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Summary record of the 2131st meeting

Topic:

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

Extract from the Yearbook of the International Law Commission:-

1989, **vol. I**

2131st MEETING

Wednesday, 5 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 (*continued*) (A/CN.4/409 and Add.1-5,[1] A/CN.4/417,[2] A/CN.4/420,[3] A/CN.4/L.431, sect. E, A/CN.4/L.432, ILC(XLI)/Conf.Room Doc.1)

[Agenda item 4]

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

ARTICLE 28 (Protection of the diplomatic bag)[5] (*concluded*)

1. Mr. OGISO said that, although he realized that the Commission had adopted article 28 at the previous meeting, he wished to come back to it to recall that he had expressed a reservation on the text because of the retention, at the end of paragraph 1, of the words "directly or through electronic or other technical devices", whose deletion he had proposed. In the explanation he had given, the Special Rapporteur had indicated that article 6 (Non-discrimination and reciprocity) would enable States to agree on various procedures and, in particular, procedures which could have the same effect as the deletion of the words in question. He assumed that the Special Rapporteur had been referring to article 6, paragraph 2 (*b*), which he himself interpreted—perhaps wrongly—to mean that a State could, by custom or agreement, extend to another State more favourable treatment, but not more restrictive treatment. In that connection, he would welcome clarifications on two points.

2. In the first place, if State A proposed to State B a procedure which allowed the examination of the diplomatic bag through electronic or other technical devices, could that be interpreted as more favourable treatment for State A? Even if the answer was affirmative, such treatment might not be more favourable for State B, with the result that article 6, paragraph 2 (*b*), which authorized only more favourable treatment, would not apply. Secondly, he was also not certain that paragraph 2 (*b*) could apply in cases where two States decided by mutual agreement not to apply certain provisions or, as in the present case, decided by custom or agreement to conduct an examination of their respective diplomatic bags through electronic or other technical devices. It was his understanding that article 6 was based on article 47 of the 1961 Vienna Convention on Diplomatic Relations and, in that connection, he quoted paragraphs (3) and (4) of the commentary to the corresponding provision (then article 44 on non-discrimination) in the draft articles on diplomatic intercourse and immunities adopted by the Commission at its tenth session, in 1958, which had been the basis for that Convention.[6] As he saw it, the application of the rule of reciprocity basically and primarily meant complying with the provision in question itself. Moreover, article 47 of the 1961 Vienna Convention lent itself to several different interpretations, but the most generally accepted one was that more favourable treatment could be extended by agreement, or more restrictive treatment on the basis of reciprocity. That general interpretation was also valid for article 6 of the present draft. The explanations which the Special Rapporteur had given at the previous meeting with regard to article 28 were much more liberal than he had expected.

3. Mr. YANKOV (Special Rapporteur) thanked Mr. Ogiso for giving him a further opportunity to explain the interaction between the principles of non-discrimination and reciprocity, on the one hand, and the various obligations provided for in the draft articles, on the other. The principle of reciprocity operated in two ways: either in a restrictive manner, in the interpretation and application of provisions; or in a positive manner, when the States concerned decided by agreement to extend to each other more favourable treatment. For example, the wealth of State practice in respect of consular relations showed that the régime applied to the consular bag was not that of article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations, but that of article 27 of the 1961 Vienna Convention on Diplomatic Relations, as a result of which the consular bag enjoyed absolute inviolability, in other words more favourable treatment than that provided for in the 1963 Vienna Convention. That confirmed that States were free, by agreement and on the basis of reciprocity, to adopt the régime they wished rather than the one provided for.

4. It was true that article 6, paragraph 2 (*a*) and (*b*), enabled States to apply to each other a régime that was either more restrictive or more favourable than the one provided for in the draft articles, and that exempting the diplomatic bag from any examination through electronic or other technical devices would mean extending more favourable treatment than if the bag were subject to such an examination. States could, however, either explicitly by agreement or implicitly by custom, exempt each other from that type of examination—even though that was precisely the general rule stated in article 28, paragraph 1, for normal situations. In that sense, he did not see any contradiction between the provisions of article 47 of the 1961 Vienna Convention or the corresponding provisions of the 1963 Vienna Convention and, for example, the practice of States which extended to the consular bag more favourable treatment than that provided for in the 1963 Convention.

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

[2] *Ibid.*

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

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

[5] For the text, see 2130th meeting, para. 89.

[6] See *Yearbook . . . 1958*, vol. II, p. 105, document A/3859, chap. III.

5. Conversely, the treatment extended could be more restrictive and State practice also showed that the diplomatic bag was sometimes made subject by agreement to the régime of the consular bag provided for in article 35, paragraph 3, of the 1963 Vienna Convention.

6. In either case, the Commission had to take account of the way in which States interpreted the principle of reciprocity in relation to the provisions of the existing instruments.

