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New York

SUMMARY RECORD OF THE 25th MEETING

Chairman: Mr. TÜRK (Austria)

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10 P.

The meeting was called to order at 10 a.m.

AGENDA ITEM 145: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FIRST SESSION (continued) (A/44/10; A/44/475, A/44/409 and Corr.1 and 2)

AGENDA ITEM 142: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (A/44/465, A/44/73-S/20381, A/44/75-S/20388, A/44/77-S/20389, A/44/123-S/20460)

1. Mr. CALERO RODRIGUES (Brazil) said that the draft articles on the status of the diplomatic courier and the diplomatic bag constituted a solid basis for an international instrument which should facilitate official communications between States. If the Committee's general objective was to consolidate and develop the rule of law in international relations, it should approach that goal whenever it was feasible. He welcomed the efforts made by the International Law Commission to draw up more uniform and more complete provisions.
2. Privileges and immunities were recognized for the benefit of States and were aimed at facilitating their official communications. The accent was put on the protection of the diplomatic bag and protection was also given to the courier only to the extent that it was necessary for the performance of his functions. The International Law Commission offered acceptable solutions for most of the questions which proved controversial during the discussions.
3. The solution adopted for the question of scope was particularly commendable. The Commission had decided to exclude from the draft former article 33 which created for any State the possibility of selecting the couriers and bags to which it would apply the proposed provisions through an optional declaration. The scope of the article was now no longer subject to uncertainty. The articles would apply to couriers and bags employed by States and their diplomatic missions, consular posts, missions to international organizations and delegations to international conferences for their communications. Couriers and bags of special missions were now excluded but States wishing to apply the articles to them could do so by becoming parties to an optional protocol. The same solution of an optional protocol was proposed to allow States to apply the articles to couriers and bags employed by international organizations for their official communications. The 1946 Convention on the Privileges and Immunities of the United Nations and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies recognized the right to use couriers and bags and provided that such couriers and bags should have the same privileges and immunities as diplomatic couriers and bags of States.
4. His delegation was glad that the Commission had decided that the bag should be exempt from examination either directly or through electronic or other technical devices. On the other hand, his delegation regretted that the Commission had not found it possible to extend to all bags the system established in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations according to which, when the authorities of a receiving State had serious reasons to believe

(Mr. Calero Rodrigues, Brazil)

that improper materials were being carried, they might request that the bag be opened, and if the request was refused, the bag should be returned to its place of origin. Cases had been known in which diplomatic bags were used to carry things very different from official correspondence and documents or articles intended exclusively for official use. It was necessary to establish a fair balance between the freedom of communications and the interests of confidentiality of the sending State, on the one hand, and the security interests of the receiving State, on the other.

5. The above arguments had been very adequately set forth by the Commission in its commentary to article 28. However, the reasons advanced for not having extended to all bags the system of the consular bag were far from convincing. The Commission had decided to maintain only for the consular bag the possibility of requesting the opening of the bag as a compromise solution capable of ensuring better prospects for a wide adherence of States to the present articles. It had done so because some members were of the view that the establishment of a uniform régime in that particular case should be done on the basis of the 1961 Vienna Convention.

6. In his delegation's view, compromise could be achieved by extending to all bags the system of the consular bag and by including in the articles provisions aimed at preventing abuses. Thus, the articles could require: (a) that the "serious reasons" should be objectively explained; (b) that examination should be conducted with restraint and that correspondence should not be inspected; (c) that, if nothing improper was found in the contents of the bag, the State which requested the opening should apologize, in writing if so requested.

7. The issue under discussion raised the question of the relationship between the articles and the three Conventions mentioned in article 3, paragraph 1, namely, the 1961 Convention on Diplomatic Relations, the 1963 Convention on Consular Relations and the 1975 Convention on the Representation of States to International Organizations.

8. The Commission proposed to state in article 32, paragraph 1, that the articles would supplement the rules on the status of the diplomatic courier and the diplomatic bag contained in those Conventions. His delegation was of the opinion that the relationship between the articles and the Conventions should be governed by the general rules of the law of treaties. Article 32, paragraph 1, should not be maintained, no deviation from those general rules seeming necessary or advisable.

