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**Third report on the status of the diplomatic courier and the diplomatic bag not accompanied  
by diplomatic courier, 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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\* Incorporating A/CN.4/359/Corr.1-4.

## NOTE

Multilateral conventions mentioned in the present report:

Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961) Hereinafter called 1961 Vienna Convention	<i>Source</i> 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)	United Nations, <i>Juridical Yearbook 1969</i> (Sales No. E.71.V.4), p. 125.
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>Ibid.</i> , 1975 (Sales No. E.77.V.3), p. 87.

## Introduction

1. This is the third report on the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, submitted by the Special Rapporteur to the International Law Commission at its thirty-fourth session, pursuant to General Assembly resolution 36/114 of 10 December 1981. By paragraph 3 (b) of that resolution, the General Assembly recommended that the Commission should continue its work aimed at the preparation of draft articles on the topic under consideration.<sup>1</sup>

2. The Special Rapporteur has deemed it appropriate, before proceeding to the submission of the next set of draft articles, to include at the outset of the present report a brief substantive summary of the Commission's consideration of the main issues raised in the previous two reports,<sup>2</sup> so as to provide a certain continuity in the work of the Commission at the commencement of its present term and in its enlarged and renewed composition. He also wishes to propose revised texts for draft articles 1-6 in part I (General provisions), which were submitted in the second report, in the light of their consideration by the Commission at its thirty-third session and the Sixth Committee of the General Assembly at its thirty-sixth session. Those draft articles were referred to the Drafting Committee, but were not considered by it.

3. The preliminary report which was submitted by the Special Rapporteur to the Commission at its thirty-second session, in 1980, contained a detailed consolidated account of the history of the consideration of the topic<sup>3</sup> in view of the increasing dynamics of international relations, where the freedom of communication

for all official purposes, including the use of diplomatic couriers and bags, has acquired particular significance. The Commission noted that there were many issues relating to the status of the diplomatic courier and the diplomatic bag on which no specific provisions were contained in the four existing conventions on diplomatic law adopted under the auspices of the United Nations,<sup>4</sup> while on several issues the relevant provisions were of a very general nature. It was therefore suggested that further elaboration was desirable through codification and progressive development of international law.<sup>5</sup> It was pointed out that for many countries, and in particular for developing countries, the elaboration of rules on the status of the diplomatic courier *ad hoc* and the unaccompanied diplomatic bag were of paramount practical significance.<sup>6</sup>

4. The preliminary report reviewed the sources of international law relevant to the topic.<sup>7</sup> It was stated that those sources were mainly conventional in character and that there was a great scarcity of international judicial decisions. The main sources are the four codification conventions concluded under the auspices of the United Nations.<sup>8</sup> References were also made to important multilateral and bilateral treaties, national legislation, diplomatic correspondence and official communications or statements which provide evidence of State practice. The importance of *travaux préparatoires* for the four codification conventions, as well as writings of publicists and learned societies, was noted in the report.

5. The form of the eventual instrument was also considered in the light of the relevant resolutions of the

<sup>1</sup>For a detailed historical background of the Commission's work on the topic up to 1981, see *Yearbook . . . 1979*, vol. II (Part Two), p. 170, paras. 149-155; *Yearbook . . . 1980*, vol. II (Part Two), pp. 162 *et seq.*, paras. 145-176; and *Yearbook . . . 1981*, vol. II (Part Two), pp. 159 *et seq.*, paras. 228-249.

<sup>2</sup>Preliminary report: *Yearbook . . . 1980*, vol. II (Part One), p. 231, document A/CN.4/335; second report: *Yearbook . . . 1981*, vol. II (Part One), p. 151, document A/CN.4/347 and Add.1 and 2.

<sup>3</sup>*Yearbook . . . 1980*, vol. II (Part One), pp. 232-235, document A/CN.4/335, paras. 7-15.

<sup>4</sup>The four multilateral conventions are: the 1961 Vienna Convention, the 1963 Vienna Convention, the 1969 Convention on Special Missions and the 1975 Vienna Convention (see above for a note concerning these instruments).

<sup>5</sup>*Yearbook . . . 1979*, vol. II (Part Two), pp. 171 *et seq.*, paras. 156-163.

<sup>6</sup>*Yearbook . . . 1980*, vol. II (Part Two), p. 164, para. 163.

<sup>7</sup>See *Yearbook . . . 1980*, vol. II (Part One), pp. 235 *et seq.*, document A/CN.4/335, paras. 17-34.

<sup>8</sup>See footnote 4 above.

General Assembly, which referred to "a protocol" or "an appropriate legal instrument". It was pointed out in the report and was supported by the Commission that, at this stage, draft articles should be construed, incorporating and combining elements of both *lex lata* and *lex ferenda*, and the final decision on the form of the instrument be left to the Members of the United Nations at an appropriate stage of the codification process.

6. The examination of empirical references as the best method for studying the topic was noted in the preliminary report, and was endorsed by the Commission.<sup>9</sup> Such an examination would take into account the nature, scope and precise functions of the couriers and the bag. The report emphasized that the facilities, privileges and immunities accorded to the diplomatic courier are *only* to facilitate the performance of his functions, which are instrumental in the exercise of the right of communication. In this connection, the Commission agreed with the approach advanced by the Special Rapporteur that in the codification and progressive development of international law in this field the main objective should be to strike a balance between the interests of the sending State for safe, unimpeded and expeditious delivery of the bag and the protection of the confidentiality of its content as a tool of official communications, on the one hand, and the legitimate security interests of the receiving and the transit States, on the other.

7. The preliminary report suggested a comprehensive and uniform approach with regard to the scope and the content of the draft articles, so as to include all types of diplomatic couriers and bags.<sup>10</sup> Thus, a comprehensive definition of diplomatic courier and bags was suggested, due to the lack of any definition in the existing conventions. In proposing such definitions, the report emphasized the importance of maintaining a balance between the interests and the obligations of the sending State with those of the receiving State, as well as of third States in cases of *force majeure*.

8. The report suggested that the draft articles should be formulated on the basis of fundamental principles of international law which underlie the four codification conventions, such as freedom of communication for all official purposes, respect for the laws and regulations of the receiving and transit State, and the principle of non-discrimination. While agreeing with this approach, the Commission also pointed out the need to elaborate

<sup>9</sup> *Yearbook . . . 1980*, vol. II (Part Two), p. 164, para. 165.

<sup>10</sup> Such a broad approach might include all types of diplomatic couriers and diplomatic bags sent to diplomatic and consular missions, to special missions or to the representatives of international organizations. (*Yearbook . . . 1980*, vol. II (Part One), pp. 240 and 244-245, document A/CN.4/335, paras. 39-40, 57 and 62.)

new rules applicable to a modern international communication system for all official purposes.<sup>11</sup>

9. With respect to the field of application of the rules governing the régime of all types of couriers and bags, it was noted by the Commission that the codification effort should be basically confined to couriers and bags used by States, though there were some suggestions also to include couriers and bags used for all official purposes of international organizations.<sup>12</sup>

10. In his preliminary report, the Special Rapporteur proposed as a working method that the draft articles consist of four parts. This structure of the draft articles, which the Commission, after consideration at its thirty-second session<sup>13</sup> and in the Sixth Committee of the General Assembly at its thirty-fifth session,<sup>14</sup> decided to retain, is as follows:<sup>15</sup>

*Part I.* General provisions;

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

*Part III.* The 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 diplomatic law concluded under the auspices of the United Nations, and other provisions.

11. Those were the main issues raised by the Special Rapporteur in his preliminary report, and subsequently considered by the Commission and the Sixth Committee. Following the main trends emerging from their discussions, the Special Rapporteur proceeded to the elaboration of the draft articles in part I (General provisions), which were submitted to the Commission in his second report.

<sup>11</sup> *Yearbook . . . 1980*, vol. II (Part Two), p. 164, para. 164.

<sup>12</sup> *Ibid.*, para. 167.

<sup>13</sup> Some members of the Commission made comments or suggestions (*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)), but the proposed structure as a working method received the general approval of the Commission (*Yearbook . . . 1980*, vol. II (Part Two), p. 165, para. 170).

<sup>14</sup> See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-fifth session of the General Assembly" (A/CN.4/L.326), para. 371.

<sup>15</sup> See second report, para. 7 (*Yearbook . . . 1981*, vol. II (Part One), pp. 155-156, document A/CN.4/347 and Add.1 and 2).

## I. Reconsideration of the draft articles on general provisions

### A. Introductory note

12. The second report submitted by the Special Rapporteur contained the text of six proposed draft articles which constituted part I of the entire set of draft articles

on the topic, entitled "General Provisions". The first three were: "Scope of the present articles" (art. 1),<sup>16</sup>

<sup>16</sup> *Yearbook . . . 1981*, vol. II (Part One), p. 164, document A/CN.4/347 and Add.1 and 2, para. 49.

“Couriers and bags not within the scope of the present articles (art. 2),<sup>17</sup> “Use of terms” (art. 3),<sup>18</sup> and the other three, on the general principles of international law underlying the four codification conventions: “Freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags” (art. 4),<sup>19</sup> “Duty to respect international law and the laws and regulations of the receiving and the transit State (art. 5),<sup>20</sup> and “Non-discrimination and reciprocity” (art. 6).<sup>21</sup> These six draft articles comprised three main issues, namely: the scope of the draft articles on the topic under consideration, the use of terms, and the general principles of international law relevant to the status of the diplomatic courier and the diplomatic bag. Therefore the Special Rapporteur proposes to examine these three issues in the light of the comments made by the Commission at its thirty-third session<sup>22</sup> and by the Sixth Committee of the General Assembly at its thirty-sixth session.<sup>23</sup>

### B. Scope of the draft articles

13. The scope of the draft articles on the topic was the subject of examination in the preliminary report and, in greater detail, in the second report submitted by the Special Rapporteur.<sup>24</sup> The Special Rapporteur has always maintained that a comprehensive and uniform approach should be applied to all kinds of couriers and bags used by States in their official communications with their missions abroad, as was stated in the preliminary report<sup>25</sup> and further elaborated in the second report.<sup>26</sup> Such an approach would correspond adequately to State practice that has been evolving since the 1961 Vienna Convention and the other multilateral conventions in the field of diplomatic law adopted under the auspices of the United Nations, which provided the basis for other multilateral and bilateral treaties in this field.

14. For the purposes of convenience, the Special Rapporteur has employed the global notions “official courier” and “official bag” as terms referring to all kinds of couriers and bags used by States as official means of communications with their missions abroad.<sup>27</sup> However, as was pointed out in the second report, the comprehensive and uniform approach “should be applied with greater caution, taking into account a pos-

sible reaction of anxiety and reservations of States when new concepts were introduced”.<sup>28</sup> Accordingly, the Special Rapporteur suggested that, while retaining the well-established and familiar notions of “diplomatic courier” and “diplomatic bag”, a new concept may be formulated to comprise, through an assimilation formula, all types of couriers and bags used by States for official communications.<sup>29</sup> This understanding was further confirmed as a prevailing trend emerging from the debate in the Commission and in the Sixth Committee in 1980.<sup>30</sup>

15. Following such a comprehensive and uniform approach with respect to the scope of the draft articles, the Special Rapporteur proceeded to the elaboration of the draft articles, taking into consideration the multi-purpose services of the diplomatic courier with respect to all types of missions of the sending State by carrying and delivering various kinds of official bags.<sup>31</sup> At the same time, the other main objective of a comprehensive and uniform approach was to provide a proper formula for applying the regime governing the status of the diplomatic courier and diplomatic bags used by States for all official purposes with their consular posts and other missions or delegations abroad.

16. It was suggested that, at this stage of the work of the Commission, the scope of the draft articles should be confined to the couriers and bags used by States, leaving aside, at least for the time being, the courier and the bag used for all official purposes by international organizations. This seemed to be the prevailing trend in the consideration of the scope of application of the draft articles which took place during the thirty-second and thirty-third sessions of the Commission and in the Sixth Committee of the General Assembly at its thirty-fifth and thirty-sixth sessions in 1980<sup>32</sup> and 1981.<sup>33</sup> However, some views expressed in the Commission and in the Sixth Committee found the exclusion of international organizations and some other subjects of international law from the scope of the present draft articles unjustifiable, considering the important role of international organizations in present international relations.<sup>34</sup> The Special Rapporteur pointed out that such a limitation was suggested for practical purposes so as to concentrate at this stage on the examination of the most common and widely known kinds of couriers and bags without losing sight of couriers and bags of international organizations.<sup>35</sup> Moreover, paragraph 2 of draft article 2 contains a safeguard provision protect-

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*, pp. 188–189, para. 211.

<sup>19</sup> *Ibid.*, p. 190, para. 217.

<sup>20</sup> *Ibid.*, pp. 191–192, para. 225.

<sup>21</sup> *Ibid.*, pp. 192–193, para. 231.

<sup>22</sup> *Yearbook . . . 1981*, vol. II (Part Two), pp. 159 *et seq.*, paras. 228–249.

<sup>23</sup> *Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 36th meeting, and 40th to 56th meetings; and “Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-sixth session of the General Assembly” (A/CN.4/L.339), paras. 180–200.

<sup>24</sup> *Yearbook . . . 1981*, vol. II (Part One), pp. 157 *et seq.*, document A/CN.4/347 and Add.1 and 2, paras. 13–49.

<sup>25</sup> See footnote 10 above.

<sup>26</sup> *Yearbook . . . 1981*, vol. II (Part One), pp. 157–158, document A/CN.4/347 and Add.1 and 2, paras. 13–14 and 18–19.

<sup>27</sup> Missions abroad may be diplomatic missions, permanent missions to international organizations, special missions, consular posts, etc.

<sup>28</sup> *Ibid.*, p. 157, para. 14.

<sup>29</sup> *Ibid.*, paras. 14–15.

<sup>30</sup> *Yearbook . . . 1980*, vol. II (Part Two), p. 164, para. 167; and “Topical summary . . . thirty-fifth session . . .” (A/CN.4/L.326), paras. 366–382.

<sup>31</sup> Official bags may be diplomatic, consular, bags of special missions, permanent missions to international organizations or delegations to international conferences.

<sup>32</sup> See footnote 30 above.

<sup>33</sup> See *Yearbook . . . 1981*, vol. II (Part Two), p. 160, para. 235; *Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 40th meeting, para. 12 (United Kingdom), 49th meeting, para. 11 (Czechoslovakia) and para. 28 (Brazil), 51st meeting, para. 9 (Bulgaria); and “Topical summary . . . thirty-sixth session . . .” (A/CN.4/L.339), paras. 190–192.

<sup>34</sup> *Yearbook . . . 1981*, vol. II (Part Two), p. 160, para. 236; and “Topical summary . . .” (A/CN.4/L.339), para. 191.

<sup>35</sup> *Yearbook . . . 1981*, vol. II (Part One), pp. 163–164, document A/CN.4/347 and Add.1 and 2, paras. 46–48.

ing the legal status of the couriers and bags used by international organizations for official purposes with regard to the facilities, privileges and immunities which could be accorded to them within the framework of the present draft articles and under international law, including international treaties governing the diplomatic intercourse of international organizations.

17. During the debate on the scope of the present draft articles which took place in the Commission and in the Sixth Committee of the General Assembly in 1981, some pertinent critical observations were made which, in the view of the Special Rapporteur, warranted the reconsideration of draft article 1. Many members of the Commission generally agreed with the proposed scope advanced in the article. Some expressed doubt as to the desirability of referring to communications not only of the sending State with its missions abroad and between those missions, but also to communications directly "with other States or international organizations".<sup>36</sup> Similar observations were also made during the discussions in the Sixth Committee.<sup>37</sup> The Special Rapporteur's proposal on this matter was considered to be "an undue extension of the concept of diplomatic courier and diplomatic bag" and a deviation from the traditional field of communications between a State and its missions abroad.<sup>38</sup> It was maintained that the Commission should consider this point with greater caution in order to keep the scope of the draft articles within well-established limits based on common State practice.<sup>39</sup>

18. Taking into consideration the above-mentioned comments and suggestions, the Special Rapporteur would propose to amend draft article 1 by deleting the reference to direct communications between the sending State and the receiving State or international organization for the purpose of determining the scope of the present draft articles. Furthermore, upon reconsideration of the text of draft article 1, the Special Rapporteur is of the view that the substantive part of paragraph 2 could be incorporated at the end of paragraph 1 through an assimilation formula, modelled after the diplomatic courier and bag, referring to the use of consular couriers and bags, couriers and bags of special missions, or other missions or delegations.

