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

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

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

[Agenda item 6]

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ABBREVIATIONS

ICAO International Civil Aviation Organization
ILO International Labour Organisation
WHO World Health Organization

NOTE

For the text of the treaties listed below, which are referred to in this document, see the following sources:

Convention on Special Missions (New York, 8 December 1969)	General Assembly resolution 2530 (XXIV), annex
Vienna Convention on Consular Relations (Vienna, 24 April 1963) (Hereinafter called "1963 Vienna Convention")	United Nations, <i>Treaty Series</i> , vol. 596, p. 261
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961) (Hereinafter called "1961 Vienna Convention")	<i>Ibid.</i> , vol. 500, p. 95
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (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 preliminary report is submitted to the Commission at its thirty-second session pursuant to the recommendation made by the General Assembly in paragraph 4(f) of its resolution 34/141 of 17 December 1979, adopted by consensus on the recommendation of the Sixth Committee. In that paragraph, the General Assembly recommended that the International Law Commission should:

Continue its work on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, taking into account the written comments of Governments and views expressed on the topic in debates in the General Assembly, with a view to the possible elaboration of an appropriate legal instrument.

2. The Special Rapporteur has deemed it necessary to include at the outset of this preliminary report a consolidated account of the history of the consideration of the topic by the Commission as well as of the relevant action taken by the General Assembly beginning at its twenty-ninth session, in 1974. The decisions and recommendations adopted since then by the Assembly, together with the Commission's own decisions following the results of the work undertaken by three successive Working Groups established on this topic on the basis of comments submitted in writing or made orally in the General Assembly by Governments of Member States, have laid down the foundations on which the Special Rapporteur and the Commission should endeavour to build, in progressively developing and codifying the law relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

3. After describing the various stages of the work accomplished thus far on the topic, this preliminary report presents, in summary fashion, some of the salient aspects of the further work to be undertaken thereon. Emphasis is placed, in particular, on the method and form of the work and on the scope, contents and structure of the draft articles to be elaborated by the Commission. This is done with a view to facilitating the discussion of the important issues on which the Special Rapporteur seeks the guidance of the Commission before proceeding to the submission of draft articles, so as to contribute more effectively to the timely fulfilment by the Commission of its mandate regarding the progressive development and codification on this particular aspect of diplomatic intercourse.

4. The present report being preliminary in character, the Special Rapporteur has not included a detailed review of the relevant sources of material on the topic as evidenced by State practice and legal doctrine. Those will be dealt with as appropriate, at a subsequent stage, in the commentaries to the draft articles that the Special Rapporteur intends to submit to the Commission in his next report on the topic. Nevertheless, the Special Rapporteur has felt that it might be

appropriate to indicate in this report what are the available source materials on the topic under consideration which could be used in his future work.

5. From a general review of sources it can already be pointed out that, as has emerged from the work carried out by the Working Groups and the study undertaken so far by the Special Rapporteur, most of the items are not covered by existing conventions nor have been the subject of specific legal regulations. This does not mean in any way that the topic is not ripe for codification and progressive development. The existing lacunae in the rules of international law with regard to the status of the diplomatic courier and the diplomatic bag provide reasonable justification for the timely need to elaborate specific rules on the topic. At the same time, the fact that in respect of those items existing international law has not yet been sufficiently developed in the practice of States calls for caution and flexibility in the work of progressive development and codification in this field.

6. Keeping the foregoing in mind, it has to be stressed that the general principles of international law underlying the future draft articles are well established. They are, in particular, freedom of communication for all official purposes, non-discrimination, and respect for the laws and regulations of the receiving State. On the basis of those principles, it might be useful at this stage of the work to identify some of the main issues in substance before proceeding to the elaboration of draft articles. To that effect, attention will be given to the degree of distinction among existing conventions and the extent of the analogy with existing rules in the field of diplomatic law, in order to determine clearly which are the newly emerging rules susceptible of being incorporated in an international legal instrument "which would constitute development concretization of the Vienna Convention on Diplomatic Relations of 1961", as requested by the General Assembly in resolution 31/76 of 13 December 1976.

II. Historical background of the consideration of the topic

7. The Commission started its consideration of the topic concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier at its twenty-ninth session (1977), pursuant to General Assembly resolution 31/76 of 13 December 1976. The Assembly, having considered at its thirty-first session (1976) the item "Implementation by States of the provisions of the Vienna Convention on Diplomatic Relations of 1961", adopted, on the recommendation of its Sixth Committee,¹ resolution 31/76 on ways and means to ensure the implementation of that convention. That resolution recognized in its preamble "the advisability of studying the question of the status of the diplomatic courier and the

¹ *Official Records of the General Assembly, Thirty-first Session, Annexes, agenda item 112, document A/31/403, para. 4.*

diplomatic bag not accompanied by diplomatic courier” and provided, in paragraphs 3 to 6, the following:

Invites Member States to submit or to supplement their comments and observations on ways and means to ensure the implementation of the provisions of the Vienna Convention on Diplomatic Relations of 1961 and on the desirability of elaborating provisions concerning the status of the diplomatic courier in accordance with paragraph 4 of the General Assembly resolution 3501 (XXX), with due regard also to the question of the status of the diplomatic bag not accompanied by diplomatic courier;

Requests the International Law Commission at the appropriate time to study, in the light of the information contained in the report of the Secretary-General on the implementation by States of the provisions of the Vienna Convention on Diplomatic Relations of 1961 and other information on this question to be received from Member States through the Secretary-General, the proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, which would constitute development and concretization of the Vienna Convention on Diplomatic Relations of 1961;

Requests the Secretary-General to submit to the General Assembly at its thirty-third session an analytical report on ways and means to ensure the implementation of the Vienna Convention on Diplomatic Relations of 1961 on the basis of comments and observations on this question received from Member States and also taking into account the results, if available and ready, of the study by the International Law Commission of the proposals on the elaboration of the above-mentioned protocol;

Decides to include in the provisional agenda of its thirty-third session the item entitled “Implementation by States of the provisions of the Vienna Convention on Diplomatic Relations of 1961: report of the Secretary-General”;

8. The consideration by the General Assembly of the question of the implementation by States of the provisions of the 1961 Vienna Convention originated in a letter dated 11 November 1974 from the Permanent Representative of the Union of Soviet Socialist Republics addressed to the Secretary-General, whereby the Government of the USSR requested the inclusion on the agenda of the twenty-ninth session of the Assembly of an item entitled “Implementation by States of the provisions of the Vienna Convention on Diplomatic Relations of 1961 and measures to increase the number of parties to the Convention”. The item was included in the agenda of that session of the General Assembly and allocated to the Sixth Committee, but its consideration was postponed to the thirtieth session of the Assembly because of the lack of time.²

9. In 1975, the General Assembly included the item in the agenda of its thirtieth session and allocated it again to the Sixth Committee. The Sixth Committee considered the item and adopted a draft resolution which was approved by the Assembly on 15 December 1975 as resolution 3501 (XXX). By paragraph 4 of

that resolution, the General Assembly invited Member States;

to submit to the Secretary-General their comments and observations on ways and means to ensure the implementation of the provisions of the Vienna Convention of 1961 as well as on the desirability of elaborating provisions concerning the status of the diplomatic courier.

Furthermore, by paragraph 5 of the same resolution the Secretary-General was requested to submit a report to the General Assembly at its thirty-first session containing the comments and observations received from Member States.³

10. Pursuant to the request contained in paragraph 4 of General Assembly resolution 31/76,⁴ the Commission inscribed on the agenda of its twenty-ninth session, in 1977, an item entitled “Proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier”, and established a Working Group chaired by Mr. Abdullah El-Erian in order to ascertain the more suitable ways and means of dealing with the topic. The Working Group reached a series of conclusions, which the Commission subsequently approved.⁵ In those conclusions, the Working Group recommended, *inter alia*, that the Commission should undertake the study of the topic during its 1978 session in order to allow the Secretary-General to take into account the results of such a study in the report he had been requested to submit to the General Assembly at its thirty-third session, and that such study should be done without curtailing the time allocated to the consideration of the topics to which priority had been given.

11. At its thirtieth session (1978), the Commission again established a Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, composed of the same members as at the twenty-ninth session and chaired also by Mr. El-Erian. The Working Group had before it three working papers,⁶ on the basis of which, together with other relevant material, it studied the proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The Working Group adopted as its basic position that there had been considerable developments in various aspects of the question in recent years, as reflected in the three multilateral conventions adopted subsequent to the 1961 Vienna Convention—namely, the 1963 Vienna

³ The report was distributed under the symbol A/31/145 and Add.1.

⁴ See para. 7 above.

⁵ *Yearbook . . . 1977*, vol. II (Part Two), p. 125, document A/32/10, paras. 83–84.

⁶ The first contained, in an annex, the comments received from Member States since 1977 on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. For a description of the contents of the working papers, see *Yearbook . . . 1978*, vol. II (Part Two), p. 138, document A/33/10, para. 141.