9. The International Law Commission recommended, in paragraph 66 of its report, that the General Assembly should convene an international conference of plenipotentiaries to study the draft articles and to conclude a convention on the subject. Although the convening of a conference represented a serious burden for the United Nations and for States, his delegation did not believe that the Sixth Committee would be in a position to act in lieu of a conference. The Committee could, however, facilitate the work of the conference by holding consultations, as was successfully done in the case of the articles on treaties between States and

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international organizations. The conference could be planned for 1991 or 1992. The international organizations whose couriers and bags might be covered by Optional Protocol II should be invited to participate in the international conference, as well as in the consultations that might be held in the Sixth Committee. That was the response of the Brazilian delegation to the question raised by the Commission in paragraph 67 of its report.

10. Mrs. OBI-NNADOZIE (Nigeria) said that diplomacy, as an instrumentality for maintaining peace and strengthening friendly relations between States, needed the solid backing of international law. Wherever the practice of States showed the existence of a lacuna in the international norms governing the interplay of actors in the international system, such a lacuna should be promptly removed through an acceptable amendment to the existing rules.

11. The Commission's draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier was a much-needed addition to the Vienna Conventions of 1961 and 1963, dealing with diplomatic and consular relations respectively. The document reiterated the inviolability of the diplomatic bag as an indispensable element in the freedom of communication between States. It was true that there had been abuses of the diplomatic bag. In many cases, the violations had been carried out without the prior knowledge or approval of States; but it was precisely because of the consequences of violations by individuals that the need for the current articles was felt.

12. In an age when there was much anxiety about illegal trafficking in foreign currency, narcotic drugs, arms and other goods, all of which constituted threats to the security of States, the concern of States that diplomatic bags should not be used in an injurious manner not originally intended was quite understandable.

13. Nevertheless, her delegation totally agreed with article 28, paragraph 1, concerning the inviolability of the diplomatic bag. Her delegation also agreed that, where there was reason to suspect that a diplomatic bag contained items other than those mentioned in article 25, paragraph 1, such a bag should be returned to its place of origin unless a request to examine it in the presence of a duly authorized representative of the sending State was heeded. A balance should be established between the principle of inviolability of the diplomatic bag and that of the security of the receiving or transit State. The two paragraphs of article 28 took care of that concern and would also take care of the varying stages of technological development of States Members of the United Nations.

14. Mr. ALEXANDROV (Bulgaria) said, firstly, that his country had acceded to the Optional Protocol to the Vienna Convention on Diplomatic Relations of 1961 and to the Vienna Conventions on Consular Relations and the two Optional Protocols of 1963.

15. With regard to the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, paragraph 31 of the Commission's report stated that the main purpose of the draft articles was to establish a uniform régime governing the status of all kinds of couriers and bags,

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(Mr. Alexandrov, Bulgaria)

based on the four international conventions, namely, the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, the Convention on Special Missions and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. That meant, firstly, consolidating, harmonizing and unifying existing rules and, secondly, developing specific and more precise rules for the situations not fully covered by those conventions. That approach enjoyed the full support of his delegation, because it reflected the evolution of diplomatic law in the aftermath of the adoption of the 1961 Vienna Convention and the increase in the number of violations of the diplomatic law governing the status of the diplomatic courier and the diplomatic bag.

16. In applying the approach he had outlined, the Commission had tried to achieve the codification of the already existing norms, which included, in addition to the four above-mentioned international conventions, the Convention on the Privileges and Immunities of the United Nations of 1946 and the Convention on the Privileges and Immunities of the Specialized Agencies of 1947. On the other hand, the Commission's task included work on the progressive development of international law.

17. The draft prepared by the Commission was balanced and reflected the opinions of the various States and groups of States. Its basic principle was reflected in article 4, which was the nucleus of the legal régime adopted. His delegation accorded great importance to the principles of non-discrimination and reciprocity and considered that it was necessary to enhance those principles further.

