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Second report on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, by Mr. Alexander Yankov, Special Rapporteur

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STATUS OF THE DIPLOMATIC COURIER AND THE DIPLOMATIC BAG NOT ACCOMPANIED BY DIPLOMATIC COURIER

[Agenda item 8]

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NOTE

Multilateral conventions mentioned in the present report:

	Source
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961) Hereinafter called 1961 Vienna Convention	United Nations, <i>Treaty Series</i> , vol. 500, p. 95.
Vienna Convention on Consular Relations (Vienna, 24 April 1963) Hereinafter called 1963 Vienna Convention	<i>Ibid.</i> , vol. 596, p. 261.
Convention on Special Missions (New York, 8 December 1969)	General Assembly Resolution 2530 (XXIV), annex.
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975) Hereinafter called 1975 Vienna Convention	<i>Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations</i> , vol. II, <i>Documents of the Conference</i> (United Nations publication, Sales No. E.75.V.12), p. 207.

I. Introduction

1. The present report is the second on the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier submitted by the Special Rapporteur for consideration by the International Law Commission. It follows the preliminary report¹ which was submitted by the Special Rapporteur at the thirty-second session of the Commission in 1980.²

2. The preliminary report contained a consolidated account of the consideration of the topic by the Commission and the Sixth Committee of the General Assembly, as well as of the comments submitted in writing by Governments of Member States. Emphasis was placed, in particular, on the scope, contents and structure of the appropriate legal instrument to be elaborated by the

Commission. This was done with a view to facilitating the exploratory discussion on certain important issues on which the Special Rapporteur sought advice and guidance before proceeding to the submission of draft articles. Taking into account the specific official functions of the diplomatic courier and the diplomatic bag, it was pointed out that the facilities, privileges and immunities accorded to the courier and the bag should create conditions for the normal performance of these functions, which are instrumental in the exercise of the right of communication for all official purposes. It was further maintained that this functional approach should be applied in a comprehensive manner to all types of official couriers and official bags sent to diplomatic missions, consular posts, special missions, permanent missions to international organizations or delegations to international organs or international conferences. In this connection, the Special Rapporteur had expressed a view that the concepts of "official courier" and "official bag" might, by assimilation to the status of the diplomatic courier and diplomatic bag, embrace all kinds of couriers and bags used for official

¹ See *Yearbook . . . 1980*, vol. II (Part One), pp. 231 *et seq.*, document A/CN.4/335.

² See *Yearbook . . . 1980*, vol. I, pp. 260–263, 1634th meeting, paras. 1–27; and *Yearbook . . . 1980*, vol. II (Part Two), pp. 162–164, paras. 147–161.

communications of States with their missions abroad. In his view, without exceeding the terms of reference for the present topic, the Commission might consider advisable the adoption of the terms "official courier" and "official bag", in order to arrive at the elaboration of a more coherent and uniform set of draft articles comprising all types of official couriers and official bags sent to diplomatic missions, consular posts, special missions or to representations of States to international institutions.³ The preliminary report pointed out the need to elaborate in greater detail draft provisions relating to the status of the diplomatic courier, the facilities, privileges and immunities accorded to him and to the courier *ad hoc* in the performance of their functions. It further emphasized the practical importance of the status of the diplomatic bag and, in particular, the unaccompanied bag, with special reference to its inviolability, the possible abuses and the requirements for the safe and rapid delivery of the bag, and respect for the sovereignty and legitimate considerations of the receiving and transit State. The preliminary report contained certain tentative suggestions regarding the format and structure of the draft articles.

3. At its thirty-second session, in 1980, the Commission considered the preliminary report and made comments on the issues raised in it and on questions relating to the topic as a whole.⁴ It was generally agreed that, taking into account the practical significance of the topic, special emphasis should be placed on the application of an empirical and pragmatic method, aiming to secure a proper balance between provisions containing specific rules and provisions containing general rules with regard to the status of the courier and the bag, without any excessive details. It was also agreed that a comprehensive approach leading to a coherent set of draft articles should be applied with great caution, taking into consideration the possible reservations of States. In this connection, the prevailing view was that, while the draft articles should cover all types of official couriers and official bags, the terms "diplomatic courier" and "diplomatic bag" should be maintained as such, but the coherence and uniformity in the legal protection of all types of official couriers and official bags should be achieved through an assimilation formula, without necessarily introducing new concepts that might not be susceptible of wide acceptance by States. It was further emphasized that the nature and scope of the facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag should be in conformity with their specific functions as tools for realization of the principle of communication for all official purposes. A considerable part of the discussion was concentrated on the status of the courier *ad hoc* and the status of the diplomatic bag. Several members of the

Commission, while recognizing the importance of the principle of inviolability of the bag, referred to the problem of possible abuses, the role of legal rules in the prevention of such abuses or the enhancement of practical measures of control, including the use of modern and more sophisticated means of checking the bags. It was generally agreed that the draft articles should try to secure an effective interplay between the principle of freedom of communication for all official purposes and respect for the laws and regulations of the receiving or transit State and international law, in establishing a reasonable balance between the secrecy of the diplomatic communication, and security and other legitimate considerations. The tentative structure of the draft articles suggested by the Special Rapporteur in his preliminary report⁵ received general support, with some observations and suggestions with regard to the order and place of some provisions.⁶ There were some other points raised during the discussion referring to the need for legal definitions of the diplomatic courier, the nature of the eventual legal instrument to be elaborated by the Commission embodying the draft articles on the topic under consideration and its relation to the existing multilateral conventions in the field of diplomatic law concluded under the auspices of the United Nations.⁷

4. The Commission's work on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier received comments by many representatives in the Sixth Committee of the General Assembly at its thirty-fifth session.⁸ The prevailing view

³ See *Yearbook ... 1980*, vol. II (Part One), pp. 241–242, document A/CN.4/335, para. 47.

⁴ See *Yearbook ... 1980*, vol. I, p. 264, 1634th meeting, para. 38 (Mr. Reuter); p. 282, 1637th meeting, para. 7 (Mr. Francis); p. 283, para. 16 (Mr. Thiam); p. 284, para. 26 (Mr. Riphagen) and para. 31 (Sir Francis Vallat). See also *Yearbook ... 1980*, vol. II (Part Two), p. 165, para. 170.

⁵ See *Yearbook ... 1980*, vol. I, p. 264, 1634th meeting, para. 37 (Mr. Reuter); p. 275, 1636th meeting, para. 11 (Mr. Šahović); p. 276, para. 23 (Mr. Tabibi); p. 282, 1637th meeting, paras. 6–7 (Mr. Francis); p. 283, para. 16 (Mr. Thiam); p. 284, para. 22 (Mr. Díaz González) and para. 26 (Mr. Riphagen); p. 285, para. 37 (Mr. Pinto). See also *Yearbook ... 1980*, vol. II (Part Two), pp. 164–165, paras. 166, 169, 170 and 174.

The multilateral conventions concluded under the auspices of the United Nations referred to in the present report are: the 1961 Vienna Convention, the 1963 Vienna Convention, the 1969 Convention on Special Missions and the 1975 Vienna Convention (see p. 153 above for note concerning these instruments).

⁸ See *Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 44th meeting, para. 41 (Netherlands); 48th meeting, para. 46 (Japan) and para. 55 (Finland); 50th meeting, para. 10 (Romania) and para. 50 (France); 51st meeting, para. 16 (United Kingdom), para. 39 (Brazil) and para. 54 (Ethiopia); 52nd meeting, para. 4 (German Democratic Republic), para. 60 (Sri Lanka) and para. 72 (USSR); 53rd meeting, para. 25 (Italy) and para. 34 (Mongolia); 54th meeting, para. 6 (Jamaica), para. 24 (Czechoslovakia) and para. 53 (India); 55th meeting, para. 23 (Spain), para. 39 (Algeria) and para. 51 (Hungary); 56th meeting, para. 74 (Egypt); 57th meeting, para. 13 (Venezuela), para. 26 (Argentina), para. 38 (Libyan Arab Jamahiriva) and para. 48 (Byelorussian SSR); 58th meeting, para. 13 (Pakistan), para. 21 (Poland), para. 33 (Tunisia); 59th meeting, para. 9 (Cyprus), paras. 22–26 (Bulgaria) and para. 54 (Bangladesh). See also "Topical summary, prepared by the Secretariat, of the discussion on the report of

³ See the preliminary report, paras. 42 and 60–62 (*Yearbook ... 1980*, vol. II (Part One), pp. 241 and 244–245, document A/CN.4/335); and *Yearbook ... 1980*, vol. II (Part Two), p. 163, para. 153.

⁴ See *Yearbook ... 1980*, vol. I, pp. 263–264, 1634th meeting, paras. 28–41; pp. 274–276, 1636th meeting, paras. 1–23; pp. 281–287, 1637th meeting, paras. 1–56; and *Yearbook ... 1980*, vol. II (Part Two), pp. 164–165, paras. 162–176.

was that the development of contemporary international relations and the intensified communications through the use of diplomatic couriers and diplomatic bags of different types called for some additions and further elaboration of new rules which would supplement the existing conventions and fill their legal gaps.⁹ It was pointed out that the elaboration of such rules safeguarding the inviolability of diplomatic couriers and diplomatic bags was particularly important to the developing countries, with their limited human and material resources.¹⁰ Some representatives, however, expressed the view that the status of the diplomatic courier and the diplomatic bag had been adequately regulated in existing international treaties and that the problem was not so much one of lack of regulation as one of political will of States to observe the existing international conventions.¹¹ Most of the representatives considered that the preliminary report submitted by the Special Rapporteur contained all the pertinent elements for the preparation of draft articles and provided a useful basis for further work. The comments made by the Commission on the scope and content of the draft articles with regard to the functional and comprehensive approach to be applied were met with general agreement. In this connection, it was emphasized that while considering the courier and the bag as important instruments in the exercise of the freedom of communication for all official purposes, the draft articles should ensure the unrestricted and uniform regulation of the status of all kinds of couriers and bags used by States to maintain links with their missions abroad. Several representatives agreed with the suggestion, reflected in paragraph 159 of the Commission's report, that the draft articles should formulate the fundamental principles of international law underlying the four multilateral conventions in the field of diplomatic law concluded under the auspices of the United Nations.¹² In the opinion of some representatives, the elaboration of definitions of the diplomatic courier and the diplomatic bag, applied to all kinds of official couriers or bags, would contribute significantly to the completion of some of the tasks facing the Commission and would have a beneficial effect on the development of diplomatic law as a whole.¹³

(Footnote 8 continued.)

the International Law Commission in the Sixth Committee during the thirty-fifth session of the General Assembly" (A/CN.4/L.326), paras. 366–382.

⁹ See *Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 50th meeting, para. 10 (Romania); 51st meeting, para. 39 (Brazil); 52nd meeting, para. 60 (Sri Lanka) and para. 72 (USSR); 53rd meeting, para. 34 (Mongolia); 55th meeting, para. 39 (Algeria) and para. 51 (Hungary); 58th meeting, para. 21 (Poland). See also "Topical summary . . ." (A/CN.4/L.326), paras. 367, 370 and 371.

¹⁰ See *Official Records of the General Assembly, Thirty-Fifth Session, Sixth Committee*, 52nd meeting, para. 60 (Sri Lanka); 54th meeting, para. 6 (Jamaica); 55th meeting, para. 39 (Algeria).

¹¹ *Ibid.*, 48th meeting, para. 46 (Japan); 51st meeting, para. 16 (United Kingdom); 53rd meeting, para. 25 (Italy); 55th meeting, para. 23 (Spain); 57th meeting, para. 13 (Venezuela).

¹² See footnote 7 above, second para.

¹³ See *Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 53rd meeting, para. 25 (Italy); 59th meeting, para. 26 (Bulgaria). See also "Topical summary . . ." (A/CN.4/L.326), paras. 376 and 378.

It was maintained that the elaboration of pertinent rules with regard to the status of the courier and the bag would help to solve issues of possible abuses and would have an effective preventive role in this matter.¹⁴ Some representatives indicated that they would present their comments on the topic when the Commission would submit draft articles for consideration by the Sixth Committee of the General Assembly, and the wish was expressed that in the not too distant future the Commission would be able to begin its work on the draft articles to be proposed by the Special Rapporteur.

5. The General Assembly, having considered the Commission's report on the work of its thirty-second session, recommended, in paragraph 4(f) of its resolution 35/163 of 15 December 1980, that the Commission should "continue its work on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, with a view to the possible elaboration of an appropriate legal instrument" on that topic. The present report is submitted by the Special Rapporteur to the Commission at its thirty-third session pursuant to the above-mentioned resolution of the General Assembly.

6. Following the recommendation that emerged from the debate in the Sixth Committee, namely, that the Commission should begin work on the draft articles to be proposed by the Special Rapporteur at the current session of the Commission,¹⁵ and in the light of the comments made so far, the present report contains the first draft articles on the topic. They are submitted on a tentative basis, as an indication of the thinking and general approach followed by the Special Rapporteur on issues relating to the scope of the draft articles and some definitional problems which by their very nature may affect the further work on the topic under consideration as a whole.

7. The structure of the draft articles and the plan of work suggested in the present report are along the lines of the proposals advanced in the preliminary report¹⁶ and the comments made during the debate in the thirty-second session of the Commission¹⁷ and the Sixth Committee of the General Assembly at its thirty-fifth session.¹⁸ Accordingly, it is proposed that the following structure of the draft articles be adopted:

Part I. General provisions.

Part II. Draft articles on the status of the diplomatic

¹⁴ See *Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 52nd meeting, para. 72 (USSR); 53rd meeting, para. 34 (Mongolia); 54th meeting, para. 24 (Czechoslovakia). See also "Topical summary . . ." (A/CN.4/L.326), para. 378.

¹⁵ See "Topical summary . . ." (A/CN.4/L.326), paras. 370–371.

¹⁶ See *Yearbook . . . 1980*, vol. II (Part One), pp. 244–245, document A/CN.4/335, para. 60.

¹⁷ Subject to certain reservations and proposals (see *Yearbook . . . 1980*, vol. I, p. 264, 1634th meeting, para. 38 (Mr. Reuter); p. 276, 1636th meeting, para. 19 (Mr. Evensen); p. 282, 1637th meeting, para. 7 (Mr. Francis); p. 283, para. 16 (Mr. Thiam); p. 284, paras. 24–26 (Mr. Riphagen) and para. 29 (Sir Francis Vallat)), the tentative structure suggested by the Special Rapporteur as a working hypothesis met with the general support of the Commission (see *Yearbook . . . 1980*, vol. II (Part Two), p. 165, para. 170).

¹⁸ See "Topical summary . . ." (A/CN.4/L.326), para. 371.

courier, including the courier *ad hoc* and the status of the captain of a commercial aircraft or ship carrying a diplomatic bag.

Part III. Status of the diplomatic bag, including the diplomatic bag not accompanied by diplomatic courier.

Part IV. Other provisions (miscellaneous provisions), including obligations of the transit State and the third

State, relationship of the draft articles to the existing multilateral conventions in the field of the diplomatic law concluded under the auspices of the United Nations, and other provisions.

8. The present report would be confined to the consideration of some issues relating to draft articles within part I.

II. Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier

PART I. GENERAL PROVISIONS

Introduction

9. It is suggested that within the general provisions should come draft articles that by their nature could constitute an introduction to the specific legal rules and would apply to the whole set of articles. In our submission, and taking into account the well-established pattern of the structure of multilateral treaties and the prevailing codification practice, such a general provision on the topic under consideration could refer to:

(a) the scope of the present draft articles;

(b) the use of terms for the purposes of the draft articles;

(c) the enunciation of certain general principles of diplomatic law, in particular principles of international law underlying the multilateral conventions concluded under the auspices of the United Nations with special reference to the status of the diplomatic courier and the diplomatic bag.

10. When dealing with the question of the scope of application of the present draft articles, the Special Rapporteur intends to explore the possibilities of adopting a comprehensive approach comprising the diplomatic courier and the diplomatic bag as well as other couriers and bags used by States in their official communications with their consular posts, special missions, permanent missions to international organizations or delegations abroad. In this connection special emphasis is placed on the brief review of the legislative history of the four multilateral conventions concluded under the auspices of the United Nations and the State practice in the field of diplomatic law.

11. Following the comments and suggestions advanced in the debate during the thirty-second session of the Commission and in the Sixth Committee of the General Assembly during its thirty-fifth session, the present report endeavours to concentrate on the definition of the terms "diplomatic courier" and "diplomatic bag" by revealing their main features.¹⁹ With regard to the use of other terms

which are pertinent to the present draft articles, it is intended to make wider use of the existing definitions embodied in the multilateral conventions concluded under the auspices of the United Nations and generally agreed upon in State practice. However, it should be pointed out at the outset that the definition of the terms "diplomatic courier" and "diplomatic bag" within the article on the "use of terms" would only indicate the main elements of their status, without exhausting all the substantive aspects which, in their entirety, determine the legal status of the diplomatic courier and the diplomatic bag under international law, particularly with respect to the facilities, privileges and immunities accorded to them in the performance of their functions. The rules relating to the specific aspects of the status of the courier and the bag will be dealt with in the subsequent draft articles constituting part I (on the status of the diplomatic courier) and part II (on the status of the diplomatic bag).

12. The formulation within the general provisions of certain principles of international law underlying the four multilateral conventions concluded under the auspices of the United Nations was suggested in the preliminary report and was met with general agreement during the discussions in the Commission and in the Sixth Committee of the General Assembly.²⁰ There were some observations on the appropriate moment for submission of draft articles on general principles, as to whether this should be done at the initial stage or when the specific draft articles had been considered.²¹ The Special Rapporteur is inclined to agree that only after the substance of the draft articles relating to

Assembly, Thirty-fifth Session, Sixth Committee, 53rd meeting, para. 25 (Italy); 59th meeting, para. 26 (Bulgaria); and "Topical summary . . ." (A/CN.4/L.326), para. 376.

²⁰ See *Yearbook . . . 1980*, vol. II (Part One), pp. 231 *et seq.*, document A/CN.4/335, paras. 6, 47, 54, 59–60; *Yearbook . . . 1980*, vol. I, p. 274, 1636th meeting, para. 3 (Mr. Bedjaoui); p. 276, para. 21 (Mr. Tabibi); p. 282, 1637th meeting, para. 7 (Mr. Francis); *Yearbook . . . 1980*, vol. II (Part Two), p. 165, para. 170; *Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee, 51st meeting, para. 54 (Ethiopia); 59th meeting, para. 25 (Bulgaria); and "Topical summary . . ." (A/CN.4/L.326), para. 373.*

²¹ See *Yearbook . . . 1980*, vol. I, p. 264, 1634th meeting, para. 40 (Mr. Reuter).

¹⁹ See *Yearbook . . . 1980*, vol. I, p. 282, 1637th meeting, para. 6 (Mr. Francis); p. 285, para. 37 (Mr. Pinto); *Yearbook . . . 1980*, vol. II (Part Two), p. 165, para. 169; *Official Records of the General*

the status of the courier and the bag had been examined would it be appropriate to formulate precisely such general principles as those of freedom of communication for all official purposes through the diplomatic courier and diplomatic bag, respect for international law and the laws and regulations of the receiving and the transit State, and the principle of non-discrimination and reciprocity in the treatment of the diplomatic courier and the diplomatic bag. At the same time, a tentative enunciation of these principles might serve as a useful guidance and indication of the foundations of the legal framework upon which the specific rules on the status of the courier and the bag are based. In the light of such an approach, a tentative formulation is suggested, on a purely preliminary basis, of the general principles with a view to providing an early opportunity for a general exchange of views, while deferring their substantive and detailed examination and formulation to a later stage when the consideration of the content of the draft articles had been specified.

A. Scope of the present draft articles

1. THE MEANING OF THE COMPREHENSIVE APPROACH TO THE QUESTION OF THE SCOPE OF THE PRESENT DRAFT ARTICLES

13. The adoption of a comprehensive approach to all kinds of couriers and bags used by States in the official communications with their missions abroad was one of the basic elements of the preliminary report. It was stated that:

The courier and the bag, whatever their particular denomination, are all official means of communication used by a State to maintain contact with or between its missions, as the case may be—whether diplomatic, permanent, permanent observer or special—as well as its consular posts and its delegations.²²

Accordingly, the Special Rapporteur referred to the notions of “official courier” and “official bag” as convenient working tools at the initial stage of the work on the topic under consideration,²³ “embracing in this way all types of means of communication for official purposes through official courier and official bag, as stipulated in the relevant provisions of the above-mentioned four multilateral conventions”.²⁴ In the view of the Special Rapporteur “such a comprehensive approach would reflect more adequately the significant developments that have taken place since the 1961 Vienna Convention”.²⁵

14. The prevailing trend that emerged from the debate in the Commission and in the Sixth Committee of the General Assembly was that a comprehensive approach was advisable in principle, since it could lead to a coherent set of draft articles on the topic, but should be applied with greater caution, taking into account a possible reaction of

anxiety and reservations of States when new concepts were introduced. It was further suggested that, while retaining the concept of “diplomatic courier” and “diplomatic bag”, an appropriate solution might be found through an assimilation formula which may comprise all types of couriers and bags used by States for official communications.²⁶

15. Thus, the Special Rapporteur was faced with two possible options. The first would be to introduce the global concepts of “official courier” and “official bag”, embracing all kinds of couriers and bags, as was tentatively suggested in the preliminary report (see para. 13 above). The second option would be to maintain the well-established and familiar notions of “diplomatic courier” and “diplomatic bag” and, after having examined all their constitutive elements and legal features on the basis of the 1961 Vienna Convention and relevant State practice, to suggest by assimilation to apply the appropriate rules to all other couriers and bags used by States for official communications, taking into account the provisions of the other multilateral conventions in the field of diplomatic law concluded under the auspices of the United Nations and the State practice in the field of diplomatic law.

16. Each of these possible solutions has its advantages and disadvantages. A global concept of the courier and the bag comprising the diversity of couriers and bags under a simple uniform notion could be instrumental for the elaboration of a comprehensive and coherent set of legal rules governing the regime of all official couriers and bags. But, as was pointed out during the debate in the Commission and in the Sixth Committee of the General Assembly, the introduction of the new terms “official courier” and “official bag” may give rise to some reservations and apprehensions (see para. 14 above), due to the deviation from the longstanding and familiar notion of “diplomatic courier” and “diplomatic bag”, which have acquired legal certainty in international and municipal law as well as in State practice.

17. In the light of these considerations, and taking into consideration some of the comments advanced in the previous examination of this issue, the Special Rapporteur would be prepared not to insist on his tentative suggestion about the use of the new global concept of “official courier” and “official bag” for all kinds of couriers and bags used by States to maintain official communications with their missions abroad. This would not mean that the attempt at applying a comprehensive and uniform approach to the couriers and bags would be abandoned altogether. The elaboration of a coherent and uniform set of rules governing the status of the diplomatic bag and the diplomatic courier as well as all other kinds of official couriers and bags, used by consular posts, special missions, permanent missions to international organizations, etc., would remain the main objectives of the present draft articles. The difference will be inevitably in the working method leading to the same objective. This is supposed to be achieved through an examination of the

²² *Yearbook ... 1980*, vol. II (Part One), p. 241, document A/CN.4/335, para. 42, and also paras. 39, 40, 57 and 62.

²³ *Ibid.*, p. 244, para. 57.

²⁴ *Ibid.*, p. 245, para. 62.

²⁵ *Ibid.*

²⁶ See *Yearbook ... 1980*, vol. II (Part Two), p. 164, para. 167.

relevant provisions of the 1961 Vienna Convention and the identification of the essential elements contained therein with regard to the status of the diplomatic courier and the diplomatic bag. The next step should be to ascertain to what extent the provisions of the other three multilateral conventions relating to the appropriate couriers and bags are identical with those of the 1961 Convention, in order to establish whether or not they form a common legal ground on which could be based the uniform treatment of all kinds of couriers and bags, modelled after the regime of the diplomatic courier and the diplomatic bag.

18. Consequently, a comprehensive and uniform approach as regards the scope of the present draft articles would pursue a twofold object. First, to try and elaborate as comprehensive as possible a set of general and specific rules regulating the whole range of functions of the diplomatic courier in the service of all kinds of missions of the sending State by carrying and delivering various kinds of bags—diplomatic, consular, bags of special missions, bags of permanent missions to international organizations, or delegations to conferences as the case may be—according to the tasks assigned to the diplomatic courier by the competent authorities of the sending State, namely the Ministry for Foreign Affairs. It has been a widespread practice of States to use the services of a given diplomatic courier during one of his assignments to carry packages duly sealed and with visible external marks indicating their destination, which the courier has to deliver on his way to a permanent diplomatic mission, to one or more consular posts and to other official missions of the sending State in the territory of the receiving State. This is very often the case, for instance, with a diplomatic courier who is performing his functions to Switzerland, carrying a diplomatic pouch to the embassy of the sending State in Bern, some parcels for its consular posts in Zurich or Geneva, and other official correspondence and material to the Permanent Mission to the United Nations or the delegation of the sending State at the Committee on Disarmament and other missions to some of the specialized agencies in Geneva.