² *Ibid.*, *Twenty-ninth Session, Annexes*, agenda item 112, document A/9951.

Convention, the Convention on Special Missions and the 1975 Vienna Convention—and that therefore the relevant provisions of those “existing conventions”, if any, should form the bases for any further study of the question. The Working Group established a first list tentatively identifying a number of issues, and examined each of them in order to ascertain whether any of the four conventions adequately covered the issue concerned and what further elements could be considered as appropriately falling within each of those issues. The Working Group submitted a report to the Commission, including the tentative list of issues.⁷ The Commission approved the result of the study undertaken by the Working Group and submitted it to the General Assembly at its thirty-third session, in 1978.⁸ The Commission brought the relevant paragraphs of its report to the attention of the Secretary-General, so that they might be taken into account in the analytical report which he had been requested to prepare by the General Assembly in paragraph 5 of resolution 31/76.⁹

12. The General Assembly, at its thirty-third session, discussed the results of the Commission’s work under two separate agenda items: “Implementation by States of the provisions of the Vienna Convention on Diplomatic Relations of 1961: Report of the Secretary-General”¹⁰ (item 116), and “Report of the International Law Commission on the work of its thirtieth session”, (item 114), both of which were allocated to the Sixth Committee. On the recommendation of that Committee, the Assembly adopted resolutions 33/139 and 33/140 of 19 December 1978, concerning respectively items 114 and 116. By paragraph 5 of section I of resolution 33/139, the Assembly recommended that the Commission should continue the study, including those issues it had already identified, concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, in the light of comments made during the debate on the item in the Sixth Committee at the thirty-third session of the General Assembly and comments to be submitted by Member States, with a view to the possible elaboration of an appropriate legal instrument. It also invited all States to submit written comments on the preliminary study carried out by the Commission on the topic for their inclusion in the report of the Commission on the work of its thirty-first session. The Assembly also, in paragraph 3 of resolution 33/140, noted the invitation to Member States in its resolution 33/139 and observed that, in replying to such a request, States might also include comments and observations on the implementation of the provisions of the Vienna Convention on Diplomatic Relations to be submitted to the Assembly at a future session.

⁷ See para. 47 below.

⁸ See *Yearbook ... 1978*, vol. II (Part Two), pp. 138–139, document A/33/10, paras. 136–144.

⁹ See para. 7 above.

¹⁰ A/33/24.

13. In a preambular paragraph to resolution 33/140, the General Assembly noted

with appreciation the study by the International Law Commission of the proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, which could constitute a further development of international diplomatic law, and, in paragraph 5, decided:

that the General Assembly will give further consideration to this question and expresses the view that, unless Member States indicate the desirability of an earlier consideration, it would be appropriate to do so when the International Law Commission submits to the Assembly the results of its work on the possible elaboration of an appropriate legal instrument on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

14. At its thirty-first session (1979), the Commission again established a Working Group on the topic, which was chaired by the present Special Rapporteur. The Working Group had before it comments submitted by States pursuant to paragraph 5 of section I of General Assembly resolution 33/139 and paragraph 3 of resolution 33/140¹¹ and a working paper prepared by the Secretariat containing an analytical summary of the general views of Governments on the elaboration of a protocol on the topic and comments and observations of Governments, as well as the Commission’s own observations, on specific issues relating to “possible elements of a protocol.”¹²

On the basis of those documents and other relevant material, the Working Group studied issues concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and reported to the Commission the results of its work. That report included, *inter alia*, summaries of comments and proposals on specific issues made by Governments since 1976, grouped together with the Commission’s own observations under each of the headings of the Commission tentatively identified in 1978. It also reproduced certain additional issues which the Working Group examined at the 1979 session of the Commission and considered it necessary to be studied.¹³ The results of the Working Group’s study of the topic were included in the Commission’s report to the General Assembly at its thirty-fourth session.¹⁴ The Commission indicated that a brief review of those results proved that there were many issues on which no provision was contained in the four existing conventions and several issues on which, although there are some relevant provisions in the existing conventions, because of the general nature of such

¹¹ A/CN.4/321 and Add.1–5. Comments received subsequently were reproduced in documents A/CN.4/321/Add.6 and 7. Document A/CN.4/321 and Add.1–7 is reproduced in *Yearbook ... 1979*, vol. II (Part One), p. 213.

¹² *Yearbook ... 1979*, vol. II (Part Two), p. 170, document A/34/10, footnote 789, and *ibid.*, pp. 171 *et seq.* document A/34/10, chap. VI, sects. B and C.

¹³ See para. 47 below.

¹⁴ *Yearbook ... 1979*, vol. II (Part Two), pp. 171 *et seq.*, document A/34/10, chap. VI, sects. B–D.

provisions further elaboration was desirable. In the light of these considerations, the Commission reached the following conclusions regarding the future work to be undertaken on the subject:

(1) The Secretariat should continue with the preparation of a comprehensive follow-up report, on the pattern of the latest working paper,¹⁵ analysing the written comments which may be forthcoming as well as the views which may be expressed by Governments during the thirty-fourth session of the General Assembly.

(2) The Commission should appoint a Special Rapporteur on the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, who will be entrusted with the preparation of a set of draft articles for an appropriate legal instrument.¹⁶

15. At its 1580th meeting, held on 31 July 1979, the Commission appointed the present Special Rapporteur for the topic and entrusted him with the preparation of a set of draft articles for an appropriate legal instrument.¹⁷

16. At the thirty-fourth session of the General Assembly (1979), representatives commented on the work carried out by the Commission on the topic in the course of the consideration of the Commission's report in the Sixth Committee.¹⁸ The governmental views expressed have been analysed in a systematic manner in the "Topical summary, prepared by the Secretariat, of the discussion on the report of the International Law Commission, held in the Sixth Committee during the thirty-fourth session of the General Assembly"¹⁹ and have been included, as appropriate, in the working paper²⁰ prepared likewise by the Secretariat pursuant to the decision of the Commission quoted above.²¹ On the recommendation of the Sixth Committee, the General Assembly adopted resolution 34/141 of 17 December 1979, paragraph 4(f) of which has been quoted above.²²

III. Sources of international law on the topic under consideration

17. The process of codification of existing rules of international law on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and the search for the evolving more specific rules on the matter must be based on an evaluation of the relevant practice of States as evidenced in treaty provisions (whether multilateral or bilateral), national laws and regulations, diplomatic

correspondence and official communications or statements, and national judicial decisions. Attention must also be paid to the legal doctrine available on this topic, in particular the writings of publicists and private codification drafts.

18. Although the detailed examination of the relevant materials will be made in the commentaries to the draft articles that the Special Rapporteur proposes to submit in the future, it seems advisable, at the present stage, to identify the different sources and their possible utilization in the further work to be accomplished. Such a description of sources may also give an opportunity for supplementary suggestions that would widen the scope of the research undertaken.

19. An initial general survey of relevant sources shows that the concretization of the basic principles of international law which underlie the efforts at progressively developing and codifying the status of the diplomatic courier and the unaccompanied diplomatic bag are mainly conventional in character. The fundamental principle of the freedom of communication for all official purposes, central to any such effort, has been explicitly recognized in all four existing codification conventions relevant to the topic,²³ although other forms of State practice, as well as legal literature, have also contributed to its crystallization. However, when it comes to the further development and concretization of the basic provisions contained in the existing conventions as regards the status of the diplomatic courier and unaccompanied diplomatic bag, there is a scarcity of international law sources—particularly in international judicial practice. This may be explained by the very delicate nature of the questions concerned and their peculiar character in terms of the confidentiality involved as well as other practical considerations.

20. Be that as it may, the Commission's work on the topic must take account, first and foremost, of State practice as reflected in treaty provisions. These are found, in particular, in: (a) codification conventions concluded under the auspices of the United Nations; (b) multilateral treaties other than United Nations codification conventions; (c) bilateral treaties concluded between States on both diplomatic and consular relations; and (d) bilateral treaties concluded between a State and an international organization.

21. The codification conventions concluded under the auspices of the United Nations relevant to the present topic are the three conventions adopted at Vienna in 1961, 1963 and 1975, as well as the 1969 Convention on Special Missions.²⁴ In particular, the provisions that embody the principle of the freedom of communication for all official purposes in those conventions are as follows: article 27 of the 1961 Vienna Convention, article 35 of the 1963 Vienna Convention, article 28 of the Convention on Special

¹⁵ *Ibid.*, p. 170, document A/34/10, footnote 789.

¹⁶ *Ibid.*, p. 184, document A/34/10, para. 164.

¹⁷ *Ibid.*, pp. 184, 189, paras. 165, 197 and 204.

¹⁸ See *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 38th and 40th to 51st meetings; and *ibid.*, *Sessional fascicle*, corrigendum.

¹⁹ See A/CN.4/L.311, chap. II, sect. F.

²⁰ A/CN.4/WP.5.

²¹ See para. 14.

²² See para. 1.