ARTICLE 29 (Exemption from customs duties and taxes)

7. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 29, which read:

Article 29. Exemption from customs duties and taxes

The receiving State or the transit State shall, in accordance with such laws and regulations as it may adopt, permit the entry, transit and departure of the diplomatic bag and grant exemption from customs duties, taxes and related charges other than charges for storage, cartage and similar services rendered.

8. The Drafting Committee had made only one substantial change to the text adopted on first reading: it had deleted the reference to "all national, regional or municipal dues and taxes", in order to make it clear that the exemption related only to the duties, taxes and charges which could be applied to the diplomatic bag on its entry into the country. The Committee had also amended the English text in order to indicate clearly that permission for the entry, transit and departure of the bag, as well as its exemption from customs duties, taxes and related charges, were subject to the laws and regulations of the receiving State or the transit State.

9. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 29.

Article 29 was adopted.

ARTICLE 30 (Protective measures in case of *force majeure* or other exceptional circumstances)

10. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 30, which read:

PART IV

MISCELLANEOUS PROVISIONS

Article 30. Protective measures in case of* force majeure *or other exceptional circumstances

1. Where, because of *force majeure* or other exceptional circumstances, the diplomatic courier, or the captain of a ship or aircraft in commercial service to whom the diplomatic bag has been entrusted, or any other member of the crew, is no longer able to maintain custody of the bag, the receiving State or the transit State shall inform the sending State of the situation and take appropriate measures with a view to ensuring the integrity and safety of the bag until the authorities of the sending State recover possession of it.

2. Where, because of *force majeure* or other exceptional circumstances, the diplomatic courier or the unaccompanied diplomatic bag is present in the territory of a State not initially foreseen as a transit State, that State, where aware of the situation, shall accord to the courier and the bag the protection provided for under the present articles and, in particular, extend facilities for their prompt and safe departure from its territory.

11. *Force majeure* or other exceptional circumstances could give rise to two situations in which the diplomatic bag, or the courier and the bag, would need special protection. The first situation, which was dealt with in paragraph 1, was that in which the courier, or the captain of a ship or aircraft in commercial service entrusted with the bag, was no longer able to maintain custody of the bag and left it unprotected. It should be noted that, in order not to impose unnecessary obligations on the receiving or transit State, paragraph 1 specified that the bag was not considered to be unprotected if a member of the crew of the ship or aircraft could take custody of it. The receiving State or the transit State then had two obligations: (i) to inform the sending State of the situation; (ii) to take appropriate measures with a view to ensuring the integrity and safety of the bag until the authorities of the sending State had recovered possession of it.

12. Primarily for the sake of clarity, the Drafting Committee had introduced a few changes in the wording of those two obligations. First, instead of saying that the receiving State or the transit State "shall take appropriate measures to inform the sending State", the article now specified that it "shall inform the sending State of the situation". The words "take appropriate measures" had been considered unnecessary. Secondly, the words "to ensure" had been replaced by "with a view to ensuring", in order to indicate that the obligation of the receiving or transit State to ensure the integrity and safety of the bag was somewhat flexible, since, in that type of situation, it was possible that the receiving or transit State might not be in a position to fulfil that obligation. Thirdly, the words "take repossession" had been replaced by "recover possession". Fourthly, the words "as the case may be" had been deleted, as had been done elsewhere.

13. The second situation, which was dealt with in paragraph 2, was that in which the courier and the bag, or the unaccompanied bag, were present in the territory of a State not initially foreseen as a transit State. In such a case, the State concerned, when aware of that situation, was bound to accord to the courier and the bag the protection provided for in the present articles and, in particular, extend to them facilities for their prompt and safe departure from its territory.

14. Again with a view to clarity, the Drafting Committee had made a few changes in the text adopted on first reading. First, the new text referred to "other exceptional circumstances" in addition to cases of *force majeure*, as in paragraph 1. Secondly, the words "the diplomatic courier or the diplomatic bag" had been replaced by "the diplomatic courier or the unaccompanied diplomatic bag". Thirdly, the Committee had decided to indicate expressly that the obligations of a State would arise only "where" that State was "aware of the situation". Fourthly, it had given the content of the obligations of the State concerned greater precision by adding the words "provided for under the present articles" after the word "protection" and by replacing the words "and shall extend to them the facilities necessary to allow them to leave the territory" by the words "and, in particular, extend facilities for their prompt and safe departure from its territory".

15. Lastly, in paragraph 1 of the Spanish text, the words *al que se haya confiado* had been replaced by *a quien se haya confiado* and the words *vuelvan a tomar posesión de ella* had been replaced by *la recuperen*.

16. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 30.

Article 30 was adopted.