Such a multipurpose service of the diplomatic courier with respect not only to the permanent diplomatic mission but also to various other official missions or delegations of the sending State has become a routine practice of many States, particularly with the ever-increasing role of international conferences and international organizations. The diplomatic courier may also use a diplomatic or other mission of the sending State as an intermediate post along his way, which could serve as a collecting and distributing centre. From that centre the official bag could be dispatched by a courier of the mission to other missions of the sending State in the territory of the receiving State or in third States. In such instances the “diplomatic courier” in fact may perform functions contemplated by article 35 of the 1963 Vienna Convention or article 28 of the Convention on Special Missions, or articles 27, 57 or 72 of the 1975 Vienna Convention. The status of such a diplomatic courier and the diplomatic bag entrusted to him would neither change, nor would it be affected at any moment when he is servicing a consular post or a

delegation to international organ and is delivering a consular bag, or a bag of a delegation, as the case may be. The regime of such a courier and the bag carried by him, with regard to the facilities, privileges and immunities accorded by the receiving State in the performance of the courier’s functions, will be the same. For it is obvious that regardless of the denomination of the courier and the destination of the official parcels, it is their confidential content and function that require special protection and facilities recognized by international law and by the law of the receiving State. There has never been any kind of hierarchy, in law or in fact, between the treatment of the couriers based on their denomination or on the destination of the official bag. In accordance with conventional and customary international law, the receiving State has the duty to permit and protect free communication for all official purposes of the sending State with its missions, through all appropriate means, including couriers and the despatch of correspondence and other documents for official use.

19. The second objective of a comprehensive and uniform approach with regard to the scope of the draft articles should be to provide a proper formula for applying the regime governing the diplomatic courier and the diplomatic bag to all types of couriers and bags used by States for all official purposes with their consular posts and other official missions and delegations. Such an assimilating formula would necessarily rest on a common denominator deriving from the pertinent provisions of the multilateral conventions in the field of diplomatic law which constitute the legal basis for the uniform treatment of the various couriers and bags. This could be ascertained only on the basis of a comparative examination of these provisions.

2. THE MULTILATERAL CONVENTIONS IN THE FIELD OF DIPLOMATIC LAW CONCLUDED UNDER THE AUSPICES OF THE UNITED NATIONS AS THE LEGAL BASIS FOR A UNIFORM REGIME GOVERNING THE STATUS OF THE COURIER AND THE BAG

(a) *The 1961 Vienna Convention on Diplomatic Relations*

20. The most relevant provisions on the scope of application of the principle of freedom of communication for all official purposes, which is of particular significance for the elaboration of the model set of rules relating to the status of the diplomatic courier and the diplomatic bag, are contained in article 27 of the 1961 Vienna Convention, which reads as follows:

Article 27

1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending States, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the receiving State.

2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.

3. The diplomatic bag shall not be opened or detained.

4. The packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use.

5. The diplomatic courier, who shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State or the mission may designate diplomatic couriers *ad hoc*. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge.

7. A diplomatic bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a diplomatic courier. The mission may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft.

21. It may be pointed out at the outset, that for the examination of the problem of the scope of application of the rules relating to the diplomatic courier and the diplomatic bag, the very provisions are contained in paragraph 1 about the means employed in the communications "for all official purposes" with the missions of the sending States, "wherever situated"; paragraph 6 about the designation of diplomatic courier *ad hoc*, distinct from the regular professional diplomatic courier, and paragraph 7 on the diplomatic bag not accompanied by diplomatic courier and entrusted to the captain of a commercial aircraft, who shall not be considered to be a diplomatic courier. The survey of the legislative history of these provisions is very indicative for the evolving process of codification towards a comprehensive treatment of the various types of official couriers and bags.

22. The initial draft article submitted by the Special Rapporteur on the topic "Diplomatic intercourse and immunities" to the Commission at its seventh session, in 1955, relating to the status of the diplomatic courier and the diplomatic bag, was much more restricted in its scope than the present article 27. At that time, the provisions on the freedom of communication and the status of the diplomatic courier and the diplomatic bag, which correspond to article 27, were contained in the first proposal submitted by the Special Rapporteur under draft article 16, which stipulated:

Article 16

1. The receiving State shall permit and protect communications by whatever means, including messengers provided with passports *ad hoc* and written messages in code or cipher, between the mission and the Ministry of Foreign Affairs of the sending State or its consulates and nationals in the territory of the receiving State.²⁷

23. The relatively restrictive character of the above formula can be identified in some directions at least. First, it refers only to communications between the diplomatic mission with the ministry for foreign affairs of the sending State and its consulates and nationals on the territory of the receiving State. Thus, official communications through

diplomatic courier between the various missions of the sending State abroad are not contemplated. It is true that, perhaps because of the influence of article 14 of the Harvard Law School Draft Convention on Diplomatic Privileges and Immunities, official communications of the diplomatic mission with the nationals of the sending State²⁸ were provided, but this provision was abandoned in the subsequent drafts submitted by the Special Rapporteur. This draft article 16 does not therefore contain the key provisions "free communications ... for all official purposes" maintained with the other missions of the sending States, "wherever situated," which undoubtedly give much wider scope of the possible functions of the diplomatic couriers and the official bags entrusted to them by different kinds of official missions of the sending State on the territory of the receiving State. Secondly, this draft article 16 does not contain any reference to the designation of a diplomatic courier *ad hoc* or to the diplomatic bag not accompanied by diplomatic courier but entrusted to the captain of a commercial aircraft.

24. The revised draft article 16 on the same matter submitted by the Special Rapporteur for consideration by the Commission at its ninth session in 1957 was also restrictive along the same lines. As regards the diplomatic courier, it referred only to the obligation of the receiving State to

... permit and protect communications by whatever means, including messengers provided with passports *ad hoc* and written messages in code or cipher, between the mission and the ministry of foreign affairs of the sending State or its consulates and nationals in the territory of the receiving State.²⁹

In this draft article, communications were again confined to contacts with the ministry for foreign affairs and the consular posts and nationals of the sending State on the territory of the receiving State, and it was not expanded to include communications between all kinds of official missions of the sending State abroad. Observations to that effect were made already at the ninth session of the Commission in 1957.³⁰ The use of the diplomatic courier *ad hoc* and the diplomatic bag entrusted to the captain of a commercial aircraft or ship was also not brought up at that stage of the Commission's work.

25. The text of draft article 21, which the Commission adopted at its ninth session, for the first time introduced the key expressions "free communication on the part of the mission for all official purposes*", maintained through diplomatic couriers "with the Government and the other missions and consulates of the sending State, wherever situated*", which are contained in article 27 of the 1961 Vienna Convention on Diplomatic Relations. For reasons that will be identified further, it could be pointed out that these two provisions gave new dimensions to the scope of the functions of the diplomatic courier and the diplomatic bag.

²⁸ Harvard Law School, *Research in International Law*, part I: "Diplomatic Privileges and Immunities" (Cambridge, Mass., 1932), in *Supplement to The American Journal of International Law* (Washington, D.C.), vol. 26 (1932), pp. 79-85.

²⁹ *Yearbook ... 1957*, vol. I, p. 74, 398th meeting, para. 27.

³⁰ *Ibid.*, pp. 74-78, 398th meeting, paras. 28-100; pp. 78-83, 399th meeting, paras. 1-87; and pp. 84-85, 400th meeting, paras. 1-33.

²⁷ *Yearbook ... 1955*, vol. II, p. 11, document A/CN.4/91 (original text of the article in French).

26. This broader formula with regard to the communications through diplomatic couriers and diplomatic bags for all official purposes with the missions of the sending State, wherever these missions were situated, was retained in the revised draft article 21 proposed by the Special Rapporteur at the tenth session of the Commission in 1958.³¹ In the commentary to article 25 (formerly article 21)³² it was emphasized that a broader application of the principle of free communication, as a generally recognized freedom, was essential for the functions of the diplomatic mission and that, in accordance with paragraph 1 of that article, the freedom of communication was to be:

accorded for all official purposes, whether for communications with the Government of the sending State, with the officials and authorities of that Government or the nationals of the sending State, with missions and consulates of other Governments or with international organizations.³³

It was further pointed out that this provision:

sets out the general principle, and states specifically that, in communicating with its Government and the other missions and consulates of that Government, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher.³⁴

This trend towards a more comprehensive treatment of the diplomatic courier and the diplomatic bag was explained by the extension and intensification of diplomatic intercourse. In this connection, it was explained in the commentary that:

Formerly, the freedom to employ all appropriate means of communications was limited in principle to the diplomatic mission's exchanges, on the one hand with the Government of the sending State and, on the other, with the consulates under its authority within the receiving State. Nowadays, with the extension of air communications, the practice has changed.³⁵

According to that practice of States, diplomatic couriers were used for multipurpose functions, delivering diplomatic bags and parcels containing official correspondence and material to various missions or to certain exchange centres. Therefore, as was indicated in the commentary,

Communications with embassies and consulates in other countries no longer always pass through the Ministry for Foreign Affairs in the sending State; often use is made of certain intermediate posts from which despatches are carried to the various capitals to which they are addressed.³⁶

27. The draft article on freedom of communication was adopted by the Commission at its tenth session, in 1958. Paragraph 1 of that article reads as follows:

Article 25

1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the mission may employ all

appropriate means, including diplomatic couriers and messages in code or cipher.³⁷

28. The substantive missing points in this formula, as regards the scope of the status of the diplomatic courier and the diplomatic bag, when compared with article 27 of the 1961 Vienna Convention, are the references to the diplomatic courier *ad hoc* and to the diplomatic bag not accompanied by diplomatic courier. It was only at the United Nations Conference on Diplomatic Intercourse and Immunities, held at Vienna in 1961, that special provisions were introduced on the designation of diplomatic couriers *ad hoc* and the use of diplomatic bags not accompanied by a diplomatic courier but entrusted to the captain of a commercial aircraft, who should be provided with a document indicating the number of packages constituting the bag, but would not be considered to be a diplomatic courier.³⁸

29. The elaboration and adoption of article 27 on the freedom of communication (see para. 20 above), which contains special provisions with respect to the status of the diplomatic courier and the diplomatic courier *ad hoc*, as well as on the diplomatic bag, including the diplomatic bag not accompanied by diplomatic courier, was indeed one of the significant contributions in the codification and progressive development of diplomatic law. It provided the basis for the evolving rules of international law to be applied to various types of couriers and bags used by States for communication with their diplomatic missions, consular posts and other missions and delegations abroad. In our submission, the most tangible achievement in the enhancement of a comprehensive and coherent regime of diplomatic communications through couriers and bags can be identified in the following three areas: *first*, the general recognition of the principle of free communication for all official purposes between the sending State and its various missions, wherever situated, through all appropriate means, including diplomatic couriers and diplomatic bags. The freedom of communication accorded for all official purposes is applied to communications of the diplomatic mission with the Government of the sending State, with the other missions, delegations or officials of that State, between the various missions of the sending State, and with the authorities and missions of other Governments or with international organizations. Such an interpretation leads to a comprehensive and uniform regime governing the legal status of the diplomatic courier and the diplomatic bag, which could provide the basis for

³¹ *Yearbook* ... 1958, vol. II, p. 17, document A/CN.4/116/Add.1 and 2.

³² For the text of article 25 and the commentary thereto, *ibid.*, pp. 96-97, document A/3859, chap. III, sect. II.

³³ *Ibid.*, para. (2) of the commentary.

³⁴ *Ibid.*

³⁵ *Ibid.*, para. (3) of the commentary.

³⁶ *Ibid.*

³⁷ This draft article contains five paragraphs. Para. 2 deals with the inviolability of the official correspondence of the mission; para. 3 stipulates that "The diplomatic bag shall not be opened or detained"; para. 4, that the bag "must bear visible external marks of its character" and that it "may only contain diplomatic documents or articles for official use"; and para. 5, that "The diplomatic courier shall be protected by the receiving State [and] shall enjoy personal inviolability and shall not be liable to any form of arrest or detention."

³⁸ See *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II (United Nations publication, Sales No. 62.X.1), p. 71, document A/CONF.20/L.2, Draft Vienna Convention on Diplomatic Relations, art. 25, paras. 6 and 7.

embracing the various types of couriers and bags. *Second*, article 27 of the 1961 Vienna Convention introduced as a legal institution the diplomat courier *ad hoc*, which responded to modern requirements of diplomatic intercourse and broadened the scope of application of the freedom of communication for all official purposes. *Third*, the widespread use of a diplomatic bag entrusted to the captain of a commercial aircraft, as a relatively new phenomenon of international diplomatic practice, has found legal recognition and protection. These three aspects of the codification process in the field of diplomatic law indeed gave new dimensions to the functions of the diplomatic bag and paved the way for the establishment of a coherent international regime governing all kinds of official couriers and bags.

30. The other relevant provisions of article 27 of the 1961 Vienna Convention with particular significance for the regime of the diplomatic courier and the diplomatic bag—and which would be relevant for the identification of the common features of the status of all kinds of couriers and bags used by States for official communications—are contained in paragraphs 2, 3, 4 and 5, relating respectively to the inviolability of the bag, which shall not be opened or detained; the content of the bag and its visible external marks; and to the status of the diplomatic courier, who shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag, as well as his protection by the receiving State in the performance of his functions and his personal inviolability and immunity from any form of arrest or detention. In order to find out whether there is any common denominator between the regime of the diplomatic courier and the diplomatic bag under the 1961 Vienna Convention and the status of the couriers and bags under the other three multilateral conventions, which could form the legal basis for a comprehensive and coherent treatment of all kinds of couriers and bags, it is necessary to proceed to a brief survey of their relevant provisions.

(b) *The 1963 Vienna Convention on Consular Relations*

31. Without entering into detailed examination of the legislative background of article 35 of the 1963 Vienna Convention, it could be pointed out at the outset that in principle this article is modelled after article 27 of the 1961 Vienna Convention, in both structure, format and content. The main elements defining the legal status of the diplomatic courier and the diplomatic bag could be found with almost similar or identical expressions in the provisions of article 35, dealing with the legal status of the consular courier, consular courier *ad hoc* and the consular bag, including the consular bag entrusted to the captain of a ship or of a commercial aircraft, who shall not be considered to be a consular courier. The legal protection of the consular courier and bag and their immunities and privileges are the same as those accorded to the diplomatic courier and the diplomatic bag.

32. However, there are some specific features of the legal status of the consular courier and the consular bag which

have to be singled out. First of all, it should be mentioned that article 35, para. 1 contemplates the possibility for the consular post to employ diplomatic or consular couriers and diplomatic or consular bags. Accordingly, the consular bag may either be a part of the diplomatic bag, carried by a diplomatic courier, or may be carried by the same courier as a separate package indicated on the diplomatic courier's waybill.³⁹ At the same time, article 35 provides for the use of consular couriers and consular couriers *ad hoc* performing couriers' functions independently from the diplomatic courier. Secondly, as regards the status of the consular bag, article 35, para. 3, provides as an exception the right of the competent authorities of the receiving State, to request "that the bag be opened in their presence by an authorized representative of the sending State", if they have serious reason to believe that the bag contains something other than the correspondence, documents or articles intended exclusively for official use. If the request of the authorities of the receiving State is refused by the authorities of the sending State, the bag shall be returned to its place of origin.

33. With the exception of this option, as indicated in paragraph 3 of article 35, all other elements of the legal status of the consular courier and the consular bag are identical with those of the diplomatic courier and the diplomatic bag. It was emphasized in the commentary to draft article 36⁴⁰ that "the rules governing the dispatch of diplomatic couriers, and defining their legal status, are applicable" to consular couriers and consular bags, with "the same protection in the receiving State as the diplomatic courier."

34. This concept of uniformity in the regime of the diplomatic courier and diplomatic bag and the regime of the consular courier and consular bag also prevailed in the consideration of this problem at the United Nations Conference on Consular Relations, held at Vienna in 1963. There was strong opposition to the attempts to accord to the consular courier more limited privileges and immunities than those accorded to the diplomatic courier. It was rightly maintained that "it was essential for couriers to receive complete inviolability and not to have the limited inviolability given to consular officials".⁴¹ A double treatment may create a dichotomy in the exercise of the freedom of communication which would only create confusion and conflicts. The present regime under the 1963 Vienna Convention is indeed fully consistent with that of the 1961 Vienna Convention in all its parts, with the exception contemplated in article 35, paragraph 3. This homogeneity of the legal status of the diplomatic courier and diplomatic bag and the legal status of the consular courier and consular bag, sets out the basis for a

³⁹ See for example, the commentary to article 36 provisionally adopted by the Commission at its twelfth session in 1960 (*Yearbook . . . 1960*, vol. II, p. 165, document A/4425, chap. II).

⁴⁰ *Ibid.*, paras. (3) and (4) of the commentary.

⁴¹ See *Official Records of the United Nations Conference on Consular Relations*, vol. I, *Summary records of plenary meetings and of the meetings of the First and Second Committees* (United Nations publication, Sales No. 63.X.2), p. 320, Second Committee, 13th meeting, para. 15.

coherent regime governing these two categories of official means for communication used by States.

35. Following the pattern established by article 27 of the 1961 Vienna Convention and subsequently by article 35 of the 1963 Vienna Convention, there is a significant number of bilateral consular and other conventions in the field of diplomatic law which apply an assimilation formula with regard to the legal status of various kinds of couriers and bags, and in particular with respect to official communications with consular posts. Some of these bilateral treaties containing assimilation formulae preceded the 1961 and 1963 Vienna Conventions, but most of them were concluded after the Vienna Conventions. The majority of them, without explicit reference in the text to the regime of the diplomatic courier and bag, provided legal protection of the consular courier and bag identical to the regime of the diplomatic courier and diplomatic bag.⁴² Other bilateral treaties contain an explicit provision to the effect that "consular couriers of the sending State shall enjoy in the territory of the receiving State the same rights, privileges and immunities as diplomatic couriers".⁴³

(c) *The 1969 Convention on Special Missions*

36. The initial draft article concerning the courier of the special mission submitted by the Special Rapporteur on the topic of "Special missions" at the sixteenth session of the Commission in 1964 contained a very concise formula, which stipulated that:

Special missions may send *ad hoc* couriers to communicate in both directions with the organs of their State. Only members of the mission or of its staff may act as couriers.⁴⁴

This formula was quite far from the text of article 27 of the 1961 Vienna Convention and article 35 of the 1963 Vienna Convention.

37. After the Commission's consideration of the initial draft article, in his second report, submitted to the seventeenth session of the Commission in 1965, the Special Rapporteur suggested a more elaborated draft article 22, taking into consideration the main provisions of article 27 of the 1961 Vienna Convention applicable to

special missions.⁴⁵ Subsequently, at its nineteenth session in 1967,⁴⁶ the Commission adopted the final text of this article, which became article 28 of the 1969 Convention on Special Missions, modelled after article 27 of the 1961 Vienna Convention.

38. Article 28 of the 1969 Convention, therefore, in substance and formulation fully corresponds to article 27 of the 1961 Vienna Convention and article 35 of the 1963 Vienna Convention. One specific feature of the regime of communication on the part of the special mission is the provision of paragraph 3 of article 28, which states that:

Where practicable, the special mission shall use the means of communication, including the bag and the courier, of the permanent diplomatic mission of the sending State.

This provision, introduced during the discussions at the Sixth Committee, reflects the current practice of States in their official communication with their special missions abroad, or between the special mission and the other missions, consular posts and official delegations of the sending State, as the case may be. With regard to the denomination of the courier of the special mission, the Commission preferred the term "courier of the special mission" instead of "diplomatic courier of the special mission" which was also considered as a possible option.⁴⁷ It is important to point out, in conclusion, that the regime of the diplomatic courier and the diplomatic bag under the 1961 Vienna Convention is fully applicable, *mutatis mutandis*, to the regime of the official communications of the special missions as provided for in the Convention on Special Missions elaborated in 1968 and adopted by the General Assembly in its resolution 2530 (XXIV) of 8 December 1969. This is indeed still another indication of the common ground for a comprehensive and coherent treatment of all kinds of couriers and bags used by States for official communications.

(d) *The 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character*

39. Article 27 of the 1975 Vienna Convention, dealing with the freedom of communication of the permanent missions of States to international organizations, was, from its early stage, modelled after the provisions of article 27 of the 1961 Vienna Convention. Draft article 27, as submitted by the Special Rapporteur on the topic of relations between States and intergovernmental organizations to the Commission at its twentieth session in 1968, followed closely the structure, format and content of the relevant provisions of the 1961 Vienna Convention and the 1969 Convention on Special Missions.⁴⁸

40. The same approach was applied to the drafting of article 57 of the 1975 Vienna Convention, on the freedom of communication on the part of the delegations to

⁴² See, for example, the Consular Convention between the United Kingdom and France of 31 December 1951 (United Nations, *Treaty Series*, vol. 330, p. 145); the Consular Convention between the United States of America and Ireland of 1 May 1950 (*ibid.*, vol. 222, p. 107), the Consular Treaty between the USSR and the German Democratic Republic of 10 May 1957 (*ibid.*, vol. 285, p. 152), the Consular Convention between Finland and the USSR of 24 January 1966 (*ibid.*, vol. 576, p. 60), the Consular Convention between the USSR and Bulgaria of 12 December 1957 (*ibid.*, vol. 302, p. 21) and many other bilateral consular conventions registered with the Secretariat of the United Nations.

⁴³ See article 13 of the Consular Convention between Poland and the USSR of 27 May 1971 (*ibid.*, vol. 831, p. 48); the Consular Convention between the United Kingdom and the USSR of 2 December 1965 (*ibid.*, vol. 655, p. 259); the Consular Convention between the United Kingdom and Hungary of 12 March 1971 (*ibid.*, vol. 824, p. 3); the Consular Convention between the USSR and Japan of 29 July 1966 (*ibid.*, vol. 608, p. 93); the Consular Convention between Bulgaria and the United Kingdom of 13 March 1968 (*ibid.*, vol. 681, p. 273) and many other conventions with similar provisions.

⁴⁴ *Yearbook* ... 1964, vol. II, p. 109, document A/CN.4/166, article 21, para. 4.

⁴⁵ *Yearbook* ... 1965, vol. II, pp. 129–130, document A/CN.4/179.

⁴⁶ *Yearbook* ... 1967, vol. II, pp. 360–361, document A/6709/Rev.1, chap. II, art. 28.

⁴⁷ *Ibid.*, para. (3) of the commentary to art. 28.

⁴⁸ See *Yearbook* ... 1971, vol. II (Part One), p. 302, document A/8410/Rev.1, chap. II, article 27 of the draft articles adopted by the Commission at its twenty-third session.

international organs or international conferences. Of course there were certain terms or expressions such as "host State", or "courier of the mission", "bag of the mission", etc., which were adapted to the specific features of the subject-matter of that Convention. It should also be noted that in article 57, para. 3, we find the same expression used in article 28, para. 3, of the 1969 Convention on Special Missions, which stipulates that:

Where practicable, the delegation shall use the means of communication, including the bag and the courier, of the permanent diplomatic mission, of a consular post, of the permanent mission, or of the permanent observer mission of the sending State.

41. Under article 72 of the 1975 Vienna Convention, the provisions of article 57 shall apply to observer delegations of States to international organizations and international conferences as regards the status of the courier and the bag used by such delegations.

3. THE APPLICABILITY OF AN ASSIMILATION PROVISION TO ALL KINDS OF COURIERS AND BAGS USED BY STATES FOR OFFICIAL PURPOSES

42. The survey of the relevant provisions of the four multilateral conventions in the field of diplomatic law concluded under the auspices of the United Nations leads to the conclusion that a common legal basis for a comprehensive and coherent treatment of all types of couriers and bags used by States for official communication with their missions abroad already exists. The established uniform rules on this matter have been widely applied in the practice of States. This set of rules is governing the communications of States for all official purposes with their missions, wherever situated, and whatever their denomination. The rights and interests of States that are subject to legal protection are the same. This uniformity is evidenced by the identity of the existing provisions modelled after the 1961 Vienna Convention and supported by the subsequent multilateral and bilateral treaties in the field of diplomatic law. Therefore, a comprehensive and uniform approach would rest on both the existing conventional and customary law and would be supported by well-established State practice.

43. It would be only logical that the scope of the present articles with regard to the legal status of the diplomatic courier and the diplomatic bag be applicable also to all kinds of couriers and bags used by States for official communications with their consular posts, special missions, permanent missions to international organizations and delegations to international organs and conferences.

44. In that case, the scope of the present articles, which is focused on the legal status of the diplomatic courier and the diplomatic bag, would also embrace all other types of couriers and bags used by States for free communication for all official purposes, employing all appropriate means, including couriers and bags.

4. COMPREHENSIVE AND COHERENT TREATMENT OF ALL KINDS OF COURIERS AND BAGS CONFINED ONLY TO COURIERS AND BAGS USED ONLY BY STATES

45. In the light of the prevailing trend in the consideration of the scope of application of the present articles

which took place during the thirty-second session of the Commission in 1980 and in the Sixth Committee of the General Assembly at its thirty-fifth session, the Special Rapporteur wishes to suggest that the scope of the present draft articles be confined to the couriers and bags used by States.

