

Document:-
A/CN.4/SR.532

Summary record of the 532nd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1960 , vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

44. Mr. LIANG (Secretary to the Commission) said that in peacetime messages in code were often sent by individuals and commercial firms. The sending of messages in code was sometimes restricted in wartime, but the restriction then applied to diplomatic missions and consulates as well.

45. The right to send messages in secret language was often acknowledged as a privilege to which consulates, as well as diplomatic missions, were entitled.

46. In that connexion, he drew attention to article 12, paragraph 3 (a), of the Consular Convention between the United Kingdom and Sweden, which specified that a career consular officer could "use secret language" in his communications "with his government, with his superintending diplomatic mission or with other consulates of the sending State which are situated in the same territory", and in the official correspondence sent and received by him in consular pouches and bags. The relevant provision, however, went on to specify that in case of war or "imminent risk of war" the consular officer's right of communication and correspondence with the superintending diplomatic mission could be restricted if that mission was situated outside the territories of the receiving State.⁶

47. The CHAIRMAN agreed that an explicit provision should be included in the draft to safeguard freedom of movement. In line with the existing practice, that freedom of movement should not be restricted to the consular district; a consul should be at liberty to move throughout the territory of the receiving State on official and even private occasions.

48. He also agreed with the suggestion for the inclusion of a provision on the inviolability of official correspondence.

49. Lastly, with regard to means of communication, he suggested that the existing practice regarding the use of couriers and of the diplomatic bag should be recognized, along the lines of article 13 of the Harvard Draft. The right to make use of couriers was particularly useful to consulates in cases of earthquakes and other natural disasters and of strikes.

50. Mr. MATINE-DAFTARY said that, since the principle of the freedom of movement was recognized by all members of the Commission, the principle should be expressly stated and the freedom should not be limited to the consular district.

51. He agreed with the suggestion for the deletion of the words "in particular" from article 29, but suggested that the list of those with whom the consulate was free to communicate should be expanded to include the sending State's nationals; communication with its nationals was essential to the work of a consulate.

52. He recalled that he did not accept as absolute the inviolability of consular premises and archives; if that inviolability were to be expressed in the draft in general and absolute terms, he wished his dissenting views to be recorded in the Commission's report, since he considered that, for the purpose of the examination of evidence in judicial proceedings, the inviolability could not be absolute. With regard to the facilitation of the work of the consulate, however, he considered that the inviolability of official correspondence should be recognized.

53. As to the use of a consular bag, he felt that any refusal to permit it would lead to consulates using the diplomatic bag and would place at a disadvantage the consulate of a country which did not have a diplomatic mission in the receiving State concerned.

The meeting rose at 1.5 p.m.

532nd MEETING

Wednesday, 4 May 1960, at 10 a.m.

Chairman: Mr. Luis PADILLA NERVO

Co-operation with other bodies (A/CN.4/124) [continued] *

[Agenda item 8]

1. The CHAIRMAN welcomed Mr. Antonio Gómez Robledo, designated observer to the Commission for the Inter-American Juridical Committee by virtue of resolution XVI of the fourth meeting of the Inter-American Council of Jurists (A/CN.4/124, paragraph 159).

2. Mr. GÓMEZ ROBLEDÓ (Observer for the Inter-American Juridical Committee) said that it was a great honour for him to represent the inter-American organ entrusted with the progressive development of international law. He transmitted to the Commission the good wishes of the Chairman of the Inter-American Juridical Committee, and expressed the hope that the relations between the two bodies would become increasingly fruitful.

Consular intercourse and immunities (A/CN.4/131, A/CN.4/L.86) [continued]

[Agenda item 2]

PROVISIONAL DRAFT ARTICLES (A/CN.4/L.86) (continued)

ARTICLE 29 (*Freedom of communication*) and
PROPOSED ADDITIONAL ARTICLE (*Freedom of movement*) *

3. Mr. ŽOUREK, Special Rapporteur, said that, although still not fully convinced of the usefulness

⁶ United Nations, *Treaty Series*, vol. 202 (1954-1955), No. 2731, pp. 170-172.