19. Thus the revised draft article 1 which the Special Rapporteur would like to submit to the Commission for examination and approval reads as follows:

## PART I

### GENERAL PROVISIONS

#### *Article 1. Scope of the present articles*

**The present articles shall apply to communications of States for all official purposes with their diplomatic missions, consular posts, special missions, permanent missions or delegations, wherever situated, 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, as well as consular couriers and bags, couriers and bags of the special missions, permanent missions or delegations.**

20. Taking into consideration the observations made on draft article 2, "Couriers and bags not within the scope of the present articles", it is proposed to retain the text of that draft article as it appears in the second report, as follows:

#### *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.**

At the same time, it may be pointed out that, should the Commission reconsider this item in the light of its further examination in connection with the detailed elaboration of the rules relating to the status of the courier and the bag, then the problem of couriers and bags used by international organizations could be considered at a later stage of the work of the Commission.

#### C. Use of terms

21. A substantial part of the second report was devoted to the examination of definitional problems inherent in the nature of the topic and relevant to the draft articles to be proposed.<sup>40</sup> Some of the terms to be used were well established by State practice and were embodied in existing treaties in the field of diplomatic law, including the four codification conventions adopted under the auspices of the United Nations. The terms in this category form a long list and enjoy general recognition. For the purpose of the present draft articles, those terms could be used directly or by reference to the respective international conventions of a universal character, such as the four codification conventions.

22. The main problem was the definition of the terms closely and specifically relating to the topic, which were only partially defined in the existing conventions.<sup>41</sup> In the view of the Special Rapporteur, those terms, which form the *sedes materiae* of the topic, deserved thorough examination based on the *travaux préparatoires* of the four codification conventions and the relevant State practice. Therefore it was suggested that they be given

<sup>36</sup> *Yearbook . . . 1981*, vol. II (Part Two), p. 160, para. 235.

<sup>37</sup> "Topical summary . . . thirty-sixth session . . ." (A/CN.4/L.339), para. 192.

<sup>38</sup> *Ibid.*; and *Official Records of the General Assembly, Thirty-sixth Session; Sixth Committee*, 49th meeting, para. 28 (Brazil).

<sup>39</sup> *Ibid.*, 48th meeting, paras. 54-55 (Spain).

<sup>40</sup> *Yearbook . . . 1981*, vol. II (Part One), pp. 164 *et seq.*, document A/CN.4/347 and Add.1 and 2, paras. 50-211.

<sup>41</sup> This was the case with the terms "diplomatic courier" and "diplomatic bag", "consular courier" and "consular bag", as well as other kinds of couriers and bags, including the notion of the "courier *ad hoc*", and the status of the captain of a commercial aircraft or ship entrusted with the transportation of a diplomatic bag.

a preponderant place within the definitional provisions of the draft articles.<sup>42</sup>

23. The examination of the notions of the diplomatic courier and the diplomatic bag and the other types of official couriers and bags was concentrated on the identification of their essential legal features. The second report contained an extensive analytical survey of the legislative background of the pertinent provisions of the four codification conventions in order to reveal the main legal elements determining the notions of the professional diplomatic courier, the diplomatic courier *ad hoc* and the status of the captain of a commercial aircraft or ship entrusted with the transportation, custody and delivery of a diplomatic bag.<sup>43</sup> The same method was applied to the study of the notion of the diplomatic bag and the other kinds of bags used by States for all official purposes in the conduct of communications with their missions abroad.<sup>44</sup> Perhaps the Special Rapporteur placed too much emphasis on the need to insert more substantive legal components in the definition of the courier and the bag, which may have led to some excessively detailed and even cumbersome definitions.

24. In the course of the consideration of the second report, both by the Commission and in the Sixth Committee of the General Assembly in 1981, several critical observations were made which, in the view of the Special Rapporteur, deserve careful consideration. Some of these observations were of a general nature, while others referred to specific issues. One of the observations of a general nature referred to article 3 ("Use of terms"). It was pointed out that this draft article contained an unnecessarily long list of terms, some of which were self-explanatory, or their meaning was so well established in international law and State practice that their enumeration might only burden the text.<sup>45</sup> Another observation referred to some definitions in paragraph 1 of that article, particularly of the terms "diplomatic courier" (sub. para. (1)), "diplomatic courier *ad hoc*" (subpara. (2)), "diplomatic bag" (subpara. (3)), "transit State" (subpara. (7)), and others. It was maintained that those definitions contained certain substantive rules which could be eliminated from a provision which is meant to define briefly a legal term to be used in various subsequent articles.<sup>46</sup>

25. Specific comments were made in the Sixth Committee with regard to the definition of the term "diplomatic courier" contained in draft article 3, where "the transmission of an official oral message" was mentioned among the main functions of that courier. Some representatives expressed doubts as to the desirability of including within the scope of the functions of the diplomatic courier the transmission of official oral messages. In their view, such an inclusion might lead to

confusion with the function of a special envoy.<sup>47</sup> They believed that the role of the diplomatic courier should be confined to carrying and delivering the diplomatic bag.

26. In the course of the debate in the Commission and in the Sixth Committee, it was suggested that the drafting of some of the definitions contained in subparagraphs (1), (2), (3), (4) and (7) of article 3, paragraph 1, be reconsidered, as well as the scope and length of that article, with a view to reducing the list of terms.

27. The extensive survey of the legislative background of article 27 of the 1961 Vienna Convention and the relevant articles of the other codification conventions examined in the second report<sup>48</sup> provided enough substantive material for the definition of the legal status of the diplomatic courier and the diplomatic bag, as well as the other kinds of courier and bag. On that basis the three main legal features of the courier were identified.<sup>49</sup> In the view of the Special Rapporteur, the identification of these main legal components of the notion of the courier, though constituting a certain deviation from the usual format of a legal definition under the "use of terms" provision, might provide a comprehensive legal notion of the term "diplomatic courier".

28. However, discussion of the proposed draft article 3, subparagraph (1) of paragraph 1, in 1981, both by the Commission and in the Sixth Committee, proved that such a comprehensive definition was not justified, for it contained substantive elements which could be the subject of specific and more comprehensive provisions. Thus a concise definition would be preferable not only for its brevity, but also as having the advantage of avoiding possible overlapping with the pertinent provisions on specific issues. The Special Rapporteur would therefore suggest that the proposed definitions be revised in line with the above considerations.

29. The definition of the term "diplomatic courier" should thus indicate briefly the official capacity and main function of the courier, i.e., 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 to the diplomatic and other missions of the sending State. In this case there are only two substantive elements which should be indispensable for the definition of the notion of the diplomatic courier: first, his official authorization by the competent authorities of the sending State, and secondly,

<sup>42</sup> *Ibid.*, p. 165, para. 55.

<sup>43</sup> *Ibid.*, pp. 172-174, paras. 107-120.

<sup>44</sup> *Ibid.*, pp. 175 *et seq.*, paras. 126-186.

<sup>45</sup> *Yearbook . . . 1981*, vol. II (Part Two), p. 161, para. 239; *Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 48th meeting, para. 55 (Spain) and 49th meeting, para. 30 (Brazil); and "Topical summary . . . thirty-sixth session . . ." (A/CN.4/L.339), para. 194.

<sup>46</sup> *Yearbook . . . 1981*, vol. II (Part Two), p. 161, para. 239; *Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 50th meeting, para. 46 (Iraq) and 53rd meeting, paras. 30-31 (Mexico); and "Topical summary . . ." (A/CN.4/L.339), para. 195.

<sup>47</sup> *Official Records of the General Assembly, Thirty-sixth session, Sixth Committee*, 48th meeting, para. 55 (Spain) and 53rd meeting, para. 29 (Mexico); and "Topical summary . . ." (A/CN.4/L.339), para. 193.

<sup>48</sup> *Yearbook . . . 1981*, vol. II (Part One), pp. 165 *et seq.*, document A/CN.4/347 and Add.1 and 2, paras. 58-120.

<sup>49</sup> The main legal features of the courier are his main function, the requirements for the proof of his status, such as his credentials, and the scope and content of the facilities, privileges and immunities accorded to him by the receiving State for the exercise of his functions. These three elements: function, proof of status, and facilities, privileges and immunities were assigned as the attributes of the diplomatic courier and identified as the main legal components of the definition which should be used in the draft articles. They have to be further elaborated in the form of specific provisions on the functions, proof of status and credentials of the courier, his appointment and nationality, as well as the facilities, privileges and immunities which he could enjoy in the territory of the receiving State.

his duty to carry and deliver the diplomatic bag to its destination. Consequently, all references in the definition to the formal credentials of the courier (the official document indicating his status and the number of packages constituting the diplomatic bag) and to the "facilities, privileges and immunities [accorded to him by the receiving State] in the performance of his official functions" could be deleted.

30. As was pointed out above (para. 25) "the transmission of an official oral message" was indicated among the functions of the diplomatic courier, contained in paragraph 1 (1) of article 3. This attribute was included in the notion of the diplomatic courier at an early stage of the consideration of the item,<sup>50</sup> based on the practice of certain States and the suggestions made in the written comments of some Governments.<sup>51</sup> However, in order to avoid a possible confusion between a diplomatic courier and a diplomatic envoy, the Special Rapporteur would suggest avoiding reference to the transmission of an official oral message as one of the functions of the diplomatic courier.

31. Following the advice to eliminate substantive rules or elements from the proposed definitions, it is also suggested that the definition of the "diplomatic courier *ad hoc*" be accordingly confined to his capacity as an official of the sending State, with a function to deliver the diplomatic bag on special occasions only as part of his other functions. Consequently, the substantive rule on the duration of the enjoyment of facilities, privileges and immunities accorded to the courier *ad hoc* up to the moment of the delivery to the consignee of the diplomatic bag in his charge should not be embodied in the definition itself. Therefore, the term "diplomatic courier *ad hoc*" may be defined as "an official of the sending State entrusted with the function of diplomatic courier for a special occasion or occasions". However, it would be indispensable in the relevant provisions on the status of the "diplomatic courier *ad hoc*" to spell out the distinction between the

status of the "diplomatic courier *ad hoc*" and that of the ordinary or professional diplomatic courier, as specifically indicated in article 27, paragraph 6, of the 1961 Vienna Convention and the relevant provisions of the other three codification conventions in the field of diplomatic law.<sup>52</sup>

32. The above considerations on the definition of the diplomatic courier regarding the elimination of some substantive rules or elements should also apply to the definitions of all other kinds of courier.<sup>53</sup> Those substantive rules or elements would be dealt with in the relevant provisions on different aspects of the legal status of those couriers.

33. The next important definitional problem which was the subject of extensive examination in the second report<sup>54</sup> and subsequent discussions by the Commission and the Sixth Committee was the definition of the term "diplomatic bag" and the kinds of official bag.<sup>55</sup> On the basis of the examination of the legislative background of the four codification conventions, the Special Rapporteur identified five substantive legal elements determining the status of the diplomatic bag, namely:

(a) The official *function* of the bag as an instrument of diplomatic communications;

(b) The *content* of the bag, consisting of official correspondence, documents or articles intended for official use only;

(c) The *external features* relevant to the identification of the diplomatic bag, such as special labels, wax-sealed packages and other visible marks;

(d) The *required documents* indicating the character of the bag and the number of packages constituting it;

(e) The *treatment accorded* to the bag by the authorities of the receiving or the transit State in accordance with international law, particularly its inviolability.<sup>56</sup>

34. These legal features are characteristic for all kinds of diplomatic bag, whether accompanied by a professional diplomatic courier, by a diplomatic courier *ad hoc* or entrusted to the captain of a ship or a commercial aircraft, as well as the diplomatic bag dispatched by postal or other means, whether by land, air or sea. Certain specific features inherent in the non-accompanied diplomatic bag, which were indicated in the second report,<sup>57</sup> should be further examined in connection with the elaboration of the relevant draft articles. In the case of a diplomatic bag dispatched by postal or other means, whether by land, air or sea, the postal

<sup>50</sup> Already in one of the early reports of the Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, in 1978, it was explicitly pointed out, when indicating the scope of the functions of the courier, that "he might also carry messages orally" (A/CN.4/L.285) (see *Yearbook . . . 1978*, vol. II (Part Two), p. 140, para. 144, sect. (2) "Function of the diplomatic courier"). This idea of the oral message was retained in the subsequent reports on this topic (A/CN.4/WP.4 and A/CN.4/L.310) which were considered by the Commission (see *Yearbook . . . 1979*, vol. II (Part Two), pp. 172-173, chap. VI, sect. C.1 (2) (e) and C.2 (1)).

<sup>51</sup> See *Yearbook . . . 1979*, vol. II (Part One), p. 213, document A/CN.4/321 and Add.1-7. According to the comment of the Government of Chile, the diplomatic courier "is responsible for the custody and physical transport of the diplomatic bag, or for transmitting an oral message, from the sending State to the premises of the appropriate mission or office in the receiving State" (*ibid.*, p. 218).

Indeed, there have been instances when an officer of the sending State was entrusted with the mission to deliver an official correspondence of that State and to convey an official oral message. Sometimes the official oral message is contained also in a written statement or other documents addressed to the competent authorities of the receiving State. In this case, however, the messenger is not a diplomatic courier as such but a special diplomatic envoy who, owing to his special function, is accorded legal protection, privileges and immunities similar to, but very often exceeding, those of a diplomatic courier. While the main task of the diplomatic courier is to deliver the diplomatic bag to the missions of the sending State, the role of the special messenger or envoy is to transmit an official oral or written message by the head of State or Government, or other higher officer of the sending State, to the corresponding competent authorities of the receiving State.

<sup>52</sup> Cf. article 35, para. 6 of the 1963 Vienna Convention; article 28, para. 7 of the 1969 Convention on Special Missions; article 27, para. 6 of the 1975 Vienna Convention.

<sup>53</sup> Consular couriers, couriers of the special missions or permanent missions to international organizations, etc.

<sup>54</sup> *Yearbook . . . 1981*, vol. II (Part One), pp. 175 *et seq.*, document A/CN.4/347 and Add.1 and 2, paras. 123-186.

<sup>55</sup> It was emphasized that the status of the diplomatic bag deserved thorough investigation, for it was one of the principal tools for the exercise of the freedom of communication for all official purposes. Following the method applied by the Special Rapporteur in the examination of the legal features of the diplomatic courier, it was suggested that the legislative background of the provisions of the four codification conventions and the relevant State practice relating to the status of the official bag be studied. The main object of this study was to identify the legal components of the definition of the diplomatic bag.

<sup>56</sup> *Ibid.*, pp. 180-181, paras. 159-166.

<sup>57</sup> *Ibid.*, pp. 182-185, paras. 174-183.



documents, the documents for the consignment on ship or the document for the air freight may indicate the official character of the parcel containing the diplomatic bag. There might also be some specific regulations for the legal protection and preferential treatment of this kind of diplomatic bag in order to ensure safe and speedy delivery.