²³ See para. 11 above.

²⁴ *Idem.*

Missions, and articles 25 and 57 of the 1975 Vienna Convention. Reference must also be made to article 72 of the latter Convention, which extends to observer delegations the application of article 57 of that instrument. Furthermore, the four conventions contain the following provisions regarding transit through the territory of a third State: 1961 Convention, art. 40; 1963 Convention, art. 54; 1969 Convention, art. 42; 1975 Convention, art. 81. The texts of those articles having already been reproduced in several Commission documents relating to the present topic, the Special Rapporteur does not deem it necessary to do so again in the present preliminary report.

22. Reference should also be made in this connection to article 58 of the 1963 Vienna Convention, containing general provisions relating to facilities, privileges and immunities of honorary consular officers and consular posts headed by such officers, which extends to such officers and posts the application of article 35 and article 54, paragraph 3 of the Convention. In addition, article 58, paragraph 4, provides specifically as follows:

“The exchange of consular bags between two consular posts headed by honorary consular officers in different States shall not be allowed without the consent of the two receiving States concerned.”

23. With regard to multilateral treaties other than United Nations codification conventions, attention is drawn, in particular, to the Convention on the Privileges and Immunities of the United Nations²⁵ and the Convention on the Privileges and Immunities of the Specialized Agencies,²⁶ adopted by the General Assembly in 1946 and 1947 respectively. Article III of the 1946 convention and article IV of the 1947 convention provide for facilities in respect of communications, article IV of the 1946 convention (sect. 11) and article V of the 1947 convention (sect. 13) recognize for representatives of Member States “the right to use codes and to receive papers or correspondence by courier or in sealed bags”.

24. Reference should also be made to the Convention regarding Diplomatic Officers adopted by the Sixth International American Conference at Havana in 1928,²⁷ articles 14 and 15 of which provide as follows:

Article 14

Diplomatic officers shall be inviolable as to their persons, their residence, private or official, and their property. This inviolability covers:

...

d. The papers, archives and correspondence of the mission.

Article 15

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.

²⁵ United Nations, *Treaty Series*, vol. 1, p. 15.

²⁶ *Ibid.*, vol. 33, p. 261.

²⁷ League of Nations, *Treaty Series*, vol. CLV, p. 259.

25. Without attempting to be exhaustive, other multilateral treaties likewise recognize the principle of freedom of communication, for instance, the General Agreement on Privileges and Immunities of the Council of Europe, signed at Paris on 2 September 1949,²⁸ the Agreement on the Status of the North Atlantic Treaty Organization, national representatives and international staff, signed at Ottawa on 20 September 1951,²⁹ the Convention concerning the juridical personality, privileges and immunities of the Council for Mutual Economic Assistance, signed at Sofia on 14 December 1959,³⁰ the Convention on the privileges and immunities of the Organization of African Unity, signed at Accra on 25 October 1965,³¹ and other similar international instruments. The above-mentioned treaties reproduce, *mutatis mutandis*, the provision of the conventions on the privileges and immunities of the United Nations and of the specialized agencies mentioned above.³²

26. As far as bilateral treaties concluded between States on *diplomatic relations* are concerned, the practice of States is evidenced mainly through exchanges of notes constituting agreements, mainly of an administrative nature, for instance, “for the exchange of official correspondence by air mail” (Brazil and Venezuela, 1946),³³ “the transmission by post of diplomatic correspondence” (the United Kingdom and Norway, 1946 and 1947),³⁴ “the exchange of diplomatic correspondence by air mail in special diplomatic bags” (Ecuador and Brazil, 1946 and 1947),³⁵ “the exchange of official mail in diplomatic pouches” (Brazil and Argentina, 1961),³⁶ “the exchange through postal channels without prepayment of postage of diplomatic bags containing non-confidential correspondence” (United Kingdom and Netherlands, 1951;³⁷ United Kingdom and Dominican Republic, 1956),³⁸ etc. It will be observed that most of the agreements referred to were concluded prior to the adoption of the 1961 Vienna Convention on Diplomatic Relations.

27. Bilateral treaties concluded between States on *consular relations* provide the best evidence of State practice as regards consular couriers and bags. The status of these couriers and bags, in particular their inviolability and protection, is recognized mainly in

²⁸ United Nations, *Treaty Series*, vol. 250, p. 12.

²⁹ *Ibid.*, vol. 200, p. 3.

³⁰ *Ibid.*, vol. 368, p. 237.

³¹ L. B. Sohn, ed., *Basic Documents of African Regional Organizations* (Dobbs Ferry, N.Y., Oceana Publications, 1971), vol. I, p. 117.

³² See para. 23 above.

³³ United Nations, *Treaty Series*, vol. 65, pp. 112, 114.

³⁴ *Ibid.*, vol. 11, pp. 187–190.

³⁵ *Ibid.*, vol. 72, pp. 30, 32.

³⁶ *Ibid.*, vol. 657, p. 117.

³⁷ *Ibid.*, vol. 123, p. 177.

³⁸ *Ibid.*, vol. 252, p. 121.

consular conventions, which normally include an affirmation of the basic principle of the freedom of communication. Examples of such conventions concluded prior to the adoption of the 1963 Vienna Convention on Consular Relations are those between the United States of America and Costa Rica (1948),³⁹ the United States of America and Ireland (1950),⁴⁰ the United Kingdom and France (1951),⁴¹ Sweden and France (1955),⁴² the Union of Soviet Socialist Republics and the German Democratic Republic (1957),⁴³ etc. Examples of bilateral consular conventions concluded after the adoption of the 1963 Convention are numerous. Most of them take the relevant articles of that Convention on freedom of communication as model provisions.

28. The bilateral treaties concluded between States and international organizations relevant to the study of the present topic are basically Headquarters Agreements. Examples are those concluded between Switzerland and the Secretary-General of the United Nations (1946),⁴⁴ the ILO (1946),⁴⁵ and the WHO (1948 and 1949),⁴⁶ and the agreement between Canada and the ICAO (1951).⁴⁷ All of these treaties recognize to the organizations concerned the right to use couriers and bags which shall have the same immunities and privileges as diplomatic couriers and bags.

29. State practice that may be relevant to the codification and progressive development of the rules of international law concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier is also evidenced by national laws and regulations. A number of those texts, mainly administrative in character, have been compiled in a volume of the United Nations Legislative Series.⁴⁸ A similar compilation, regarding national legislation of

the countries of the American continent, can be found in a publication of the Pan American Union.⁴⁹

30. Evidence of State practice of interest to the study of the present topic is also found in diplomatic correspondence and official communications or statements. Reference to these sources will be made, as appropriate, in the context of the individual draft articles to be submitted by the Special Rapporteur. Attention may, nevertheless, be drawn at this stage to the reservations made by certain States (Bahrain, Kuwait and Libyan Arab Jamahiriya) to paragraphs 3 and 4 of article 27 of the 1961 Vienna Convention, as regards the opening of the diplomatic bag, and to the objections to those reservations made by Belgium, Bulgaria, Canada, Czechoslovakia, France, the Federal Republic of Germany, Haiti, Hungary, Mongolia, Poland, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics, the United Kingdom and the United States of America.⁵⁰

31. The writings of publicists represent another source and provide valuable information and analytical doctrinal material relevant to the progressive development and codification of the present topic. Most writers have dealt in general with the principle of free communication of diplomatic missions. Without attempting to present an exhaustive bibliography, an indicative list of authors may include Fauchille,⁵¹ de Erice y O'Shea,⁵² Oppenheim,⁵³ Lion Depetre,⁵⁴ Lyons,⁵⁵ Colliard,⁵⁶ Valencia-Rodríguez,⁵⁷ Maresca,⁵⁸

⁴⁹ *Documents and Notes on Privileges and Immunities with Special Reference to the Organization of American States* (Washington, D.C., Pan American Union, 1968). See for example pp. 231, 234 and 235 (Argentina; Decree No. 4891 of 21 June 1961, modified by Decree No., 3408 of 12 April 1966); pp. 264 270-271 (Colombia: Decree No. 3135 of 20 December 1956); p. 292 (Ecuador: Supreme Decree No. 1422 of 31 December 1963); p. 338 (Paraguay: Decree-Law No. 160 of 26 February 1958); pp. 385-386 (United States of America: Code of Federal Regulations, Title 19).

⁵⁰ *Multilateral treaties in respect of which the Secretary-General performs depositary functions: List of Signatures, Ratifications, Accessions, etc., as at 31 December 1978* (United Nations publications, Sales No. E.79.V.7), pp. 55-62.

⁵¹ P. Fauchille, *Traité de droit international public*, 8th ed. of *Manuel de droit international public* by H. Bonfils (Paris, Rousseau, 1926), vol. I, part 3, p. 66.

⁵² J.S. de Erice y O'Shea, *Normas de diplomacia y de derecho diplomático* (Madrid, Instituto de Estudios Políticos, 1945), vol. I, pp. 532-533.