18. He supported the functional approach adopted by the Commission to define the status of the diplomatic bag, which made it possible to harmonize the interests, rights and obligations of the sending State, the receiving State and the State of transit. Articles 5, 12, 25, inter alia, established guarantees for the interests of the receiving State and the State of transit, while articles 13, 15, 27 and 30 guaranteed the interest of the sending State. A typical example of that balanced approach was the compromise reflected in articles 17, 18 and 28. His delegation commended the Commission for having achieved that solution, although, naturally, it did not fully reflect the position of Bulgaria, which continued to believe that the diplomatic courier should enjoy absolute immunity with respect to the criminal jurisdiction of the receiving State and the State of transit. Furthermore, he believed that the uniform approach should apply to every type of courier and bag. Nevertheless, he considered that article 28 constituted a reasonable compromise and that, in conjunction with article 6, it made it possible to adopt a flexible criterion when the States concerned so agreed. His delegation believed that the text should deal with all kinds of official communications of States and international organizations of a universal character. In that case also, the Commission had achieved a balanced solution. The possibility of applying the provisions of the draft articles to the courier and the bag of special missions or international organizations of a universal character was established in two optional protocols. In his delegation's view, that approach offered two important advantages: it considerably broadened the scope of the draft articles and eliminated the ambiguity of article 33 of the previous draft.

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19. Of particular importance was the relation existing between the draft articles and the three conventions mentioned in article 3, paragraph 1. Paragraph 2 of the commentary to article 32 explained lucidly and concisely the principle on which that relation was based. Similar wording had been included in his delegation's previous statement on the subject.

20. The Commission considered that approval of the present draft articles, concretized in a binding multilateral instrument, would constitute the culmination of work on the codification and progressive development of diplomatic law and consular law. His delegation categorically supported the Commission's recommendation that the General Assembly should convene an international conference of plenipotentiaries to study the draft articles.

21. Mr. HANAFI (Egypt) said that the main objective of the draft articles prepared by the Commission on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier was to establish a coherent system based on the Vienna Convention on Diplomatic Relations of 1961, the Vienna Convention on Consular Relations of 1963, the Convention on Special Missions of 1969 and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 1975.

22. It would be necessary to consolidate and harmonize the existing norms and to establish other, new ones to regulate situations not provided for in order to facilitate the effective functioning of official communications, ensure the confidential character contents of the bag and avoid abuses. The constant increase in international relations and the practical application of the existing norms had revealed that lacunae existed in the legal system in force, and they had to be filled pragmatically so as to ensure a balance between the provisions laying down concrete practical rules and those stating general rules. The broad approach adopted by the Commission was based on the current norms of diplomatic law. The principal objective should always be to harmonize existing provisions and new draft articles.

23. The present draft should not modify the provisions of the existing conventions. Nevertheless, those provisions could be given concrete form in order to respond to the practical exigencies deriving from the implementation of those rules. The previous work of the Commission had culminated in the conclusion of four conventions. The preparation of a new instrument to regulate the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier would represent the culmination of the Commission's work in that field.

24. The Commission had proposed that the General Assembly should convene an international conference of plenipotentiaries to study the draft articles and the draft optional protocols and successfully to conclude a convention on the topic.

25. The Commission believed that a binding legal instrument would be the most appropriate form for the draft articles and the draft optional protocol. His delegation agreed with the Commission's recommendation but was prepared to consider

(Mr. Hanafi, Egypt)

other constructive approaches concordant with that framework, in order to obtain the maximum benefit from the important work done by the Commission.

26. Mr. AUST (United Kingdom), referring first to abuse of the diplomatic bag, said that, despite his doubts about the usefulness of the exercise, he had hoped that the draft articles might help to curb abuses of the diplomatic bag and, accordingly, his Government had submitted very full written comments on previous texts of the draft articles. In the previous years, his delegation had expressed disappointment that the draft articles did not help to curb those abuses. He reiterated that sentiment. The draft articles did not adequately reflect the interests and needs of receiving and transit States, especially in the light of the many cases of abuse which had occurred. That was all the more surprising since the commentary referred to those abuses.