ARTICLE 31 (Non-recognition of States or Governments or absence of diplomatic or consular relations)

17. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 31, which read:

Article 31. Non-recognition of States or Governments or absence of diplomatic or consular relations

The State on whose territory an international organization has its seat or an office or a meeting of an international organ or a conference is held shall grant the facilities, privileges and immunities accorded under the present articles to the diplomatic courier and the diplomatic bag of a sending State directed to or from its mission or delegation, notwithstanding the non-recognition of one of those States or its Government by the other State or the non-existence of diplomatic or consular relations between them.

18. The fact that two States did not recognize each other or did not maintain diplomatic or consular relations did not prevent one of them from having a mission or delegation in the territory of the other if an international organization had its seat or an office in that territory or if a conference was held there. In that case, the sending State-receiving State relationship provided for in the present articles would apply.

19. The Drafting Committee believed that the wording now proposed for article 31 made the intention of its provisions clear. The articles could no longer be interpreted as meaning that two States had to apply the present articles even if they did not recognize each other or did not maintain diplomatic or consular relations—an interpretation which, though illogical, had nevertheless been possible. The text now clearly indicated that that situation of non-recognition or absence of relations did not exempt a State in whose territory an international organization had its seat or an office or in whose territory an international conference was held from having the obligation to act as a receiving State towards any State which had a mission to the organization or sent a delegation to the conference. However, that obligation concerned only couriers and bags exchanged between the sending State and its mission or delegation. That point was made clear by the words "the diplomatic courier and the diplomatic bag of a sending State directed to or from its mission or delegation".

20. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 31.

Article 31 was adopted.

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

21. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 32, which read:

Article 32. Relationship between the present articles and other agreements and conventions

1. The present articles shall, as between Parties to them and to the conventions listed in subparagraphs (1) and (2) of paragraph 1 of article 3, supplement the rules on the status of the diplomatic courier and the diplomatic bag contained in those conventions.

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

3. Nothing in the present articles 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.

22. The text adopted on first reading had been considered by a number of Governments to call for further clarification and a revised text submitted by the Special Rapporteur at the previous session had not been considered fully satisfactory by members of the Commission. The Drafting Committee had deemed it advisable to go further in developing the approach taken by the Special Rapporteur in his eighth report (see A/CN.4/417, para. 274) and had accordingly agreed to deal in three separate paragraphs with three categories of agreements, namely: (i) the conventions on diplomatic and consular law referred to in article 3 of the draft; (ii) other international agreements on the same subject in force as between the parties; (iii) agreements which might be concluded in the future.

23. Paragraph 1 dealt with the relationship between the present articles and the codification conventions referred to in article 3. The word "supplement" indicated that the draft articles elaborated on the provisions of those conventions and did not purport to amend them, since only the States parties to the conventions in question could do that. That point would be developed in the commentary. In order to bring it out as clearly as possible in the text of the article, the Drafting Committee had decided to refer to "the rules . . . contained" in the three conventions rather than to the provisions of those conventions. The Committee had furthermore inserted the words "as between Parties to them and to the conventions listed in subparagraphs (1) and (2) of paragraph 1 of article 3" in order to make it clear that the supplementary nature attributed to the articles applied only when the States concerned were parties to the conventions listed in article 3.

24. Paragraph 2 reproduced the text of article 73, paragraph 1, of the 1963 Vienna Convention on Consular Relations, except that, following the model of article 4 of the 1975 Vienna Convention on the Representation of States, the words "are without prejudice to" had replaced "shall not affect". In the Drafting Committee's view, the words "are without prejudice to" had the advantage of giving the States parties to agreements other than those referred to in article 3 of the draft some leeway with regard to the effects of the present articles on their mutual relations.

25. Paragraph 3 was modelled on article 4 of the 1975 Vienna Convention and recognized the sovereign right of States to conclude international agreements on the subject-matter of the present articles, provided that such agreements did not result in discrimination within the meaning of article 6.

26. Mr. YANKOV (Special Rapporteur) said he thought that the reference in paragraph 1 should be only to subparagraph (1) of paragraph 1 of article 3. The same conventions were listed in subparagraph (6) of paragraph 1 of that article and that subparagraph would also have to be mentioned if reference were made to subparagraph (2). He therefore proposed that, for the sake of logic and brevity, the reference to subparagraph (2) be deleted.

27. Mr. ILLUECA recalled that, during the debate in the Sixth Committee at the forty-third session of the General Assembly, it had been stated that article 32 was not fully in keeping with the provisions of article 30 of the 1969 Vienna Convention on the Law of Treaties, in particular with regard to the application of the doctrine of *lex posterior* or *lex specialis*. Furthermore, while the word "supplement" could be used to define the relationship between compatible rules, it was not suitable for defining the relationship between rules whose content was different. On the basis of the wording of article 73, paragraph 2, of the 1963 Vienna Convention on Consular Relations and the debate in the Sixth Committee, he proposed that the first part of paragraph 1 of article 32 should be amended to read: "The present articles shall . . . confirm, supplement, extend or amplify . . .". He would also prefer the title of the article to read: "Relationship between the present articles and other international agreements".