⁵³ L. Oppenheim, *International Law: A Treatise*, 8th ed. rev. by H. Lauterpacht (London, Longmans, Green, 1955), vo. I, p. 788.

⁵⁴ J. Lion Depetre, *Derecho diplomático*, 2nd ed., rev. and enl. (Mexico City, Porrúa, 1974), pp. 289-290.

⁵⁵ A. B. Lyons, "Personal immunities of diplomatic agents", *The British Year Book of International Law, 1954* (London), vol. 31, pp. 334, 336, 337 and 340.

⁵⁶ C. A. Colliard, "La Convention de Vienne sur les relations diplomatiques", *Annuaire français de droit international, 1961* (Paris), vol. VII, p. 22.

⁵⁷ L. Valencia Rodríguez, "Curso de derecho y prácticas diplomáticas", *Anuario ecuatoriano de derecho internacional, 1964-1965* (Quito), vol. 1, p. 69.

⁵⁸ A. Maresca, *La missione diplomatica*, 2nd ed., enl. (Milan, Giuffrè, 1967), pp. 218-220.

³⁹ *Ibid.*, vol. 70, p. 27.

⁴⁰ *Ibid.*, vol. 222, p. 107.

⁴¹ *Ibid.*, vol. 330, p. 145.

⁴² *Ibid.*, vol. 427, p. 133.

⁴³ *Ibid.*, vol. 285, p. 135.

⁴⁴ *Ibid.*, vol. 1, p. 163.

⁴⁵ *Ibid.*, vol. 15, p. 377.

⁴⁶ *Ibid.*, vol. 26, p. 331.

⁴⁷ *Ibid.*, vol. 96, p. 155.

⁴⁸ *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* (United Nations publication, Sales No. 58.V.3). See for example p. 7 (Argentina: decree No. 3437 of 22 November 1955); p. 20 (Austria: Federal Act of 15 June 1955); pp. 29-30 and pp. 45-46 (Belgium: Memorandum and Instruction concerning diplomatic immunity, 1955); p. 67 (Colombia: Decree No. 1311 of 20 April 1950); pp. 118 and 119 (Finland: Customs Act No. 271 of 8 September 1939); p. 237 (Philippines: Foreign Service Regulations dealing with the Immunities, Powers and Privileges of Diplomatic and Consular Representatives); p. 302 (Sweden: Circular of the Director General of Customs of 24 May 1918); p. 307 and pp. 323-324 (Switzerland: Rules applied by the Federal Political Department and Decision of the Executive Council of the Canton of Berne, of 24 August 1955); p. 338 and pp. 345-347 (USSR: Order of 14 January 1927 and Regulations of 26 April 1954).

Hardy,⁵⁹ Denza,⁶⁰ Levin,⁶¹ Blishchenko,⁶² Durdenevski,⁶³ Romanov,⁶⁴ Kovalev,⁶⁵ Makowski,⁶⁶ Ilin,⁶⁷ Libera,⁶⁸ Hofmann,⁶⁹ Azud,⁷⁰ Ustor,⁷¹ Zorin,⁷² Myslil,⁷³ and Graefrath.⁷⁴ More specifically on the diplomatic courier and its status, reference may be made to de Martens,⁷⁵ Hall,⁷⁶ Calvo,⁷⁷ Hurst,⁷⁸ Genet,⁷⁹ Oppenheim,⁸⁰ Lyons,⁸¹ Satow,⁸² Cahier,⁸³

Valencia Rodríguez,⁸⁴ Sen,⁸⁵ Hardy,⁸⁶ and Denza;⁸⁷ and on the diplomatic bag and its status, to Bluntschli,⁸⁸ de Garden,⁸⁹ Perrenoud,⁹⁰ Satow,⁹¹ Reynaud,⁹² Kerley,⁹³ Valencia Rodríguez,⁹⁴ Colliard,⁹⁵ Cahier,⁹⁶ Sen,⁹⁷ Denza⁹⁸ and Salmon.⁹⁹ With regard to the principle of free communication in the context of special missions and the status of the courier and the bag of the special mission, reference can be made to the work of Maresca¹⁰⁰ and Blishchenko.¹⁰¹

32. With respect to the principle of freedom of communication in consular relations and the status of the consular courier and bag, reference may be made to Hyde,¹⁰² Sen,¹⁰³ Torres-Bernárdez,¹⁰⁴ Lee,¹⁰⁵ Ilin,¹⁰⁶ Libera,¹⁰⁷ Hofmann,¹⁰⁸ Graefrath¹⁰⁹ and Fedorov.¹¹⁰ A

⁵⁹ M. Hardy, *Modern Diplomatic Law* (Manchester, Manchester University Press, 1968), pp. 36, 37 and 40.

⁶⁰ E. Denza, *Diplomatic Law—Commentary on the Vienna Convention on Diplomatic Relations* (Dobbs Ferry, N.Y., Oceana Publications, 1976), pp. 124–125.

⁶¹ D. B. Levin, *Diplomatsia, ee sushchnost, metody i formy* (Moscow, Izdatel sotsialno-ekonomicheskoi literatury, 1962).

⁶² I. P. Blishchenko, *Diplomaticheskoe pravo* (Moscow, Vyshaia shkola, 1972).

⁶³ I. P. Blishchenko and V. N. Durdenevskii, *Diplomaticheskoe i konsulskoe pravo* (Moscow, Instituta mezhdunarodnykh otnoshenii, 1962).

⁶⁴ V. A. Romanov, "Venskaia konventia o diplomaticheskikh snosheniakh i osnovnye voprosy kodifikatsii mezhdunarodnogo prava v oblasti diplomaticheskikh privilegii i immunitetov", *Sovetskii ezhegodnik mezhdunarodnogo prava 1961* (Moscow), p. 65.

⁶⁵ A. Kovalev, *Azbuka diplomatsii* (Moscow), mezhdunarodnye otnoshenia, 1968.

⁶⁶ J. Makowski, *Prawo dyplomatyczne i organizacja sluzby zagranicznej* (Warsaw, Panstwowe wydawnictwa naukowe, 1952).

⁶⁷ Y. D. Ilin, *Osnovnye tendentsii v razvitiu konsul'skogo prava*, (Moscow, Yuridicheskaya literatura, 1969).

⁶⁸ K. Libera, *Zasady miedzynarodowego prawa konsularnego* (Warsaw, Panstwowe wydawnictwo naukowe, 1960).

⁶⁹ K. Hofmann, "Die rechtliche Regelung der konsularischen Beziehungen der DDR", *Völkerrecht-Lehrbuch* (Berlin, Staatsverlag, 1973), part I, p. 442.

⁷⁰ J. Azud, *Diplomatické imunity a výsady* (Bratislava, Vydavateľ'stvo Slovenskej Akadémie Vied, 1959).

⁷¹ E. Ustor, *A diplomáciai kapcsolatok joga* (Budapest, Közgazdasági és Jogi Könyvtudó, 1965).

⁷² V. A. Zorin, *Osnovy diplomaticheskoi sluzhby*, (Moscow, Mezhdunarodnye otnoshenia, 1964).

⁷³ S. Myslil, *Diplomatické styky a imunity* (Prague, Československá Akademie Věd, 1964).

⁷⁴ B. Graefrath, "Zur Neugestaltung des Konsularrechts", *Staat und Recht* (Berlin), 7th year, No. 1 (January 1958), p. 12.

⁷⁵ C. de Martens, *Le guide diplomatique—Précis des droits et des fonctions*, 5th ed. (Leipzig, Brockhaus, 1866), vol. 1, p. 80.

⁷⁶ W. E. Hall, *A Treatise on International Law*, 4th ed. (Oxford, Clarendon Press, 1895), p. 330.

⁷⁷ C. Calvo, *Le droit international théorique et pratique*, 6th ed., rev. and completed (Paris, Guillaumin, 1888), vol. III, pp. 329 et seq.

⁷⁸ C. Hurst, "Les immunités diplomatiques", *Recueil des cours de l'Académie de droit international de La Haye, 1926-II* (Paris, Hachette, 1927), vol. 12, pp. 153–154.

⁷⁹ R. Genet, *Traité de diplomatie et de droit diplomatique* (Paris, Pedone, 1931), vol. I, p. 509, 512–513.

⁸⁰ Oppenheim, *op. cit.*, pp. 810–813.

⁸¹ Lyons, *loc. cit.*, pp. 334–335.

⁸² E. Satow, *A Guide to Diplomatic Practice*, 4th ed., rev. by N. Bland (London, Longmans, 1957), p. 180.

⁸³ P. Cahier, *Le droit diplomatique contemporain* (Geneva, Droz, 1962), pp. 225–226.

⁸⁴ Valencia Rodríguez, *loc. cit.*, p. 69.

⁸⁵ B. Sen, *A Diplomat's Handbook of International Law and Practice* (The Hague, Nijhoff, 1965), pp. 104, 180 and 181.

⁸⁶ Hardy, *op. cit.*, pp. 39 and 40.