35. Taking into consideration the main legal features of the diplomatic bag as elucidated by the provisions of the 1961 Vienna Convention and the other codification conventions and evidenced by State practice, a functional definition of the diplomatic bag was suggested for consideration.<sup>58</sup> However, in the light of the comments made during the consideration of the second report in the Commission and in the Sixth Committee, the proposed definition of the diplomatic bag contained in draft article 3, paragraph 1 (3) should be reconsidered. First, the definition should be harmonized with the revised provision on the scope of the present articles (draft article 1). Consequently, the function of the diplomatic bag should be confined to communications between the sending State and its missions abroad and the reference to direct communications "with other states or international organizations" should be deleted. Secondly, the substantive rule for granting facilities, privileges and immunities to the official bag by the receiving State or the transit State should also be left out, though it is central to the legal status of the bag. Of course, the treatment to be accorded to the diplomatic bag will be the subject of special provisions. In this case the definition of the diplomatic bag will contain only the indication: (a) of its function, to carry official correspondence, documents or articles exclusively for official use as an instrument for communications between the sending State and its missions abroad; (b) its external features or visible external marks certifying the official character of the bag; and (c) the method of its delivery—by a diplomatic courier or not accompanied by such a courier. These three objective features are, in the view of the Special Rapporteur, indispensable for the definition of the status of the diplomatic bag and will distinguish it *prima facie* from the personal luggage of a diplomatic agent or an ordinary postal parcel or consignment dispatched by land, air or sea. The same approach shall be applied to the legal definition of a diplomatic bag not accompanied by diplomatic courier, i.e., a diplomatic bag entrusted to the captain of a ship or a commercial aircraft or sent by postal or other means, whether by land, air or sea.

36. The legal definition under the "use of terms" provisions in article 3 may provide only the most essential objective elements of the legal status of the

<sup>58</sup> For the examination of the official bag entrusted to the captain of a ship or a commercial aircraft, *ibid.*, pp. 183–184, paras. 176–180, and for some specific aspects of the legal status of the diplomatic bag sent by postal channels or through overland shipment by sea and air freight, *ibid.*, pp. 184–185, paras. 181–183.

This definition was conceived as a model definition of all kinds of official bag, such as consular bags and bags of the missions or delegations to international meetings (*ibid.*, p. 185, para. 184). The proposed definition, though not exhaustive with regard to all distinctive elements of the legal status of the official bag, in the view of the Special Rapporteur, should "contain only an indication of the legal components of the notion, which as a whole define the essential characteristics of the bag" (*ibid.*, para. 185). It was also understood that each one of these elements would deserve special consideration and should be further elaborated in specific draft articles (*ibid.*).

diplomatic bag. Other equally important attributes<sup>59</sup> or questions of a more technical nature ought to be considered in substance in part III of the present draft articles.

37. The other terms listed in draft article 3, paragraph 1, could also be reconsidered in the light of the comments made in the course of the debate on this item in the Commission and in the Sixth Committee. The revision of the proposed terms could be carried out in either of two ways, by amending some of the terms, or by reducing the list of legal definitions by removing those terms which are self-explanatory or well established in international law or generally recognized State practice. This approach was already suggested by the Special Rapporteur in his second report<sup>60</sup> and during the consideration of that report by the Commission,<sup>61</sup> and was further recommended by some members of the Commission and some representatives in the Sixth Committee.<sup>62</sup> It is therefore suggested to modify the definition of "sending State" in article 3, para. 1 (4), by deleting, in accordance with the revised text of draft article 1 ("Scope of the present articles"), the words "or to other States or international organizations".

38. Regarding the definition of "transit State" contained in para. 1 (7), there were some observations with regard to the consent of that State as a requirement for the passage of the courier or the non-accompanied diplomatic bag *en route* to the receiving State. A view was expressed that such a provision might impose undue restrictions upon the sending State.<sup>63</sup> However, in the view of the Special Rapporteur the consent of the transit State is already implied in the case of a visa-free regime when, in accordance with bilateral or other agreements between the sending and the transit State, an entry or transit visa is not required for persons visiting or passing through the territory of the latter State.<sup>64</sup> Perhaps it should be clarified in the text that the reference to the consent of the transit State should be made more conditional, in accordance with the regime established between the sending and the transit State. It is obvious that in normal circumstances, prior consent of the transit State should not be required for the dispatch of a diplomatic bag not accompanied by diplomatic courier. Another solution of this problem would be to leave out the requirement of "consent" from the definition of the transit State and to consider it specifically with respect to the provisions on the rights and obligations of the transit State and the third State.

<sup>59</sup> These attributes include the notion of "official correspondence, documents or articles exclusively for official use", which is of particular significance for the prevention of possible abuses, or the problems relating to the treatment to be accorded to the bag and the protection of its inviolability.

<sup>60</sup> *Yearbook . . . 1981*, vol. II (Part One), pp. 164–165, and 186–188, document A/CN.4/347 and Add.1 and 2, paras. 54 and 187–210.

<sup>61</sup> *Yearbook . . . 1981*, vol. II (Part Two), p. 161, para. 241.

<sup>62</sup> *Ibid.*, paras. 239–240; *Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 48th meeting, para. 55 (Spain), 49th meeting, para. 30 (Brazil), 50th meeting, para. 46 (Iraq), 51st meeting, para. 9 (Bulgaria), 53rd meeting, paras. 30–31 (Mexico); and "Topical summary . . . thirty-sixth session . . ." (A/CN.4/L.339), paras. 194–196.

<sup>63</sup> *Yearbook . . . 1981*, vol. II (Part Two), p. 161, para. 239.

<sup>64</sup> It is evident that a transit visa when requested is a restriction, but it is applied to all nationals including officials of the sending State, unless an exemption from such consent is given on the basis of a special arrangement with regard to diplomatic agents or other State officials of the sending State.

39. As was pointed out earlier (para. 24 above), some critical observations were made with respect to the length of the list of legal definitions contained in draft article 3.<sup>65</sup> Following the comments made, definition of some of the terms in article 3 could be omitted, at least at this stage of the work on the topic. There is another category of legal terms which are defined in the codification conventions and are widely used in international law and State practice<sup>66</sup> which may be retained in the draft at this stage, for they pertain very closely to the very nature of the status of the diplomatic courier and the diplomatic bag.

40. It is further suggested that the list of the terms to be used should be considered in connection with the development of the work on the topic; thus definitions could be submitted as soon as needed in the relevant draft provisions proposed for examination. The examination of the draft article on the use of terms as a whole could therefore be considered after the completion of the entire set of draft articles.

41. Since there were no comments or amendments regarding the provisions of paragraphs 2-3 of draft article 3, the Special Rapporteur proposes to retain them without any change.

42. Taking into consideration the comments and suggestions made on legal definitions to be used for the purpose of presenting draft articles, the Special Rapporteur would like to submit to the Commission for examination and provisional approval the following revised draft article on the use of terms:

#### *Article 3. Use of terms*

##### 1. For the purpose of the present articles:

(1) "diplomatic courier" means a person duly authorized by the competent authorities of the sending State entrusted with the custody, transportation and delivery of the diplomatic bag to the diplomatic missions, consular posts, special missions, permanent missions or delegations of the sending State, wherever situated;

(2) "diplomatic courier *ad hoc*" means an official of the sending State entrusted with the function of diplomatic courier for a special occasion or occasions;

(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, permanent missions or delegations, wherever situated, dispatched through diplomatic courier or the captain of a commercial ship or aircraft or sent by postal or other means, whether by land, air or sea;

(4) "sending State" means a State dispatching a diplomatic bag, with or without a courier, to its diplo-

matic missions, consular posts, special missions, permanent missions or delegations, wherever situated:

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

(a) diplomatic missions, consular posts, special missions or permanent missions are situated; or

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

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

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

(8) "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;

(9) "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 performing a special task in relation to it;

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

(11) "delegation" means the delegation sent by a State to participate on its behalf in the proceedings of either an organ of an international organization or an international conference;

(12) "international organization" means an inter-governmental organization.

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

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

#### D. General principles

43. The attempt at formulating some general principles of international law underlying the existing basic rules of modern diplomatic law with special reference to the legal status of the diplomatic courier and the diplomatic bag found a favourable response, both by the Commission and the Sixth Committee.<sup>67</sup> At the same time, there were some comments on specific

<sup>65</sup> Indeed, while some of the terms, such as "delegation", "delegation to an organ", "delegation to a conference", are self-explanatory, others, such as "host State", "permanent observer mission", "observer delegation", "observer delegation to an organ" and "observer delegation to a conference", might seldom be used in the relevant articles.

<sup>66</sup> "Diplomatic mission", "consular post", "special mission", "permanent mission", "sending State", "receiving State", "transit State" and "international organizations".

<sup>67</sup> *Yearbook . . . 1981*, vol. II (Part Two), p. 162, para. 243; *Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 42nd meeting, para. 29 (USSR), 44th meeting, para. 18 (Ukrainian SSR), 49th meeting, para. 31 (Brazil), 50th meeting, para. 37 (German Democratic Republic) and para. 46 (Iraq); and "Topical summary . . ." (A/CN.4/L.339), para. 197.

provisions contained in draft articles 4-6 submitted by the Special Rapporteur in his second report.<sup>68</sup>

44. Since these draft articles, like those preceding them, were referred to the Drafting Committee but were not considered by it, it might be prudent, in the light of the comments and observations made in the course of the debate in the Commission and in the Sixth Committee, to suggest certain amendments thereto. It should be pointed out, however, that in the case of draft articles 4-6, the suggestions for changes were relatively limited in number and scope.

45. It was emphasized that the three general principles should be taken together as a framework of rights and obligations of all States concerned, namely the sending State, receiving State and transit State. The interplay of those principles provides a sound basis for effective reciprocity and a viable balance between the rights and obligations of the sending and the receiving State. Diplomatic law as a system of international legal rules is based on the sovereign equality of States and operates predominantly through reciprocity. Therefore, very often in State practice the most effective sanction in the field of diplomatic law takes the form of reciprocal action. The fact is that every State is both a sending and a receiving State, so that there could always be an equilibrium between rights and obligations in the process of the diplomatic intercourse governed by the general accepted rules of international law.

46. Nevertheless, the principle of freedom of diplomatic communication contains certain basic norms which cannot be derogated from or nullified by way of reciprocity. In the submission of the Special Rapporteur, the rule of reciprocity could provide a compromise or a balance between mutual rights and obligations only in respect to certain modalities in the application of the principle itself. These modalities may refer, for instance, to the size of the staff of the mission, the establishment of laws and regulations concerning zones of entry in which the operation of radio transmitters is restricted or prohibited, or the scope of facilities accorded to the missions for the acquisition of accommodation and other facilities.

47. The restrictive application of the principle of freedom of diplomatic communication could operate through reciprocity only on the condition that it does not affect the fundamental rights inherent in that principle, such as the right of free and confidential communication between the sending State and its missions abroad by all appropriate means, including diplomatic couriers and bags, the dispatch of written or radio messages in code or cipher, the inviolability of the diplomatic courier and the diplomatic bag, as well as other related facilities, privileges and immunities.

48. The main objective of the principle of freedom of communication for all official purposes is to provide legal protection of, and ensure favourable conditions for, the performance of the functions of the diplomatic mission. The safe, unimpeded and expeditious delivery of the diplomatic message and the inviolability of its confidential character constitute the most important practical aspect of that principle. Therefore it was placed as the first in order of the set of three general

principles constituting the basis of the legal framework of specific provisions relating to the status of the diplomatic courier and the diplomatic bag. It was therefore explicitly stated in draft article 6, paragraph 2 (b), that States could modify among themselves, by custom or agreement, the extent of the facilities, privileges and immunities for their diplomatic couriers and diplomatic bags, provided that such reciprocal modification was not incompatible with the object and purpose of the provisions on the status of the courier and the bag.

49. The effective application of the rule of free diplomatic communication not only requires the receiving State to permit and protect free communications on its territory, effected through diplomatic couriers and bags or other appropriate means, but places upon the transit State or States an identical obligation. For it is obvious that in some instances the safe, unimpeded and expeditious delivery of the diplomatic bag to its final destination depends upon its passage, on its itinerary, through the territories of other States. This practical requirement is embodied as a general rule in paragraph 2 of draft article 4. It is contemplated further that on that basis there should be some more specific provisions regarding the right of the diplomatic courier to travel through the territory of the transit State *en route* to the receiving State, his obligation to respect the laws and regulations of the transit State and the facilities, privileges and immunities accorded by the transit State to the diplomatic courier and the diplomatic bag.

50. Taking into consideration the above observations, it is suggested that the text of draft article 4 be maintained as submitted in the second report,<sup>69</sup> with some minor editorial changes. The duties of the receiving and the transit States to permit and protect on their territory free communications on the part of the sending State with its diplomatic and other missions, as well as between those missions, as stipulated in draft article 4, are well harmonized with the duties of the sending State and its officials, including its diplomatic couriers, to respect the rules of international law and the laws and regulations of the receiving and the transit State. In this case, the required proper balance is struck between the rights and obligations of all States concerned, i.e., the sending State, the receiving State and the transit State.

51. It was suggested during the consideration of the second report by the Commission and later in the Sixth Committee<sup>70</sup> that draft article 5, paragraph 1, should prescribe not only the duty of the courier to respect international law and the laws and regulations of the receiving and the transit State, but also such a duty of the sending State itself, in order to establish the necessary equilibrium between the rights and duties of the sending, the receiving and transit States stipulated in draft articles 4-5. This approach seems reasonable and, accordingly, draft article 5, paragraph 1, is amended.

52. Draft article 5 contains further references to some more specific duties of the diplomatic courier in the

<sup>69</sup> *Ibid.*, p. 190, para. 217.

<sup>68</sup> *Yearbook . . . 1981*, vol. II (Part One), pp. 189 *et seq.*, document A/CN.4/347 and Add.1 and 2, paras. 212-231.

<sup>70</sup> *Yearbook . . . 1981*, vol. II (Part Two), p. 162, para. 243; *Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 49th meeting, para. 31 (Brazil); and "Topical summary . . ." (A/CN.4/L.339), para. 198.

discharge of his functions not to interfere in the internal affairs of the receiving and the transit State (para. 2). According to this article, the temporary accommodation of the diplomatic courier should not be used in any manner incompatible with his functions as set out by the present articles, by the relevant provisions of the 1961 Vienna Convention or by other rules of general international law or by special agreements in force between the sending and the receiving or the transit State.

53. The duty to respect international law and the laws and regulations of the receiving or the transit State may relate to a wide range of specific obligations regarding the maintenance of law and order and respect for administrative and other regulations enforced in the public interest. They should be spelled out in more specific terms in part II of the draft articles, devoted to the status of the diplomatic courier.

54. The provisions of draft article 5 as a whole constitute an essential correlative rule of the freedom of communication which could enhance the protection of the legitimate interests of the receiving and the transit States. They also provide a framework of general rules which could have a preventive function with respect to possible abuses with the facilities, privileges and immunities accorded to the diplomatic courier. For the purposes of formulating general principles, the present drafting of articles 4-5 could be sufficient, since it lays down the ground rules for the equilibrium between the rights and obligations of the sending and the receiving States or the transit State. These rules may, of course, be further substantiated in specific provisions on various aspects of the legal status of the diplomatic courier.

55. The general principle of non-discrimination and equal treatment through reciprocity applied in the field of diplomatic intercourse in general, and to the status of the diplomatic courier and the diplomatic bag in particular, is based on the sovereign equality of States. Considered together with the two other principles formulated in draft articles 4-5, it adds an important element to the legal framework underlying the rules governing the status of the diplomatic courier and the diplomatic bag. This principle was reflected in the draft article 6 submitted in the second report.<sup>71</sup> Since there were no specific observations or amendments, the Special Rapporteur suggests that that text be retained.

56. In the light of the above observations, the Special Rapporteur would like to submit to the Commission for consideration and provisional adoption the draft articles on general principles, with the amendments already indicated:

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

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

<sup>71</sup>Yearbook . . . 1981, vol. II (Part One), pp. 192-193, document A/CN.4/347 and Add.1 and 2, para. 231.