28. Mr. EIRIKSSON said that he agreed with the Special Rapporteur's suggestion concerning paragraph 1, but thought that, for the sake of clarity, it would be still better to spell out what conventions were being referred to, using the conjunction "or". The text as it stood might give the impression of referring to States parties to the present articles and to *all* the conventions in question.

29. With regard to substance, he said that article 32 had a very pronounced legal character which called for scrupulously careful drafting. Whatever explanations the commentary might contribute, however, paragraph 1 was not very clear about the relationship between the present articles and the conventions referred to. In particular, it should be noted that, even in the absence of that paragraph, the régime provided for in the present articles would apply to bags of missions of States, whether or not they were parties to the 1975 Vienna Convention on the Representation of States; paragraph 1 merely cast doubt on that point. In fact, unless the Commission's intention was to provide a definitive definition of the legal relationship between the present articles and the conventions in question, paragraph 1 was unnecessary.

30. Referring to paragraph 2, he said that it was superfluous to reproduce the words "in force as between parties to them" from the texts of the conventions on which the draft was modelled; he had never seen the point of those words in those conventions.

31. As to the safeguard clause at the end of paragraph 3, he said that he could not imagine a case in which an agreement might have the result which that clause was designed to prevent. The only possibility was a case where two or three parties to the present articles decided to have an agreement which resulted in a less favourable relationship between them, causing other States to complain, but a relationship freely entered into by States could be of no relevance to third States.

32. Mr. McCAFFREY said he also thought that paragraph 1 was unclear. It had been proposed in the Drafting Committee that the word "supplement" be replaced by the words "shall prevail" if the intention was that, in the event of incompatibility between the present articles and the provisions of the conventions in question, it was the present articles that should prevail. If the opposite was the case, then it had to be stated that the provisions of those conventions would prevail. And if, as had been pointed out in the Drafting Committee, incompatibility between the two sets of provisions was not possible, then paragraph 1 was unnecessary. By implying an addition, the word "supplement" suggested that there might be some incompatibility or inconsistency. However, he would not oppose the adoption of article 32.

33. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that Mr. Eiriksson and Mr. McCaffrey had both participated in the Drafting Committee's work and their views had been taken into consideration. However, the majority of the members of the Committee had decided to retain paragraph 1. The word "supplement" had been discussed at length in the Committee. To add the words "confirm", "extend" and "amplify", as Mr. Illueca had suggested, would be to add a great deal; as it now stood, paragraph 1 meant that, if the articles of the future instrument supplemented the provisions of the conventions in question, they were applicable and that, in the opposite case, they were not.

34. Mr. YANKOV (Special Rapporteur), replying to Mr. Illueca, recalled that article 32 as originally proposed had been modelled on article 73 of the 1963 Vienna Convention on Consular Relations and article 4 (*a*) of the 1975 Vienna Convention on the Representation of States. When the Commission had considered the article on first reading, it had concluded that simpler wording was preferable. He had therefore suggested very simple wording from which the present text derived. From the very outset, the purpose of the draft articles had been precisely to supplement the various codification conventions concerning the diplomatic bag and the diplomatic courier, because those conventions contained some gaps, for example in connection with the unaccompanied bag, the bag forwarded by mail and the status of the courier and the bag.

35. With regard to the word "supplement" in paragraph 1, he said that he had proposed the word "complement", but the Drafting Committee had preferred the word "supplement". He personally was in favour of Mr. McCaffrey's proposal to replace the word "supplement" by the words "shall prevail", because the present articles would, in fact, prevail; there again, however, the Drafting Committee had agreed on the word "supplement".

36. As to Mr. Eiriksson's comment on the safeguard clause in paragraph 3, he could, unlike Mr. Eiriksson, imagine cases where the clause would be of some use. States could, for example, conclude agreements among themselves which would affect transit States. It was, moreover, necessary to place some limits on the discretionary power of States to conclude agreements in the present field, since the practice of States was often innovative.

37. Mr. REUTER said that the problem with article 32 was the same as the one the Commission had encountered when drafting the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations; in other words, it was a matter of "codifying codification". The present text might not be entirely logical in some ways, but it offered definite practical advantages. He fully supported it and stressed that the work done on it by the Special Rapporteur and the Drafting Committee was irreproachable.

38. Referring to Mr. Ogiso's comments on article 6, he said that the point at issue was the meaning of the words "more favourable treatment" in paragraph 2 (*b*) of that

article. Did they mean more favourable to the integrity of the bag or to the fact that it was as it should be? The Special Rapporteur had said that, in some cases, State practice favoured the bag's integrity, by providing for the absolute inviolability of the consular bag, and, in others, emphasized the importance of its being as it should be. The expression "more favourable treatment" used in article 6 was not absolutely explicit in that regard, but that was to be welcomed.

