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Summary record of the 2132nd meeting

Topic:
**Status of the diplomatic courier and the diplomatic bag not accompanied by the
diplomatic courier**

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

It was so agreed.

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

The meeting rose at 1 p.m.

2132nd MEETING

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

Chairman: Mr. Bernhard GRAEFRATH

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

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

[Agenda item 4]

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

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

and

DRAFT OPTIONAL PROTOCOL ONE ON THE STATUS OF THE COURIER AND THE BAG OF SPECIAL MISSIONS⁶ (*concluded*)

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

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

² *Ibid.*

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

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

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

⁶ For the text, *ibid.*, para. 76.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.

The title and paragraph 3 of article 32 were adopted.

Article 32 was adopted.

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

Article III of draft Optional Protocol One was adopted.

Draft Optional Protocol One was adopted.

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

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

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

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

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

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

Have agreed as follows:

Article I

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

- (a) with its missions and offices, wherever situated, and for the official communications of those missions and offices with each other;
- (b) with other international organizations of a universal character.

Article II

For the purposes of the articles:

- (a) "diplomatic courier" also means a person duly authorized by the international organization as a courier who is entrusted with the custody, transportation and delivery of the bag and is employed for the official communications referred to in article I;
- (b) "diplomatic bag" also means the packages containing official correspondence, and documents or articles intended exclusively for official use, whether accompanied by a courier or not, which are used for the official communications referred to in article I and which bear visible external marks of their character as a bag of an international organization.

Article III

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

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

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

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

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

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

Article 2 would then have been deleted.

34. The Special Rapporteur's proposal had received support from a number of members of the Commission, although some of them had pointed out that the text did not

cover communications between an international organization and its offices or agencies located away from headquarters. The Drafting Committee had considered that it would be overstepping its authority if it recommended such a fundamental change in the scope of the draft articles at the present stage. However, it had decided to recommend that States be afforded the possibility of applying the articles to couriers and bags of international organizations. To that end, it had prepared draft Optional Protocol Two.

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

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

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

It was so agreed.

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

It was so agreed.

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

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

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

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

It was so agreed.

Draft Optional Protocol Two was adopted.

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

It was so agreed.

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

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

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

It was so agreed.

47. Mr. PAWLAK said that, at the end of the consideration of the topic, he wished to revert briefly to the question of the relationship between the draft articles and optional protocols just adopted and customary law. Although the Special Rapporteur and all members of the

Commission had done their best to complete and supplement the existing conventions, they had failed to cover all aspects of questions relating to the topic. He had raised the matter during the work of the Drafting Committee and now wished, for the sake of consistency, to place on record that the Commission had discussed the issue and that one member had recommended that the problem be taken up at the future diplomatic conference and be reflected in the preambular part of the future convention on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

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

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

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

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

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

It was so agreed.

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

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

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

ADOPTION OF THE DRAFT ARTICLES ON SECOND READING

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

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

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

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

59. His proposals at the previous session had been designed to make the draft more generally acceptable by keeping the provisions on the status of a courier to a minimum so as to avoid assimilating such status to that of diplomatic staff. In the first place, the draft should be entitled "Draft articles on the diplomatic courier and the diplomatic bag", bearing in mind that the articles dealt not only with the status of the unaccompanied bag but also

with that of the accompanied bag. He could also support Mr. McCaffrey's suggestion to reverse, both in the title and in the articles themselves, the order in which the courier and the bag were mentioned.

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

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

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

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

DRAFT RECOMMENDATION OF THE COMMISSION

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

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

⁷ See 2130th meeting, footnote 12.

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

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

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

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

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

The draft recommendation was adopted.

DRAFT RESOLUTION OF THE COMMISSION

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

"The International Law Commission,

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

"Desires to express to the Special Rapporteur, Mr. Alexander Yankov, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft by his tireless efforts and devoted work and for the results achieved in the elaboration of the draft articles on the status of the

diplomatic courier and the diplomatic bag not accompanied by diplomatic courier."

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

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

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

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

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

It was so agreed.

The meeting rose at 12.10 p.m.

2133rd MEETING

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

Chairman: Mr. Bernhard GRAEFRATH

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

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

[Agenda item 8]

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

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

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