⁸⁷ Denza, *op. cit.*, pp. 119, 129 and 130.

⁸⁸ J. C. Bluntschli, *Le droit international codifié*, 4th ed. rev. and enl., trans. (from German) by C. Lardy (Paris, Guillaumin, 1886), p. 146.

⁸⁹ G. de Garden, *Traité complet de diplomatie, ou théorie générale des relations extérieures des puissances de l'Europe* (Paris, de Treuttel et Würtz, 1833), vol. II, p. 22.

⁹⁰ G. Perrenoud, *Régime des privilèges et immunités des missions diplomatiques étrangères et des organisations internationales en Suisse* [thesis]. (Lausanne, Librairie de l'Université, F. Rouge, 1949), p. 46.

⁹¹ Satow, *op. cit.*, p. 176.

⁹² H. J. Reynaud, "Les relations et immunités diplomatiques", *Revue de droit international, de sciences diplomatiques et politiques* (Geneva), vol. 36, No. 4 (October–December 1958), pp. 426–427.

⁹³ 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.

⁹⁴ Valencia Rodríguez, *loc. cit.*, p. 69.

⁹⁵ Colliard, *loc. cit.*, pp. 24–25.

⁹⁶ Cahier, *op. cit.*, pp. 213–214.

⁹⁷ Sen, *op. cit.*, p. 257.

⁹⁸ Denza, *op. cit.*, pp. 119, 125–127 and 129.

⁹⁹ J. J. A. Salmon, *Fonctions diplomatiques, consulaires et internationales*, 3rd ed. (Brussels, Presses universitaires de Bruxelles), vol. I, 1976–77, p. 138.

¹⁰⁰ A. Maresca, *Le missioni speciali* (Milan, Giuffrè, 1975), pp. 351–353 and 355–361.

¹⁰¹ Blishchenko, *op. cit.*, pp. 59–137.

¹⁰² C. C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, 2nd ed., rev. (Boston, Little, Brown, 1947) [repr. 1951], vol. 2, pp. 1330 and 1331.

¹⁰³ Sen, *op. cit.*, p. 256.

¹⁰⁴ S. Torres Bernárdez, "La Conférence des Nations Unies sur les relations consulaires", *Annuaire français de droit international, 1963* (Paris), p. 98.

¹⁰⁵ L. T. Lee, *Vienna Convention on Consular Relations* (Leyden, Sijthoff, 1966), pp. 99–102.

¹⁰⁶ Ilin, *op. cit.*

¹⁰⁷ Libera, *op. cit.*

¹⁰⁸ Hofmann, *op. cit.*

¹⁰⁹ Graefrath, *loc. cit.*

¹¹⁰ L. Fedorov, *Diplomat i konsul* (Moscow, Mezhdunarodnye otnoshenia, 1965).

number of authors have also dealt with the obligations of third States as regards couriers and bags. Among them mention may be made of Wheaton,¹¹¹ Hurst,¹¹² Lyons,¹¹³ Oppenheim,¹¹⁴ Cahier,¹¹⁵ Sen,¹¹⁶ Lee,¹¹⁷ Hardy¹¹⁸ and Denza.¹¹⁹ Finally, writings on the effects of war and other emergencies includes those of de Vattel,¹²⁰ Wheaton,¹²¹ Calvo,¹²² de Erice y O'Shea,¹²³ Lion Depetre,¹²⁴ Lyons,¹²⁵ Lee,¹²⁶ Valencia Rodriguez,¹²⁷ Sen¹²⁸ and Denza.¹²⁹

33. To complete this short survey of sources, mention may be made of private codification drafts, whether prepared by individual jurists or learned societies. They include, among those prepared by individual jurists, Bluntschli's draft code of 1868 (arts. 197, 198 and 199); Field's draft code of 1876 (sect. IV); Fiore's draft code of 1890 (arts. 366, 453, 456, 463 and 464); Pessôa's draft code of 1911 (arts. 125 and 126); Phillimore's draft code of 1926 (art. 20) and Strupp's draft code of 1926 (arts. X and XIII).¹³⁰ As to codification drafts prepared by learned societies, reference may be made to the resolution of the Institute of International Law of 1895 (arts. 2 and 4); draft No. 22, entitled "Diplomatic Agents", prepared in 1925 by the American Institute of International Law (arts. 20 and 21); the draft code adopted in 1926 by the Japanese Branch of the International Law Association and the Kokusaiho Gakkwai (art. 1, sect. VI); draft No. VII of 1927, entitled "Diplomatic agents", of the International Commission of American Jurists (arts. 19 and 20); the resolution of 1929 of the Institute of International Law (art. 8) and the Harvard Law

School draft of 1932 on Diplomatic Privileges and Immunities (art. 14).¹³¹

34. To conclude this section of the present preliminary report, attention may also be drawn to the *travaux préparatoires* of the relevant provisions of the four United Nations codification Conventions, which contain very valuable material on the topic under consideration. The documents and proceedings of the United Nations Committee on Relations with the Host Country could also provide useful information on some cases relevant to the status of the diplomatic bag.

IV. Form of the work

35. As in the case of many of the topics of international law dealt with by the Commission (e.g. law of the sea,¹³² consular relations,¹³³ law of treaties,¹³⁴ special missions,¹³⁵ representation of States in their relations with international organizations,¹³⁶ succession of States in respect of treaties¹³⁷ and most-favoured-nation clause¹³⁸), the distinction embodied in article 15 of the Commission's Statute between the method applicable to "progressive development" and the method applicable to "codification" need not be strictly maintained as regards the Commission's work on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. This has been expressly acknowledged by the Commission at its thirty-first session when it entrusted the Special Rapporteur with the task of preparing a set of draft articles for an appropriate legal instrument.¹³⁹ The preparation of draft articles incorporating and combining elements of both *lex lata* and *lex ferenda* in such a manner as to make them susceptible of serving as a basis for the elaboration and adoption of an international instrument is the reflection of the consolidated procedure that has evolved in the practice of the Commission, based on the provisions of the Statute, and has proved to be the most adequate and effective method and form of identifying and embodying the rules of international law relating to a given topic. The fact that, as a methodological approach, the work is to be couched in the form of a

¹¹¹ H. W. Wheaton, *Elements of International Law*, 2nd ed., rev. and annotated by W. B. Lawrence (Boston, Little, Brown, 1863), p. 417.

¹¹² Hurst, *loc. cit.*, pp. 154 and 227.

¹¹³ Lyons, *loc. cit.*, p. 334.

¹¹⁴ Oppenheim, *op. cit.*, p. 813.

¹¹⁵ Cahier, *op. cit.*, p. 324.

¹¹⁶ Sen, *op. cit.*, p. 180-181.

¹¹⁷ Lee, *op. cit.*, p. 101-102.

¹¹⁸ Hardy, *op. cit.*, p. 88.

¹¹⁹ Denza, *op. cit.*, pp. 256-258 and 260.

¹²⁰ E. de Vattel, *Le droit des gens ou Principes de la loi naturelle* [1758], book IV, chap. VII, para. 86: *The Classics of International Law* (Washington, D.C., Carnegie Institution of Washington, 1916), vol. II, p. 320.

¹²¹ Wheaton, *op. cit.*, pp. 417-418.

¹²² Calvo, *op. cit.*, p. 329.

¹²³ De Erice y O'Shea, *op. cit.*, p. 533.

¹²⁴ Lion Depetre, *op. cit.*, p. 289.

¹²⁵ Lyons, *loc. cit.*, pp. 335 and 340.

¹²⁶ L. T. Lee, *Consular Law and Practice* (London, Stevens, 1961), pp. 272-274.

¹²⁷ Valencia Rodríguez, *loc. cit.*, pp. 69-70.

¹²⁸ Sen, *op. cit.*, pp. 105-106.

¹²⁹ Denza, *op. cit.*, pp. 119-120.

¹³⁰ Texts reproduced in: Harvard Law School, *Research in International Law, Drafts of Conventions prepared for the Codification of International Law* (Cambridge, Mass., 1932), parts I and II, "Diplomatic Privileges and Immunities" and "Legal Position and Functions of Consuls".

¹³¹ *Ibid.*

¹³² *Yearbook ... 1956*, vol. II, p. 255-256, document A/3159, paras. 25-27.

¹³³ *Yearbook ... 1961*, vol. II, p. 91, document A/4843, paras. 29-32.

¹³⁴ *Yearbook ... 1966*, vol. II, p. 177, document A/6309/Rev.1, part II, para. 35.

¹³⁵ *Yearbook ... 1967*, vol. II, p. 346, document A/6709/Rev.1, para. 23.

¹³⁶ *Yearbook ... 1971*, vol. II (Part One), p. 283, document A/8410/Rev.1, para. 50.

¹³⁷ *Yearbook ... 1974*, vol. II (Part One), p. 174, document A/9610/Rev.1, para. 83.

¹³⁸ *Yearbook ... 1978*, vol. II (Part Two), p. 16, document A/33/10, para. 72.