* Resumed from the 531st meeting.

of such a provision, he was prepared to include in the consular draft an article on freedom of movement, employing, *mutatis mutandis*, the wording of article 24 of the draft on diplomatic intercourse and immunities. In any case, so far as the inclusion of the provision in the final draft was concerned, the Commission would be guided by the comments of governments.

4. So far as the inviolability of official correspondence was concerned he said he shared what seemed to be the general feeling in the Commission regarding the principle involved but considered that the matter was dealt with under article 27, the terms of which might be made more explicit. Accordingly, he was prepared to re-word article 27, which dealt with the inviolability of the archives and documents of the consulate. He suggested that it should be left to the Drafting Committee to recommend where the provision should be inserted.

5. With regard to the use of a consular pouch or bag, and also to the use of diplomatic couriers for carrying consular correspondence, he said that practice and opinion clearly admitted the use of such means of communication. He proposed to include a detailed commentary explaining the words "all appropriate means", and his intention had been to refer in that commentary to the use of the consular pouch or bag and of diplomatic couriers. If, however, the Commission considered that an express provision on the subject should be included in the article itself along the lines of that contained in article 13 of the Harvard Draft¹ he would have no objection.

6. With reference to the use of code in the communications of the consulate he agreed with the remarks of the secretary at the previous meeting (531st meeting, paragraph 44-46). So far as messages in cipher or secret language were concerned, however, he said that, though messages in cipher were certainly permissible between two consulates, the use of cipher was restricted by the postal administrations of some countries and by international conventions; hence it was desirable that the right of the consulate to send and receive them should be specified in the draft in order that difficulties might be avoided. The actual formulation of the provision could be left to the Drafting Committee.

7. Lastly, with reference to the general remarks of Mr. Bartoš (531st meeting, paragraph 35), he said that it had always been his intention to explain in the commentary to each article the reasons why any particular provision in the consular draft differed from the text of the diplomatic draft.

8. Mr. PAL said he was glad that the Special Rapporteur had agreed to include a provision on freedom of movement. The provision in question

should, he thought, be modelled as far as possible on article 24 of the diplomatic draft. The latter provision was the result of a compromise, and any attempt to depart from its language might reopen the controversy to which its subject matter had given rise in the Commission.

9. The questions raised in connexion with article 29 were largely concerned with drafting. For his part, he thought that article 29 should be as comprehensive as possible and that its text should be similar in all its provisions to that of article 25, paragraph 1, of the draft on diplomatic intercourse and immunities. Lastly, he considered that the use of the consular bag and couriers should be expressly mentioned.

10. Mr. VERDROSS said that Mr. François had doubted whether the consul's freedom of communication included the freedom to communicate with private persons (531st meeting, paragraph 28).

11. In his (Mr. Verdross's) opinion, in the exceptional case of communication with private persons, the privileges of consuls were wider than those of diplomatic agents. The main reason was that consuls, as distinct from diplomats, were concerned primarily with the protection of the interests of their nationals vis-à-vis the local authorities. In order to carry out his duties in that connexion, a consul had to be free to communicate with his nationals in the consular district. That freedom, of course, did not imply the right to use code or cipher in a consulate's correspondence with its nationals.

12. Accordingly, he proposed the deletion of the words "in particular" from article 29, which would thus specify the authorities with which a consul was entitled to communicate freely.

13. Secondly, he proposed that article 29 should be supplemented by a second paragraph which would provide that a consulate was entitled to communicate freely with private persons in the consular district, provided that those persons were its nationals or persons under its consular protection.

14. Mr. YOKOTA noted that there was agreement regarding the principles of freedom of movement, freedom of communication and inviolability of official correspondence.

