

Document:-
A/CN.4/374 and Corr.1 and Add.1-4

**Fourth 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**

Extract from the Yearbook of the International Law Commission:-
1983, vol. II(1)

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

DOCUMENT A/CN.4/374 and Add.1-4*

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

[Original: English]
[18 May, 1, 10, 16 and 28 June 1984]

CONTENTS

	<i>Page</i>
<i>Conventions and agreements cited in the present report</i>	64
	<i>Paragraphs</i>
INTRODUCTION.....	1-5 66
<i>Section</i>	
I. CONSIDERATION BY THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY OF THE DRAFT ARTICLES ON GENERAL PROVISIONS AND ON THE STATUS OF THE COURIER.....	6-21 67
A. Debate on the topic as a whole.....	6-15 67
B. Comments on the various draft articles submitted by the Special Rapporteur	16-21 68
II. DRAFT ARTICLES ON THE FACILITIES, PRIVILEGES AND IMMUNITIES ACCORDED TO THE DIPLOMATIC COURIER AND THE DIPLOMATIC COURIER <i>AD HOC</i>	22-212 70
A. Facilities accorded to the diplomatic courier.....	26-43 70
1. General facilities	26-31 70
<i>Article 15. General facilities</i>	31 71
2. Entry into the territories of the receiving and the transit States and freedom of movement and communication of the diplomatic courier	32-43 71
<i>Article 16. Entry into the territory of the receiving State and the transit State</i>	43 73
<i>Article 17. Freedom of movement</i>	43 73
<i>Article 18. Freedom of communication</i>	43 73
<i>Article 19. Temporary accommodation</i>	43 73
B. Privileges and immunities accorded to the diplomatic courier	44-178 74
1. Inviolability of the diplomatic courier	44-80 74
(a) Personal inviolability	47-68 74
<i>Article 20. Personal inviolability</i>	68 78
(b) Inviolability of temporary accommodation and personal means of transport.....	69-80 78
<i>Article 21. Inviolability of temporary accommodation</i>	80 80
<i>Article 22. Inviolability of the means of transport</i>	80 80
2. Immunity from jurisdiction	81-139 80
<i>Article 23. Immunity from jurisdiction</i>	139 90
3. Exemptions accorded to the diplomatic courier and the diplomatic courier <i>ad hoc</i>	140-178 91
(a) Exemption from personal examination, customs duties and inspection	150-165 93
<i>Article 24. Exemption from personal examination, customs duties and inspection</i>	165 95
(b) Exemption from dues and taxes	166-169 95
<i>Article 25. Exemption from dues and taxes</i>	169 96
(c) Exemption from personal and public services	170-174 96
<i>Article 26. Exemption from personal and public services</i>	174 97
(d) Exemption from social security provisions.....	175-178 97
<i>Article 27. Exemption from social security provisions</i>	178 97
C. Duration of facilities, privileges and immunities.....	179-212 98
1. Duration	179-189 98
<i>Article 28. Duration of privileges and immunities</i>	189 99
2. Waiver of immunity.....	190-212 99
<i>Article 29. Waiver of immunity</i>	212 103
III. DRAFT ARTICLE ON THE STATUS OF THE CAPTAIN OF A COMMERCIAL AIRCRAFT OR THE MASTER OF A MERCHANT SHIP ENTRUSTED WITH THE TRANSPORTATION AND DELIVERY OF A DIPLOMATIC BAG	213-243 103
A. Introduction	213-215 103
B. Legislative background of the relevant provisions in the codification conventions	216-228 103

* Incorporating documents A/CN.4/374/Corr.1, A/CN.4/374/Add.1/Corr.1, A/CN.4/374/Add.2/Corr.1, A/CN.4/374/Add.3/Corr.1 and A/CN.4/374/Add.4/Corr.1 and 2.

Section	Paragraphs	Page
C. Brief analytical survey of State practice.....	229-237	106
D. Main constituent elements of the status of the captain of a commercial aircraft or the master of a merchant ship.....	238-243	107
<i>Article 30. Status of the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew.....</i>	243	108
IV. DRAFT ARTICLES ON THE STATUS OF THE DIPLOMATIC BAG	244-365	108
A. Introduction	244-249	108
B. Indication of status of the diplomatic bag.....	250-273	110
1. External marking and required documents indicating the official status of the diplomatic bag.....	250-256	110
2. Brief analytical survey of State practice.....	257-273	111
<i>Article 31. Indication of status of the diplomatic bag</i>	273	113
C. Content of the diplomatic bag	274-289	113
1. Scope and practical significance of the rules determining the content of the diplomatic bag	274-275	113
2. State practice regarding the requirements in respect of the content of the diplomatic bag	276-289	113
<i>Article 32. Content of the diplomatic bag.....</i>	289	115
D. Status of the diplomatic bag entrusted to the captain of a commercial aircraft or the master of a merchant ship	290-299	115
1. Practical significance of this type of diplomatic bag	290-292	115
2. Main characteristics of the diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or a member of the crew	293-297	116
3. Obligations of the receiving or the transit State	298-299	117
<i>Article 33. Status of the diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew.....</i>	299	117
E. Status of the diplomatic bag dispatched by postal services or other means	300-321	117
1. Introduction	300	117
2. Use of postal services for the dispatch of diplomatic bags	301-302	118
3. Practice of States, including international agreements and domestic regulations, regarding use of postal services	303-311	118
4. Position of the Universal Postal Union	312-317	120
5. Diplomatic bags dispatched through ordinary means of transport by land, air or sea.	318-321	121
<i>Article 34. Status of the diplomatic bag dispatched by postal services or other means</i>	321	121
F. General facilities accorded to the diplomatic bag.....	322-325	122
<i>Article 35. General facilities accorded to the diplomatic bag</i>	325	122
G. Inviolability of the diplomatic bag	326-349	122
1. Introduction	326-327	122
2. Legislative background of the principle of the inviolability of the diplomatic bag	328-337	123
3. Recent practice of States relating to the inviolability of the diplomatic bag	338-341	124
4. Scope of the principle of the inviolability of the diplomatic bag	342-349	125
<i>Article 36. Inviolability of the diplomatic bag</i>	349	126
H. Exemption from customs and other inspections	350-355	126
1. Legal grounds and scope of the exemption from customs and other inspections	350-352	126
2. Recent practice of States	353-355	127
<i>Article 37. Exemption from customs and other inspections</i>	355	127
I. Exemption from customs duties and all dues and taxes	356-360	127
1. Scope of the exemptions	356-357	127
2. Treaty practice and national legislation of States regarding exemption from customs duties and dues and taxes	358-360	127
<i>Article 38. Exemption from customs duties and all dues and taxes</i>	360	128
J. Protective measures in circumstances preventing the delivery of the diplomatic bag	361-365	128
<i>Article 39. Protective measures in circumstances preventing the delivery of the diplomatic bag</i>	365	129
V. DRAFT ARTICLES OF PART IV MISCELLANEOUS PROVISIONS	366-403	129
A. Introduction	366-368	129
B. Obligations of a transit State in case of <i>force majeure</i> or fortuitous event	369-380	129
<i>Article 40. Obligations of the transit State in case of force majeure or fortuitous event</i>	380	131
C. Non-recognition of States or Governments or absence of diplomatic or consular relations	381-395	131
<i>Article 41. Non-recognition of States or Governments or absence of diplomatic or consular relations.....</i>	395	133
D. Relation of the draft articles to other conventions and international agreements	396-403	133
<i>Article 42. Relation of the present articles to other conventions and international agreements</i>	403	134
CONCLUSION	404	135

Conventions and agreements cited in the present report

MULTILATERAL CONVENTIONS

	<i>Source</i>
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961) Hereinafter referred to as the 1961 Vienna Convention	United Nations, <i>Treaty Series</i> , vol. 500, p. 95
Vienna Convention on Consular Relations (Vienna, 24 April 1963) Hereinafter referred to as the 1963 Vienna Convention	<i>Ibid.</i> , vol. 596, p. 261
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	United Nations, <i>Juridical Yearbook 1969</i> (Sales No. E.71.V.4), p. 140
Convention on Special Missions (New York, 8 December 1969)	<i>Ibid.</i> , p. 125
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal character (Vienna, 14 March 1975) Hereinafter referred to as the 1975 Vienna Convention	<i>Ibid.</i> , 1975 (Sales No. E.77.V.3), p. 87

CONSULAR CONVENTIONS

<i>Contracting parties*</i>	<i>Date of signature</i>	<i>Published in Treaty Series or registration No.</i>
Austria - Romania	24 September 1970	vol. 848, p. 69
Belgium - Czechoslovakia	15 June 1976	17139
Belgium - Hungary	9 July 1976	17197
Belgium - Poland	11 February 1972	vol. 950, p. 21
Belgium - Turkey	28 April 1972	vol. 1029, p. 183
Belgium - USSR	12 July 1972	vol. 981, p. 279
Belgium - United Kingdom	8 March 1961	vol. 523, p. 17
Belgium - United States of America	2 September 1969	vol. 924, p. 71
Bulgaria - Austria	14 May 1975	15660
Czechoslovakia - Cyprus	12 May 1976	17836
Czechoslovakia - German Democratic Republic	24 May 1957	vol. 292, p. 327
Czechoslovakia - Italy	10 October 1975	17905
Czechoslovakia - Yugoslavia	24 June 1963	vol. 496, p. 3
Finland - Hungary	24 August 1971	vol. 859, p. 3
Finland - Poland	2 June 1971	vol. 858, p. 97
Finland - Romania	30 June 1971	vol. 897, p. 3
France - Algeria	24 May 1974	18952
France - Bulgaria	22 July 1968	vol. 747, p. 375
France - Cameroon	13 November 1960	vol. 741, p. 65
France - Cameroon (United Republic of)	21 February 1974	vol. 999, p. 49
France - Czechoslovakia	22 January 1969	vol. 771, p. 61
France - Poland	20 February 1976	vol. 1054, p. 35
France - Romania	18 May 1968	vol. 747, p. 203
France - Senegal	29 March 1974	16158
France - Tunisia	28 June 1972	vol. 939, p. 219
Greece - Bulgaria	31 May 1973	vol. 965, p. 245
Greece - Hungary	18 March 1977	17962
Greece - Poland	30 August 1977	17871
Greece - United Kingdom	17 April 1953	vol. 191, p. 151
Hungary - Bulgaria	26 November 1971	vol. 902, p. 123
Hungary - Cuba	24 July 1969	vol. 892, p. 13
Hungary - Czechoslovakia	17 May 1973	vol. 986, p. 117
Hungary - Democratic People's Republic of Korea	5 October 1970	vol. 892, p. 69
Hungary - German Democratic Republic	28 June 1972	vol. 902, p. 37
Hungary - United States of America	7 July 1972	vol. 902, p. 177
Japan - United States of America	22 March 1963	vol. 518, p. 179
Mongolia - Czechoslovakia	3 June 1976	vol. 1055, p. 259
Mongolia - German Democratic Republic	12 October 1973	vol. 949, p. 3
Mongolia - United Kingdom	21 November 1975	15183
Poland - Austria	2 October 1974	16848
Poland - Cuba	12 May 1972	16845
Poland - Mongolia	31 May 1973	16855
Poland - Romania	24 March 1973	16583

* The first Member State mentioned is the registering State.

<i>Contracting parties*</i>	<i>Date of signature</i>	<i>Published in Treaty Series or registration No.</i>
Poland - USSR	27 May 1971	vol. 831, p. 3
Romania - Belgium	1 July 1970	vol. 931, p. 63
Romania - Cuba	31 May 1971	vol. 881, p. 101
Romania - Democratic People's Republic of Korea	2 November 1971	vol. 889, p. 31
Romania - German Democratic Republic	15 July 1958	vol. 387, p. 133
Romania - Hungary	18 March 1959	vol. 417, p. 3
Romania - Italy	8 August 1967	vol. 847, p. 3
Romania - Mongolia	29 April 1967	vol. 710, p. 237
Romania - Spain	5 January 1967	vol. 642, p. 103
Romania - USSR	14 March 1972	vol. 881, p. 153
Romania - United Kingdom	11 September 1968	vol. 789, p. 3
Romania - United States of America	5 July 1972	vol. 890, p. 109
Sweden - Romania	12 February 1974	20537
Sweden - United Kingdom	14 March 1952	vol. 202, p. 157
USSR - Angola	26 May 1976	17921
USSR - Benin	16 December 1976	19287
USSR - Bulgaria	12 December 1957	vol. 302, p. 21
USSR - Bulgaria	6 May 1971	vol. 897, p. 147
USSR - Cape Verde	27 November 1976	17844
USSR - Cuba	15 June 1972	vol. 897, p. 301
USSR - Cyprus	8 February 1978	18121
USSR - Czechoslovakia	27 April 1972	vol. 897, p. 249
USSR - Ethiopia	6 May 1977	17918
USSR - German Democratic Republic	10 May 1957	vol. 285, p. 135
USSR - Guinea	23 April 1976	16479
USSR - Guinea-Bissau	16 April 1976	16477
USSR - Hungary	24 August 1957	vol. 318, p. 3
USSR - Hungary	20 March 1971	vol. 897, p. 91
USSR - India	29 November 1973	15037
USSR - Italy	16 May 1967	vol. 936, p. 35
USSR - Japan	29 July 1966	vol. 608, p. 93
USSR - Mexico	18 May 1978	18206
USSR - Mongolia	5 April 1972	vol. 914, p. 129
USSR - Mozambique	31 March 1977	18119
USSR - Norway	7 December 1971	vol. 941, p. 33
USSR - Romania	4 September 1957	vol. 318, p. 55
USSR - Somalia	19 November 1971	vol. 897, p. 205
USSR - Syrian Arab Republic	3 June 1976	17917
USSR - United Kingdom	2 December 1965	vol. 655, p. 259
United Kingdom - Bulgaria	13 March 1968	vol. 681, p. 273
United Kingdom - Czechoslovakia	3 April 1975	vol. 1037, p. 319
United Kingdom - Denmark	27 June 1962	vol. 562, p. 75
United Kingdom - France	31 December 1951	vol. 330, p. 143
United Kingdom - German Democratic Republic	4 May 1976	vol. 1038, p. 53
United Kingdom - Hungary	12 March 1971	vol. 824, p. 3
United Kingdom - Japan	4 May 1964	vol. 561, p. 25
United Kingdom - Mexico	20 March 1954	vol. 331, p. 21
United Kingdom - Mongolia	21 November 1975	15183
United Kingdom - Norway	22 February 1951	vol. 326, p. 209
United Kingdom - Poland	23 February 1967	vol. 813, p. 261
United Kingdom - Spain	30 May 1961	vol. 562, p. 169
United States of America - Bulgaria	15 April 1974	vol. 998, p. 99
United States of America - China	17 September 1980	not registered**
United States of America - France	18 July 1966	vol. 700, p. 257
United States of America - Ireland	1 May 1950	vol. 222, p. 107
United States of America - Poland	31 May 1972	vol. 925, p. 31
United States of America - Republic of Korea	8 January 1963	vol. 493, p. 105

EXCHANGES OF NOTES

Australia - China	18 September 1978	19630
Brazil - Argentina	6 July 1961	vol. 657, p. 117
Brazil - Uruguay	16 December 1944	vol. 65, p. 305
Brazil - Venezuela	30 January 1946	vol. 65, p. 107
Ecuador - Brazil	15 November 1946	vol. 72, p. 25
United Kingdom - Dominican Republic	1 and 9 August 1956	vol. 252, p. 121
United Kingdom - Mexico	27 September 1946	vol. 91, p. 161
United Kingdom - Netherlands	30 November 1951	vol. 123, p. 177
United Kingdom - Norway	23 December 1946	vol. 70, p. 269
United Kingdom - Norway	15 January 1947	vol. 11, p. 187

** Text published in *International Legal Materials* (Washington, D.C.), vol. XIX, No. 5 (September 1980), p. 1119.

Introduction

1. The fourth report on the topic under consideration follows the structure of the draft articles proposed by the Special Rapporteur in his three previous reports.¹ The structure tentatively agreed by the Commission consists of four parts: *Part I*. General provisions; *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; *Part III*. Status of the diplomatic bag; *Part IV*. Miscellaneous provisions, including those on the obligations of the third State in cases of *force majeure* or fortuitous events, and the relationship between the present draft articles and existing multilateral conventions in the field of diplomatic law, and other provisions.²

2. The second report contained draft articles 1-6, constituting part I of the draft (General provisions).³ Those draft articles (with the exception of articles 2 and 6), as revised by the Special Rapporteur in his third report,⁴ were referred to the Drafting Committee.⁵

3. The third report concentrated on some issues relating to the status of the diplomatic courier. As was pointed out in that report,⁶ the status of the diplomatic courier, conceived in a more restrictive sense, would entail provisions relating to proof of status, appointment, nationality and functions. It was further indicated that the notion of the status of the courier could also have a broader meaning, which would entail provisions relating to the rights and obligations of the diplomatic courier, including the facilities, privileges and immunities accorded to him for the performance of his functions. The draft articles in the third report were

confined to the status of the diplomatic courier in its restrictive sense, and therefore dealt with proof of status (art. 7), appointment of a diplomatic courier (art. 8), appointment of the same person by two or more States as a diplomatic courier (art. 9), nationality of the diplomatic courier (art. 10), functions (art. 11), commencement of functions (art. 12), end of functions (art. 13), and persons declared *non grata* or not acceptable (art. 14). These draft articles were also referred to the Drafting Committee.⁷

4. The present report is designed: (a) to complete the examination of part II of the draft articles on the status of the diplomatic courier by submitting for consideration draft articles on the facilities, privileges and immunities of the diplomatic courier as well as on the status of the captain of a commercial aircraft or the master of a ship; (b) to examine the status of the diplomatic bag, whether or not accompanied by diplomatic courier, and to propose draft articles pertaining thereto, which constitute part III of the draft; (c) to propose draft articles on part IV of the draft (Miscellaneous provisions), concerning: (i) the obligations of third States in cases of *force majeure* and fortuitous events; (ii) treatment of the diplomatic courier and the diplomatic bag in case of non-recognition by States or Governments or in the absence of diplomatic or consular relations; (iii) relationship between these draft articles and other conventions and international agreements on diplomatic law dealing with the status of the diplomatic courier and the diplomatic bag. Consequently, the whole set of draft articles on the status of the diplomatic courier and the diplomatic bag, as contemplated by the Special Rapporteur, will be submitted for first reading.

5. The issues relating to the status of the diplomatic courier and the diplomatic bag will be examined in the present report from the same functional point of view as before. Taking into account the multipurpose service of the courier and the bag with respect to all kinds of official missions—permanent diplomatic missions and consular posts, special missions, permanent missions to international organizations and delegations to international conferences—it is suggested that the same comprehensive and uniform approach be applied to all kinds of couriers and bags. Since the previous reports contained an extensive analytical survey of the *travaux préparatoires* of the four codification conventions⁸ adopted under the auspices of the United Nations pertaining to the status of the diplomatic courier and the

¹ The three previous reports of the Special Rapporteur were:

(a) preliminary report, submitted to the Commission at its thirty-second session, in 1980 (*Yearbook ... 1980*, vol. II (Part One), p. 231, document A/CN.4/335);

(b) second report, submitted to the Commission at its thirty-third session, in 1981 (*Yearbook ... 1981*, vol. II (Part One), p. 151, document A/CN.4/347 and Add.1 and 2);

(c) third report, submitted to the Commission at its thirty-fourth session, in 1982 (*Yearbook ... 1982*, vol. II (Part One), p. 247, document A/CN.4/359 and Add.1).

On the structure of the draft articles, see preliminary report para. 60; second report, para. 7; third report, para. 10.

² Structure approved by the Commission after examination of the Special Rapporteur's proposals at its thirty-second session (*Yearbook ... 1980*, vol. II (Part Two), p. 165, para. 170). See also the observations or suggestions made by members of the Commission at that session (*Yearbook ... 1980*, vol. I, p. 264, 1634th meeting, para. 38 (Mr. Reuter); p. 276, 1636th meeting, para. 19 (Mr. Evensen); pp. 282-284, 1637th meeting, para. 7 (Mr. Francis), para. 16 (Mr. Thiam), paras. 24-26 (Mr. Riphagen), para. 29 (Sir Francis Vallat)).

³ Document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), paras. 49, 211, 217, 225, 231.

⁴ Document A/CN.4/359 and Add.1 (see footnote 1 above), paras. 19, 42, 56.

⁵ *Yearbook ... 1982*, vol. II (Part Two), p. 120, para. 249.

⁶ Document A/CN.4/359 and Add.1 (see footnote 1 above), para. 61.

⁷ See footnote 5 above.

⁸ The 1961 Vienna Convention, the 1963 Vienna Convention, the Convention on Special Missions and the 1975 Vienna Convention, referred to hereinafter as "codification conventions" or "conventions codifying diplomatic law" (see p. 57 above for references to these instruments).

diplomatic bag,⁹ the present report would place greater emphasis on the examination of State practice, including national legislation and international agreements. In this connection special attention will be at-

⁹ See in particular the second report (see footnote 1 above), which contained on the one hand an analytical survey of the four conventions as the legal basis for a uniform régime governing the status of diplomatic and consular couriers, of couriers of special missions and permanent missions and of couriers of delegations to international organizations and, on the other hand, an extensive history of the concepts of diplomatic bag, consular bag and bags of special missions, permanent missions and delegations to international conferences.

tached to an inquiry into the recent treaties on the subject matter under consideration. In many instances it would be necessary to go beyond the existing rules in an attempt to overcome certain loopholes and suggest new provisions which would more adequately correspond to the dynamics of contemporary official communications. In this work of codification and progressive development of the rules governing the status of the diplomatic courier and the diplomatic bag, it is proposed to follow an empirical and pragmatic approach, as has been the case with the draft articles submitted so far.

I. Consideration by the Sixth Committee of the General Assembly of the draft articles on general provisions and on the status of the diplomatic courier

A. Debate on the topic as a whole

6. The debate on the status of the diplomatic courier and the diplomatic bag in the Sixth Committee, at the thirty-seventh session of the General Assembly, was very indicative of the attention attached to this topic by Member States. It may be pointed out that well over 40 representatives in their statements on the work of the Commission expressed their views on the topic as a whole and made comments on various draft articles under consideration. There were many useful observations and critical remarks which deserve careful consideration.

7. Most of the speakers who referred to the status of the diplomatic courier and the diplomatic bag noted the importance of freedom of communication between States and their missions abroad, as a fundamental principle of international law and a prerequisite for the normal functioning of those missions. In that connection, it was indicated that the current work on the status of the diplomatic courier and the diplomatic bag had practical significance, especially in the light of the technological development of the means of official communications. Several representatives indicated that the growing abuse of the privileges and immunities of the courier and the bag made existing international agreements in that field inadequate and thus justified the formulation and adoption of an international legal instrument codifying the rules on the topic. They suggested that the Commission should continue its work on the topic more actively and on a priority basis, with a view to a speedy and successful conclusion.¹⁰

8. At the same time, some representatives expressed reservations about the need for immediate attention to the codification of the matter, since the existing law was reasonably determined. It was also pointed out that it

was not the proliferation of legal rules but the will to respect them that guaranteed their implementation.¹¹

9. Several representatives indicated that they would postpone their specific comments until the Commission had finalized the draft articles on the topic. It was also stated that more detailed comments could be made when the Commission had considered the status of the diplomatic bag and its possible abuses.¹²

10. Among the various views expressed on the significance and the feasibility of codifying the topic of the status of the diplomatic courier and the diplomatic bag, the prevailing trend was recognition of the practical importance of and the need for codification of specific rules on the topic. The debate which took place in the Sixth Committee at the thirty-eighth session of the General Assembly provided further evidence to that effect.

11. The general comments referred also to various aspects of the topic as a whole, including its scope and the methodology to be applied in the work in progress. Several representatives maintained that the draft articles should also cover couriers and bags used for official purposes by international organizations.¹³ The view was expressed that the scope of the draft articles should be further extended to include also the communications of recognized national liberation movements.¹⁴ At the

¹¹ *Ibid.*, para. 188.

¹² *Ibid.*, para. 186.

¹³ *Ibid.*, para. 193. See also the statements of the representatives of Brazil (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee, 47th meeting, para. 4*); Algeria (*ibid.*, 48th meeting, para. 39); Iraq (*ibid.*, 50th meeting, para. 60); and Zaire (*ibid.*, 51st meeting, para. 28).

¹⁴ See "Topical summary ... " (A/CN.4/L.352), para. 193, and also the statements of the representatives of the German Democratic Republic (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee, 40th meeting, para. 73*); the Libyan Arab Jamahiriya (*ibid.*, 49th meeting, para. 55); and Zaire (*ibid.*, 51st meeting, para. 30). See also the opposing view expressed by the representative of Israel (*ibid.*, 47th meeting, para. 18).

¹⁰ See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-seventh session of the General Assembly" (A/CN.4/L.352), paras. 186, 187, 189.

same time, some representatives emphasized that the extension of the scope of the draft articles was not justified and would not make them generally acceptable.¹⁵

12. Taking into consideration the views expressed in the Sixth Committee and in the Commission, the special Rapporteur suggests that, at this stage of the work on the topic, its scope should be confined to couriers and bags used by States, as proposed in the third report,¹⁶ and recalls that draft article 2 contains safeguard provisions, particularly with regard to couriers and bags used by international organizations, so that the interests of those organizations are not overlooked.

13. The comprehensive and uniform approach applied to all kinds of couriers and bags used by States was commended. However, the view was expressed by one delegation that

... at least for some purposes, the applicable standards for the protection of those communications were treated separately in the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations [and that the] recognized different standards of treatment should not be undermined by their treatment in a draft on the status of the diplomatic bag.¹⁷

That statement referred to the problem of the inviolability of the diplomatic bag and the consular bag as provided for respectively in article 27, paragraph 3, of the 1961 Vienna Convention and in article 35, paragraph 3, of the 1963 Vienna Convention. The matter was considered in some detail by the Special Rapporteur in his second report,¹⁸ and will be dealt with again in the present report in connection with the draft articles on the inviolability of the diplomatic bag and its exemption from checking by electronic or other mechanical devices.

14. Several representatives commended the endeavour of the Commission to achieve a fair balance between the requirements for secrecy of the bag and the security and other legitimate interests of the receiving and the transit States.¹⁹ It is the intention of the Special Rapporteur to proceed from this basic prerequisite for harmony of in-

¹⁵ For example, the representative of France stated:

"... any attempt to extend the provisions beyond the diplomatic courier and the unaccompanied diplomatic bag *stricto sensu* might jeopardize the success of an undertaking which his delegation viewed with great favour." (*Ibid.*, 38th meeting, para. 21).

Several representatives expressed in more general terms their agreement as to the scope and structure of the draft articles as submitted by the Special Rapporteur.

¹⁶ Document A/CN.4/359 and Add.1 (see footnote 1 above), paras. 16-18, setting out the main reasons for maintaining the scope of the draft articles as formulated in revised draft article 1.

¹⁷ Statement by the representative of the United States of America (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 52nd meeting, para. 37).

¹⁸ Document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), paras. 168-173.

¹⁹ See "Topical summary ..." (A/CN.4/L.352), para. 192. See also the statements of the representatives of the Libyan Arab Jamahiriya (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 49th meeting, para. 55); Pakistan (*ibid.*, 51st meeting, para. 80); and Sri Lanka (*ibid.*, para. 86).

terests to the examination of the status of the diplomatic bag, and in particular its inviolability.

15. There were some other general comments and suggestions which will be considered further in the present report in connection with specific issues relating to the draft articles.

B. Comments on the various draft articles submitted by the Special Rapporteur

16. The 14 draft articles submitted by the Special Rapporteur were generally commended as a basis for a legal instrument codifying the rules on the topic. One representative, however, held the view that the draft articles were sometimes too detailed,²⁰ while another thought that the draft articles on the status of the diplomatic courier (arts. 7-14) were perhaps excessively based on an assimilation of the diplomatic courier to the staff of the diplomatic mission.²¹ These critical remarks, expressed in general terms, will be taken into account by the Special Rapporteur in his work on the draft articles to follow.

17. Some comments on specific draft articles referred mainly to merely drafting matters, which should be brought to the attention of the Drafting Committee when considering the pertinent draft articles prepared by the Special Rapporteur. They will therefore not be dealt with in this report. This is the case with comments made on draft articles 1-4, 6, 8, 12 and 14, or on some aspects of the provisions contained in those articles.²²

18. Some comments on specific draft articles were of an interpretative nature and could be considered more appropriately in the commentary to them. This is the case with the remark made by one representative on the term "diplomatic courier", to the effect that this term should apply to persons entrusted with the transportation of the bag not only to the missions of the sending State but also from those missions back to the sending State.²³ Indeed, this is the meaning of draft article 1, which rerefers to "communications of States ... with* their diplomatic missions, consular posts ...", and to "official communications of these missions ... with* the sending State or with* each other, by employing diplomatic couriers and diplomatic bags ...". The idea of *two way communications*, in our view, is obvious. Another comment of an interpretative nature concerned the content of draft article 4 with respect to communications with special missions, permanent missions

²⁰ See the statement of the representative of the German Democratic Republic (*ibid.*, 40th meeting, para. 72); see also "Topical summary ..." (A/CN.4/L.352), para. 190.

²¹ See the statement of the representative of Spain (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 48th meeting, para. 102); see also "Topical summary ..." (A/CN.4/L.352), para. 197.

²² See "Topical summary ..." (A/CN.4/L.352), paras. 198-202, 204, 207, 209.