27. The draft articles could only be justified if there was a functional necessity for them. His Government was very doubtful about that. The Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963 still provided a satisfactory framework in that field. Although not perfect, they had stood the test of time. The only justification for a new convention on the diplomatic courier and the diplomatic bag would be if it tackled the problem of abuse. The draft articles did not do so.

28. The Commission had decided that the couriers and the bags of diplomatic missions and international organizations of a universal character should be dealt with in optional protocols. His delegation considered that approach reasonable but felt that it reduced yet further the justification for a separate convention on the subject, given that the convention would not be comprehensive. Developing that idea still further, the Commission might have tackled the question of the bags of permanent missions to international organizations in a separate protocol. It should be noted that, unlike the Vienna Conventions of 1961 and 1963, the Vienna Convention of 1975 had not been widely accepted.

29. Turning to the problems raised by particular draft articles, articles 13 and 30 imposed too onerous a burden on receiving States and especially on transit States. The same could be said of article 15 if it were interpreted in the manner indicated in the last two sentences of paragraph 2 of the Commentary on it, which suggested that a receiving or transit State might in exceptional circumstances be required to assist a courier over his transportation problems. His delegation also had serious reservations about articles 17, 18 and 20. As had been said on a number of occasions, it did not believe that there was any justification for making a courier's temporary accommodation inviolable. Nor had there yet been any convincing explanation for article 20, paragraph 1, which would exempt the diplomatic courier from "personal examination". If that was meant to cover normal security checks at airports as well, it was surprising that the text did not instead encourage couriers to comply with such checks.

30. With regard to article 18, his delegation had been particularly struck by paragraph 9 of the Commentary on it, where it was suggested that the question of

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(Mr. Aust, United Kingdom)

whether an act was, or was not, one to which immunity attached should be settled through diplomatic channels. In the United Kingdom and, he was sure, in many other countries, such a question had to be decided by the courts, which were of course independent of the executive branch.

31. With reference to article 22, paragraph 4, dealing with waiver of immunity, paragraph 10 of the Commentary explained that the provision had been extended. It now provided that the so-called "double waiver" requirement would also apply in criminal proceedings. In other words, a State that had waived immunity in order for criminal proceedings to be instituted would have to make a further waiver before a sentence could be imposed and carried out. That was contrary to the position under the Vienna Conventions of 1961 and 1963 on diplomatic relations and consular relations. In the view of his delegation, a "double waiver" system was both unreasonable and impracticable.

32. Article 28 was probably the most important provision in the draft. His delegation was frankly very disappointed with the text. Paragraph 1 provided specifically that a diplomatic bag should be exempt from examination through electronic or other technical devices. That was a significant departure from existing law. It would do nothing to help curtail abuse of the bag but could, instead, make the problem worse. Paragraph 2 of the draft article was equally disappointing, in that it repeated the provisions of the Vienna Convention on Consular Relations of 1963 but did not apply them to diplomatic bags. The Commentary described paragraph 2 as a compromise, but since that paragraph applied only to consular bags, which were relatively unimportant, to describe the paragraph as a compromise was rather unconvincing. In presenting the report of the International Law Commission (see A/C.6/44/SR.24, para. 17), Professor Graefrath had said that "the opinions of Governments ... concurred with the view expressed by the majority of the Commission's members during the discussion of the article on first reading". As could be seen, he had not said "all Governments", which seemed to indicate that, even now, members of the Commission were still not all in agreement on that important matter. A careful reading of paragraph 6 of the Commentary on article 28 led to the same conclusion. It was hardly surprising that differing views were still held by members of the Commission, given the positions taken by States over the years. In short, the draft articles had in no sense resolved the issue.

33. His delegation also had misgivings about paragraph 8 of the Commentary on article 24, which said that the question of the size and weight of the diplomatic bag should be determined by agreement between the sending and receiving States, since the United Kingdom Government had never accepted or imposed any limitation on the size or weight of the diplomatic bag.