**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.**

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

**1. Without prejudice to the facilities, privileges and immunities accorded to a diplomatic courier, it is the duty of the sending State and its 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, in the discharge of his functions, not to interfere in the internal affairs of the receiving State and the transit State.**

**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 of 1961 or by other rules of international law or by any special agreements in force between the sending State and the receiving State or the transit State.**

**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 articles restrictively because of a restrictive application of that provision to its 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.**

57. In the course of the debate on the general principles (draft articles 4, 5 and 6), both in the Commission and in the Sixth Committee, reference was made to some other issues of a general nature such as, on the one hand, the rule of unconditional and complete inviolability of the diplomatic bag as provided for in article 27 of the 1961 Vienna Convention, article 28 of the 1969 Convention on Special Missions and article 57 of the 1975 Vienna Convention, and, on the other hand, the option to open or return the consular bag if the request for opening is refused by the authorities of the sending State, as provided for in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations. This is an important issue which deserves full consideration. At this stage of the work on the topic, the issue of the inviolability of the bag was dealt with in the two previous reports, in greater detail in the second report.<sup>72</sup>

<sup>72</sup>Yearbook . . . 1980, vol. II (Part One), p. 243, document A/CN.4/335, para. 52; and Yearbook . . . 1981, vol. II (Part One), pp. 154, 162 *et passim*, document A/CN.4/347 and Add.1 and 2, paras. 3, 35 and footnotes 42 and 43, paras. 143-146 and 165-173.

58. The Special Rapporteur expressed the view that it would be advisable to opt toward the uniform rule contained in article 27 of the 1961 Vienna Convention<sup>73</sup> and accordingly suggested to proceed on that basis to the elaboration of draft articles on the legal status of the diplomatic bag.<sup>74</sup> This suggestion was also based on the examination of some 110 bilateral treaties in the field of diplomatic law, 92 of which contained provisions on unconditional and complete inviolability similar to article 27 of the 1961 Vienna Convention, while only 18 had provisions deviating from it in one way or another along the lines of article 35, paragraph 3, of the 1963 Vienna Convention.<sup>75</sup>

<sup>73</sup> *Yearbook . . . 1981*, vol. II (Part One), pp. 181–182, document A/CN.4/347 and Add.1 and 2, para. 168.

<sup>74</sup> *Ibid.*, p. 182, para. 173.

<sup>75</sup> *Yearbook . . . 1981*, vol. II (Part Two), p. 162, para. 244. Some bilateral conventions contain the rule of unconditional and complete

59. If this matter is to be examined further, it may be more appropriate to do so when the draft articles on the status of the diplomatic bag are considered by the Commission. Such a pragmatic approach might offer more substantive grounds for the study and evaluation of the practical consequences of the appropriate solution of that problem. The Special Rapporteur is conscious of the significance of this issue and would keep in mind the comments that were made thereon.

inviolability of the consular bag. A number of those conventions were concluded prior to the 1963 Vienna Convention but many of them were concluded after it, and yet they contain the rule of unconditional and complete inviolability (for further reference to this issue, see *Yearbook . . . 1981*, vol. II (Part One), pp. 161–162, document A/CN.4/347 and Add.1 and 2, paras. 34–35 and footnotes 42 and 43). A further examination of some additional bilateral treaties and other instruments up to 1980, most of them on consular relations, has provided even stronger evidence of the trend towards unconditional and complete inviolability of the diplomatic and consular bag.

## II. Draft articles on the status of the diplomatic courier, the diplomatic courier *ad hoc* and the captain of a commercial aircraft or the master of a ship carrying a diplomatic bag

### A. Introductory note

60. Following the structure of the draft articles proposed in the second report,<sup>76</sup> the next part of the study of the topic and elaboration of draft articles therein will be devoted to the status of the diplomatic courier, the diplomatic courier *ad hoc* and the captain of a commercial aircraft or the master of a ship entrusted with the delivery of a diplomatic bag. The work on this second part of the draft articles would be greatly assisted by the analytical survey of the *travaux préparatoires* of the four codification conventions pertaining to those issues, which was done in the second report.<sup>77</sup> Therefore, while applying the same functional and pragmatic approach in the examination of the problems under consideration, greater emphasis will be placed on inquiry into the present State practice, as evidenced by international treaties, national laws and regulations and established practices. Consequently, the reference to the legislative history of the relevant provisions of the four codification conventions would be confined only to a brief background, which should serve for the elucidation of the main legal elements determining the status of the diplomatic courier.

61. The notion of the status of the diplomatic courier could be conceived in a restricted sense as a set of rules which lay down the formal requirements for the determination of the position of the diplomatic courier, his credentials, and the recognition or acceptance of his official functions. This notion of the status of the diplomatic courier will be used for the purpose of the present draft articles related to the proof of his status, the procedure for his appointment by the sending State, and his acceptance by the receiving State, including the question of his nationality. The notion of the status of the diplomatic courier could also have a broader meaning. It may comprise not only the status of the diplomatic courier in the restricted sense but in addition it may

include the indication of his official functions, their scope and duration, as well as his rights and obligations, including the facilities, privileges and immunities accorded to him for the performance of his functions. Under such a general notion would fall three categories of provisions which reflect the main facets of the legal status of the diplomatic courier: firstly, the proof of the status of the diplomatic courier, his appointment, nationality and acceptance or non-acceptance by the receiving State; *secondly*, the content, scope and duration of his functions; and *thirdly*, his rights and obligations, including the facilities, privileges and immunities accorded to him by the receiving State. These three categories of provisions in their entirety form part II of the present draft articles. They would be considered, as appropriate, when determining the status of the regular professional diplomatic courier, and in more limited ways, the status of the diplomatic courier *ad hoc* and the captain of a commercial aircraft or the master of a ship. It is suggested that the examination of these issues proceed in the order indicated above.

### B. Status of the diplomatic courier

#### 1. PROOF OF STATUS

62. The formal requirements of the documents or credentials testifying to the status of the diplomatic courier are essentially within the domestic jurisdiction of the sending State. They are set out by national laws, regulations or established practices, and may be embodied in various legal instruments such as laws and other legislative acts, decrees, customs, immigration and other administrative regulations, foreign office circulars, orders.<sup>78</sup> However, there are certain general rules

<sup>76</sup> *Yearbook . . . 1981*, vol. II (Part One), pp. 155–156, document A/CN.4/347 and Add.1 and 2, para. 7; see also para. 10 above.

<sup>77</sup> *Ibid.*, pp. 165 *et seq.*, paras. 58–122.

<sup>78</sup> The legal nature and denominations of the relevant acts are known for their diversity, even within one State. In some instances there are specific provisions on the status of foreigners, and diplomatic couriers in particular, embodied in civil and criminal laws and laws on customs, immigration and foreign trade. For example, for such laws of the USSR which contain information on administrative regulations on the matter, see United Nations, Legislative Series,

of international law established through international customary law or bilateral and multilateral treaties in the field of diplomatic intercourse which are related to the documents required for indicating the status of the diplomatic courier.<sup>79</sup> Such rules also have been developed in State practice, in diplomatic correspondence and in official communications or statements.<sup>80</sup>

vol. VII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* (Sales No. 58.V.3), pp. 338 and 345–347; and information communicated in 1982 by the USSR (see pp. 240–244 above), document A/CN.4/356 and Add.1–3). The Austrian Federal Act of 15 June 1955 concerning customs and customs procedures provides, in article 172, para. 9, that “the official luggage of diplomatic couriers” shall not be submitted to customs inspection (United Nations, Legislative Series, vol. VII . . . , p. 20). Similar régimes of exemption are provided by Customs Act No. 271 of Finland of 8 September 1939 (*ibid.*, pp. 118–119) and the Customs Act of Czechoslovakia of 24 April 1974 (see the information communicated by Czechoslovakia, pp. 235–236 above, document A/CN.4/356 and Add.1–3).

Certain States have enacted special decrees on the diplomatic courier and the diplomatic bag. This is the case with Argentina: Decree No. 3437 of 22 November 1955 (United Nations, Legislative Series, vol. VII . . . , p. 7); Colombia: Decree No. 615 of 6 April 1935 (*ibid.*, p. 67) and Decree No. 3135 of 20 December 1956 (Pan American Union, *Documents and notes on privileges and immunities with special reference to the Organization of American States* (Washington, D.C., 1968), pp. 264 and 270–271); Ecuador: Supreme Decree No. 1422 of 31 December 1953 (*ibid.*, p. 292); and Paraguay: Decree-law No. 160 of 26 February 1958 (*ibid.*, p. 338).

The prevailing State practice attests that usually States prefer to deal with the status of the diplomatic courier and the diplomatic bag through regulations and other administrative acts, orders, circulars, memoranda or instructions issued by the Ministry of Foreign Affairs, the Ministry of Foreign Trade or other governmental agencies. Such regulations and circulars on diplomatic privileges and immunities have been adopted, for instance, by the Philippines: chapter III of the Foreign Service Regulations of the Philippines (United Nations, Legislative Series, vol. VII . . . , p. 237); Sweden: Ordonnance royale sur les étrangers of 4 June 1954 (*ibid.*, p. 303); Switzerland: Règles appliquées par le Département politique fédéral en matière d'immunités et privilèges diplomatiques et consulaires (*ibid.*, p. 307) and Règlement sur le traitement en douane des envois destinés aux missions diplomatiques à Berne et à leur personnel, of 24 August 1955 (*ibid.*, pp. 323–324); Belgium: Mémoire sur le régime fiscal, douanier, etc., applicable aux membres du corps diplomatique accrédités en Belgique (*ibid.*, pp. 29–30) and Instruction du Ministère des finances concernant les immunités diplomatiques, 1955 (*ibid.*, pp. 45–46); Republic of Korea: Regulation on the Treatment of Official Documents (see above, pp. 237–238, document A/CN.4/356 and Add.1–3); Czechoslovakia: Customs Act of 24 April 1974 (*ibid.*, p. 235); Yugoslavia: Circular note 949/80 of 12 May 1980 sent by the Federal Secretariat for Foreign Affairs to all the diplomatic missions in Belgrade on the procedures applicable to receiving and dispatching mail (*ibid.*, p. 245); and others. The *Code of Federal Regulations* of the United States of America contains, in Title 19, specific provisions on the immunities of the official bag and the accompanied personal baggage of the diplomatic courier (*Code of Federal Regulations, Title 19—Customs Duties*, revised as of April 1, 1981 (Washington, D.C.), pp. 594–596, sect. 148.82 and 148.83).

<sup>79</sup>For more detailed reference to international treaties dealing with the status of the diplomatic and other kinds of official courier, see the preliminary report, paras. 17–30 (*Yearbook . . . 1980*, vol. II (Part One), pp. 235–237, document A/CN.4/335).

<sup>80</sup>Sources of this kind reveal interesting international disputes and attitudes of States with regard to some important issues relating to the required documents testifying to the official status of the diplomatic courier, his functions, privileges and immunities in general, and his personal inviolability, exemption from customs control, granting of visas and other specific issues, in particular. Reference to such cases could be found in some well-known collections of international treaties and diplomatic documents, writings of publicists and periodicals in the field of international law, such as: J. B. Moore, *A Digest of International Law*, vol. IV (Washington, D.C., U.S. Government Printing Office, 1906), pp. 695–701 and 711–716; G. H. Hackworth, *Digest of International Law*, vol. IV (Washington, D.C., U.S. Government Printing Office, 1942), pp. 621–629; M. M. Whiteman, *Digest of International Law*, vol. 7 (Washington, D.C., U.S. Government Printing Office, 1970), pp. 214–220; G. Perrenoud,

63. The rule of customary international law regarding the proof of status of the diplomatic courier was first reflected in article 27, paragraph 5, of the 1961 Vienna Convention. According to established practice, it stipulates that the diplomatic courier “shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag”. This provision was later used as a model for the other codification conventions in the field of diplomatic law adopted under the auspices of the United Nations.<sup>81</sup>

64. An analytical survey of the legislative history of the above provision indicates that the discussions were confined to the consideration of the kind of documents required to testify to the status of the courier, their character and denomination. The diversity of State practice on this matter was referred to very often in the *travaux préparatoires* of the Convention. The following lines give a brief account of the initial consideration of the issue by the Commission and the subsequent codification work of the 1961 Vienna Convention.

65. The reference to the proof of status of the diplomatic courier was made in draft article 16, paragraph 1, on diplomatic intercourse and immunities proposed by the Special Rapporteur for the topic at the ninth session of the Commission, in 1957. It stated that:

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\* . . .<sup>82</sup>

In reference to article 16 above, the Secretary to the Commission stated that “as regards the reference to passports *ad hoc*, . . . diplomatic couriers often had regular passports designating them as such”.<sup>83</sup> Regarding the use of the term “passport”, one member of the Commission stated that, in the French language, the term “passport” for the travel document carried by diplomatic couriers was inappropriate. He stated that in Europe the practice was for such persons to receive from the head of the mission or the minister of foreign

*Régimes des privilèges et immunités des missions diplomatiques étrangères et des organisations internationales en Suisse* (Lausanne, Librairie de l'Université F. Rouge, 1949), pp. 66–68; 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. 115 et seq.; E. Satow, *A Guide to Diplomatic Practice*, 4th ed., rev. by N. Bland (London, Longmans, 1957); R. Genet, *Traité de diplomatie et de droit diplomatique* (Paris, Pedone, 1931), vols. I–III; C. Parry, *A British Digest of International Law* (London), part VII, “Organs of States” (London, Stevens, 1965); J. A. Beesley, ed., “Canadian practice in international law during 1972 as reflected mainly in public correspondence and statements of the Department of External Affairs”, *The Canadian Yearbook of International Law 1973* (Vancouver, B.C.), vol. XIII, pp. 308–309; P. Cahier, *Le droit diplomatique contemporain* (Geneva, Droz, 1962); C. Rousseau, “Chronique des faits internationaux”, *Revue générale de droit international public* (Paris), vol. 75 (1971), p. 159; A. W. Rovine, “Contemporary practice of the United States relating to international law”, *American Journal of International Law* (Washington, D.C.), vol. 67 (1973), pp. 536–538.

<sup>81</sup>Cf. article 35, para. 5, of the 1963 Vienna Convention; article 28, para. 6, of the 1969 Convention on Special Missions; article 27, para. 5, article 57, paras. 6 and 8, and article 72 of the 1975 Vienna Convention.

<sup>82</sup>*Yearbook . . . 1957*, vol. I, p. 74, 398th meeting, para. 27. The term “passports *ad hoc*” was used in article 14, para. 1, of the Harvard Law School draft on Diplomatic Privileges and Immunities (see Harvard Law School, *Research in International Law*, part I, “Diplomatic Privileges and Immunities” (Cambridge, Mass., 1932), published as *Supplement to The American Journal of International Law* (Washington, D.C.), vol. 26 (1932), pp. 79–85).