²³ See the statement of the representative of Jamaica (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 40th meeting, para. 39); see also "Topical summary ..." (A/CN.4/L.352), para. 198.

to international organizations and delegations to international conferences when there were no diplomatic relations between the sending and the receiving or transit States.²⁴ Draft article 4 contains a formulation of the general principle of freedom of communication through diplomatic couriers and diplomatic bags, and therefore stipulates the general obligations of the receiving and the transit States to permit and protect on their territory free communications without any conditions. Nevertheless, it should be mentioned that, within part IV (Miscellaneous provisions), a specific draft article is contemplated on that matter. A comment made on paragraph 2 (b) of article 6 also could be qualified as one of interpretation, which may be included in the commentary. It referred to the interpretation of the term "third State"; that term was considered inappropriate since the provision concerned "other States which were parties to the instrument".²⁵ The term "third State", as used in paragraph 2 (b) of draft article 6, refers to States that are not parties to the agreement concluded between two or more States *to modify among themselves* the extent of the facilities, privileges and immunities for their diplomatic couriers and diplomatic bags. Perhaps this clarification should be included in the commentary to draft article 6.

19. Several comments were made on the commencement and the end of the functions of the diplomatic courier (draft articles 12 and 13). It was stated that the function of the diplomatic courier did not begin when he crossed the frontier of the transit or receiving State but when he started his journey within the receiving State, and that he should be protected from that moment.²⁶ It is obvious that, as was pointed out in the third report, the official function of the diplomatic courier is assumed at the moment of his appointment or assignment, but for the receiving or the transit State the commencement of the functions of the diplomatic courier should be considered from the moment he enters its territory. From that moment he enjoys the facilities, privileges and immunities accorded to him by these States for the performance of his official functions.²⁷ Perhaps it should be made clear that, while the functions of the courier begin when he is entrusted with the custody, transportation and delivery of the bag, with regard to the receiving and the transit States his functions shall be recognized from the moment he enters their territories. As to the end of the function of the

diplomatic courier, it was considered that further clarification was necessary in respect of draft article 13, paragraphs (a) and (b). With reference to paragraph (a), on the end of the function of the courier upon completion of his task, it was stated that, even though the courier had delivered the diplomatic bag, his status should not abruptly change to that of a mere alien in the receiving State and that he should continue to receive the necessary protection.²⁸ In this connection it should be made clear that the function of the diplomatic courier comes to an end upon delivery of the bag to its final destination or his return to the country of origin. It should further be made clear that paragraph (b) of article 13 refers to notification by the sending State to the receiving State that the function of the diplomatic courier has been terminated in the case of recall or dismissal, as was pointed out in the third report.²⁹ In normal circumstances, therefore, when the courier's mission is completed, notification to this effect is not necessary, and was not contemplated in the draft article prepared by the Special Rapporteur. Such a clarification may be included in the commentary in order to avoid any confusion.

20. It was considered by one representative that paragraph 2 of draft article 14 was out of place and superfluous, since the decision to appoint or to send another diplomatic courier in cases where the previous one was declared *persona non grata*, or not acceptable, was at the discretion of the sending State. It was argued that, as it stood, the draft article might be interpreted as imposing an obligation on the sending State to replace a diplomatic courier who had been declared *persona non grata* or not acceptable.³⁰ The replacement of the diplomatic courier in this case is inevitable for the normal functioning of official communications between the States concerned. The explicit reference to this effect in draft article 14, paragraph 2, is of a consequential nature. It is also an indication that the diplomatic courier can perform his functions in the territory of the receiving State only with the consent of that State.

21. There were some comments relating to the status of the diplomatic bag, particularly with respect to its content and preventive measures against possible abuses.³¹ They can be dealt with further in this report in connection with the relevant draft articles to be submitted for consideration.

²⁴ See the statement of the representative of Israel (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee, 47th meeting, para. 19*); see also "Topical summary ... " (A/CN.4/L.352), para. 201.

²⁵ See "Topical summary ... " (A/CN.4/L.352), para. 202.

²⁶ See the statements of the representatives of Spain (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee, 48th meeting, para. 103*); and Israel (*ibid.*, 47th meeting, para. 19); see also "Topical summary ... " (A/CN.4/L.352), para. 207.

²⁷ Document A/CN.4/359 and Add.1 (see footnote 1 above), para. 112.

²⁸ See the statement of the representative of Chile (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee, 44th meeting, para. 92*); see also "Topical summary ... " (A/CN.4/L.352), para. 208.

²⁹ Document A/CN.4/359 and Add.1 (see footnote 1 above), para. 122.

³⁰ See "Topical summary ... " (A/CN.4/L.352), para. 209.

³¹ See the statements of the representatives of India (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee, 46th meeting, para. 92*); and Zaire (*ibid.*, 51st meeting, para. 29).

II. Draft articles on the facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic courier *ad hoc*

22. The nature and scope of the facilities, privileges and immunities accorded to the diplomatic courier for the performance of his functions constitute the core of his legal status. They have always been considered as the essential legal means for the protection of freedom of communication between the sending State and its official missions abroad. The significance of this problem has to be considered also in close connection with the facilities, privileges and immunities which the diplomatic bag should enjoy as the main instrument of official communications. For it is obvious that the protection of the person of the diplomatic courier is indeed a prerequisite for the inviolability and safety of the diplomatic bag entrusted to him.

23. Since the initial stages of the drafting of the 1961 Vienna Convention until the most recent treaty practice of States, this matter has always been considered as the central question relating to the whole legal framework of diplomatic intercourse in general, and the status of any kind of official courier in particular. It was evidently assumed by the drafters of the four codification conventions that the courier, whatever kind of courier he might be, should be protected by the receiving and the transit States and that he should enjoy certain rights in the performance of his functions. This principle has been further attested in the consular and other agreements concluded by a large number of States. Taken as a whole, the scope of this principle seems to comprise the following implications:

First, the States concerned should allow the entrance and free movement of the diplomatic courier in their territories and his communications with the sending State and its missions, when necessary, and should offer him other facilities required for his function.

Secondly, the States concerned should treat the courier with due respect and should take all appropriate measures to protect him and the diplomatic bag entrusted to him and prevent any infringement of his person, freedom and official function.

Thirdly, the courier should enjoy certain immunities and exemptions accorded to him in the performance of his functions.

Fourthly, the facilities, privileges and immunities accorded to the diplomatic courier should be the same as those of consular and the other official couriers.

24. The draft articles on the status of the diplomatic courier submitted in the present report follow from these basic considerations. Accordingly, this part of the report consists of the following main sections:

1. *Facilities*, including general facilities, entry into the territory of the receiving or the transit State, freedom of movement and communication and facilities for temporary accommodation of the diplomatic courier.

2. *Privileges and immunities*, including inviolability of the courier and of his temporary accommodation and means of transport, immunity from jurisdiction and various exemptions accorded to him in the performance of his functions.

3. *Duration of facilities*, privileges and immunities, as well as the question of waiver of immunity.

25. The examination of the facilities, privileges and immunities should be carried out in accordance with the already established concept of a comprehensive and uniform treatment of all kinds of couriers and couriers *ad hoc*. Of course, in the case of couriers *ad hoc*, certain specific characteristics of the status of this kind of diplomatic courier should be taken into consideration, as indicated in the second report.³²

A. Facilities accorded to the diplomatic courier

1. GENERAL FACILITIES

26. The diplomatic courier, as an official of the sending State, while exercising his function in the territory of the receiving or the transit State, may need some assistance in connection with his journey. The facilities that he may need include various forms of help or co-operation offered by the authorities of the receiving or the transit State in order to enable him to perform his duties expeditiously and without undue difficulties. Some of these facilities could be conceived well in advance due to their essential and repetitive character, while others might be very circumstantial, unpredictable or peculiar in nature, so that their explicit formulation in a draft article is very difficult. Moreover, it would not be advisable to introduce any exhaustive list of facilities rendered to the courier.

27. This approach, presenting a general provision on facilities along with separate provisions on certain facilities, was followed by the four codification conventions. Article 25 of the 1961 Vienna Convention refers to the obligation of the receiving State to "accord full facilities for the performance of the functions of the mission". Article 28 of the 1963 Vienna Convention is modelled upon this provision and uses the same expression. So is article 22 of the Convention on Special Missions, which refers to "the facilities required", and articles 20 and 51 of the 1975 Vienna Convention, which use the expression "all necessary facilities". The main requirement with respect to the nature and scope of the general facilities is their close dependence upon the need for the proper performance of the functions of the courier. The facilities could be granted by the central or the local authorities, as the case may be. They may be of

³² Document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), paras. 111-115

a technical or administrative nature, relating to admission or entry into the territory of the receiving or the transit State, or help in procuring transportation or other similar facilities connected with the carrying of the diplomatic bag and the securing of its safety.

28. Reference to the general facilities offered to the diplomatic courier may be found in the *travaux préparatoires* of the codification conventions which resulted in the above-mentioned articles. In this connection, it should be recalled that draft article 16, paragraph 1, submitted to the Commission at its ninth session, in 1957, by the Special Rapporteur on the topic of diplomatic intercourse and immunities, 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* and written messages in code or cipher, between the mission and the ministry of foreign affairs of the sending State or its consulates and nationals in the territory of the receiving State.³³

29. No other draft article contains specific provisions on the general facilities to be accorded to the diplomatic courier in the performance of his functions, and there have therefore been no other discussions on this matter. In the *travaux préparatoires* of the other codification conventions, there were no difficulties in adopting provisions on general facilities identical with or similar in their wording to article 25 of the 1961 Vienna Convention.

30. In State practice, as evidenced by national legislation or international agreements, attention is as a rule focused on certain specific facilities. In most instances the granting of general facilities is presumed, although there are some examples of their explicit mention.³⁴ The consular conventions reviewed by the Special Rapporteur do not specifically address themselves to this matter.

31. Taking into consideration the need for a provision on general facilities to be accorded to the diplomatic courier for practical reasons, and the fact that there are no such provisions in existing treaties, the Special Rapporteur submits the following draft article for examination and approval:

Article 15. General facilities

The receiving State and the transit State shall accord to the diplomatic courier the facilities required for the performance of this official functions.

³³ *Yearbook...1957*, vol. I, p. 74, 398th meeting, para. 27.

³⁴ See e.g. the Regulations concerning diplomatic and consular missions of foreign States in the territory of the USSR (reproduced in *Yearbook ... 1982*, vol. II (Part One), p.241, document A/CN.4/356 and Add.1-3), article 9 of which provides:

"The appropriate organs of the USSR and the Union republics shall afford every assistance to diplomatic couriers in order to ensure their unimpeded passage to the destination and place of safe-keeping of the diplomatic bag conveyed by them.

"..."

2. ENTRY INTO THE TERRITORIES OF THE RECEIVING AND THE TRANSIT STATES AND FREEDOM OF MOVEMENT AND COMMUNICATION OF THE DIPLOMATIC COURIER

32. Admission of the diplomatic courier to the territory of the receiving State or crossing of the territory of the transit State is an indispensable condition for him to perform his functions. The facilities for entry or transit rendered to the courier by the receiving or the transit State constitute an essential prerequisite for the fulfilment of the task with which the courier is entrusted: transportation and delivery of the diplomatic bag. Therefore the obligation of States to permit the entry into their territories of diplomatic couriers has been well established in international law and State practice as an essential element of the principle of freedom of communication for official purposes effected through diplomatic couriers and diplomatic bags. It is obvious that, if a diplomatic courier is refused entry into the territory of the receiving State, then he is prevented from performing his function.

33. The facilities for entry into the territory of the receiving or the transit State rendered by those States to the diplomatic courier depend very much upon the régime established by them for admission across their frontiers of foreigners in general, and members of the foreign diplomatic and other missions and official delegations in particular. The main purpose of those facilities is to ensure unimpeded and expeditious passage through the immigration and other checking offices at the frontier. Where the régime for admission requires entry or transit visas for all foreign visitors or for nationals of some countries, such visas should be granted to the diplomatic courier by the competent authorities of the receiving or the transit State as quickly as possible, and ultimately with reduced formalities. There has been abundant State practice established through national regulations and international agreements or simplified procedures for the issuance of special visas to diplomatic couriers valid for multiple journeys and for long periods of time.³⁵

34. Freedom of movement and travel within the territory of the receiving or the transit State is another essential condition for the proper performance of the functions of the diplomatic courier. It also constitutes an important element of the general principle of freedom of diplomatic communication. Any impediment to the exercise of free movement and travel inevitably leads to retardation of the delivery of diplomatic correspondence and thus adversely affects official communications. In an article on personal im-

³⁵ Among the many examples, mention may be made of the practice of the Indonesian Government to grant a "multiple entry visa" valid for six months, to diplomatic couriers (see p. 59 above, document A/CN.4/372 and Add.1 and 2). It may also be pointed out that the 1975 Vienna Convention contains a special provision (art. 79) on entry into the territory of the host State of members of permanent missions and delegations as well as of members of their families forming part of their respective households. The same article (art. 79, para. 2) stipulates that visas, when required, shall be granted as promptly as possible to any of the aforementioned persons.

munities of diplomatic agents, Lyons writes, in respect of the freedom of movement of the diplomatic courier:

... the courier must enjoy a degree of freedom of movement similar to that of the ambassador himself. The privilege is in fact that of the ambassador, and it attaches to his messenger because it is necessary for the interest or convenience of the ambassador that his messages pass freely and without delay.³⁶

35. The facilities granted by the receiving or the transit State to the diplomatic courier in order to assist him in his journey through their respective territories may be of an administrative or of a purely technical character. The authorities of the receiving or the transit State have the obligation to render the necessary aid to the diplomatic courier to overcome possible difficulties and obstacles that could be caused by routine police, customs or other inspections or control during his travel. It is also assumed that the courier should rely on the help and co-operation of the authorities of the receiving or the transit State, when requested by him, to obtain appropriate means of transportation. Normally, the diplomatic courier has to make all the necessary travel arrangements for his journey in the exercise of his tasks. He may however be compelled to address a request for assistance to the authorities of the receiving State in special circumstances, if he has to face obstacles that might delay his journey and that could be overcome with the help or co-operation of the local authorities.

36. Freedom of movement and travel entails the right of the diplomatic courier to use all available means of transportation, and access to any appropriate itinerary on the territory of the receiving or the transit State. However, with respect to access to some parts of the territory of those States, certain limitations could be established. Such restrictions on freedom of movement and travel have been generally recognized by international law and State practice with regard to foreign nationals, including members of diplomatic and other missions. Thus, article 26 of the 1961 Vienna Convention states:

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the mission freedom of movement and travel in its territory.

Similar provisions on freedom of movement and travel are contained in article 34 of the 1963 Vienna Convention, article 27 of the Convention on Special Missions and article 26 of the 1975 Vienna Convention.

37. Restrictions under national laws and regulations are usually established on a reciprocal basis between the States concerned. Such rules and regulations regarding zones to which access is prohibited or regulated for reasons of national security should apply to diplomatic couriers as well. Moreover, having in mind the fact that the freedom of movement and travel of the diplomatic courier is subordinated to his function of carrying the

³⁶ A. B. Lyons, "Personal immunities of diplomatic agents", *The British Year Book of International Law*, 1954 (London), vol. 31, p. 334, cited in M. Whiteman, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1970), vol. 7, p. 179.

diplomatic bag, it should be assumed that he has to follow the most appropriate itinerary, which usually should be the most convenient journey for the safe, speedy and economical delivery of the bag to its destination.

38. The facilities rendered by the receiving or the transit State to the diplomatic courier should also comprise an obligation to assist him, when necessary, to communicate with the authorities of the sending State or its missions situated on his route or referred to in his waybill. This right or communication of the diplomatic courier derives from the rule of freedom of communication of the sending State through diplomatic couriers and diplomatic bags provided in the four codification conventions and generally recognized in international law and State practice. The commentary to article 35 (Freedom of communication) of the draft articles on consular intercourse and immunities, adopted by the Commission at its thirteenth session, in 1961, contains the following relevant points:

(3) As regards the means of communication, the article specifies that the consulate may employ all appropriate means, including diplomatic or consular couriers, the diplomatic or consular bag, and messages in code or cipher. In drafting this article, the Commission based itself on existing practice, which is as a rule to make use of the diplomatic courier service, i.e. of the couriers dispatched by the Ministry for Foreign Affairs of the sending State or by a diplomatic mission of the latter. Such diplomatic couriers maintain the consulate's communications with the diplomatic mission of the sending State, or with an intermediate post acting as a collecting and distributing centre for diplomatic mail; with the authorities of the sending State; or even with the sending State's diplomatic missions and consulates in third States. In all such cases, the rules governing the dispatch of diplomatic couriers, and defining their legal status, are applicable. The consular bag may either be part of the diplomatic bag or may be carried as a separate bag shown on the diplomatic courier's waybill. This last procedure is preferred where the consular bag has to be transmitted to a consulate *en route*.³⁷

39. The scope and content of the facilities that should be rendered for the exercise of freedom of communication by the diplomatic courier may differ from case to case. However, there are some essential features that have to be taken into consideration. First of all, freedom of communication should be conceived in direct connection with the functions of the courier. This might be the case when the diplomatic courier *en route*, or at a certain point during a stopover, might need to communicate directly with the competent authorities of the sending State or its missions abroad, in order to seek instructions, to inform them about delays or deviation from the original waybill, or to convey any other information in connection with the performance of his functions. Secondly, the freedom of communication granted to the diplomatic courier should entail an obligation of the receiving or the transit State to facilitate, when necessary, the use by the courier of all appropriate public means of communication, including telephone, telegraph, telex and other services available. It is obvious that the aid of the receiving or the transit State should not be requested in normal circumstances, when the means of communication are generally accessible.

³⁷ *Yearbook ... 1961*, vol. II, p. 111, document A/4843, chap. II, sect. IV.

The request for assistance has therefore to be justified on the grounds that difficulties or obstacles exist which the courier cannot overcome without the direct help or co-operation of the authorities of the receiving or the transit State. It is obvious that such exceptional instances would in practice be limited, but this fact alone does not make the need for assistance unwarranted.

40. Freedom of communication in its broader sense has been provided for, as a general rule, in the bilateral consular conventions concluded prior to and after the entry into force of the codification conventions adopted under the auspices of the United Nations. It is to be noted that in recent treaty practice the provision on freedom of communication has acquired a prominent place. A consular post shall have the right to communicate with its government or with the diplomatic mission of the sending State and with other consulates of the sending State. For example, article 16, paragraph 1, of the Consular Convention between Czechoslovakia and Cyprus (1976) reads as follows:

1. A consulate shall be entitled to exchange communications with its Government, with the diplomatic missions of the sending State and with other consulates of the sending State wherever they may be. ...

41. Several bilateral agreements explicitly state that a receiving State shall permit and protect freedom of communication for all official purposes.³⁸ One agreement indicates that the receiving State shall permit and protect freedom of communication on the part of the consular post for all official purposes in accordance with accepted international practice,³⁹ while another simply states that the receiving State recognizes the right of a consulate to communicate and renders assistance to this effect.⁴⁰ Most of the agreements, with few exceptions,⁴¹ stipulate that, when ordinary means of communication are used, the same rates shall apply to a consulate as to the diplomatic mission.

42. Within the scope of the practical facilities that may be accorded by the receiving or the transit State to the diplomatic courier for the performance of his functions on its territory, reference may be made to the assistance

³⁸ See e.g. the consular conventions concluded between the following States: Belgium and Turkey (1972), France and Bulgaria (1968), Greece and Hungary (1977), Greece and Poland (1977), Poland and Cuba (1972), Sweden and United Kingdom (1952), USSR and German Democratic Republic (1957), USSR and India (1973), USSR and Italy (1967), USSR and Mozambique (1977), USSR and Norway (1971), USSR and Syrian Arab Republic (1976), United Kingdom and Czechoslovakia (1975), United Kingdom and France (1951), United States of America and China (1980), United States of America and Ireland (1950), United States of America and Republic of Korea (1963); and the Exchange of Notes between the Government of Australia and the Government of the People's Republic of China concerning the establishment of consulates-general (1978).

³⁹ Exchange of Notes between the Government of Australia and the Government of the People's Republic of China (1978).

⁴⁰ See the Consular Convention between the USSR and Cape Verde (1976).

⁴¹ See the consular conventions between Greece and Hungary (1977), Greece and Poland (1977), USSR and Syrian Arab Republic (1976), and the Exchange of Notes between the Government of Australia and the Government of the People's Republic of China (1978).

rendered to him in obtaining temporary accommodation when requested under certain circumstances. Normally, the diplomatic courier has to resolve all the practical problems that may arise during his journey. However, in some special situations the diplomatic courier may not be able to find suitable temporary accommodation for himself and for the protection of the diplomatic bag, in which case he would be compelled either to change his original itinerary or to make a stopover in a certain place. In that exceptional case, the receiving State or the transit State may be requested to assist him in obtaining temporary accommodation. It is of paramount importance that the diplomatic courier and the diplomatic bag carried by him be housed in a safe and secure place, protected against any intrusion or access by unauthorized persons who might endanger the safety and integrity of the diplomatic bag. Hence a provision providing for facilities to be rendered by the receiving or the transit State for the proper performance of the functions of the diplomatic courier may be justified.

43. In the light of the above considerations regarding the various facilities that should be accorded to the diplomatic courier, the Special Rapporteur submits the following draft articles for examination and approval:

Article 16. Entry into the territory of the receiving State and the transit State

1. The receiving State and the transit State shall allow the diplomatic courier to enter their territory in the performance of his official functions.

2. Entry or transit visas, if required, shall be granted by the receiving or the transit State to the diplomatic courier as quickly as possible.

Article 17. Freedom of movement

Subject to the laws and regulations concerning zones where access is prohibited or regulated for reasons of national security, the receiving State and the transit State shall ensure freedom of movement in their respective territories to the diplomatic courier in the performance of his official functions or when returning to the sending State.

Article 18. Freedom of communication

The receiving and the transit State shall facilitate, when necessary, the communications of the diplomatic courier by all appropriate means with the sending State and its missions, as referred to in article 1, situated in the territory of the receiving State or in that of the transit State, as applicable.

Article 19. Temporary accommodation

The receiving and the transit State shall, when requested, assist the diplomatic courier in obtaining temporary accommodation in connection with the performance of his official functions.

B. Privileges and immunities accorded to the diplomatic courier

1. INVIOIABILITY OF THE DIPLOMATIC COURIER

44. The inviolability of the diplomatic courier in its broader sense includes his personal inviolability, as well as the inviolability of his temporary accommodation or the individual means of transport used by him in the performance of his functions. Since these main kinds of inviolability have specific features and legal implications, the Special Rapporteur proposes to examine them individually and to submit separate draft articles. However, it should be emphasized at the outset that the common denominator that unites them is the protection of the person of the courier and the underlying concept of their functional nature and close connection with the inviolability of diplomatic correspondence.

45. Inviolability thus conceived should be considered as a focal point within the whole framework of rules governing the legal status of the diplomatic courier. Consequently, the inviolability of the diplomatic courier has to be seen in its relationship with all the facilities, privileges and immunities granted to the courier for the discharge of his official functions. Inviolability, therefore, which constitutes a system of rules, has to be placed in its proper relationship with other rules, such as immunity from jurisdiction and the exemptions accorded to the courier from personal examination, control and inspection, as well as from personal services and social security.

46. Taking into account these general considerations on the specific features of the problem of inviolability and its close connection with the other facilities, privileges and immunities accorded to the diplomatic courier, it is suggested that the following main aspects of inviolability be examined, namely:

(a) Personal inviolability of the diplomatic courier;

(b) Inviolability of the temporary accommodation and the individual means of transport used by the courier in the performance of his official functions.

(a) *Personal inviolability*

47. The rules on the personal inviolability of the diplomatic courier have been greatly influenced by the principle of the inviolability of the diplomatic agent generally recognized in international law and State practice. In accordance with this principle, the diplomatic agent enjoys personal immunity and is under the legal protection of the receiving and the transit States. The main constituent elements of the status of personal inviolability may be identified as follows:

(1) The person enjoying personal inviolability is not liable to arrest, detention or any other form of restriction on his freedom;

(2) The receiving State shall treat such a person with due respect and take all appropriate measures to prevent any attack on his person, freedom or dignity;

(3) Persons who have committed such attacks shall be prosecuted and punished by the receiving or the transit State.

48. The principle of personal inviolability was applied with regard to diplomatic couriers prior of the adoption of the 1961 Vienna Convention and the other conventions codifying diplomatic law adopted under the auspices of the United Nations. Undoubtedly, the entry into force of the 1961 Vienna Convention and the 1963 Vienna Convention have provided the legal grounds for a comprehensive and precise formulation of that principle, in all its aspects, including its relevance to the status of diplomatic and consular couriers. In this connection, a brief survey of the history of the provisions of the 1961 Vienna Convention relating to the personal inviolability of the diplomatic courier might be appropriate for the purpose of the present study.⁴²

49. The initial draft article on the personal inviolability of the diplomatic courier was draft article 16, prepared in 1955 by the Special Rapporteur on the question of diplomatic intercourse and immunities. That text provided that the "messenger carrying the dispatches" should be protected by the receiving State as well as by third States.⁴³ The revised draft article 16 was considered by the Commission at its ninth session, in 1957. Upon the proposal of one member of the Commission, a provisional text was adopted at the same session, reading as follows:

The diplomatic courier shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to arrest or detention, whether administrative or judicial.⁴⁴

Article 25, paragraph 5, of the final draft submitted by the Commission at its tenth session, in 1958, remained virtually unchanged, except that the words "shall not be liable to arrest or detention, whether administrative or judicial" were replaced by the simplified expression "shall not be liable to any form of arrest or detention".⁴⁵ Article 39, paragraph 3, of the text also provided that third States "shall accord to diplomatic couriers in transit the same inviolability and protection as the receiving State is bound to accord".⁴⁶

50. The United Nations Conference on Diplomatic Intercourse and Immunities of 1961 did not add anything new to the Commission's final draft as far as the basic principle of the courier's personal inviolability was concerned. The United States of America proposed an amendment to the Commission's draft article 25 replacing the words "and shall not be liable to any form of arrest or detention" by the words "to the same extent as a member of the administrative and technical staff of the

⁴² See also the second report of the Special Rapporteur, document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), paras. 63-70.

⁴³ *Yearbook ... 1955*, vol. II, p. 11, document A/CN.4/91.

⁴⁴ Art. 21, para. 4; see *Yearbook ... 1957*, vol. II, p. 138, document A/3623, chap. II, sect. II.

⁴⁵ *Yearbook ... 1958*, vol. II, p. 97, document A/3859, chap. III, sect. II.

⁴⁶ *Ibid.*, p. 103.

mission".⁴⁷ This amendment, however, was not adopted by the Committee of the Conference. Switzerland and France introduced a joint amendment, which was adopted, to the effect that the diplomatic courier should be protected by the receiving State only "in the performance of his functions".⁴⁸ Thus article 27, paragraph 5, of the Vienna Convention on Diplomatic Relations, as adopted by the Conference in 1961, reads as follows:

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

51. The obligation of transit States to accord to diplomatic couriers the same inviolability and protection as the receiving State is bound to accord was provided for in article 40, paragraph 3, of the 1961 Vienna Convention. Each of the other three conventions incorporated similar language providing for obligations for the receiving and the transit States, namely: article 35, paragraph 5, and article 54, paragraph 3, of the 1963 Vienna Convention with regard to the consular courier; article 28, paragraph 6, and article 42, paragraph 3, of the Convention on Special Missions concerning the courier of the special mission; and article 27, paragraph 5, of the 1975 Vienna Convention with respect to the courier of the mission, and article 57, paragraph 6, of the same Convention with respect to the courier of the delegation.⁴⁹

52. It was evidently assumed by the drafters of these conventions that the courier, of whatever kind he might be, should be protected by the receiving State as well as by the third State in transit and that he should enjoy personal inviolability. Accordingly, the courier shall not be liable to arrest, detention or any other form of restriction on his person and shall be treated by the receiving or the transit State with due respect by reason of his official functions.

53. Thus the personal inviolability of the diplomatic courier in its scope and legal implications comes very close to that of a diplomatic agent, owing primarily to the function of the courier concerning the custody, transportation and delivery of the diplomatic bag and the legal protection of the confidential character of official correspondence. In this connection it may be recalled that, at the United Nations Conference on Consular Relations, in 1963, the representative of the United Kingdom opposed the Japanese proposal to the effect that a consular courier should be treated simply as a consular official. That proposal provided that the courier should be accorded the limited inviolability and

immunities accorded to a consular official. The United Kingdom representative, opposing the Japanese proposal, stated that "it was essential for courier to receive complete inviolability and not to have the limited inviolability given to consular officials".⁵⁰ This concept of complete personal inviolability of the consular courier was agreed by the Conference and adhered to by the other codification conventions adopted in 1969 and 1975.

54. State practice in this matter, as evidenced by national legislation and international agreements, has set out as a general rule the personal inviolability of the diplomatic courier. All consular conventions provide for the personal inviolability of consular couriers. Most of them grant the same rights, privileges and immunities to consular couriers as those granted to diplomatic couriers, which include, first of all, personal inviolability.

55. Many pertinent examples of equality of treatment of diplomatic and consular couriers in general, and of their personal inviolability in particular, are reflected in bilateral agreements. For example, the Consular Convention between the USSR and the United Kingdom (1965) provides in article 16, paragraph 3, that:

Persons charged with the conveyance of consular pouches, bags and other containers shall be accorded the same rights, privileges and immunities as are accorded by the receiving State to the diplomatic couriers of the sending State.⁵¹

Similar or even identical formulae are used in several consular conventions. Some of them state that "consular couriers of the sending State shall enjoy in the territory of the receiving State the same rights, privileges and immunities as diplomatic couriers".⁵² Others state the principle thus: "Persons conveying consular bags—consular couriers—shall be accorded the same rights, privileges and immunities as diplomatic couriers of the sending State."⁵³

⁵⁰ *Official Records of the United Nations Conference on Consular Relations*, vol. 1 (United Nations publication, Sales No. 63.X.2), p. 320, *Second Committee*, 13th meeting, para. 15.