46. Consequently, it is proposed that the legal status of the official couriers and official bags used by international organizations should be outside the scope of application of the present articles, even though it is well known that, with the ever increasing role of international organizations in the global system of international relations, they use official couriers and official bags on a large scale. This widespread practice is also evidenced by a number of international agreements. The Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946⁴⁹ and the Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly on 21 November 1947,⁵⁰ have been followed by other similar treaties governing the diplomatic intercourse of various intergovernmental organizations.⁵¹ There are several bilateral treaties concluded between States and international organizations in the field of diplomatic law.⁵² In their entirety these international agreements have already formed an important field of contemporary diplomatic law. Therefore, the codification and progressive development of the diplomatic law with respect to international organizations, including the regulation of their official communications, could not be overlooked.

47. Some of these agreements contain an assimilation provision, which stipulates that the couriers and the bags of the international organization shall have the same

⁴⁹ Arts. III and IV (United Nations, *Treaty Series*, vol. 1, pp. 20 and 22).

⁵⁰ Arts. IV and V (*ibid.*, vol. 33, pp. 270 and 272).

⁵¹ See for example the General Agreement on Privileges and Immunities of the Council of Europe, signed at Paris on 2 September 1949 (*ibid.*, vol. 250, p. 10); the Agreement on the North Atlantic Treaty Organization, National Representatives and International Staff, signed at Ottawa on 20 September 1951 (*ibid.*, vol. 200, p. 3); the Convention on the Privileges and Immunities of the Council for Mutual Economic Assistance, signed at Sofia on 14 December 1959 (*ibid.*, vol. 368, p. 242).

⁵² See the Interim Arrangement on Privileges and Immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council, on 11 June 1946 and on 1 July 1946, approved by the General Assembly of the United Nations on 14 December 1946, art. III (*ibid.*, vol. 1, p. 169); *Procès-Verbal*, Agreement between the Swiss Federal Council and the International Labour Organisation, signed on 11 March 1946, art. 15, and Arrangement for the Execution of the Agreement, art. 5 (*ibid.*, vol. 15, pp. 389 and 401); Agreement between the Swiss Federal Council and the World Health Organization, approved on 17 July 1948 and 21 August 1948, art. 15 (*ibid.*, vol. 26, pp. 339–340); Agreement between the International Civil Aviation Organization and the Government of Canada, signed on 14 April 1951, sects. 9 and 10 (*ibid.*, vol. 96, p. 162); Agreement between the Swiss Federal Council and the World Meteorological Organization, signed on 10 March 1955, arts. 12 and 13, and Plan of Execution of the Agreement, art. 3 (*ibid.*, vol. 211, pp. 283 and 293).

immunities and privileges as diplomatic couriers and bags.⁵³

48. Nevertheless, for practical convenience, it is suggested at this stage of the work of the Commission, to leave the regulation of the status of the courier and the bag of the intergovernmental organizations outside the scope of application of the present draft articles. The Special Rapporteur, however, would propose that a formula be provided along the lines of article 3 of the 1969 Vienna Convention on the Law of Treaties, as a safeguard provision with respect to the legal status of the couriers and bags of the international organizations.

DRAFT ARTICLES 1 AND 2

49. Taking into consideration the observations made on the problem of the scope of the present draft articles, the Special Rapporteur would like to submit to the Commission for examination and approval the following draft articles:

PART I: GENERAL PROVISIONS

Article 1. Scope of the present articles

1. The present articles shall apply to communications of States for all official purposes with their diplomatic missions, consular posts, special missions, or other missions or delegations, wherever situated, or with other States or international organizations, and also to official communications of these missions and delegations with the sending State or with each other, by employing diplomatic couriers and diplomatic bags.

2. The present articles shall apply also to communications of States for all official purposes with their diplomatic missions, consular posts, special missions, or other missions or delegations, wherever situated, and with other States or international organizations, and also to official communications of these missions and delegations with the sending State or with each other, by employing consular couriers and bags, and couriers and bags of the special missions or other missions or delegations.

Article 2. Couriers and bags not within the scope of the present articles

1. The present articles shall not apply to couriers and bags used for all official purposes by international organizations.

2. The fact that the present articles do not apply to couriers and bags used for all official purposes by international organizations shall not affect:

(a) the legal status of such couriers and bags;

(b) the application to such couriers and bags of any rules set forth in the present articles with regard to the facilities, privileges and immunities which would be accorded under international law independently of the present articles.

⁵³ See the Convention on the Privileges and Immunities of the United Nations, art. III, sect. 10 (see footnote 49 above), and the Convention on the Privileges and Immunities of the Specialized Agencies, art. IV, sect. 12 (see footnote 50 above).

B. Use of terms for the purposes of the present draft articles

INTRODUCTION

50. In accordance with the structure of the present draft articles and the plan of work suggested by the Special Rapporteur, the present report is confined to the examination of some issues relating to the draft articles within the general provisions (see paras. 7 and 8 above).

51. The first item of the general provisions was the scope of the present draft articles. The report proceeded to the study of it on the basis of a survey of the historic background of article 27 of the 1961 Vienna Convention and the relevant provisions of the other three multilateral conventions in the field of diplomatic law concluded under the auspices of the United Nations (see paras. 20 *et seq.* above). The basic objective of this exercise was to identify the essential legal elements that form a common basis for a comprehensive and uniform treatment of the diplomatic courier and the diplomatic bag as well as all other types of couriers and bags used by States for official communication with their diplomatic and other missions and delegations abroad.

52. In the light of the preliminary conclusions reached by the Special Rapporteur, he suggested for examination and approval by the Commission two draft articles, article 1 on the scope of the present draft articles and article 2 on the couriers and bags not within the scope of the present articles, namely, on the legal status of couriers and bags used by international organizations.

53. The main task of this part of the present report is the examination of some definitional problems relating to the use of terms for the purposes of the present draft articles. As has already been pointed out (see para. 11 above), following the comments and suggestions made in the Commission and the Sixth Committee, the work at this stage should be concentrated on the definition of the terms "diplomatic courier" and "diplomatic bag". In this connection, the study of some issues pertaining to the scope of the present articles may provide some assistance in exploring the main legal features defining the status of the courier and the bag. On the other hand, the use of the same source material and *travaux préparatoires* in both instances could create an impression of redundancy, which we shall try to avoid as much as possible.

54. The definitional problems inherent in the nature of the subject matter under examination relating to the interpretation of the terms to be used in the present draft articles, are, generally speaking, of two categories. The first refers to terms already defined by existing treaties and, in particular, by the four multilateral conventions. Such terms have acquired legal certainty and may not need further elaboration for the purposes of the present draft articles. They may form quite a long list of terms, such as: "sending State", "receiving State", "transit State", "third State", "diplomatic mission", "permanent mission", "permanent observer mission", "delegation", "international organ", "international organization", "international conference", etc. Those terms are very relevant to the interpretation of the appropriate provisions

on diplomatic intercourse by means of couriers and bags; but due to the fact that they have been embodied in international treaties in force and enjoy general recognition in international practice, they may be used directly or through reference to the respective international treaties of a universal character, such as the four multilateral conventions concluded under the auspices of the United Nations. This would be the suggestion of the Special Rapporteur.

55. The second category of terms relating to the courier and the bag has two main features. First, these terms relate closely to the *sedes materiae* of the topic under consideration, and their definition in the text of the draft articles and in the commentary thereupon is absolutely indispensable. Secondly, the terms "diplomatic courier" and "diplomatic bag", "consular courier" and "consular bag" and the other kinds of couriers and bags, including the courier *ad hoc*, are only partially defined in the provisions of the existing conventions. It is evident that for the purposes of the present draft articles on the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the definition of these terms should take its preponderant place.

56. It is proposed to identify the essential elements of the notion of the diplomatic courier and the diplomatic bag, as well as the other types of couriers and bags. This should be done, primarily, through the examination of the *travaux préparatoires* and the relevant provisions of the four multilateral conventions in the field of diplomatic laws, in particular the provisions on the freedom of communication and State practice on that matter. The idea is to suggest a definition which could have certain practical significance for the elaboration of the specific rules on the legal status of the courier and the bag, with special reference to their functions and the facilities, privileges and immunities accorded to them in the performance of these functions.

57. The remaining item, dealt with in the present report, within part I of the draft articles (General Provisions) would be devoted to the general principles of international law underlying the four multilateral conventions concluded under the auspices of the United Nations. Following the considerations advanced above (see paras. 4, 9 and 12), it is proposed to submit draft articles containing the formulation of those principles on a purely tentative basis, for a preliminary exchange of views, on the understanding that their substantive and detailed examination would take place at a later stage when the content of the draft articles had been studied by the Commission.

1. DEFINITION OF THE TERM "DIPLOMATIC COURIER"

58. The term "diplomatic courier" has acquired universal recognition in international law and practice as a denomination of a person duly authorized by the competent authorities of the sending State who is entrusted with the custody, transportation and delivery of the diplomatic bag or with the transmission of an official oral message to the missions abroad of that State. Though in the practice of some States or in their national laws and regulations such terms as "messenger", "bearer of official

dispatches"⁵⁴ or other denominations⁵⁵ of the diplomatic couriers were used in the past and are, if seldom, found today, the term "diplomatic courier" has gained an absolute application as a generally accepted notion with a well-known legal meaning.

59. The notion of "the diplomatic courier *ad hoc*" has become more familiar since the adoption of the 1961 Vienna Convention. However, in some rare instances national rules and regulations have used other expressions, such as "*courriers porteurs de dépêches*" to designate a diplomatic courier who is an official of the Ministry for Foreign Affairs, not necessarily a professional diplomatic courier, or other officials, including diplomats or nationals of the sending State appointed to carry and deliver a diplomatic bag on an *ad hoc* basis.⁵⁶

60. The present report attempts to analyse the status of "diplomatic courier" first of all on the basis of the *travaux préparatoires* of the relevant provisions of the four multilateral conventions concluded under the auspices of the United Nations. It is intended that herein some of the basic notions of the diplomatic courier would be clarified, such as the definition, functions, appointment, nationality, facilities and freedom of movement of the diplomatic courier. It goes without saying that the core question of the diplomatic courier is the question of inviolability and immunity, and the extent thereof to be recognized. However, those basic elements constituting the status of the diplomatic courier are no less important for the discussion on inviolability and immunity, which could profitably take place only after the basic agreement of the former.

⁵⁴ See for example the letter of 29 May 1861 from the Secretary of State of the United States of America, Mr. Seward to the Minister to Colombia, Mr. Burton, concerning the refusal of a passport to Mr. Valeri "as a bearer of dispatches" and the right "to designate the messengers" (J.B. Moore, *A Digest of International Law*, vol. IV (Washington, D.C., U.S. Government Printing Office, 1906), pp. 695-696) and the telegram dated 8 September 1915 in which Secretary of State Lansing instructed the United States Ambassador in Austria-Hungary, where reference is made to the status of an American citizen "as a secret bearer of official despatches" (G.H. Hackworth, ed., *Digest of International Law*, vol. IV (Washington, D.C., U.S. Government Printing Office, 1942), pp. 621-622).

⁵⁵ See "Mémorandum sur le régime fiscal, douanier, etc., applicable aux membres du corps diplomatique accrédités en Belgique", in which the terms "courriers ou porteurs de dépêches" are used (United Nations, Legislative Series, vol. VII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* (Sales No. 58.V.3), p. 30), and "Instruction du Ministère des finances concernant les immunités diplomatiques, 1955 (Administration des douanes et accises)", in which the terms "courriers", "courriers de cabinet" and "courriers porteurs de dépêches" are used (*ibid.*, p. 45). For the use of the term "courriers de cabinet", see also C. Calvo, *Le droit international théorique et pratique*, 6th ed., rev. (Paris, Guillaumin, 1888), vol. III, p. 329.

⁵⁶ Thus in the State practice of Belgium, the national regulations mentioned above (footnote 55) provide as follows:

"On peut charger comme courriers des hommes de toute confiance. Les courriers ordinaires forment un corps spécial; on les appelle courriers de cabinet.

"On peut charger de cette mission d'autres personnes, à titre extraordinaire: des fonctionnaires ministériels, des aides de camp, des secrétaires, des attachés, même de simples particuliers; on les appelle alors courriers porteurs de dépêches" (United Nations, Legislative Series, vol. VII, *op. cit.*, p. 45.)

61. After having identified the main features determining the notion of the diplomatic courier, based upon the relevant provisions of the four multilateral conventions, we hope to arrive at the definition of the term "diplomatic courier" as well as of the notion of all other types of couriers used for official purposes by the sending State in communicating with its missions abroad.

62. In the study of the definitional aspects, special reference should also be made to the notion of the "diplomatic courier *ad hoc*" and the notion of a special courier who is not considered to be a diplomatic courier, such as the captain of a commercial aircraft or ship entrusted with the custody and transportation of a diplomatic bag which is to be delivered to a member of the mission of the sending State.

(a) *The notion of the "diplomatic courier" under the 1961 Vienna Convention*

(i) *The work of the Commission (1955–1958)*

63. As regards the diplomatic courier, the original draft articles submitted to the Commission at its seventh session, in 1955, by the Special Rapporteur for the topic "Diplomatic intercourse and immunities" consisted of a few simple sentences:

Article 16

1. The receiving State shall permit and protect communications by whatever means, including messengers provided with passports *ad hoc* and written messages in code or cipher, between the mission and the Ministry of Foreign Affairs of the sending State or its consulates and nationals in the territory of the receiving State.

...

3. The messenger carrying the dispatches shall be protected by the receiving State.

4. Third States shall be bound to accord the same protection to dispatches and messengers in transit.⁵⁷

64. The revised draft articles submitted by the Special Rapporteur to the ninth session of the Commission in 1957 read as follows:

Article 16

1. The receiving State shall accord all necessary facilities for the performance of the work of the mission. In particular, it shall permit and protect communications by whatever means, including messengers provided with passports *ad hoc*...

...

3. The messenger carrying the dispatches shall be protected by the receiving State.⁵⁸

65. In submitting the draft article, the Special Rapporteur explained that he had refrained from including a long list of persons and institutions, as had been done in the Harvard Draft (art. 14, para. 1),⁵⁹ to avoid giving the impression that the list was intended to be exhaustive.⁶⁰

⁵⁷ *Yearbook* ... 1955, vol. II, p. 11, document A/CN.4/91; text of article in French.

⁵⁸ *Yearbook* ... 1957, vol. I, p. 74, 398th meeting, para. 27. The obligation of third States to accord the same protection to "messengers in transit" was provided in paragraph 4 of the same article.

⁵⁹ See footnote 28 above.

⁶⁰ *Yearbook* ... 1957, vol. I, p. 74, 398th meeting, para. 30.

66. During the debate in the Commission at its ninth session, in 1957, it was pointed out that the phrase "the messenger carrying the dispatches" was confusing and that "no difficulty would arise if the Commission adhered firmly to the well-established idea of a diplomatic courier as someone who carried special papers showing his official status as a courier".⁶¹ As to the kinds of diplomatic couriers, although reference was made to regular and *ad hoc* couriers, much of the discussion focused on the status of aeroplane pilots entrusted with diplomatic mail. It was suggested, for instance, by one member of the Commission, that pilots carrying diplomatic mail could be divided into three categories: (a) the ordinary commercial airline pilots, (b) commercial airline pilots accredited as diplomatic couriers and (c) flying couriers operating planes allocated to embassies for the sole purpose of carrying diplomatic mail.⁶² The majority of the Commission appeared to be agreed that, where commercial airline pilots were involved, it was the diplomatic pouch only that enjoyed immunity and not the pilot.⁶³

67. Following the discussions at that session, the Commission adopted the text of draft article 21, paragraph 4 of which read as follows:

The diplomatic courier shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to arrest or detention, whether administrative or judicial.⁶⁴

68. The commentary relating to the above paragraph stated that:

The diplomatic courier is furnished with a document testifying to his status: normally, a courier's passport. When the diplomatic bag is entrusted to the captain of a commercial aircraft who is not provided with such a document, he is not regarded as a diplomatic courier under the terms of this paragraph.⁶⁵

69. In the light of the comments and suggestions made by Governments,⁶⁶ the Special Rapporteur submitted his revised text of article 21 to the Commission at its tenth session (1958), in which the following definition was inserted:

3. The expression "diplomatic courier" means a person who carries a diplomatic bag and who is for this purpose furnished with a document (courier's passport) testifying to his status. If such a person is travelling exclusively as a diplomatic courier he shall enjoy personal inviolability during his journey and shall not be liable to arrest or detention, whether administrative or judicial.⁶⁷

70. The Commission was divided on this proposal, however, and the text (now article 25) and commentary thereto were therefore left virtually unchanged. In the discussion, the focus was again on the captain of an

⁶¹ *Ibid.*, p. 83, 399th meeting, para. 85.

⁶² *Ibid.*, p. 84, 400th meeting, para. 4.

⁶³ *Ibid.*, para. 15.

⁶⁴ *Yearbook* ... 1957, vol. II, p. 138, document A/3623, chap. II, sect. II.

⁶⁵ *Ibid.*, para. (4) of the commentary to article 21.

⁶⁶ "Diplomatic intercourse and immunities: summary of observations received from Governments and conclusions of the Special Rapporteur" (A/CN.4/116), pp. 48–50 (mimeographed document).

⁶⁷ *Yearbook* ... 1958, vol. II, p. 17, document A/CN.4/116/Add.1 and 2.

aircraft, and as a result the following was added to the commentary:

This case must be distinguished from the not uncommon case in which a diplomatic courier pilots an aircraft specially intended to be used for the carriage of diplomatic bags. There is no reason for treating such a courier differently from one who carries the bag in a car driven by himself.⁶⁸

(ii) *The United Nations Conference on Diplomatic Intercourse and Immunities (1961)*

71. The Conference devoted very little discussion to the question of diplomatic couriers, which was completely overshadowed by the question of wireless transmitters and the diplomatic bag.⁶⁹ However, three amendments were adopted which replaced the Commission's text entirely by the much more detailed provisions contained in the last three paragraphs of article 27, thus greatly expanding and clarifying the content of customary international law regarding diplomatic couriers. The French amendment,⁷⁰ which became paragraph 5, introduced three requirements into the text: (1) the courier must be furnished with a document indicating his status (which the Commission had stated in its commentary to be practice), (2) he must carry a document indicating the number of packages in the diplomatic bag, and (3) protection is accorded to him "in the performance of his functions" by the accrediting State. Chile introduced the new provision which became paragraph 6 regarding "diplomatic courier *ad hoc*", to whom the protection is limited to the period during which he is in charge of the bag.⁷¹

72. The Swiss proposal was to add to the text a provision on the lines of the Commission's commentary regulating the status of the captain of a commercial aircraft;⁷² this amendment became paragraph 7, with some details added by the Drafting Committee.

73. To sum up, article 27 of the 1961 Convention clarified the notion of diplomatic courier, professional and *ad hoc*. It also made it clear that the captain of a commercial aircraft entrusted with a diplomatic bag cannot be considered to be a diplomatic courier as such. Paragraphs 5 to 7 of article 27 are entirely devoted to the main legal features of these three categories of persons.

(b) *The notion of "diplomatic and consular couriers" under the 1963 Vienna Convention*

(i) *The work of the Commission (1957-1961)*

74. The first draft articles submitted to the Commission at its ninth session, in 1957, by the Special Rapporteur on

the topic "Consular intercourse and immunities" did not contain any specific reference to either diplomatic or consular couriers, although article 23 provided in general terms for "communication with the authorities of the sending State", and article 25 for the "inviolability of consular correspondence, archives and premises".⁷³ None of the draft articles submitted by the Special Rapporteur at the twelfth session of the Commission in 1960—in particular, article 29 on "Freedom of communication"⁷⁴—contained a specific provision regarding the courier.

75. It was in the course of the discussion on draft article 29 at the Commission's twelfth session that the question of "consular couriers" was first raised. Some members of the Commission were of the view that in practice there was no such person as a consular courier, but only a diplomatic courier, used also by consulates, and therefore did not think that there was any need to mention a consular courier as such in article 29.⁷⁵ The Special Rapporteur, however, pointed out that cases might arise where special couriers were used to enable one consulate to communicate with another or with a diplomatic mission.⁷⁶ It was suggested that the use of consular couriers should not be excluded in the draft article and that, possibly, the wording of article 13 of the Harvard Draft (which referred to messengers holding *ad hoc* passports)⁷⁷ might be followed in any provision relating to consular couriers.

76. In the light of the discussions, the Commission adopted at that session, in 1960, draft article 36 on "Freedom of communication", which provided that:

1. The receiving State shall permit and protect free communication on the part of the consulate for all official purposes. In communicating with the government, the diplomatic missions and the other consulates of the sending State, wherever situated, the consulate may employ all appropriate means, including diplomatic or other special couriers . . .⁷⁸

77. Paragraph 4 of the commentary relating thereto is substantially the same as the one in the Commission's final draft.⁷⁹

78. At the thirteenth session of the Commission, in 1961, a suggestion was made to the effect that draft article 36 might be redrafted along the lines of article 27 of the 1961 Vienna Convention, and also that paragraph (4) of the commentary might be incorporated in the article itself.⁸⁰

⁶⁸ *Ibid.*, p. 97, document A/3859, chap. III, para. (6) of the commentary to article 25.

⁶⁹ E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (Dobbs Ferry, N.Y., Oceana, 1976), p. 130; E. Kerley, "Some aspects of the Vienna Conference on diplomatic intercourse and immunities", *The American Journal of International Law* (Washington, D.C.), vol. 56, No. 1 (January 1962), pp. 116-118.

⁷⁰ *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II (United Nations publication, Sales No. 62.X.1), p. 20, document A/CONF.20/C.1/L.125.

⁷¹ *Ibid.*, pp. 20-21, document A/CONF.20/C.1/L.133.

⁷² *Ibid.*, pp. 23-24, document A/CONF.20/C.1/L.158 and Add.1.

⁷³ *Yearbook . . . 1957*, vol. II, pp. 97-98, document A/CN.4/108. Also note articles 35 to 37 relating to privileges and immunities of honorary consuls and similar officers (*ibid.*, pp. 102-103).

⁷⁴ *Yearbook . . . 1960*, vol. II, p. 36, document A/CN.4/131.

⁷⁵ *Yearbook . . . 1960*, vol. I, p. 31, 532nd meeting, para. 29.

⁷⁶ *Ibid.*, para. 30.

⁷⁷ *Ibid.*, para. 32. For article 13 of the Harvard Draft, see Harvard Law School, *Research in International Law* (*op. cit.*), part II: "Legal Position and Functions of Consuls", in *Supplement to The American Journal of International Law*, vol. 26 (*op. cit.*), p. 306.

⁷⁸ *Yearbook . . . 1960*, vol. II, p. 165, document A/4425, chap. II, sect. III.

⁷⁹ *Ibid.*

⁸⁰ *Yearbook . . . 1961*, vol. I, pp. 94-96, 596th meeting, paras. 74-99.

79. Thus the final draft article on freedom of communication (art. 35) appeared as follows:

1. The receiving State shall permit and protect free communication on the part of the consulate for all official purposes. In communicating with the government, the diplomatic missions and the other consulates of the sending State, wherever situated, the consulate may employ all appropriate means, including diplomatic or consular couriers . . .

5. The consular courier shall be provided with an official document indicating his status and the number of packages constituting the consular bag. In the performance of his functions he shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. A consular bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a consular courier. The consulate may send one of its members to take possession of the consular bag directly and freely from the captain of the aircraft.⁸¹

80. It should be noted that in paragraph 1 the term "other special couriers" in the 1960 article has been changed to "consular couriers". Paragraphs 5 and 6 correspond to article 27, paragraphs 5 and 7, respectively, of the 1961 Vienna Convention.

81. The relevant part of the commentary to the Commission's final draft article 35, though substantially the same as its 1960 commentary, is reproduced below:

(3) As regards the means of communication, the article specifies that the consulate may employ all appropriate means, including diplomatic or consular couriers, the diplomatic or consular bag, and messages in code or cipher. In drafting this article, the Commission based itself on existing practice, which is as a rule to make use of the diplomatic courier service—i.e., of the couriers dispatched by the Ministry for Foreign Affairs of the sending State or by a diplomatic mission of the latter. Such diplomatic couriers maintain the consulate's communications with the diplomatic mission of the sending State, or with an intermediate post acting as a collecting and distributing centre for diplomatic mail; with the authorities of the sending State; or even with the sending State's diplomatic missions and consulates in third States. In all such cases, the rules governing the dispatch of diplomatic couriers, and defining their legal status, are applicable. The consular bag may either be part of the diplomatic bag, or may be carried as a separate bag shown on the diplomatic courier's way-bill. This last procedure is preferred where the consular bag has to be transmitted to a consulate en route.