34. His delegation considered that there was no justification for holding a costly international conference to consider the draft articles, as recommended by the report of the International Law Commission, since there was no reasonable certainty that a consensus would emerge. Unless States demonstrated greater willingness to tackle the problem of abuse of the diplomatic bag, it would not be possible to achieve consensus. The last thing anyone wanted was a repetition of the 1975

(Mr. Aust, United Kingdom)

conference that had produced the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. Fourteen years later, only 22 States had become parties to that Convention, and they included none of the principal host countries to international organizations.

35. The considerable expense of a conference could not be justified, given the international community's other priorities, the fact that the existing rules had worked well for many years, and the likelihood that a conference would fail to reach consensus on the main issues. For those reasons, the Vienna Conventions of 1961 and 1963, on diplomatic relations and consular relations, which had been so widely accepted, should continue to be the law on the subject. Since Governments needed more time to digest the final draft articles and the lengthy Commentary on them, it would not be prudent for the Sixth Committee to rush into a decision on the question at the current session.

36. Mr. BERRY (Australia) said that although a diplomatic conference to consider the draft articles and protocols could be held at Vienna in the spring of 1991, it would be less expensive if the Sixth Committee adopted the articles as a convention. His delegation continued to believe that there was no need for such a convention, however, since the subject was already adequately dealt with in the four existing codification conventions, particularly the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963. Those two Conventions, which had been widely ratified, had achieved a balance that might be disturbed by the adoption of any further instrument.

37. Turning to draft articles 1, 2 and 3, his delegation noted with approval the deletion of international organizations from the coverage of the draft articles as previously presented. The general practice of the International Law Commission, as endorsed by the Committee and successive diplomatic conferences, had been to draw a clear distinction between relations among States, on the one hand, and between States and international organizations on the other. In the past, the different types of relations had not been dealt with in the same instrument or even in the form of a protocol to an instrument. While his delegation agreed with that practice, it nevertheless acknowledged that the draft articles and protocols as they currently stood represented a compromise solution.

38. With regard to article 17, dealing with the inviolability of temporary accommodation of the courier, while his delegation had expressed considerable reservations as to the necessity of such an article at past sessions, it was pleased to note that some minor improvements had been made, such as the clarification that the article applied only when the courier was actually with the diplomatic bag in the temporary accommodation. However, if the courier and the bag were themselves inviolable, the need for additional protection for "temporary accommodation" was not clear and draft article 17 still made no attempt to define the scope of "temporary accommodation", particularly in cases such as hotels. In its latest form, the article went too far in limiting the freedom of States. In that context, and also in relation to draft articles 18, 19 and 20, it was imperative to limit the immunity of the courier to what was strictly necessary for the performance of the functions of both the courier and the bag.

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(Mr. Berry, Australia)

39. With regard to draft article 28, dealing with protection of the diplomatic bag itself, his delegation's principal concern had been to ensure that any final text which emerged did not weaken the protection already offered to the bag by article 27, paragraph 3, of the Vienna Convention on Diplomatic Relations. His delegation was pleased to note that the Commission had finally adopted a text which maintained the régime established by the four existing conventions in that area. That only reinforced its view, however, that existing instruments were already sufficient to cover the question of the status of the diplomatic courier and bag and that it was therefore unnecessary to embark upon the expensive exercise of holding a diplomatic conference.

40. Mr. KEKOMÄKI (Finland), speaking on behalf of the Nordic countries, said that despite the recommendation of the International Law Commission, it would be premature to hold a conference to study the draft articles and conclude a convention on the subject. In the view of the Nordic countries more time for reflection was needed before the necessary decisions on future action could be made. The current text, whose corner-stone was the inviolability of the courier and the bag, raised certain problems that must be solved before any agreement could be reached. One practical way of proceeding might be to ask Member States, in the current year's resolution, for any additional comments they might have on the draft articles and the procedure to be followed.

The meeting rose at 11.25 a.m.