⁵¹ See also the consular conventions concluded between the following States: Belgium and Hungary (1976), art. 15, para. 5; Czechoslovakia and Cyprus (1976), art. 16, para. 4; Czechoslovakia and Yugoslavia (1963), art. 15, para. 2; Hungary and Czechoslovakia (1973), art. 15, para. 2; Mongolia and Czechoslovakia (1976), art. 14, para. 3; USSR and Angola (1976), art. 13, para. 3; USSR and Benin (1976), art. 14, para. 3; USSR and Cape Verde (1976), art. 13, para. 3; USSR and Cyprus (1978), art. 13, para. 3; USSR and Guinea (1976), art. 14, para. 3; USSR and Guinea-Bissau (1976), art. 13, para. 3; USSR and Japan (1966), art. 17, para. 3; USSR and Mozambique (1977), art. 13, para. 3; USSR and Syrian Arab Republic (1976), art. 14, para. 3; United Kingdom and Bulgaria (1968), art. 19, para. 4.

⁵² See the consular conventions concluded between the following States: Hungary and United States of America (1972), art. 14, para. 4; Poland and Mongolia (1973), art. 17, para. 3; USSR and Cuba (1972), art. 13; USSR and Czechoslovakia (1972), art. 13; USSR and Hungary (1971), art. 14, para. 3; USSR and Mongolia (1972), art. 13, para. 3; USSR and Somalia (1971), art. 14, para. 3.

⁵³ See the consular conventions concluded between the following States: Greece and Bulgaria (1973), art. 13, para. 3; Hungary and German Democratic Republic (1972), art. 14, para. 3; Mongolia and German Democratic Republic (1973), art. 14, para. 3; USSR and

⁴⁷ *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II (United Nations publication, Sales No. 62.X.1), p. 23, document A/CONF.20/C.1/L.154, para. 6.

⁴⁸ *Ibid.*, p. 39, document A/CONF.20/C.1/L.286, para. 2. For the discussion in the Conference on the two proposed amendments, *ibid.* vol. I (United Nations publication, Sales No. 61.X.2), p. 181, *Committee of the Whole*, 29th meeting, paras. 82 and 85-88.

⁴⁹ See the Special Rapporteur's second report, document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), paras. 74-104.

56. While a presumption may be made that these provisions also apply to diplomatic or consular couriers *ad hoc*, the Consular Convention between the United Kingdom and the German Democratic Republic (1976) specifically provides, in article 17, paragraph 4, that the rights, privileges and immunities accorded to diplomatic and consular couriers of the sending State shall apply also to a consular courier *ad hoc*, whose rights, privileges and immunities as such shall, however, cease to apply upon the handing over of the consular bag to the recipient.⁵⁴ The Rules concerning passage across the State frontier of the USSR of the diplomatic bag of the USSR and of foreign States and of the personal belongings of diplomatic couriers also provide that, when the diplomatic bag is entrusted to a temporary (*ad hoc*) diplomatic courier,

the provisions of these Rules shall apply, except that his entitlement to the privileges and immunities enjoyed by diplomatic couriers in the execution of their duties shall cease as soon as the diplomatic bag entrusted to him has been delivered to its destination.⁵⁵

57. Most bilateral consular conventions, when referring to the personal inviolability of the diplomatic or consular courier, explicitly stipulate that couriers are not liable to any form of arrest or detention and that their personal liberty may not be restricted. Mention may be made by way of illustration of several conventions which, although using various expressions, indicate the content of the term "personal inviolability" of the courier.

58. The Convention between Romania and Spain (1967) states simply, in article VII, paragraph 4, that, "in the performance of their functions, the couriers of the consular and trade mission shall enjoy inviolability, shall not be liable to any form of arrest or detention and shall be protected by the receiving State".⁵⁶ The Consular Convention between Romania and the United States of America (1972) also states, in article 21, paragraph 5, that: "In the exercise of his functions, the consular courier is protected by the receiving State. He enjoys personal inviolability."⁵⁷ The Consular Convention between Poland and Cuba (1972) uses the term "deprivation of freedom" instead of "arrest". It provides in article 16, paragraph 5, that, "in the performance of his functions, the courier shall be protected by the receiving State, shall enjoy personal inviolability and shall not be subject to deprivation of freedom".

Bulgaria (1971), art. 14, para. 3; USSR and Italy (1967), art. 28, para. 3; United Kingdom and Czechoslovakia (1975), art. 16, para. 3; United Kingdom and Mongolia (1975), art. 16, para. 3; United States of America and China (1980), art. 12, para. 4.

⁵⁴ See also the consular conventions between Belgium and Czechoslovakia (1976), art. 18, paras. 5 and 6; and between France and Algeria (1974), art. 13, paras. 5 and 6.

⁵⁵ Para. 5 of the Rules, reproduced in *Yearbook ... 1982*, vol. II (Part One), p. 242, document A/CN.4/356 and Add.1-3.

⁵⁶ See also the consular conventions between France and Romania (1968), art. 25, para. 5; and between the USSR and India (1973), art. 14, para. 5.

⁵⁷ See also in this connection the Consular Convention between Hungary and the Democratic People's Republic of Korea (1970), art. 19, para. 3.

The Consular Convention between the USSR and Mexico (1978) employs the following formula in article 14, paragraph 5:

The receiving State shall grant consular couriers the same protection as that afforded to diplomatic couriers. They shall enjoy personal inviolability and shall not be subject to any form of detention or arrest.

59. National legislation, although not as abundant as treaty practice on this subject, is nevertheless very clear about recognition of the status of personal inviolability of the diplomatic courier. Some States simply apply the rule of inviolability on the basis of their treaty obligations under the multilateral or bilateral agreements to which they are parties, or recognize it as a part of general international law, while others have embodied this rule in their national legislation and regulations. The latter case may be illustrated by some typical examples of specific provisions contained in certain laws dealing with the régime of foreign diplomatic agents, including diplomatic couriers. Thus the Regulations concerning the diplomatic and consular missions of foreign States in the territory of the Soviet Union provide:

The diplomatic courier shall enjoy personal inviolability in the performance of his duties, he shall not be liable to arrest or detention.⁵⁸

Similarly, the Foreign Service Regulations of the United States of America provide in respect of immunities accorded to bearers of dispatches:

Consular couriers and bearers of dispatches employed by a diplomatic representative in the service of his Government are privileged persons, so far as is necessary for their particular service, whether in the State to which the representative is accredited or in the territory of a third State with which the Government is at peace.⁵⁹

60. The Rules issued by the Government of the Federal Republic of Germany add a further dimension to the question of personal inviolability of couriers to include the time when they are in transit. The relevant provision reads:

Couriers and bags also enjoy inviolability and protection in transit from the sending State.⁶⁰

61. According to a book by G. Perrenoud published in 1949, the Swiss Political Department had classified the personnel of diplomatic missions accredited to the Federal Government into four categories. Diplomatic couriers belong to the fourth category, which does not enjoy diplomatic privileges and immunities in their entirety. However, in 1931 the Political Department stated:

We have arrived at the conclusion that, although the courier does not form a part of the diplomatic personnel in the strict sense of the

⁵⁸ Art. 9 of the Regulations (see footnote 34 above).

⁵⁹ *Foreign Service Regulations of the United States of America* (Washington, D.C., U.S. Government Printing Office, January 1941), chap. III.1, footnote 5. See also G. H. Hackworth, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1942), vol. IV, p. 621.

⁶⁰ Para. 5 of the Rules concerning the Courier Service (text reproduced in *Yearbook ... 1982*, vol. II (Part One), p. 237, document A/CN.4/356 and Add.1-3).

term, he must, in the interests above all of the free performance of his mission, be considered inviolable in the exercise of his functions.⁶¹

62. Case law on the question of the inviolability of the diplomatic courier provides some precedents of settlement through ordinary diplomatic channels. Most of those that are known are previous to the Vienna Conventions of 1961 and 1963. They refer to acts of detention or unjustified impediments and delays to which diplomatic couriers have been subjected.⁶²

63. It may follow from the recognition of the principle of the inviolability of the diplomatic courier that the receiving and transit States are under the obligation to prosecute and punish persons who violate the diplomatic courier's person. Some precedents attest to the right of the sending State to request the prosecution and punishment of persons under the jurisdiction of the receiving or the transit State who have committed abuses against the personal inviolability of the diplomatic courier. This was the case, for example, in the incident occurring in 1943 when diplomatic couriers of the United States of America were detained by the Spanish authorities in the Spanish zone of Morocco. In a note of 4 June 1943 to the Spanish Minister for Foreign Affairs, the Ambassador of the United States requested that "measures ... be taken to punish the officials or employees responsible for the incident referred to".⁶³

64. Another case occurred 50 years earlier between France and Spain, in 1893. The Spanish customs officers at Irun seized the bag and correspondence of the

courier of the French Embassy at Madrid and detained him for 24 hours. Upon the strong and immediate protest of the French Government, the Spanish authorities released the courier and transferred the customs officer involved in the incident and responsible for the detention of the French courier.⁶⁴

65. The responsibility of the receiving or the transit State may be invoked in other instances of violation of rules international customary or conventional law with respect to their obligations to protect the diplomatic courier and the diplomatic bag. The wrongful act of the State concerned which entails its international responsibility may be attributed to that State for the conduct of any State organ of any character or of persons acting on behalf of the State. The receiving or the transit State may be liable for taking measures of a preventive and enforcement nature, including prosecution and punishment, against persons under its jurisdiction who have committed acts constituting infringement of the personal inviolability of the diplomatic courier. For this purpose, it would be under the obligation to enact relevant domestic laws and regulations to that effect.

66. This obligation of the receiving or the transit State is a new element of protective measures which was not embodied in the four codification conventions adopted under the auspices of the United Nations. The appropriate measures of a preventive or punitive nature may be legislative or administrative, such as laws, regulations, instructions, orders, procedures or other action taken by the competent authorities of the receiving or the transit State for the protection of the diplomatic courier, and more particularly for the protection of his personal inviolability. It is obvious that an obligation of this kind is first of all in conformity with the general principles underlying the responsibility of the State for securing proper conditions for the normal functioning of diplomatic communications and for the wrongdoing of its organs and of persons acting on its behalf. This obligation has also to be regarded as a legal requirement and as a means of ensuring the efficient protection of the inviolability of the diplomatic courier. Thus the additional obligation for the receiving or the transit State to take all appropriate measures, including enactment and implementation of national laws and regulations for the prosecution and punishment of persons under its jurisdiction responsible for violation of an international obligation, constitutes a legal consequence of the international responsibility of the State concerned; at the same time, it has practical significance for the efficient protection of the personal inviolability of the diplomatic courier.

67. The same obligation of the receiving or transit State has to be considered also in connection with the status of the diplomatic bag, namely, with regard to abuses against the inviolability of the diplomatic bag. On the question of abuses of the status of the bag, however, there may also be liability on the part of the

⁶¹ G. Perrenoud, *Régime des privilèges et immunités des missions diplomatiques étrangères et des organisations internationales* (Lausanne, Librairie de l'Université, F. Rouge, 1949), p. 68 (quotation from the administrative report of the Federal Council for 1931).

⁶² See e.g. the protest lodged in 1943 by the United States of America with the Spanish Foreign Minister against the detention of United States diplomatic couriers by Spanish customs officials in the Spanish zone of Morocco. This incident led to an exchange of notes between the Ambassador of the United States and the Spanish Foreign Minister in June 1943. In his note of protest, the Ambassador requested "formal and firm assurances that in the future such couriers will be unmolested and will not be delayed in any way". He also requested that "measures ... be taken to punish the officials or employees responsible for the incident referred to". In his reply, the Spanish Minister maintained that the couriers had "endeavoured to cover as official materials two large brief-cases which had not been closed and sealed by the legation, nor included in the certificate covering the five pouches mentioned". At the end, the Minister assured the United States that official sacks duly sealed and included in the certification customarily delivered by the representation of the United States in Tangier had at all times been respected and would continue to be respected. See telegram No. 1251 of 2 June 1943 from United States Secretary of State, Hull, to the United States Ambassador to Madrid, Hayes (MS. Department of State, file 121.67/3579); dispatch No. 1026 of 24 June 1943 from the United States Ambassador to Madrid, Hayes, to the United States Secretary of State, Hull (*ibid.*, 3686); note No. 1014 of 4 June 1943 from the United States Ambassador to Madrid, Hayes, to the Spanish Foreign Minister, Jordana (*ibid.*, enclosure No. 1); note of 16 June 1943 from the Spanish Foreign Minister, Jordana, to the United States Ambassador to Madrid, Hayes (*ibid.*, enclosure No. 2) (texts published in *Foreign Relations of the United States, 1943*, vol. IV (Washington, D.C., U.S. Government Printing Office, 1964), pp. 726-729; cited in Whiteman, *op. cit.* (see footnote 36 above), pp. 214-216).

⁶³ See preceding footnote.

⁶⁴ See *Revue générale de droit international public* (Paris), vol. 1 (1894), p. 50.

sending State in case of violation of the rules concerning the content of the diplomatic bag by its officials. These specific problems relating to the status of the diplomatic bag and its protection will accordingly be dealt with further in this report.

68. In the light of the above considerations with respect to the personal inviolability of the diplomatic courier, the Special Rapporteur submits the following draft article for examination and approval:

Article 20. Personal inviolability

1. The diplomatic courier shall enjoy personal inviolability when performing his official functions and shall not be liable to any form of arrest or detention.

2. The receiving State or, as applicable, the transit State shall treat the diplomatic courier with due respect and shall take all appropriate measures to prevent any infringement of his person, freedom or dignity and shall prosecute and punish persons responsible for such infringements.

(b) Inviolability of temporary accommodation and personal means of transport

69. The personal inviolability of the diplomatic courier in the performance of his official functions and the inviolability of the diplomatic bag carried by him require certain safety conditions during his journey. It has been pointed out above (para. 42) that it is of paramount importance for the inviolability of the courier and the bag that the courier should be housed in a safe and secure place, and protected from any intrusion or access by unauthorized persons who might endanger the safety and integrity of the diplomatic bag.

70. This requirement of inviolability of the temporary accommodation of the diplomatic courier should be considered as a rule deriving from the official function of the diplomatic courier. It should be regarded as one of the important components of the privileges and immunities accorded to the courier only by reason of his duty to take care of the diplomatic bag and ensure its safe and speedy delivery to its destination. This functional approach in respect of the inviolability of the temporary accommodation is determined by the general concept of the functional nature of all the facilities, privileges and immunities granted to the diplomatic courier for the proper performance of his official functions.

71. There is no specific rule regarding the inviolability of the temporary accommodation of the diplomatic courier in any of the four codification conventions or in other international agreements in the field of diplomatic or consular law. However, it may be quite relevant to infer such a rule from similar provisions in those conventions relating to the status of the private residence of a diplomatic agent, and the private accommodation of members of special missions, permanent missions to international organizations or members of delegations to international conferences. Article 30 of the 1961 Vienna

Convention, which is the model provision on this matter, followed by the other multilateral conventions, provides:

1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.

2. His papers, correspondence and, except as provided in paragraph 3 of article 31,⁶⁴ his property, shall likewise enjoy inviolability.

Modelled upon the above provision are article 30 of the Convention on Special Missions relating to the inviolability of the private accommodation of representatives of the sending State in the special mission and of members of its diplomatic staff, as well as articles 29 and 59 of the 1975 Vienna Convention regarding, respectively, the inviolability of "the private residence of the head of mission and of the members of the diplomatic staff of the mission" and of "the private accommodation of the head of delegation and of other delegates and members of the diplomatic staff of the delegation".

72. Having in mind the fact that the diplomatic courier is performing an official duty of practical significance for the normal functioning of the diplomatic or other missions of the sending State in the territory of the receiving or the transit State, his accommodation, although temporary, should enjoy similar protection. This would be the case whether the courier stops over at an intermediate station or arrives at the final point of his official journey. Normally, couriers are housed on the premises of the mission, in private apartments owned or used by the mission or in the private accommodation of a member of the mission. In such instances, the inviolability of the temporary accommodation of the diplomatic courier will be protected under the relevant provisions of the above-mentioned conventions or customary international law. When the temporary accommodation of the diplomatic courier happens to be in hotels, motels, guest houses, private apartments or similar common facilities for lodging visitors on temporary stay, then the special rules or the inviolability of the temporary accommodation of the diplomatic courier should apply.

73. The rule of inviolability of the temporary accommodation of the courier should comprise several essential elements. *First*, it should contain a provision stipulating that access by officials of the receiving or the transit State to the room or apartment used by the courier may be allowed only with his consent. *Secondly*, the receiving or the transit State is under the obligation to take the appropriate measures, legislative, administrative or other, to protect the diplomatic courier

⁶⁴ Paragraph 3 of article 31 deals with the applicability of measures of execution in cases of exceptions to immunity from civil and administrative jurisdiction in the case of (a) a real action relating to private immovable property situated in the territory of the receiving State which is not held for the official purposes of the mission; (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State; (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

and the bag entrusted to him. It should secure the inviolability of his temporary accommodation from any intrusion by unauthorized persons. Such protective measures regarding the privacy, personal security and safety of the property of guests in hotels and other housing facilities open to visitors are common to places of this kind. They are considered to be the main features of law and order in establishments accessible to the general public. However, the official function of the courier, and more particularly the protection of the diplomatic bag carried by him, would justify the taking of special measures of protection. *Thirdly*, the inviolability of the temporary accommodation of the diplomatic courier entails immunity from inspection, search and other measures of execution.

74. However, this rule could be applied with some exceptions and limitations under certain conditions. Accordingly, inspection or search of the temporary accommodation could be undertaken when there are serious grounds for believing that there are, in the room or apartment used by the courier, apart from the sealed diplomatic bag, articles whose import or export is prohibited by law or controlled by the quarantine regulations of the receiving or the transit State. In such cases, the inspection may be conducted only in the presence of the diplomatic courier and shall not affect in any way the inviolability of the diplomatic bag. A provision of this kind is aimed, on the one hand, at observing the laws and regulations of the receiving or the transit State and respecting that State's legitimate interests and, on the other hand, at protecting the inviolability of the diplomatic bag. It may be added that the application of the exceptions to the inviolability of the temporary accommodation of the diplomatic courier should not cause any unreasonable impediments or delays in the dispatch of the diplomatic bag.

75. The rules suggested in respect of the protection of the inviolability of the temporary accommodation could be applied accordingly to the inviolability of the personal means of transport used by the diplomatic courier in the discharge of his official function. Such protection accorded to the diplomatic courier, while functional in nature, may be deduced from the principle of freedom of movement and travel embodied in the relevant provisions of article 26 of the 1961 Vienna Convention, article 34 of the 1963 Vienna Convention, article 27 of the Convention on Special Missions and articles 26 and 56 of the 1975 Vienna Convention.

76. The rule of protection of the inviolability of the individual means of transport used by the diplomatic courier may be further inferred from the relevant provisions of the codification conventions regarding protection of the means of transport of the diplomatic mission, consular post, and other missions or delegations to international organizations.⁶⁶

⁶⁶ See the 1961 Vienna Convention, art. 22, para. 3; the 1963 Vienna Convention, art. 31, para. 4; the Convention on Special Missions, art. 25, para. 3; the 1975 Vienna Convention, art. 23, para. 3.

77. The field of application of the rule on the protection of personal means of transport is relatively limited, when applied to diplomatic couriers. Usually, couriers employ public means of transportation in their long-distance journeys. When they make use of personal motor vehicles between cities within the same country, e.g. between Geneva and Berne, New York City and Washington, Rome and Milan, Paris and Marseilles, where the sending State may have diplomatic missions and consular posts or other missions, couriers normally utilize the transport means of those missions. In such cases, the protection of that vehicle is covered by the relevant provisions of the multilateral conventions or other agreements. Thus only in instances when the courier employs his own individual means of transport in the exercise of his functions would the question arise of the application of a special rule with regard to the inviolability of the individual means of transport. The basic requirement for the application of the rule of inviolability would be the use of individual means of transport during the journey of the courier carrying diplomatic correspondence. In such a case, the individual means of transport used by the diplomatic courier in the performance of his official duty shall not be liable to inspection, search, requisition, seizure or other measures of execution. The grounds for such immunity would be the use of the means of transport for official communications of the sending State with its missions in the territory of the receiving or the transit State. Moreover, any inspection, search, requisition, seizure or other measures of execution may lead either to retardation of delivery of the diplomatic bag or to serious danger to its safety. Therefore the general rule applies to the inviolability of the individual means of transport used by the diplomatic courier only in the performance of his official functions, and not when on private trips.

78. However, as in the rule on the inviolability of the temporary accommodation used by the courier, there are some exceptions that should be applied under certain conditions. The conditions set out for the inspection conducted by the competent authorities of the receiving or the transit State would be the same as those required for the inspection of the temporary accommodation, namely, (a) serious grounds for presuming that the individual vehicle used by the courier carries not only the diplomatic bag and the personal baggage of the courier, but also articles whose import and export is prohibited or controlled by the laws and quarantine regulations of the receiving or the transit State; (b) the inspection or other measures of execution should be conducted in the presence of the diplomatic courier and, when possible, also in the presence of a representative of the diplomatic mission or consular post of the sending State in the territory of the receiving or the transit State; (c) such inspection and measures of execution should not affect the inviolability of the diplomatic courier and the diplomatic bag entrusted to him, nor should they cause unreasonable delays and impediments to the safe and timely delivery of the diplomatic bag.

79. Provisions on the inviolability of the temporary accommodation and of the individual means of transport used by the diplomatic courier would have practical significance as privileges and immunities of a functional character. They may contribute to the further elaboration of the legal framework of rules governing the status of the diplomatic courier.

80. Taking into consideration the comments and suggestions on the inviolability of the temporary accommodation and individual means of transport used by the diplomatic courier in the performance of his official functions, the Special Rapporteur submits the following draft articles for examination and provisional approval:

Article 21. Inviolability of temporary accommodation

1. The temporary accommodation used by the diplomatic courier shall be inviolable. Officials of the receiving State or the transit State shall not enter the accommodation except with the consent of the diplomatic courier.

2. The receiving State or the transit State has the duty to take appropriate measures to protect from intrusion the temporary accommodation used by the diplomatic courier.

3. The temporary accommodation of the diplomatic courier shall be immune from inspection or search, unless there are serious grounds for believing that there are in it articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or the transit State. Such inspection or search shall be conducted only in the presence of the diplomatic courier, provided that the inspection or search be taken without infringing the inviolability of the person of the diplomatic courier or the inviolability of the diplomatic bag carried by him and will not cause unreasonable delays and impediments to the delivery of the diplomatic bag.

Article 22. Inviolability of the means of transport

1. The individual means of transport used by the diplomatic courier in the performance of his official functions shall be immune from inspection, search, requisition, seizure and measures of execution.

2. When there are serious grounds for believing that the individual means of transport referred to in paragraph 1 carries articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or the transit State, the competent authorities of those States may undertake inspection or search of that individual means of transport, provided that such inspection or search shall be conducted in the presence of the diplomatic courier and without infringing the inviolability of the diplomatic bag carried by him and will not cause unreasonable delays and impediments to the delivery of the diplomatic bag.

2. IMMUNITY FROM JURISDICTION

81. It may be pointed out, at the outset, that the Commission was briefly seized of the general question of the jurisdictional immunities of States under diplomatic law, and in particular under the four codification conventions, in connection with the submission of the second report of Mr. Sucharitkul, Special Rapporteur on the topic "Jurisdictional immunities of States and their property"⁶⁷ In that report, the Special Rapporteur submitted a draft article 4 (Jurisdictional immunities not within the scope of the present articles),⁶⁸ in connection with which he pointed out that, in State practice, jurisdictional immunities recognized and accorded to diplomatic missions, consular posts and other official missions and delegations, as well as to visiting forces were "regulated by international or bilateral conventions or prevailing rules of customary international law", and that for that reason jurisdictional immunities under diplomatic law "should be excluded from the scope of the present articles" [the articles on the jurisdictional immunities of States and their property].⁶⁹ He emphasized, however, that the immunities accorded to diplomatic and other missions, their members, various categories of staff and premises, including archives, means of transport and communication, which were inviolable, formed the subject of separate conventions treated earlier,⁷⁰ i.e. the four codification conventions.

82. The report of the Commission on the work of its thirty-second session, in 1980, noted:

On the suggestion of the Special Rapporteur, the Commission agreed to defer consideration, *inter alia*, of those articles [articles 4 and 5] until it was in a position to examine the remainder of the draft articles to be proposed on the topic.⁷¹

83. It might be useful to refer to the work of the Commission on the much wider topic of the jurisdictional immunities of States, for two reasons: first, in order to make use as much as possible of any comments or conclusions that might have relevance to the jurisdictional immunities accorded to the diplomatic courier, including the question of waiver of immunities; secondly, when appropriate, to harmonize the views on the same issues concerning two distinct but somewhat connected topics included in the current programme of the Commission.

84. The examination of the question of the jurisdictional immunities accorded to the diplomatic courier and the elaboration of relevant draft articles on this matter seems to be of some practical significance, for there are no such provisions in existing multilateral or bilateral treaties. On the other hand, the practice of States proves that, although not frequent, there have been instances when it has been necessary to define the

⁶⁷ *Yearbook ... 1980*, vol. II (Part One), p. 199, document A/CN.4/331 and Add.1.

⁶⁸ *Ibid.*, p. 213, para. 54.

⁶⁹ *Ibid.*, p. 212, para. 49.

⁷⁰ *Ibid.*, para. 51.

⁷¹ *Yearbook ... 1980*, vol. II (Part Two), p. 140, para. 117.

legal scope and implications of the immunity from jurisdiction of the receiving State in respect of diplomatic couriers.

85. In this field again, it might be advisable to explore the legal background of the provisions of the four codification conventions relating to immunity from jurisdiction,⁷² in order to ascertain to what extent these provisions could be applied to the status of the diplomatic courier. Article 31 of the 1961 Vienna Convention⁷³ has served as a model for the articles dealing with jurisdictional immunities embodied in the other three conventions.⁷⁴ Of course there are certain adjustments deriving from the specific status of consular officers and consular employees, members of special missions, members of the diplomatic staff of permanent missions to international organizations and members of the diplomatic staff of delegations to international organizations, who enjoy immunity from the criminal, civil and administrative jurisdiction of the receiving or the host State.

86. The basic rule set out in article 31 of the 1961 Vienna Convention stipulates that diplomatic agents shall enjoy immunities from the criminal, administrative and civil jurisdiction of the receiving State. In the case of civil and administrative jurisdiction, immunity is restricted by three exceptions: (a) in the case of a real action relating to private immovable property situated in the territory of the receiving State which is not held on behalf of the sending State for the official purposes of the mission; (b) in the case of an action relating to succession in which the diplomatic agent is involved as a private person; (c) in the case an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions. This basic rule underlies the relevant provisions of the other multilateral conventions

⁷² See the 1961 Vienna Convention, art. 31; the 1963 Vienna Convention, art. 43; the Convention on Special Missions, art. 31, and the 1975 Vienna Convention, arts. 30 and 60.

⁷³ Article 31 of the 1961 Vienna Convention reads as follows:

“Article 31

“1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

“(a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

“(b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

“(c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

“2. A diplomatic agent is not obliged to give evidence as a witness.

“3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (a), (b) and (c) of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

“4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.”

⁷⁴ See footnote 8 above.

in respect of the diplomatic staff of special missions and permanent missions to international organizations.⁷⁵

87. Members of the administrative and technical staff of diplomatic missions, special missions and permanent missions to international organizations, if they are not nationals or permanent residents of the receiving State, shall enjoy the same immunity from the jurisdiction of that State, except that immunity from civil and administrative jurisdiction shall not extend to acts performed outside the course of their duties. Thus, according to this rule, as expressed in the relevant provisions of the codification conventions,⁷⁶ the immunity from the criminal jurisdiction of the receiving State accorded to the administrative and technical staff is the same as that accorded to the diplomatic agents and the diplomatic staff of the missions concerned. On the other hand, the immunity from civil and administrative jurisdiction of the administrative and technical staff of the missions is confined to their official functions.

88. In this case, the functional conception of the nature and scope of the jurisdictional immunities accorded to the administrative and technical staff is applied also to all kinds of jurisdiction—criminal, administrative and civil—with respect to consular officers and consular employees. In conformity with article 43, paragraph 1, of the 1963 Vienna Convention:

Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.

Hence no distinction is made between the nature and scope of the jurisdictional immunities granted to the consular officer as a person exercising consular functions and those of the consular employee who is engaged in the administrative or technical service of the consular post. Consequently, the immunity of the consular officer from the criminal jurisdiction of the receiving State should be related to his official functions.

89. There is another similar solution to the question of jurisdictional immunities of members of the administrative and technical staff of delegations to international conferences. According to article 66, paragraph 2, of the 1975 Vienna Convention:

Members of the administrative and technical staff of the delegation shall, if they are not nationals of or permanently resident in the host State, enjoy the privileges and immunities specified in articles 58, 59, 60, 62, 63 and 64 ...

The articles referred to in the above provision deal with the question of the immunity from the criminal, administrative and civil jurisdiction of the host State, granted to the head of delegation and other delegates and members of the diplomatic staff of the delegation in respect of all acts performed by them in the exercise of their official functions.

⁷⁵ See the Convention on Special Missions, art. 31, and the 1975 Vienna Convention, art. 30.

⁷⁶ See the 1961 Vienna Convention, art. 37, para. 2; the Convention on Special Missions, art. 36; and the 1975 Vienna Convention, art. 36, para. 2.