(4) However, by reason of its geographical position, a consulate may have to send a consular courier to the seat of the diplomatic mission or even to the sending State, particularly if the latter has no diplomatic mission in the receiving State. The text proposed by the Commission provides for this contingency. The consular courier shall be provided with an official document certifying his status and indicating the number of packages constituting the consular bag. The consular courier must enjoy the same protection in the receiving State as the diplomatic courier. He enjoys inviolability of person and is not liable to any form of arrest or detention.

(8) The Commission, being of the opinion that the consular bag may be entrusted by a consulate to the captain of a commercial aircraft, has inserted a rule to that effect by adapting the text of article 27, paragraph 7, of the 1961 Vienna Convention on Diplomatic Relations.⁸²

(ii) *The United Nations Conference on Consular Relations (1963)*

82. Regarding the definition of the "courier", three

amendments proposed at the Conference contributed to the clarification of the term. They were an amendment by Japan, a joint proposal of the Netherlands and the Byelorussian SSR and an amendment by Italy. As regards the new regime of the "consular courier", the amendment submitted by Japan⁸³ to the effect of deleting the term provoked a lively discussion at the Second Committee of the Conference. The reason for this proposal was that "the post of consular courier was entirely new and would only lead to complications."⁸⁴ The Japanese amendment was strongly opposed by the representative of Czechoslovakia, who stated that:

. . . although consular couriers might seem to be an innovation, it was essential to include them in the Convention for practical reasons. First, a courier carrying correspondence between the capital and a country where there was a consular but no diplomatic mission would, in effect, be a consular courier. Secondly, a head of a consular post or vice-consul carrying a bag to the capital would still be a consular and not a diplomatic courier for he did not appear on the diplomatic list. Thirdly, the representatives of the Netherlands and of the Byelorussian Soviet Socialist Republic had each proposed an amendment, which he supported, to the effect that *ad hoc* couriers appointed to carry the consular bag to the capital should be consular couriers.⁸⁵

83. The main concern expressed in the Japanese amendment was that the draft convention should not include a new category of courier or official to whom the immunities in paragraph 5 of article 35 would have to be accorded. The Japanese representative also considered that in so far as the courier was not a diplomatic courier, he should be treated only as a consular official and given the corresponding limited inviolability and immunities. To this, the representative of the United Kingdom expressed his objection on two grounds that:

Firstly, couriers did not fall within the definition of consular officials in article 1. Secondly, and more important, it was essential for couriers to receive complete inviolability and not to have the limited inviolability given to consular officials. The situation that would result from the Japanese amendment—the existence of two categories of courier, with different degrees of inviolability—was neither satisfactory nor acceptable.⁸⁶

84. Although the Japanese amendment was supported by several representatives (of Yugoslavia, Australia, Belgium and others), the majority of the Committee did not favour it.⁸⁷ In the words of the representative of India, "it might be true that the term 'consular courier' was a relatively new one, but it was a category that was going to figure increasingly in the world of consular relations."⁸⁸ Thus the term "consular couriers" was now accepted as a recognized notion of international law.

85. Then the amendments proposed by the Netherlands⁸⁹ and the Byelorussian SSR,⁹⁰ which were later merged into a joint proposal, created a new category by

⁸³ *Official Records of the United Nations Conference on Consular Relations*, vol. II (United Nations publication, Sales No. 64.X.1), p. 79, document A/CONF.25/C.2/L.55.

⁸⁴ *Ibid.*, vol. I (United Nations publication, Sales No. 63.X.2), p. 319, *Second Committee*, 13th meeting, para. 8.

⁸⁵ *Ibid.*, para. 10.

⁸⁶ *Ibid.*, p. 320, para. 15.

⁸⁷ *Ibid.*, p. 321, paras. 31–34.

⁸⁸ *Ibid.*, p. 320, para. 23.

⁸⁹ *Ibid.*, vol. II, p. 74, document A/CONF.25/C.2/L.15.

⁹⁰ *Ibid.*, p. 80, document A/CONF.25/C.2/L.70.

⁸¹ *Yearbook . . . 1961*, vol. II, p. 111, document A/4843, chap. II, sect. IV.

⁸² *Ibid.*, pp. 111–112.

inserting a provision which read: "The sending State, its diplomatic mission and its consulate may designate consular couriers *ad hoc*." The proposal was adopted without much opposition.⁹¹

86. Finally, the amendment proposed by Italy⁹² raised another definitional question. The Italian amendment was composed of two parts: the first, to add, in paragraph 6 of the Commission's draft article 35, specific reference to the captain of a ship to whom a consular bag may be entrusted, which was adopted by the conference. The main thrust of the Italian amendment was the second part, which was to delete the words: "he [the captain of a ship or an aircraft] shall not be considered to be a consular courier", since, according to the representative of Italy, the captain in question "should be protected by certain safeguards."⁹³ However, this part of the amendment was opposed by several representatives, including that of the Netherlands, who reminded the Committee of article 27, paragraph 7 of the 1961 Vienna Convention, which expressly stated that the captain of an aircraft, to whom the diplomatic bag could be entrusted, would not be considered to be a diplomatic courier, and asked, "What then would be the captain's position if he were carrying both a diplomatic bag and a consular bag?"⁹⁴ Realizing that this part of the amendment might lead to confusion, the Italian representative revised his proposal, as suggested by the representative of Yugoslavia, to the effect that the captain in question "shall be considered to be a consular courier *ad hoc*". However, this amendment was rejected by the Second Committee of the Conference, thus leaving no doubt that the captain of a ship or an aircraft could not be considered as a consular courier, either regular or *ad hoc*.

87. To sum up, under the 1963 Vienna Convention there are three kinds of couriers: (1) the diplomatic courier, (2) the consular courier and (3) the consular courier *ad hoc*. It should be added that a captain of a ship or of a commercial aircraft entrusted with a consular bag cannot be considered to be a consular courier.

88. Thus, paragraphs 1, 5, 6 and 7 of article 35 of the Convention provide as follows:

Article 35. Freedom of communication

1. The receiving State shall permit and protect freedom of communication on the part of the consular post for all official purposes. In communicating with the Government, the diplomatic missions and other consular posts, wherever situated, of the sending State, the consular post may employ all appropriate means, including diplomatic or consular couriers, diplomatic or consular bags and messages in code or cipher. However, the consular post may install and use a wireless transmitter only with the consent of the receiving State.

5. The consular courier shall be provided with an official document indicating his status and the number of packages constituting the consular bag. Except with the consent of the receiving State he shall be neither a national of the receiving State, nor, unless he is a national of the sending State, a permanent resident of the receiving State. In the

performance of his functions he shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State, its diplomatic missions and its consular posts may designate consular couriers *ad hoc*. In such cases the provisions of paragraph 5 of this article shall also apply except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the consular bag in his charge.

7. A consular bag may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a consular courier. By arrangement with the appropriate local authorities, the consular post may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

89. As was pointed out above (para. 35), prior to the 1961 Vienna Convention and the 1963 Vienna Convention, large numbers of bilateral agreements contained provisions to the effect that consular couriers of the sending States shall enjoy in the territory of the receiving States the same rights, privileges and immunities as diplomatic couriers.⁹⁵ It should also be emphasized that the use of a diplomatic courier for delivering a consular bag, as contemplated in article 35, paragraph 1, has been widely applied in State practice.

(c) The notion of the "courier" under the 1969 Convention on Special Missions

(i) The work of the Commission (1964–1967)

90. The first report submitted to the Commission at its sixteenth session, in 1964, by the Special Rapporteur on the topic of special missions contained a provision, in draft article 21 on "Freedom of communication", paragraph 4, which read as follows:

Special missions may send *ad hoc* couriers to communicate in both directions with the organs of their State. Only members of the mission or of its staff may act as couriers.⁹⁶

91. In his second report, submitted at the following session in 1965, the Special Rapporteur had reworded the draft article, drawing on article 27 of the 1961 Vienna Convention, with changes corresponding to the nature of special missions, as follows:

Article 22. Freedom of communication

1. The receiving State shall permit and protect free communication on the part of the special mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the special mission may employ all appropriate means, including its couriers. . . .

5. The courier of the special mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

⁹⁵ See footnotes 42 and 43 above.

⁹⁶ *Yearbook . . . 1964*, vol. II, p. 109, document A/CN.4/166. The Special Rapporteur's commentary to this provision merely stated that: "If the *ad hoc* mission is operating in a frontier area, it is generally accorded the right to maintain relations by courier with the territory of its own country, without the intermediary of the permanent mission." (*Ibid.*, p. 110, para. (4) of the commentary to article 21.) Draft article 35, para. 4, stipulated "the necessary guarantees and immunities to diplomatic couriers" (*ibid.*, p. 117).

⁹¹ *Ibid.*, vol. I, pp. 327–28, *Second Committee*, 14th meeting.

⁹² *Ibid.*, vol. II, p. 84, document A/CONF.25/C.2/L.102.

⁹³ *Ibid.*, vol. I, p. 328, *Second Committee*, 14th meeting, para. 43.

⁹⁴ *Ibid.*, para. 48.

8. Only members of the special mission or of its staff may act as couriers of the special mission.⁹⁷

92. This new enlarged version of the draft article on the freedom of communication was explained in the commentary as follows:

...
(9) In view of the nature of special missions, the Special Rapporteur has made no provision for the possibility of the special mission's using couriers *ad hoc* (article 27, paragraph 6 of the Vienna Convention on Diplomatic Relations) or for the possibility of its employing as courier a national or resident of the receiving State. He considers, however, that the courier might be any person, irrespective of his nationality, who forms part of the special mission under the terms of article 14 as already adopted. He believes that it is not necessary to insert a special rule on this point in the draft.

(10) Nor has the Special Rapporteur included any provisions on the use of the captain of a commercial aircraft (article 27, paragraph 7 of the Vienna Convention on Diplomatic Relations and article 35, paragraph 7 of the Vienna Convention on Consular Relations) or the captain of a ship (article 35, paragraph 7 of the Vienna Convention on Consular Relations) as courier for the special mission. Such persons are not generally used for these purposes. However, this is not an absolute rule in practice. It has been observed recently that in exceptional cases special missions employ such persons as couriers *ad hoc*. For this reason, the provisions of article 35, paragraph 7 of the Vienna Convention on Consular Relations should perhaps also be inserted in the present article.⁹⁸

93. Since, by this time, the notions of the courier, whether diplomatic or consular, or whether professional or *ad hoc*, had already become familiar to the world of diplomatic law, there was not much in-depth discussion on these terms at the seventeenth session of the Commission, in 1965. With regard to paragraph 8 of the draft article quoted above, however, it was pointed out by one member of the Commission that "the use, when considered necessary, of diplomatic couriers who were not members of the special mission should also be permitted".⁹⁹ It was further suggested by another member that "reference should be made in paragraph 8 to the possibility of using captains of ships and of commercial aircraft as *ad hoc* couriers of the special mission, because in certain circumstances they constituted the most convenient means of communication".¹⁰⁰ To these comments the Special Rapporteur responded in the following manner:

It was against his own personal feelings that he had included paragraph 8, concerning couriers. The fact was that most special missions operated in frontier areas; and, if they used as *ad hoc* couriers persons recruited in the area who did not belong to the mission and were not members of the diplomatic or consular staff, serious problems might arise. The Swiss Federal Political Department had issued a circular stating that, in such cases, the courier could not be regarded as having any diplomatic status. A provision permitting *ad hoc* couriers had been accepted without difficulty in the Vienna Convention on Diplomatic Relations, but had met with some opposition at the 1963 Conference on Consular Relations. He saw no objection to introducing in article 22 of his draft a provision similar to that contained in article 35, paragraph 6, of the Vienna Convention on Consular Relations.¹⁰¹

⁹⁷ *Yearbook ... 1965*, vol. II, pp. 129–130, document A/CN.4/179.

⁹⁸ *Ibid.*, pp. 130–131.

⁹⁹ *Yearbook ... 1965*, vol. I, p. 216, 805th meeting, para. 80.

¹⁰⁰ *Ibid.*, para. 86.

¹⁰¹ *Ibid.*, p. 218, 806th meeting, para. 17. The Special Rapporteur also pointed out that his draft did not mention diplomatic or consular couriers and hence did not exclude the possibility of diplomatic or consular officers acting as couriers for the special mission (*ibid.*, para. 18).

94. As a result of this exchange of views, the Commission decided to delete paragraph 8 of the draft article. It also provisionally adopted a new paragraph 6 regarding "couriers *ad hoc*" and a new paragraph 7 relating to the captain of a ship or of a commercial aircraft.¹⁰²

95. Consequently, the relevant paragraphs of the final draft (which became article 28) adopted by the Commission at its nineteenth session in 1967 read as follows:

Article 28. Freedom of communication

1. The receiving State shall permit and protect free communication on the part of the special mission for all official purposes. In communicating with the Government of the sending State, its diplomatic missions, its consular posts and its other special missions, or with sections of the same mission, wherever situated, the special mission may employ all appropriate means, including couriers.

...
5. The courier of the special mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State or the special mission may designate couriers *ad hoc* of the special mission. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the special mission's bag in his charge.

7. The bag of the special mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a courier of the special mission. ...¹⁰³

96. It is important to note here that the commentary of article 28 clarified the point of terminology. It stated:

As to terminology, the Commission had a choice between two sets of expressions to designate the ... courier of a special mission. It could have referred to [it] as ... "the diplomatic courier of the special mission" or, more simply, as ... "the courier of the special mission". The Commission chose the second alternative in order to prevent any possibility of confusion with the ... courier of the permanent diplomatic mission.¹⁰⁴

(ii) *The Sixth Committee of the General Assembly (1968)*

97. The only substantial addition to the text proposed by the Commission that was elaborated by the Sixth Committee of the General Assembly at its twenty-third session in 1968 came from the proposal for amendment by Ghana.¹⁰⁵ In introducing his amendment, the repre-

¹⁰² *Ibid.*, p. 288, 817th meeting, para. 15. The text of the new paragraphs is the same as the Commission's final draft.

¹⁰³ *Yearbook ... 1967*, vol. II, pp. 360–61, document A/6709/Rev.1, chap. II, sect. D.

In the course of the discussion before adopting the final text, at the nineteenth session of the Commission, the Special Rapporteur stated that: "It should be noted that apart from regular diplomatic couriers, there were couriers *ad hoc* appointed by the sending States, as well as special couriers who might be the captain of a ship or of a commercial aircraft. Ministries of Foreign Affairs had reduced the number of regular couriers and made more use of special couriers, because they could thereby communicate more quickly and easily with their permanent diplomatic missions or special missions." (*Yearbook ... 1967*, vol. I, pp. 112–13, 915th meeting, para. 56.) The term "special couriers", however, may not be proper.

¹⁰⁴ *Yearbook ... 1967*, vol. II, p. 361, document A/6709/Rev.1, chap. II, sect. D, para. (3) of the commentary to article 28.

¹⁰⁵ A/C.6/L.696/Rev.1. The United Kingdom had a similar proposal (A/C.6/L.699) which was later withdrawn. *Official Records of the*

(Continued on next page.)

sensitive of Ghana stated that "practice would tend to suggest that it was in the best interests of both the sending State and the receiving State to avoid any situation that would lead to proliferation of . . . diplomatic couriers." He therefore proposed that the special mission should employ the services of the couriers of the permanent diplomatic mission wherever practicable.¹⁰⁶

98. With minor drafting changes, the Sixth Committee adopted this amendment as a new paragraph 3 of article 28,¹⁰⁷ and it also adopted the draft articles submitted by the Commission without change (other than necessary renumbering of the original paragraphs). The relevant provisions of the Convention on Special Missions adopted by the General Assembly, in its resolution 2530 (XXIV) of 8 December 1969, read as follows:

Article 28. Freedom of communication

1. The receiving State shall permit and protect free communication on the part of the special mission for all official purposes. In communicating with the Government of the sending State, its diplomatic missions, its consular posts and its other special missions or with sections of the same mission, wherever situated, the special mission may employ all appropriate means, including couriers . . .

3. Where practicable, the special mission shall use the means of communication, including the bag and the courier, of the permanent diplomatic mission of the sending State.

6. The courier of the special mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

7. The sending State or the special mission may designate couriers *ad hoc* of the special mission. In such cases the provisions of paragraph 6 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the special mission's bag in his charge.

8. The bag of the special mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. The captain shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a courier of the special mission. . . .

(d) *The notions of the "courier of the mission" and the "courier of the delegation" under the 1975 Vienna Convention*

(i) *The work of the Commission (1968–1971)*

99. The Special Rapporteur on the topic of "Relations between States and International Organizations" submitted to the Commission at its twentieth session, in 1968, draft article 27 on "Freedom of communication" of the permanent missions to international organizations. The relevant provisions, which were based on article 27 of the 1961 Vienna Convention and the other multilateral Conventions concluded under the auspices of the United

Nations, with appropriate changes for a convention on the present subject, read as follows:

Article 27. Freedom of communication

1. The host State shall permit and protect free communication on the part of the permanent mission for all official purposes. In communicating with the Government and the diplomatic missions, consulates and special missions of the sending State, wherever situated, the permanent mission may employ all appropriate means, including diplomatic couriers . . .

5. The courier of the permanent mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the host State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State or the permanent mission may designate couriers *ad hoc* of the permanent missions. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the permanent mission's bag in his charge.

7. The bag of the permanent mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a courier of the permanent mission. . . .¹⁰⁸

100. It may be noted that, on the model of article 28 of the Convention on Special Missions, the article used the expression "the courier of the permanent mission". The expression "diplomatic courier" was not used, except in paragraph 1, in order to prevent any possibility of confusion with the courier of the permanent diplomatic mission.¹⁰⁹ The word "diplomatic" before "courier" in paragraph 1 was deleted in the course of consideration of this article (which had become article 29) at the Commission's twenty-first session, in 1969, in order to avoid any further confusion.¹¹⁰

101. As for the delegations of States to organs and conferences, the Commission adopted, at its twenty-second session in 1970, a provision (which had become article 97) parallel with that on permanent missions, substituting the word "delegation" for "permanent mission".¹¹¹ The Commission also adopted draft article 67, in which, *inter alia*, article 29 on freedom of communication was also to apply to permanent observer missions.¹¹²

102. In the subsequent consideration by the Commission of these draft articles, there was no change made with regard to the meaning of the notion of "courier".¹¹³

103. The text of article 27 of the Commission's final draft, which was substantially the same as the Special

(Footnote 105 continued.)

General Assembly, Twenty-third Session, Annexes, agenda item 85, document A/7375, "Report of the Sixth Committee", para. 214(b).

¹⁰⁶ *Official Records of the General Assembly, Twenty-third Session, Sixth Committee*, 1068th meeting, para. 16.

¹⁰⁷ *Ibid.*, 1089th meeting, para. 8.

¹⁰⁸ *Yearbook . . . 1968*, vol. II, pp. 149–150, document A/CN.4/203 and Add.1–5.

¹⁰⁹ *Ibid.*, p. 150, para. (6) of the commentary to article 27.

¹¹⁰ *Yearbook . . . 1969*, vol. I, p. 136, 1017th meeting, para. 53.

¹¹¹ *Yearbook . . . 1970*, vol. I, pp. 197–198, 1077th meeting, para. 83; and *Yearbook . . . 1970*, vol. II, pp. 293–294, document A/8010/Rev.1, chap. II, sect. B, see also art. 110, *ibid.*, pp. 297–298.

¹¹² *Ibid.*, vol. II, pp. 284–285.

¹¹³ *Yearbook . . . 1971*, vol. II (Part One), pp. 54–55, document A/CN.4/241 and Add.1 and 2, art. 29, and pp. 130–131, document A/CN.4/241/Add.6, art. 97.

Rapporteur's original draft, with minor drafting changes, read as follows:

Article 27. Freedom of communication

1. The host State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government of the sending State, its permanent diplomatic missions, consular posts, permanent missions, permanent observer missions, special missions and delegations, wherever situated, the mission may employ all appropriate means, including couriers . . .

5. The courier of the mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the host State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State or the mission may designate couriers *ad hoc* of the mission. In such cases the provisions of paragraph 5 shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the mission's bag in his charge.

7. The bag of the mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a courier of the mission. . . .¹¹⁴

(ii) *The United Nations Conference on the Representation of States in their Relations with International Organizations (1975)*

104. The Conference made no substantial change to the Commission's text that might affect the definition of "courier". In paragraph 1 of article 27, the words "observer delegations" were added to the list of organs with which the mission may communicate by appropriate means, including couriers. Article 57 is a parallel provision for delegation to organs and to conferences. As for observer delegations to organs and conferences, article 72 provided that article 57, *inter alia*, shall also apply thereto.¹¹⁵

(e) *The main legal features of the status of the professional diplomatic courier, the diplomatic courier ad hoc and the captain of a commercial aircraft or*

ship entrusted with the custody, transportation and delivery of the diplomatic bag as well as of the other couriers employed by the sending State for official communication with its missions abroad

105. The survey of the legislative background of article 27 of the 1961 Vienna Convention reveals the main legal features which determine the notion of the diplomatic courier. Although article 27 does not deal in detail with all aspects of the legal status of the diplomatic courier, it offers enough substantive elements which could serve as a basis for the legal definition of the diplomatic courier. Moreover, it indicates not only the components of the legal definition of the regular or professional diplomatic courier, but also some specific characteristics of the status of the diplomatic courier *ad hoc* and of the captain of a commercial aircraft or ship to whom is entrusted a diplomatic bag.

106. The identification of the main legal features of the diplomatic courier within the provisions of article 27 could also be useful as a starting point for the definition of the status of all other types of couriers employed by States as provided for in the other multilateral conventions concluded under the auspices of the United Nations.

(i) *The professional diplomatic courier*

107. The notion of the regular or professional diplomatic courier as defined by the relevant provisions of article 27 of the 1961 Vienna Convention and substantiated by extensive State practice, contains several legal elements relating to his functions, the requirements for the proof of his status and the facilities, privileges and immunities accorded to him by the receiving or transit State in the performance of his functions. The professional diplomatic courier is an official of the sending State duly authorized by the competent authorities of that State to take the responsibility for the custody, transportation and delivery of the diplomatic bag or the transmission of an oral message from the sending State to its diplomatic missions, consular posts or other missions and delegations, as well as to other States or international organizations, in the receiving State. In accordance with well-established practice in diplomatic intercourse, the professional diplomatic courier, as a rule, is a national of the sending State and an official of the Ministry for Foreign Affairs of that State. Consequently, he should be neither a national nor a permanent resident of the receiving State. As an official of the sending State he serves as one of the appropriate means employed by that State in the exercise of its right to communicate with its missions abroad, or with other States or international organizations.

108. Article 27 of the 1961 Vienna Convention further stipulates that the diplomatic courier shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag. In conformity with this rule and the routine practice, the diplomatic courier is provided with a diplomatic passport certifying his official function and a diplomatic courier's letter, containing his name, status as a diplomatic courier and the number of packages carried by him. This diplomatic courier's letter (or diplomatic courier's list) is

¹¹⁴ *Ibid.*, p. 302, document A/8410/Rev.1, chap. II, sect. D. A parallel provision for delegations to organs and to conferences appeared in article 58 (*ibid.*, p. 318). In the annex to the draft articles, concerning observer delegations to organs and to conferences, article L provided for the freedom of communication (*ibid.*, p. 337).

¹¹⁵ See the discussion at the Conference concerning the aforementioned articles in *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. I (United Nations publication, Sales No. E.75.V.11), p. 21, 6th plenary meeting, paras. 66–74 (art. 27); pp. 26–27, 7th plenary meeting, paras. 68–70 (art. 58—now art. 57); pp. 37–41, 9th plenary meeting, paras. 48–68, and 10th plenary meeting, paras. 1–36: (annex to the draft articles); p. 178, *Committee of the Whole*, 18th meeting, paras. 31–34 (art. 27); pp. 236–242, *ibid.*, 27th meeting, paras. 41–59, and 28th meeting, paras. 1–47 (art. 58); pp. 280–283, *ibid.*, 36th meeting, paras. 22–52 (art. L of the annex); p. 313, *ibid.*, 42nd meeting, paras. 42–44 (art. 78); p. 343, *ibid.*, 47th meeting, para. 54 (art. 27); p. 345, *ibid.*, 48th meeting, para. 20 (art. 58); p. 347, *ibid.*, para. 42 (annex to the draft articles). See also the Report of the Committee of the Whole of the Conference, *Official Records of the United Nations Conference on the Representation of States . . .*, vol. II (United Nations publication Sales No. E.75.V.12), pp. 101–102 (art. 27); pp. 123–125 (art. 58); pp. 147–149 (art. L of the annex); pp. 159–160 (art. 78).

duly signed and certified with the seal of the institution issuing it, the Ministry for Foreign Affairs or the diplomatic mission, as the case may be. The courier's passport, and in particular, the document indicating his status and the number of packages constituting the diplomatic bag, are the formal credentials of the diplomatic courier which are required for the exercise of his functions.