<sup>83</sup>*Yearbook . . . 1957*, vol. I, p. 74, 398th meeting, para. 34.

affairs special papers which showed the number and serial numbers of the letters or parcels entrusted to the couriers; in certain countries, those papers had to be stamped. He admitted, however, that some States employed regular diplomatic couriers who carried regular diplomatic passports, but they too had to carry couriers' papers.<sup>84</sup>

66. In the draft articles submitted to the Commission at its tenth session, in 1958, by the Special Rapporteur on the same subject, article 21, paragraph 3, alluded to the status of a diplomatic courier. It read in part:

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. . . .<sup>85</sup>

In regard to the above paragraph, one Commission member drew attention to the difficulty which often arose in connection with the courier's passport. He pointed out that while some States insisted that the passport should be visaed by the embassy, the general practice was not to demand a visa, though States were within their rights in requiring a visa, as either a permanent or a temporary measure. He added that it was important, however, for States to notify other States of any change in their practice.<sup>86</sup> Another member, on the other hand, doubted the necessity of including a definition in the text, adding that it might perhaps be sufficient to state that "A diplomatic courier shall be furnished with a document testifying to his status."<sup>87</sup> Referring to the practice of some countries, one member of the Commission wondered whether it was necessary to mention the courier's passport, as distinct from a document testifying to the status of the courier, taking into consideration the fact that only couriers who were permanent members of the courier service were given courier's passports.<sup>88</sup> There was a compromise suggestion to the effect that, in addition to the phrase in the 1957 text, it should be stated that the diplomatic courier should be furnished with a document testifying to his status, though not necessarily a courier's passport.<sup>89</sup>

67. As was pointed out in the second report,<sup>90</sup> the 1961 United Nations Conference on Diplomatic Intercourse and Immunities devoted relatively limited discussion to the question of diplomatic couriers, which was overshadowed by the question of wireless transmitters and the diplomatic bag. Perhaps the most essential proposition was an amendment to paragraph 5 of draft article 25 (containing a provision on the status of the diplomatic courier),<sup>91</sup> submitted by the French delegation. According to this amendment, in paragraph 5 of article 25, after the words: "The diplomatic courier" the following text was to be inserted: ". . . , who shall be provided with an official document attesting his rank

and the number of packages constituting the bag",<sup>92</sup> The amendment was adopted with some drafting changes.<sup>93</sup>

68. In the draft articles on consular intercourse and immunities which were considered by the Commission at its twelfth session, in 1960, no specific mention was made of diplomatic or consular couriers. The general assumption at that time was that the institution of consular couriers was unknown to international law and was not common in State practice. In line with such a perception, a member of the Commission maintained the view that even though an agreement had been reached that consuls were entitled to use diplomatic couriers, it was however undeniable that they could in no case issue diplomatic passports to such couriers.<sup>94</sup>

69. In the final report submitted to the United Nations Conference on Consular Relations in 1963, article 35 on the freedom of communication contained some references to diplomatic or consular couriers. The pertinent part of paragraph 1 of that article read:

. . . 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 . . .<sup>95</sup>

The commentary relative to the status of a consular courier read in part:

. . . The consular courier shall be provided with an official document certifying his status and indicating the number of packages constituting the consular bag. . . .<sup>96</sup>

70. At the Conference on Consular Relations, the discussion on the status of the courier was concentrated on three amendments. Two of them referred to the consular courier *ad hoc*<sup>97</sup> and the captain of an aircraft or ship entrusted with a consular bag.<sup>98</sup> They were adopted after an animated discussion. The third amendment, submitted by Japan, was to the effect of deleting the term "Consular courier", since it "was entirely new and would only lead to complications".<sup>99</sup>

<sup>92</sup> *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. Draft article 25, para. 5, proposed in 1958 by the Commission, read:

"5. The diplomatic courier shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention." (*Yearbook . . . 1958*, vol. II, p. 97, document A/3859.)

<sup>93</sup> The French amendment was further amended by substituting the word "attestant" for the word "constatant" and, in the English text, by substituting the word "status" for the word "rank".

<sup>94</sup> *Yearbook . . . 1960*, vol. I, pp. 32-33, 532nd meeting, para. 40. See also remarks to the same effect by Sir Gerald Fitzmaurice (*ibid.*, p. 34, para. 44).

<sup>95</sup> *Official Records of the United Nations Conference on Consular Relations*, vol. II (United Nations publication, Sales No. 64.X.1), p. 22.

<sup>96</sup> *Ibid.*, p. 23, para. (4) of the commentary to article 35.

<sup>97</sup> Amendment proposed by the Netherlands (A/CONF.25/C.2/L.15) (*ibid.*, p. 74) and amendment proposed by the Byelorussian SSR (A/CONF.25/C.2/L.70) (*ibid.*, p. 80), which were later merged into a joint proposal.

<sup>98</sup> Amendment proposed by Italy (A/CONF.25/C.2/L.102) (*ibid.*, p. 84). For more details on the consideration of this amendment, see the statement by the representative of Italy (*ibid.*, 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. 328, *Second Committee*, Fourteenth meeting, para. 43).

<sup>99</sup> A/CONF.25/C.2/L.55 (*ibid.*, vol. II, p. 79); see the statement of the representative of Japan in regard to this amendment (*ibid.*, vol. I, p. 319, *Second Committee*, Thirteenth meeting, para. 8).

<sup>84</sup> *Ibid.*, p. 75, para. 41.

<sup>85</sup> *Yearbook . . . 1958*, vol. II, p. 17, document A/CN.4/116/Add.1 and 2.

<sup>86</sup> *Yearbook . . . 1958*, vol. I, p. 139, 457th meeting, para. 65.

<sup>87</sup> *Ibid.*, para. 66.

<sup>88</sup> *Ibid.*, p. 140, 458th meeting, para. 1.

<sup>89</sup> *Ibid.*, paras. 7-8.

<sup>90</sup> *Yearbook . . . 1981*, vol. II (Part One), p. 167, document A/CN.4/347 and Add.1 and 2, para. 71 and footnote 69.

<sup>91</sup> This article later became article 27 of the 1961 Vienna Convention.

This amendment, though supported by some representatives at the Conference<sup>100</sup> was strongly opposed by several other representatives.<sup>101</sup> Consequently, the Japanese amendment was rejected. The concept of the consular courier, including the consular courier *ad hoc*, adopted by the Conference and reflected in article 35 of the 1963 Vienna Convention was further reiterated in a considerable number of bilateral treaties and it is now firmly established in State practice.<sup>102</sup>

71. In the draft articles submitted by the Special Rapporteur on Special Missions at the sixteenth session of the Commission, in 1964, only an indirect reference to the status of diplomatic couriers can be inferred. Article 21, para. 4 stated that:

4. Special missions may send *ad hoc* couriers to communicate in both directions with the organs of their State. *Only members of the missions or of its staff may act as couriers.*<sup>103</sup>

The draft articles which were submitted the following year were more specific on the status of the diplomatic courier of the special mission. Thus article 22, paragraph 5, read:

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. . . .<sup>104</sup>

No change was made to the above wording in the text adopted by the Commission at its nineteenth session, in 1967, but article 22 was renumbered as article 28 of the draft articles.<sup>105</sup>

72. When the final draft articles on Special Missions were proposed by the Commission to the Sixth Committee of the General Assembly for adoption, at its twenty-third session in 1968, no changes were made with regard to article 28, paragraph 6, referring to the proof of status of the courier of the special mission. The only substantial addition to the proposed text came from the proposal for amendment by Ghana,<sup>106</sup> which was eventually adopted with minor drafting changes as new paragraph 3 of article 28 of the convention, stipulating that:

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.

73. The work of the Commission with respect to the status of the courier of a permanent mission to international organizations or the courier of the delegation of a

State at an international conference was greatly helped by the previous codification of international diplomatic law. Article 27, paragraph 5, of the draft articles on relations between States and international organizations<sup>107</sup> prepared by the Commission at its twentieth session, in 1968, was modelled verbatim after article 27, paragraph 5, of the 1961 Vienna Convention and article 28, paragraph 6, of the 1969 Convention on Special Missions. The same approach was applied to the elaboration of article 57, paragraph 6, on the proof of status of the courier of a delegation to an international conference.

74. At the United Nations Conference on the Representation of States in their Relations with International Organizations in 1975, no substantial change was made in the draft articles referring to the status of the courier, including the proof of his status. Article 28, paragraph 6, and article 57, paragraph 6, would also be applied to couriers used by observer delegations to meetings of international organs and to international conferences. This was explicitly stipulated in article 72 of the convention adopted by the conference.<sup>108</sup>

75. The prevailing State practice, particularly during the last two decades, has followed closely the pattern established by the 1961 Vienna Convention with regard to the required documents as a proof of the official status of the diplomatic and other couriers. The survey of some 30 bilateral consular conventions signed after the 1963 Vienna Convention also confirmed the standard provision, according to which "the consular courier shall be provided with an official document indicating his status and the number of packages constituting the consular bag" (art. 35, para. 5). The same provision referring to an official document indicating the number of packages constituting the bag is applied to the captain of a commercial aircraft or master of a vessel.<sup>109</sup>

<sup>107</sup> *Yearbook . . . 1968*, vol. II, pp. 149–150, document A/CN.4/203 and Add.1–5. See also *Yearbook . . . 1969*, vol. I, p. 136, 1017th meeting, para. 53; *Yearbook . . . 1970*, vol. II, document A/8010/Rev.1, pp. 293–294 (art. 97), and pp. 297–298 (art. 110).

<sup>108</sup> See *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; p. 27, 7th plenary meeting, paras. 68–70; pp. 37–41, 9th plenary meeting, paras. 48–68, and 10th plenary meeting, paras. 1–36; p. 178, *Committee of the Whole*, 18th meeting, paras. 31–34; pp. 236–242, *ibid.*, 27th meeting, paras. 41–59, and 28th meeting, paras. 1–47; pp. 280–283, *ibid.*, 36th meeting, paras. 22–52; p. 313, *ibid.*, 42nd meeting, paras. 42–44; p. 343, *ibid.*, 47th meeting, para. 54; p. 345, *ibid.*, 48th meeting, para. 20; and p. 347, *ibid.*, para. 42. See also the report of the Committee of the Whole, *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, 123–125, 147–149 and 159–160. See also the second report, para. 104 (*Yearbook . . . 1981*, vol. II (Part One), p. 172, document A/CN.4/347 and Add.1 and 2).

<sup>109</sup> See, for example, the Consular Convention between France and Romania of 18 May 1968 (art. 25, para. 5); the Consular Convention between Mongolia and the German Democratic Republic of 12 October 1973 (art. 14, para. 4); the Consular Convention between Belgium and Turkey of 28 April 1972 (art. 22, para. 4); the Consular Convention between Poland and Cuba of 12 May 1972 (art. 16, paras. 5–6); the Consular Convention between the USSR and Norway of 7 December 1971 (art. 14, paras. 4–6); the Consular Convention between Hungary and Mongolia of 27 June 1974 (art. 14); the Consular Convention between the United Kingdom and Czechoslovakia of 3 April 1975 (art. 16); the Consular Conventions between Greece and Hungary of 18 March 1977 and between Greece and Poland of 30 August 1977; the Consular Convention between

(Continued on next page.)

<sup>100</sup> Among these representatives were those of Yugoslavia (*ibid.*, vol. I, p. 320, para. 17), Australia (*ibid.*, para. 18) and Belgium (*ibid.*, para. 25).

<sup>101</sup> *Inter alia*, the representatives of the United Kingdom (*ibid.*, pp. 319–320, para. 15); Bulgaria (*ibid.*, p. 320, para. 20); Italy (*ibid.*, para. 21); India (*ibid.*, para. 23); and Finland (*ibid.*, para. 26).

<sup>102</sup> See the second report, paras. 82–89 (*Yearbook . . . 1981*, vol. II (Part One), pp. 168–169, document A/CN.4/347 and Add.1 and 2).

<sup>103</sup> *Yearbook . . . 1964*, vol. II, p. 109, document A/CN.4/166.

<sup>104</sup> *Yearbook . . . 1965*, vol. II, p. 130, document A/CN.4/179.

<sup>105</sup> *Yearbook . . . 1967*, vol. II, pp. 360–361, document A/6709/Rev.1. See also the second report, paras. 90–96 (*Yearbook . . . 1981*, vol. II (Part One), pp. 169–170, document A/CN.4/347 and Add.1–2).

<sup>106</sup> A/C.6/L.696/Rev.1. The United Kingdom had a similar proposal (A/C.6/L.699), which was withdrawn. See *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 85, document A/7375, "Report of the Sixth Committee", para. 214, under (b); see also the statement of the representative of Ghana (*ibid.*, Sixth Committee, 1068th meeting, para. 16) and the decision of the Sixth Committee (*ibid.*, 1089th meeting, para. 8).



76. The formula related to the official document indicating the official status of the courier contained in article 27, paragraph 5, of the 1961 Vienna Convention and other multilateral and bilateral treaties in the field of diplomatic law, has also been adopted in some national laws, regulations and established practices, with various denominations of the document itself or emphasis on the specific nature of such a document. In the Spanish regulations concerning the diplomatic bag of 1 July 1968, there is only a general reference to the effect that the status of the official couriers "shall be certified by means of appropriate credentials" (sect. II, art. 8, para. 2).<sup>110</sup> The relevant regulations on this matter embodied in the Manual of the Diplomatic Service of Finland are more specific. They indicate that the *ad hoc* courier will be provided not only with a diplomatic passport or a passport of official service "but also with a courier passport which will indicate his/her diplomatic status and which the courier has to hand over to the receiver".<sup>111</sup> Under the term "courier passport" usually is conceived a special document indicating the status of the courier and very often also the number of parcels constituting the diplomatic bag. The regulations and practice of some States provide the couriers with such documents called "courier passport" testifying to their status.<sup>112</sup> This kind of "passport" should be distinguished from the regular and widespread use of the term "passport" meaning an official document issued by the competent authorities to their nationals, permitting the bearer of the passport to travel abroad.<sup>113</sup> Of course, such a passport could also be employed as a proof of the official status of the courier if among the personal particulars contained in the passport it is indicated that its bearer is a diplomatic courier. As a matter of fact there are many countries which furnish with diplomatic passports their professional or regular couriers, i.e., the diplomatic couriers regularly employed in the courier's service of the

(Footnote 109 continued.)

Czechoslovakia and Cyprus of 12 May 1976; the Consular Convention between the United States of America and the People's Republic of China of 17 September 1980; the Consular Conventions concluded by Austria with Romania, of 24 September 1974 (art. 31, para. 4) (see p. 234 above, document A/CN.4/356 and Add.1-3), with Hungary, of 25 February 1975 (art. 15, para. 5) (*ibid.*, p. 235), with the German Democratic Republic, of 26 March 1975 (art. 14, para. 5) (*ibid.*, p. 234), and with Bulgaria of 4 May 1975 (art. 30, para. 4) (*ibid.*, p. 235).

<sup>110</sup> See p. 239 above, document A/CN.4/356 and Add.1-3.

<sup>111</sup> *Ibid.*, p. 236.

<sup>112</sup> On the use of the term "passport" as a travel document and its distinction from the official document issued to the diplomatic courier as a proof of his status, see also the comments made by some members of the Commission in 1957 and 1958, as mentioned in paragraphs 65-66 above.

<sup>113</sup> See, for example, article 17 of Decree No. 3437 of Argentina (United Nations, Legislative Series, vol. VII . . . , p. 7), which refers to the courier's passport as a document testifying to his status. According to the relevant regulations of Belgium: "Mémorandum sur le régime fiscal, douanier, etc., applicable aux membres du corps diplomatique accrédités en Belgique" and "Instruction du Ministère des finances concernant les immunités diplomatiques, 1955" (*ibid.*, pp. 29-30 and 45-46), the parcels, packages, etc., should be mentioned in the passport or the way-bill ("*la feuille de route*") of the courier. According to the *Foreign Affairs Manual* of the Department of State of the United States of America, "each professional diplomatic courier will be issued in addition to his diplomatic passport, a courier passport, signed by the Secretary of State for his official travel as a courier . . ." (United States of America, Department of State, *Foreign Affairs Manual* (Washington, D.C., U.S. Government Printing Office, 1970), pp. 213-214, paras. 352.1, 352.2, 352.3-1 and 352.4-1).

foreign office. In addition to the passport (diplomatic passport or passport of official service) the couriers are provided with an official document or certificate indicating the status of the courier, the destination of the diplomatic bag entrusted to him and some data about the diplomatic bag itself.<sup>114</sup> The rules, regulations and established practices in many States refer specifically to the official document as a proof of the status of the diplomatic courier on the presumption that a diplomatic or service passport is in any case indispensable as a valid document for travel abroad. There are various denominations of the documents testifying to the status of the courier, but the terminological differences have no legal significance. Whether the document is called simply a document indicating the status of the courier<sup>115</sup> or "official document",<sup>116</sup> "courier letter",<sup>117</sup> "certificate", "courier's certificate", or "special certificate",<sup>118</sup> etc. its legal nature and purpose remain essentially the same, namely an official document proving the status of the diplomatic courier.<sup>119</sup>

77. The survey of the *travaux préparatoires* and the recent State practice with all its diversity reveal the main legal requirements for the proof of the status of the diplomatic courier. It attests the existence of a general practice that, in addition to his passport (diplomatic or service passport), the diplomatic courier is provided with an official document testifying explicitly to his status and most essential personal particulars, and indicating some pertinent data of the diplomatic bag. Such data, if required, include the total number of packages constituting the diplomatic pouch, the serial numbers of each parcel, the destination, its size and the weight of the diplomatic bag. This document is issued by the competent authorities of the sending State or its

<sup>114</sup> See paragraph 13 (d) of the "Regulations concerning entry into and exit from the Union of Soviet Socialist Republics", which stipulates that diplomatic passports shall be issued to diplomatic couriers, and paragraph 3 of the "Rules concerning the admission across the State frontier of the USSR of the diplomatic bag of Foreign States and the personal belongings of diplomatic couriers", which states that "The diplomatic courier must be provided with an official document (courier's certificate) indicating his status and the number of parcels constituting the diplomatic bag" (see pp. 241 and 242 above, document A/CN.4/356 and Add.1-3). According to the *Foreign Affairs Manual* of the Department of State of the United States (see footnote 113 above), "each professional diplomatic courier will be issued in addition to his diplomatic passport, a courier passport . . .", and, when indicating the requirements for a professional courier service, the same *Manual* states that "the person to be designated is a male employee who has been issued a diplomatic passport". In the practice of the United States, the terms "courier letters" or "regional courier letters" are also employed.