90. Having indicated briefly the scope of the jurisdictional immunities accorded to members of diplomatic missions, consular posts and other missions and delegations, it is suggested that it should be ascertained to what extent, *ratione personae* and *ratione materiae*, similar immunities could be granted to the diplomatic courier. This question has to be examined with caution and prudence in order to avoid unwarranted analogies or complete assimilation of the status of the diplomatic courier to that of diplomatic staff. The basis for the essential distinction in this case should be the nature of the courier's status and his official functions. First, the diplomatic courier is a person whose task is to take care of the diplomatic bag, and its transport and delivery to the diplomatic or other missions of the sending State and back from these missions to the capital of the sending State. Secondly, owing to the short sojourn of the diplomatic courier in the territory of the receiving or the transit State, the duration of his functions in a given State is limited, and thus the privileges and immunities accorded to him, including jurisdictional immunities, are temporary. In fact, the contractual or other relations that the diplomatic courier could enter into in the receiving or the transit State concerning property rights, commercial or financial undertakings or professional activities are very limited in scope and legal implications. Moreover, considering the strictly limited character of his official function, the diplomatic courier, like the members of the diplomatic missions, consular posts and other missions of the sending State, is not allowed to undertake professional or other lucrative activities which by nature are outside and even incompatible with his official functions. There are specific provisions in the four codification conventions providing that members of diplomatic and other missions shall not practise for personal profit any professional or commercial activity in the receiving or host State.⁷⁷ These essential features of the functions of the diplomatic courier—limited in scope and duration—have definite practical significance regarding the extent of the privileges and immunities accorded to him, including jurisdictional immunities.

91. Taking into account these specific features of the functions of the diplomatic courier, namely, their limited scope and especially their relatively short duration, the most comparable of the jurisdictional immunities would be those accorded to the staff of special missions. Perhaps an even closer example might be the jurisdictional immunities accorded to members of delegations under articles 60 and 66 of the 1975 Vienna Convention. These two articles are modelled on articles 31 and 37 of the 1961 Vienna Convention, with the appropriate adjustments required by the particular characteristics of the status of a delegation to an international conference.

92. Bearing in mind the reservations made above (para. 90) concerning the similarities between the jurisdictional immunities granted to members of the

staff of diplomatic missions and those granted to the diplomatic courier, it seems that article 60 of the 1975 Vienna Convention contains most of the essential elements of the immunity from jurisdiction applicable to the status of the diplomatic courier. Article 60 provides:

Article 60. Immunity from jurisdiction

1. The head of delegation and other delegates and members of the diplomatic staff of the delegation shall enjoy immunity from the criminal jurisdiction of the host State and immunity from its civil and administrative jurisdiction in respect of all acts performed in the exercise of their official functions.

2. No measures of execution may be taken in respect of such persons unless they can be taken without infringing their rights under articles 58 and 59.

3. Such persons are not obliged to give evidence as witnesses.

4. Nothing in this article shall exempt such persons from the civil and administrative jurisdiction of the host State in relation to an action for damages arising from an accident caused by a vehicle, vessel or aircraft used or owned by the persons in question, where those damages are not recoverable from insurance.

5. Any immunity of such persons from the jurisdiction of the host State does not exempt them from the jurisdiction of the sending State.

93. As has already been pointed out (para. 89), article 66, paragraph 2, of that Convention grants to members of the administrative and technical staff of a delegation the same immunities from criminal, administrative and civil jurisdiction as those enjoyed by the head of delegation, other delegates and members of the diplomatic staff of the delegation. It would then be logical to maintain the view that, if jurisdictional immunities are accorded to members of the administrative and technical staff of a delegation, they should also be granted to the diplomatic courier by reason of his official functions. The rationale is that a diplomatic courier, entrusted with the custody, transportation and delivery of diplomatic mail, has access to State secrets and performs important confidential duties that are directly related to the normal functioning of diplomatic communications. Thus his functional capacity may be of even higher significance than that of many other members of the diplomatic mission. It is therefore obvious that the diplomatic courier should enjoy immunities from local jurisdiction of the same nature and scope as are accorded to the members of diplomatic missions, special missions, permanent missions or delegations to international conferences.

94. Of course, such a general conclusion ought to be sustained on the basis of an appropriate study of international law and State practice. It is suggested that the Commission examine first of all the question of immunity from local criminal jurisdiction, and then explore the nature and scope of immunity from local civil and administrative jurisdiction. The study would cover the legal implications of the question of immunity from execution and of civil liability for damages arising from an accident caused by a means of transport used by a person enjoying jurisdictional immunities in respect of acts performed in the exercise of his official functions in the territory of the receiving or the transit State. Some

⁷⁷ See the 1961 Vienna Convention, art. 42; the Convention on Special Missions, art. 48; and the 1975 Vienna Convention, art. 39.

other aspects of jurisdictional immunities reflected in the provisions of article 60 of the 1975 Vienna Convention, quoted above, are also relevant to the question of the jurisdictional immunities that may be granted to the diplomatic courier.

95. The granting of immunity from the criminal jurisdiction of the receiving or host State to members of the diplomatic mission has been a long-standing principle in international customary and conventional law, previous to the 1961 Vienna Convention. Article 31 of that Convention codified this basic tenet as a rule forming part of modern international law and reflected in multilateral and bilateral treaties. The underlying concept of this rule is complete immunity from the criminal jurisdiction of the receiving or the transit State. There are no specific exceptions from local criminal jurisdiction. However, it has always been assumed that, by an equally important legal principle, persons enjoying such immunity are bound to respect the laws and regulations of the receiving or the transit State. Article 37 of the 1961 Vienna Convention extended the rule of complete immunity from local criminal jurisdiction to members of the family of the diplomatic agent and members of the administrative and technical staff together with their families, if they are not nationals or permanently resident in the receiving State. This rule has been generally accepted and was not challenged throughout the preparatory work on the codification conventions in the field of diplomatic law. It was incorporated in almost the same language in the Convention on Special Missions and in the 1975 Vienna Convention. The 1963 Vienna Convention, in article 43, stipulates that:

Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.

Thus the jurisdictional immunities accorded to members of the consular post, including immunity from local criminal jurisdiction, are subordinated to the exercise of their consular functions. All the other codification conventions adhere firmly to the concept of full immunity from criminal jurisdiction.

96. The rule of absolute immunity from the criminal jurisdiction of the receiving State is based on the general recognition of the fundamental principle of the sovereignty and sovereign equality of States. The exercise of freedom of communication for all official purposes by the State is one of the attributes of its sovereignty. Therefore the granting of immunity from local criminal jurisdiction to the diplomatic agents and other members of the diplomatic mission is an essential element of the jurisdictional immunities of the sending State from the jurisdiction of the receiving State.

97. The diplomatic courier, who is so instrumental in the exercise by the State of its right to official communication, should be placed among the officials of the sending State who are entitled to full immunity from criminal jurisdiction by reason of their confidential duties in the service of that State. Such immunity granted to the diplomatic courier would be in conform-

ity with the provisions of articles 31 and 37 of the 1961 Vienna Convention and the similar provisions embodied in the other conventions codifying diplomatic law. The complete immunity of the diplomatic courier from the local criminal jurisdiction of the receiving or the transit State should also be regarded as a right closely connected with the rule of his personal inviolability. It is a basic requirement for the protection of the person of the courier so that he may appropriately perform his official functions. The immunity from local criminal jurisdiction of the diplomatic courier should naturally be viewed in conjunction with his duty to respect international law and the laws and regulations of the receiving and the transit States, as provided in draft article 5 present draft articles.

98. The question of the immunities from the civil and administrative jurisdiction of the receiving State granted to members of the diplomatic or other missions of the sending State is much more complex, owing primarily to the legal nature and scope of these immunities. While as a rule immunity from local criminal jurisdiction is absolute, immunities from local civil and administrative jurisdiction are restricted through a system of specific exceptions or by a general formula expressing the principle of functional immunity. The method of restrictive application of the general principle of jurisdictional immunities, based on the dependence of such immunity on the character of the activity of the person enjoying it, or on a direct connection therewith, inevitably raises several difficult questions. First, it would be necessary to draw a distinction between acts performed in the exercise of official functions and private acts performed outside the course of such functions. Determination of the nature and scope of exceptions to immunities from local civil and administrative jurisdiction, in order to identify the official functions that are excluded from such jurisdiction, may very often produce difficult problems of interpretation. Secondly, in such instances the need would inevitably arise of deciding who would be entitled to determine the nature of the act in question and the applicability of the immunity from local jurisdiction. There might be other related matters as well, such as measures of execution for the enforcement of a judicial decision, on civil liability for damages resulting from traffic accidents. All these problems are very relevant to the immunity from the civil and administrative jurisdiction of the receiving or the transit State granted to the diplomatic courier in respect of acts performed in the exercise of his official functions. A brief analytical survey of the legislative background of the relevant provisions of the conventions codifying diplomatic law, reflecting the functional method applied to immunities from civil and administrative jurisdiction, may be useful for the purposes of the present draft articles.

99. It should be pointed out, at the outset, that the four conventions codifying diplomatic law reflect the functional approach in respect of immunities from the civil and administrative jurisdiction of the receiving State accorded to members of diplomatic missions, con-

sular posts and other missions or delegations. Some of the conventions contain provisions identifying the specific exceptions to immunity from local civil and administrative jurisdiction;⁷⁸ others are not explicit on the kind of exceptions, but use a more general formula stipulating that the persons concerned shall enjoy immunity from the civil and administrative jurisdiction of the receiving or host State "in respect of all acts performed in the exercise of their official functions".⁷⁹ The functional approach is applied with regard to members of the administrative and technical staff of diplomatic and special missions, as well as to consular employees of the consular post. In this case, the exceptions to immunity from local civil and administrative jurisdiction are not specific. They are expressed in a general formula, stipulating that immunity from the civil and administrative jurisdiction of the receiving State accorded to these persons "shall not extend to acts performed outside the course of their duties".⁸⁰ It may be added that this expression was introduced by the delegation of the United Kingdom at the United Nations Conference on Diplomatic Intercourse and Immunities in 1961, as a compromise according to which "administrative and technical staff should have full immunity from criminal jurisdiction, but their immunity from civil jurisdiction should not extend to acts performed outside the course of their duties".⁸¹ That provision is incorporated in article 37, paragraph 2, of the 1961 Vienna Convention, and has ever since been followed by the corresponding articles of the other conventions in the field of diplomatic law.

100. For the purpose of the present study, it might be of some significance to present an analytical survey of the legislative background of article 60 of the 1975 Vienna Convention. This article, in its content and format, might well serve as a model for the draft article on immunity from the civil and administrative jurisdiction of the receiving or the transit State accorded to the diplomatic courier in respect of acts performed in the exercise of his official functions.

⁷⁸ See, for example, the 1961 Vienna Convention, art. 31, para. 1 (a), (b) and (c); the Convention on Special Missions, art. 31, para. 2 (a), (b), (c) and (d); the 1975 Vienna Convention, art. 30, para. 1 (a), (b) and (c).

⁷⁹ The 1963 Vienna Convention, art. 43, para. 1, uses the expression: "in respect of acts performed in the exercise of consular functions", and the 1975 Vienna Convention, art. 60, para. 1, the expression: "in respect of all acts performed in the exercise of their official functions".

⁸⁰ With regard to immunities granted to members of the service staff of the delegation "in respect of acts performed in the course of their duties", see the 1961 Vienna Convention, art. 37, para. 3, and the 1975 Vienna Convention, art. 66, para. 3.

⁸¹ E. Denza, *Diplomatic Law. Commentary on the Vienna Convention on Diplomatic Relations* (Dobbs Ferry, N.Y., Oceana Publications, 1976), p. 229. For the discussion at the Conference on the United Kingdom amendment (A/CONF.20/L.20) and on the joint amendment submitted by the United Kingdom and nine other countries (A/CONF.20/L.21 and Add.2), see *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. I, pp. 36-37 and 39-41, 10th plenary meeting, paras. 1-6 and 30-56; and pp. 47-49, 12th plenary meeting, paras. 1-24. For the text of the above-mentioned amendments, *ibid.*, vol. II, pp. 77-78.

101. The question of formulating exceptions to immunity from the civil and administrative jurisdiction of the host State accorded to representatives at international conferences was the subject of lengthy discussions in the Commission during its work at its twenty-second and twenty-third sessions, in 1970 and 1971, on the preparation of draft articles on the privileges and immunities of members of delegations to international organizations. At the twenty-second session of the Commission, the Drafting Committee proposed two alternative texts, A and B, for draft article 73 on immunity from jurisdiction.⁸²

102. Alternative A was modelled on article 31 of the 1961 Vienna Convention and followed almost *verbatim* the text of article 31 of the Convention on Special Missions, adapted to a delegation to an international conference. It contained four exceptions to immunity from the civil and administrative jurisdiction of the receiving State accorded to representatives in a delegation to an organ or to a conference and to members of the diplomatic staff of the sending State in the case of:

(a) a real action relating to private immovable property situated in the territory of the host State, unless the person concerned holds it on behalf of the sending State for the purposes of the delegation;

(b) an action relating to succession in which the person concerned is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) an action relating to any professional or commercial activity exercised by the person concerned in the host State outside his official functions;

(d) an action for damages arising out of an accident caused by a vehicle used outside the official functions of the person concerned.

In accordance with draft article 77, paragraph 2, on privileges and immunities of other persons, also proposed by the Drafting Committee, the same jurisdictional immunity was accorded to members of the administrative and technical staff of the delegation.⁸³

103. Alternative B did not contain specific exceptions to immunity from the civil and administrative jurisdiction of the host State. Instead, it stipulated in general terms that the representatives and members of the diplomatic staff of the delegation should "enjoy immunity from the civil and administrative jurisdiction of the host State in respect of all acts performed in the exercise of their official functions". The Chairman of the Drafting Committee, when presenting that text, pointed out that "alternative B was a somewhat more restrictive proposal".⁸⁴ That alternative was based on article IV, section 11, of the Convention on the Privileges and Immunities of the United Nations.⁸⁵ However, as was rightly explained in the commentary of the Commission,

⁸² *Yearbook ... 1970*, vol. I, pp. 198-199, 1077th meeting, para. 93. At the same session, the Commission adopted the two versions of draft article 73, renumbered article 100 (see *Yearbook ... 1970*, vol. II, pp. 294-295, document A/8010/Rev.1, chap. II, sect. B).

⁸³ *Yearbook ... 1970*, vol. I, p. 202, 1078th meeting, para. 2.

⁸⁴ *Ibid.*, p. 199, 1077th meeting, para. 95.

⁸⁵ United Nations, *Treaty Series*, vol. I, pp. 20-22.

... it follows that section in limiting immunity from the civil and administrative jurisdiction to acts performed in the exercise of official functions but goes beyond it in providing, as in alternative A, for full immunity from the criminal jurisdiction of the host State.⁸⁶

104. In his sixth report on relations between States and international organizations, submitted to the Commission at its twenty-third session, in 1971, the Special Rapporteur again proposed two alternative versions of article 100, A and B,⁸⁷ which were identical with draft article 100 provisionally adopted by the Commission.⁸⁸ As the members of the Commission were divided in their preference for one or other alternative, the two versions were submitted to Governments and international organizations for their consideration.

105. Those who opted for alternative A maintained the view that it provided greater protection to delegations and was more precise owing to the specific formulation of exceptions, which would make the operation of the provision more efficient. They also argued that alternative A was based directly on the corresponding article of the Convention on Special Missions and thus closely reflected current thinking on the subject and the ever-growing importance of multilateral diplomacy.⁸⁹ One member of the Commission expressed the view that, in civil matters, the exercise of jurisdiction by the local courts was a useful remedy only if the defendant was likely to stay a long time in the host State; the same remedy was of little use against a person who spent short periods in the country, so that the claimant would simply not have the time to take effective action in the civil courts.⁹⁰

106. Other members of the Commission expressed preference for alternative B, emphasizing its merits and suggesting that it was more likely to be accepted by Governments. They thought that the extension of privileges and immunities outside the permanent diplomatic mission was not advisable. Some members considered that alternative B was closer to existing practice and more consistent with the 1946 Convention on the Privileges and Immunities of the United Nations and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies.⁹¹ It was also argued that alternative B in fact set out all the safeguards that were necessary for the functioning of a delegation. A member of the Commission said, in support of alternative B:

Alternative B merely laid down a more general principle, but it was difficult to see what acts other than those listed in paragraph 2 of alternative A could be regarded as being outside official functions.

⁸⁶ *Yearbook ... 1970*, vol. II, p. 295, document A/8010/Rev.1, chap. II, sect. B, commentary to art. 100, para. (1).

⁸⁷ *Yearbook ... 1971*, vol. II (Part One), pp. 132-133, document A/CN.4/241 and Add.1-6.

⁸⁸ See footnote 82 above.

⁸⁹ For the discussion in the Commission on the subject, see *Yearbook ... 1970*, vol. I, pp. 198-201, 1077th meeting, paras. 93-130; and *Yearbook ... 1971*, vol. I, pp. 147-150, 1108th meeting, paras. 51-88, and pp. 151-152, 1109th meeting, paras. 1-17.

⁹⁰ *Yearbook ... 1971*, vol. I, p. 150, 1108th meeting, para. 84 (Mr. Ustor).

⁹¹ *Ibid.*, p. 148, para. 55 (Mr. Castrén), and p. 149, para. 70 (Sir Humphrey Waldock).

Alternative B was therefore more restrictive in its effect, because in case of doubt it provided for the application of a principle which was not contained in alternative A but which, basically, was subject to the same exceptions.⁹²

It was also contended that alternative B constituted a "compromise between those who favoured extensive immunities and those who wished to adhere to the pattern of the existing instruments".⁹³

107. The comments and observations of Governments and international organizations on the matter, as well as the debate in the Sixth Committee of the General Assembly, were focused on the same issues. The positions taken on the subject were not conclusive. In its commentary to article 61 (Immunity from jurisdiction)⁹⁴ of the draft articles submitted to the United Nations Conference on the Representation of States in their Relations with International Organizations, in 1975, the Commission pointed out that it had re-examined the text of article 100 of the provisional draft in the light of the observations made by certain Governments. While stating that some Member States had expressed a preference for alternative B, the Commission noted that the majority of its members nevertheless preferred alternative A. The Commission had therefore included in the final draft an article on immunity from jurisdiction accorded to delegations, which reproduced the substance of alternative A of the provisional draft. That decision was in accordance with the position taken by the Commission that the privileges and immunities of members of delegations "should be based upon a selective merger of the pertinent provisions of the Convention on Special Missions and the provisions regarding missions to international organizations provided for in part II" of the draft. It went on to explain that that position reflected the evolution of the institution of permanent missions to international organizations and the assimilation of their status and immunities to diplomatic status and immunities. The Commission further expressed the view that, "owing to the temporary character of their task, delegation to organs of international organizations and to conferences convened by international organizations [occupied], in the system of diplomatic law of international organizations, a position similar to that of special missions within the framework of bilateral diplomacy".⁹⁵

108. The debate on the legal nature and scope of the immunity from civil and administrative jurisdiction accorded to members of delegations was pursued at the United Nations Conference on the Representation of States. Three amendments were submitted to article 61

⁹² *Yearbook ... 1970*, vol. I, p. 199, 1077th meeting, para. 103 (Mr. Eustathiades).

⁹³ *Yearbook ... 1971*, vol. I, p. 148, 1108th meeting, para. 58 (Mr. Kearney).

⁹⁴ Article 61 reproduced the substance of alternative A of article 100 of the provisional draft.

⁹⁵ See *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II (United Nations publication, Sales No. E.75.V.12), p. 41, commentary to art. 61 para. (4).

(Immunity from jurisdiction).⁹⁶ Only the amendment proposed by the Netherlands, providing that draft article 61 be replaced by a text based on alternative B of article 100 of the provisional draft articles, was extensively discussed and ultimately put to a vote.⁹⁷ After lengthy and intensive debate, this proposal, as orally amended, was adopted by the Conference⁹⁸ and became the present article 60 of the 1975 Vienna Convention.

109. An analytical survey of the legislative history of the provisions on jurisdictional immunities, and particularly immunity from the civil and administrative jurisdiction of the receiving or host State, could provide the basis for the examination and elucidation of some important aspects of this problem with direct relevance to the status of the diplomatic courier. For the purpose of the present study it might be more appropriate, for the reasons already indicated (see paras. 90, 91, 93 and 97 above) to consider the main aspects of article 60 of the 1975 Vienna Convention.

110. The key to the interpretation of the expression "in respect of all acts performed in the exercise of their official functions" by persons enjoying immunity from local, civil and administrative jurisdiction, lies in the determination of the legal nature and scope of the official act, which should be distinguished from the private activity of the person concerned. The functional approach in this case presupposes that the immunity is accorded to that person not *in propria persona*, but as a recognized immunity of the sending State, and is therefore limited to official acts of that State performed on its behalf by its authorized official. The official character of such acts could be determined either by international treaty or customary international law, or by the internal laws and regulations of States. Usually, the main functions of the foreign mission and its members are defined in bilateral or multilateral treaties. The four codification conventions, as well as the 1946 Convention on the Privileges and Immunities of the United Nations⁹⁹ and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies,¹⁰⁰ contain special provisions to this effect.¹⁰¹

⁹⁶ Amendments submitted by: (a) Pakistan (A/CONF.67/C.1/L.69), for the deletion of subparagraph (d) of paragraph 1 of article 61, concerning an action for damages arising from a traffic accident; the amendment was not put to the vote; (b) France (A/CONF.67/C.1/L.86), for the addition of the following words at the end of the first sentence of paragraph 1, concerning immunity from criminal jurisdiction: "except in the case of *flagrante delicto*"; the amendment was withdrawn before consideration of the article; (c) Netherlands (A/CONF.67/C.1/L.95, as revised orally); the amendment was adopted (*ibid.*, p. 127, paras. 524-525).

⁹⁷ Paragraph 1, on jurisdictional immunities, of the Netherlands amendment was adopted by 29 votes to 23, with 15 abstentions (*ibid.*, p. 128, para. 527 (a)).

⁹⁸ *Ibid.*, p. 128, paras. 526-530; and *ibid.*, vol. 1 (United Nations publication, Sales No. E.75.V.11), pp. 259-262, *Committee of the Whole*, 32nd meeting and 33rd meeting, paras. 1-10.

⁹⁹ United Nations, *Treaty Series*, vol. 1, p. 15.

¹⁰⁰ *Ibid.*, vol. 33, p. 261.

¹⁰¹ See e.g. the 1961 Vienna Convention, arts. 1, 3, 27, 39, 41 and others; the 1963 Vienna Convention, arts. 1, 3, 5-8, 15, 17, 25, 35-38, 55 and others; the Convention on Special Missions, arts. 1, 3, 13, 20,

111. There is another method of determining the distinction between an official act *per se* and an act, although performed by an official of the sending State in the territory of the receiving State, that is not within the scope of his official functions. According to such a method, acts that are outside the official functions of the person concerned are specifically identified and listed as exceptions from the immunity accorded to this person. As has already been pointed out, some of the codification conventions apply this method (see paras. 85, 86, 87, 101 and 102 above).

112. The exceptions to immunity from local civil and administrative jurisdiction specified in article 31, paragraph 1 (a), (b) and (c) of the 1961 Vienna Convention, and in paragraph 2 (a), (b), (c) and (d) of the corresponding article 31 of the Convention of Special Missions, refer to personal rights in respect of private immovable property; private involvement in succession; action relating to any professional or commercial activity exercised outside official functions; and an action for damages arising out of an accident caused by a vehicle used outside the official functions of the person concerned.¹⁰² However, other acts could be contemplated as being performed by the person enjoying immunity from local civil jurisdiction, such as contracts concluded by him that were neither expressly nor implicitly concluded as an official act of the sending State. Such acts include renting a hotel room, renting a car, making use of services for cartage and storage or concluding a contract of lease or purchase entered into by a diplomatic courier during his journey. The obligation of payment of the hotel bill or of other purchases made and services rendered to the diplomatic courier, although arising during and even in connection with the exercise of his official functions, is not exempted from local laws and regulations. The main reason for such a conclusion is that in all these instances the purchases and services are of a general commercial nature rendered to the person concerned, which have to be paid by anyone who is their beneficiary. The same rule applies also the charges levied for specific services rendered, as provided for in article 34 (e) of the 1961 Vienna Convention and the corresponding articles in the other conventions codifying diplomatic law. Consequently, acts relating to such purchases or services cannot be considered *per se* as acts performed in the exercise of the official functions of the courier covered by immunity from local civil and administrative jurisdiction.

113. The next important question is who is entitled to draw the distinction between an official act, exempted from local civil and administrative jurisdiction, and a private act attributed to an official of the sending State *in propria persona*. On this point, uniform solutions have not been offered by State practice or legal doctrine. As a matter of fact, case law on this matter is

28, 47 and others; the 1975 Vienna Convention, arts. 1, 6, 7, 16, 27, 40, 57, 69, 77 and others; the Convention on the Privileges and Immunities of the United Nations, arts. III, IV and V.

¹⁰² The question of liability for damages caused by traffic accidents will be discussed later (see paras. 128-136 below).

relatively limited, although there have been cases in which the main issue was the determination of the official nature of the act subject to the dispute.¹⁰³

114. According to one doctrine, it is the receiving State that is entitled to determine the nature of the act. This view was advanced in the draft convention of the Harvard Law School on the legal position and functions of consuls, in which it was stated that "the receiving State decides, subject to diplomatic recourse by the sending State, whether the act was done in the performance of such functions".¹⁰⁴

115. According to another doctrine, both the sending and the receiving States are entitled to ascertain whether an act is performed in the exercise of official functions, on the basis of the merits and circumstances of each case. This view was reflected in the third report of the Special Rapporteur on consular intercourse and immunities, submitted to the Commission at its thirteenth session, in 1961.¹⁰⁵ Some authors, while adhering to this opinion, consider that an act is an official act *per se* only if both the sending and the receiving States recognize it as such, on the basis of a treaty to which they are parties and of customary international law or of the laws and regulations of those States.¹⁰⁶

116. On the same question, namely who is entitled to determine the legal nature of the act performed by the official of the sending State in the territory of the receiving State, the Special Rapporteur on the topic of the representation of States in their relations with international organizations, in his capacity as an expert consul-

tant at the United Nations Conference on the Representation of States, in 1975, considered it preferable that the host State should determine the official character of the act. Replying to a question on this point, he stated that:

... it was indeed difficult to give practical examples [of the distinction] ... because there were no specific criteria for determining exactly when the member of the delegation was acting in his official capacity and when he was not. It would therefore be necessary for the courts of the host State to decide on that matter according to the particular circumstances of the case.¹⁰⁷

117. In State practice in this matter, however limited it may be, both doctrines have been followed, i.e. that the decision on the distinction should be made by both the sending and the receiving State, or by the receiving State alone. It may be submitted that, in case of dispute between the sending and the receiving States, the most appropriate practical manner to resolve a problem of this kind would be by arriving at an amicable solution through diplomatic channels.

118. The next problem concerning immunity from local, civil and administrative jurisdiction relates to measures of execution. As a consequence of the functional immunity of the person concerned, measures of execution can be taken only in cases that are not related to acts performed in the exercise of official functions, i.e. cases that are not covered by the immunity accorded by the receiving State. This is a standard provision, which is incorporated in article 31, paragraph 3 of the 1961 Vienna Convention and in the corresponding articles in the other conventions codifying diplomatic law. The most relevant provision reflecting the specific features of the legal status and functions of the diplomatic courier would be article 60, paragraph 2, of the 1975 Vienna Convention.

119. The rule on immunity from execution granted to diplomats was established in international law long before the 1961 Vienna Convention. It has been considered not only as an important aspect of immunity from local civil and administrative jurisdiction, but also as a consequence of the principle of the inviolability of the person, residence and property of a diplomatic agent.

120. Immunity from execution, therefore, by its nature and scope, reflects a functional approach to immunity from local civil jurisdiction. This characteristic of measures of execution is emphasized by the explicit provision of paragraph 3 of article 31 of the 1961 Vienna Convention, which states that "no measures of execution may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (a), (b) and (c) of paragraph 1 of this article", i.e. in the case of an action relating to private immovable property, private involvement in a succession, and professional and commercial activity exercised outside official func-

¹⁰³ See, for example, the cases referred to in Whiteman, *op. cit.* (see footnote 36 above), p. 213: *Laterrade v. Sangro y Torrès* (1951) (*Recueil Sirey, Jurisprudence, 1951* (Paris), p. 155); and *Juan Ysmael & C^o. v. S.S. "Tasikmalaja"* (1952) (*International Law Reports, 1952* (London), vol. 19 (1957), case No. 94, p. 400, at p. 408). See also *Arçaya v. Paéz* (1956) (*ibid.*, 1956 (London), 1960 (vol. 23), p. 436); *Maas v. Seelheim* (1936) (*Annual Digest and Reports of Public International Law Cases, 1935-1937* (London), vol. 8 (1941), p. 404); *Bigelow v. Princess Zizianoff and others* (1928) (*La Gazette du Palais* (Paris), 1st sem. 1928, No. 125, p. 726). Most of these cases relate to the distinction between "official" or "consular" functions and private acts performed by consular officers and employees; in this connection, see L. T. Lee, *Vienna Convention on Consular Relations* (Leyden, Sijthoff, 1966), pp. 115-146, where several cases are mentioned.

¹⁰⁴ Art. 21 of the draft convention. See Harvard Law School, *Research in International Law*, sect. II, "Legal Position and Functions of Consuls" (Cambridge, Mass., 1932), published as *Supplement to the American Journal of International Law* (Washington, D.C.), vol. 26 (1932), p. 198.

¹⁰⁵ *Yearbook ... 1961*, vol. II, p. 69, document A/CN.4/137, "Observations and proposals by the Special Rapporteur" concerning article 41 (Immunity from jurisdiction).

¹⁰⁶ Lee, *op. cit.* (see footnote 103 *in fine*), p. 121. The author states further:

"... In other or borderline cases, however, the express or implied admission by both States that the act is "official" would be necessary. Such admission by the sending State may take the form of re-affirmation by its diplomatic mission in the receiving State that a particular act performed by its consul is "official", or of mere silence in the face of the assertion to this effect by the head of the consular post. With respect to the receiving State, its admission may be a matter for determination by the appropriate court." (*Ibid.*)

¹⁰⁷ *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. 1, p. 263, *Committee of the Whole*, 32nd meeting, para. 35.

tions. The same provision is contained in paragraph 4 of article 31 of the Convention on Special Missions.