109. According to the rules established by customary and conventional international law, as evidenced by article 27 of the 1961 Vienna Convention and supported by longstanding international practice, the receiving and the transit States are obliged to permit and protect free communication through diplomatic couriers and to offer them certain facilities, privileges and immunities. The receiving State has the duty to protect the courier and to create conditions for the discharge of his tasks. Among the immunities accorded to the diplomatic courier, special emphasis is made on the rule that the diplomatic courier shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

110. These three main components of the notion of the professional diplomatic courier, namely, his official functions, the required credentials and the facilities, privileges and immunities accorded to him in the performance of his official functions, constitute the basic elements determining his legal status. They could be identified, *mutatis mutandis*, within the basic legal elements determining the legal status of all other types of couriers used by States for official communications.

(ii) *The diplomatic courier ad hoc*

111. The possibility of designating diplomatic couriers *ad hoc* was considered by the Commission at an early stage of its work on the codification and progressive development of diplomatic law. As was pointed out above (paras. 66, 71 and 73), at the ninth session of the Commission in 1957, during discussion of the report submitted by the Special Rapporteur on diplomatic intercourse and immunities, reference was made *inter alia* to diplomatic couriers *ad hoc*. However, more elaborate provisions were worked out at the Vienna Conference in 1961, when specific proposals were made on this matter.

112. The codification of international diplomatic law regarding the status of the diplomatic courier *ad hoc* came as a result of the widespread practice of States at a time when the intensification of diplomatic intercourse required more flexible use of various means of official communication. The service of regular or professional diplomatic couriers had to be more often supplemented by the employment of other officials of the sending State entrusted with the delivery of diplomatic mail. This kind of *ad hoc* courier's service proved to be both economical and expedient, especially for countries whose Foreign Office disposed of limited financial means and personnel. In many countries the use of diplomatic couriers *ad hoc* has acquired great practical significance, and even surpassed the regular diplomatic courier's service. This trend in the field of official communications has been evolving with the further expansion and intensification of international relations.

113. There are no kind of specific rules or uniform practice regarding the persons who could be entrusted with the mission of diplomatic courier *ad hoc*. There has been great diversity in the use of officials of the sending State as diplomatic couriers. Some countries apply a more restrictive approach on this matter by confining the list of possible *ad hoc* couriers to diplomatic officers or officials of the foreign service enjoying diplomatic privileges and immunities, while other countries follow a more liberal approach, entrusting a diplomatic bag not only to functionaries of the Foreign Office but also to other officials, and even to any national authorized to that effect by the sending State.¹¹⁶ The prevailing practice has been, however, that the functions of diplomatic couriers *ad hoc* have been charged to officials belonging to the foreign service or other institutions of the sending State with similar functions in the field of foreign relations, such as, for example, the Ministry for Foreign Trade or Foreign Economic Relations, or State organs involved in international cultural co-operation. The essential requirement is always a proper authorization by the competent authorities of the sending State, evidenced by the official document testifying to the status of the *ad hoc* courier and the number of packages constituting the diplomatic bag.

114. Article 27, paragraph 6, stipulates that the "sending State or the mission may designate diplomatic couriers *ad hoc*." It further states that in cases when such couriers are employed, the provisions of the same article with respect to the status of the regular diplomatic couriers shall also apply until the delivery of the diplomatic bag. That means that the courier *ad hoc* is duly authorized to perform the same functions as the professional diplomatic courier and shall have the same responsibilities regarding the custody, transportation, and safe delivery of the diplomatic bag. He is also provided with the required official document indicating his status and the number of packages constituting the diplomatic bag. The receiving State has the same obligation to protect the diplomatic courier *ad hoc* and to accord to him the facilities, privileges, and immunities necessary for the performance of his official functions. Like the professional (regular) diplomatic courier, the *ad hoc* courier also enjoys personal inviolability and is not liable to any form of arrest or detention.

115. The only significant difference in the legal status of the two categories of diplomatic couriers is the duration of the immunities accorded to them. In the case of the professional diplomatic couriers, the facilities, privileges, and immunities provided by the sending State continue to apply until they leave the territory of that State after having accomplished their official mission. The main reason for this regime could be explained by the nature of the functions of the courier, who is responsible for the delivery of the bag to the missions concerned and for collecting and carrying, on his return, the bag from the missions to the competent authorities of the sending State.

¹¹⁶ As was pointed out above (see footnote 55), according to the national regulations of Belgium, for instance, diplomatic couriers *ad hoc* could be officials of the Ministry for Foreign Affairs, *aides-de-camp*, private secretaries, or ordinary citizens.

The official mission of the diplomatic courier *ad hoc* is accomplished when such a courier has delivered to the consignee the diplomatic bag in his charge, as provided by paragraph 6 of article 27 of the 1961 Vienna Convention. Since the facilities, privileges, and immunities are accorded to the courier for the performance of his official mission, they cease to apply when he has delivered the diplomatic bag to the missions concerned. As has been pointed out on several occasions, the courier is one of the appropriate means for the exercise of the freedom of communication, and protection is due to him by the sending State only in the performance of his official functions. Therefore, it is natural that when the *ad hoc* courier has completed his mission, there is no legal justification for maintaining the special status accorded to him in his capacity as a courier. However, if the diplomatic courier *ad hoc* happens to be a member of a diplomatic mission or an official with diplomatic status, then he is entitled to enjoy accordingly the privileges and immunities recognized to the diplomatic agents.

(iii) *The legal status of the captain of a commercial aircraft or ship entrusted with the transportation and delivery of a diplomatic bag*

116. The regulation of the legal status of the captain of a commercial aircraft or ship entrusted with the custody, transportation and handing over of a diplomatic bag to members of the mission of the sending State at the port of entry of the receiving State, represents a significant development of modern diplomatic law. It has further expanded the practical means for the exercise of the freedom of communication through the dispatch of a diplomatic bag not accompanied by a professional (regular) or *ad hoc* diplomatic courier. The codification of international law with respect to this kind of official communication was an appropriate response to the increasing demand for speedy and more economic delivery of diplomatic mail. The establishment of relevant legal rules in this field has provided for more reliable and efficient protection of the accompanied diplomatic bag and has further promoted this kind of communication. At present, the use of a diplomatic bag entrusted to the captain of a commercial aircraft has acquired very significant practical application by all States, and in particular by those with limited financial means, which could not afford to maintain a large service of professional diplomatic couriers.

117. The need for elaboration of specific rules with respect to the diplomatic bag entrusted to the captain of a commercial aircraft was expressed already at the initial stage of the Commission's work in the field of diplomatic law. As has been pointed out (see paras. 66, 68, 70 and 73), during the debate at the ninth session of the Commission in 1957 special emphasis was placed on the status of aeroplane pilots entrusted with diplomatic mail and on its protection.

118. The main provisions relating to the status of the captain entrusted with the function of carrying and delivering the diplomatic bag are contained in paragraph 7 of article 27 of the 1961 Vienna Convention. It stipulates

that a diplomatic bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. The main mission of the captain regarding the bag which is not accompanied by a diplomatic courier is to take care of the custody, transportation and safe handing over of the bag to an authorized member of the diplomatic mission, who shall have access to the aircraft and take possession of the bag directly and freely from the captain. It is further required that the captain shall be provided with an official document indicating the number of packages constituting the diplomatic bag. Though he is essentially performing a significant part of the functions of a diplomatic courier, namely the custody, transportation and delivery of the bag to a member of the receiving diplomatic mission, article 27 explicitly states that the captain performing such functions shall not be considered to be a diplomatic courier, and consequently he shall not enjoy the facilities, privileges and immunities accorded by the receiving State to a regular diplomatic courier or a diplomatic courier *ad hoc*. However, the diplomatic bag entrusted to the captain shall enjoy the inviolability provided for the official correspondence and shall not be opened or detained. The legal protection and immunity in this case were accorded to the diplomatic bag, and not to the captain who was entrusted with it (see para. 73 above), though there were some suggestions to provide the captain with certain safeguards, which were not accepted at the United Nations Conference on Consular Relations (see paras. 86–87 above).

(iv) *Other couriers employed by the sending State for the delivery of consular bags or official bags to its missions and delegations abroad*

119. The legal status of all other couriers used for official communications under the 1963 Vienna Convention, the 1969 Convention on Special Missions and the 1975 Vienna Convention, are modelled after the provisions of article 27 of the 1961 Vienna Convention. The official functions, required documents indicating the status of the respective courier and the number of packages constituting the official bag, as well as the facilities, privileges and immunities accorded to them by the receiving State, are identical to those of the diplomatic courier under article 27 of the 1961 Vienna Convention.

120. The relevant provisions of the three multilateral conventions concluded under the auspices of the United Nations, mentioned above, also provide for an official bag entrusted to the captain of a commercial aircraft. The only difference with paragraph 6 of article 27 is the possibility of entrusting such a bag not only to the captain of a commercial aircraft but also to the captain of a ship. Perhaps this was an unessential omission, which was later remedied by a reference to the possibility of entrusting the bag to a captain of a ship.

(v) *The main elements of the definition of a diplomatic courier*

121. In the light of the main legal features of a diplomatic courier under the relevant provisions of article 27 of the 1961 Vienna Convention, the following working

definition is suggested for the purpose of the present draft articles:

The diplomatic courier is a person duly authorized by the competent authorities of the sending State and provided with an official document to that effect indicating his status and the number of packages constituting the diplomatic bag, who is entrusted with the custody, transportation and delivery of the diplomatic bag or with the transmission of an official oral message to the missions and delegations of the sending State, wherever situated, as well as to other States and international organizations, and is accorded by the receiving State or the transit State with facilities, privileges, and immunities in the performance of his official functions.

122. This definition could provide the basis for the definition of the notion of diplomatic courier *ad hoc* and the other types of official couriers employed for official communications with consular posts, special missions, permanent missions to international organizations and delegations to international organs and international conferences, taking into consideration their specific features. Such definitions could be incorporated in the draft article dealing with the use of terms for the purpose of the present articles. The definition should indicate the main legal features of the status of the diplomatic courier, without being exhaustive in detail with respect to each one of those legal features, which should be elaborated in specific draft articles, in particular, articles relating to the legal status of the diplomatic courier, including the facilities, privileges and immunities accorded to him in the performance of his official functions.

2. DEFINITION OF THE TERM "DIPLOMATIC BAG"

123. The definition of the diplomatic bag, accompanied or not accompanied by a diplomatic courier, represents one of the main definitional problems inherent in the nature of the topic under consideration. After examination of the main legal features determining the status of the diplomatic courier and the captain of a ship or a commercial aircraft entrusted with a diplomatic bag, the next item for examination should be the definition of the term "diplomatic bag", and then, by analogy to it, all other kinds of official bags. The definition of the diplomatic bag falls within the terms to be used for the purpose of the present draft articles, which constitute indeed the *sedes materiae* of the topic (see paras. 55 and 56 above). Following the examination of the main components of the legal notion of the diplomatic bag, we shall proceed to the definition of the other terms to be used in the draft articles, as was suggested above (para. 54).

124. It is proposed to examine the legal status of a diplomatic bag accompanied by diplomatic courier and diplomatic bag not accompanied by such courier which is entrusted to the captain of a ship or dispatched through a commercial aircraft or postal channels.

125. In the examination of the main legal features of the diplomatic bag, special emphasis will be placed, as in the case of the diplomatic courier, on the survey of the "travaux préparatoires" of the relevant provisions of the

four multilateral conventions in the field of diplomatic law concluded under the auspices of the United Nations, as well as the practice of States regarding the legal protection of the diplomatic bag and other official bags used by States in communications with their missions abroad.

(a) *The notion of the "diplomatic bag" under the 1961 Vienna Convention*

(i) *The work of the Commission (1955–1958)*

126. The original draft articles submitted to the Commission, at its seventh session in 1955, by the Special Rapporteur for the topic of diplomatic intercourse and immunities contained the following provisions:

Article 16

...

2. The diplomatic pouch shall be exempt from inspection unless there are very serious grounds for presuming that it contains illicit articles. The pouch may be opened for inspection only with the consent of the Ministry of Foreign Affairs of the receiving State and in the presence of an authorized representative of the mission.¹¹⁷

127. However, this original text was withdrawn and the revised draft article 16 he submitted to the Commission at its ninth session, in 1957, simply provided that:

2. The diplomatic pouch shall be exempt from inspection.¹¹⁸

128. Explaining why he had abandoned his original text, the Special Rapporteur stated that it was drafted before he had been able to study the municipal laws on the subject.

On discovering that none of the many municipal laws dealing with the question of the diplomatic bag provided for any exception to the principle of inviolability, he had come to the conclusion that it would be better to state the bare principle in the article, and see whether the Commission wished to include in the commentary qualifications on the lines of those made in his original text.¹¹⁹

129. In the course of discussion in the Commission at its ninth session, some members favoured the inviolability of the bag in all circumstances,¹²⁰ while others stressed the danger of abuse of the bag. Taking into consideration these conflicting views, one member observed that "the best way to preserve intact the rule of the inviolability of the diplomatic bag, while preventing possible abuse, was to give a clear definition of the diplomatic bag"¹²¹ and

¹¹⁷ *Yearbook ... 1955*, vol. II, p. 11, document A/CN.4/91. Thus the Special Rapporteur considered it an established international practice that in cases where it had grounds for suspecting abuse of the bag as containing illegal objects, the receiving State might challenge it with the approval of its Foreign Ministry and in the presence of a member of the mission of the sending State. See E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (Dobbs Ferry, N.Y., Oceana, 1976), pp. 125–126.

¹¹⁸ *Yearbook ... 1957*, vol. I, p. 74, 398th meeting, para. 27. Paragraph 4 also stipulated that "Third States shall be bound to accord the same protection to ... messengers in transit".

¹¹⁹ *Ibid.*, p. 80, 399th meeting, para. 29.

¹²⁰ One member submitted an amendment to article 16, paragraph 2, which read: "Diplomatic despatches carried by diplomatic messengers shall in no circumstances whatsoever be subject to opening or detention." (*ibid.*, p. 77, 398th meeting, para. 84).

¹²¹ According to that member of the Commission, a distinction could be made between the "diplomatic mail, not only sealed but also certified by the head of the mission or the foreign minister." and "other diplomatic bags or packages, which were only sealed and not certified" (*ibid.*, p. 79, 399th meeting, paras. 4–5).

referred to the explanation given by Oppenheim.¹²² While several members of the Commission were in favour of including a definition of the diplomatic bag, others expressed doubts as to whether it would be possible to frame a definition that would prevent the abuses of the bag.¹²³ Eventually a delicate compromise was reached by the adoption of a proposal to the effect that the text of the article should set out the general principle of inviolability, while the commentary should contain a qualifying passage. It was also pointed out that a distinction should be drawn between diplomatic bags accompanied by couriers and those not accompanied by such couriers.¹²⁴

130. Thus, the text of the part of the article and commentary relating to the diplomatic bag which were adopted by the Commission at its ninth session in 1957 appeared as follows:

Article 21. Freedom of communication

- ...
2. The diplomatic bag may not be opened or detained.
 3. The diplomatic bag may contain only diplomatic documents or articles intended for official use.
- ...

Commentary

...
(2) Paragraph 2 states that the diplomatic bag is inviolable, while paragraph 3 indicates what the diplomatic bag may contain. In accordance with the terms of the latter paragraph, the diplomatic bag may be defined as a bag (sack or envelope) containing diplomatic documents or articles intended for official use.

(3) The Commission has noted that the diplomatic bag has on occasion been opened with the permission of the Ministry for Foreign Affairs of the receiving State, and in the presence of a representative of the mission concerned. While recognizing that States have been led to take such measures in exceptional cases where there were serious grounds for suspecting that the diplomatic bag was being used in a manner contrary to paragraph 3 of the article, and with detriment to the interests of the receiving State, the Commission wishes nevertheless to emphasize the overriding importance which it attaches to the observance of the principle of the inviolability of the diplomatic bag.¹²⁵

131. In the light of the comments and suggestions made by Governments, the Special Rapporteur submitted his revised text of article 21 to the Commission at its tenth session, in 1958, para. 2 of which read:

2. The diplomatic bag, which may contain only diplomatic documents or articles of a confidential nature intended for official use, shall be furnished with the sender's seal and bear a visible indication of its character. The diplomatic bag may not be opened or detained.¹²⁶

132. The Special Rapporteur explained that the reason for proposing an amalgamated text was that "it might be advisable to provide a definition of the diplomatic bag, and the definition should come first".¹²⁷ This proposal was not

acceptable to the Commission, however, "since it might be argued from such a juxtaposition that the inviolability of the bag was conditional on its complying with the requirements regarding contents".¹²⁸

133. Thus, the Commission preferred to retain the text adopted at the previous session in 1957. It agreed, however, to add a phrase dealing with seals and external identification marks.¹²⁹

134. The relevant paragraphs of the final text of the article and commentary relating thereto adopted by the Commission read as follows:

Article 25. Freedom of communication

- ...
3. The diplomatic bag shall not be opened or detained.
 4. The diplomatic bag, which must bear visible external marks of its character, may only contain diplomatic documents or articles intended for official use.
- ...

Commentary

...
(4) Paragraph 3 (former paragraph 2) states that the diplomatic bag is inviolable. Paragraph 4 (former paragraph 3) indicates what the diplomatic bag may contain. The Commission considered it desirable that the statement of the inviolability of the diplomatic bag should be preceded by the more general statement that the official correspondence of the mission, whether carried in the bag or not, is inviolable. In accordance with paragraph 4, the diplomatic bag may be defined as a bag (sack, pouch, envelope or any type of package whatsoever) containing documents and (or) articles intended for official use. According to the amended text of this paragraph, the bag must bear visible external marks of its character.

(5) The Commission has noted that the diplomatic bag has on occasion been opened with the permission of the Ministry for Foreign Affairs of the receiving State, and in the presence of a representative of the mission concerned. While recognizing that States have been led to take such measures in exceptional cases where there were serious grounds for suspecting that the diplomatic bag was being used in a manner contrary to paragraph 4 of the article, and with detriment to the interests of the receiving State, the Commission wishes nevertheless to emphasize the overriding importance which it attaches to the observance of the principle of the inviolability of the diplomatic bag.¹³⁰

(ii) The United Nations Conference on Diplomatic Intercourse and Immunities (1961)

135. There were a great number of amendments submitted to the Conference aimed at restricting in one way or another the unconditional inviolability of the diplomatic bag as stipulated in the Commission's draft articles. A French amendment contained a provision permitting inspection of the bag in the presence of a representative of the mission,¹³¹ while the amendment of the United States of America aimed at permitting such inspection rather than send the bag back, allowing the receiving State to reject a suspect bag.¹³² The amendment of Ghana provided for the right of the sending State to

¹²² "... according to general usage, those parts of their luggage [the luggage of couriers] which contain diplomatic despatches and are sealed with the official seal must not be opened and searched." (L. Oppenheim, *International Law: A Treatise*, 8th ed., rev. by H. Lauterpacht (London, Longmans, Green, 1955), vol. I, p. 813).

¹²³ *Yearbook* ... 1957, vol. I, pp. 78-80, 398th and 399th meetings.

¹²⁴ *Ibid.*, p. 80, 399th meeting, para. 24.

¹²⁵ *Yearbook* ... 1957, vol. II, pp. 137-138, document A/3623, chap. II, sect. II.

¹²⁶ *Yearbook* ... 1958, vol. II, p. 17, document A/CN.4/116/Add.1.

¹²⁷ *Yearbook* ... 1958, vol. I, p. 139, 457th meeting, para. 57.

¹²⁸ Denza, *op. cit.*, pp. 126-127.

¹²⁹ *Yearbook* ... 1958, vol. I, p. 139, 457th meeting, paras. 60-62.

¹³⁰ *Yearbook* ... 1958, vol. II, pp. 96-97, document A/3859, chap. III, sect. II.

¹³¹ *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II, p. 20, document A/CONF.20/C.1/L.125.

¹³² *Ibid.*, p. 23, document A/CONF.20/C.1/L.154.

withdraw such a bag unopened.¹³³ The joint amendment of France and Switzerland attempted to add to the definition of the bag the phrase "an official nature necessary for the performance of the functions of the mission".¹³⁴

136. Referring to the above French-Swiss amendment, the representative of the USSR made the following statement, which was seemingly shared by the majority of the Conference:

A close examination of the first amendment submitted by France and Switzerland (A/CONF.20/C.1/L.286, para. 1) suggested that it might mean that the diplomatic bag enjoyed inviolability only if its contents were in keeping with the specifications laid down in the amendment. In theory, of course, inviolability was based on the contents of the diplomatic bag. The International Law Commission had, however, tried to avoid the kind of misinterpretation to which the amendment seemed to be open by avoiding a direct link between the definition of the contents of the bag and the statement that the bag was inviolable. Article 25, paragraph 3, provided that the diplomatic bag should not be opened or detained, while paragraph 4 provided that it should only contain diplomatic documents or articles intended for official use. If one of those provisions was infringed, the necessary action could be taken, although there was no direct link. Paragraphs 3 and 4 as they stood were therefore preferable to the terms of the amendment.¹³⁵

137. Thus, this amendment, as well as all other amendments, were rejected¹³⁶ on more or less the same ground as that given by the representative of USSR. Accordingly, paragraphs 3 and 4 of the article (now article 27) remained unchanged.

138. It should be noted that, at the Conference, paragraphs 5, 6 and 7 were added, which were related primarily to the question of "couriers" (see paras. 71-73 above). Paragraph 5 refers to the diplomatic bag accompanied by a diplomatic courier. Paragraph 6 deals with the diplomatic courier *ad hoc* and paragraph 7 provides that a diplomatic bag may be entrusted to the captain of a commercial aircraft.

(b) *The notion of the "diplomatic and consular bag" under the 1963 Vienna Convention*

(i) *The work of the Commission (1957-1961)*

139. Neither the original draft articles submitted by the Special Rapporteur to the Commission at its ninth session in 1957, nor his revised draft articles submitted at its twelfth session in 1960, provided for the diplomatic or consular bag specifically as a means of communication.¹³⁷ In the course of the discussion in the Commission at its twelfth session, in 1960, it was suggested that some reference should be made to the use of the diplomatic bag as a means of communication by consular representatives. On this point one member of the Commission referred to the treaty practice that bags containing the

official correspondence of consulates were entitled to receive the same treatment as diplomatic bags.¹³⁸ At the same time, it was pointed out by another member of the Commission that any refusal to permit the use of a consular bag 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.¹³⁹

140. In the light of that discussion, the Commission provisionally adopted the text of draft article 36 and the commentary thereto, which read as follows:

Article 36. Freedom of communication

1. The receiving State shall permit and protect free communication on the part of the consulate for all official purposes. In communicating with the government, the diplomatic missions and the other consulates of the sending State, wherever situated, the consulate may employ all appropriate means, including . . . the diplomatic or consular bag . . .

2. The bags containing the consular correspondence shall not be opened or detained.

3. These bags, which must bear visible external marks of their character, may only contain documents or articles intended for official use.

Commentary

...

(3) . . . The consular bag may either be part of the diplomatic bag, or may be carried as a separate bag shown on the diplomatic courier's waybill. This last procedure is preferred where the consular bag has to be transmitted to a consulate en route.

...

(5) The consular bag referred to in paragraph 1 of the article may be defined as a bag (sack, box, wallet, envelope or any sort of package) containing documents or articles, or both, intended for official purposes. The consular bag must not be opened or detained. This rule, set forth in paragraph 2, is the logical corollary of the rule providing for the inviolability of the consulate's official correspondence, archives and documents, which is the subject of article 33 of the draft. As is specified in paragraph 3, consular bags must bear visible external marks of their character, i.e. they must bear an inscription or other external mark so that they can be identified as consular bags.

...¹⁴⁰

141. At the thirteenth session of the Commission, in 1961, several members of the Commission expressed some doubts as to whether the status of the consular bag could be assimilated to that of the diplomatic bag in view of the fact that, even in the case of the latter, nearly one-third of the representatives at the 1961 United Nations Conference favoured a provision under which the diplomatic bag could be either opened or denied admission by the authorities of the receiving State in certain special cases. A majority of the members, however, stressed that the matter had been discussed thoroughly in the Commission at previous sessions and hence there was no need to reopen the question.¹⁴¹ The Commission consequently did not make any substantial change to its original draft, but it included some drafting changes and also a new provision regarding the captain of a commercial aircraft to whom a consular bag may be entrusted.

¹³³ *Ibid.*, p. 42, document A/CONF.20/C.1/L.294.

¹³⁴ *Ibid.*, pp. 38-39, document A/CONF.20/C.1/L.286.

¹³⁵ *Ibid.*, vol. I, p. 179, *Committee of the Whole*, 29th meeting, para. 64.

¹³⁶ *Ibid.*, pp. 180-181, paras. 72-79.

¹³⁷ See *Yearbook . . . 1957*, vol. II, pp. 97-99, document A/CN.4/108 (arts. 23 and 25), and *Yearbook . . . 1960*, vol. II, p. 36, document A/CN.4/131 (art. 29), respectively.

¹³⁸ *Yearbook . . . 1960*, vol. I, p. 27, 531st meeting, paras. 37-38.

¹³⁹ *Ibid.*, p. 28, para. 53.