15. It remained for the Commission to agree on the principle of the inviolability of the consular bag or pouch. He said that in Japan, although the law made no express provision for either the diplomatic or the consular bag, in practice no distinction was drawn between the two and both of them were exempted from inspection. He was therefore in favour of the principle of the inviolability of the consular bag.

16. Mr. ERIM said that article 25, paragraph 3, of the diplomatic draft stipulated the inviolability of the diplomatic bag in absolute terms. That provision represented in fact a progressive development of international law rather than an expression of existing practice. There had been occasions

¹ Harvard Law School, *Research in International Law. (II) The Legal Position and Functions of Consuls* (Cambridge, Mass., Harvard Law School, 1932), p. 306.

recently in which the authorities of a receiving State had gone so far as to order, at the risk of diplomatic complications, the opening of the diplomatic bag in cases where it was suspected that the bag contained material other than official correspondence.

17. If the consular draft was to contain a provision concerning the consular bag, such a provision should, accordingly, be less categorical than article 25, paragraph 3, of the diplomatic draft. He agreed that some measure of inviolability should be accorded to the consular bag, but safeguards against possible abuse were also necessary. A mere reproduction of the terms of article 25, paragraph 3, of the diplomatic draft was likely to lead to difficulties.

18. Mr. AMADO pointed out that, as stated in the commentary to article 25 of the diplomatic draft, a diplomatic courier was furnished with a document testifying to his status (normally the courier's passport). He asked whether a similar practice existed in the case of consular couriers.

19. He agreed with the principle embodied in article 29, but thought that the Commission should receive more information about existing practice before deciding to include a provision concerning the somewhat novel concept of a consular bag.

20. Mr. AGO thanked the Special Rapporteur for agreeing to include an article on freedom of movement.

21. Referring to Mr. Yokota's and his own remarks (531st meeting, paragraphs 24 and 21), concerning the differences between the terms of article 29 and those of article 25 of the diplomatic draft, he emphasized that those differences reflected more than a change in drafting. All members of the Commission agreed that consuls had the right to use code or cipher in their communications with official authorities. The language of article 29 as it stood, however, seemed to allow the use of code or cipher in correspondence with private individuals; he urged that article 29 should be amended so as to bring it into line with article 25, paragraph 1, of the diplomatic draft.

22. He was not entirely in favour of the suggestion of Mr. Verdross that a separate paragraph be added concerning correspondence between the consulate and private persons. The inclusion of such a provision was unnecessary, as the possibility that such correspondence might take place was self-evident. On the contrary, its inclusion, by contrast with the absence of a similar provision in the diplomatic draft, might be interpreted as meaning that diplomatic agents were not entitled to communicate freely with their nationals. In fact, the diplomatic protection of citizens abroad was a matter for the diplomatic missions of the sending State; accordingly diplomatic missions, as well as consular missions, needed to maintain contact with their nationals.

23. For all those reasons he considered that article 29 should be modelled on article 25, paragraph 1, of the diplomatic draft. The statement

in a first sentence that the receiving State must permit free communication on the part of the consulate for all official purposes would cover communication with the consulate's own nationals and with those persons to whom it owed protection. The second sentence would make it clear that the use of couriers and messages in code or cipher was limited to communications with the Government and other missions and consulates of the sending State.

24. He did not consider that a special provision was necessary on the subject of the consular bag; it would be sufficient to lay down the inviolability of official correspondence, since that inviolability would automatically apply to the bag containing such correspondence. The commentary to the article would, of course, mention that certain consular conventions made provision for a consular bag.