121. The close intrinsic relation between measures of execution and immunity from civil jurisdiction is also reflected in the provisions on immunity from civil jurisdiction which, instead of listing specific exceptions, use general formulae defining the functional nature of that immunity. This is the case with article 60, paragraph 2 of the 1975 Vienna Convention, which simply provides that "no measures of execution may be taken in respect of such persons", i.e. the head of delegation and other delegates and members of the diplomatic staff of the delegation. Through the operation of article 66, paragraph 2, such immunity from execution is also accorded to members of the administrative and technical staff of the delegation.

122. The only other requirement in respect of measures of execution is that such measures are admitted only if they do not infringe the inviolability of the person or the residence of the official concerned. This, in fact, confirms that the position concerning measures of execution follows from the principle of inviolability. The practical significance of this rule is that, if by a decision of the local court a person enjoying immunity from execution loses his rights or titles to immovable property in the territory of the receiving State, such a person or a member of his family may not be evicted, no other measure of execution may be taken that might affect the personal freedom of the protected person, and no search or examination of himself or his residence may be undertaken.

123. The rule on immunity from execution should be applicable to a diplomatic courier as well. First, by virtue of his official functions, he is entitled to enjoy immunity from local civil and administrative jurisdiction, at least on the same level as members of the administrative and technical staff. Secondly, all the codification conventions explicitly provide for the personal inviolability of the courier, which means that he is not liable to any form of arrest and detention. Thirdly, it is obvious that measures of execution would lead inevitably to impediments to the normal performance of the official functions of the courier.

124. Another element of immunity from local jurisdiction is the exemption of a diplomatic agent from the obligation to give evidence as a witness. This rule is incorporated in article 31, paragraph 2, of the 1961 Vienna Convention and in the corresponding provisions in the other conventions codifying diplomatic law, with the exception of the 1963 Vienna Convention, according to which the operation of this rule is subject to certain modalities. Exemption from the obligation of giving evidence as a witness has also been considered in the framework of the principle of inviolability, in the sense that there is no legal obligation to give evidence. This means that a diplomatic agent, or a person enjoying jurisdictional immunity by reason of his official functions, if he so wishes, or has the necessary permission

from the sending State,¹⁰⁸ may testify in respect of matters that are outside his official functions. Exemption from the obligation of giving evidence as a witness is not limited by exceptions to immunity from civil jurisdiction. The same régime applies to members of the administrative and technical staff.

125. It is obvious that a diplomatic courier, by the confidential nature of his duties and the need to perform his functions as expeditiously as possible, should be exempt from the obligation to give evidence as witness before judicial or administrative institutions of the receiving or the transit State. Such an exemption is justified on grounds of principle and by reason of his legal status, as well as by the practical requirements of his official functions of ensuring the rapid delivery of diplomatic mail.

126. Case law in this matter is very scarce, perhaps because the authorities of the receiving or the transit State recognize the special character of the status and functions of the courier and therefore avoid instances when he might be called upon to testify.

127. By way of illustration of the attitude of States on this matter, the case of *Juan Ysmael & Co. v. S.S. "Tasikmalaja"* (1952) may be mentioned, when a Hong Kong court issued an order requiring a professional diplomatic courier of the Indonesian Government to appear in court for cross-examination on an affidavit he had filed. The courier claimed immunity from process on the grounds that he was a diplomatic courier, with a diplomatic passport and, as such, must hold himself in readiness to carry official communications for his Government at a moment's notice. The Court ruled:

... A courier is in an altogether different position from that of a consul. He has no official recognition and is granted exemption from civil and criminal jurisdiction and afforded special protection only during the exercise of his office. I can see no reason why Mr. Pamoerhardjo should be exempted from attending to be cross-examined and I cannot anticipate any situation arising as a result of his attending the court to be cross-examined which could possibly conflict with his duty as a courier. His application is refused and he is ordered to attend the court for cross-examination.¹⁰⁹

The court however acknowledged, later in the proceedings, that "... diplomatic couriers cannot be compelled to give evidence about matters within the scope of their official duties".¹¹⁰

¹⁰⁸ In the practice of some States, diplomats are not permitted to decide on their own, without instructions, to testify as witnesses before foreign courts. Some States have specific regulations on this matter. Such regulations apply not only in cases where the diplomatic agent is called upon to give evidence on matters related to his functions but also in cases of matters unrelated to his official functions or to the activities of the mission. This is the practice in the United States of America, the United Kingdom and other States; see e.g. J. B. Moore, *A Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1906), vol. IV, p. 642. See also in United Nations, Legislative Series, vol. VII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* (Sales No. 58.V.3), the laws and regulations of Austria (pp. 13-16), Colombia (p. 65), Ecuador (p. 106), Guatemala (p. 145), Honduras (p. 152), Nicaragua (p. 22), USSR (p. 337).

¹⁰⁹ *Loc. cit.* (footnote 103 above), p. 408.

¹¹⁰ *Idem*, p. 410.

128. One of the exceptions to immunity from the local civil and administrative jurisdiction of the host State listed in article 31, paragraph 2 (*d*), of the Convention on Special Missions, and in article 60, paragraph 4, of the 1975 Vienna Convention, relates to an action for damages arising from accidents caused by a motor vehicle, vessel or aircraft used or owned by the person enjoying immunity from local jurisdiction. The use of motor vehicles for personal or professional purposes has become part of daily life. Traffic accidents and offences have inevitably increased, giving rise to a growing number of claims. The need to regulate questions of liability for personal injuries and damages to property arising from traffic accidents in which diplomatic agents and other persons enjoying diplomatic immunities are involved has become obvious. Nevertheless, it has taken some time for the proper codification of international law to take place in this field. In this connection a very brief survey of the legislative history of the rules mentioned above is quite indicative of the rapid developments on this matter in the course of the last two decades.

129. At the United Nations Conference on Diplomatic Intercourse and Immunities, in 1961, the delegation of the Netherlands submitted a proposal providing that local courts should have jurisdiction in respect of claims for damages arising out of an accident caused by a motor vehicle, unless a direct right of action existed in the receiving State against an insurance company.¹¹¹ This proposal was viewed by many delegations as constituting a significant departure from the other exceptions to immunity from civil and administrative jurisdiction, which were definitely of a private character, having no connection with the official functions of the person concerned.¹¹² The use of a motor vehicle, on the other hand, was considered to be closely related to the official activity of such a person. On those grounds the Netherlands amendment was not accepted.

130. However, only two years later, at the United Nations Conference on Consular Relations, the discussion on the same matter took a different course. Two special provisions were incorporated in the Convention on Consular Relations adopted by the Conference. One of them is in the form of an exception, listed in article 43, paragraph 2 (*b*), to the jurisdictional immunities accorded to consular officers and employees, to the effect that such immunity shall not apply in respect of a civil action "by a third party for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft", it being understood that these means of transport belong to or are used by consular officers or consular employees. The other provision relating to liability for damage caused by traffic accidents is contained in article 56, which states that members of the consular post must comply with any re-

quirement imposed by the laws and regulations of the receiving State in respect of insurance against third party risks arising from the use of any vehicle, vessel or aircraft.

131. The exception to immunity from local civil and administrative jurisdiction in respect of claims for damages arising from traffic accidents was thereafter included in international agreements and has become almost a standard provision. Following this trend, some States have introduced in their internal laws and regulations a requirement for mandatory insurance with full coverage.

132. This trend found its further confirmation in article 31 of the Convention on Special Missions. Among the four specific exceptions to immunity from civil and administrative jurisdiction, paragraph 2 (*d*) lists "an action for damages arising out of an accident caused by a vehicle used outside the official functions of the person concerned". While the 1963 Vienna Convention does not provide for any limitations on the exception in the case of civil action for damages caused by a vehicle, vessel or aircraft, the Convention on Special Missions takes a more restrictive approach to the scope of the exception. According to article 31, paragraph 2 (*d*), of the Convention, the exception to immunity from civil and administrative jurisdiction applies only in the case of an action for damages arising out of an accident caused by a vehicle used *outside the official functions* of the person concerned. Thus the exception would not apply to traffic accidents involving persons *during the exercise of their official duties*.

133. On the same matter the 1975 Vienna Convention takes a somewhat different approach. Article 60, paragraph 4, relating to liability for damages arising from traffic accidents, in our submission, contains some new elements. First, it does not confine the exception to immunity from local civil and administrative jurisdiction to accidents occurring outside the exercise of official functions. Secondly, it specifically provides that the exemption includes in its scope *ratione personae* both the user and the owner of the vehicle. In this case, better protection of the victim of the accident is ensured. The special reference to liability for damages that are not recoverable from insurance is yet another remedy to prevent any injustice to the injured party. This position is further strengthened by the provision of article 78 of the same Convention relating to insurance against third party risks, similar to article 56 of the 1963 Vienna Convention mentioned above (para. 130). Here again, the broader formula is used with regard to the vehicle involved in the accident used or owned by a person enjoying immunity. Thus, where a vehicle owned by a person enjoying immunity from local jurisdiction but which at the time of the accident was being used by another person, there is no exemption from civil action. Moreover, a diplomatic agent is answerable to local jurisdiction if he causes damage in a rented motor vehicle.

134. Taking into consideration all these aspects of the problem of liability for damages arising out of traffic

¹¹¹ *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II, p. 27, document A/CONF.20/C.1/L.186/Rev.1.

¹¹² *Ibid.*, vol. I, pp. 166-172, *Committee of the Whole*, 27th meeting, paras. 19-65, and 28th meeting, paras. 1-27.

accidents, it seems only logical that the same régime should apply to diplomatic couriers when exercising their official duties. Although the practice of States and related case law on this matter is very limited, there are enough reasons in favour of a special provision on exception to immunity from the local civil and administrative jurisdiction of the receiving or the transit State granted to the diplomatic courier during the performance of his official duties. State practice on this matter in itself is not conclusive. Most cases that are known occurred prior to the 1961 Vienna Convention and the other conventions codifying diplomatic law. It is submitted that most cases involving claims for damages caused by members of diplomatic missions and, in rare instances, diplomatic couriers, have been resolved through diplomatic channels.

135. The few cases brought before the courts occurred prior to the codification conventions. For example, in *Laterrade v. Sangro y Torres* (1951), the defendant claimed diplomatic immunity from the court's jurisdiction in an action arising out of an automobile accident. He argued that, as Spanish Consul, he enjoyed immunity from civil jurisdiction, and that at the time of the accident he was transporting the Spanish diplomatic bag as representative of the Government of Spain and with the agreement of the French authorities. The Paris Court of Appeals held that the plea must be rejected. It concluded:

The transport of the diplomatic bag is not part of the normal functions of a consul. The plea to the jurisdiction, in so far as it is based on this act, cannot be upheld by the court.¹¹³

However, it is not clear from this decision how the court would have reacted in the case of a professional diplomatic courier, since the main argument in the decision was that, in the view of the court, the carrying of a diplomatic bag was not part of the normal functions of the consul. The question arises whether a courier *ad hoc*, as in that case, should not be accorded the same protection as an ordinary diplomatic courier. In any case, the limited case law on the subject matter seems to suggest that diplomatic couriers are granted immunity from local civil and administrative jurisdiction and afforded special protection during the exercise of their official duties. For practical reasons, however, States tend to settle any disputes in this area through diplomatic channels.

136. The last point to be considered in connection with the immunity from local jurisdiction accorded to the diplomatic courier by the receiving or the transit State relates to the rule that such immunity shall not exempt the courier from the jurisdiction of the sending State. This rule is incorporated in article 31, paragraph 4, of the 1961 Vienna Convention and in the corresponding articles of the other codification conventions.¹¹⁴ This rule is well established in international customary law

¹¹³ *Loc. cit.* (footnote 103 above), p. 157.

¹¹⁴ See, for example, the Convention on Special Missions, art. 31, para. 5; the 1975 Vienna Convention, art. 30, para. 4 and art. 60, para. 5.

and in internal laws, and has not been questioned in State practice. The effective jurisdiction of the sending State over its officials abroad is a rule designed to enhance justice and legal order. It gives the sending State the opportunity of offering such a procedure as a legal remedy in favour of a claimant in the receiving State whose rights could not be otherwise protected, owing to the immunity of the diplomatic agent. This rule also derives from the permanent legal relationship between a person and the State of which he is a national, even when the person is abroad.

137. This matter was discussed by the Commission during its work at its ninth session, in 1957, on the draft articles on diplomatic relations and immunities. The main problem being the justiciability of the diplomatic agent in the courts of the sending State, one member of the Commission proposed that this rule should be further elaborated to provide that the competent court should be that of the seat of the Government of the sending State, unless some other tribunal were designated under the law of that State.¹¹⁵ This question was further discussed in the Commission at its tenth session, in 1958,¹¹⁶ and at the United Nations Conference on Diplomatic Intercourse and Immunities, in 1961.¹¹⁷

138. Although it cannot be claimed that recourse by a plaintiff to judicial procedure against a diplomat before the court of his own State would be an efficient remedy, nevertheless an action of this kind cannot be ruled out altogether. It is true that cases of this kind are usually better settled by more pragmatic and less formal ways, through diplomatic or political channels. However, since such a rule exists in the conventions codifying diplomatic law, there is no reason why a similar provision should not be provided with regard to the status of the diplomatic courier.

139. In the light of all these considerations on the immunity from jurisdiction to be accorded to the diplomatic courier, the Special Rapporteur submits the following draft article for examination and provisional approval:

¹¹⁵ *Yearbook ... 1957*, vol. I, p. 105, 404th meeting, para. 29 (Mr. François). Cf. the 1929 resolution of the Institute of International Law on diplomatic immunities, article 9 of which provides:

"The head of mission, the members of the mission officially recognized as such and the members of their families residing in the same household shall not lose their former domicile." (*Annuaire de l'Institut de droit international*, 1929, vol. II, p. 309.)

Text cited in Ph. Cahier, *Le droit diplomatique contemporain* (Geneva, Droz, 1962), p. 459, and Harvard Law School, *op. cit.* (footnote 104 above), p. 187.

¹¹⁶ *Yearbook ... 1958*, vol. I, pp. 153-154, 460th meeting, paras. 47-63.

¹¹⁷ See the discussion at the Conference on the amendments to article 29 (Immunity from jurisdiction) submitted by Spain (A/CONF.20/C.1/L.221), Netherlands (A/CONF.20/C.1/L.186) and Venezuela (A/CONF.20/C.1/L.229) (*Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. I, pp. 166-172, *Committee of the Whole*, 27th meeting, paras. 18-65, and 28th meeting, paras. 1-27).

Article 23. Immunity from jurisdiction

1. The diplomatic courier shall enjoy immunity from the criminal jurisdiction of the receiving State or the transit State.

2. He shall also enjoy immunity from the civil and administrative jurisdiction of the receiving State or the transit State in respect of all acts performed in the exercise of his official functions.

3. No measures of execution may be taken against the diplomatic courier, except in cases not covered by paragraph 2 of this article and provided that the measures concerned can be taken without infringing the inviolability of his person, temporary accommodation or the diplomatic bag entrusted to him.

4. The diplomatic courier is not obliged to give evidence as witness.

5. Nothing in this article shall exempt the diplomatic courier from the civil and administrative jurisdiction of the receiving State or the transit State in respect of an action for damages arising from an accident caused by a vehicle used or owned by the courier in question, if such damages cannot be covered by the insurer.

6. Immunity from the jurisdiction of the receiving State or the transit State shall not exempt the diplomatic courier from the jurisdiction of the sending State.

3. EXEMPTIONS ACCORDED TO THE DIPLOMATIC COURIER AND THE DIPLOMATIC COURIER *AD HOC*

145. As has been pointed out above (para. 24 (b)), the privileges and immunities accorded to the diplomatic courier include recognition of the *inviolability* of his person, of his temporary accommodation and of his means of transport, as well as *immunity from local jurisdiction* and the granting of various *exemptions* in the performance of his functions. The first two components of the privileges and immunities, namely, inviolability and immunity from jurisdiction, were considered together with the corresponding draft articles 20, 21, 22 and 23 (paras. 68, 80 and 139 above). The Special Rapporteur proposes to proceed with the examination of the exemptions to be accorded to the diplomatic courier and to submit for consideration the relevant draft articles.

141. The four codification conventions contain no legal definition of the general notion of *facilities*, *privileges*, and *immunities*, nor do they attempt to draw a distinction between *privileges*, *immunities* and *exemptions*. The 1961, Vienna Convention, which sets the pattern on this matter, prefers to use either the aggregate term "privileges and immunities", or the terms "rights", "facilities", "immunities" or "exemptions", for each specific provision, according to its subject matter. The 1963 Vienna Convention, in its chapter II, entitled "Facilities, privileges and immunities relating to consular posts, career consular officers and other members of a consular post", while following the same

approach, uses as titles of certain articles the terms "facilities", "inviolability", "exemptions", along with the cumulative term "privileges and immunities". The other conventions, namely, the Convention on Special Missions and the 1975 Vienna Convention, conform to this pattern. This inductive and pragmatic method is well justified, for it leads to more precise provisions with a specific legal content.

142. Following this methodology, the view could be maintained that there might be some nuances inherent in the legal notions of *immunity* or *exemption*, expressed in the form of a rule providing for certain rights and obligations. Nevertheless, the practical legal implications and results are the same. It is true that under customary international law diplomatic immunity constitutes a legal shelter against local jurisdiction and enforcement measures of a judicial or administrative character. *Diplomatic immunity* provides the legal basis for the inviolability of the person concerned, including inviolability of his person, correspondence, accommodation and property. *Exemption* means that the person to whom it is granted is relieved of certain legally binding duties otherwise applicable in regard to all. Thus exemption entails special rights, accorded by the receiving State to diplomatic agents and other officials of the sending State, which create a privileged régime of treatment resulting in the non-application of local laws or regulations in respect of the persons concerned.

143. The functional approach is equally applicable to the various kinds of privileges, immunities and exemptions accorded to the diplomatic courier. In some instances, the functional necessity is more manifest in the direct relation between the special right accorded to the member of a diplomatic mission and the performance of his official function. In other instances, such a special right may be identified within a general framework of stipulations which are propitious to the proper exercise of official functions. However, in both instances, the exemptions accorded to a diplomatic agent or a member of the diplomatic mission, as well as to a diplomatic courier, have to be viewed in connection with their impact, either directly on the performance of the official duties of the persons concerned, or as measures of hospitality which would create favourable conditions for the exercise of these duties.

144. The exemptions granted to a diplomatic agent from personal examination, customs duties and inspection, from dues and taxes, and from local personal and public services or social security, have been qualified in some publications on international law as "immunities" or "privileges". It may be noted that some authors have used both terms with no differentiation whatsoever,¹¹⁸

¹¹⁸ See, for example, Cahier, *op. cit.* (footnote 115 above), p. 277, where exemptions from local dues and taxes are considered as "*privilèges fiscaux*" or "*immunité fiscale*". See also Lee, *op. cit.* (footnote 103 above), p. 149, where the term "financial privileges" is used for exemption from taxation, also termed "exemptions". Some writers, like E. M. Satow, *A Guide to Diplomatic Practice*, 4th ed. (London, Longmans, Green, 1957), p. 228, use only the term "ex-

or have even gone so far as to define them as facilities based on diplomatic courtesy.¹¹⁹

145. Exemptions from customs duties and inspections, as well as from taxes, dues or charges and other exemptions, were considered by customary international law not as legally binding obligations but rather as a matter of courtesy, usually applied on a basis of reciprocity. This concept was substantiated by State practice, as evidenced by national legislation and bilateral agreements. The prevailing legal doctrine until the turn of the century, and up to a few decades ago, reflected this concept of the legal nature of the exemptions as that of comity. However, the evolving process of the codification of diplomatic law has brought about significant conceptual modifications with practical implications. This evolution in the development of international law has affected the legal foundations of the exemptions granted to diplomatic missions and their personnel. Customs and other fiscal exemptions, and the rules determining their scope and operation *ratione materiae* and *ratione personae*, are within the jurisdiction of every State, based upon its laws and regulations. The most common practice relates to the free admission without customs duties or examination of articles for official use. This rule has been further extended to cover also articles for the personal use of members of diplomatic missions and their families. This type of exemption has been applied in some other fields, outside the framework of customs and fiscal regulations, such as personal and public services.

146. The most significant event in the codification and development of diplomatic law in general, and of the rules governing diplomatic privileges and immunities in particular, was the United Nations Conference on Diplomatic Intercourse and Immunities, in 1961. The draft articles on diplomatic intercourse and immunities prepared by the Commission at its ninth and tenth sessions, in 1957 and 1958, already included provisions relating to various exemptions. Some were based on the comments or proposals submitted by Governments on the draft articles elaborated by the Commission,¹²⁰ prior

emption". Most of the works on the subject published in the USSR use the term "fiscal immunity" for exemptions from all taxes, dues and charges, personal or real, and the term "customs privileges" for exemptions from all customs duties, taxes and related charges on the import and export of articles for the official or personal use of members of the diplomatic mission. See G. I Tunkin, ed., *Mezhdunarodnoe Pravo* [International Law] (Moscow, 1982), p. 276.

¹¹⁹ See Perrenoud, *op. cit.* (footnote 61 above), p. 197, where exemption from taxation is termed a "*facilité de simple courtoisie*". It is obvious that, since the adoption of the 1961 Vienna Convention, at least for the over 140 States that are parties to that Convention, the exemptions from all dues and taxes provided for in articles 28, 34, 36 and 37 cannot be considered as a "simple courtesy" but as legal obligations.

¹²⁰ See, for example, in "Comments by Governments on the draft articles concerning diplomatic intercourse and immunities adopted by the International Law Commission at its ninth session in 1957" (*Yearbook ... 1958*, vol. II, p. 111, document A/3859, annex), the proposals of Luxembourg, on exemption from social security provisions (present article 33) (*ibid.*, p. 123); of the Netherlands, on exemption of dues and charges levied by the mission (present article 28) (*ibid.*, p. 125); and of the USSR, on exemption from personal services (pre-

to the Conference, while others were presented as amendments at the Conference itself.¹²¹ It may be added that consideration of these draft articles, both in the Commission and later in the Conference, in general did not give rise to extensive discussions or difficulties. Some of them were adopted unanimously¹²² or with little disagreement.¹²³

147. The significant developments that deserve to be indicated with respect to the legal nature and scope of the exemptions, in our submission, are the following: (a) prior to the 1961 Vienna Convention, fiscal and other exemptions were generally considered as privileges deriving from comity and based upon reciprocity; (b) some of the exceptions, such as exemption from social security, were viewed as domestic law which did not give rise to obligations under international law; (c) exemption from taxation granted to members of diplomatic missions, although recognized in State practice, lacked the necessary uniformity and precision. Therefore it may be reasonably maintained that the 1961 Vienna Convention, with all its loopholes and ambiguities, constituted an important step forward in the codification and progressive development of diplomatic law. It set in motion a process which affected the other codification conferences in the field of diplomatic law and is still going on. This achievement of the 1961 Vienna Convention is most noteworthy in respect of the transformation of the exemptions accorded to diplomatic missions and their personnel from privileges of courtesy based on reciprocity into legally binding rules of modern international law. It is suggested that this development be borne in mind when examining the specific exemptions granted to members of diplomatic and other missions, which could also be accorded to diplomatic couriers.

148. Among the exemptions established as legal rules by the 1961 Vienna Convention and followed by the other codification conventions, there are four that have a certain relevance in respect of the status of the diplomatic courier. These are exemptions from: (a) personal examination, customs duties and inspection; (b) dues and taxes; (c) personal and public services; (d) social security provisions in force in the receiving State. The Special Rapporteur proposes to consider those exemptions in that order and to present corresponding draft articles.

sent article 35) (*ibid.* p. 131). See also articles 26, 31, 32, 33 and 34 of the draft adopted by the Commission at its tenth session, in 1958 (*ibid.* pp. 97, 99, 100).

¹²¹ See *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. I, pp. 153-154 and 182-193, *Committee of the Whole*, 25th meeting, paras. 1-11; 30th meeting; 31st meeting, paras. 1-87; 32nd meeting, paras. 1-13.

¹²² This was the case with draft article 26 (art. 28 of the Convention) on tax exemption of charges levied by the mission, which was adopted unanimously and without amendment (*ibid.*, p. 152, 24th meeting, para. 56).

¹²³ This was the case with the provision on exemption from customs duties (draft art. 34) as a legally binding rule, which was incorporated in article 36 of the Convention. The discussion bore essentially on the application of this rule within the framework of national laws and regulations (*ibid.*, pp. 188-191, 31st meeting, paras. 34-87).

149. The elaboration of draft articles on such exemptions to be granted to the diplomatic courier has a practical significance. Having in mind the fact that there are no specific provisions in this field with special reference to the status of the courier, the adoption of certain rules on this matter may provide a sound legal basis for the prevention of possible abuses of the privileges and immunities granted to the diplomatic courier without diminishing the legal protection he enjoys or impeding the proper performance of his official functions. It is well known that customs and fiscal privileges and immunities are most likely to be misused. On the other hand, unwarranted and excessive measures of inspection and other restrictions might also be used as a pretext for infringement of the inviolability of the person of the courier and the safety and confidential nature of the diplomatic bag entrusted to him. Furthermore, a reasonable legal framework of exceptions, justified by functional necessity, can create favourable conditions for the discharge of the official duties of the courier. Consequently, the draft articles in this field should be based on a viable balance between the legitimate rights and interests of the receiving and the transit States on the one hand and the sending State on the other hand.

(a) *Exemption from personal examination, customs duties and inspection*

150. Exemptions from personal search or examination and from customs duties and inspection are connected with the regulations relating to entry or exit procedures applied at frontier check points. There are in fact two kinds of interrelated problems: (a) exemption from personal inspection, i.e. a search of the person effected through the examination of everything on him, including his papers and personal effects; and (b) exemption from customs regulations relating to customs inspection of personal baggage and permission for entry of articles for personal use free of customs duties, taxes and related charges.

151. Laws and regulations on admission of persons and goods across the frontier, including immigration, customs and public health control at frontier check points, are within the national jurisdiction of the State. They are aimed at protecting the security and the economic, fiscal and other legitimate interests of the State. Therefore the exemptions from the application of these laws and regulations accorded to diplomatic agents and other officials of the sending State, deriving from the principles of State immunity and freedom of communications for official purposes, should be as specific as possible and in conformity with the laws and regulations of the receiving or the transit State.

152. These basic considerations have acquired particular significance nowadays when illicit traffic in foreign currency, narcotic drugs, arms and other goods has reached alarming dimensions. Thus the spread of international terrorism and the unlawful seizure of aircraft and other forms of air piracy have justified special measures of increased scrutiny of passengers and their

baggage, including the regular use of electronic and mechanical devices for examination and screening.

153. The status of the diplomatic courier, as a person entrusted with a highly confidential task by the sending State, has to be examined in the light of these basic considerations, as far as the conditions for his admission into the territory of the receiving or the transit State are concerned. The problem is whether he should be exempt from personal inspection, including examination carried out at a distance by means of electronic or other mechanical devices. State practice in this matter, so far, has not been very uniform. According to the preliminary and limited information available, in most instances diplomatic couriers have been exempted from personal examination at entry or exit check points upon their request and proof of status. This practice has usually been established on a reciprocal basis.

154. The main reason behind the exemption of a diplomatic courier from personal examination has been the recognition of his official functions, deriving from the fundamental principles of freedom of communication of States for official purposes and of the inviolability of the person entrusted with the carrying out of these functions. Exemption from personal search has also been considered as a courtesy accorded to a State official and as an expression of good faith and legitimate presumption that such an official would not be involved in illicit acts endangering the safety of civil aviation or in other offences against the receiving or the transit State. It may thus be suggested that, without overlooking the rationale of the measures against illicit traffic and other abuses, it would not be warranted by practical considerations to apply such measures in regard to the diplomatic courier in the performance of his official functions. Otherwise, suspicion on the part of the sending State that the means of examination, including the use of sophisticated mechanical devices, are designed to penetrate matters considered to be of a confidential nature might not be alleviated.

155. Exemption from all customs duties, taxes and related charges on articles for the official use of the diplomatic mission, and for the personal use of a diplomatic agent or members of his family, formed part of international law long before the adoption of the 1961 Vienna Convention. As has already been pointed out (paras. 145-147 above), they were considered as customs privileges accorded to members of the diplomatic mission on the basis of courtesy and by way of reciprocity. Article 36 of the 1961 Vienna Convention has transformed them into conventional rules of modern international law by stipulating that the receiving State shall, in accordance with its laws and regulations, permit entry of the aforementioned articles and grant them exemption from all customs duties and taxes. Article 36 also provides that the personal baggage of a diplomatic agent shall be exempt from inspection. While providing that the exemptions are granted within the framework of the laws and regulations of the receiving State, article 36 explicitly stipulates two exceptions to their operation. The first exception relates to charges

for storage, cartage and similar services rendered, which are not exempt from payment. The second exception provides that the personal baggage of a diplomatic agent may be examined where there are serious grounds for presuming that it contains articles not for official or personal use, but for lucrative purposes, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State. However, an important requirement is specifically stipulated in this case, namely, that the inspection shall be conducted only in the presence of the diplomatic agent or of an authorized representative of the sending State.

156. Taken together, the provisions of article 36 in respect of permission for the entry and exemption from customs duties and taxes of articles for official and personal use, as well as exemption from inspection of personal baggage, constitute a privileged customs régime. At the same time, it should be emphasized that this régime operates within the laws and regulations of the receiving State and is subject to certain exceptions and restrictions. Although the reference to the laws and regulations of the receiving State is not specified, it is understood that they permit the operation of the régime and that the formalities and other procedural requirements are basically aimed at preventing possible abuses in connection with the import of articles duty free or other exemptions.

157. Article 36 of the 1961 Vienna Convention established model rules on this matter, which were followed by the other conventions codifying diplomatic law.¹²⁴ The provisions contained in article 36 regarding the free entry of articles for official or personal use and the granting of exemptions from all customs duties, taxes and related charges on such articles, as well as from inspection of personal baggage, could be applicable in regard to the diplomatic courier when performing his official functions. This assertion is supported by State practice, as evidenced by national laws and regulations, international agreements and diplomatic correspondence.

