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Summary record of the 2130th meeting

Topic:

Status of the diplomatic courier and the diplomatic bag not accompanied by the diplomatic courier

Extract from the Yearbook of the International Law Commission:-

1989, **vol. I**

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

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

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

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

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

The meeting rose at 1.05 p.m.

2130th MEETING

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

Chairman: Mr. Bernhard GRAEFRATH

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

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

[Agenda item 4]

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

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

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

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

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

[2] *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.

Article 17 was adopted.

ARTICLE 18 (Immunity from jurisdiction)

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

Article 18. Immunity from jurisdiction

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 18 was adopted.

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

ARTICLE 20 (Exemption from examination and inspection)

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

Article 19. Exemption from customs duties, dues and taxes

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

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

Article 20. Exemption from examination and inspection

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

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

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.

Articles 19 and 20 were adopted.

ARTICLE 21 (Beginning and end of privileges and immunities)

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

Article 21. Beginning and end of privileges and immunities

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 21 was adopted.

ARTICLE 22 (Waiver of immunities)

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

Article 22. Waiver of immunities

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

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

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

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

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

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

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

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

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

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

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

Article 22 was adopted.

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

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

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

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

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

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

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

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

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

Article 23 was adopted.

ARTICLE 24 (Identification of the diplomatic bag)

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

PART III

STATUS OF THE DIPLOMATIC BAG

Article 24. Identification of the diplomatic bag

1. The packages constituting the diplomatic bag shall bear visible external marks of their character.

2. The packages constituting the diplomatic bag, if not accompanied by a diplomatic courier, shall also bear visible indications of their destination and consignee.

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

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

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

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

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

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

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

Article 24 was adopted.

ARTICLE 25 (Contents of the diplomatic bag)

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

Article 25. Contents of the diplomatic bag

1. The diplomatic bag may contain only official correspondence, and documents or articles intended exclusively for official use.

2. The sending State shall take appropriate measures to prevent the dispatch through its diplomatic bag of articles other than those referred to in paragraph 1.

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

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

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

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

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

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

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

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

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

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

Article 25 was adopted.

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

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

Article 26. Transmission of the diplomatic bag by postal service or any mode of transport

The conditions governing the use of the postal service or of any mode of transport, established by the relevant international or national rules, shall apply to the transmission of the packages constituting the diplomatic bag in such a manner as to ensure the best possible facilities for the dispatch of the bag.

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

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

Article 26 was adopted.

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

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

Article 27. Safe and rapid dispatch of the diplomatic bag

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

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

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

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

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

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

Article 27 was adopted.

ARTICLE 28 (Protection of the diplomatic bag)

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

Article 28. Protection of the diplomatic bag

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 28 was adopted.

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

The meeting rose at 1 p.m.

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[10] *Ibid.*

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

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