25. Mr. MATINE-DAFTARY said that he had intended to comment on Mr. Verdross's suggestion in much the same terms as Mr. Ago had employed. It was correct to say that the principal function of the consul was to protect the interests of the sending State's nationals who lived in the consular district. For that purpose the consul clearly had to be able to communicate with them, and article 29 should provide for that freedom of communication. However, he did not think that the difficulties mentioned in a debate would be disposed of if article 29 followed the language of article 13 of the Harvard Draft, to which the Special Rapporteur had referred, for that article 13 itself raised difficulties. For example, it spoke of communication with the vessels of the sending State, without specifying whether it meant vessels flying the flag of the sending State or vessels owned by nationals of the sending State; and it was well known that ownership and flag did not always coincide. Again, article 29 should not be drafted in excessively broad terms. To illustrate his point he said that, though consuls should undoubtedly be free to communicate with their nationals, it would be unthinkable that a consul should be able to communicate with a national who was in prison by code or cipher. He considered that article 29 should be based on the corresponding provision of article 25 of the diplomatic draft, possibly with the addition of a special clause concerning communications between the consulate and nationals of the sending State in the consular district.

26. Mr. SCELLE considered that there should be as close a parallel as possible between the diplomatic and the consular drafts. He could not accept Mr. Verdross's suggestion because, as Mr. Ago had pointed out, the scope of consular functions was less broad than that of diplomatic missions, and a consul was, of course, free at any time to apply to his embassy for assistance and in practice consuls often did so. Mr. Verdross's suggestion would make the interpretation of the article more difficult.

27. Mr. Erim had supported the orthodox view that the diplomatic bag and equally the consular bag should be used exclusively for official purposes. He (Mr. Scelle) did not think that it was worth while preventing the sending of a comparatively small number of duty-free presents by making express provision for the opening of the bag. Every government knew that there were abuses, but surely in any particular case in which abuse was suspected it would be far more desirable to draw the sending State's attention to the case in a friendly way without creating a diplomatic incident by opening the bag. He agreed with the Special Rapporteur on the way in which the article could be redrafted.

28. Sir Gerald FITZMAURICE feared it was obvious that Governments would take note of any differences between the Commission's draft of article 29 and the text of the corresponding article in the diplomatic draft. He therefore thought it better that in article 29 no reference should be made to the diplomatic bag which was mentioned in article 25 of the diplomatic draft. However, if the Commission agreed that official correspondence between consuls and their governments should be sent by diplomatic bag, it might be better to say so. The inviolability of the diplomatic bag was laid down in article 25 of the diplomatic draft, and in paragraph 5 of the commentary on that article the Commission had noted that the diplomatic bag had on occasion been opened with the permission of the Ministry of Foreign Affairs of the receiving State and in the presence of a representative of the mission concerned. It had in fact been recognized that, on rare occasions, despite its inviolability, the diplomatic bag could be opened. He recalled that in formulating that article in the diplomatic draft the Commission had agreed that it would be wrong, after having recognized the principle of inviolability, to refer in the text of the article to the possibility of the bag being opened. The reasons which had restrained the Commission in the past from qualifying the principle were equally cogent in the case of the consular draft.

29. Referring to Mr. Amado's question, he said that in practice there was no such person as a consular courier. In the practice of the United Kingdom, for instance, consular correspondence was always entrusted to members of the Queen's Messenger Corps, who were the diplomatic couriers and carried diplomatic bags containing both diplomatic and consular correspondence. Bags for consulates might be delivered direct or be fetched from the embassy or from some central point by other messengers or consular officials. Therefore, he did not think there was any need to mention a consular courier as such in article 29.

30. Mr. ŽOUREK, Special Rapporteur, confirmed Sir Gerald's explanation; there were normally no consular couriers but only diplomatic couriers, used also by consulates. Cases might arise, however, where special couriers were used to enable one consulate to communicate with another or