158. Most national laws and regulations refer to the customs privileges and immunities accorded to the personal baggage of the diplomatic courier. Some were enacted prior to the adoption of the 1961 Vienna Convention and explicitly provided for reciprocal treatment.¹²⁵ The laws and regulations adopted since the adoption of the Convention simply state that exemption

from customs inspection shall also apply to the personal baggage of the diplomatic courier.¹²⁶ However, there are national laws and regulations which do not contain specific provisions relating to the customs régime of the diplomatic courier. In rare cases it has been explicitly indicated that the personal baggage of the courier should not be exempt from customs inspection.¹²⁷

159. There has been a distinct trend in State practice to accord to diplomatic couriers the same customs privileges and immunities as those granted to members of diplomatic missions. As has been pointed out, this practice was established long before the adoption of the 1961 Vienna Convention and has been confirmed ever since. By way of illustration, we could mention the national legislation on this matter of several States. The Code of Federal Regulations of the United States of America specifically states: "The accompanied personal baggage of diplomatic couriers of foreign countries shall be accorded customs privileges and immunities extended to foreign personnel of diplomatic rank under paragraph (c), except in cases provided for by special instructions from the Commissioner of Customs."¹²⁸ Article 9 of the Rules adopted by the Soviet Union in 1967 concerning the personal belongings of diplomatic couriers stipulates that "the personal belongings of diplomatic couriers which are imported for their personal use shall be admitted without customs inspection".¹²⁹ Similar regulations with regard to exemption from customs inspection of the personal baggage of the courier are incorporated in the national legislation of the Netherlands, Belgium and other States.¹³⁰ The order issued by the Federal Ministry of Foreign Trade of Czechoslovakia for the implementation of Customs Act No. 44/1974 provides that exemption from customs inspection shall also apply to the baggage of diplomatic and consular couriers, even if it is imported or exported by a means of transport other than that used by such persons.¹³¹

160. Case-law on this matter is relatively limited. However, most of the cases on which information is available, with few exceptions, support the rule of exemption from customs duties, taxes and inspection accorded to diplomatic couriers. In this connection, the experience of the United States and some other coun-

¹²⁴ See, for example, the 1963 Vienna Convention, art. 50; the Convention on Special Missions, art. 35; and the 1975 Vienna Convention, arts. 35 and 65.

¹²⁵ See, for example, the customs regulations of the Netherlands and the USSR, reported by Satow, *op. cit.* (footnote 118 above), pp. 236-239. There are also laws and regulations on customs exemption accorded to diplomatic couriers that were adopted prior to the 1961 Vienna Convention, in which no special reference is made to the principle of reciprocity. This is the case with the regulations of Belgium contained in the "Instruction du Ministère des finances concernant les immunités diplomatiques, 1955 (Administration des douanes et accises)", paras. 86-90, reproduced in United Nations, Legislative Series, vol. VII ... , pp. 45-46.

¹²⁶ See article 29 of Customs Act No. 44/1974 of 24 April 1974 of Czechoslovakia, and articles 5 and 6 of the order of the Federal Ministry of Foreign Trade of 25 November 1974 implementing that Act (reproduced in *Yearbook ... 1982*, vol. II (Part One), pp. 235-236, document A/CN.4/356 and Add.1-3). See also *Code of Federal Regulations, Title 19, Customs Duties (Revised as of January 1, 1968)* (Washington, D.C., 1968), p. 269, sect. 10.29.

¹²⁷ See, in the case of Switzerland, article IV, para. 3, of the "Règles appliquées par le Département politique fédéral en matière d'immunités et privilèges diplomatiques et consulaires", reproduced in United Nations, Legislative Series, vol. VII ... , p. 307.

¹²⁸ Section 10.29, para. (f) of title 19 of the Code (see footnote 126 above).

¹²⁹ See *Yearbook ... 1982*, vol. II (Part One), p. 243, document A/CN.4/356 and Add.1-3.

¹³⁰ See footnote 125 above.

¹³¹ Art. 6 of the order (see footnote 126 above).

tries provides grounds for such a conclusion. By way of example, the following diplomatic correspondence on this subject might be appropriate.

161. In a telegram addressed by the Secretary of State of the United States of America to the Ambassador of Turkey, it was stated:

As regards customs immunity of diplomatic couriers it appears that diplomatic couriers are not mentioned in article 425 (a) (1) of the Customs Regulations of 1931 and that they are therefore not entitled to the privilege of having their baggage and effects passed without customs examination in the absence of specific authorization. According to a ruling of the Treasury Department, however, that Department has signified its willingness to instruct the Collector of Customs at the appropriate port of entry to admit free of duty the baggage and effects of diplomatic couriers upon request from the Department of State *in each instance*. The making of such a request by this Department would, of course, be conditioned on the assurance that reciprocal courtesies would be extended.¹³²

Again, in a communication from the Chief of the Division of Near Eastern Affairs of the United States Department of State to the Persian Minister, it was stated:

... they [diplomatic couriers] receive free entry, without examination, for their official papers and documents, and expeditious passage through the customs for themselves and their effects.

In other words, the exemptions accorded him are for the documents he carries rather than for himself. Once he has finished his mission and delivered his bag to his Ambassador or Minister he is not entitled to any diplomatic privileges.¹³³

162. On the same issue, the diplomatic correspondence between the Government of the USSR and the United States Embassy in Moscow could also be mentioned. The United States Ambassador to the Soviet Union informed the Department of State, in August 1935, that it was the practice of the Soviet Government to pass without examination the personal baggage of United States diplomatic couriers in the Soviet Union and suggested that the same courtesy should be extended to Soviet diplomatic couriers in the United States. The Department of State accordingly wrote to the Secretary of the Treasury asking that the customs authorities at New York be informed of the practice of the Soviet Government and instructed to accord Soviet couriers all possible facilities upon their arrival in the United States.¹³⁴

163. The above-mentioned cases occurred prior to the adoption and entry into force of the 1961 Vienna Convention. Therefore the principle of reciprocity had a prominent role. The situation has changed since the incorporation in the 1961 Vienna Convention of special provisions on customs duties and inspection, which constitute a rule of modern diplomatic law. This should not

lead to the conclusion that the principle of reciprocity in such matters has lost its significance. Having in mind the fact that exemptions from all customs duties, taxes and inspection operate within the framework of national laws and regulations and thus have a permissive character, reciprocal treatment would be in many instances the *modus operandi* of the general rules of diplomatic law incorporated in the 1961 Vienna Convention.

164. National laws contain few provisions regarding the customs régime applicable to the diplomatic courier. Hence the status of the diplomatic courier in relation to customs matters remains uncertain. It would therefore be advisable to provide some specific rules governing the personal examination, customs duties and inspection applicable to the status of the courier. The same provisions should apply *mutatis mutandis* to the diplomatic courier *ad hoc*, when his own status does not give him better legal protection.

165. In the light of the above considerations regarding personal examination, customs duties and inspection of baggage applicable to the diplomatic courier, the Special Rapporteur submits the following draft article for examination and provisional approval:

Article 24. Exemption from personal examination, customs duties and inspection

1. The diplomatic courier shall be exempt from personal examination, including examination carried out at a distance by means of electronic or other mechanical devices.

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

3. The personal baggage of the diplomatic courier shall be exempt from inspection, unless there are serious grounds for believing that it contains articles not covered by the exemptions referred to in paragraph 2 of this article, or articles the import or export of which is prohibited by law or controlled by the quarantine regulations of the receiving State or the transit State. In such cases inspection shall be carried out only in the presence of the diplomatic courier.

(b) *Exemption from dues and taxes*

166. Exemption from taxation falls within the broader scope of financial privileges and immunities accorded to diplomatic missions and their members. Like some of the other exemptions, particularly from customs duties and inspection, exemption from taxation, prior to the 1961 Vienna Convention, was applied on the basis of reciprocity. The operation of this rule was influenced by national tax systems and there was therefore a great diversity of régimes. With the adoption of article 34 of the 1961 Vienna Convention, the general rule was

¹³² Telegram dated 24 August 1937 (MS. Department of State, file 811.111 Diplomatic/10667), cited in Hackworth, *op. cit.* (footnote 59 above), p. 622.

¹³³ Communication dated 16 January 1930 (MS. Department of State, file 701/159a), *idem*.

¹³⁴ Telegram No. 353 of 16 August 1935 addressed by the Ambassador of the United States, Bullitt, to the Secretary of State, Hull; and letter of 23 August 1935 addressed by the Assistant Secretary of State, Moore, to the Secretary of the Treasury (MS. Department of State, file 701.6111/841), *idem*.

established according to which diplomatic agents should be exempt from all dues and taxes, personal or real, national, regional or municipal, with several specific exceptions. These exceptions from taxation relate to indirect taxes incorporated in the price of goods or services, dues and taxes levied on private immovable property situated in the receiving State, inheritance duties, private commercial or other lucrative activities, as well as charges levied for specific services rendered, including various kinds of registration, court or record fees. The provisions contained in article 34 served as a model for the corresponding articles in the other codification conventions.¹³⁵

167. Considering the specific features of the official functions of the diplomatic courier, his short sojourn in the territory of the receiving or the transit State and the very limited scope of his contractual or other relations concerning property rights, it is obvious that the exemptions from taxation would also be limited. This aspect of the status of the courier has been repeatedly emphasized in connection with the privileges and immunities which he could enjoy (see paras. 90-91 above). Thus, of the six specific exceptions listed in article 34 of the 1961 Vienna Convention, only the exception concerning indirect taxes incorporated in the price of goods or services and the exception concerning charges levied for specific services rendered would be of practical significance for the diplomatic courier. The short stay of the diplomatic courier in a given country would prevent him from having the practical opportunity to exercise private rights relating to immovable property or to taxable private income. In any event, if such cases should arise, the diplomatic courier should comply with all the rules applicable to members of the diplomatic mission. Thus in practice the granting of tax privileges to the diplomatic courier will not lead to any tangible limitation of the fiscal jurisdiction of the receiving State, but will provide him with a treatment corresponding to his status as a person exercising official functions.

168. The basic rule that would be relevant in respect of exemptions from taxation granted to the diplomatic courier should not be more restrictive than the standard provisions applicable in this regard to members of the diplomatic mission. The operation of this rule should exempt the diplomatic courier from all dues, taxes and charges, personal or real, levied at the national, regional or municipal level. The only exception to this rule should be in respect of indirect taxes such as those that are normally incorporated in the price of goods, such as sales tax, value added tax, or any other taxes, dues or charges levied for specific services rendered.

169. In the light of these considerations it is suggested that the following draft article should be considered:

Article 25. Exemption from dues and taxes

The diplomatic courier shall be exempt from taxes, dues and charges, personal or real, national, regional and municipal, except for indirect taxes of a kind which are normally incorporated in the price of goods or services and charges levied for specific services rendered.

(c) Exemption from personal and public services

170. Exemption from personal and public services such as those required in emergency situations, as well as from military obligations, such as requisitioning, or various kinds of military contributions, including billeting, has been a long-standing rule of customary law. In order to give effect to this rule, some States have enacted national legislation providing for exemption of diplomatic agents from specific personal and public services.¹³⁶

171. The Soviet Union initiated the inclusion of a special provision on this matter in the draft articles on diplomatic intercourse and immunities prepared by the Commission. In its written comments, the Soviet Government proposed the inclusion of an article on exemption from personal and public services.¹³⁷ Following the proposal, the Special Rapporteur presented a draft article which was considered by the Commission at its tenth session, in 1958.¹³⁸ At the United Nations Conference on Diplomatic Intercourse and Immunities, in 1961, Belgium submitted an amendment to the draft article, which was adopted with some drafting changes as article 35 of the Vienna Convention on Diplomatic Relations. This article provides that the receiving State shall exempt diplomatic agents from all personal and public services, including military and other obligations connected with requisitioning, military contributions and billeting. By virtue of article 37, paragraph 2, this rule, which was supported by State practice and was in conformity with the official status of diplomatic agents, was applied also in regard to the administrative and technical staff of the diplomatic mission. The corresponding provisions in the other codification conventions¹³⁹ were modelled on article 35 of the 1961 Vienna Convention.

172. The application of exemption from personal and public services in respect of the diplomatic courier would be well justified, taking into account his official functions. The duty of the courier is to ensure the safe and speedy delivery of the diplomatic bag to its destination. By the nature of his functions, the courier is a per-

¹³⁵ See the 1963 Vienna Convention, art. 49; the Convention on Special Missions, art. 33; and the 1975 Vienna Convention, arts. 33 and 63.

¹³⁶ See, for example, in United Nations, Legislative Series, vol. VII ... the laws and regulations of Czechoslovakia (pp. 83-85), Denmark (p. 101), Greece (pp. 136-137), Netherlands (p. 199), Poland (pp. 269-275), Portugal (p. 288) and other countries.

¹³⁷ See footnote 120 above.

¹³⁸ *Yearbook ... 1958*, vol. I, pp. 157-158, 461st meeting, paras. 19-28.

¹³⁹ See the 1963 Vienna Convention, art. 52; the Convention on Special Missions, art. 34; and the 1975 Vienna Convention, arts. 34 and 64.

son whose stay in a given country is very limited, and the proper discharge of his duties requires rapid delivery of the bag. Thus any delays that may be caused by the performance of personal or other civic duties would make it impossible for the courier to deliver the diplomatic bag in time. The functional necessity underlying the exemption from personal and public services to be accorded to the diplomatic courier is obvious. This applies to both the receiving State and the transit State, and to all types of diplomatic couriers, including the diplomatic courier *ad hoc*.

173. The formulation of the rule that the receiving or transit State shall exempt the diplomatic courier from all personal and public services need not be so detailed and specific as article 35 of the 1961 Vienna Convention. The rationale of such an approach would above all be the short sojourn of the courier, which in practice restricts the probabilities of a courier being called upon to perform military and other similar obligations connected with requisitioning, military contributions of any kind or to provide board and lodging to military personnel.

174. In the light of these considerations on exemption from personal and public services, the Special Rapporteur submits the following draft article for examination and provisional approval:

Article 26. Exemption from personal and public services

The receiving State or the transit State shall exempt the diplomatic courier from all personal and public services of any kind.

(d) *Exemption from social security provisions*

175. The rule according to which diplomatic agents shall be exempt from the social security provisions of the receiving State in respect of services rendered for the sending State is of relatively recent origin. Because this rule was initially incorporated in domestic legislation, as has been pointed out above (para. 147), it was viewed as not entailing international obligations.

176. The decisive element in the adoption of this rule was the proposal made by Luxembourg in its written comments on the draft articles on diplomatic intercourse and immunities,¹⁴⁰ which the Commission considered at its tenth session, in 1958.¹⁴¹ The draft article subsequently adopted by the Commission provided for exemption from the social security legislation of the receiving State for all members of the diplomatic mission and members of their families, with the exception of employees who are nationals of the receiving State. At the United Nations Conference in 1961, the draft article was adopted with an amendment submitted by

Austria,¹⁴² and became article 33 of the Convention. The corresponding articles of the other codification conventions were modelled on that article.¹⁴³

177. Exemption from the social security provisions of the receiving or the transit State would have practical significance for the status of the diplomatic courier owing to the specific features inherent in his official duties. The granting of such an exemption to a diplomatic courier would be well justified, since he constantly moves from one locality to another in the performance of his official functions. It would therefore be inexpedient for the receiving or the transit State to request the courier to make contributions to its social security system. The diplomatic courier, who presumably contributes to social security in the sending State (for example, to health insurance, old-age insurance or disability insurance), would find it extremely difficult to start contributing in the receiving State, only to withdraw from the scheme when he has to move to other places in connection with his official functions. Furthermore, it would be absolutely in conformity with established State practice to accord such an exception to all members of the diplomatic mission, including the private servants employed by a diplomatic agent, on condition that they are not nationals of or permanently resident in the receiving State and are covered by the social security provisions that may be in force in the sending State. The diplomatic courier, therefore, by reason of his official functions and his status, has all the qualifications for being accorded exemption from the social security legislation of the receiving or the transit State. The rule in respect of the courier could be formulated in more concise form, having in mind the special circumstances under which the courier performs his duties, and more specifically the nature and duration of his functions.

178. In the light of these considerations regarding exemption from the social security provisions in force in the receiving or the transit State, the Special Rapporteur presents the following draft article for examination and provisional adoption:

Article 27. Exemption from social security provisions

The diplomatic courier shall be exempt from the social security provisions which may be in force in the receiving State or the transit State with respect to services rendered for the sending State.

¹⁴² *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. I, pp. 153-154, 182-183, and 193, *Committee of the Whole*, 25th meeting, paras. 1-11; 30th meeting, paras. 1-27; 32nd meeting, paras. 1-14. For the text of the Austrian amendment, *ibid.*, vol. II, p. 35, document A/CONF.20/C.1/L.265.

¹⁴³ See the 1963 Vienna Convention, art. 48; the Convention on Special Missions, art. 32; and the 1975 Vienna Convention, arts. 32 and 62.

¹⁴⁰ See footnote 120 above.

¹⁴¹ *Yearbook ... 1958*, vol. I, p. 198, 467th meeting, paras. 52-56.

C. Duration of facilities, privileges and immunities

1. DURATION

179. Under the general heading of duration of facilities, privileges and immunities accorded to the diplomatic courier, the examination is suggested of two interrelated problems dealing with the commencement and the end of those facilities, privileges and immunities, namely, duration proper and waiver of immunity from jurisdiction, as a special case of suspending the operation of such immunity.

180. The problems relating to the duration of the facilities, privileges and immunities accorded to the diplomatic courier are closely connected with the duration of his functions. Since this aspect is of particular significance for the practical implementation of the relevant rules pertaining to individual facilities, privileges and immunities, it might be advisable to have a closer look at their relation with the functions of the courier. In this connection, it is proposed to examine the *travaux préparatoires* on article 27, paragraph 5, of the 1961 Vienna Convention, on the immunity of the diplomatic courier, and also, to some extent, those on article 39 of the same Convention, on the duration of diplomatic privileges and immunities.

181. During the drafting of a provision on the diplomatic courier to be included in a convention on diplomatic relations, the Commission, at its ninth session, in 1957, assumed that the duration of the courier's privileges and immunities should correspond to the periods during which he performed his functions as a courier. There was, however, a conflict of views as to exactly how to prescribe the duration. One member of the Commission took the view that "the privilege of inviolability was enjoyed by diplomatic couriers only as long as they were carrying the diplomatic bag".¹⁴⁴ In the opinion of another member, however, it would be

inadvisable to limit the inviolability of diplomatic couriers strictly to the periods during which they were carrying diplomatic bags. Diplomatic couriers usually moved from capital to capital, spending a short time in each, and it would only create confusion if they were inviolable for part of the time and not for the rest.¹⁴⁵

182. In 1958, the Special Rapporteur for the topic on diplomatic intercourse and immunities presented a revised draft on the diplomatic courier (art. 21, para. 3), in which he had inserted the following phrase: "If such a person is travelling exclusively as a diplomatic courier he shall enjoy personal inviolability during the journey ..."¹⁴⁶ One member of the Commission made a critical remark thereon:

... the phrase "during his journey" in the new text might be interpreted to mean that the courier should not enjoy personal inviolability and immunity from arrest or detention in the intervals between his

¹⁴⁴ *Yearbook ... 1957*, vol. I, p. 84, 400th meeting, para. 5 (Mr. François).

¹⁴⁵ *Ibid.*, para. 6 (M. Tunkin).

¹⁴⁶ *Yearbook ... 1958*, vol. II, p. 17, document A/CN.4/116/Add.1.

journeys. Such intervals might be short or long, according to the remoteness of the post to which the courier was sent; but, unless he went on leave during the interval, his inviolability and immunity should not be interrupted.¹⁴⁷

While it was the Special Rapporteur's intention that the word "journey" meant "both the outward and the return journey, and also the interval between them", it was generally felt among the members of the Commission that the words "during his journey" might give rise to an excessively restrictive interpretation. Accordingly, the Special Rapporteur's amendment was withdrawn.¹⁴⁸

183. The United Nations Conference in 1961 did not elaborate on this point. The joint amendment by France and Switzerland, however, which became article 27, paragraph 5, of the Vienna Convention on Diplomatic Relations, provided in general terms that the diplomatic courier should be protected "in the performance of his functions".¹⁴⁹ The basic assumption that the duration of the diplomatic courier's privileges and immunities was subject to "the performance of his functions" was thus expressly confirmed.

184. The three other conventions, each of which contains a provision identical with the above, did not add anything to the results arrived at in the 1961 Vienna Convention. The only exception was the question regarding the duration of the privileges and immunities of the courier *ad hoc*, provided for in article 27, paragraph 6, which stipulates that the immunities accorded to him shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge. The main features of the legal status of the diplomatic courier *ad hoc* have already been considered in the second report presented by the Special Rapporteur.¹⁵⁰

185. Some of the provisions of article 39 of the 1961 Vienna Convention and of the corresponding articles of the other codification conventions are very relevant to the problems relating to the commencement and the end of the facilities, privileges and immunities accorded to the diplomatic courier. This is the main reason for a brief analytical survey of the legislative history of article 39, especially in regard to the critical moments of entitlement and end of diplomatic privileges and immunities. This survey should also confirm the close relationship between diplomatic functions and diplomatic privileges and immunities.

186. Prior to the 1961 Vienna Convention, there were no uniform rules governing the commencement and the end of diplomatic privileges and immunities. A great deal of diversity prevailed in State practice and legal

¹⁴⁷ *Yearbook ... 1958*, vol. I, p. 140, 458th meeting, para. 2 (Sir Gerald Fitzmaurice).

¹⁴⁸ *Ibid.*, pp. 140-141, paras. 3-15.

¹⁴⁹ *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II, pp. 38-39, document A/CONF.20/C.1/L.286

¹⁵⁰ Document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), paras. 111-115.

doctrine.¹⁵¹ The Commission, at its ninth and tenth sessions and later the United Nations Conference on Diplomatic Intercourse and Immunities, decided that the moment at which the diplomatic courier entered the territory of the receiving State on proceeding to take up his post or, if already on its territory, the moment at which his appointment was communicated to the competent authorities of the receiving State, was the moment at which a diplomatic agent was entitled to privileges and immunities.¹⁵²

187. The rules relating to the end of diplomatic privileges and immunities had been well established in State practice and recognized by customary international law. Those rules are expressed in more precise terms in paragraphs 2 and 3 of article 39 of the 1961 Vienna Convention, in which it is provided that, when the functions of the person concerned have come to an end, the privileges and immunities he was accorded shall normally cease at the moment when he leaves the territory of the receiving State, or on expiry of a reasonable period in which to do so. However, with respect to acts performed by such a person in the exercise of his official functions, immunity shall continue to subsist, i.e. it will not be affected by the termination of his functions and subsequent departure from the country. The reason for this exception is the official nature of the acts, attributable to the State and enjoying the immunity granted to that State by virtue of its sovereignty. Another important aspect of the duration of diplomatic privileges and immunities relates to the privileges and immunities granted to members of the family of a member of the mission. In the case of death of a member of the diplomatic mission, the members of his family are entitled to enjoy the privileges and immunities until the expiry of a reasonable period in which to leave the country. This provision was modelled on article 24 of the Convention regarding Diplomatic Officers, signed at Havana on 20 February 1928,¹⁵³ and reproduced in an amendment submitted by Mexico at the 1961 Vienna Conference.¹⁵⁴

188. The conventions codifying diplomatic law do not contain special provisions regarding the duration of the facilities, privileges and immunities accorded to the diplomatic courier. The *travaux préparatoires* relating to article 27 of the 1961 Vienna Convention examined

¹⁵¹ The main trends were to consider that a diplomat enjoyed privileges and immunities from the moment at which he received notification of his appointment, at which he crossed the frontier of the receiving State, at which he presented his credentials, etc.

¹⁵² See *Yearbook ... 1957*, vol. II, p. 142, document A/3623, draft article 31; *Yearbook ... 1958*, vol. II, p. 103, document A/3859, draft article 38; *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. I, p. 37, 10th plenary meeting, paras. 8-14, and pp. 207-209, *Committee of the Whole*, 35th meeting, paras. 1-24; and *ibid.*, vol. II, p. 33, document A/CONF.20/C.1/L.251, and p. 37, document A/CONF.20/C.1/L.275/Rev.1.

¹⁵³ League of Nations, *Treaty Series*, vol. CLV, p. 271.

¹⁵⁴ See *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. I, p. 208, *Committee of the Whole*, 35th meeting, paras. 11-12; *ibid.*, vol. II, p. 26, document A/CONF.20/C.1/L.181.

above (paras. 181-183) offer only very general guidance on this issue. That is sufficient reason for attempting to suggest certain rules concerning the commencement and end of the privileges and immunities accorded to diplomatic couriers. Considering the limited State practice in this area, a draft article clarifying the duration of the privileges and immunities of the diplomatic courier may be useful.

189. In the light of the above considerations, the Special Rapporteur presents the following draft article for examination and provisional adoption:

Article 28. Duration of privileges and immunities

1. The diplomatic courier shall enjoy privileges and immunities from the moment he enters the territory of the receiving State or the transit State in order to perform his official functions.

2. If the official functions of a diplomatic courier come to an end, his privileges and immunities shall normally cease when he leaves the territory of the receiving State or, as applicable, the transit State, or on the expiry of a reasonable period in which to do so. However, with respect to acts performed by the courier in the exercise of his official functions, immunity shall continue to subsist.

2. WAIVER OF IMMUNITY

190. Waiver of jurisdictional immunity as a method of renunciation of or voluntary submission to the jurisdiction of the receiving State directly affects the duration of such immunity accorded to the diplomatic mission of the sending State and its members. From this point of view, waiver of jurisdictional immunity could be regarded as one form of suspension or termination of diplomatic immunities. It is however obvious that waiver constitutes only one specific case within the broader scope of problems relating to the end of the facilities, privileges and immunities accorded by the receiving State to foreign diplomatic missions and their members. Waiver of jurisdictional immunity is thus considered in this report under the heading of duration of facilities, privileges and immunities that may be granted to the diplomatic courier in the performance of his official functions.

191. For the purposes of the present study, reference is made to the general doctrine of waiver of jurisdictional immunity as it emerges from State practice. Moreover, as in the case of the problem of jurisdictional immunity (see paras. 81-83 above), the work which has been done by the Commission on the topic of jurisdictional immunities of States and their property has to be taken into consideration.¹⁵⁵ The Special Rapporteur proposes to examine briefly the problem of waiver of jurisdictional

¹⁵⁵ See the third report on jurisdictional immunities of States and their property submitted to the Commission at its thirty-third session (*Yearbook ... 1981*, vol. II (Part One), pp. 125 *et seq.*, document A/CN.4/340 and Add.1, paras. 50-71 (voluntary submission), paras. 72-81 (counter-claims), and paras. 82-92 (waiver)).

immunities, with special reference to the status of the diplomatic courier, on the basis of an analytical survey of the main provisions of article 32 of the 1961 Vienna Convention, which served as the model for the corresponding articles in the other codification conventions.¹⁵⁶ It might be advisable also to examine article 31, paragraph 5, and article 61, paragraph 5, of the 1975 Vienna Convention, for they contain in addition a provision on amicable settlement of a dispute in a case where the sending State does not waive its immunity.

192. It may be pointed out that article 32 of the 1961 Vienna Convention, on waiver of jurisdictional immunity, is based on the fundamental concept of such immunity as an expression of the principle of sovereignty and sovereign equality of States. At the same time, in its scope and operation, article 32 reflects the underlying idea embodied in the preamble to the Convention that

... the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.

These two basic concepts should be taken into account in the examination of the main legal features of the renunciation of jurisdictional immunity in general and of the status of the diplomatic courier in particular.

193. The main problems within the limited objectives of the present study may be confined to the following: (a) who is entitled to waive immunity; (b) how the waiver should be exercised; and (c) what is the scope of the waiver.

194. On the first question, relating to competence for renunciation of jurisdictional immunity, article 32, paragraph 1, of the 1961 Vienna Convention and the corresponding articles of all the other codification conventions stipulate in general terms that immunity from jurisdiction of the members of the diplomatic mission "may be waived by the sending State". Such a provision is in conformity with the doctrine of the jurisdictional immunities of States, as an attribute of their sovereignty. There has, however, been a great deal of diversity in State practice and doctrinal views regarding the authority entitled to exercise the right of waiver. The most significant difference in practice has been whether in all cases the central authority, for example the Ministry for Foreign Affairs, or the head of the mission, another diplomatic agent, or the member of the mission involved in a particular case, should have the right to waive jurisdictional immunity. The possible solutions to this problem depend essentially upon domestic laws and regulations, where such laws and regulations have been enacted, or upon established practices and procedures, where no formal legislation exists. Some States confer

the power to waive jurisdictional immunity to heads of missions or their members, but only on instructions from the Ministry given prior to a specific case.¹⁵⁷ In such instances heads of diplomatic and other missions or members of such missions are required to seek instructions before making a statement of waiver.

195. The problem of entitlement to exercise waiver should be considered also in connection with the procedural rules of the local judicial authority where proceedings against a member of a diplomatic mission have been instituted. These rules may relate to the requirements for competence to renounce jurisdictional immunity or to other conditions for proof of validity of the waiver. Therefore an efficient and smooth operation of waiver of jurisdictional immunity may require not only a greater degree of uniformity with regard to the power to waive such immunity but also harmonization of national rules and regulations regarding evidence of validity of the waiver before the court.

196. Another important element of the legal effect of waiver is that, once exercised by the sending State, it cannot be revoked. Consequently, a waiver made in accordance with the relevant requirements, and recognized or accepted by the court concerned, precludes the right to plead immunity either before the judgment is pronounced by that court or on appeal. This conclusion is supported by extensive State practice and was elucidated in the Commission's commentary to article 30 of its final draft on diplomatic intercourse and immunities,¹⁵⁸ which was to become article 32 of the 1961 Vienna Convention.