¹⁴⁰ *Yearbook . . . 1960*, vol. II, p. 165, document A/4425, chap. II, sect. III.

¹⁴¹ *Yearbook . . . 1961*, vol. I, pp. 94-95, 596th meeting, paras. 83-84.

142. Thus the relevant text of the Commission's final draft article adopted at its thirteenth session (1961), and the commentary thereto, read as follows:

Article 35. Freedom of communication

1. The receiving State shall permit and protect free communication on the part of the consulate for all official purposes. In communicating with the government, the diplomatic missions and the other consulates of the sending State, wherever situated, the consulate may employ all appropriate means, including . . . the diplomatic or consular bag and . . .

3. The consular bag, like the diplomatic bag, shall not be opened or detained.

4. The packages constituting the consular bag must bear visible external marks of their character and may contain only official correspondence and documents or articles intended for official use.

6. A consular bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a consular courier. The consulate may send one of its members to take possession of the consular bag directly and freely from the captain of the aircraft.

Commentary

(3) . . . The consular bag may either be part of the diplomatic bag, or may be carried as a separate bag shown on the diplomatic courier's way-bill. This last procedure is preferred where the consular bag has to be transmitted to a consulate en route.

(5) The consular bag referred to in paragraph 1 of the article may be defined as a bag (sack, box, wallet, envelope or any sort of package) containing the official correspondence, documents or articles intended for official purposes or all these together. The consular bag must not be opened or detained. This rule, set forth in paragraph 3, is the logical corollary of the rule providing for the inviolability of the consulate's official correspondence, archives and documents which is the subject of article 32 and of paragraph 2 of article 35 of the draft. As is specified in paragraph 4, consular bags must bear visible external marks of their character—i.e., they must bear an inscription or other external mark so that they can be identified as consular bags.

(8) The Commission, being of the opinion that the consular bag may be entrusted by a consulate to the captain of a commercial aircraft, has inserted a rule to that effect by adapting the text of article 27, paragraph 7, of the 1961 Vienna Convention on Diplomatic Relations.

142

(ii) The United Nations Conference on Consular Relations (1963)

143. At the Conference, there were a series of amendments which centred around paragraph 3 of draft article 35, with the aim of restricting the unconditional inviolability of the consular bag.¹⁴³ The sponsors of these

¹⁴² *Yearbook . . . 1961*, vol. II, pp. 111–112, document A/4843, chap. II, sect. IV. Asked by a member of the Commission about the utility of the phrase “like the diplomatic bag”, in paragraph 3, the Chairman of the Drafting Committee explained that these words had been inserted because consular papers were sometimes sent in the diplomatic bag. (*Yearbook . . . 1961*, vol. I, p. 242, 619th meeting, paras. 23–24.)

¹⁴³ See *Official Records of the United Nations Conference on Consular Relations*, vol. II, p. 81, document A/CONF.25/C.2/L.73 (Federal Republic of Germany), document A/CONF.25/C.2/L.75 (South Africa); p. 83, document A/CONF.25/C.2/L.91 (Spain); p. 85, document A/CONF.25/C.2/L.108 (Nigeria).

amendments stressed that they reflected the “prevailing distinction between purely diplomatic bags and consular bags,” representing a compromise between the rights of the receiving State and those of the sending State.¹⁴⁴

144. These amendments were emphatically opposed by other representatives who favoured the text proposed by the Commission which guaranteed the absolute inviolability of consular bags. It was pointed out, for instance, that “such phrases as ‘serious reasons’ used in those amendments . . . left wide scope for interpretation by the receiving State and could lead to abuse and the restriction of the sending State’s freedom of communication”.¹⁴⁵ Fear was also expressed that the amendments would “only add to the possibility of friction, suspicion and misunderstanding”.¹⁴⁶

145. The amendments were merged into one submitted by the Federal Republic of Germany, as orally revised, and it was adopted by the Second Committee of the Conference by 46 votes to 15, with 3 abstentions.¹⁴⁷

146. As a result of the deliberations on the above amendments, the 1963 Vienna Convention, as adopted by the Conference, specifically authorizes officials of the receiving State to “request that the bag be opened in their presence by an authorized representative of the sending State” if they have serious reason to believe that the bag contains something other than official papers or articles intended exclusively for official use; should the request be denied, the bag shall be returned to its place of origin. In this sense, the legal status of the consular bag, as opposed to the diplomatic bag, is clearly restricted.¹⁴⁸

(c) The notion of the “bag of the special mission” under the 1969 Convention on Special Missions

(i) The work of the Commission (1964–1967)

147. The first report submitted to the Commission, at its sixteenth session in 1964, by the Special Rapporteur on the topic of special missions contained no provision regarding the bag of the special mission, and no mention was made thereof in its commentary to article 21 (Freedom of communication).¹⁴⁹

148. In the second report, submitted at the following session of the Commission, in 1965, however, the Special

¹⁴⁴ *Ibid.*, vol. I, pp. 321 and 322, *Second Committee*, 13th meeting, paras. 37 and 42.

¹⁴⁵ *Ibid.*, pp. 321–22, para. 40.

¹⁴⁶ *Ibid.*, p. 324, para. 67.

¹⁴⁷ *Ibid.*, p. 325, para. 79. See also plenary meetings, *ibid.*, pp. 29–34, 10th meeting, paras. 2–60.

¹⁴⁸ It has been observed, however, that “they fail to take account of the situation in which the consular bag originated not from the sending State, but rather from the consulate in the receiving State itself”. (L. T. Lee, *Vienna Convention on Consular Relations* (Leyden, Sijthoff, 1966), p. 101.)

¹⁴⁹ *Yearbook . . . 1964*, vol. II, pp. 109–110, document A/CN.4/166. Only a reference to “diplomatic bags” was made with regard to the treatment thereof “while in transit through the territory of a third State” in draft article 35, para. 5 (*ibid.*, p. 117).

Rapporteur had redrafted the draft article in line with the 1961 Vienna Convention, as follows:

Article 22. Freedom of communication

...

3. The bag of the special mission shall not be opened or detained.

4. The packages constituting the bag of the special mission must bear visible external marks of their character and may contain only documents or articles intended for the official use of the special mission.

...

149. As was described earlier, the 1961 Vienna Convention lays down the principle of the absolute inviolability of the diplomatic bag (art. 27, para. 3), while the 1963 Vienna Convention confers more limited protection on the consular bag (art. 35, para. 3).

150. As to the question whether absolute inviolability of the special mission's bag should be guaranteed for all categories of special missions, the Special Rapporteur stated in his commentary that he had been unable to decide whether the guarantees in this respect should be limited in the case of particular categories of special missions, and requested the Commission to give its attention to this matter. He added, however, that it would be dangerous to decide summarily to limit the guarantees in the case of all special missions of a technical nature: "Such limitation might", he wrote, "constitute a threat to good relations between States, to preservation of the dignity of the State whose special mission is affected by it and to the smooth performance of such a mission's task".¹⁵¹

151. The Commission generally agreed not to limit the guarantees, assimilating the legal status of the bag of the special mission with the diplomatic bag under the terms of the 1961 Vienna Convention. It also agreed that a provision should be inserted to the effect that "the bag of the special mission may be entrusted to the captain of a ship or of a commercial aircraft".¹⁵²

152. In his third report, submitted to the Commission at its eighteenth session in 1966, the Special Rapporteur referred to the written comment of the Belgian Government in which the question of a special postal rate for diplomatic bags was discussed, as follows:

After studying this comment by the Belgian Government, the Special Rapporteur feels bound to point out that what was intended by the Commission in paragraphs 3 and 4 of article 22 was solely the protection under substantive law of the inviolability of the contents and secrecy of the bag, and not any special treatment of diplomatic bags in respect of postal rates. The Special Rapporteur is of the opinion that the Commission should not discuss the question of privileged rates, which is not referred to in the Vienna Conventions of 1961 and 1963; the diplomatic bag should be uniformly protected regardless of the means used for its transport and there is no need to draw special attention to the situation of diplomatic bags sent by post.¹⁵³

¹⁵⁰ *Yearbook* ... 1965, vol. II, pp. 129–130, document A/CN.4/179.

¹⁵¹ *Ibid.*, p. 130, para. (8) of the commentary to article 22.

¹⁵² *Yearbook* ... 1965, vol. I, p. 288, 817th meeting, paras. 15–16; *Yearbook* ... 1965, vol. II, pp. 183–184, document A/6009, chap. III, sect. B, paras. (5) and (6) of the commentary to article 22.

¹⁵³ *Yearbook* ... 1966, vol. II, p. 146, document A/CN.4/189 and Add.1 and 2, para. 191.

153. There was no discussion affecting the status of the bag of the special mission at the nineteenth session of the Commission in 1967. Thus the text relating to the bag in the Commission's final draft article 28 read as follows:

Article 28. Freedom of Communication

...

3. The bag of the special mission shall not be opened or detained.

4. The packages constituting the bag of the special mission must bear visible external marks of their character and may contain only documents or articles intended for the official use of the special mission.

...

7. The bag of the special mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a courier of the special mission. By arrangement with the appropriate authorities, the special mission may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.¹⁵⁴

154. As to the terminology, the commentary noted as follows:

... the Commission had a choice between two sets of expressions to designate the bag ... of a special mission. It could have referred to [it] as "the diplomatic bag of the special mission" ... or, more simply, as "the bag of the special mission" ... The Commission chose the second alternative in order to prevent any possibility of confusion with the bag ... of the permanent diplomatic mission.¹⁵⁵

(ii) *The Sixth Committee of the General Assembly (1968)*

155. As in the case of the "couriers of the special mission" (see paras. 97–98 above), the only substantial change to the text proposed by the Commission was elaborated at the Sixth Committee of the General Assembly at its twenty-third session in 1968; it was based on the amendment proposed by Ghana,¹⁵⁶ which was eventually adopted, with minor drafting changes, as new paragraph 3 of the Convention.¹⁵⁷ The relevant provisions of the Convention on Special Missions adopted by the General Assembly in resolution 2530 (XXIV) of 8 December 1969 read as follows:

Article 28. Freedom of communication

3. Where practicable, the special mission shall use the means of communication, including the bag and the courier, of the permanent diplomatic mission of the sending State.

4. The bag of the special mission shall not be opened or detained.

5. The packages constituting the bag of the special mission must bear visible external marks of their character and may contain only documents or articles intended for the official use of the special mission.

¹⁵⁴ *Yearbook* ... 1967, vol. II, p. 361, document A/6709/Rev.1, chap. II, sect. D.

¹⁵⁵ *Ibid.*, para. (3) of the commentary to article 28.

¹⁵⁶ A/C.6/L.696/Rev.1; see *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 85, document A/7375, "Report of the Sixth Committee", para. 214(b). The representative of Ghana, introducing the amendment, stated that it was in the best interests of both the sending State and the receiving State to avoid any situation that would lead to proliferation of diplomatic bags ... and proposed that special missions should use the bag of the permanent diplomatic mission wherever practicable. (*Official Records of the General Assembly, Twenty-third Session, Sixth Committee*, 1068th meeting, para. 16.)

¹⁵⁷ *Ibid.*, 1089th meeting, para. 8.

...

8. The bag of the special mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. The captain shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a courier of the special mission. By arrangement with the appropriate authorities, the special mission may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

(d) *The notions of the "bag of the mission"
and the "bag of the delegation"
under the 1975 Vienna Convention*

(i) *The work of the Commission (1968–1971)*

156. As was described earlier (paras. 99–103 above), the draft article 27 on the topic of relations between States and intergovernmental organizations, submitted by the Special Rapporteur to the Commission at its twentieth session, in 1968, was based on article 27 of the 1961 Vienna Convention and the other multilateral conventions concluded under the auspices of the United Nations, with appropriate drafting changes;¹⁵⁸ accordingly, there was no significant addition to the definition of the "bag" in the consideration of this topic by the Commission.

157. The Commission's final text on "Freedom of communication" on the part of the mission (art. 27) and the delegation (art. 58)¹⁵⁹ was the same as the text of the Convention as finally adopted.

(ii) *The United Nations Conference on the Representation of States in Their Relations with International Organizations (1975)*

158. The text of the relevant provisions, namely, articles 27, 57 and 72, was adopted by the Conference¹⁶⁰ without any significant debate affecting the definition of the term "bag".

(e) *The main elements of the legal status of the diplomatic bag and other bags used by the sending State for official communications*

(i) *The substantive elements of the legal status of the diplomatic bag whether accompanied or not by diplomatic courier*

159. The examination of the legislative background of article 27 of the 1961 Vienna Convention and the relevant provisions of the other multilateral conventions concluded under the auspices of the United Nations in the field of diplomatic law regarding the legal status of the diplomatic

bag constitute a reliable source for the identification of the main components for the legal definition of the diplomatic bag. In the view of the Special Rapporteur, there are at least five such substantive components, which are inter-related and as a whole form the legal notion of a diplomatic bag, namely: (a) the function of the bag, (b) its content, (c) the external features relevant to its identification as such, (d) the required documents indicating the character of the bag and (e) its treatment by the authorities of the receiving or the transit State in accordance with international law.

160. The diplomatic bag is one of the means employed by States for official communications with their missions abroad and also between those missions, wherever situated. It is one of the main instruments for the exercise of the freedom of communication for all official purposes which is recognized as a fundamental principle of international law. This function of the diplomatic bag predetermines the scope of the rule aimed at the legal protection of the bag, including its inviolability and the facilities and preferential treatment accorded to it by the sending or the transit State. At the same time, the official function of the bag is instrumental for the determination of the content of the bag, which is related to the official functions of the missions of the sending State.

161. Article 27 of the 1961 Vienna Convention stipulates that the diplomatic bag may contain only diplomatic documents or articles intended for official use. Under this general provision fall, first of all, the official correspondence of the mission, documents, manuals for the use of code or cipher, any kind of confidential materials and articles for official use relating to the functions of the mission. This provision is of such a nature that its strict observance by the sending State and its missions require, above all, mutual respect and good faith, having in mind the generally recognized immunities accorded to the diplomatic mail and the inviolability of the diplomatic bag. The possible legal safeguards against any abuses ought to take into consideration the importance of the principle of freedom of communication for all official purposes, which should be matched with the genuine abidance by the relevant rules of international law, including those relating to the explicit limitations concerning the content of the diplomatic bag, as provided for in the 1961 Vienna Convention and well-established by international practice.

162. An essential legal feature related to the formal characteristics of the diplomatic bag is the requirement for visible external marks indicating the character of the diplomatic bag, such as special labels attached to the bag and the individual packages constituting the bag, with the inscription "diplomatic mail" or some other external indications. Usually the diplomatic bag is wax-sealed as a kind of sign of its authenticity and a safeguard against being opened before its delivery to its final destination. The packages constituting the diplomatic bag could be numbered in conformity with the official document accompanying the bag.

163. As was pointed out above (para. 108), the regular (professional) diplomatic courier, the diplomatic courier *ad hoc* and the captain of a ship or commercial aircraft

¹⁵⁸ *Yearbook* . . . 1968, vol. II, pp. 149–150, document A/CN.4/203 and Add.1–5. It may be noted that, as in article 28 of the 1969 Convention on Special Missions, the expression "diplomatic bag" was not used here in order to prevent any possibility of confusion with the bag of the permanent diplomatic mission (*ibid.*, para. (6) of the commentary to art. 27).

¹⁵⁹ *Yearbook* . . . 1971, vol. II (Part One), pp. 302 and 318, document A/84 iO/Rev. I, chap. II, sect. D.

¹⁶⁰ See footnote 115 above.

entrusted with a diplomatic bag are provided with an official document indicating their status and the number of packages constituting the diplomatic bag. In fact, this official document also serves as a proof of the character and destination of the diplomatic bag. It is, therefore, a formal requirement for the legal status of the bag.

164. It is the treatment of the diplomatic bag by the authorities of the receiving State or by the transit State that constitutes, indeed, the core of its legal status. It should be the subject of more detailed examination in order to elaborate specific draft articles on a comprehensive legal regime of the diplomatic bag. At this stage of the study and for the purpose of the definition of the term "diplomatic bag", we propose to identify briefly the main legal features determining the legal status of the bag, and in particular its treatment by the receiving State or the transit State.

165. The principle of inviolability of the official correspondence is of foremost significance for the legal status of the diplomatic bag. The confidential nature and the secrecy of the diplomatic mail has been considered a legitimate interest of the State deserving special treatment and legal protection. The direct legal consequence of the principle of the inviolability of the official correspondence is the rule according to which the diplomatic bag shall not be opened or detained and shall be exempt from any kind of inspection or control, directly or through sophisticated technical devices. These rules constitute a legal guarantee for the unimpeded and safe delivery of the bag and at the same time serve as preventive safeguards against any attempt to disclose the confidential character of the bag and its content by technical means, even without opening the bag itself. The inviolability of the diplomatic bag, including its adequate protection and all other preventive measures aimed at safeguarding its secrecy, are legal obligations incumbent upon the receiving or the transit State. Those States also have the duty to provide the necessary facilities and offer a preferential treatment of the diplomatic bag in order to ensure its speedy delivery to the appropriate consignee.

166. These rules on the inviolability of the bag, its legal protection and preferential treatment through facilities, privileges and immunities accorded by the receiving or the transit State, which are embodied in article 27 of the 1961 Vienna Convention, are common to the other multilateral conventions on diplomatic law concluded under the auspices of the United Nations. They reflect the relevant customary rules of international law and constitute the legal regime of the diplomatic bag generally recognized by national legislation and State practice. Thus the legal regime of inviolability of the diplomatic bag under the provisions of the 1961 Vienna Convention is identical to the regime applicable to the bag of the consular posts, special missions, permanent missions of States to international organizations and delegations to international organs and international conferences, with one exception: that which is envisaged by paragraph 3 of article 35 of the 1963 Vienna Convention, and which will be indicated below.

167. Paragraph 3 of article 35 of the 1963 Vienna Convention, while reiterating the general rule that "the

consular bag shall be neither open nor detained", sets out an exception, to the effect that if the competent authorities of the receiving State have serious reason to believe that the bag contains something other than the official correspondence, documents or articles intended exclusively for official use, they may request that the bag be opened in their presence by an authorized representative of the sending State and if this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.

168. It may be pointed out at the outset that this exception—as was already mentioned earlier (see para. 146 above)—is a restriction, which constitutes an important deviation from the principle of free communication for all official purposes, affecting the inviolability of the consular bag. It should be further noted that it is the only instance when a restrictive provision of such a character was embodied in a multilateral convention in the field of diplomatic law concluded under the auspices of the United Nations, since it was not followed by the 1969 Convention on Special Missions and the 1975 Vienna Convention. On the other hand, the restriction introduced by the 1963 Vienna Convention in the exceptional cases envisaged by paragraph 3 of Article 35, creates a kind of dichotomy in the otherwise coherent and uniform régime relating to the status of all other kinds of bags used by States for official purposes.

Therefore, a preliminary question could be raised as to whether, in the further elaboration of the draft articles on the status of the diplomatic bag, it would be advisable to opt towards the uniform rule contained in article 27 of the 1961 Vienna Convention and reiterated by the relevant provisions of the 1961 Convention on special missions and the 1975 Vienna Convention, or to accept as a basis the alternative solution stipulated in article 35, paragraph 3, of the 1963 Vienna Convention. In the latter option, delicate legal problems of a general nature would arise regarding the concordance of the specific provisions on the status of the diplomatic bag with the unequivocal provisions contained in international treaties, which are the legal basis of the present draft articles. Such a lack of concordance would become absolutely evident if the articles were confined primarily to the legal status of the diplomatic bag under the 1961 Vienna Convention. If this were the case, then the provisions of article 27 of the 1961 Vienna Convention should apply to the determination of the legal status of the diplomatic bag, and on that basis to the regime of the bags under the other two conventions of 1969 and 1975, leaving the consular bag aside as a special case or submitting specific draft articles relating to the consular bag as an exceptional case.¹⁶¹ These are possible

¹⁶¹ It is interesting to note that in some bilateral consular conventions concluded in the last few years there are explicit provisions which differ from the provision of paragraph 3 of article 35 of the 1963 Vienna Convention with regard to the possibility for opening the consular bag. They stick, rather, to the rule of article 27 of the 1961 Vienna Convention. For example the Consular Convention between Poland and Austria of 2 October 1974 stipulates that the consular bag shall not be subject to being opened, to control or detention (Austria, *Bundesgesetzblatt für die Republik Österreich* (Vienna), No. 122 (18 July 1975), p. 1633, document No. 383); see on this subject

(Continued on next page.)

solutions of the problem, on which the Commission may find it convenient to express its views.

169. Nevertheless, with a view to examining the possible impact on the legal status of the diplomatic bag of the exceptional rule introduced by the 1963 Vienna Convention, it is proposed to identify briefly some of its essential aspects and to indicate problems that may arise in its implementation when the procedure contemplated in paragraph 3 of article 35 is applied. It is well known that the opening of the diplomatic bag in exceptional cases is not a mere hypothetical or theoretical problem but an approach that has been suggested in order to avoid possible abuses of the bag which sometimes may affect important interests of the receiving State, including security and other legitimate considerations.

170. Article 35, paragraph 3 of the 1961 Vienna Convention sets out certain conditions and specific requirements for the opening of the bag. First of all, it stipulates that the competent authorities of the receiving State may request that the bag be opened only when they have evidence or serious reasons to believe that the content of the bag is not in conformity with its official functions recognized by international law and contains something other than the official correspondence, documents or articles intended exclusively for official use. This challenge of the legitimate character of the bag may be based on presumption or evaluation of the circumstances which are difficult to be predetermined by any objective criteria or strict regulations. Therefore, they might be susceptible to genuine error or be suspected as an attempt to break the secrecy of the content of the bag. In addition, in some cases serious differences may appear in the interpretation of the expression "articles intended exclusively for official use", even if an effort were made to suggest an indicative list of such articles. Thus, the subjective aspects of the expression "serious reasons to believe" may give rise to opposing perceptions and disputes which may not favour the safe and unimpeded delivery of the diplomatic bag. Most of these difficulties would remain even if the opening and inspection of the bag were limited only to the checking of the physical contents of the packages constituting the bag and not to trying to ascertain the official character of the papers or the articles, whether or not they correspond to the notion of "documents and articles intended exclusively for official use". In our submission, if the authorities of the sending State were to undertake an inspection equal to scrutinizing of or acquainting themselves with the content of the bag in order to prove that it contains articles that do not exclusively relate to the official functions of the diplomatic mission, that might indeed jeopardize the principle of the freedom of communication. The definition of the preventive measures against an arbitrary action on the part of the receiving State may be as difficult as the prevention of possible abuses by the sending State if the use of the

diplomatic bag does not rely on good faith and mutual trust.

171. The second important requirement within the framework of paragraph 3 of article 35 refers to the right of the competent authorities of the receiving State to request that the consular bag be opened in their presence by an authorized representative of the sending State. This provision also could raise practical problems, relating to the duration of the detention pending the appointment and arrival of the authorized persons representing the competent authorities of the receiving State and the representative of the appropriate mission, as well as some other problems indicated *inter alia* in the report of the Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (hereinafter called Working Group) submitted by the Special Rapporteur to the thirty-first session of the Commission in 1979 in his capacity as Chairman of that group.¹⁶² Some of them could find a satisfactory solution through appropriate rules, while others by their nature may inevitably cause impediments and delays in the delivery of the diplomatic bag.

172. The third important provision of paragraph 3 of article 35 envisages an alternative contingency when the request by the competent authorities of the receiving State is refused by the authorities of the sending State. In this case, the bag shall be returned unopened to its place of origin. This appears to be a solution which, while taking into account the legitimate concern of the receiving State, does not induce direct harm to the secrecy of the bag. However, in some circumstances, due to the lack of immediate transport means for the return of the bag or for other technical reasons, the bag in practice may be detained, pending its dispatch back, and in any case its delivery will be prevented.

173. In the light of the above considerations of legal and practical nature, the Special Rapporteur, while seeking advice and guidance by the Commission on the questions raised, suggests that the elaboration of the draft articles on the legal status of the diplomatic bag should proceed on the basis of the relevant provisions of article 27 of the 1961 Vienna Convention. A procedure for opening the bag, if considered at all, ought to be limited only to the status of the consular bag as provided for by paragraph 3 of article 35 of the 1963 Vienna Convention.

(ii) *Some specific features relating to the legal status of the diplomatic bag not accompanied by diplomatic courier*

174. The elements determining the legal status of the diplomatic bag as identified in the preceding paragraphs

(Footnote 161 continued.)

Yearbook . . . 1979, vol. II (Part Two), p. 180 (item 15(a), sect. 2(a) of the report of the Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier).