with a diplomatic mission. Some recent conventions, as for instance that of 28 February 1959 between the U.S.S.R. and Austria, expressly stated that consuls could communicate in cipher and by the diplomatic bag (article 13, paragraph 4). Similar provisions appeared in consular conventions entered into by the Soviet Union with Czechoslovakia on 5 October 1957 (article 6, paragraph 4); with the Mongolian People's Republic on 25 August 1958 (article 13, paragraph 4); with the Democratic People's Republic of Korea on 16 December 1957 (article 13, paragraph 4); with the People's Republic of Bulgaria on 12 December 1957 (article 13, paragraph 4); with the Romanian People's Republic on 4 September 1957 (article 13, paragraph 4); with the Hungarian People's Republic on 24 August 1957 (article 12, paragraph 4); with the People's Republic of Albania on 18 September 1957 (article 13, paragraph 4); with the People's Republic of China on 23 June 1959 (article 13, paragraph 4); and with the Federal Republic of Germany on 25 April 1958 (article 14, paragraph 2).

31. The CHAIRMAN agreed with previous speakers that freedom of movement should preferably form the subject of a special article. The Drafting Committee should be able to devise a text parallel to the corresponding provisions of the diplomatic draft.

32. So far as the subject of article 29 was concerned he said that the principle of freedom of communication should be laid down first and then the means of putting it into effect should be specified on the lines of article 25 of the diplomatic draft. He believed that the article should refer to the use of codes and ciphers, and the provisions of the consular and diplomatic drafts should be substantially the same. The need for the bag and a courier derived both from the inviolability of consular correspondence and from the principle of freedom of communication. Therefore consular correspondence should be placed in special envelopes bearing external marks and seals denoting its character; it would not be wise, however, to define the physical characteristics of bags of consular correspondence. The important thing was that the article should not exclude the use of consular bags, nor for that matter the use of consular couriers. Possibly, the wording of article 13 of the Harvard Draft (which referred to messengers holding *ad hoc* passports) might be followed in any provision relating to consular couriers.

33. With regard to the matter of communication between the consul and his nationals, he thought the article should not include any special mention of the consul's rights, for if it did governments would be bound to ask why the Commission had included such a provision in the consular draft but not in the diplomatic draft.

34. Mr. HSU doubted whether it was wise to extend protection to consular bags and couriers. It had for long been an accepted principle that diplomats must have those privileges, but he did

not believe that consuls had the same needs, and he feared that there would be much greater abuse by consulates than was the case among diplomatic missions. It could, of course, be argued that, if the Commission were agreed on the question of freedom of communication, consulates needed bags and couriers.

35. Mr. AMADO said it seemed clear that, in general practice, as Sir Gerald Fitzmaurice and the Special Rapporteur had explained, a consular courier was in fact a diplomatic courier. The Commission had agreed that the consul had a right to the secrecy of his official correspondence, but he had never heard of the use of the expressions "consular bag" and "consular courier" in any language.

36. Mr. BARTOŠ said it was obvious that unless the freedom of consuls to communicate with their nationals were guaranteed, a consul could not in fact give them the necessary protection. He strongly supported the opinion that a consul should have the right to travel and complete freedom to give advice to his nationals by post, telegram or telephone; otherwise it was impossible for a consul to know whether his nationals stood in need of protection. That right and that freedom should be expressly stated in the article, and it might also be advisable to add in the commentary that in the Commission's opinion diplomats equally had the right to communicate with their nationals. He had come to the same conclusion as Sir Gerald Fitzmaurice had, namely that in nearly all countries diplomatic and consular mail were virtually the same thing.

37. The question raised by Mr. Matine-Daftary with regard to the nationality of vessels had been settled in one of the conventions adopted by the First United Nations Conference on the Law of the Sea,² which, although not yet ratified, embodied the principle that the nationality of a vessel was that of the Power which exercised effective control over it. Besides, the International Court of Justice had been asked for an advisory opinion upon that problem, which came within the competence of the Inter-governmental Maritime Consultative Organization, and as the matter was *sub judice*, it should not be discussed by the Commission.