39. Mr. KOROMA said that, if he had been present in the Drafting Committee during the consideration of article 32, he would have argued in favour of the word "complement". The word "supplement" in paragraph 1 suggested that the main substantive rules were to be found in other conventions. In view of the autonomous nature of the present articles, the word "complement" was more correct. Moreover, the French text used the word *complètent* and the Spanish text the word *completarán*.

40. Mr. BENNOUNA recalled that he had already expressed his opinion on article 32 at the previous session. While he did not intend to call in question the compromise solution that had been adopted, he did wish to state his views again.

41. When the General Assembly entrusted a particular topic to the Commission, it simultaneously gave it full competence to codify and possibly develop the law relating to that topic. Some members had said that the Commission could not revise earlier conventions. That view was disputable to say the least. The Commission was, of course, required by its statute to take account of existing law. That did not mean, however, that it was bound by earlier instruments which covered the topic only partially. If it were, the situation would be like the one in which the Commission found itself at present, where the text on which it was working would have to be interpreted in the light of the conventions on diplomatic and consular relations and where it would have to be assumed that there could be no contradiction between the conventions referred to in article 3 of the draft and the draft itself. That was, however, only an assumption and there was no way of showing that it was true. The fact was that the Commission had found it expedient to pass the difficulty on to States themselves and to the third parties which would be called upon to interpret the text—an approach which was probably politically advisable, but which was contrary to the concept of legal rigour. If the point at issue had been simply to supplement the existing conventions, a few additional provisions would have been enough. But that was not the case, since the Commission had started afresh and had tried to draft an exhaustive instrument. The word "supplement" in paragraph 1 of article 32 was therefore inappropriate and would certainly give rise to problems in the future. It would have been better to take account of the time sequence of the various instruments and to rely on the fact that a State was unlikely to invoke an earlier convention in order to challenge the provisions of a more complete and more recent instrument.

42. He was thus prepared to accept article 32 as proposed by the Drafting Committee, because it safeguarded the future of the draft in political terms. He nevertheless maintained the reservations he had on technical points.

43. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) explained that the Drafting Committee had regarded the word "supplement" as the best possible compromise. He nevertheless agreed that there was a terminology problem in the French and Spanish texts, where he was not sure that the words *complètent* and *completarán* expressed the same idea.

44. Replying to Mr. Eiriksson's suggestion that the codification conventions referred to in article 3 should be listed again in article 32, he said that the Drafting Committee had followed the normal practice of using cross-references to other texts.

45. Mr. MAHIOU said that it was because of its flexibility that paragraph 1 would give rise to problems of interpretation. In the event of conflict between the present articles and the existing codification conventions, the solution would be found not in that provision, but, rather, in article 30, paragraph 3, of the 1969 Vienna Convention on the Law of Treaties, which stated the rules governing successive treaties. The technical problem which was worrying Mr. Bennouna was thus not legally insurmountable.

46. Mr. FRANCIS said that paragraph 1 lent itself to a variety of interpretations. Although he was prepared to accept it as proposed by the Drafting Committee, he thought that the Commission should allow itself time for further reflection. It could come back to the issue once it had completed the consideration of the draft as a whole and had a complete overview of the text.

47. Mr. EIRIKSSON said that he found the wording of paragraph 3 awkward because it could be interpreted to mean that no agreement which went beyond the scope of the present articles could be concluded between States. Read in that way, the provision was far too strict. It was possible to imagine a very simple situation which might be regarded as discrimination within the meaning of article 6: State A and State B, both of them parties to the future convention, agreed reciprocally to apply a stricter régime of inspection of the bag than provided for by the convention. As that régime would be less favourable, there would be a breach of paragraph 3 and yet no third State would have reason for complaint. He therefore proposed that further thought be given to the words "provided that such agreements do not result in discrimination within the meaning of article 6", which complicated the situation and which did not, moreover, appear in the corresponding provision of the 1963 Vienna Convention on Consular Relations (art. 73).

48. Mr. ROUCOUNAS said that, when working on a codification convention, it was necessary to determine the relationship between the new instrument and those which were in force or would come into force. Paragraph 1 of article 32, whose purpose was precisely that, was worded in such a way that reference had to be made to article 30, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties. It was true that the Commission had avoided saying that the new text "prevailed" over existing conventions and had preferred to use the term "supplement", which was much more cautious, but the future convention would have a life of its own, independently of the earlier codification conventions, and States would be able to become parties to it without having signed the others. The situation then would be unclear and he would like an explanation of the way in which paragraph 1 should be interpreted in such a case.