197. These requirements for the exercise of the right to waive jurisdictional immunity could be applied also in respect of cases where a diplomatic courier is involved. Considering the specific features inherent in the functions of the diplomatic courier and his short sojourn in the State where proceedings have been instituted, the addition of some specific elements to the general rule of article 32 might be advisable. It may be stressed that the power of the sending State to waive jurisdictional immunity may be exercised on its behalf by the head or an authorized member of the diplomatic mission, consular post, special mission, permanent mission or delegation of that State in the territory of the receiving or the transit State.

198. The methods of waiver contemplated in the provisions of paragraphs 2 and 3 of article 32 of the 1961 Vienna Convention follow the pattern established in State practice. First, it is explicitly stated that waiver may take two forms: an express waiver during the court's proceedings, in *facie curiae*, or an express undertaking to waive immunity, set out in an agreement or con-

¹⁵⁶ See the 1963 Vienna Convention, art. 45; the Convention on Special Missions, art. 41; and the 1975 Vienna Convention, arts. 31 and 61. While the aforementioned articles of the first two conventions are identical with article 32 of the 1961 Vienna Convention, articles 31 and 61 of the 1975 Vienna Convention contain an additional paragraph (para. 5) on settlement of a case where the sending State does not waive immunity.

¹⁵⁷ See, for example, Denza, *op. cit.* (footnote 81 above), p. 184, where reference is made to the rules applied in the matter by the Government of the United Kingdom, which requires that its diplomatic missions abroad seek instructions.

¹⁵⁸ *Yearbook ... 1958*, vol. II, p. 99, document A/3859, chap. III, sect. II.

tract to submit to jurisdiction.¹⁵⁹ Secondly, paragraph 3 of article 32 provides for an *implied waiver* through the initiation of proceedings by a person enjoying jurisdictional immunity in respect of any counter-claim directly connected with the principal claim. This may be effected either by instituting or intervening in proceedings without pleading jurisdictional immunity or by submitting a counter-claim.¹⁶⁰

199. The question of the legal effect of *express* or *implied* waiver was extensively discussed by the Commission during the preparation of the draft articles on diplomatic intercourse and immunities. The main problem was whether the express waiver should be accepted as the only way of renunciation of immunity and to what extent an implied waiver during the court's proceedings would be valid.¹⁶¹ In article 30, paragraph 3, of its final draft, the Commission adopted the following position:

3. In civil ... proceedings, waiver may be express or implied. A waiver is presumed to have occurred if a diplomatic agent appears as defendant without claiming any immunity.¹⁶²

At the United Nations Conference in 1961, however, it was argued that an express waiver would be preferable in practice. This approach was expressed in the language of paragraph 2 of article 32, which stipulates that "waiver must *always** be express".¹⁶³ However, as has already been pointed out, paragraph 3 of the same rule sets out the rule that a person enjoying jurisdictional immunity, who has initiated proceedings, shall be precluded from invoking immunity in respect of any counter-claim directly connected with the principal claim. It is thought by some that this rule is inconsistent with the concept of express waiver.¹⁶⁴ However, it is generally agreed, and follows from article 32, that in criminal proceedings waiver of immunity from jurisdiction should always be express.

200. It should be further pointed out that, in the case of express waiver or in the case of initiation of proceedings in respect of a counter-claim, the requirements for the validity of a waiver and the other procedural rules should be in accordance with the laws and regulations of the State of the forum.¹⁶⁵

¹⁵⁹ Cf. the third report on jurisdictional immunities of States and their property (see footnote 155 above), document A/CN.4/340 and Add.1, paras. 86-89.

¹⁶⁰ *Ibid.*

¹⁶¹ *Yearbook ... 1957*, vol. I, pp. 110-118, 405th meeting, paras. 21 *et seq.*, and 406th meeting.

¹⁶² See footnote 158 above.

¹⁶³ See the discussion on this subject at the Conference (*Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. I, pp. 173-177, *Committee of the Whole*, 28th meeting, paras. 35-45, and 29th meeting, paras. 1-42). See also the amendment submitted by Poland (*ibid.*, vol. II, p. 25, document A/CONF.20/C.1/L.171).

¹⁶⁴ See Denza, *op. cit.* (footnote 81 above), p. 186.

¹⁶⁵ See the third report on jurisdictional immunities of States and their property (see footnote 155 above), document A/CN.4/340 and Add.1, para. 85.

201. The next problem area is the *scope* of the waiver of jurisdictional immunities and the *implications* of such a waiver in respect of exception from execution of a judgment resulting from civil or administrative proceedings.

202. The scope of the waiver, as provided for in article 32 of the 1961 Vienna Convention and in the corresponding articles of the other codification conventions, covers all kinds of jurisdictional immunities, i.e. immunities from criminal, administrative or civil jurisdiction. This conclusion derives from the explicit provisions of the articles on jurisdictional immunities, such as article 31 of the 1961 Vienna Convention. The immunities from criminal, administrative or civil jurisdiction are also accorded to members of the administrative and technical staff. In conformity with these provisions, and taking into consideration the official functions of the diplomatic courier, as has been suggested in the present report,¹⁶⁶ such jurisdictional immunities should also be accorded to the diplomatic courier. Consequently, waiver of immunity from jurisdiction should encompass all forms of waiver of immunity in respect of cases in which a diplomatic courier may be involved.

203. The other problem relating to the effect of waiver of jurisdictional immunities is waiver of execution of a judgment handed down in a criminal, administrative or civil action in which a diplomatic courier is involved. It is suggested that these cases be considered separately, especially waiver in respect of criminal proceedings as distinct from waiver in respect of civil and administrative proceedings.

204. Waiver of immunity from the criminal jurisdiction of the receiving or the transit State should also be considered in relation to jurisdictional immunities in their entirety. Nevertheless, such waiver might raise certain specific problems relating to waiver of execution in respect of criminal proceedings. In this case, the provisions of draft articles 20, on personal inviolability (para. 68 above), and 23, on immunity from jurisdiction (para. 139 above), should be taken into account. According to draft article 20, the diplomatic courier shall enjoy personal inviolability and shall not be liable to any form of arrest or detention when performing his functions. Consequently no penalty affecting personal inviolability could be conceived. Furthermore, draft article 23, paragraph 3, provides that no measures of execution may be taken against the diplomatic courier, except in respect of acts performed outside his official functions, provided that the measures of execution would not infringe the inviolability of his person, of his temporary accommodation or of the diplomatic bag entrusted to him. These provisions, as has already been pointed out in the present report, are based on articles 27, 29 and 31 of the 1961 Vienna Convention.¹⁶⁷

¹⁶⁶ See para. 139 above, draft article 23 on jurisdictional immunity of the diplomatic courier.

¹⁶⁷ See paras. 47-68, 85-87, 91, 95-97, 119-121 and 133-139 above.

205. The 1961 Vienna Convention and the other codification conventions do not attempt to establish any special rule governing waiver of immunity from jurisdiction in respect of criminal proceedings as distinct from waiver of immunity in respect of execution of a judgment resulting from such proceedings. Perhaps one of the reasons is the difficulty or the practical value of a case where the effective execution of a judgment resulting from criminal proceedings could be detached from such proceedings. Even when immunity from criminal jurisdiction of the receiving State has been renounced, a judgment resulting from criminal proceedings against a member of the diplomatic mission, imposing as a penalty his arrest, detention or other measures infringing his inviolability, cannot be executed. It may also be inferred from the absence of a special provision on separate waiver of immunity from jurisdiction in respect of criminal proceedings that no separate waiver in respect of execution of the judgment was contemplated. Therefore waiver of immunity from criminal jurisdiction cannot be conceived in disassociation from waiver of immunity in respect of execution of the judgment resulting from criminal proceedings.

206. However, in respect of civil and administrative proceedings instituted in the receiving State in which a member of the diplomatic mission is involved, article 32, paragraph 4, of the 1961 Vienna Convention draws a distinction between waiver of immunity from jurisdiction and waiver of immunity in respect of execution of the judgment. It stipulates that waiver of immunity from jurisdiction in respect of civil and administrative proceedings shall not be held to imply waiver of immunity in respect of execution of the judgment, for which a *separate waiver* is required. This rule was established in customary international law prior to the 1961 Vienna Convention and confirmed by State practice. Nevertheless, at the United Nations Conference in 1961, there were some amendments designed to delete or modify this rule.¹⁶⁸ The discussion at the Conference produced no substantive change in the draft article, which was adopted in its present form.

207. It was argued after the 1961 Conference, and in connection with the 1963 Vienna Convention, that the separate waiver of immunity in respect of execution of judgment defeated the purpose of the waiver of immunity from jurisdiction in respect of civil proceedings. Some critics of this rule, referring to it as the "double-waiver requirement", considered that, in some cases when the waiver of immunity in respect of execution of a judgment imposing a certain obligation on a consul was withheld, to accept such a second waiver would "make a mockery of justice."¹⁶⁹ It may be mentioned, without entering into polemics on this matter, that State practice since the United Nations Conferences of 1961 and 1963 has provided no substantive support to such

conclusions. Moreover, the two other conventions codifying diplomatic law, namely, the Convention on Special Missions and the 1975 Vienna Convention, incorporated corresponding provisions on waiver of immunity, modelled on article 32 of the 1961 Vienna Convention and article 45 of the 1963 Vienna Convention. This could imply that the provisions of those two articles were considered viable.

208. The 1975 Vienna Convention on the Representation of States added a new aspect to the issue of waiver of immunity from jurisdiction in respect of civil proceedings. Articles 31 and 61 of the Convention introduced a special provision on the settlement of cases in respect of civil proceedings, if the sending State did not waive the immunity from jurisdiction of the head of delegation, other delegates and members of the diplomatic staff of the delegation and of other persons enjoying immunity from the civil jurisdiction of the host State. Such a provision was introduced as a method for a just settlement of disputes by peaceful means other than judicial proceedings.

209. This idea was based on the recommendation contained in General Assembly resolution 3531 (XXIV) of 8 December 1969, in connection with consideration of the draft articles on special missions, and in particular with the question of settlement of civil claims. The recommendation itself was inspired by article IV, section 14, of the Convention on the Privileges and Immunities of the United Nations which provides:

Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United Nations. Consequently a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.¹⁷⁰

This provision was reproduced *mutatis mutandis* in article V, section 16, of the Convention on the Privileges and Immunities of the Specialized Agencies,¹⁷¹ and in other international instruments of regional organizations.¹⁷²

210. The Commission, in its commentary to paragraph 5 of draft article 62 (Waiver of immunity) of the draft articles on the representation of States in their relations with international organizations, submitted the following to the United Nations Conference of 1975:

... the provision set forth in paragraph 5 places the sending State, in respect of civil action, under the obligation of using its best endeavours to bring about a just settlement of the case if it is unwilling to waive the immunity of the person concerned. If, on the one hand, the provision of paragraph 5 leaves the decision to waive immunity to the discretion of the sending State which is not obliged to explain its decision, on the other, it imposes on that State an objective obligation

¹⁶⁸ See footnote 163 above, and *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II, pp. 26 and 28, documents A/CONF.20/C.1/L.179 and Add.1 and A/CONF.20/C.1/L.200/Rev.2.

¹⁶⁹ Lee, *op. cit.* (footnote 103 above, *in fine*), p. 146.

¹⁷⁰ United Nations, *Treaty Series*, vol. 1, p. 22.

¹⁷¹ *Ibid.*, vol. 33, p. 261.

¹⁷² See para. (3) of the Commission's commentary to article 31 (Waiver of immunity) of the final draft on the representation of States in their relations with international organizations (*Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II, pp. 25-26).

which may give to the host State grounds for complaint if the sending State fails to comply with it. The legal obligation of the sending State to seek a just settlement of the case might lead, in the case of delegations as well as of missions, to the initiation of the consultation and conciliation procedures provided for in articles 81 and 82 [on conciliation], to which the host State can resort if the sending State does not find a means of settlement.¹⁷³

211. This provision, of course, should be considered as a practical method for the settlement of disputes in civil matters. Perhaps it may offer a more effective means of resolving problems by a procedure that may be less formal and more appropriate. Taking into account the specific features of the legal status and official functions of the diplomatic courier, the extrajudicial method of amicable solution of a dispute is more appropriate.

212. In the light of the above considerations, the Special Rapporteur presents the following draft article for examination and provisional approval:

Article 29. Waiver of immunity

1. **The sending State may waive the immunity of the diplomatic courier from jurisdiction. The waiver of immunity may be authorized by the head or a competent member of the diplomatic mission, consular post, special mission, permanent mission or delegation of that State in the territory of the receiving State or transit State.**

2. **The waiver must always be express.**

3. **The initiation of proceedings by the diplomatic courier shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.**

4. **The waiver of immunity from jurisdiction for the purposes of civil or administrative proceedings shall not be deemed to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.**

5. **If the sending State does not waive the immunity of the diplomatic courier in respect of a civil suit, it shall make every effort to settle the matter justly.**

¹⁷³ *Ibid.*, p. 42, para. (2) of the commentary.

III. Draft article on the status of the captain of a commercial aircraft or the master of a merchant ship entrusted with the transportation and delivery of a diplomatic bag

A. Introduction

213. As has already been indicated in the second report submitted by the Special Rapporteur, the use of aircraft personnel for the transportation and delivery of diplomatic bags represents a significant development in modern diplomatic communications.¹⁷⁴ Therefore the regulation of the legal status of the captain of a commercial aircraft or the master of a ship entrusted with such a mission has acquired practical importance. The survey of State practice clearly attests to the widespread recourse to civil aviation for the dispatch of diplomatic mail. The number of States using this kind of official communication has increased enormously and its use is not confined to States with limited financial means. The speedy and more economic delivery of the diplomatic bag through aircraft pilots has indeed become a common practice. This does not mean that the practical significance of the regular service of professional diplomatic couriers or of couriers *ad hoc* has declined. It is a well-known fact that States that entrust their diplomatic bags to the captains of aircraft employ either a professional courier or a courier *ad hoc* when they are concerned with the secrecy of the mail. Thus there are States that continue to maintain a regular courier service as an important part of the communications activities of

the Foreign Ministry. The extensive use of aircraft pilots or masters of commercial vessels for the delivery of the diplomatic bag should thus be considered as one of the means of official communication of States with their missions abroad.

214. The use of the captain of a commercial aircraft or the master of a merchant ship or, in rare cases, the truck driver, for the transportation and delivery of diplomatic mail has increased the practical need for the elaboration of relevant rules governing the operation of this kind of official communication. In fact, the necessity for such rules was pointed out at an early stage of the work of the Commission, at its ninth session, in 1957.¹⁷⁵ It is all the more justified now, when the utilization of diplomatic bags not accompanied by diplomatic couriers has acquired such importance.

215. The main problems relating to the legal status of the captain of a commercial aircraft or the master of a merchant ship may be identified as follows: (a) rights and duties of these persons in connection with the transportation, custody and delivery of the bag, including special arrangements or contracts concluded to that effect; (b) treatment by the authorities of the receiving or the transit State of the captain or the master, including the facilities and protection accorded

¹⁷⁴ Document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), para. 116.

¹⁷⁵ See *Yearbook ... 1957*, vol. 1, pp. 83-84, 399th meeting, paras. 82-87, and 400th meeting, paras. 1-16.

to them; (c) conditions and procedures for access of authorized persons of the diplomatic mission of the sending State concerned in order to take direct possession of the diplomatic bag. The examination of these three matters would be facilitated by a brief account of the legislative background of the existing provisions on this matter in the four codification conventions and an analytical survey of State practice as evidenced by international agreements and national laws and regulations.

B. Legislative background of the relevant provisions in the codification conventions

216. In the Special Rapporteur's two previous reports,¹⁷⁶ reference was made to the *travaux préparatoires* relating to the status of the captain of a commercial aircraft or the master of a merchant ship. There were also some indications on the evolving process of codification on this issue. However, it is suggested that this examination be supplemented by more information that could serve as a starting-point for the draft provision to be submitted for examination by the Commission.

217. During the consideration of article 21 of the draft articles on diplomatic intercourse and immunities by the Commission, one member divided pilots carrying diplomatic mail into three categories. The first was "the ordinary commercial airline pilot, carrying diplomatic mail merely as part of the aircraft's payload, and naturally not entitled to any diplomatic privileges". The second was "the commercial airline pilot who was also accredited as diplomatic courier". Cases of that kind, he maintained, were quite common, and "such pilots enjoyed the privilege of inviolability until they handed over their diplomatic mail to a representative of the mission, a formality generally carried out at the airport itself". The third category he alluded to was a "quite new category, of flying couriers operating planes allocated to embassies for the sole purpose of carrying diplomatic mail". He gave the example of the United States Embassy in Belgrade as having had two such planes at the time. However, since the innovation had not been introduced by agreement with the Yugoslav Government, the latter had protested. On further consideration, however, it had been agreed that the practice was in accordance with international law: States were entitled to use any means of communication in their relations with their missions, and all civil planes had the right to fly over countries signatories to the conventions of ICAO.¹⁷⁷

218. Another member of the Commission expressed the view that captains of aircraft carrying diplomatic mail were in exactly the same position as ordinary postmen unless they were provided with a diplomatic passport.¹⁷⁸ Some members stated that, if the same per-

son combined the functions of pilot and diplomatic courier, he was entitled to protection. If, however, he was merely a pilot and not an accredited courier, he was not entitled to protection.¹⁷⁹ One member pointed out that, if the sending State chose a means of communication such as the aeroplane, which prevented the receiving State from according the diplomatic courier proper protection, then the sending State must bear the consequences.¹⁸⁰ Some members considered that the use of aircraft pilots as couriers raised an important legal problem. The point raised was that, under the ICAO conventions, aircraft pilots were liable to arrest on personal grounds, "for instance if they were not properly qualified, or on grounds involving third party liability". It was thus maintained that "pilots accredited as diplomatic couriers, though still subject to the law, would have to be immune from arrest on such grounds".¹⁸¹ The Chairman of the Commission then observed that the majority of members of the Commission appeared to agree that, "where commercial airline pilots were involved, it was the diplomatic pouch only that enjoyed immunity and not the pilot".¹⁸²

219. In a commentary to article 25 of the draft articles on diplomatic intercourse and immunities, adopted by the Commission at its tenth session, in 1958, it was stated that the captain of a commercial aircraft carrying a diplomatic bag "is not regarded as a diplomatic courier", and that "this case must be distinguished from the not uncommon case in which a diplomatic courier pilots an aircraft specially intended to be used for the carriage of diplomatic bags"; in the latter case, "there is no reason for treating such a courier differently from one who carries the bag in a car driven by himself".¹⁸³

220. The 1961 Vienna Convention states in article 27, paragraph 7, that:

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

221. The Commission again embarked on the consideration of the status of the captain of a commercial aircraft entrusted with the transportation of a diplomatic bag in connection with the preparation of draft articles on consular intercourse and immunities. It was agreed that the draft article on consular communications through the employment of consular couriers and bags should be modelled on article 27 of the 1961 Vienna Convention.¹⁸⁴

¹⁷⁶ Second report: document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), paras. 66, 86, 116 and 118; third report: document A/CN.4/359 and Add.1 (*ibid.*), paras. 86 and 94.

¹⁷⁷ *Yearbook ... 1957*, vol. I, p. 84, 400th meeting, para. 4 (Mr. Bartos).

¹⁷⁸ *Ibid.*, para. 2 (Mr. Matine-Daftary).

¹⁷⁹ *Ibid.*, para. 8 (Mr. Verdross) and para. 14 (Mr. Sandstrom).

¹⁸⁰ *Ibid.*, para. 11 (Mr. Amado).

¹⁸¹ *Ibid.*, paras. 12-13 (Mr. Bartos, supported by Mr. Spiropoulos).

¹⁸² *Ibid.*, para. 15.

¹⁸³ *Yearbook ... 1958*, vol. II, p. 97, document A/3859, chap. III, sect. II, B, para. (6) of the commentary.

¹⁸⁴ *Yearbook ... 1961*, vol. II, p. 112, document A/4843, chap. II, sect. IV, commentary to article 35 para. (8).

222. At the United Nations Conference on Consular Relations, in 1963, Italy submitted an amendment, with reference to the status of the captain of an aircraft carrying a consular bag, aimed at deleting the words "but he shall not be considered to be a consular courier",¹⁸⁵ on the grounds that the captain in question "should be protected by certain safeguards".¹⁸⁶ However, the prevailing view was to retain the wording of article 27, paragraph 7, of the 1961 Vienna Convention, i.e. that the captain of a commercial aircraft "shall not be considered to be a diplomatic courier". It was argued that the position of a captain carrying a *consular bag* should not differ from that of a captain carrying a *diplomatic bag*, and that there might be confusion if the captain was entrusted with a diplomatic *and* a consular bag. The representative of Italy therefore proposed that the captain entrusted with a bag "shall be considered to be a courier *ad hoc*". However, that amendment was rejected at Committee level.

223. Thus the text adopted by the Conference (art. 35, para. 7) was modelled on article 27, paragraph 7, of the 1961 Vienna Convention, but included the captain of a passenger vessel among the persons to whom a consular bag could also be entrusted. It should be underlined that the main controversial issue in connection with the status of a captain carrying a consular bag was the legal protection of the captain in question, including the problem of granting him facilities, privileges and immunities in the exercise of his task in respect of the delivery of the bag.

224. As has already been pointed out, some delegations at the United Nations Conferences in 1961 and 1963 expressed opposition to according personal inviolability or immunity to the captain of a commercial aircraft or the master of a ship, whose position was governed by the international rules on civil aviation or maritime navigation. At the United Nations Conference in 1963, one delegation observed that, by virtue of those rules, the captain

had many civil liabilities and responsibility for the safety of his passengers and cargo . . . It would be a contradiction in law, and impracticable, to give a captain the immunities and inviolability of a consular courier simply because he was carrying a consular bag: to do so would mean that he would be unable to discharge his main responsibility as the commander of the vessel or aircraft. The question of inviolability arose in respect of the consular bag itself, which remained immune wherever it was. Since the principle of the inviolability of consular archives and documents always applied, there was no reason to confer immunity on the captain, who was merely the carrier in the same way as his aircraft or vessel. In 1961 and 1962 there had been occasion in India to arrest at least six captains of aircraft and several ships' captains for smuggling gold into the country.¹⁸⁷

225. Paragraph 6 of article 35 of the final draft articles of the Commission on consular relations, dealing with the status of a captain carrying a consular bag, was adopted with an amendment inserting at the beginning

¹⁸⁵ *Official Records of the United Nations Conference on Consular Relations*, vol. II (United Nations publication, Sales No. 64.X.1), p. 84, document A/CONF.25/C.2/L.102.

¹⁸⁶ *Ibid.*, vol. I, p. 328, *Second Committee*, 14th meeting, para. 43.

¹⁸⁷ *Ibid.*, p. 329, *Second Committee*, 15th meeting, para. 3.

of the last sentence the words "By arrangement with the local airport authorities".¹⁸⁸ That paragraph, as amended, thus became paragraph 7 of article 35 of the 1963 Vienna Convention.

226. Article 28, paragraph 7, of the draft articles on special missions,¹⁸⁹ as well as paragraph 7 of article 27 of the draft articles on permanent missions¹⁹⁰ and paragraph 8 of article 97 of the draft articles on the representation of States in their relations with international organizations,¹⁹¹ were copied *mutatis mutandis* from paragraph 7 of article 35 of the 1963 Vienna Convention.

227. Views on the legal protection of the captain of a commercial aircraft entrusted with a diplomatic bag have also been expressed on the occasion of the consideration of the present topic. During the debate in the Sixth Committee at the thirty-sixth session of the General Assembly, in 1981, one representative suggested that the captain of an aircraft carrying a bag should be accorded some degree of functional immunity.¹⁹² That issue was raised in connection with the consideration of the second report of the Special Rapporteur at the thirty-third session of the Commission, in 1981. The Special Rapporteur pointed out at the time that all multilateral conventions concluded under the auspices of the United Nations *explicitly* provided that the captain carrying a bag *should not be considered to be a diplomatic or any other kind of courier*. He suggested further that the main concern should be the *safety and inviolability* of the bag as well as the *facilities for access* to the aircraft or the ship in order to ensure the taking of *direct and free possession* of the bag.¹⁹³

228. In international law and in national laws and regulations, supported by well established State practice, the captain of a commercial aircraft or the master of a merchant ship is in full command on board the aircraft or ship on or flying over the high seas, and his position is also given due respect within maritime zones or air space under national jurisdiction. It may thus be assumed that the captain of an aircraft or the master of a ship needs no further protection than that which is generally recognized for commanding officers of aircraft or vessels in international law and national laws and regulations. The captain of an aircraft or the master

¹⁸⁸ *Ibid.*, vol. II, p. 81, document A/CONF.25/C.2/L.75.

¹⁸⁹ *Yearbook ... 1967*, vol. II, p. 361, document A/6709/Rev.1, chap. II, sect. D.

¹⁹⁰ *Yearbook ... 1968*, vol. II, p. 150, document A/CN.4/203 and Add.1-5. This article subsequently became article 28 (see *Yearbook ... 1969*, vol. II, p. 11, document A/CN.4/218 and Add.1).

¹⁹¹ *Yearbook ... 1970*, vol. II, pp. 293-294, document A/8010/Rev.1, chap. II, sect. B.

¹⁹² See the statement of the representative of Poland (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 48th meeting, para. 11); 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), para. 188.

¹⁹³ Document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), paras. 179-180.

of a ship is not supposed to deliver the bag outside the aircraft or the vessel under his command. Special legal protection would be justified only if it were required or admitted that the captain of an aircraft or the master of a ship had to deliver the bag to a diplomatic mission at a point outside the port of entry within the territory of the receiving State. In international law and in State practice, diplomatic mail has to be received by an authorized person of the mission of the sending State directly *at the aircraft or vessel*. Therefore, in the elaboration of the relevant rules governing the dispatch of a diplomatic bag through a commercial aircraft or merchant ship, the main attention has to be focused on the *conditions for access and direct and free possession of the bag*. Nevertheless, the captain of a commercial aircraft or the master of a merchant ship carrying a diplomatic bag should be treated with due respect and should be accorded special facilities for handing over the bag to an authorized person of the mission of the sending State or an official of that State.

C. Brief analytical survey of State practice

229. State practice, as reflected in international agreements and national laws and regulations, provides sufficient evidence of the implementation of the rules incorporated in the four codification conventions in regard to the status of the captain of a commercial aircraft entrusted with the transportation and delivery of a diplomatic bag. It attests to the viability of the existing rules but also shows the need for their further elaboration in order to provide a sound legal framework for the practical functioning of such a widely used means of official communication. State practice is quite revealing and conclusive on this matter.

230. A number of consular conventions contain provisions relating to the status of the captain of a commercial aircraft or ship carrying a diplomatic bag. It is generally recognized in such conventions that the captain of a merchant ship or commercial aircraft scheduled to land at an authorized port *may be entrusted to carry a consular bag*. It is further stipulated that the captain must be provided with *an official document indicating the number of packages constituting the bag*.

231. Most of the conventions in this category provide that the captain, by virtue of carrying a consular bag, is not to be considered to be a consular courier. They also provide that the consular post may send one of its members to take *direct possession* of the bag from the captain of the ship or aircraft after due arrangements have been made with the appropriate authorities. Article 25, paragraph 4, of the Consular Convention between France and Czechoslovakia (1969) is illustrative of this rule:

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

take possession of the bag directly and freely from the captain of the ship or aircraft or to deliver a bag to him.¹⁹⁴

232. Some conventions are however silent on the question of the status of the captain of a ship or commercial aircraft when he is carrying the consular bag.¹⁹⁵ It seems that they operate on the assumption that in this case the rules incorporated in article 35 of the 1963 Vienna Convention would apply.

233. Domestic laws and regulations also provide evidence as to the main trends of State practice in regard to the transmission of diplomatic bags not accompanied by diplomatic courier or diplomatic courier *ad hoc*, but entrusted to the captain of a commercial aircraft. The source materials available on this matter indicate the existence of a variety of rules. Nevertheless, most of the rules and regulations promulgated by a number of States are in conformity with the international rules embodied in the four codification conventions and are followed by a significant number of bilateral consular and other agreements.¹⁹⁶

234. Some details of the practice of certain States are worth mentioning by way of illustration. For instance, in Finland:

¹⁹⁴ See also the corresponding provisions in the consular conventions concluded between the following States: Austria and Romania (1970), art. 31, para. 5; Belgium and Czechoslovakia (1976), art. 18, para. 7; Belgium and Hungary (1976), art. 15 (b); Belgium and Turkey (1972), art. 19, para. 3; Belgium and USSR (1972), art. 19, para. 3; Bulgaria and Austria (1975), art. 30, para. 5; Czechoslovakia and Cyprus (1976), art. 16, para. 5; Czechoslovakia and Italy (1975), art. 26, para. 5; France and Algeria (1974), art. 13, para. 7; France and Poland (1976), art. 18, b; France and Senegal (1974), art. XI, para. 7; France and Tunisia (1972), art. 12, para. 7; Greece and Hungary (1977), art. 14, para. 6; Greece and Poland (1977), art. 18, b; Hungary and Bulgaria (1971), art. 14, para. 4; Hungary and Czechoslovakia (1973), art. 15, para. 4; Hungary and German Democratic Republic (1972), art. 14, para. 4; Mongolia and Czechoslovakia (1976), art. 14, para. 4; Poland and Cuba (1972), art. 16, para. 6; Poland and Mongolia (1973), art. 17, para. 4; Poland and Romania (1973), art. 31, para. 6; Romania and Italy (1967), art. 28, para. 6; Romania and USSR (1972), art. 24, para. 4; USSR and Benin (1976), art. 14, para. 4; USSR and Bulgaria (1971), art. 14, para. 4; USSR and Cyprus (1978), art. 13, para. 4; USSR and Czechoslovakia (1972), art. 13; USSR and Ethiopia (1977), art. 13, para. 4; USSR and Guinea (1976), art. 14, para. 4; USSR and Guinea-Bissau (1976), art. 13, para. 4; USSR and Hungary (1971), art. 14, para. 4; USSR and India (1973), art. 14, b; USSR and Mongolia (1972), art. 13, para. 4; USSR and Somalia (1971), art. 14, para. 4; United Kingdom and Czechoslovakia (1975), art. 16, para. 4; United Kingdom and German Democratic Republic (1976), art. 17, para. 5; United Kingdom and Mongolia (1975), art. 16, para. 4; United States of America and Bulgaria (1974), art. 14, para. 5; United States of America and China (1980), art. 12, para. 5.