<sup>115</sup> See the instructions concerning the courier service of the Federal Republic of Germany (p. 236 above, document A/CN.4/356 and Add.1-3).

<sup>116</sup> See article 7 of the Order of the Federal Ministry of Foreign Trade of Czechoslovakia (*ibid.*, p. 235).

<sup>117</sup> See footnote 114 above. The same term "courier letter" ("*lettre de courier*") is employed by Switzerland in its "Règles appliquées par le Département politique fédéral en matière d'immunités et privilèges diplomatiques et consulaires" (United Nations, Legislative Series, vol. VII . . . , p. 307).

<sup>118</sup> See the relevant regulations of Spain (p. 239 above, document A/CN.4/356 and Add.1-3) and the practice of the USSR mentioned in footnote 114 above. In the practice of the United States the term "special certificate" was used in the past (see Hackworth, *op. cit.*, p. 621).

<sup>119</sup> The following are among the other terms used for indicating documents which serve as a proof of the status of the diplomatic courier: "attestation" and "sauf-conduit", used in the Swiss Regulations (see footnote 117 above) and "*feuille de route*", used by Belgium (see footnote 113 above).

diplomatic or other official missions abroad. The form of the document, its formal particulars and denomination, are entirely within the jurisdiction and discretion of the sending State in accordance with its laws, regulations and established practices.

78. However, it would be advisable to attain a certain minimum degree of coherence and uniformity which may facilitate the safe, unimpeded and expeditious dispatch and delivery of the diplomatic bag through the establishment of generally agreed rules and regulations. It might be advisable to furnish the professional diplomatic courier or the courier regularly employed in the courier service with a diplomatic or service passport. Such a passport should indicate the official position of a diplomatic courier in addition to the other data, such as the name of its bearer, the date and place of birth (if required), the date of the issuance of the passport and its validity, etc. Therefore, in the ordinary travel document used by all persons travelling abroad, the status of the diplomatic courier will be certified. Such a practice could be very useful when the courier is required to undergo ordinary checking of travel documents at intermediate transit points on his journey. This kind of a passport could by itself provide certain legal protection or preferential treatment, even before producing the special courier's document as a proof of status. With regard to diplomatic couriers *ad hoc*, their passports and the rank indicated therein serves the same purpose. Of course, there is no doubt whatsoever that the most important specific proof of the position of the courier should be the official document indicating his status and the particulars of the accompanied diplomatic bag.

79. In the light of the above considerations regarding the proof of status of the diplomatic courier, the Special Rapporteur submits for examination and provisional approval the following draft article:

## PART II

### STATUS OF THE DIPLOMATIC COURIER, THE DIPLOMATIC COURIER *AD HOC* AND THE CAPTAIN OF A COMMERCIAL AIRCRAFT OR THE MASTER OF A SHIP CARRYING A DIPLOMATIC BAG

#### *Article 7. Proof of status*

**The diplomatic courier shall be provided, in addition to his passport, with an official document indicating his status and the number of packages constituting the diplomatic bag as accompanied by him.**

#### 2. APPOINTMENT OF A DIPLOMATIC COURIER

80. The requirements and procedures for the appointment of a diplomatic courier constitute an essential aspect of his legal status. The appointment of a diplomatic courier is an act of the competent authorities of the sending State or its mission abroad to designate a person for the performance of an official function, namely the custody, transportation and delivery of the diplomatic bag. This act defines the category of the courier and consequently his legal position in the territory of the receiving or the transit State. The legal characteristics and implementations of an "appoint-

ment" of the professional or regular diplomatic courier differ significantly from that of a diplomatic courier *ad hoc*. The "assignment" of the captain of a commercial aircraft or the master of a ship to carry a diplomatic bag should not be considered as an "appointment".

81. The appointment of a professional diplomatic courier who is employed in the regular courier service, as a general rule, is effected by an act of a competent organ of the Ministry of Foreign Affairs.<sup>120</sup> Thus the diplomatic courier becomes a member of the permanent staff of the Foreign Office, with rights and duties deriving from his position as a civil servant. The act of appointment therefore creates a permanent legal relationship, stipulating also a pay in return for the service rendered by the courier. In his capacity of an official performing a function in the field of diplomatic communications, the diplomatic courier is accorded certain facilities, privileges and immunities by the receiving or the transit State. The diplomatic courier enjoys those facilities, privileges and immunities throughout the duration of his official journey abroad until his return back to the sending State, since they are granted to him not as a person but as an official of the foreign service.

82. The act of appointment so defined should be distinguished from an assignment for a particular round of official travel in connection with the delivery of a diplomatic bag. Such an assignment is attested by the official document (courier's letter or way-bill) with which he is provided for that occasion. Of course, this official document indicating the status of the courier and the number of packages constituting the diplomatic bag testifies to the status of the courier, who presumably had already been duly appointed as a member of the foreign office staff.

83. The designation of a diplomatic courier *ad hoc* is essentially a different act from the act of appointment of a professional diplomatic courier. Though in most instances a diplomatic courier *ad hoc* may be a diplomat, a member of the staff of the diplomatic mission or a member of the staff of the foreign office of the sending State, this official status is not a mandatory requirement. The function of a diplomatic courier *ad hoc* could be performed by any official of the sending State or any person freely chosen by its competent authorities.<sup>121</sup> The designation of a diplomatic courier *ad hoc* is for a special occasion. Therefore the legal relationship between the relevant office of the sending State and the diplomatic courier *ad hoc* is of a temporary

<sup>120</sup>This is the usual practice of States with regular courier service employing professional couriers. The appointment of such couriers is governed by the rules applicable to the designation of members of the staff of the foreign office. The courier service may be a distinct and autonomous unit within the institutional structure of the Ministry of Foreign Affairs or associated with some other departments or divisions, such as, for example, a communication department, dispatching service or other departments. In all instances, however, the appointment of a professional (regular, or permanent) diplomatic courier is considered to be an act of designation of a civil servant whose function is to carry the diplomatic pouch. As a matter of fact, most of the examples mentioned above (see footnotes 78, 109 and 113-119 above) referring to professional diplomatic or consular couriers have in mind couriers duly appointed as members of the staff of the foreign service.

<sup>121</sup>The foreign service of Finland, for example, employs *ad hoc* couriers designated for special assignments. Such couriers are chosen among the officials of the Foreign Office or adult members of their families, or even other Finnish citizens, but are, in the first place, persons eligible to carry a diplomatic passport or a passport of official service (see p. 236 above, document A/CN.4/356 and Add.1-3).

nature. The obligation of such a courier is to deliver the diplomatic bag safely to its destination, and for that reason he is entitled to certain rights, including some facilities, privileges and immunities necessary for the exercise of his function. Obviously, if the courier *ad hoc* happens to be a member of the staff of the foreign office or a member of the diplomatic staff he may have a permanent legal relationship with that office, but his rights and obligations would derive from the act of his appointment as an official of the foreign service or the diplomatic mission, and not because of his special assignment as a courier *ad hoc*. This distinction may acquire practical significance in certain circumstances.

84. The diplomatic courier *ad hoc* could be designated either by the competent authorities of the sending State or by its diplomatic missions, consular posts, special missions, permanent missions or delegations. In accordance with the regulations and practice of some States, their missions abroad maintain a list of members of the staff who are eligible to perform the functions of a courier *ad hoc*.<sup>122</sup> The diplomatic courier *ad hoc*, like the professional courier, is furnished with a special document indicating his status and the number of packages constituting the diplomatic bag.

85. Unlike the professional diplomatic courier, however, who is granted facilities, privileges and immunities throughout his official journey until he returns back to the sending State, the courier *ad hoc* enjoys such facilities, privileges and immunities up to the moment when he has delivered to the consignee the diplomatic bag in his charge. This restriction is explicitly contemplated in article 27, paragraph 6, of the 1961 Vienna Convention and has invariably been followed by the other codification conventions and in State practice. It is an indication of the functional approach to the legal status of the diplomatic courier. Obviously if the diplomatic courier *ad hoc* is at the same time a diplomatic agent entitled to privileges and immunities he would certainly enjoy them even after the delivery of the diplomatic bag, by virtue of his diplomatic status and not because of his already accomplished task as a diplomatic courier *ad hoc*. Accordingly, if the diplomatic courier *ad hoc* is a person not eligible for a diplomatic status, the facilities, privileges and immunities accorded to him as a courier shall cease to apply when he has delivered the diplomatic bag to its destination, because his designation was with limited legal effect.

86. The assignment of a captain of a commercial aircraft or a master of a ship<sup>123</sup> to carry a diplomatic bag is of much more limited character as far as their rights and duties are concerned. In accordance with article 27, paragraph 7, of the 1961 Vienna Convention and the relevant provisions of the other codification conventions, the captain or the master shall not be considered to be diplomatic couriers. This provision has been

<sup>122</sup>The regulations concerning the diplomatic bag of 1 July 1968 of Spain provide in sect. II, article 7, para. 2, that "Each mission or post shall maintain a list of officers who may perform the duty of delivering and accepting bags", and in the same section, article 8, para. 2, that "Official couriers are the officers responsible for accompanying and accepting bags. They shall normally perform this duty in the Central Government". Presumably this category of couriers are regular or professional couriers.

<sup>123</sup>When the diplomatic bag is in the form of heavy consignments for land transportation, it could also be entrusted to truck drivers (see the regulations of Finland, *ibid.*, p. 236, para. 5).

generally reiterated in other treaties, and especially in recent State practice, as a standard rule on that matter.<sup>124</sup> The captain of a commercial aircraft or the master of a ship may be employed for the custody, transportation and delivery of the diplomatic bag to an authorized port of entry on their scheduled itinerary. The designation of the captain or master is made on an *ad hoc* basis and is not effected by any formal act. However, their special assignment is indirectly evidenced by that fact that they are provided with an official document indicating the number of packages constituting the bag entrusted to them. Some bilateral treaties and national regulations and established practices envisage facilities for free and direct delivery of the bag to members of the diplomatic mission of the sending State, who are allowed to have access to the aircraft or the ship in order to take direct possession of the diplomatic consignment.

87. The legal protection and favourable treatment to which the diplomatic bag is entitled constitutes the legal ground for the appropriate arrangements provided for the delivery of the bag at the aircraft or the ship. These are facilities which are not granted to the captain of the aircraft or the master of the ship but to the members of the diplomatic mission which is the consignee of the bag.<sup>125</sup> The captain or the master do not need any special treatment on the territory of the receiving State and are not granted any diplomatic privileges and immunities, because they are not supposed to carry the bag through the territory of the receiving State. Their task is to hand over the bag to the members of the diplomatic mission of the sending State, on board the aircraft or the ship under their authority. Therefore the assignment of a captain of a commercial aircraft or a master of a ship with courier's function does not entail a courier's status of any kind.

88. The appointment of a diplomatic courier is an act which is within the domestic jurisdiction of the sending States. This means that the requirements for appointment or special assignment, the procedure to be followed in the issuance of the act, the designation of the relevant competent authorities and the form of the act are governed by the national laws, regulations and established practices. The sending State is entitled freely, at its own discretion, to appoint a professional diplomatic courier, to designate on special occasion a diplomatic courier *ad hoc* or to entrust the diplomatic bag to the captain of a commercial aircraft or the master of a ship. This is the general rule, applied also to the appointment of members of the staff of the diplomatic mission.<sup>126</sup> There has not been any doubt as

<sup>124</sup>See the second report, paras. 116-118 (*Yearbook . . . 1981*, vol. II (Part One), p. 174, document A/CN.4/347 and Add.1 and 2); see also para. 75 and footnote 103 above.

<sup>125</sup>The regulations and established practices of many States require explicitly that the delivery of the bag by the captain or the master to the authorized member of the diplomatic mission of the receiving State should be effected against a receipt, confirming the handing over of the diplomatic bag (see, for example, the regulations of Spain concerning the diplomatic bag, sect. I, art. 3 (p. 239) above, document A/CN.4/356 and Add.1-3)).

<sup>126</sup>The 1961 Vienna Convention stipulates, in article 7, that "the sending State may freely appoint the members of the staff of the mission". Identical provisions exist in the 1963 Vienna Convention (art. 19, para. 1), the 1969 Convention on Special Missions (art. 8) and the 1975 Vienna Convention (arts. 9, 43 and 72). The rule mentioned above has also been reiterated by subsequent bilateral

to the legal nature of this rule, deriving from the sovereignty of the State.

89. However, the right of the sending State to appoint freely a diplomatic courier, based on its internal law and regulations, has some international implications affecting the receiving State. There is a need for certain harmonization between the rights and obligations of the sending State and those of the receiving State, which could be achieved through the adoption of some international rules in this field. The sovereign right of the sending State to freely appoint its diplomatic courier should be balanced with the equally sovereign right of the receiving State to admit an official of the sending State on its territory and to allow him to carry and deliver a diplomatic bag. The diplomatic courier ought to perform his official function on the territory of the receiving or the transit State. It is therefore in the interest of the sending State to appoint a diplomatic courier who would not meet any difficulties during the discharge of his duties and would enjoy certain facilities, privileges and immunities while on the territory of the receiving or the transit State. For the receiving State, on the other hand, it is inconvenient to invoke often the rule of declaring the foreign official *persona non grata* or not acceptable.

90. The appointment of a diplomatic courier in principle does not require prior express consent by the receiving State. Nevertheless, this general rule may be subject to some requirements and could be applied with certain modalities. Without entering into details, it could be pointed out that such requirements may refer to the nationality of the courier.<sup>127</sup> As a rule, the regular diplomatic courier should be a national of the sending State and not a national of the receiving State. In case of an appointment of a courier which is not in accordance with this rule, the receiving State is entitled to raise an objection or may declare such a person non-acceptable. There may be other reasons for recourse to the declaration of *persona non grata* or not acceptable,<sup>128</sup> prior to the appointment, if such an advanced notification is addressed by the sending State to the receiving State, or *a posteriori* when the diplomatic courier has already reached the territory of the receiving State. The modalities of application of the provisions related to the requirements and procedures for the appointment of a diplomatic courier by the sending State and his admission to the territory of the receiving State could be of varying character. As has been pointed out, there is no mandatory condition for prior agreement of the receiving State, unless an entry or transit visa is required as a prior condition for admission to the receiving or the transit State. In that case, the procedure of applying for a visa for the diplomatic courier provides an opportunity for the receiving or the transit State to pronounce itself, directly or indirectly, on the acceptability of the diplomatic courier. Entry or transit visas could be granted to the diplomatic courier on an *ad hoc* basis for a single

journey or for several or an unlimited number of journeys for a certain period of time.