38. Mr. ERIM said that the expression "consular bag and pouch" was not used, so far as he knew, in any of the classic works on consular intercourse and immunities nor in the draft conventions prepared by various international organizations; it occurred in only two recent consular conventions concluded on 14 March 1952 by the United Kingdom with Sweden (1952) (article 12, paragraphs 3 and 4)³ and with Italy. Whereas the diplomatic

bag was recognized in international customary and treaty law, and was referred to in article 25 of the Commission's draft on diplomatic intercourse and immunities, the consular bag was an innovation. The examples given by Sir Gerald Fitzmaurice and Mr. Bartoš had not convinced him of the existence of a general practice in the matter of the consular bag. Provision for packages and envelopes carried by diplomatic couriers was sometimes made in regulations enacted under municipal law, as for example in Belgium,⁴ although certain very strict rules were laid down in those regulations concerning even the diplomatic bag. The very full Belgian regulations made no reference anywhere to consular bags. No one, of course, would deny that the official correspondence of consuls should be protected from all outside interference, but to accept the freedom of consular correspondence on the same footing as that of the diplomatic bag would be to go beyond the limits of what was required for the smooth operation of the consular functions. The consular conventions which mentioned the consular bag were too few to prove that the bag had received recognition in customary international law. To draw a distinction between the diplomatic bag and the consular bag would be an innovation which might not commend itself to many States. He agreed with Mr. Scelle that contraband might occasionally be passed in such bags. The Commission's draft should therefore reflect the reality in terms which would not restrict the freedom of consular correspondence, but which would prevent that freedom from being abused.

39. Mr. VERDROSS observed that the freedom of consuls to communicate with their nationals was far more important than the freedom of diplomatic missions to enter into such communication, because consuls intervened in the domestic procedures of the State of residence, whereas diplomatic missions could intervene only after the domestic remedies had been exhausted. In such cases, diplomatic missions were not protecting an individual as such, but defending the right of their State which had been injured in the person of one of its nationals. It was true that if there were no consulates in a State but only a diplomatic representative, the latter might exercise certain consular functions, but he could defend his nationals before the local authorities only if he had received an *exequatur* and was thus acting as a consular agent. That point might receive expression either in the commentary or in a special paragraph in the body of the text.

40. Mr. FRANÇOIS supported Mr. Erim's contention that to introduce the notion of a consular bag would be an innovation. If the Commission wished to be very liberal with regard to consuls, it was of course free to do so, but it must realize that it

² Convention on the High Seas (article 5). See United Nations Conference on the Law of the Sea, *Official Records*, vol. II, Plenary Meetings, Annexes (document A/CONF.13/L.53) (United Nations publication, Sales No. 58.V.4), p. 136.

³ United Nations *Treaty Series*, vol. 202 (1954-1955), No. 2731, pp. 170-172.

⁴ *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations *Legislative Series*, vol. VII (United Nations publication, Sales No. 58.V.3), p. 45.

would be making an innovation. The institution of consular couriers was likewise unknown to classic international law. The suggestion had been made that they might be recognized, but should be classed as diplomatic couriers. The two were, however, quite different. Diplomatic couriers enjoyed safeguards when carrying the diplomatic bag from their governments to the diplomatic mission, but it was not their business to distribute its contents to consulates and as diplomatic couriers they could not do so. It had also been argued that consuls were entitled to make use of diplomatic couriers; but it was undeniable that they could in no case issue diplomatic passports to such couriers. He also doubted whether the post office was bound to accept coded telegrams between consulates in the same country; in some countries it might certainly refuse to do so. If any such privilege was to be accorded to consulates, it must be stated explicitly in the draft. The Special Rapporteur seemed to be suggesting that there might be no objection to including such provisions even though they might perhaps be debatable, since the draft was merely provisional, and governments would be free to reject it. He (Mr. François) doubted the wisdom of such a course. The Commission knew from experience that very few governments commented on its drafts. The Commission should therefore exercise the greatest caution in taking the provisional drafts too lightly.