¹⁶² See the report of the Working Group, item 14, sect. 2(b) and item 15, (a), sect. 2(a), in *Yearbook . . . 1979*, vol. II (Part Two), pp. 179 and 180. Among the questions raised in connection with the opening of the bag, constituting an indicative list, were listed the admissibility of examining the bag, the procedure to be followed, including the procedure in the case of non-appearance of one or the other of the officials, the purpose of checking of the contents, problems of delay which may hinder diplomatic communications, including the duration of the detention, etc.

are also inherent in the status of the diplomatic bag not accompanied by a courier, namely the diplomatic bag entrusted to the captain of a ship or a commercial aircraft who is not considered to be a diplomatic courier, or a diplomatic bag dispatched through postal channels as a shipment or an air freight, and therefore not entrusted to the captain of the ship or the aircraft. The rules relating to the function, content, external characteristics and the treatment due to the diplomatic bag in general, are applicable also to the diplomatic bag not accompanied by a diplomatic courier, whether ordinary (professional) or *ad hoc* courier. Taking into consideration the fact that the diplomatic bag is dispatched as a postal parcel, shipment or air freight, the requirement for an accompanying official document indicating the number of packages could not be applicable in the form envisaged by paragraph 5 of article 27 of the 1961 Vienna Convention and the relevant provisions of the other multilateral conventions in the field of diplomatic law concluded under the auspices of the United Nations. In that case the postal documents, the documents for the consignment on ship or the document for the air freight may indicate the official character of the parcel containing diplomatic mail.

175. The most important legal feature of the non-accompanied diplomatic bag, as in the case of the diplomatic bag accompanied by courier, is its legal protection and special preferential treatment by the sending and the transit State. It should be emphasized at the outset that there has been a firm and generally agreed principle, supported by well-established State practice, to the effect that the provisions applied to the legal status of the diplomatic bag accompanied by diplomatic courier should also be relevant for the status of the diplomatic bag not accompanied by such courier. That means that the non-accompanied diplomatic bag shall not be opened or detained and shall be given the same legal protection and accorded the same facilities, privileges and immunities as are granted to the bag accompanied by diplomatic courier. The fact that such a diplomatic bag is not under the direct custody of a diplomatic courier requires an even greater measure of protection and preferential treatment in order to ensure its unimpeded and safe delivery. The principle of equal treatment was acknowledged on several occasions by the Commission¹⁶³ and in written comments on the topic under consideration by Governments of the United Nations.¹⁶⁴ In many bilateral treaties it has been explicitly stipulated that official bags dispatched through postal channels by air mail or surface mail shall be inviolable "and shall enjoy all other privileges which are granted to official mail in accordance with the generally accepted

principles of international law",¹⁶⁵ or that they "shall enjoy all the immunities customarily granted [by the contracting States] to official mails, and shall be inviolable".¹⁶⁶ This treatment of the non-accompanied diplomatic bag assimilated to the regime of the diplomatic bag accompanied by diplomatic courier, is reflected in a considerable number of bilateral agreements¹⁶⁷ concluded mostly prior to, and in some instances after, the multilateral conventions under the auspices of the United Nations.

176. As was already pointed out in the present reports, the four multilateral conventions in the field of diplomatic law concluded under the auspices of the United Nations contain identical provisions stipulating that the diplomatic bag, as well as the consular bag and the bags of the other missions and delegations of the sending State, may be entrusted to the captain of a ship or a commercial aircraft. Therefore, in this part of the report are indicated only some specific matters relating to the employment of a captain of a ship or an aircraft with the transportation and delivery of the bag.

177. The first question is whether the reference to the captain in the existing conventions is to be interpreted *stricto sensu*, or whether the bag could be entrusted to another authorized member of the crew. The Special Rapporteur submits that the bag could be entrusted also to another authorized member of the crew who may be charged with such a mission by the captain of the ship or the aircraft. However, the prevailing practice has been more in favour of entrusting the bag to the highest ranking officer of the ship or the aircraft with a view to underlining the importance attached to the function of carrying the official mail of the sending State.¹⁶⁸

¹⁶³ See para. 2(e) of the Exchange of Notes between Brazil and Venezuela constituting an administrative agreement for the exchange of official correspondence by air mail (supplementary to the Agreement of 3 June 1919), Caracas, 30 January 1946 (United Nations, *Treaty Series*, vol. 65, pp. 112 and 114).

¹⁶⁴ See para. 3 of Exchange of Notes constituting an agreement between the United Kingdom of Great Britain and Northern Ireland and Mexico for the transmission of diplomatic correspondence between London and Mexico City, London, 27 September 1946 (*ibid.*, vol. 91, p. 162).

¹⁶⁵ See for example the Exchange of Notes between the Government of the United Kingdom and the Government of Norway concerning the transmission by post of diplomatic correspondence, Oslo, 23 December 1946 and 15 January 1947 (*ibid.*, vol. 11, pp. 188-189 and 191); Exchange of Notes between Ecuador and Brazil constituting an agreement for the exchange of diplomatic correspondence by air mail in special diplomatic bags, Quito, 15 November 1946 and 31 May 1947 (*ibid.*, vol. 72, pp. 30 and 32) in which it is stipulated that the diplomatic bags "shall be inviolable and not liable to inspection and shall enjoy the privileges accorded to Cabinet mail". There are similar agreements between the United Kingdom and the Netherlands on the exchange through postal channels of postage of diplomatic bags containing non-confidential correspondence, The Hague, 30 November 1951 (*ibid.*, vol. 123, p. 177); between the United Kingdom and the Dominican Republic, London, 1 and 9 August 1956 (*ibid.*, vol. 252, p. 121); between Brazil and Argentina, Rio de Janeiro, 6 July 1961 (*ibid.*, vol. 657, p. 117).

¹⁶⁶ Suggestions of such a character were advanced during the earlier consideration of this issue and, most recently, in the preliminary examination of the present topic. See, for example, the written

(Continued on next page.)

¹⁶³ See item 15 of the report of the working group, *ibid.*, pp. 180-181.

¹⁶⁴ See the written comments of the USSR (*ibid.*, sect. 2(b) of the report, p. 180), and the written comments of the Federal Republic of Germany (*Yearbook . . . 1979*, vol. II (Part One), pp. 223-224, document A/CN.4/321 and Add.1-7, and *Yearbook . . . 1979*, vol. II (Part Two), p. 180 (item 15(a), sect. 2(f) of the report of the Working Group).

178. The second question which could arise is whether the bag must necessarily be entrusted to the captain of a ship flying the flag of the sending State or to the captain of a commercial aircraft of an airline company of the sending State. Here again, it could be pointed out that usually this is the case, but at the same time there are some instances when for practical convenience the official bag is entrusted to the captain of a ship or a commercial aircraft which is not under the jurisdiction of the sending State.

179. Another question relating to the status of the captain entrusted with the official bag is whether the personal inviolability and other immunities accorded to the professional diplomatic courier and the diplomatic courier *ad hoc* could be extended to the captain or the authorized member of the crew only during the duration of the journey until the bag is handed over to the authorized member of the mission of the receiving State.¹⁶⁹ In answering this question, the Special Rapporteur holds the view that in all multilateral conventions concluded under the auspices of the United Nations there is an explicit provision to the effect that the captain to whom the bag is entrusted shall not be considered to be a diplomatic or any other kind of courier. Consequently, according to these clear provisions, the captain cannot enjoy the immunities granted by the receiving State to the diplomatic and other official couriers. Perhaps the only feasible rule in this case would be to provide that any measure which the receiving State might possibly adopt with respect to the person of the captain should not affect the status of the bag, its inviolability and legal protection, or its safe and speedy delivery. It could be further suggested on this point that any measure which the receiving State might adopt against an official bag should not be extended to the captain of a ship or a commercial aircraft to whom the bag was entrusted, since the captain is independent of the bag itself.¹⁷⁰

180. Another important condition for the accomplishment of the mission of the captain regarding the safe delivery of the bag entrusted to him is the procedure provided for the transmission of the bag. Article 27, paragraph 7 of the 1961 Vienna Convention stipulates that the mission of the receiving State to whom the bag is addressed may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft. The captain is not supposed to deliver the bag to the consignee at the premises of the mission. His

function is to take care of the custody and transportation of the bag until an authorized port of entry according to the flight schedule. His duty is confined to the handing over of the bag to the authorized member of the receiving mission "directly and freely" at the airport. Such a procedure requires the access of the authorized member of the mission to the airfields, which could be done only by special arrangement with the competent authorities of the receiving State. A specific provision relating to such an arrangement is not embodied in the text of article 27, though it may stem from paragraph 7 referring to the right of the authorized member of the receiving mission "to take possession of the diplomatic bag directly and freely from the captain of the aircraft", which presupposes a direct access to the apron of the airfields and to the aircraft itself. We find such additional provision on the access to the ship or the aircraft, incorporated in paragraph 7 of article 35 of the 1963 Vienna Convention, and since then included also in the relevant provisions of the 1969 Convention on Special Missions (art. 28, para. 8) and the 1975 Vienna Convention (art. 27, para. 7 and art. 57, para. 8). The Special Rapporteur submits that in the appropriate draft article there should be a somewhat more elaborated provision regarding the handing over of the bag to the representative of the receiving mission with the necessary facilities for access to the ship or the aircraft in order to ensure the taking of direct and free possession of the bag. In this sense, there were some suggestions advanced by certain states in their written comments,¹⁷¹ which deserve due consideration. As a matter of fact, arrangements to this effect already exist in State practice and national regulations.

181. The dispatch of diplomatic bags through normal postal channels or overland shipment and air freight has been common practice, particularly for non-confidential correspondence and other documents and materials intended for official use. Though the four multilateral conventions in the field of diplomatic law do not contain special provisions on this kind of unaccompanied diplomatic bags, they do not prevent official communications through such means either. In this case, the elaboration of the relevant draft articles relating to the diplomatic bag not accompanied by diplomatic courier or not entrusted to the captain of a ship or a commercial aircraft ought to rely mostly on the existing bilateral treaties substantiated by State practice, and only as far as general rules are concerned, to refer to the multilateral conventions concluded under the auspices of the United Nations.

182. Before proceeding to the examination of some specific aspects of the diplomatic bag dispatched through postal channels, shipment or air freight, it should be indicated that this kind of diplomatic bag is entitled to the same régime of immunities, legal protection and preferential treatment as the diplomatic bag accompanied by diplomatic courier or entrusted to the captain of a ship or

(Footnote 168 continued.)

comments of Chile in *Yearbook* . . . 1979, vol. II (Part One), p. 220, para. 15, document A/CN.4/321 and Add.1-7, and *Yearbook* . . . 1979, vol. II (Part Two), p. 181 (item 15(b), sect. 2(d) of the report of the Working Group).

¹⁶⁹ As has already been pointed out, similar suggestions were made during the elaboration of some of the multilateral conventions, but they were rejected. More recently such a suggestion was made by Poland during the consideration of the present topic (see *Official Records of the General Assembly, Thirty-first Session, Sixth Committee*, 65th meeting, para. 57, and *Yearbook* . . . 1979, vol. II (Part Two), p. 181 (item 15(b), sect. 2(a) of the report of the Working Group).

¹⁷⁰ See in the same sense the written comments of Colombia (A/33/224, annex, pp. 4-5) and *Yearbook* . . . 1979, vol. II (Part Two), p. 182 (item 15(b), sect. 2(e) of the report of the Working Group).

¹⁷¹ See the written comments of the USSR (A/33/224, annex, p. 2, para. 4), and *Yearbook* . . . 1979, vol. II (Part Two), p. 180 (item 15(a), sect. 2(b) of the report of the Working Group).

a commercial aircraft. This principle has found general recognition in a number of bilateral treaties and in State practice.¹⁷² During the preliminary consideration of this topic at the Sixth Committee of the General Assembly and in written comments by Governments, the view was expressed that diplomatic bags sent by post should be treated in the same way as diplomatic bags accompanied by courier and be granted the legal protection provided for in article 27 of the 1961 Vienna Convention.¹⁷³ Indeed, there is no reason whatsoever to treat differently the diplomatic bags dispatched by post or as a shipment or airfreight, performing the same official functions envisaged by international law. Taking into consideration the official functions of the bag, the receiving State is bound to grant it the same facilities for safe and speedy delivery as are granted to the diplomatic bag accompanied by diplomatic courier or entrusted to the captain of a ship or an aircraft.

183. Among the specific aspects of the legal status of the diplomatic bag sent by postal channels as air mail or surface mail parcels and the diplomatic bag dispatched through overland shipment and air freight, [inherent in this kind of diplomatic bag], reference should be made to the requirements for the identification of the official character of such a bag, the measures for the safety of forwarding the parcels and the procedure and preferential treatment for the direct and swift delivery. It is suggested to provide special markings and other visible signs which would allow the easy recognition of the diplomatic bag among other postal parcels or consignments, in order to ensure its preferential treatment. As far as the security and safety of the bag is concerned, many of the existing bilateral agreements contain certain requirements for appropriate seals and technical devices, including the use of locks and padlocks, safety bolts and the establishment of maximum dimensions in weight or size for facilitating the safety and unimpeded forwarding. Some bilateral agreements also envisage an agreed time-table for dispatch and receipt of the bag. Considering the measures intended to facilitate the exchange of diplomatic bags through postal parcels, shipments or air freight, special emphasis should be made on the provisions for accelerating customs clearance, or exemption from customs formalities and inspection. On the basis of established State practice, the present draft articles may attempt to elaborate the relevant provisions applied specifically to the diplomatic bag dispatched by postal channels or other means. At this stage of the work on the topic, and for the purpose of proposing a definition of the diplomatic bag, it might be sufficient to indicate the main features of the status of this kind of diplomatic bag,

without entering into a detailed elaboration of the possible requirement or procedure for the use of such a diplomatic bag and for ensuring that diplomatic bag sent by post, overland shipment or airfreight should arrive quickly and safely at its destination. In this connection, as was suggested in the written comments by some Governments, it might be appropriate to request again the advice and assistance of the Universal Postal Union (UPU).¹⁷⁴

(iii) *Definition of the term "diplomatic bag" and other bags used by States for official communications*

184. Taking into consideration the main elements determining the legal status of the diplomatic bag and the specific features of the diplomatic bag not accompanied by diplomatic courier and in the light of the relevant provisions of article 27 of the 1961 Vienna Convention, the following working definition could be suggested for the purpose of the present draft articles:

"'Diplomatic bag' means all packages containing official correspondence, documents or articles exclusively for official use, which bear visible external marks of their character, used for communications between the sending State and its missions abroad or between those missions, wherever situated, as well as with other States or international organizations, dispatched through diplomatic courier or the captain of a ship or a commercial aircraft or sent by post, overland shipment or air freight and which is accorded by the receiving or the transit State facilities, privileges and immunities in the performance of its official function."

185. This definition is not meant to be exhaustive on all substantive elements regarding the content, external characteristics and treatment of the diplomatic bag in general, and the diplomatic bag not accompanied by diplomatic courier in particular. Each one of these items deserve special consideration in order to elaborate specific draft articles. It is the view of the Special Rapporteur that the definition of the term "diplomatic bag" should contain only an indication of the legal components of the notion which, as a whole, define the essential characteristics of the bag. Such a definition may provide the basis for the examination of the specific aspects of the status of the bag with a view to suggesting relevant draft articles.

186. The proposed definition could be used *mutatis mutandis* as a starting point for the definition of the consular bag, the bag of special missions, permanent missions to international organizations or delegations to

¹⁷² The agreement between Brazil and Venezuela, for example, explicitly provides in article 2, para. (f), that the diplomatic mail sent by post shall enjoy security and inviolability and all other privileges which are granted to official mail in accordance with the generally accepted principles of international law (see footnote 165 above). Similar provisions are contained in most of the other agreements mentioned above (footnotes 166–167).

¹⁷³ See the written comments of Switzerland in *Yearbook ... 1979*, vol. II (Part One), p. 225, document A/CN.4/321 and Add.1–7, and *Yearbook ... 1979*, vol. II (Part Two), pp. 180–181 (item 15(a), sect. 2(h) of the report of the Working Group).

¹⁷⁴ It may be advisable to address such a request to the Executive Council of the UPU, pursuant to decision C.42 of May 1976 of the Lausanne Congress, taking into account the development of the study of this problem by the Commission since then. As was mentioned in the written comments of Colombia (A/33/24, annex, pp. 5–7), the Executive Council of the UPU, at the request of the United Nations Secretariat, approved a questionnaire which was sent out to all postal administrations. The answers received were briefly summarized in five points. It was not agreed to include in the Acts of UPU any provision relating to diplomatic correspondence free of charge, while a positive view was expressed regarding the use of international postal services for handling diplomatic bags and regarding the international carriage of diplomatic mail, being governed by bilateral or multilateral agreements "which have so far been applied without difficulty".

international organs or international conferences, since it contains all the essential elements envisaged by the relevant provisions of the four multilateral conventions in the field of diplomatic law regarding the appropriate official bag (diplomatic, consular or bags of the missions and delegations.) There is also a possibility of introducing as a working hypothesis the global notion of "official bag" embracing all kinds of bags used by States for official communication, on the understanding that such a term should not eliminate the use of the specific denominations for different bags, which have acquired legal certainty and wide recognition in State practice.

3. DEFINITION OF OTHER TERMS USED FOR THE PURPOSES OF THE PRESENT DRAFT ARTICLES

187. The examination of the main constitutive elements of the notions of the diplomatic courier and the diplomatic bag constitutes only part, though the essential part, of the study of the definitional problems inherent in the nature of the present draft articles. As was pointed out above (para. 54), there is another category of terms, embodied in the existing multilateral conventions in the field of diplomatic law concluded under the auspices of the United Nations, which have acquired legal certainty and confirmation in State practice. Therefore the Special Rapporteur would suggest to use them directly or by reference to the respective conventions as legal definitions for the purposes of the present draft articles. They constitute a long list of terms, to which could be added some other terms that, in the form of legal definitions, could not be found in the multilateral conventions referred to above.

188. In order to introduce these terms in a more concise way, it is proposed to present them under three main headings, namely (a) definitions referring to the term "State", such as "sending State", "receiving State", "host State", "transit State" and "third State"; (b) definitions referring to the terms "mission" and "delegation", such as "permanent diplomatic mission" or simply "diplomatic mission", "consular post", "special mission", "permanent mission", "permanent observer mission", "delegation", "delegation to an organ", "delegation to a conference", "observer delegation", "observer delegation to an organ" and "observer delegation to a conference"; and (c) definitions referring to other terms, such as "international organization", "international organ" and "international conference". In all instances, the relevant provisions of the four multilateral conventions in the field of diplomatic law concluded under the auspices of the United Nations shall be utilized as the main source for the legal definition of the respective terms to be used in the present draft articles. It is interesting to note that the greatest number of such definitions are found in the 1969 Convention on Special Missions and, particularly, in the 1975 Vienna Convention, while the 1961 Vienna Convention does not contain a special article on the use of terms. Perhaps this is an indication of the evolving modern pattern of legislative technique, which is attaching greater significance to provisions carrying definitions of the terms used in a particular treaty for the purposes of application or interpretation of that treaty.

(a) Definition of the terms "sending State", "receiving State", "transit State", "third State" and "host State"

189. A definition of the term "sending State" is contained only in the 1975 Vienna Convention (art. 1, para. 1(16)), referring to the State which sends a mission to an organization, or a delegation to an organ or to a conference, or an observer delegation to an organ or a conference. It is obvious that this definition could be of little use for the purposes of the present draft articles.

190. Some bilateral treaties¹⁷⁵ in the field of diplomatic law also contain definitions of the term "sending State" closely adapted to their subject-matter and therefore of no direct use for the topic under consideration.

191. The same could be said with regard to definitions of the term "sending State" considered in some research drafts of the Harvard Law School in the field of diplomatic¹⁷⁶ or consular relations.¹⁷⁷

192. The term "sending State" for the purpose of the present articles should designate the State which is employing a courier and is dispatching a diplomatic bag, accompanied or not accompanied by diplomatic courier, to its missions abroad or to other States or international organizations, and to whom those missions are sending back the diplomatic bag. The definition could therefore simply refer to the State employing diplomatic courier and sending diplomatic bag. It could also in more elaborated manner indicate the State dispatching to its missions abroad or to other States and international organizations a diplomatic bag accompanied or not accompanied by diplomatic courier.

193. A definition along the lines of the preceding paragraph could be applied *mutatis mutandis* to all other kinds of couriers and bags, i.e. consular couriers and consular bags, as well as couriers and bags of special missions, permanent missions to international organizations and delegations to international organs and conferences.

194. As far as the definition of the term "receiving State" is concerned, none of the multilateral conventions in the field of international law concluded under the auspices of the United Nations and only a few of the bilateral conventions contain such definitions. In the case of the latter, like the definition of the term "sending State", they could not serve as a basis for a definition to be applied in the present draft articles due to the same reasons. This conclusion is equally valid with regard to the

¹⁷⁵ See for instance article 2, para. (1) of the Convention relating to consular officers between the United States of America and the United Kingdom of 6 June 1951 (United Nations, *Treaty Series*, vol. 165, p. 124). The definition contained therein cannot be of direct use, since it is very closely attached to the context of that Convention and, under the term "sending State", refers to "the High Contracting Party by whom the consular officer is appointed, or all the territories of that party to which the Convention applies".

¹⁷⁶ Harvard Law School, *Research in International Law*, part I. "Diplomatic Privileges and Immunities" (*op. cit.*), p. 42.

¹⁷⁷ *Ibid.*, part II. "The Legal Position and Functions of Consuls" (*op. cit.*), p. 193.

relevant provisions of the Harvard Law School research drafts.¹⁷⁸

195. The term "receiving State" under the present draft articles should indicate the State on whose territory are situated the diplomatic mission, consular post, permanent mission or special mission, as well as the State in whose territory a session of an international organ takes place or an international conference is convened, and to where the diplomatic bag of the sending State is addressed.

196. Such a definition of the term "receiving State" may apply to all kinds of couriers and bags used by States for official communications.

197. The definition of the term "host State" contained in the 1975 Vienna Convention (art. 1, para. 1, subpara. (15)) could very well be adapted to the present draft articles and therefore could be used in its entirety.

198. There is no definition as such of the term "transit State" in the four multilateral conventions concluded under the auspices of the United Nations. However, article 40, paragraph 3 of the 1961 Vienna Convention and the respective provisions of the other three conventions¹⁷⁹ related to the obligations of third States provide that third States "shall accord to official correspondence and other official communications *in transit** . . . the same freedom and protection as is accorded by the receiving State." Furthermore, it is stipulated therein that "They shall accord to diplomatic couriers, who have been granted a passport visa if such visa was necessary, and diplomatic bags *in transit** the same inviolability and protection as the receiving State is bound to accord". In such a case the *transit State*, under this provision, is the "third State" through whose territory and with whose consent the official bag passes *en route* to the receiving State. In our view, the *transit State* should be defined as such and not merely be assimilated to third State, i.e. a State which is neither a sending nor a receiving State. In normal circumstances the transit State is known in advance, according to the established itinerary and, when required, a transit visa is provided for the courier to cross its territory, whereas a third State is the State which only in exceptional conditions could be involved, usually in the occurrence of *force majeure* or some fortuitous event.

199. Thus, for the purposes of the present draft articles, the term "transit State" would mean a State through whose territory and with whose prior consent the courier accompanying a diplomatic bag or a diplomatic bag not accompanied by diplomatic courier passes *en route* to the receiving State. The transit State has with regard to the diplomatic courier and the diplomatic bag, whether accompanied or not accompanied by diplomatic courier, the same obligations regarding the legal protection and treatment of the courier and the bag, including the facilities, privileges and immunities to be granted in the performance of their official functions.

200. As has been pointed out, the four multilateral conventions concluded under the auspices of the United Nations contain specific provisions with respect to the duties of *third States*. Normally by third State is meant a State not directly involved in certain legal relationships. For the purpose of the present draft articles, under the term "third State" should come a State which is neither a sending nor a receiving nor a transit State and which yet, in some exceptional circumstances, may be affected by the functioning of official communications in which normally only the sending, the receiving and possibly the transit State may be involved. This would be the case contemplated in paragraph 4 of article 40 of the 1961 Vienna Convention and the relevant provisions of the other three multilateral conventions,¹⁸⁰ as a result of *force majeure* or fortuitous event, such as forced landing of an aircraft, breakdown of the means of transport, natural disaster forcing a sudden deviation from the original itinerary or a situation of distress which compels the courier to stop over at a port of entry of a given State which was not foreseen.

201. In accordance with article 40, para. 4, of the 1961 Vienna Convention and the relevant provisions of the other three conventions, the facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag in normal circumstances by the receiving State or the transit State shall be granted also by the third State when the courier or the bag are on its territory due to *force majeure*. This general rule may require further elaboration in the draft articles, but for the purposes of the draft article on the use of terms it would be sufficient to point out that the term "third State" means any State, except the sending State, the receiving State or the transit State, on whose territory the courier and the bag are compelled to be present due to *force majeure* or fortuitous event.

202. The 1975 Vienna Convention contains, in article 1, para. 1, subpara. (15), the following definition of the term "host State":

"host State" means the State in whose territory:

- (a) the Organization has its seat or an office, or
- (b) a meeting of an organ or a conference is held.

203. The Special Rapporteur submits that this definition could be adapted to the present draft articles without any change.