¹³⁹ See para. 15 above.

set of draft articles, will not prejudice the recommendations that the Commission may make under article 23, paragraph 1 of the Statute, regarding further action once the work is completed.

36. This approach adopted by the Commission at its thirty-first session has been confirmed by the recommendation of the General Assembly in paragraph 4(f) of resolution 34/141,¹⁴⁰ which specifically refers to the "elaboration of an appropriate legal instrument". This indeed conforms also with the views expressed on the point by representatives of Member States in the Sixth Committee at the thirty-fourth session of the General Assembly. In this connection it should be mentioned that in its earlier resolution 3501 (XXX) the General Assembly expressed, in more general terms, "the desirability of elaborating provisions concerning the status of the diplomatic courier", while in its subsequent resolutions on the same topic, reference was made more specifically to the elaboration of "a protocol" (resolution 31/76) or of "an appropriate legal instrument" (resolutions 33/139 and 33/140).

37. As is mentioned in the "Topical summary" referred to in above,¹⁴¹

Many representatives agreed with the Commission's conclusion in paragraphs 163 and 164 of its report that the further elaboration of specific provisions was desirable and that the Commission should make further progress by undertaking the preparation of a set of draft articles for an appropriate international legal instrument, which they hoped would soon be submitted to the Sixth Committee for consideration. It was said in this connection that sound State practice and uniform legal doctrine provided the right conditions for the speedy elaboration of a draft agreement.¹⁴²

Furthermore,

Some representatives indicated that they had an open mind regarding the nature and form of the future instrument and would take a final position on whether it should be a convention or a protocol in the light of future progress on the topic. Also, a number of representatives reserved their position on the form of the instrument to be adopted until the work on the topic had reached a more advanced stage or had been completed by the Commission.¹⁴³

The Special Rapporteur also draws the Commission's attention to the fact that in the Sixth Committee the view was expressed by one representative that no additional protocol was needed and that the Commission would discharge its duties by submitting a report along the lines of section C of chapter VI of its

report, before the end of the current term of office of its members.¹⁴⁴

38. However, the prevailing view has been that at present there is a need for more elaborated rules of international law in order to enhance the protection of the diplomatic courier and the diplomatic bag through the progressive development and codification of international law in this field subsequent to the multilateral conventions adopted under the auspices of the United Nations in the last two decades.

V. Scope and contents of the work

39. With a view to determining the precise scope of the work of progressive development and codification of the rules of international law concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, it would appear necessary at the outset to focus attention on the fact that similar means of communication in inter-State relations are provided for in the three multilateral conventions adopted after the 1961 Vienna Convention.¹⁴⁵ Those official means of communication are the consular courier and consular bag (art. 35, paras. 1 and 5, of the 1963 Vienna Convention), the courier of the special mission and the bag of the special mission (art. 28, paras. 1 and 6 of the Convention on Special Missions), and the courier of the mission, courier of the delegation, bag of the mission and bag of the delegation (art. 27, paras. 1 and 5, and art. 57, paras. 1 and 6 of the 1975 Vienna Convention).

40. It will be recalled in this connection that at its thirtieth session (1978) the Commission approved the result of the study undertaken by the Working Group established at that session to consider the topic and the possible elements of a protocol on the status of the diplomatic courier and the diplomatic bag. The Working Group had adopted as its basic position that the three multilateral conventions concluded subsequent to the 1961 Vienna Convention reflected the considerable developments that had taken place in recent years on various aspects of the question, and that, therefore, the relevant provisions of those conventions, if any, should form the basis for any further study of the question.¹⁴⁶

41. The foregoing decision of the Commission might be interpreted to the effect that recent developments, as reflected in the 1963, 1969 and 1975 conventions, should form the basis of the further development of the law relating to the status of the *diplomatic* courier and the *diplomatic* bag not accompanied by diplomatic

¹⁴⁰ See para. 1 above.

¹⁴¹ See para. 16 above.

¹⁴² A/CN.4/311, para. 237. See also *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 38th meeting, para. 49; 42nd meeting, para. 12; 43rd meeting, paras. 7 and 34; 44th meeting, para. 24; 46th meeting, para. 63; 47th meeting, paras. 49 and 57; 48th meeting, para. 18; 50th meeting, para. 40; 51st meeting, para. 15; and *ibid.*, *Sessional fascicle*, corrigendum.

¹⁴³ A/CN.4/L.311, para. 239. See also *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 40th meeting, para. 27; 44th meeting, para. 48; 48th meeting, para. 18; 51st meeting, para. 28; and *ibid.*, *Sessional fascicle*, corrigendum.

¹⁴⁴ A/CN.4/L.331, para. 238. See also *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 46th meeting, para. 22; and *ibid.*, *Sessional fascicle*, corrigendum.

¹⁴⁵ See para. 11 above.

¹⁴⁶ See *Yearbook ... 1978*, vol. II (Part Two), p. 139, document A/33/10, para. 142.

courier. Thus, that decision does not necessarily settle the question whether or not—and if so, to what extent—the status of the diplomatic courier and the unaccompanied diplomatic bag should be assimilated to that of the other official means of communication mentioned above,¹⁴⁷ or vice versa.¹⁴⁸

42. 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. Besides, the corresponding provisions in the 1963, 1969 and 1975 conventions are modelled on article 27 of the 1961 Vienna Convention. Nevertheless, the use of different terms in each of those four conventions testifies to the distinctiveness of the various *official means of communication* envisaged therein.

43. The Commission had occasion to express itself on this point in the commentary to the relevant provision of its final draft on special missions, adopted in 1967, where it stated:

As to terminology, the Commission had a choice between two sets of expressions to designate the bag and courier of a special mission. It could have referred to them as “the diplomatic bag of the special mission” and “the diplomatic courier of the special mission” or, more simply, as “the bag of the special mission” and “the courier of the special mission”. The Commission chose the second alternative in order to prevent any possibility of confusion with the bag and courier of the permanent diplomatic mission.¹⁴⁹

44. The Commission also referred to the point in the commentaries to two articles of its final draft on the representation of States in their relations with international organizations, adopted in 1971. In the first, it stated:

On the basis of article 28 of the Convention on Special Missions, the article uses the expressions “the bag of the mission” and the “courier of the mission”. The expressions “diplomatic bag” and “diplomatic courier” were not used in order to prevent any possibility of confusion with the bag and courier of the diplomatic mission.¹⁵⁰

In the second, the Commission explained that:

... as to terminology, the article uses the expressions “bag of the delegation” and “courier of the delegation” for reasons similar to those set forth in paragraph (6) of the commentary to article 27.¹⁵¹

45. Also as regards this aspect of the scope of the work, it is noted that international organizations make

use of means of communication in the nature of couriers and bags. The 1946 Convention on the Privileges and Immunities of the United Nations¹⁵² provides as follows:

Article III

FACILITIES IN RESPECT OF COMMUNICATIONS

...

Section 10. The United Nations shall have the right to use codes and to dispatch and receive its correspondence by courier or in bags, which shall have the same immunities and privileges as diplomatic couriers and bags.

Similarly, the 1947 Convention on the Privileges and Immunities of the Specialized Agencies¹⁵³ provides as follows:

Article IV

FACILITIES IN RESPECT OF COMMUNICATIONS

...

Section 12

...

The specialized agencies shall have the right to use codes and to dispatch and receive correspondence by courier or in sealed bags, which shall have the same immunities and privileges as diplomatic couriers and bags.

46. In accordance with the foregoing provisions, the courier and bags of the United Nations and its specialized agencies enjoy the same status as diplomatic couriers and bags. This being the case, there would appear to be no need to deal specifically with the status of those couriers and bags under the present topic. Whatever the results of the work of progressive development and codification concerning the status of the diplomatic courier and the unaccompanied diplomatic bag, they would likewise apply to the couriers and bags of those international organizations.

47. As has already been mentioned,¹⁵⁴ the Commission, at its thirtieth session (1978), approved a tentative list of issues relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier which were prepared by its Working Group on the basis of comments and proposals submitted by Governments. At its thirty-first session (1979), the Commission added to the foregoing list certain issues which the Working Group had examined and considered necessary to be studied.¹⁵⁵ The issues thus identified by the Commission provide the best indication of the possible contents of the work to be carried out and were approved by the Commission as possible elements of a protocol, in the following order:

1. Definition of “diplomatic courier”
2. Function of the diplomatic courier
3. Multiple appointment of the diplomatic courier

¹⁴⁷ Para. 39.

¹⁴⁸ See A/33/224, annex, p. 4; *Yearbook ... 1979*, vol. II (Part One), p. 218, document A/CN.4/321 and Add.1-7, Chile, sect. 1; and *ibid.*, p. 217, Byelorussian SSR, sect.6.

¹⁴⁹ *Yearbook ... 1967*, vol. II, p. 361, document A/6709/Rev. 1, chap. II, sect. D, para. (3) of the commentary to art. 28.

