article 11 was adopted.

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

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

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

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

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

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

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

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

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

Article 12 was adopted.

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

ARTICLE 13 (Facilities accorded to the diplomatic courier)

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

Article 13. Facilities accorded to the diplomatic courier

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

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

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

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

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

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

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

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

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

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

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

Article 13 was adopted.

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 14 was adopted.

Mr. Graefrath took the Chair.

ARTICLE 15 (Freedom of movement)

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

Article 15. Freedom of movement

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

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

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

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

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

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

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

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

It was so agreed.

Article 15 was adopted.

ARTICLE 16 (Personal protection and inviolability)

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

Article 16. Personal protection and inviolability

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

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

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

Article 16 was adopted.

ARTICLE 17 (Inviolability of temporary accommodation)

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

Article 17. Inviolability of temporary accommodation

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

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

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

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

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

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

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

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

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

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

81. Paragraph 1 of the new text enunciated the general rule that the temporary accommodation of the diplomatic courier was inviolable. The words "in principle", however, immediately introduced an element of flexibility, suggesting the exceptions which appeared in subparagraphs (a) and (b). Subparagraph (a) was basically the final part of paragraph 1 of the text adopted on first reading. It provided

that inviolability might be disregarded when fire or other disaster required prompt protective action by the receiving State or the transit State. Subparagraph (b) was basically the first part of paragraph 3 of the adopted text. It allowed inspection or search by the authorities of the receiving State or the transit State when there were serious grounds for believing that, in the temporary accommodation of the courier, there were articles whose possession, import or export was prohibited by the law of the receiving State or the transit State or controlled by their quarantine regulations.

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

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

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

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

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

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

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

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

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

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

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

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

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

position at the diplomatic conference or in the Sixth Committee of the General Assembly. In his view, the Commission should retain the articles which had attracted majority support and he believed that that was the case of article 17.

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

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

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

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

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

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

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

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

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

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

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

Closure of the International Law Seminar

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

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

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

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

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

United Nations Office at Geneva for their assistance. He also thanked the Swiss authorities for their country's hospitality.

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

The meeting rose at 1.05 p.m.

2130th MEETING

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

Chairman: Mr. Bernhard GRAEFRATH

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

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

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
ON SECOND READING⁴ (*continued*)

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

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

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

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

² *Ibid.*

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

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

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