(b) *Definition of the terms "diplomatic mission", "consular post", "special mission", "permanent mission", "permanent observer mission", "delegation to an organ", "observer delegation to an organ", "delegation to a conference" and "observer delegation to a conference"*

204. The meaning of the term "diplomatic mission" (or "permanent diplomatic mission") stems from the relevant provisions of the 1961 Vienna Convention and may be introduced as formulated in article 1, subpara. (b) of the 1969 Convention on Special Missions.

¹⁷⁸ See footnotes 176 and 177 above.

¹⁷⁹ See art. 54, para. 3 of the 1963 Vienna Convention; art. 42, paras. 3 and 4, of the 1969 Convention on Special Missions, and art. 81, para. 4 of the 1975 Vienna Convention.

¹⁸⁰ See art. 54, para. 4, of the 1963 Vienna Convention; art. 42, para. 5 of the 1969 Convention on Special Missions; and art. 81, para. 5, of the 1975 Vienna Convention.

205. The term "consular post", which comprises any consulate-general, consulate, vice-consulate, or consular agency, could be used as it stands in article 1, subpara. (a), of the 1963 Vienna Convention and article 1, subpara. (c) of the 1969 Convention on Special Missions.

206. The term "special mission", referring to a temporary mission, representing the State, which is sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a special task, as contained in article 1, subpara. (a), of the 1969 Convention on Special Missions could also be introduced in the present draft articles without any modification.

207. Regarding the terms "permanent mission", "permanent observer mission", "delegation to an organ", "observer delegation to an organ", "delegation to a conference" and "observer delegation to a conference", they could also be taken unchanged from the relevant provisions of article 1, subpara. 1 of the 1975 Vienna Convention.

(c) *Other terms used for the purposes of the present draft articles*

208. Under the term "international organization", it is suggested to include all intergovernmental organizations, of a universal or regional character, with more comprehensive or specialized functions and powers, both within and outside the institutional system of the United Nations. In this case, the proposed definition would be based on the provision of article 1, para. 1, subpara. (1) of the 1975 Vienna Convention and would be wider in scope than the "international organization of a universal character" to which that Convention is confined.

209. Regarding the term "organ", we suggest adopting the definition contained in article 1, para. 1, subpara. (4) of the 1975 Vienna Convention.

210. For the term "conference", we suggest adopting a notion which would embrace international conferences of States convened by States or by international organizations. In this case the scope of the term would be wider than the provision of article 1, para. 1, subpara. (5) of the 1975 Vienna Convention, which is limited only to conferences of States convened by or under the auspices of an international organization. The Special Rapporteur is of the view that such a limitation could not be justified for the purpose of the present draft articles.

4. TEXT OF THE PROPOSED DRAFT ARTICLE
ON THE USE OF TERMS

211. Taking into consideration the comments and suggestions made on various definitional problems and in particular on the use of terms for the purposes of the present draft articles, the Special Rapporteur would like to submit to the Commission for examination and approval the following draft article:

Article 3. Use of terms

1. For the purposes of the present articles:

(1) "diplomatic courier" means a person duly authorized by the competent authorities of the sending

State and provided with an official document to that effect indicating his status and the number of packages constituting the diplomatic bag, who is entrusted with the custody, transportation and delivery of the diplomatic bag or with the transmission of an official oral message to the diplomatic mission, consular post or other missions and delegations of the sending State, wherever situated, as well as to other States and international organizations, and is accorded by the receiving State or the transit State facilities, privileges and immunities in the performance of his official functions;

(2) "diplomatic courier *ad hoc*" means an official of the sending State entrusted with the function of diplomatic courier for special occasion only, who shall cease to enjoy the facilities, privileges and immunities accorded by the receiving or the transit State to a diplomatic courier, when he has delivered to the consignee the diplomatic bag in his charge;

(3) "diplomatic bag" means all packages containing official correspondence, documents or articles exclusively for official use which bear visible external marks of their character, used for communications between the sending State and its diplomatic missions, consular posts, special missions or other missions or delegations, wherever situated, as well as with other States or international organizations, dispatched through diplomatic courier or the captain of a ship or a commercial aircraft or sent by post, overland shipment or air freight and which is accorded by the receiving or the transit State facilities, privileges and immunities in the performance of its official function;

(4) "sending State" means a State dispatching a diplomatic bag, with or without a courier, to its diplomatic mission, consular post, special mission or other missions or delegations, wherever situated, or to other States or international organizations;

(5) "receiving State" means a State on whose territory:

(a) a diplomatic mission, consular post, special mission or permanent mission is situated, or

(b) a meeting of an organ or of a conference is held;

(6) "host State" means a State on whose territory:

(a) an organization has its seat or an office, or

(b) a meeting of an organ or a conference is held;

(7) "transit State" means a State through whose territory and with whose consent the diplomatic courier and/or the diplomatic bag passes *en route* to the receiving State;

(8) "third State" means any State other than the sending State, the receiving State and the transit State;

(9) "diplomatic mission" means a permanent mission within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(10) "consular post" means any consulate-general, consulate, vice-consulate or consular agency within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

(11) "special mission" means a temporary mission, representing the State, which is sent by one State to another with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a special task;

(12) "mission" means, as the case may be, the permanent mission or the permanent observer mission;

(13) "permanent mission" means a mission of permanent character, representing the State, sent by a State member of an international organization to that organization;

(14) "permanent observer mission" means a mission of permanent character, representing a State, sent to an international organization by a State not a member of that organization;

(15) "delegation" means, as the case may be, the delegation to an organ or the delegation to a conference;

(16) "delegation to an organ" means the delegation sent by a State to participate on its behalf in the proceedings of the organ;

(17) "observer delegation" means, as the case may be, the observer delegation to an organ or the observer delegation to a conference;

(18) "observer delegation to an organ" means the delegation sent by a State to participate on its behalf as an observer in the proceedings of the organ;

(19) "delegation to a conference" means the delegation sent by a State to participate on its behalf in the proceedings of the conference;

(20) "observer delegation to a conference" means the delegation sent by a State to participate on its behalf as an observer in the proceedings of the conference;

(21) "international organization" means an inter-governmental organization;

(22) "organ" means:

(a) any principal or subsidiary organ of an international organization, or

(b) any commission, committee or subgroup of any such organ, in which States are members;

(23) "conference" means a conference of States.

2. The provisions of paragraph 1, subparagraphs (1), (2) and (3), on the terms "diplomatic courier", "diplomatic courier *ad hoc*" and "diplomatic bag" may apply also to consular courier and consular courier *ad hoc*, to couriers and *ad hoc* couriers of special missions and other missions or delegations, as well as to the consular bag and the bags of special missions and other missions and delegations of the sending State.

3. The provisions of paragraphs 1 and 2 of the present article regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or the internal law of any State.

C. General principles underlying the four multilateral conventions in the field of diplomatic law concluded under the auspices of the United Nations

212. The formulation of certain fundamental principles of international law underlying the existing rules of modern diplomatic law with special reference to the legal status of the diplomatic courier and the diplomatic bag, has been suggested throughout the work on the present topic. The feasibility of such a formulation was indicated in the preliminary reports submitted to the Commission by the

working groups and the working documents of the Secretariat since the early stage of the examination of the topic, and during the discussions the Sixth Committee of the General Assembly.¹⁸¹ The preliminary report submitted to the Commission by the Special Rapporteur¹⁸² also dealt with this matter. It was generally agreed that the enunciation of such general principles would be useful for the purpose of the present draft articles.

213. In accordance with the plan of work suggested by the Special Rapporteur in the present report, at this stage it would suffice to present these draft articles on a purely preliminary basis as tentative formulations (see para. 12 above). This may provide an early opportunity for a general exchange of views, while deferring the substantive and detailed examination to a later stage when the content of the draft articles had been specified.

214. It is therefore proposed to introduce, under the heading of part I of the present draft articles, "General provisions", the draft text of the three general principles, namely: (a) the principle of freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags; (b) the principle of respect for international law and the laws and regulations of the receiving and the transit State and (c) the principle of non-discrimination and reciprocity. These three principles are interrelated and set out the basic legal framework for an effective regime of the diplomatic courier and the diplomatic bag. Their interplay also leads to a proper balance between the requirements for safe and speedy delivery of the bag and the legitimate interests of the receiving and transit State as well as between the secrecy of the diplomatic mail and the security considerations of the receiving State.

1. PRINCIPLE OF FREEDOM OF COMMUNICATION FOR ALL OFFICIAL PURPOSES EFFECTED THROUGH DIPLOMATIC COURIERS AND DIPLOMATIC BAGS

215. The principle of freedom of communication for all official purposes has been universally recognized to constitute the legal foundation of modern diplomatic law. It should also be considered as the core of the legal régime of diplomatic couriers and diplomatic bags. The preponderant impact of this principle on the legal aspects of diplomatic intercourse was rightly identified as "the most important of all the privileges and immunities accorded under international law."¹⁸³ The significance of free communication for all official purposes takes a prominent place in the four multilateral conventions concluded under the auspices of the United Nations and in many other bilateral and multilateral treaties in the field of diplomatic

¹⁸¹ In addition to document A/CN.4/WP.5, the reports of the working groups and working documents of the Secretariat are reproduced essentially in *Yearbook ... 1978*, vol. II (Part Two), pp. 138-144, paras. 137-144; *Yearbook ... 1979*, vol. II (Part One), pp. 213 *et seq.*, document A/CN.4/321 and Add.1-7; *Yearbook ... 1979*, vol. II (Part Two), pp. 170-184, paras. 153-164.

¹⁸² *Yearbook ... 1980*, vol. II (Part One), pp. 231 *et seq.*, document A/CN.4/335.

¹⁸³ See Denza, *op. cit.*, p. 119.

law.¹⁸⁴ With regard to the topic under consideration, it is very indicative that in the four multilateral conventions the provisions relating to the status of the courier and the bag are placed under the heading "freedom of communication" and are introduced as "appropriate means" for its operation.

216. The object and purpose of the principle of freedom of communication and its scope of application determine the legal basis of the rights and obligations of the sending and receiving State with respect to the use of couriers and bags as instruments of diplomatic intercourse. First of all, the application of the principle of freedom of communication entitles the sending State and its missions abroad to maintain free communications with all appropriate means, including the employment of diplomatic courier and dispatching of diplomatic bag for communications between the missions, or between the sending State and other States or international organizations. Secondly, the principle of free communication provides the legal basis for the inviolability and legal protection of the diplomatic bag, placing upon the receiving or the transit State the obligation to grant certain facilities, privileges and immunities in favour of the diplomatic courier and the diplomatic bag in the performance of their official function.

217. In the light of these observations, the Special Rapporteur would like to submit to the Commission for preliminary consideration the following draft article:

Article 4. Freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags

1. The receiving State shall permit and protect free communications on the part of the sending State for all official purposes with its diplomatic missions, consular posts and other missions or delegations as well as between those missions, consular posts and delegations, wherever situated, or with other States or international organizations, as provided for in article 1.

2. The transit State shall facilitate free communication through its territory effected through diplomatic couriers and diplomatic bags referred to in paragraph 1 of the present article.

¹⁸⁴ As was pointed out, article 27 of the 1961 Vienna Convention reflected in a well established rule of international customary law with respect to the freedom of communication and was the model provision for the relevant articles in the other multilateral conventions concluded under the auspices of the United Nations. The principle of freedom of communication was embodied in multilateral conventions outside the framework of the United Nations, such as the Interamerican Convention regarding Diplomatic Officers adopted by the Sixth International Conference of American States, signed at Havana on 20 February 1928, which stipulates, in article 15, that "States should extend to diplomatic officers every facility for the exercise of their functions and especially to the end that they may freely communicate with their Governments". (League of Nations, *Treaty Series*, vol. CLV, p. 269.)

2. PRINCIPLE OF RESPECT FOR INTERNATIONAL LAW AND THE LAWS AND REGULATIONS OF THE RECEIVING AND THE TRANSIT STATE

218. It may be pointed out at the outset that there is no specific provision in the four multilateral conventions regarding the obligation of the courier or the sending State, when using diplomatic couriers and bags, to respect the laws and regulations of the receiving State or the transit State. Nor is any explicit provision found in those conventions on the duty to respect international law, though this could be implied, taking into consideration their text as a whole, including the preamble of each one of them, where in general terms reference is made to the duties of States to respect the rules and principles of international law. Of course article 41, para. 1, of the 1961 Vienna Convention stipulates that "Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. . . ." Identical provisions are contained in the other multilateral conventions concluded under the auspices of the United Nations.¹⁸⁵ In those cases, the diplomatic or other couriers should be considered within the expression "all persons enjoying such privileges and immunities." Nevertheless, during the consideration of this item in the Commission¹⁸⁶ and in the Sixth Committee,¹⁸⁷ as well as in comments of some Governments,¹⁸⁸ it was suggested that a draft article be submitted on the duty to respect international law and the laws and regulations of the receiving and the transit State.

219. The duty to respect the rules of international law and the laws and regulations of the receiving State and the transit State is an essential correlative rule of the freedom of communication, including the facilities, privileges and immunities granted by those States to diplomatic couriers or bags of the sending State on their territory. In this way the required balance could be established between the interests of the sending State for safe and unimpeded delivery of the bag and the security and other legitimate considerations of the receiving and the transit States deriving from their sovereignty. The principle of respect for the rules of international law and the laws and regulations of the receiving State is an important legal safeguard against the abuse of the privileges and immunities accorded to foreign officials, including diplomatic couriers. Therefore, this general principle could be

¹⁸⁵ See art. 55, para. 1, of the 1963 Vienna Convention; art. 47, para. 1, of the 1969 Convention on Special Missions, and art. 77, para. 1, of the 1975 Vienna Convention.

¹⁸⁶ See *Yearbook . . . 1980*, vol. I, pp. 262 and 363, 1634th meeting, para. 23 (Mr. Yankov) and para. 34 (Mr. Reuter); pp. 281-282, 1637th meeting, paras. 2-3 (Mr. Schwebel) and para. 7 (Mr. Francis).

¹⁸⁷ See *Official Records of the General Assembly, Thirty-third Session, Sixth Committee*, 41st meeting, para. 58 (Czechoslovakia).

¹⁸⁸ In its written comments, Chile stated that "there is no reason why the principle [of respect for the laws and regulations of the receiving State] should not be reiterated in the future rules concerning the diplomatic courier." (*Yearbook . . . 1979*, vol. II (Part One), p. 220, para. 16, document A/CN.4/321 and Add.1-7).

instrumental for the establishment of certain rules of conduct which will have not only moral value but legally binding force.¹⁸⁹

220. Within the scope of the duty to respect the rules of international law and the laws and regulations of the receiving or the transit State in the use of diplomatic courier and diplomatic bag, several substantive obligations of the sending State and the courier employed by that State could be identified.

221. First of all should be singled out the duty to respect the rules of international law in general and the rules of diplomatic law in particular. This obligation may be interpreted to refer primarily to international customary law and international treaties establishing general rules. It can refer also to rules of international law applicable specifically to the conduct of diplomatic intercourse. In this connection, of foremost importance is the principle of non-interference in the domestic affairs of the receiving or the transit State and the respect for their sovereignty and self-determination. Article 41, para. 1 of the 1961 Vienna Convention and the identical provisions in the other multilateral conventions explicitly stipulate that persons enjoying diplomatic privileges and immunities have the duty not to interfere in the internal affairs of the receiving State. This rule should apply also to the status of the diplomatic courier. The fact that such a rule has already been embodied in a number of multilateral¹⁹⁰ and bilateral agreements relating to diplomatic intercourse, may provide the ground for the elaboration of similar rules applicable to the régime governing the functions of the diplomatic courier as well.

222. The duty on the part of the diplomatic courier to observe the established legal order in the receiving or the transit State may also relate to a wide range of obligations regarding the maintenance of law and order, regulations in the field of public health and the use of public services and transport means or regulations with respect to hotel accommodation and the requirements for registration of foreigners, as well as regulations with respect to driver's licence, etc. While the diplomatic courier is accorded certain facilities, privileges and immunities exclusively for the performance of his official functions, he could not be

exempt from the existing rules and regulations enforced in the public interest. It is suggested that certain provisions along these lines could be contemplated in the present draft articles.

223. The four multilateral conventions contain specific rules stipulating that the premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the pertinent provisions of those conventions or by other rules of international law or any special agreements in force between the sending and the receiving State.¹⁹¹ This rule could be adapted to the status of the diplomatic courier by introducing a draft provision which would not allow the temporary residence of the diplomatic courier to be used for activities incompatible with general international law and diplomatic law embodied in the relevant conventions and other treaties in force.

224. Within the obligations of the diplomatic courier with respect to the receiving and the transit State should be mentioned the duty stipulated in article 41, para. 2, of the 1961 Vienna Convention and the identical provisions on this matter in the other multilateral conventions, which require that the diplomatic agents conduct all official business with the receiving State with or through the Ministry for Foreign Affairs of the receiving State. Such a rule could be applied to a diplomatic courier as well, though in most instances matters relating to diplomatic communications may not be taken directly by the courier, but either through the competent authorities of the sending State or, on behalf of it, by its mission in the territory of the receiving State. Another obligation of the diplomatic agent, provided in article 42 of the 1961 Vienna Convention and the other multilateral conventions concluded under the auspices of the United Nations, is the rule which does not permit a professional or commercial activity of the diplomatic agent for personal profit. This rule should also be applied to the diplomatic courier and to this effect special provision could be included in the present draft articles.

225. In the light of the above considerations regarding the duty to respect international law and the laws and regulations of the receiving or the transit State, the Special Rapporteur submits for examination and approval the following draft article:

Article 5. Duty to respect international law and the laws and regulations of the receiving and the transit State

1. Without prejudice to his privileges and immunities, it is the duty of the diplomatic courier to respect the rules of international law and the laws and regulations of the receiving State and the transit State.

2. The diplomatic courier also has a duty not to interfere in the internal affairs of the receiving and the transit State.

¹⁸⁹ It may be noted that the international law doctrine in the past was more inclined to conceive the respect of the laws of the receiving State as a moral duty or courtesy on the part of a diplomat (see Denza, *op. cit.*, pp. 263–264). At the same time there were some authors, who, while admitting that the privileges and immunities accorded to diplomatic agents exempt them from the laws and regulations of the receiving State, considered that they had the duty to respect the law and order in the receiving State. According to Vattel, for instance: “Cette indépendance du Ministre Etranger ne doit pas être convertie en licence: Elle ne, le dispense point de se conformer dans ses actes extérieurs, aux usages et aux lois du pays, dans tout ce qui est étranger à l’objet de son caractère: il est indépendant; mais il n’a pas droit de faire tout ce qu’il lui plaît.” (E. de Vattel, *Le droit des gens ou Principes de la loi naturelle* [1758], Book 4, chap. VII, para. 93, *The Classics of International Law* (Washington, D.C., Carnegie Institution of Washington, 1916), vol. II, p. 327).

¹⁹⁰ See, for example, article 12 of the Havana Convention regarding Diplomatic Officers (1928), which reads: “Foreign diplomatic officers may not participate in the domestic or foreign politics of the State in which they exercise their functions”. (See footnote 184 above.)

¹⁹¹ See art. 41, para. 3 of the 1961 Vienna Convention, art. 55, para. 2 of the 1963 Vienna Convention, art. 47, para. 2 of the 1969 Convention on Special Missions and art. 77, para. 3 of the 1975 Vienna Convention.

3. The temporary accommodation of the diplomatic courier must not be used in any manner incompatible with his functions as laid down in the present articles, by the relevant provisions of the Vienna Convention on Diplomatic Relations or by other rules of general international law or by any special agreements in force between the sending State and the receiving or the transit State.

3. PRINCIPLE OF NON-DISCRIMINATION AND RECIPROCITY

226. The principle of non-discrimination and reciprocity is one of the general principles underlying the four multilateral conventions in the field of diplomatic law concluded under the auspices of the United Nations. It stems from the fundamental principle of sovereign equality of States. The application of this principle with regard to diplomatic agents leads to the establishment of a viable and coherent regime governing diplomatic intercourse. The intrinsic cohesion between non-discrimination and reciprocity in the treatment of diplomatic agents, in general, and diplomatic couriers, in particular, contributes to the attainment of a sound ground for a viable legal framework of rules governing the régime of the courier and the bag. Although sometimes it is maintained that States usually attach greater importance to reciprocity than to non-discrimination,¹⁹² it cannot be denied that the best results with regard to the enhancement of such a régime are the integrity and effective balance between these two aspects of the general principle relating to the status of the diplomatic agents and the diplomatic couriers. Of course, the interplay between the treatment of non-discrimination and the treatment of reciprocity should always be considered in its realistic and dynamic perspective, taking into consideration the state of relationships between the sending State and the receiving or the transit State.

227. The principle of non-discrimination and reciprocity as embodied in article 47 of the 1961 Vienna Convention and in the relevant provisions of the other multilateral conventions¹⁹³ concluded under the auspices of the United Nations stipulates that in the application of the provisions of the Convention, States shall not discriminate as between different States. It is suggested that this basic rule should find its expression in the present draft articles relating to the status of the diplomatic courier and the diplomatic bag, as well as the other couriers and bags used by States for all official purposes in communicating with their missions abroad or with other States and international organizations.

228. While article 47, paragraph 1 and the other relevant provisions in three other multilateral conventions

lay down the general principle of non-discrimination based upon the sovereign equality of States, paragraph 2 of the same article, introduces some exceptions which shall not be regarded as discrimination. The first exception allows a restrictive application of the provisions of the conventions, based on reciprocity. This option reflects the inevitable impact of the state of relations between the sending and the receiving State. However, there should be some criteria or requirements for tolerable restrictions. This requirement was introduced for the first time in a treaty provision by the 1969 Convention on Special Missions. Article 49, paragraph 2(b) of that Convention established special provision of tolerable modifications, by stipulating that States may modify among themselves, by custom or agreement, the extent of facilities, privileges and immunities for their special missions, provided that such a modification is not incompatible with the object and purpose of the Convention and does not affect the enjoyment of the rights or the performance of the obligations of third States. In our submission, this safeguard provision is very pertinent for maintaining a certain international standard and stability regarding the scope of the facilities, privileges and immunities granted to the diplomatic missions and their personnel and the maximum restrictions which are permissible.

229. The second exception envisaged by article 47, paragraph 2(b) of the 1961 Vienna Convention refers to the case where, by custom or agreement, States may extend to each other more favourable treatment than is required by the provisions of the Convention. Such a more favourable regime established between the States concerned should not constitute a discrimination with respect to other States whose treatment is within the standard established by the Convention or on the basis of reciprocity. In this case again—this time in a positive sense—through the operation of reciprocity, States may establish more favourable treatment between themselves.

230. The Special Rapporteur is of the view that the provisions of the multilateral conventions in the field of diplomatic law concluded under the auspices of the United Nations that concern the principle of non-discrimination and reciprocity could be adapted to the régime of the diplomatic courier and the diplomatic bag, as well as to all other couriers and bags.

231. In the light of the observations and suggestions made on the principle of non-discrimination and reciprocity, the Special Rapporteur would like to submit to the Commission, for consideration and approval, the following draft article:

Article 6. Non-discrimination and reciprocity

1. In the application of the provisions of the present articles, no discrimination shall be made as between States with regard to the treatment of diplomatic couriers and diplomatic bags.

2. However, discrimination shall not be regarded as taking place:

(a) where the receiving State applies any of the provisions of the present draft articles restrictively because of a restrictive application of that provision to its

¹⁹² See in this sense Denza, *op. cit.*, p. 283.

¹⁹³ See art. 72 of the 1963 Vienna Convention, art. 49 of the 1969 Convention on Special Missions and art. 83 of the 1975 Vienna Convention. While the provisions of the 1961 Vienna Convention, the 1963 Vienna Convention and the 1969 Convention contain reference to both non-discrimination and reciprocity, article 83 of the 1975 Vienna Convention contains only one paragraph which reads: "In the application of the provisions of the present Convention no discrimination shall be made as between States."

diplomatic couriers and diplomatic bags in the sending State;

(b) where States modify among themselves, by custom or agreement, the extent of facilities, privileges and immunities for their diplomatic couriers and diplomatic bags, provided that it is not incompatible with the object and purpose of the present articles and does not affect the enjoyment of the rights or the performance of the obligations of third States.

Conclusion

232. With the submission of the draft articles on the three general principles underlying the four multilateral

conventions in the field of diplomatic law concluded under the auspices of the United Nations, the present report has completed the presentation of draft articles within part I, "General Provisions", relating to the scope of the present draft articles (arts. 1 and 2), the use of terms (art. 3) and general principles (arts. 4, 5 and 6).

233. In accordance with the plan of work suggested in the present report, and if approved by the Commission, the next reports should deal with part II of the draft articles: Status of the diplomatic courier, including the status of the diplomatic courier *ad hoc* and the captain of a ship or a commercial aircraft carrying a diplomatic bag; part III: Status of the diplomatic bag, including the diplomatic bag not accompanied by diplomatic courier; and part IV: Other provisions (Miscellaneous provisions).