¹⁵⁰ *Yearbook ... 1971* vol. II (Part One), p. 302, document A/8410/Rev.1, chap. II, sect. D, para. (6) of the commentary to art. 27.

¹⁵¹ *Ibid.*, p. 318, para. (2) of the commentary to art. 58.

¹⁵² For reference, see footnote 25 above.

¹⁵³ *Idem.*, footnote 26.

¹⁵⁴ See para. 11 above.

¹⁵⁵ See para. 14 above.

4. Privileges and immunities of the diplomatic courier (general):
 - (a) Personal inviolability:
 - (i) Immunity from arrest or detention
 - (ii) Exemption from personal examination or control
 - (iii) Exemption from inspection of personal baggage
 - (b) Inviolability of residence
 - (c) Inviolability of means of transport
 - (d) Immunity from jurisdiction
 - (e) Waiver of immunities
5. Facilities accorded to the diplomatic courier
6. Duration of privileges and immunities of the diplomatic courier
7. Nationality of the diplomatic courier
8. End of functions of the diplomatic courier
9. Consequences of the severance or suspension of diplomatic relations, of the recall of diplomatic missions or of armed conflict
10. Granting of visas to the diplomatic courier
11. Persons declared not acceptable
12. Status of the diplomatic courier *ad hoc*
13. Definition of "diplomatic bag"
14. Status of the diplomatic bag accompanied by diplomatic courier
15. Status of the diplomatic bag not accompanied by diplomatic courier:
 - (a) General
 - (b) The Diplomatic bag entrusted to the captain of a commercial aircraft or of a ship
16. Respect for the laws and regulations of the receiving State
17. Obligations of the receiving State:
 - (a) General
 - (b) Obligations of the receiving State in the event of death of or accident to the diplomatic courier precluding him from the performance of his functions
18. Obligations of the transit State:
 - (a) General
 - (b) Obligation of the transit State in the event of death of or accident to the diplomatic courier precluding him from the performance of his functions
19. Obligations of the third State in cases of *force majeure*
20. Additional items to be studied:
 - (1) Facilities accorded to the diplomatic courier with respect to his entry and departure from the territory of the receiving State
 - (2) Facilities accorded to the diplomatic courier for movement within the territory of the receiving State and the transit State in the performance of his functions
 - (3) Facilities accorded to the diplomatic courier for communicating with the sending State and its diplomatic mission in the territory of the receiving State for all official purposes
 - (4) Exemption from national, regional or municipal dues and taxes
 - (5) Exemption from personal service and public service of any kind
 - (6) Obligation of the diplomatic courier not to undertake any professional or commercial activity on the territory of the receiving State or the State of transit
 - (7) Suspension of the functions of the diplomatic courier by the competent authorities of the sending State
 - (8) Application of the principle of non-discrimination with respect to the diplomatic courier, the accompanied and non-accompanied bag.¹⁵⁶

¹⁵⁶ *Yearbook ... 1979*, vol. II (Part Two), pp. 172 *et seq.*, document A/34/10, chap. VI, sects. C and D.

48. In the light of the foregoing list of issues identified by the Commission, some preliminary questions arise that could conveniently be discussed in the Commission in order to provide further guidance to the Special Rapporteur for the preparation of draft articles. By way of illustration, reference may be made, in the first place, to the question of definitions, which is intimately linked with the question of the extent to which the future draft articles should deal with all official means of communication in the nature of couriers and bags provided for in the four existing multilateral conventions. It may be noted in this connection that, both as regards the courier and the bag, the existing conventions do not contain definitions of the various terms employed as such, but limit themselves to a description of their formal characteristics. In all four conventions, the courier is a person who "shall be provided with an official document indicating his status and the number of packages constituting the bag". Likewise, as regards the bag, the four conventions basically provide that the packages constituting the bag must bear visible external marks of their character and may contain only documents or articles intended for official use.

49. In relation to *the courier*, the tentative list of issues indicates the kind of provisions that might be included in the draft as regards the determination of his status as such. Even though no specific provisions on the point are found in the existing conventions, rules could be developed on the functions of the courier and the end of those functions, his nationality, and the possibility of multiple appointment, along the lines of those established in the existing conventions for the governmental agents dealt with therein.

50. Similarly, the tentative list of issues implies a prior determination of the extent to which facilities and immunities should be granted to the courier beyond what is provided for in the existing conventions. It should be noted in this respect that, for each of the couriers involved, the corresponding conventions all recognize his personal inviolability and his immunity from arrest or detention. As to the further rules that could be elaborated, attention is drawn to the observations made by the Commission at its 1978 session, to the effect that:

... certain members stressed the importance of according the fullest possible diplomatic status to the courier, whereas others took the view that such privileges and immunities should be strictly limited to the needs of his functions.¹⁵⁷

51. Another question suggested by the tentative list of issues concerns *the status of the courier ad hoc*. Each of the four existing conventions allows for the designation of such couriers, extending to them the personal inviolability and the immunity from arrest or detention recognized in the case of the regular agents to which they relate. They also limit those immunities,

¹⁵⁷ *Yearbook ... 1978*, vol. II (Part Two), p. 140, document A/33/10, para. 144, sect. (4).

for each type of *ad hoc* courier involved, to cover only such time as elapses until he will have delivered to the consignee the bag in his charge. This limitation makes it necessary to determine to what extent the further rules to be elaborated on the privileges and immunities of regular couriers would be applicable to *ad hoc* couriers and, if they are not fully applicable, what additional specific provisions should be elaborated regarding their legal status during the time elapsing between the delivery of the bag and their being entrusted with another bag.

52. As regards *the status of the bag*, each of the four existing conventions affirms the inviolability of the bag, which shall not be opened or detained. Nevertheless, in the case of the consular bag,

... if the competent authorities of the receiving State have serious reason to believe that the bag contains something other than the correspondence, documents or articles [that can be carried therein pursuant to art. 35, para. 4, of the convention], they may request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin (1963 Vienna Convention, art. 35, para. 3.)

In further developing the rules of international law relating to the status of the bag, whatever its denomination, the question arises of the extent to which the foregoing provision is to be taken into account.¹⁵⁸

53. From the tentative list of issues approved by the Commission, it is evident that the future draft articles should also contain provisions dealing with the obligations of transit States and other *third States*. Under the four existing conventions, the *transit State* shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving State. Furthermore, each of those conventions provides that, in the cases envisaged therein, third States shall accord to couriers who have been granted a visa, if such a visa was necessary, and to bags in transit, the same inviolability and protection as the receiving State is bound to accord under those conventions. Finally, the obligations of third States regarding that inviolability and protection are extended under the four existing conventions to the corresponding couriers and bags when their presence in the territory of the third State is due to *force majeure*. The further development of the rules relating to the obligations of the receiving State may also have an impact—of which the precise extent is yet to be determined—on the obligations of third States in the circumstances already contemplated in the applicable conventional instruments.

54. Finally, the question arises whether or not to embody in the context of the future legal instrument on the status of the courier and the bag some of the *general principles* which underlie the four existing

conventions. It is our view that, together with the fundamental principle of the freedom of communication, common to all, which constitutes the legal foundation of the status of the official courier, other basic principles could appropriately be formulated therein, such as non-discrimination and respect for the laws and regulations of the receiving State. The corresponding provisions, which should be made generally applicable to the draft as a whole, may be inserted at the beginning or at the end of the draft or be embodied in the appropriate substantive parts dealing, respectively, with the status of the courier and the status of the bag.

VI. Structure of the work

55. The title of the present topic, as consistently used by the General Assembly and by the Commission, already suggests the division of the work into at least two main parts dealing respectively with the status of the diplomatic courier and that of the diplomatic bag not accompanied by diplomatic courier. Although no definition of the terms “diplomatic courier” and “diplomatic bag not accompanied by diplomatic courier” as such is found in article 27 of the 1961 Vienna Convention, their use in the title of the present topic reflects the meaning commonly attributed to them: the diplomatic bag, which has been characterized as “a bag (sack or envelope) containing diplomatic documents or articles intended for official use”¹⁵⁹ may be unaccompanied or not, the diplomatic courier being, as characterized in a report submitted to the Commission by A. E. F. Sandström, “a person who carries a diplomatic bag and who is for this purpose furnished with a document (courier’s passport) testifying to his status.”¹⁶⁰

56. By referring specifically only to the “status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier” the title might appear to be excluding the status of the diplomatic bag accompanied by such a courier; nevertheless, the fact is that, as explained in the preceding paragraph, the concept of diplomatic courier implies the existence of an accompanied diplomatic bag. This does not mean, however, that the question of the international legal regulation of the status of the diplomatic courier as such, that is, of the person so identified who carries the diplomatic bag, cannot and should not be differentiated from that of the international legal regulation of the status of the

¹⁵⁹ *Yearbook ... 1957*, vol. II, p. 138, document A/3623, chap. II, sect. II, draft articles concerning diplomatic intercourse and immunities, art. 21, para. (2) of the commentary.