41. Mr. MATINE-DAFTARY supported Mr. Bartoš with regard to the consul's right to communicate freely with his nationals. However, he would wish to go further with article 29 and all other articles in the draft. Owing to the essential juridical difference between diplomats and consuls, the Commission should, as far as possible, draft exhaustive provisions. The suggestion that the Special Rapporteur's text be replaced by article 13 of the Harvard Draft was acceptable, since the phrase "for all official purposes" was appropriate only in connexion with diplomatic intercourse and immunities, and should therefore be deleted. The Harvard Draft was more restrictive. If the phrase was deleted, there would be no danger in adding a phrase at the end of article 29 to the effect that consuls were fully entitled to communicate freely with their nationals.

42. Mr. LIANG (Secretary to the Commission) observed that there was some doubt whether a provision concerning consular couriers or consular bags would be an innovation, since such provisions appeared in a few consular conventions. Still, he thought that many countries, especially those whose diplomatic missions had the function of supervising consulates or whose diplomatic and consular services both formed part of the foreign service, probably did in practice send their instructions to the consulates under their supervision in the diplomatic bag. Similarly the reports of consuls addressed to the Ministry of Foreign Affairs were probably transmitted through the same channel. The practice might not be in complete conformity

with article 25, paragraph 4, of the diplomatic draft, but that paragraph might be too restrictive, because, if a diplomatic mission had the function of supervising consulates, it would be very difficult to distinguish between documents in the diplomatic bag which were strictly diplomatic and those which were strictly consular. The concept of separate consular bags would be of only theoretical importance in such a case.

43. Mr. ŽOUREK, Special Rapporteur, did not agree that the concept of the consular bag was a complete innovation. Besides the two consular conventions cited by Mr. Erim, conventions between the United Kingdom and France, Mexico, Greece and Norway, contained similar provisions. The question at issue did not, however, depend solely on the existence of provisions in consular conventions, but also on practice. For decades, diplomatic couriers had carried consular bags. He did not agree with Mr. François that a diplomatic courier must in all cases deliver the bag at the diplomatic mission; it was often delivered at a consulate for practical convenience. The bag might also be entrusted to the captain of a commercial aircraft instead of being carried by a courier, as had been pointed out in paragraph 6 of the commentary on article 25 of the diplomatic draft. Since the concept was not an innovation, he could see no reason why it should not be included in a draft which embodied the two basic principles supporting it, free communication on the part of the consulate for all official purposes and the protection of consular correspondence. Furthermore, it should be noted that several States had no diplomatic relations *inter se*, only consular relations; such consulates were free to correspond by means of couriers. The Commission's function was not only to codify international law, but also to promote its progressive development; hence it was at liberty to state rules which had not yet been uniformly accepted by all States. The needs of international relations should be its guide. Although the use of the consular bag was not an innovation, but a matter of daily practice without which consulates could not properly conduct their business, the question was not of vital importance. If the Commission hoped to finish the draft at the current session it should not spend too much time on that question.

44. Sir Gerald FITZMAURICE agreed with the Special Rapporteur. He had been extremely surprised by Mr. François' statement, because all members of the Commission must surely be aware that many governments corresponded directly by consular bag with their consulates in Geneva. The Foreign Office in London did not send official correspondence to the United Kingdom consulate at San Francisco via Washington; to all intents and purposes, a consular bag was used. But in other cases, as the Secretary had pointed out, consulates received their correspondence through their diplomatic mission, which it had reached in the diplomatic bag. The idea of the

carriage of specifically consular correspondence — sometimes in bags containing nothing else and which were therefore in fact consular bags — was consequently no innovation. Admittedly, he had never heard of a consular courier as such, since all couriers were recruited as diplomatic couriers and were drawn from a corps of such couriers in the Ministry of Foreign Affairs; they carried both diplomatic and consular correspondence indifferently. The Drafting Committee might now find the form in which the concept might appropriately be expressed.