49. Paragraph 3 was designed to give some flexibility to the obligations which States would assume by signing the future convention. However, since the paragraph referred to article 6, on non-discrimination, whose content was also to be found in article 47 of the 1961 Vienna Convention on Diplomatic Relations, States parties to that Convention would already have assumed that obligation. As to article 73 of the 1963 Vienna Convention on Consular Relations, its scope was far broader than that of draft article 32, inasmuch as its paragraph 2 stated that "Nothing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof". In the circumstances, it was open to question whether the restriction imposed in draft article 32, paragraph 3, by the reference to article 6 would have any real importance in the future. The restriction was, however, a sensible one and it should not stand in the way of the adoption of article 32 as it now stood. The point at issue was not to prevent States from concluding any agreements they might wish to conclude; the very logic of codification, in which the Commission was engaged at present, called for limits and restrictions.

50. Mr. Sreenivasa RAO said that the problem of compatibility between a text in the process of elaboration and agreements already in force was a constantly recurring one. In the case in point, it arose in simple terms. The purpose of the draft under consideration was to bring together, without mutual contradiction, all existing provisions on the subject of the immunities of the diplomatic courier and the diplomatic bag. The Commission had taken advantage of the present exercise to add some new provisions, and it was those new passages which were additional to the existing conventions and which would "supplement" them, as paragraph 1 of article 32 very aptly stated. However, if two States accepted those new provisions, there would not normally be any problem between them; and third States would not be affected. The problem of non-discrimination could arise only between those two States, namely the States which had accepted the new provisions and, by so doing, had undertaken to abide by them in accordance with article 32.

51. In his view, article 32 was entirely acceptable in its present form.

52. Mr. TOMUSCHAT said that the word "supplement" clearly reflected the general thrust of the draft articles. If there was an inconsistency between the future convention and the instruments listed in article 3, then article 30, paragraph 3, of the 1969 Vienna Convention on the Law of Treaties would apply, as Mr. Mahiou had pointed out.

53. On the other hand, paragraph 3 of draft article 32 seemed to elevate the article to a kind of *jus cogens*. The words "provided that such agreements do not result in discrimination within the meaning of article 6" referred specifically to those situations where discrimination might be allowed, and that was somewhat illogical. He would nevertheless not oppose the adoption of the text proposed by the Drafting Committee.

54. Mr. BEESLEY said that, while not wishing to repeat what had been said, he agreed with Mr. Mahiou and Mr. Tomuschat as to the interaction between the present articles and article 30 of the 1969 Vienna Convention on the Law of Treaties. He also agreed with Mr. Sreenivasa Rao that the present articles were of a supplementary nature. Hence he foresaw difficulties when States realized that, despite the exceptions incorporated in article 6, the supplementary provisions being offered for their signature would prevent them from proceeding as they had formerly done, because they would make their actions discriminatory. In that connection, a reading of articles 17 and 28, in the light of articles 32 and 6, could give an unforeseen impression. Thus there was a cumulative effect in the Commission's work on the present articles such that, at various stages, results had been achieved that were different from those expected, although it was impossible to identify the stage at which the initial intention had been diverted. Article 32, which sought to prevent future signatory States from abusing the régime that was to be set up, might actually open the door to such abuse by jeopardizing the chances of States accepting the draft articles.

55. No one was trying to block the adoption of a text which was the result of arduous negotiations and serious legal drafting efforts, but it remained to be seen how Governments, which were political bodies, would react to the proposed instrument and whether they would let it operate for very long.

56. Mr. ARANGIO-RUIZ said that he, too, was afraid the text proposed by the Drafting Committee might meet with heavy resistance from Governments during the diplomatic conference at which it was to be adopted. In an ideal world, the Commission would have started on the topic with a clean slate and drafted all the relevant rules, instead of trying to supplement existing codification conventions. That was why it was faced with the problem raised by paragraph 1 of article 32.

57. As to paragraph 3, he believed that the situation described by Mr. Eiriksson was entirely hypothetical. In practice, two States could always come to an agreement to give each other treatment different from that provided for by the present articles. Paragraph 3 reflected what might be called the real situation: two States could agree to give the diplomatic courier and the diplomatic bag more favourable treatment than the rules provided for, or even less favourable treatment, if they so wished.

58. Mr. BENNOUNA requested that the commentary to article 32 should explain that consistency between the present articles and the existing codification conventions was assumed, but that, if an inconsistency should develop, the 1969 Vienna Convention on the Law of Treaties would apply.

59. Mr. YANKOV (Special Rapporteur) said that paragraph 3 of article 32 must be read in the light of articles 30 and 41 of the 1969 Vienna Convention on the Law of Treaties. In his fourth report, he had originally proposed an article with much more substance to it, based on article 73 of the 1963 Vienna Convention on Consular Relations.[7] The article had subsequently been shortened to a single sentence, which had read: "The provisions of the present articles shall not affect bilateral or regional agreements in force as between States parties to them." When adopting that text on first reading, the Commission had incorporated the following explanation in paragraph (5) of the commentary:

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[7] *Yearbook . . . 1983*, vol. II (Part One), p. 134, document A/CN.4/374 and Add.1-4, para. 403.