91. Another modality for the application of the general rule on the appointment of the diplomatic courier would be a prior notification to that effect, addressed by the sending State to the receiving State, on its own will and discretion, as a courtesy to the latter or with a view to ensuring better conditions for the treatment of its diplomatic courier while performing his functions. All these requirements and modalities do not affect the legal nature of the act of appointment as a sovereign act of the competent authorities of the sending State. The effective operation of this rule, however, requires the co-operation of the receiving State and the establishment of a proper balance between the rights and obligations of the sending and the receiving States. This would be the objective of the draft articles to be submitted on this issue. The practice of States is unequivocally in favour of international rules that would contribute to the promotion of such a flexible legal framework.

92. The appointment of a diplomatic courier has undergone certain developments in response to practical demands deriving from the dynamics of diplomatic intercourse and more rational use of financial means and manpower. This is the case with the ever-increasing practice of appointing the same person by two or more sending States as their joint diplomatic courier. There is no specific provision of this kind relating to the couriers in the four codification conventions. However, there is a provision in the 1961 Vienna Convention stipulating that "Two or more States may accredit the same person as head of mission to another State, unless objection is offered by the receiving State". A similar provision is embodied in the other codification conventions.<sup>129</sup> Responding to such pragmatic considerations and inspired by the multilateral conventions in the field of diplomatic law adopted under the auspices of the United Nations, some States have introduced in their practice this new type of joint diplomatic courier. Of course, such a diplomatic courier should meet all the requirements of an ordinary diplomatic courier.

93. The special legal features of the multiple appointment of a diplomatic courier are to a certain degree modifications of the main elements determining the status of the diplomatic courier. The appointment of a joint courier is made on the basis of an agreement between the sending States concerned. This agreement could be for a special occasion or for a longer period of time and for an unspecified number of journeys. The scope and the form of such an instrument is determined by the competent authorities of the States involved in the multiple appointment of a diplomatic courier. The diplomatic courier should be a national of one of those sending States, furnished with a passport (diplomatic or service passport) issued by that State. His status of diplomatic courier may be indicated in such a passport. The special document or documents testifying to the status of the joint diplomatic courier and the number of packages constituting the bag or the bags entrusted to him by the sending States could be issued either by one or all of the sending States. One common certificate

treaties and enjoys general recognition in State practice. In some States there are special regulations on the requirements and procedures related to the appointment of diplomatic couriers confirming their full discretion on this matter.

<sup>127</sup>The problem of the nationality of the diplomatic courier will be dealt with separately (see paras. 97–103 below).

<sup>128</sup>This problem will be considered below (paras. 104 *et seq.*).

<sup>129</sup>See article 6 of the 1961 Vienna Convention; article 18 of the 1963 Vienna Convention; article 5 of the 1969 Convention on Special Missions; and article 8 of the 1975 Vienna Convention.

might be advisable for practical convenience, unless the long list of packages would create certain difficulties in a checking procedure. The letters, parcels or packages with serial numbers and other particulars determined by the individual sending State may be placed in one or separate bags or containers, but the official document containing the necessary data about the diplomatic bag should indicate the origin and destination of each bag.

94. The same procedure should be applied *mutatis mutandis* to a diplomatic courier *ad hoc* appointed by two or more States. He should be provided with a passport issued by the sending State of which he is a national, and an official document or documents indicating his status and the number of packages constituting the bag or the bags of each sending State. In the case of multiple assignment by several sending States of the captain of an aircraft or the master of a ship to carry their diplomatic bags, the prior agreement between those States is not required. When one commercial aircraft or ship is transporting the diplomatic bag, the separation and distinction between the bags of each individual State may acquire particular practical significance in view of the fact that the bag should be received on board by authorized members of the diplomatic mission of the respective sending State. It is possible by mutual agreement between the sending States concerned that a member of the diplomatic mission of one of them take possession of the joint diplomatic bag.

95. There may be some other practical procedures in the operation of a courier appointed by two or more States which are of such a nature that they should not be the subject of strict legal regulations. The main issue is the possibility of multiple appointment of a diplomatic courier, the legal protection of a joint diplomatic bag carried by such a courier and his legal status. The regular diplomatic courier or diplomatic courier *ad hoc* appointed by several States should have the same rights and obligations and enjoy the same facilities, privileges and immunities as those accorded to a diplomatic courier appointed by one sending State. This applies also to the legal protection of the diplomatic bag entrusted by several States to the captain of a commercial aircraft or the master of a ship. For the reasons mentioned above, it may be more justified to issue separate official documents indicating the number of the packages constituting the diplomatic bag of each State.

96. In the light of the above considerations regarding the appointment of the diplomatic courier, the Special Rapporteur submits for examination and provisional approval the following draft articles:

**Article 8. Appointment of a diplomatic courier**

**Subject to the provisions of articles 9, 10 and 11, diplomatic couriers and diplomatic couriers *ad hoc* are freely appointed by the competent authorities of the sending State or by its diplomatic missions, consular posts, special missions, permanent missions or delegations, and are admitted to perform their functions on the territory of the receiving State or the transit State.**

**Article 9. Appointment of the same person by two or more States as a diplomatic courier**

**Two or more States may appoint the same person as a diplomatic courier or diplomatic courier *ad hoc*.**

### 3. NATIONALITY OF THE DIPLOMATIC COURIER

97. The question of the nationality of the diplomatic courier may be considered as a part of the more general issue of the nationality of the diplomatic agent. The specific rules on the nationality of the diplomatic courier are often related to or influenced by the law governing the status of the diplomatic agent. On the other hand the nationality is an essential legal feature which has an impact on the appointment or non-acceptance of a diplomatic courier and on the privileges accorded to him. Thus the nationality determines important aspects of the status of the diplomatic courier.

98. The history of diplomatic intercourse and diplomatic law bears witness to the political and legal significance of the problem of nationality of all kinds of diplomatic officials. Due to the political importance and confidential nature of the diplomatic functions, it has always been considered that, as a rule, all diplomatic agents should be nationals of the sending State. In the past, there were some exceptions when members of a foreign diplomatic mission were nationals of the receiving State. However, such cases are now almost vanished from State practice and are considered as "curiosities" of history. It should be pointed out that, already at the end of the last century and the beginning of this century, the employment of a national of the receiving State for a diplomatic function performed by the sending State without the consent of the former was considered a violation of diplomatic norms.<sup>130</sup> In the 1928 Havana Convention regarding Diplomatic Officers, it was stipulated in article 7 that "States are free in the selection of their diplomatic officers; but they may not invest with such functions the nationals of a State in which the mission must function without its consent".<sup>131</sup> This trend has been strengthened and recognized as a general rule of diplomatic law. There are prevailing reasons of political and legal nature which justify the adoption by States of a positive attitude towards the enhancement of this rule. The *travaux préparatoires* of the codification conventions adopted under the auspices of the United Nations and the present State practice give enough evidence to this effect.

99. The 1961 Vienna Convention was an important step forward in this direction with respect to the members of the diplomatic staff of the mission.<sup>132</sup> From the text of article 8 of the convention it is evident that,

<sup>130</sup> See, for example, the note of protest of 8 September 1915 by the United States Embassy to the Foreign Office of Austria-Hungary, pointing out that Ambassador Dumba was no longer acceptable as Austro-Hungarian Ambassador at Washington because he had been guilty of "flagrant violation of diplomatic propriety" in employing an American citizen protected by an American passport as a secret bearer of official despatches through the lines of the enemy of Austria-Hungary. (See Hackworth, *op. cit.*, pp. 621-622.)

<sup>131</sup> Convention regarding Diplomatic Officers, adopted by the Sixth International American Conference, signed at Havana, 20 February 1928 (League of Nations, *Treaty Series*, vol. CLV, p. 267).

<sup>132</sup> Article 8 of the 1961 Vienna Convention reads:

"1. Members of the diplomatic staff of the mission should in principle be of the nationality of the sending State.

"2. Members of the diplomatic staff of the mission may not be appointed from persons having the nationality of the receiving State, except with the consent of that State which may be withdrawn at any time.

though in principle members of the diplomatic staff of the mission should be nationals of the sending State, there could be, as an exception, such members who are nationals of the receiving State. This kind of diplomatic agent, however, "shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions", as stipulated in article 38 of the same convention. No specific reference is made on this matter with regard to the nationality of a diplomatic courier.

100. The Commission, when considering the draft articles on consular relations, also did not deal with this issue. This was done later at the Vienna Conference on Consular Relations of 1963 during the discussion on article 35 on freedom of communication.<sup>133</sup> It was proposed to add to paragraph 5 of that article, after the words "consular courier" the words "who shall be neither a national of the receiving State nor a permanent resident thereof".<sup>134</sup> After some discussions on several other amendments referring one way or the other to the nationality of the consular courier, the present text of paragraph 5 of article 35 was adopted by the conference.<sup>135</sup>

101. The 1963 Vienna Convention made headway for the enhancement of the rule contained in the above-mentioned article. Recent State practice has further reinforced that rule. There are several consular conventions signed during the last decade containing specific provisions which stipulate that the consular courier "must be a national of the sending State and may not be domiciled in the territory of the receiving State".<sup>136</sup>

102. Taking into account the main trend in the present diplomatic law and the prevailing State practice, it should be pointed out that the emerging general rule seems to be that the diplomatic courier as well as the other regular couriers should be, in principle, nationals of the sending State. To this general rule certain exceptions may be contemplated. They would, of course, basically be determined by mutual agreement between the sending and the receiving State. The express consent of the latter for appointing as a diplomatic courier a person who has its nationality may

be withdrawn at any time upon the discretion of that State. This right of the receiving State to withdraw its consent is well justified considering the fact that the diplomatic courier is performing his official functions on its territory, and for that purpose is entitled to enjoy certain facilities, privileges and immunities which are granted to foreign subjects. Following the practice of States as confirmed by some bilateral treaties, the receiving State may also reserve its right to object or withdraw its prior consent to the appointment, as a diplomatic courier, of a person who, though a national of the sending State, is a permanent resident of the receiving State. The receiving State should have the same option also with regard to nationals of a third State who are permanent residents of the receiving State. The reason for such an option is that the facilities, privileges and immunities are provided in the interest of the freedom of diplomatic communications between the sending and the receiving State. In a special case when one person is appointed by two or more States as their joint diplomatic courier, the rule requiring that the courier have the nationality of the sending State would be applied to one of the sending States and the exception would be valid with respect to the other sending States. In the latter, a joint diplomatic courier will perform an official function in the field of the diplomatic communications between those States and the receiving State. The above stated general rule and the exceptions thereto may be applied *mutatis mutandis* to a diplomatic courier *ad hoc*.

103. In the light of the above considerations regarding the nationality of the diplomatic courier, the Special Rapporteur submits for examination and provisional approval the following draft article:

#### *Article 10. Nationality of the diplomatic courier*

1. The diplomatic courier should, in principle, have the nationality of the sending State.
2. Diplomatic couriers may not be appointed from among the persons having the nationality of the receiving State except with the express consent of that State, which may be withdrawn at any time.
3. The receiving State may reserve the same right under paragraph 2 with regard to:
  - (a) nationals of the sending State who are permanent residents of the receiving State;
  - (b) nationals of a third State who are not also nationals of the sending State.
4. The application of this article is without prejudice to the appointment of the same person by two or more States as a diplomatic courier, as provided in article 9.

#### **C. Functions of the diplomatic courier**

##### **1. SCOPE AND CONTENT OF THE FUNCTIONS**

104. The determination of the scope and content of the official functions of the diplomatic courier as well as their duration is of paramount significance for the courier's legal status. The functions of the courier are instrumental for the exercise by the State of its right to diplomatic communications. Therefore the functions of

<sup>133</sup> "3. The receiving State may reserve the same right with regard to nationals of a third State who are not also nationals of the sending State."

<sup>133</sup> *Official Records of the United Nations Conference on Consular Relations*, vol. II . . . , pp. 22-23.

<sup>134</sup> *Ibid.*, vol. I . . . , p. 325, *Second Committee*, Fourteenth meeting, para. 6.

<sup>135</sup> Paragraph 5 of article 35 reads:

"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."

<sup>136</sup> See, for example, article 31, para. 4 of the Consular Convention between Austria and Romania (p. 234 above, document A/CN.4/356 and Add.1-3). Similar provisions are contained (*ibid.*, pp. 233-235) in consular treaties signed by Austria with the German Democratic Republic (art. 14, para. 5), Bulgaria (art. 30, para. 4) and Hungary (art. 15, para. 5), and a number of other bilateral consular conventions to which one of the following States is a party: Austria, Bulgaria, Cyprus, France, German Democratic Republic, Greece, Hungary, Mongolia, United Kingdom, Union of Soviet Socialist Republics.

the courier are, in the end, those of the State itself.<sup>137</sup> The courier is a person designated by the sending State to deliver the diplomatic bag. The diplomatic bag, as a means of the freedom of official communications, is the main subject of legal protection, or the legal status of the diplomatic bag derives from, or is the corollary of the principle of the inviolability of the official correspondence of the diplomatic mission. The facilities, privileges and immunities accorded to the diplomatic bag are extended to the person who is in charge of the custody, transportation and delivery of that bag.

105. The establishment of rules which would provide the guidelines for defining the scope, content and duration of the functions of the diplomatic courier could be of practical importance for the legal protection of the courier and for the prevention or solution of issues arising from possible abuses. The establishment of rules defining the scope and the content of the official functions of the diplomatic courier would provide the legal framework for the distinction of functions which are inherent in the status of the courier and necessary for the accomplishment of his official task from activities which may go beyond those functions. In the case of abuse of the admissible functions, the receiving State may exercise its right to declare the diplomatic courier in question not acceptable or *persona non grata*. On the other hand, an agreed definition of the scope and content of the functions of the diplomatic courier may be useful against an unwarranted recourse to such a right.

106. The recognition of the official functions of the diplomatic courier through international rules would provide the legal foundation for his rights and obligations including the facilities, privileges and immunities granted to him by the receiving and the transit State. This aspect of the problem has always been emphasized as the starting point in the examination of the legal nature, scope and content of diplomatic privileges and immunities accorded to the diplomatic courier. Though the functions of the diplomatic courier were not specifically discussed as a separate issue in the preparation of the four codification conventions, there are some indications in the *travaux préparatoires* of those conventions which may be of some use to the present draft articles. This assumption is based on the fact that the functions of the diplomatic courier can be inferred from certain provisions of the above conventions, as well as from remarks made by the Commission, while discussing other pertinent questions relating to the freedom of communication.

107. During the preparatory work on the 1961 Vienna Convention, there were some observations relating to the functions of a diplomatic courier and their significance as a basis for the privileges and immunities accorded to him. This functional approach induced the general concept that the facilities, privileges and immunities are granted to the diplomatic courier in the *performance of his functions*. Consequently, the definition and clarification of these *functions* are essential to the core of the privileges and immunities of the courier. As was pointed out by one member of the Commission, the immunity of the couriers flows from their official

function: to carry pouches and other strictly confidential diplomatic packages.<sup>138</sup> Other remarks were made to the effect that when the diplomatic bag was used for illicit traffic, such as smuggling diamonds or perfume or for the trafficking of dangerous drugs and parts of atomic bombs, as well as other objects of danger to the public, the transportation and delivery of such a bag did not constitute a function which was supposed to form part of the duties of a diplomatic courier.<sup>139</sup> Reference to the scope and content of the functions of the courier was also made by the Commission in connection with the consideration of article 35 (Freedom of communication) of the draft articles on consular relations. In the commentary to its final draft, the Commission pointed out that the consular posts may use the "diplomatic courier service" of the sending State. Taking into consideration the existing State practice, the Commission indicated that:

... 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.<sup>140</sup>

108. State practice following the adoption of the general provisions of the 1961 Vienna Convention and the 1963 Vienna Convention further contributed to the definition of the scope and content of the diplomatic courier's functions. The main task of the diplomatic courier is, of course, the safe delivery of the diplomatic bag to its final destination. The courier is in charge of the custody and transportation of the accompanied bag from the moment of receiving it from the competent organ of the sending State until the delivery of that bag to the consignee indicated in the official document and on the bag itself. With the technological development of the means of transportation, the extent of time when the bag is under the exclusive custody and responsibility of the courier has become relatively short, though some overseas official journeys may take more time, if there are intermediate posts for delivering or collecting diplomatic mail. Nevertheless, the duty of the diplomatic courier to take care for the safety and inviolability of the bag is an important component of his official functions. The performance of this function has sometimes been associated with personal strains and even exposure to risks of the life of the courier. This element of the functions of the courier, namely his duty to ensure the safe and expeditious delivery of the diplomatic bag, should be taken into consideration particularly when we consider the facilities, privileges and immunities accorded to him not only by the receiving State but also by the transit State, and the third State in case of *force majeure*.