45. Mr. YOKOTA doubted whether the concept of a consular bag was an innovation; apart from the instances cited by Mr. Žourek and by Sir Gerald Fitzmaurice, he himself had already drawn attention to the practice in Japan (see paragraph 15 above). Consular couriers, on the other hand, were not widely used in practice. Some provision should certainly be made for the protection of the consular bag. No member of the Commission had as yet cited any instances in which protection had in practice been denied to the consular bag. Mr. Erim had said (paragraph 38) that the consular bag was mentioned in only a very few recent consular conventions. The explanation might be that the more recent conventions had begun to reflect the actual practice. It was hardly likely, for instance, in a case where a courier was carrying both a diplomatic and a consular bag, that the receiving State would differentiate between the two and inspect the one but not the other.

46. The question had been raised whether free communication between the consulate and nationals of the sending State should be mentioned explicitly. No member of the Commission thought that the principle should be excluded altogether. If the Special Rapporteur's draft was retained, with the modifications which he (Mr. Yokota) had suggested (531st meeting, paragraph 24) it would cover free communication with nationals of the sending State, just as the principle had been implicitly included in the first sentence of article 25, paragraph 1, of the diplomatic draft, as explained in paragraph 2 of the commentary. There had been no explicit reference to that freedom in the second sentence of article 25, paragraph 1, of the diplomatic draft, not because the principle was unimportant, but because code and cipher could not be used in communication with nationals of the sending State, whereas they could be used in communication with the government and the diplomatic missions and consulates of the sending State. A similar course should be followed in article 29 of the consular draft.

47. Mr. AGO said that the very general formula used in article 25, paragraph 1, of the diplomatic draft undoubtedly covered communication with nationals of the sending State, but if the Commission wished for an explicit reference and if Mr. Matine-Daftary was right in wanting a more restrictive formulation, the Drafting Committee could easily find a formula. The use of bags and

couriers for consular correspondence was certainly no innovation. The Italian Consulate at Geneva had for years had direct communication with Rome, and its bag had always been treated by the Swiss Federal authorities as a diplomatic bag. He had thought initially that the mere statement that consular correspondence was inviolable might be sufficient for the purpose. If, however, any doubts lingered, a phrase covering the protection of bags containing consular correspondence might be included, although the term "consular bag" itself should not be used, since it might not be accepted.

48. The CHAIRMAN asked the Commission's consent to refer article 29 forthwith to the Drafting Committee, with the following general indications: (i) the principle of the freedom of movement should be expressly stated in the draft; (ii) the general principle of freedom of communication should be expressed in article 29 in the terms used in article 25 of the diplomatic articles; (iii) a special mention should be made of the inviolability of the official correspondence of consulates. The Drafting Committee should also note that opinions were still divided on two points. First, the question remained open whether or not explicit reference should be made in the draft to free communication between consulates and the nationals of the sending State. It should be noted that it was the consensus that that was one of the main functions of a consulate and that the practice was general. The Drafting Committee should also consider whether the principle might be stated more appropriately in the text or in the commentary, and should bear in mind that the omission of that particular function in the diplomatic articles did not imply that diplomatic missions did not enjoy that right. Second, there was a difference of opinion about the manner of communication, including sending official correspondence by a messenger, whether called a consular courier or not and whether his inviolability did or did not derive from a passport or credentials issued by his government. All members agreed that the official correspondence of consulates was inviolable and should not be detained or opened. If that were true of a single envelope or package, it should be equally true regardless whether a number of envelopes or packages despatched together was called a bag or pouch. The Drafting Committee should bear in mind not only that the Commission was entrusted with the progressive development of international law, but that it was dealing with an established practice. The progress in the techniques of communications must be taken into account. In that connexion, he referred to paragraphs 2 and 3 of the commentary on article 25 of the diplomatic draft. He proposed that the article be referred forthwith to the Drafting Committee, on those terms.

It was so agreed.

The meeting rose at 1.10 p.m.