(5) There was a consensus in the Commission to the effect that the provision in article 6, paragraph 2 (*b*), of the present draft made it possible to dispense with the adoption of an additional paragraph to cover the relationship between the present articles and future agreements relating to the same subject-matter, particularly if account was taken of article 41 of the 1969 Vienna Convention on the Law of Treaties. It should therefore be understood that, in accordance with article 6, paragraph 2 (*b*), nothing in the present articles shall preclude States from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag, 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 of the rights or the performance of the obligations of third States.[8]

That explanation had replaced the provision he had originally proposed.

60. He understood the reference to article 6 to mean that the international agreements in question must not defeat the object and purpose of the present articles, taking into account the general rules contained in the 1969 Vienna Convention.

61. The provisions of article 32 left the States concerned free to conclude agreements as long as there was no discrimination within the meaning of article 6 and the agreements did not infringe the rights of third States, which, in some cases, might be transit States.

62. Mr. EIRIKSSON said that he could not accept the solution suggested by Mr. Arangio-Ruiz. He would have preferred article 32 to be drafted on the basis of the wording used in paragraph (5) of the commentary to the article, which the Special Rapporteur had just read out. Such a provision would certainly have received the Commission's endorsement. It was unfortunate that the Commission had begun to consider article 32 only at the current meeting.

63. Mr. BEESLEY said he was not convinced that the text under consideration reflected the Special Rapporteur's position as he had just explained it. He therefore had the same reservations as Mr. Eiriksson concerning article 32.

64. The CHAIRMAN asked whether the Commission would be able to accept the substitution of the text just read out by the Special Rapporteur for the safeguard clause in paragraph 3.

65. Mr. EIRIKSSON said that the Commission could achieve the same result by deleting the safeguard clause from paragraph 3 and including in the commentary to article 32 the explanation that had been incorporated in the commentary to the article when it had been adopted on first reading, namely that States which were bound by the régime of the law of treaties could not conclude agreements that would affect the rights of other States or defeat the object and purpose of the present articles. Such a text would not prevent States which so desired from concluding agreements that instituted less favourable treatment in their mutual relations and third States would then have no reason to object.

66. Mr. YANKOV (Special Rapporteur) explained that he had not been proposing an amendment. He had no objection to the idea of replacing the reference to non-discrimination in paragraph 3 of article 32 by the reproduction in the commentary of the last phrase of the commentary to the article as adopted on first reading in 1986, namely: "provided that such new provisions are not incompatible with the object and purpose of the present articles . . .". He was afraid, however, that the Commission was getting into a debate on substance.

67. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the text of article 32 had in fact been before the members of the Commission for several days. The problem was basically that agreements concluded in the future must not result in discrimination. It was now proposed to replace the wording that expressed that idea by that used at the end of the 1986 commentary. Since it was when the rights of other States were affected that discrimination occurred, however, to state that agreements concluded in the future must not affect the rights of third States amounted to the same thing as saying that there must be no discrimination against third States. And if discrimination was to be mentioned, it should be made clear that it was discrimination "within the meaning of article 6".

68. He was not convinced that it would be appropriate to mention the idea of not defeating the object and purpose of the present articles. Since the object and purpose of the articles was to facilitate communications, it could be assumed that States which concluded additional agreements on the same subject might wish to modify, but not necessarily to defeat, the object and purpose of the articles.

69. In conclusion, he said that he did not oppose the amendment of paragraph 3, although, judging from the intensive work done by the Drafting Committee, he was not sure that the Commission could redraft the paragraph without a lengthy discussion, something which he would advise against. In his opinion, the best approach might be to retain paragraph 3 as it stood and to incorporate in the commentary the additional explanation given by the Special Rapporteur.

70. Mr. EIRIKSSON said that the commentary to the text adopted on first reading would be irrelevant if paragraph 3 were adopted as it now stood: it would be relevant only if the safeguard clause were omitted. Because of the existence of the 1969 Vienna Convention on the Law of Treaties, moreover, the Commission could obtain the same result by deleting paragraph 3.

71. Mr. McCAFFREY said that, while it might be a departure from usual practice, the Commission could consider adopting paragraph 3 in its present form provisionally and inviting further comments on article 32 when it took up the commentary thereto during its consideration of its draft report.

72. Mr. BENNOUNA said he agreed with Mr. Eiriksson that paragraph 3 was unnecessary. Nothing, except the peremptory rules of international law, prevented States from concluding among themselves international agreements that did not infringe the rights of third States. He therefore had some reservations about the idea of restricting the ability of States to enter into agreements by invoking an indefinite rule, namely the principle of non-discrimination, which was indeed referred to, but not defined, in article 6.