109. The diplomatic courier could perform a broad range of functions when he is involved in delivering

<sup>138</sup> *Yearbook* . . . 1957, vol. I, p. 75, 398th meeting, para. 41.

<sup>139</sup> *Ibid.*, p. 78, paras. 92 and 95. It was suggested by some members of the Commission that such a bag could be opened in exceptional circumstances, but this could also imply that to carry such a bag was not supposed to fall within the duties of the diplomatic courier (*ibid.*, p. 77, para. 85). One member of the Commission remarked that booksellers were also regularly supplied through the medium of the diplomatic bag, which in itself was an abuse (*ibid.*, pp. 77-78, para. 89).

<sup>140</sup> *Yearbook* . . . 1961, vol. II, p. 111, document A/4843, para. (3) of the commentary to article 35.

<sup>137</sup> See *Yearbook* . . . 1978, vol. II (Part Two), pp. 139 *et seq.*, para. 144; and *Yearbook* . . . 1979, vol. II (Part Two), pp. 172-173, chap. VI, sects. C.1 and C.2.

and/or collecting different kinds of official bags from diplomatic missions, consular posts, permanent missions or other missions or delegations of the sending State situated in several countries or in several cities of a receiving State. As was pointed out in the second report, there has been a widespread practice to use the services of one diplomatic courier during his assignment to carry packages to be delivered on his way to a number of official missions of the sending State.<sup>141</sup> This multi-purpose service which the courier may render constitutes another dimension of the scope and content of the functions which could be performed by the diplomatic courier. Therefore, the rules relating to the functions of the courier should be broad enough to encompass in a comprehensive manner the duties of the diplomatic courier with respect to the custody, transportation and delivery of different kinds of official bags to various missions of the sending State and from those missions to the relevant organs of the sending State.

110. Taking into consideration the above observations on the scope and content of the functions of the diplomatic courier, the Special Rapporteur submits for examination and provisional approval the following article:

**Article 11. Functions of the diplomatic courier**

**The functions of the diplomatic courier shall consist in taking care of and delivering to its destination the diplomatic bag of the sending State or its diplomatic missions, consular posts, special missions, permanent missions or delegations, wherever situated.**

2. DURATION OF THE FUNCTIONS

(a) *Commencement of the functions*

111. The duration of the functions of the diplomatic courier, i.e., the moment of their commencement and of their termination, constitutes an important aspect of the status of the courier. It determines *ratione temporis* the official function of the diplomatic courier and has a direct effect on the duration of the facilities, privileges and immunities granted by the receiving State. Between the commencement and the end of the functions of the diplomatic courier, an intermediary situation of temporary suspension may, in exceptional circumstances, arise. While the commencement of the functions is determined by a single act or event, the end of the functions could be the result of various acts or events such as, for example, the accomplishment of the assignment, the recall of the courier by the sending State, the death of the courier or his declaration as *persona non grata* or not acceptable by the receiving State. The severance or suspension of diplomatic relations as well as the recall of the diplomatic mission, or armed conflict, may also have legal consequences on the duration of the functions of the diplomatic courier.<sup>142</sup>

112. The official function of the diplomatic courier is

<sup>141</sup> *Yearbook . . . 1981*, vol. II (Part One), pp. 168–169, document A/CN.4/347 and Add.1–2, paras. 83–86.

<sup>142</sup> The question of severance or suspension of diplomatic relations, the recall of the diplomatic mission or the occurrence of armed conflict may be considered later as factors which may affect the status of the diplomatic courier.

assumed at the moment of his appointment or assignment. As was pointed out in this report, there is a difference in the legal characteristics and implications between the appointment of the professional courier and that of a diplomatic courier *ad hoc* (see paras. 80–85 above). However, for the receiving or the transit State the commencement of the functions of the diplomatic courier is considered as the moment he enters their territory. When the courier is travelling by car or train, his official function is recognized by the competent authorities of the receiving or transit State at the border check-point. In case the courier uses air or sea transportation, it is at the airport or seaport of entry where his official functions commence. The facilities, privileges and immunities accorded to the diplomatic courier in the performance of his official functions have particular *practical significance* at the moment when he *enters* the territory of the receiving State, where immigration, customs and other regulations are applied with respect to foreign nationals.

113. The diplomatic courier *ad hoc* may be appointed by the diplomatic mission in the territory of the receiving State among the officials of the mission. A diplomatic courier *ad hoc* thus appointed who is supposed to carry an *outgoing diplomatic bag* from the territory of the State where the diplomatic mission is accredited should enjoy facilities, privileges and immunities on the territory of that State until he *crosses* its border on his way to the final destination of the bag. In that case the function of the courier may produce its legal effect at *the exit* from the territory of the State where his function commenced. At the border exit checkpoint, the courier and the bag should enjoy the privileges and immunities accorded by that State.

114. In the light of the above considerations regarding the commencement of the functions of the diplomatic courier, the Special Rapporteur submits for examination and provisional approval the following draft article:

**Article 12. Commencement of the functions of the diplomatic courier**

**The functions of the diplomatic courier shall commence from the moment he is crossing the territory of the transit or receiving State, depending upon which of these events occurs first.**

(b) *End of the functions*

115. There is no specific provision on the end of the functions of the diplomatic courier in the four codification conventions in the field of diplomatic law adopted under the auspices of the United Nations. The Commission, acknowledging this fact, indicated in its report on its thirtieth session that “the termination of a courier’s functions should be the moment when he returned to his home base”.<sup>143</sup>

116. Such a definition of the end of the function of the diplomatic courier, accurate and useful though it may be, seems not to be sufficient. The termination of the functions of a diplomatic courier at the moment of his entry in the sending State may be relevant to the

<sup>143</sup> *Yearbook . . . 1978*, vol. II (Part Two), p. 141, para. 144, item (8).



termination of the function of the *professional or regular diplomatic courier*. It is obvious that the function of such a courier was completed when he "returned to his home base" as the final destination of his official voyage. However, the above formula on the termination of a courier's functions would not embrace the case of a diplomatic courier *ad hoc*, whose function ends upon the delivery of the diplomatic bag entrusted to him to an official mission of the sending State situated on the territory of the receiving State.

117. That there is a need for comprehensive rules relating to the termination of the mission of the diplomatic courier is without doubt. The determination of the relevant moment of the end of the functions is an important prerequisite for greater certainty with respect to the status of the courier. It is also a decisive factor affecting the enjoyment of the facilities, privileges and immunities granted to the courier by the receiving or the transit State, since the official function of the courier is the legal basis for the legal protection of the courier and his favourable treatment.

118. A possible solution of the problem relating to the termination of the end of the diplomatic courier's functions may be sought in the examination of the relevant provisions of the codification conventions and of the State practice regarding the end of the functions of a diplomatic agent or consular officer. Such a study, brief as it may be, could provide the grounds for some useful analogies with the position of the diplomatic courier. Of course, any conclusions based on similarities of the legal status of various kinds of diplomatic and other officials should be made with great caution and careful scrutiny of their specific features, taking into consideration the legal characteristics of the status of the courier and his function.

119. The 1961 Vienna Convention contains several provisions referring, directly or indirectly, to the termination of the function of a diplomatic agent or a member of the staff of the diplomatic mission. Article 43 of the convention states:

The function of a diplomatic agent comes to an end, *inter alia*:

(a) on notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end;

(b) on notification by the receiving State to the sending State that, in accordance with paragraph 2 of article 9, it refuses to recognize the diplomatic agent as a member of the mission.

120. The provisions of article 43 obviously are confined only to acts of the sending and the receiving State. In the latter case, it refers to non-compliance with the consequences of a declaration of a diplomatic agent as *persona non grata* or any other member of the mission as not acceptable. The listing of the possible reasons for the end of the function is not exhaustive, as is emphasized by the explicit use of the words "*inter alia*". However, there are some other provisions in the same convention which implicitly deal with the question of the end of the functions of the diplomatic agent in the occurrence of events such as the death of the diplomatic agent, the severance of diplomatic relations between the sending and the receiving State, or if the diplomatic mission is permanently or temporarily recalled.<sup>144</sup> The convention also contains some provisions relating to

the effect of armed conflict on the privileges and immunities accorded to the diplomatic agent.<sup>145</sup>

121. Similar provisions are contained in the other codification conventions in the field of diplomatic law adopted under the auspices of the United Nations.<sup>146</sup> Those rules, generally agreed by States in their practice, may be applicable *mutatis mutandis* to the status of the diplomatic courier concerning the end of his functions. The factors for the termination of the courier's functions may be:

(a) acts of the sending and the receiving States or the transit State;

(b) events or facts the occurrence of which may also cause the end of the courier's functions.

122. The acts of the sending State which could bring to an end the mission of the diplomatic courier may vary in their substance and motivations. They may take the form of recall, dismissal or other means of termination of the courier's function effected by an act of the competent authority of the sending State. However, vis-à-vis the receiving State or the transit State, this act of the competent organ of the sending State should be expressed by a notification to the courier service or relevant unit of the foreign office of the receiving or the transit State. The act of the receiving State is a declaration to the effect that the diplomatic courier is either *persona non grata* or not acceptable.<sup>147</sup> Thus the receiving State should notify the sending State of its decision to declare a diplomatic courier *persona non grata* or not acceptable. The purpose of this notification is to ask the sending State to terminate the function of its courier.

123. The events which may cause the end of the courier's functions mentioned above may differ greatly in their legal nature or origin; some of them could be physical phenomena, while others could derive from personal actions. Nevertheless, it is possible to identify the most important of those events or facts, taking into consideration the provisions of the codification conventions referring to them and the well-established State practice on this matter. The most frequent and usual fact with such an effect would be the completion of the function of the courier after he had delivered the bag to its final destination. As was pointed out, in the case of the regular or professional courier, this fact would be the return of the courier to the sending State, while in the case of the diplomatic courier *ad hoc* it would be the delivery of the bag in his charge to the consignee. Other events which may bring the courier's function to an end are the death of the courier during the performance of his duties or his resignation before completing his task, i.e., the delivery of the bag to its final destination.

124. For the purpose of the present draft articles it is also appropriate to examine the legal characteristics and implications of the decision of the receiving State to declare a diplomatic courier *persona non grata* or not

<sup>145</sup>See article 44 of the convention. The effects of the severance of diplomatic or consular relations between the sending and the receiving State, the recall of the diplomatic mission or the occurrence of armed conflict on the status of the diplomatic courier may be considered in a later part of this study (see footnote 142 above).

<sup>146</sup>See articles 23 and 53 of the 1963 Vienna Convention; articles 12, 20 and 43 of the 1969 Convention on Special Missions; and articles 34, 40, 68-69 and 72 of the 1975 Vienna Convention.

<sup>147</sup>The distinction between the decision to declare a diplomatic courier *persona non grata* or not acceptable will be examined in para. 125 below.

<sup>144</sup>See articles 39 and 45 of the convention.

acceptable. Though this is only one form of termination of the courier's functions by an act of the receiving State, it deserves special attention. The recourse to this act represents an effective means at the disposal of the receiving State to prevent the appointment of a foreign official or to terminate his function on its territory in order to protect its interests. This right of the receiving State established by international customary law was reiterated in the special provisions of the 1961 Vienna Convention as a model rule of modern international law.<sup>148</sup> Article 9 of the convention identifies the scope of application of this rule, the procedure to be followed in its operation and the legal consequences deriving therefrom with regard to the sending and the receiving State.

125. According to this article, the declaration of a person *non grata* or not acceptable is applicable to the head of the diplomatic mission or any member of the diplomatic staff, i.e., persons with diplomatic status as well as to any other member of the administrative, technical and service staff of the mission. There is a distinction *ratione personae* between the term "*persona non grata*", which is applicable to members of the staff of the mission having diplomatic rank, and the term "not acceptable", which is applicable to those officials who do not have a diplomatic rank. The exercise of the right of the receiving State to declare a member of the diplomatic mission *non grata* or not acceptable could be exercised *ratione temporis* at any time either before the arrival of the official in question in the receiving State or during his stay there. In the first case, the sending State shall withdraw its appointment and recall the person concerned, while in the second case, the functions of that person shall be terminated. If the sending State refuses or fails to carry out these obligations, deriving from the decision of the receiving State, the latter may refuse to recognize the person declared *non grata* or not acceptable as a member of the mission with all the consequences that follow from this act. The receiving State is obliged to notify the sending State of its decision, but without having to explain or justify such a decision.

126. Most of the above-mentioned rules could be applied *mutatis mutandis* to the regular diplomatic courier and the diplomatic courier *ad hoc*. The professional diplomatic courier and the diplomatic courier *ad hoc* may be declared *persona non grata* when they have a diplomatic rank, and not acceptable if they do not have such a rank. As far as the application *ratione temporis* is concerned, a diplomatic courier may be declared *non grata* or not acceptable before the commencement of his functions. This may happen when the sending State deems it suitable to notify the receiving State of the appointment of the courier, or in the event of application for an entry visa if such a visa is required by the receiving State. The decision of the receiving State to declare a diplomatic courier *non grata* or not acceptable could also take place after his entry in the

territory of that State, during his stay there. In both instances the receiving State should not be obliged to explain or justify its decision, unless it decides otherwise. This discretion is not only an expression of the sovereignty of the receiving State, but in many instances it is justified by political or security interests or other considerations.

127. The establishment and application of rules relating to the conditions for terminating the functions of the courier, including the declaration of a diplomatic courier *persona non grata* or not acceptable, may be of some practical significance for the effectiveness of diplomatic law in all its fields of application, and may contribute to provide a viable legal framework for the promotion of co-operation among States in their diplomatic communications. Such rules also may enhance the harmonization of the rights and obligations of the sending and the receiving States, in order to prevent possible abuses of diplomatic privileges and immunities or unjustified restrictions in the performance of the functions of the diplomatic courier.

128. In the light of the above considerations regarding the rules governing the termination of the functions of the diplomatic courier, including the right of the receiving State to declare a diplomatic courier *persona non grata* or not acceptable, the Special Rapporteur submits for examination and provisional approval the following draft articles:

**Article 13. End of the function of  
the diplomatic courier**

The function of a diplomatic courier comes to an end, *inter alia*, upon:

- (a) the completion of his task to deliver the diplomatic bag to its final destination;
- (b) the notification by the sending State to the receiving State that the function of the diplomatic courier has been terminated;
- (c) notification by the receiving State to the sending State that, in accordance with article 14, it refuses to recognize the official status of the diplomatic courier;
- (d) the event of the death of the diplomatic courier.

**Article 14. Persons declared non grata  
or not acceptable**

1. The receiving State may at any time, and without having to explain its decision, notify the sending State that the diplomatic courier of the latter State is declared *persona non grata* or not acceptable. In that event, the sending State shall, as the case may be, either recall the person concerned or terminate his function.

2. In cases when a diplomatic courier is declared *persona non grata* or not acceptable in accordance with paragraph 1 prior to the commencement of his function, the sending State shall send another diplomatic courier to the receiving State.

<sup>148</sup> Identical provisions are contained in the 1963 Vienna Convention (art. 23) and the 1969 Convention on Special Missions (art. 12).