¹⁶⁰ *Yearbook ... 1958*, vol. II, p. 17, document A/CN.4/116/Add.1 and 2, art. 21, para. 3. See also *Official Records of the General Assembly. Thirty-first Session, Sixth Committee*, 65th meeting, para. 41; and *ibid.*, *Sessional fascicle*, corrigendum; *ibid.*, *Thirty-third Session, Sixth Committee*, 17th meeting, para. 12; and *ibid.*, *Sessional fascicle*, corrigendum; *Yearbook ... 1979*, vol. II (Part One), p. 218, document A/CN.4/321 and Add.1–7, Chile, sect. 1; and A/33/224, annex, pp. 65 and 67.

¹⁵⁸ See para. 30 above.

diplomatic bag itself. Such differentiation has already been made in article 27 of the 1961 Vienna Convention: while paragraph 5 of that article provides for the personal inviolability of the diplomatic courier and his immunity from arrest or detention, paragraph 3 of the same article provides for the inviolability of the diplomatic bag itself, without distinguishing whether it is accompanied or not.¹⁶¹

57. In the light of the foregoing, and taking into account the tentative list of issues approved by the Commission, the Special Rapporteur concludes that the work of progressive development and codification of the topic to be undertaken by the Commission should deal in two main parts, respectively, with the status of the official courier and that of the official bag whether or not accompanied by official courier. Although the question of the use of terms for the purposes of the draft articles to be prepared will be dealt with by the Special Rapporteur at the appropriate time, when work will have advanced further, he refers to "official courier" and "official bag" as convenient working tools at the present initial stage of the work. Their use is not intended to prejudge the position that the Commission may take regarding the scope of the draft, and in particular whether it should extend to couriers and bags other than diplomatic ones, as are provided for in the 1963 Vienna Conventions, the Convention on Special Missions, and the 1975 Vienna Convention.

58. Each of the two main parts referred to in the preceding paragraph would include, arranged in a sequence modelled on the relevant multilateral conventions, as many draft articles as would be required in the light of the Commission's position concerning the extent of the facilities, privileges and immunities and the protection to be accorded to the official couriers as persons independent from the bag, and to the official bags, respectively.

59. A third part, separate from that dealing with the official courier, would include provisions on the official courier *ad hoc*, and a fourth part would be devoted to determining the obligations of the official courier towards the receiving State and those of the receiving, transit and third States with regard both to the official courier and the official bag. Additional miscellaneous provisions might be included in this part, as appropriate, dealing, for instance, with the relationship of the draft articles to existing conventions and the general principles that are basic to the progressive development and codification of the topic, such as non-discrimination and respect for the laws and regulations of the receiving State. Lastly, a part at the beginning of

the draft would comprise general provisions such as the scope of application of the draft articles, the use of terms, and the restatement of the principle of freedom of communication for all official purposes as the legal foundation of the status of the official courier and the official bag.

60. As a working method intended to facilitate the comments of members of the Commission and invite their suggestions, the structure of the draft could, therefore, be presented in the following manner:

I. GENERAL PROVISIONS

1. Scope of application of the draft articles
2. Use of terms
3. Freedom of communication for all official purposes, with special reference to the official courier and the official bag.

II. STATUS OF THE OFFICIAL COURIER

1. Appointment of official courier
2. Credentials and other relevant documents with which the official courier should be provided, indicating his status and that of the official bag
3. Multiple appointment of the official courier
4. Nationality of the official courier
5. Functions of the official courier
6. Suspension of the functions
7. Persons declared not acceptable
8. End of functions
9. Consequences of the severance or suspension of diplomatic relations, of the recall of diplomatic missions or of armed conflict
10. Facilities accorded to the official courier (general)
11. Facilities accorded to the official courier with respect to his entry (granting of visas) into the territory of the receiving State and departure from that territory
12. Facilities accorded to the official courier for movement within the territory of the receiving State and the transit State in the performance of his functions
13. Facilities accorded to the official courier for communicating with the sending State and its diplomatic, consular or other official mission in the territory of the receiving State for all official purposes
14. Facilities accorded to the official courier for obtaining suitable accommodation (residence)
15. Privileges and immunities of the official courier (general)
16. Personal inviolability
17. Inviolability of private accommodation (residence)
18. Inviolability of means of transport used in the performance of official functions
19. Immunity from jurisdiction
20. Exemption from personal examination or control
21. Exemption from inspection of personal baggage
22. Exemption from national, regional or municipal dues and taxes
23. Exemption from customs duties and inspection
24. Exemption from personal service and public service of any kind
25. Exemption from social security legislation
26. Waiver of immunities
27. Duration of privileges and immunities of the official courier
28. Obligation of the official courier not to undertake any professional or commercial activity on the territory of the receiving State or the transit State

III. STATUS OF THE OFFICIAL COURIER *ad hoc*

1. Appointment of the official courier *ad hoc*
2. Credentials and other relevant documents with which the official courier *ad hoc* should be provided, indicating his status and that of the official bag

¹⁶¹ See in this connection A/33/224, annex, pp. 59-60, and *ibid.*, p. 65; *Official Records of the General Assembly, Thirty-third Session, Sixth Committee*, 18th meeting, para.11, and 41st meeting, para. 58; and *ibid.*, *Sessional fascicle*, corrigendum; and *Yearbook . . . 1979*, vol. II (Part One), pp. 221-222, document A/CN.4/321 and Add.1-7, Czechoslovakia; and *ibid.*, pp. 225-226, United Kingdom.

3. Multiple appointment of the official courier *ad hoc*
4. Nationality of the official courier *ad hoc*
5. Functions of the official courier *ad hoc*
6. End of functions of the official courier *ad hoc*
7. Facilities, privileges and immunities of the official courier *ad hoc*
8. Duration of the privileges and immunities of the official courier *ad hoc*
9. General provisions with respect to the status of the official courier *ad hoc*

IV. STATUS OF THE OFFICIAL BAG

1. Visible external marks and content of the official bag
2. Status of the official bag accompanied by official courier
3. Status of the official bag not accompanied by official courier
4. Facilities accorded for the expeditious delivery of the official bag
5. Inviolability of the official bag
6. Exemption from customs and other inspection or control
7. Exemption from customs duties, taxes and related charges other than charges for storage, cartage and similar services
8. The official bag entrusted to the captain of a commercial aircraft or of a ship

V. MISCELLANEOUS PROVISIONS

1. Obligations of the receiving State
2. Obligations of the receiving State in the event of death or of accident to the diplomatic courier precluding him from the performance of his functions
3. Obligations of the transit State
4. Obligation of the transit State in the event of death or of accident to the diplomatic courier precluding him from the performance of his functions
5. Obligations of the third State in cases of *force majeure*
6. Respect for the laws and regulations of the receiving State
7. Non-discrimination
8. Relationship to existing conventions.

VII. Conclusion

61. The suggestions advanced in this preliminary report, particularly on the scope and the structure of the work, should be considered as an indication of the possible format of the set of draft articles on the status of all types of appropriate means of communication for official purposes through official couriers and official bags. It should also be pointed out that the denomination of the issues listed above should not necessarily be construed to suggest the titles and the order in which the respective draft articles would be placed. The tentative structure has indeed followed substantially the list of issues identified and approved by the Commission as possible elements of a protocol or appropriate legal instrument. Furthermore, taking into account the specific features of the status of the official courier and the official bag, the Special

Rapporteur has endeavoured to reflect in his suggestions, as much as possible, the relevant provisions of the four multilateral conventions elaborated under the auspices of the United Nations: namely, the Vienna Convention on Diplomatic Relations (1961), the Vienna Convention on Consular Relations (1963), the Convention on Special Missions (1969) and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (1975). It is therefore obvious that, in the course of the subsequent closer study of the topic under consideration and in the process of the elaboration of draft articles, modifications would be made both with regard to the structure and the precise formulation of the titles of the respective draft articles.

62. It would none the less be highly desirable at this stage if the Commission, as guidance for the future work of the Special Rapporteur, would express its observations and recommendations on the scope and contents of the work, particularly with respect to the proposed concept of *official courier* and *official bag*, 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. It is hoped that such a comprehensive approach would reflect more adequately the significant developments that have taken place since the 1961 Vienna Convention. Diplomatic law in all its facets has acquired new forms and new dimensions because of the ever-increasing dynamics of international relations in which States and international organizations are involved in very active contacts through various means, including official couriers and official bags. In view of these developments, the international regulation of the communications between various subjects of international law and, on different occasions, through official couriers and official bags has been faced substantially with the same kind of problems and has to respond to similar challenges and practical requirements, whether the courier is diplomatic, consular or is sent to a special mission or permanent mission of a State or an international organization. The increasing number of violations of the diplomatic law, some of which have raised public concern, also warrant such a comprehensive and coherent regulation of the status of all types of official couriers and official bags. In this way, all means of communication for official purposes through official couriers and official bags would enjoy the same degree of international legal protection.