73. Mr. YANKOV (Special Rapporteur) said that he had difficulty seeing how article 32 could be adopted provisionally, but it went without saying that members of the Commission were free to express their views on its provisions during the consideration of the commentary. Personally, he thought it would be unfortunate to delete paragraph 3, even though the text was somewhat ambiguous. It

[8] *Yearbook . . . 1986*, vol. II (Part Two), pp. 32-33.

might require further interpretation, but was that not the case with all treaties? Indeed, that was why provisions on the settlement of disputes were so useful.

74. Mr. EIRIKSSON suggested that the Commission resume its consideration of article 32 at its next meeting. The Special Rapporteur might then submit a text in which the safeguard clause was replaced by the relevant part of the commentary to the text adopted on first reading, although he believed that it would be enough to incorporate that language in the new commentary.

75. The CHAIRMAN proposed that the Commission should adopt paragraph 1 of article 32 as amended by the Special Rapporteur (para. 26 above), and paragraph 2 as proposed by the Drafting Committee, and that the consideration of paragraph 3 be deferred until the next meeting to enable members to hold consultations on the text.

It was so agreed.

Paragraphs 1 and 2 of article 32 were adopted.

DRAFT OPTIONAL PROTOCOL ONE ON THE STATUS OF THE COURIER AND THE BAG OF SPECIAL MISSIONS

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

DRAFT OPTIONAL PROTOCOL ONE ON THE STATUS OF THE COURIER AND THE BAG OF SPECIAL MISSIONS

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 a State with its special missions within the meaning of the Convention on Special Missions of 8 December 1969, wherever situated, and for the official communications of those missions with the sending State or with its diplomatic missions, consular posts, delegations or other special missions.

Article II

For the purposes of the articles:

(*a*) "mission" also means a special mission within the meaning of the Convention on Special Missions of 8 December 1969;

(*b*) "diplomatic courier" also means a person duly authorized by the sending State as a courier of a special mission within the meaning of the Convention on Special Missions of 8 December 1969 who is entrusted with the custody, transportation and delivery of a diplomatic bag and is employed for the official communications referred to in article I;

(*c*) "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 a special mission within the meaning of the Convention on Special Missions of 8 December 1969.

Article III

1. The present Protocol shall, as between Parties to it and to the Convention on Special Missions of 8 December 1969, supplement the rules on the status of the diplomatic courier and the diplomatic bag contained in that Convention.

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.

77. As he had explained when introducing article 1, on the scope of the present articles (2128th meeting), the Drafting Committee had decided to recommend, in addition to the deletion of article 33 (Optional declaration), that the courier and the bag of special missions be dealt with, not in the draft articles, but in a separate optional protocol. It was a very simple protocol. Article I defined its object and purpose: the application of the draft articles to the courier and the bag employed for the official communications of a State with its special missions, within the meaning of the 1969 Convention on Special Missions, and for the communications of those missions with the sending State or with other special missions, diplomatic missions, consular posts or delegations of that State.

78. Article II contained definitions supplementing article 3 of the draft articles and was aimed at extending their scope—as between parties to the articles and the protocol—to missions, couriers and bags within the meaning of the 1969 Convention.

79. Article III was based on article 32 of the draft articles and supplemented the rules on the status of the diplomatic courier and the diplomatic bag contained in the 1969 Convention on Special Missions. Paragraphs 2 and 3 established exactly the same relationship between the protocol and present and future agreements as did article 32, paragraphs 2 and 3.

80. The CHAIRMAN suggested that the Commission proceed in the same way for article III as it had for article 32 (see para. 75 above).

81. Mr. EIRIKSSON said that, in order to avoid confusion in the French text between article 1 of the draft articles and article I of the draft optional protocols, the formula *article premier* should be replaced by *article I* in the protocols.

82. He further proposed that the last phrase of article I be amended to read: "or with the other missions of that State, its consular posts or its delegations".

83. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) proposed instead the following wording: "or with its other missions, consular posts or delegations".

84. Mr. ROUCOUNAS said that, since the very reason for the presence of article III in both draft optional protocols was that article 32 of the draft articles did not refer to all the relevant conventions, it might be better to extend the scope of the draft articles in such a way that article 32 would also apply to special missions and international organizations.

85. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, if the provisions of article III were not retained, the applicability of article 32 to the types of couriers and bags to which the protocols referred would be open to question.

86. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article I of draft Optional Protocol One as amended by Mr. Eiriksson and the Chairman of the Drafting

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 READING[4] (*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 MISSIONS[6] (*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.

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?

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

[2] *Ibid.*

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

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

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

[6] For the text, *ibid.*, para. 76.