¹⁹⁵ See the consular conventions between Belgium and Poland (1972), art. 15, para. 4; Belgium and Turkey (1972), art. 22, para. 4; and Poland and USSR (1971), art. 13, para. 4.

¹⁹⁶ See, for example, the rules of the Federal Republic of Germany on the Courier Service, reproduced in *Yearbook ... 1982*, vol. II (Part One), pp. 236-237, document A/CN.4/356 and Add.1-3; art. 9 of the Regulations concerning diplomatic and consular missions of foreign States on the territory of the USSR (*ibid.*, p. 241); para. 4 of the Rules concerning passage of the diplomatic bag of foreign States and of the personal effects of diplomatic couriers across the USSR frontier (*ibid.*, p. 242); and sect. I, para. 3 (c), of the information communicated by Yugoslavia (*ibid.*, p. 245).

When land or sea transportation is used (for heavy consignments), captains of Finnish ships or Finnish truck drivers may act as couriers.¹⁹⁷

In respect of "confidential, classified or urgent documents only", the Regulations concerning the diplomatic bag issued in 1968 by the Government of Spain provide:

... Such bags shall be entrusted, against receipt, to the flight personnel of national airlines, who shall deliver them at the place of destination, against receipt, to authorized members of diplomatic and consular missions or to official couriers of this Ministry. In exceptional cases, they may be delivered to the Chief of Operations of the Spanish airline Iberia.¹⁹⁸

Similar special arrangements have been made by several other States, for example Colombia, whose Ministry for Foreign Affairs has concluded a contract with the airline Avianca providing for the transportation of couriers and bags on routes served by that airline.¹⁹⁹

235. Sometimes domestic laws and regulations provide that special international agreements be concluded for the delivery of diplomatic mail entrusted to the captains of civil aircraft. Article 22 of Decree No. 4891 of 21 June 1961 of the Government of Argentina as amended by Decree No. 3408 of 12 April 1966, thus provides:

The diplomatic pouches of the States with which the Republic has signed special agreements shall continue to be dispatched according to the provisions of the same. Diplomatic privileges shall not be granted to the so-called "annexes" to diplomatic pouches, except in the cases contemplated in special agreements. The envelopes, sealed packets, or packages containing diplomatic mail that arrive in the country by air shall be dispatched directly by the customs authorities at the airport and delivered to a duly authorized person possessing the corresponding identity card. The said pieces, sealed and labelled, should be sent by the Ministries of Foreign Affairs and addressed to their respective diplomatic missions in Buenos Aires to the chief thereof. The shipments should be declared on a bill of lading.²⁰⁰

A similar provision is contained in article 52 of Decree No. 3135 of 20 December 1956 adopted by the Government of Colombia.²⁰¹

236. Since captains of commercial aircraft are not entitled to special treatment and are not accorded any privileges and immunities, national laws and international agreements concentrate basically on measures facilitating the delivery of the bag at the airport. For example, the administrative regulations concerning the diplomatic bag contained in the Manual of Diplomatic Service of Finland provide:

... The Ministry for Foreign Affairs has regular connections by air to all Finnish diplomatic missions and missions headed by appointed consuls-general. Since the captain of the aeroplane cannot, in accordance with article 27, para. 7, of the 1961 Vienna Convention, be considered a diplomatic courier, he or the member of the crew acting in his place as "courier" will be given only the reference numbers of

the packages constituting the bag and a certificate indicating the total number of the packages, but not a courier passport. In the instructions issued to Finnish missions, it is also emphasized that a courier consignment shall be delivered directly to the plane as well as received directly from the plane.²⁰²

237. It is useful to refer also, in connection with State practice in respect of the handing over of a diplomatic bag carried by the captain of an aircraft, to the regulations established by the Indonesian Government in 1978, 1980 and 1981. These regulations stipulate that

... the diplomatic bag which has been sealed is exempted from inspection and can be picked up from the airport platform on arrival.

If the diplomatic bag is not picked up immediately and is kept in storage, the issuance procedures are as stated in Government Regulation No. 8 of 1957 relating to the issuance of diplomatic materials.²⁰³

The regulations contain special rules regarding the procedure to be followed for taking possession of the unaccompanied bag. The person authorized by the foreign mission to receive the diplomatic bag is provided with a special pass issued by the competent Indonesian authorities (Perum Angkasa Pura). Direct possession of the bag may be taken upon presentation of the special pass. There are also contingency provisions in cases where the person in charge of receiving the diplomatic bag is not in possession of a special pass, etc. In all instances the main concern is to ensure the safety of the diplomatic bag and to facilitate its delivery.

D. Main constituent elements of the status of the captain of a commercial aircraft or the master of a merchant ship

238. The examination of the *travaux préparatoires* of the codification conventions and the brief analytical survey of State practice in regard to the employment of air or maritime transportation for the dispatch of unaccompanied diplomatic bags provide sufficient source material for drawing some conclusions concerning the status of the captain of an aircraft or the master of a merchant ship carrying diplomatic bags. The ground rules on this matter are set out in article 27, paragraph 7, of the 1961 Vienna Convention and the corresponding articles in the other codification conventions.

239. The employment of the captain of a commercial aircraft or the master of a merchant ship for the custody, transportation and delivery of diplomatic bags forms part of modern international law. The relevant rules are generally recognized and apply primarily to aircraft or vessels used in regular service on a scheduled itinerary and travelling to an authorized port of entry in the territory of the receiving State. It may be assumed that the same rules should apply to a chartered plane following an established itinerary in the territory of the receiving State, although on an *ad hoc* service. The same rules may apply to merchant ships used for an *ad hoc* voyage.

¹⁹⁷ Para. 5 of the information communicated by Finland (*ibid.*, p. 236).

¹⁹⁸ Art. 3 of the Spanish Regulations of 1 July 1968 (*ibid.*, p. 239).

¹⁹⁹ See p. 58 above, document A/CN.4/372 and Add.1 and 2.

²⁰⁰ See Pan American Union, *Documents and Notes on Privileges and Immunities with special reference to the Organization of American States* (Washington, D.C., 1968), p. 235.

²⁰¹ *Ibid.*, p. 271.

²⁰² Para. 4 of the information communicated by Finland, see footnote 197 above.

²⁰³ Paras 3 and 4 of the information communicated by Indonesia, see p. 59 above, document A/CN.4/372 and Add.1 and 2.

240. Article 27, paragraph 7, of the 1961 Vienna Convention and numerous bilateral agreements explicitly refer to the *captain* of a commercial aircraft or the *master* of a ship as a person entrusted with the transportation and delivery of diplomatic mail. However, in the domestic rules and regulations of certain States and in some international agreements, such tasks may also be assigned to members of the crew.²⁰⁴ In such cases it is assumed that such members of the personnel of the aircraft or vessel should be duly authorized by the captain of the aircraft or the master of the ship to act in his place or on his behalf. This rule may provide some flexibility warranted by practical considerations.

241. The captain of an aircraft or the master of a merchant ship entrusted with the transportation of the diplomatic bag has a special status which is recognized in international law and in national laws and regulations. He is provided with an *official document* indicating the number of packages constituting the diplomatic bag entrusted to him. This document may be considered as having the same character as the official document issued to a diplomatic courier. The captain of an aircraft and the master of a ship are not considered to be diplomatic couriers or diplomatic couriers *ad hoc*, but simply by reason of their mission they are entitled to be treated by the authorities of the receiving State with due respect and be given appropriate assistance for the handing over of the diplomatic bag entrusted to them to an authorized person of the diplomatic or other mission of the sending State. This assistance should be accorded particularly with a view to facilitating the *free and direct delivery* of the diplomatic bag to the authorized members of the diplomatic mission or other duly authorized officials of the sending State, who are allowed to have access to the aircraft or ship in order to take possession of the diplomatic bag.

242. When the aircraft or vessel is carrying a diplomatic bag from the mission of the sending State to the capital of that State, the persons entitled to take direct possession of the bag should be officials duly authorized by the Ministry for Foreign Affairs or other governmental institution of the sending State. The receiving State should be under the obligation to enact relevant rules and regulations and establish appropriate procedures in order to ensure the prompt and free delivery of the diplomatic bag at its port of entry. *Free and direct access* to the plane or ship should be provided

²⁰⁴ See the Finnish practice, para. 234 above.

for *reception* of *incoming* diplomatic mail at the authorized port of entry, or for the *handing over*, to the captain of the aircraft or the master of the ship or other authorized members of the crew, of *outgoing* diplomatic mail. In both instances the persons entitled to *receive* or *hand over* the diplomatic bag should be authorized members of the diplomatic mission of the sending State. This two-way facility—*reception* of the diplomatic bag from the captain or a crew member and *handing over* of the diplomatic bag to the captain or a crew member—should be reflected in appropriate provisions of the rules governing the dispatch of a diplomatic bag entrusted to the captain of a commercial aircraft or the master of a merchant ship.

243. In the light of the above considerations, the Special Rapporteur presents the following draft article for examination and provisional approval:

Article 30. Status of the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew

1. The captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew under his command may be employed for the custody, transportation and delivery of the diplomatic bag of the sending State to an authorized port of entry on his scheduled itinerary in the territory of the receiving State, or for the custody, transportation and delivery of the bag of the diplomatic mission, consular post, special mission, permanent mission or delegation of the sending State in the territory of the receiving State addressed to the sending State.

2. The captain, the master or the authorized member of the crew entrusted with the diplomatic bag shall be provided with an official document indicating the number of packages constituting the bag entrusted to him.

3. The captain, the master or the authorized member of the crew shall not be considered to be a diplomatic courier.

4. The receiving State shall accord to the captain, the master or the authorized member of the crew carrying the diplomatic bag the facilities for free and direct delivery of the diplomatic bag to members of the diplomatic mission of the sending State who are allowed by the receiving State to have access to the aircraft or ship in order to take possession of the diplomatic bag.

IV. Draft articles on the status of the diplomatic bag

A. Introduction

244. The draft articles on the status of the diplomatic bag form part III of the entire set of draft articles on the present topic, in conformity with the structure of the draft articles suggested by the Special Rapporteur and

provisionally adopted by the Commission.²⁰⁵ These draft articles are intended to cover both the diplomatic bag carried by diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, i.e. the bag

²⁰⁵ See footnote 1 above, *in fine*.

entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew, and the bag dispatched by postal services or other means, whether by land, air or sea. It is suggested, whenever reference is made to the status of the diplomatic bag, that these two kinds of diplomatic bags be borne in mind, unless the special legal features of the unaccompanied bag make it necessary to indicate that the reference is specifically to such a bag. Furthermore, it should be pointed out at the outset that, as in the case of the status of the diplomatic courier, it is proposed to proceed with the examination of the issues relating to the diplomatic bag from the same functional point of view, taking into consideration the multipurpose service of the bag in respect of all kinds of official missions—diplomatic missions, consular posts, special missions, permanent missions to international organizations and delegations to international conferences.²⁰⁶

245. The status of the diplomatic bag, as an important instrument in the exercise by States of freedom of communication for all official purposes, constitutes the core of the entire set of draft articles on the topic under consideration. It highlights many important elements of the status of the diplomatic courier, for the official function of the courier is to ensure the safety of the bag and its transportation and delivery to the final destination. The diplomatic courier is entitled to certain facilities, privileges and immunities in the territory of the receiving or the transit State even when he is not carrying a diplomatic bag and is proceeding from one mission of the sending State to another in order to pick up the diplomatic bag that is to be entrusted to him. The legal protection accorded to the diplomatic bag by national and international law is reflected in the facilities, privileges and immunities granted to the diplomatic courier for the performance of his official functions. The impact of such special legal protection of the diplomatic bag on the treatment of the diplomatic courier underlines the intrinsic relationship between the status of the diplomatic courier and that of the diplomatic bag; they are inseparable and cannot be considered in isolation from each other.

246. The increasing significance of the status of the diplomatic bag has also to be considered from the point of view of the widespread practice of using diplomatic bags not accompanied by diplomatic couriers. The volume of this kind of diplomatic communication and the importance of adequate protection of unaccompanied diplomatic mail further emphasize the need for the elaboration of appropriate rules that would supplement existing law in this field. There are some elements of the legal status of the diplomatic bag that still remain unresolved or problematic in spite of multilateral and bilateral treaties on diplomatic relations. It is therefore necessary to design a formula that will adequately protect the confidentiality of diplomatic communication

through the bags as well as the legitimate interests of the receiving State. The abuse of diplomatic bags has been sufficiently proved in practice to warrant a more equitable balancing of the interests of the sending State and the receiving State. In other words, a set of international rules governing the status of the bag, especially the régime of the facilities, privileges and immunities that should be accorded to the diplomatic bag, is lacking. Hence the adoption of appropriate rules regarding the status of the diplomatic bag would, it may be hoped, contribute to the prevention of possible abuses and provide an effective legal framework for the utilization of such important means of official communications.

247. It may be recalled that already in the second report submitted by the Special Rapporteur the basic elements of the legal status of the diplomatic bag were indicated.²⁰⁷ It was suggested that those elements were the following: *function* of the bag as an instrument for the exercise of freedom of communication; *indication of the status* of the bag through visible external marks; *content* of the bag; and *treatment* of the diplomatic bag by the authorities of the receiving or the transit State.

248. The Special Rapporteur therefore proposes to examine the following points relating to the status of the diplomatic bag and the corresponding draft articles:

(1) Indication of the status of the diplomatic bag, including the required visible external marks and the documents indicating the official character of the bag (art. 31).

(2) Rules relating to the content of the diplomatic bag (art. 32).

(3) Status of the diplomatic bag not accompanied by diplomatic courier, i.e. the bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew (art. 33).

(4) Status of a diplomatic bag dispatched by postal services (art. 34).

(5) General facilities accorded to the diplomatic bag (art. 35).

(6) Inviolability of the diplomatic bag (art. 36).

(7) Exemption from customs inspection (art. 37).

(8) Exemption from customs duties and all dues and taxes (art. 38).

(9) Protective measures to prevent any infringement of the diplomatic bag and applicable in the event of termination of the functions of the diplomatic courier (art. 39).

19. It is proposed to follow the same methodology in the examination of the above-mentioned issues, i.e. to survey briefly the *travaux préparatoires* of the relevant rules in the four codification conventions and to study State practice regarding the legal protection of diplomatic and other official bags used by States in communications with their missions abroad. In this connection, two observations are to be made. First, the second report, in 1981, contained an extensive survey of

²⁰⁶ See in this connection the Special Rapporteur's second report, document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), paras. 14-19; the third report, document A/CN.4/359 and Add.1 (*ibid.*), para. 7; and the present report, para. 5.

²⁰⁷ Document A/CN.4/347 and Add.1 and 2, para. 159.

the work of the Commission since 1955 and of the three United Nations codification conferences of 1961, 1963 and 1975, as well as of the debate in the Sixth Committee of the General Assembly in 1968 on the notion of "diplomatic bag" and its main elements.²⁰⁸ Reference to the *travaux préparatoires* will therefore be confined to the particular issues under consideration. Secondly, as has been pointed out (para. 243 above), specific aspects of the status of the diplomatic bag have seldom been dealt with in the domestic law and treaty practice of States. Case-law in this area is very scarce.

B. Indication of status of the diplomatic bag

1. EXTERNAL MARKINGS AND REQUIRED DOCUMENTS INDICATING THE OFFICIAL STATUS OF THE DIPLOMATIC BAG

250. Two main problems relate directly to proof of the official character of the diplomatic bag, namely the *external features* of the diplomatic bag and the *official documents* indicating its status. In addition, some other physical features of the diplomatic bag have to be taken into account, for instance its size and weight or other external characteristics, including the type or denomination of the consignment, such as envelope, pouch, sack, bag, box, brief-case or any kind of container. The term "diplomatic bag" has been employed as the common denomination for all packages containing official correspondence, documents or articles used for communications between the sending State and its missions abroad. It should also be mentioned that the basic requirements and rules regarding proof of status are identical for both the diplomatic bag accompanied by a diplomatic courier and the non-accompanied bag. Nevertheless, some specific features of the documents indicating the status of the bag concern especially the bag dispatched by postal services or entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew. These aspects, of a secondary and technical character, should be taken into account when considering the question of proof of status of the bag.

251. In conformity with long-standing State practice, diplomatic mail has always been identified through certain *visible external marks*. Above all, the diplomatic bag must be sealed with wax or lead seals bearing the official stamp by the competent authority of the sending State, usually the Ministry for Foreign Affairs. In some instances the diplomatic bag is also locked and fastened with fastenings or padlocks indicating the sending authority. The most common visible external feature of a diplomatic bag is a tag, or a stick-on label, on which is written "diplomatic correspondence", "official correspondence" or *expédition officielle*, with an indication of the sender and the consignee.

252. The *official documents* should indicate the character of the bag and the number of packages con-

stituting the bag. When the diplomatic bag is carried by a diplomatic courier, it is the courier who is provided with an official document testifying to his status as a courier and indicating the number of packages constituting the diplomatic bag carried by him. This document may take the form of "courier's passport", "courier's waybill", or "courier's certificate", in conformity with the regulations adopted by various States.²⁰⁹

253. When the diplomatic bag is entrusted to the captain of a commercial aircraft, the master of merchant ship, or an authorized crew member, that person also has to be provided with an official document indicating the number of packages constituting the bag. Such a document serves the purpose of testifying to the official character of the bag and its destination. As far as the visible external markings of this kind of diplomatic bag are concerned, they must meet all the requirements already indicated.

254. The diplomatic bag dispatched through postal services, as airmail or surface mail parcels, or shipped by sea or air freight, should be sealed and have the required visible external marks. The official documents attesting to the character of the bag are the postal documents issued by the receiving postal administration, or the documents for the consignment by ship or air freight, indicating the number of packages and their consignee.

255. For other physical features of the diplomatic bag there are optional requirements, such as the maximum size or weight of the container carrying the official correspondence, documents or articles for the official use of the diplomatic or other missions. This issue was discussed by the Commission and the codification conferences, especially with reference to diplomatic bags of excessive size or weight.²¹⁰ Postal regulations usually set certain limits on the maximum weight or size of postal parcels, but in all other instances this matter should be settled by agreement between the States concerned. The Executive Council of UPU has observed that the international carriage of diplomatic mail governed by bilateral or multilateral agreements has so far functioned without difficulty.

256. The external features and required documents indicating the official status of the diplomatic bag mentioned above were considered during the preparation of the relevant provisions of the four codification conventions. This may be seen from a brief account of the *travaux préparatoires*. State practice is another important source material on this issue, and should also be reviewed.

²⁰⁹ Details of national regulations on official documents used by diplomatic couriers may be found in the information communicated to the Secretariat by Governments and published in *Yearbook ... 1982*, vol. II (Part One), p. 231, document A/CN.4/356 and Add.1-3. The Special Rapporteur's third report (*ibid.*, pp. 261-262, document A/CN.4/359 and Add.1, paras. 75-76) contains information on the various forms or denominations of the official document with which the diplomatic courier is provided.

²¹⁰ See Cahier, *op. cit.* (footnote 115 above), pp. 213-214.

²⁰⁸ *Ibid.*, paras. 123-186.

2. BRIEF ANALYTICAL SURVEY OF STATE PRACTICE

257. During the preparation of draft articles on diplomatic intercourse and immunities between 1955 and 1958, the Commission, when considering the status of the diplomatic bag, concentrated on the problem of the inviolability of the diplomatic bag. However, provisions on proof of status and external features of the bag were occasionally discussed. In the draft articles on diplomatic intercourse and immunities submitted by the Special Rapporteur at the tenth session of the Commission, in 1958, article 21, paragraph 2, read as follows:

2. The diplomatic bag, which may contain only diplomatic documents or articles of a confidential nature intended for official use, shall be furnished with the sender's seal and bear a visible indication of its character ...²¹¹

At the same session, the Commission adopted the following final text as article 25, paragraph 4:

4. The diplomatic bag, which must bear visible external marks of its character, may only contain diplomatic documents or articles intended for official use.²¹²

In the commentary to this article, the Commission stated:

... In accordance with paragraph 4, the diplomatic bag may be defined as a bag (sack, pouch, envelope or any type of package whatsoever) containing documents and (or) articles intended for official use. According to the amended text of this paragraph, the bag must bear visible external marks of its character.²¹³

258. At the United Nations Conference on Diplomatic Intercourse and Immunities, in 1961, there were many amendments on several issues relating to the status of the diplomatic courier and the diplomatic bag, but they did not, in substance, affect the text mentioned above, which was incorporated as paragraph 4 of article 27 of the Vienna Convention on Diplomatic Relations.

259. During the consideration of draft articles on consular intercourse and immunities at the twelfth session of the Commission, in 1960, the Chairman of the Commission stated that

... consular correspondence should be placed in special envelopes bearing external marks and seals denoting its character; it would not be wise, however, to define the physical characteristics of bags of consular correspondence.²¹⁴

260. In the final draft articles on consular relations submitted by the Commission in 1963 to the United Nations Conference on Consular Relations, article 35, paragraph 4, provided:

4. The packages constituting the consular bag must bear visible external marks of their character and may contain only official correspondence and documents or articles intended for official use.²¹⁵

The 1963 Vienna Convention provides for no specific requirements as to marks except that the bag should have "visible external marks". These may or may not

be the official seal of the mission of the sending State. Some States, however, lay down such requirements as an internal administrative matter, and this seems to have been generally accepted.

261. Article 28, paragraph 4, of the Convention on Special Missions²¹⁶ was taken *mutatis mutandis* from the corresponding provision in the 1963 Vienna Convention, as were articles 27 and 57 of the 1975 Vienna Convention.²¹⁷

262. The treaty practice of States regarding indication of the official status of diplomatic, consular and other official bags has followed basically the provisions of the four codification conventions. Several consular conventions specifically provide that consular bags must be easily identifiable by some special external marks indicating their official character. Some examples are cited below.

263. The Consular Convention between the USSR and the United Kingdom (1965) provides, in article 16, paragraph 2, that

The official correspondence of a consulate, whatever the means of communication employed, as also the sealed pouches, bags, and other containers ... shall, provided they bear visible external marks of their official character, be inviolable ...²¹⁸

In other words, the inviolability of official correspondence is dependent upon its proper identification as such, and this is achieved by the exhibition of external marks, as stated above.

²¹⁶ See the history of the Commission's work on this article in the Special Rapporteur's second report, document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), paras. 147-153.

²¹⁷ *Idem.*, paras. 156 and 157.

²¹⁸ See also the corresponding provisions of the consular conventions concluded between the following States: Belgium and Poland (1972), art. 15, para. 2; Belgium and Turkey (1972), art. 22, para. 2; Belgium and USSR (1972), art. 19, para. 2; Belgium and United States of America (1969), art. 18, para. 2; Czechoslovakia and Cyprus (1976), art. 16, para. 3; Finland and Hungary (1971), art. 11, para. 3; Finland and Poland (1971), art. 10, para. 2; Greece and Bulgaria (1973), art. 13; Hungary and Bulgaria (1971), art. 14, para. 2; Hungary and Czechoslovakia (1973), art. 15, para. 2; Hungary and German Democratic Republic (1972), art. 14, para. 2; Hungary and United States of America (1972), art. 14, para. 3; Mongolia and Czechoslovakia (1976), art. 14, para. 2; Mongolia and German Democratic Republic (1973), art. 14, para. 2; Romania and USSR (1972), art. 24, para. 2; Romania and United States of America (1972), art. 21, para. 4; USSR and Benin (1976), art. 14, para. 2; USSR and Bulgaria (1971), art. 14, para. 2; USSR and Cuba (1972), art. 13, para. 2; USSR and Cyprus (1978), art. 13, para. 2; USSR and Czechoslovakia (1972), art. 13; USSR and Guinea (1976), art. 14, para. 2; USSR and Guinea-Bissau (1976), art. 13, para. 2; USSR and Hungary (1971), art. 14, para. 2; USSR and India (1973), art. 14, para. 2; USSR and Italy (1967), art. 28, para. 2; USSR and Mexico (1978), art. 14, para. 3; USSR and Mongolia (1972), art. 13, para. 2; USSR and Norway (1971), art. 12, para. 2; USSR and Somalia (1971), art. 14, para. 2; United Kingdom and Bulgaria (1968), art. 19, para. 3; United Kingdom and Czechoslovakia (1975), art. 16, para. 2; United Kingdom and German Democratic Republic (1976), art. 17, para. 2; United Kingdom and Hungary (1971), art. 14, para. 3; United Kingdom and Mongolia (1975), art. 16, para. 2; United Kingdom and Poland (1967), art. 21, para. 3; United States of America and Bulgaria (1974), art. 14, para. 2; United States of America and China (1980), art. 12, para. 2; United States of America and Poland (1972), art. 12, para. 3.

²¹¹ *Yearbook ... 1958*, vol. II, p. 17, document A/CN.4/116/Add.1.

²¹² *Ibid.*, p. 96, document A/3859, chap. III, sect. II.

²¹³ *Ibid.*, commentary to article 25, para. (4).

²¹⁴ *Yearbook ... 1960*, vol. I, p. 31, 532nd meeting, para. 32.

²¹⁵ See *Official Records of the United Nations Conference on Consular Relations*, vol. II, p. 23.

264. The Consular Convention between Romania and Mongolia (1967), provides in article 18, paragraph 3, that "the consular bag and its parts, if it consists of more than one package ... shall bear visible external marks of their character ...", while the Consular Convention between Romania and the United Kingdom (1968) provides, in article 34, paragraph 4, that "the consular bag and its components shall ... bear physical external marks of their official character ...". The Consular Convention between Czechoslovakia and Italy (1975) provides, in article 23, that "packages constituting the consular bag must bear visible external marks indicating their nature ...". It is to be noted here that even though different terms are used in the conventions cited above, they all point to one and the same objective, namely, ease of identification of official bags, pouches, sacks, boxes and other containers used to convey diplomatic or consular correspondence and objects intended for official use.²¹⁹

265. Only a limited number of bilateral conventions are silent on the question of indication of the status of the diplomatic or consular bag. This is conclusive proof of the main pattern of treaty practice on this matter.

266. Similarly, the national rules and regulations of many States contain provisions on indication of the official status of the bag. For example, the regulations concerning the diplomatic bag issued by the Government of Spain state:

The bag shall consist of one or more sealed bags or one or more sealed canvas packages. Each bag shall have attached to it a tag or a stick-on label in a visible position bearing the stamp of the Ministry of Foreign Affairs or the mission of origin and the words "diplomatic bag". Diplomatic bags may be addressed only to the Minister of Foreign Affairs, heads of diplomatic missions or officers in charge of a consular post. Consignments dispatched by other departments or addressed to other offices, even within the Ministry of Foreign Affairs itself, have no such status and are not, therefore, regarded as diplomatic bags by the Spanish or foreign customs.²²⁰

267. The Order issued by the Government of Czechoslovakia implementing the Customs Act of 1974 provides that diplomatic bags "shall be accompanied by an official document ... [which] must indicate ... the type of external cover ...".²²¹ A ministerial directive issued by the Government of the Republic of Korea states:

²¹⁹ See also the corresponding provisions in the consular conventions concluded between the following States: Austria and Romania (1970), art. 31, para. 3; Belgium and Czechoslovakia (1976), art. 18, para. 4; Belgium and Hungary (1976), art. 15, para. 4; Bulgaria and Austria (1975), art. 30, para. 3; France and Bulgaria (1968), art. 13, para. 3; France and Romania (1968), art. 25, para. 4; France and Tunisia (1972), art. 12, para. 4; Greece and Hungary (1977), art. 14, para. 3; Greece and Poland (1977), art. 18, para. 3; Hungary and Cuba (1969), art. 25, para. 4; Poland and Cuba (1972), art. 16, para. 3; Romania and Belgium (1970), art. 32, para. 4; Romania and Democratic People's Republic of Korea (1971), art. 20, para. 3; Romania and Italy (1967), art. 28, para. 4; USSR and Ethiopia (1977), art. 13, para. 2.

²²⁰ Art. 23 of the Regulations of 1 July 1968, reproduced in *Yearbook ... 1982*, vol. II (Part One), p. 239, document A/CN.4/356 and Add.1-3.

²²¹ Art. 7, para. 2, of the Order of 25 November 1974 (*ibid.*, p. 236).

Newspapers, books or other materials may be sent by air or sea mail depending on their urgency. In such a case, they shall bear the visible external mark "diplomatic freight".²²²

The rules concerning passage of the diplomatic bag of foreign States and the personal belongings of diplomatic couriers across the USSR frontier also provide:²²³

All parcels constituting the diplomatic bag must bear visible external indications of their character and may contain only official correspondence and documents or articles intended for official use.

Each parcel of the diplomatic bag must be sealed with wax or lead seals by the sender and must bear a gummed label with the words "expédition officielle".

The rules provide further:

The weight of the diplomatic bag sent to the USSR may be limited on the basis of reciprocity. There shall be no limit on the weight of the diplomatic bag sent in transit through the territory of the USSR.

269. In a circular note sent by the Federal Secretariat for Foreign Affairs of the Government of Yugoslavia to all diplomatic missions in Belgrade on the procedures applicable to receiving and dispatching diplomatic mail, it was stated:

... accompanied and unaccompanied diplomatic bags should bear visible external marks (a seal or *plomb*, address of the sender and address of the recipient) ...²²⁴

270. The United States of America has established specific practices in respect of pouches, couriers and open mail, recorded in a memorandum prepared by the Department of State in 1960.²²⁵ For instance, with regard to the Soviet Union, the memorandum provides:

All pouches sent into or out of the Soviet Union must be in perfect condition, with no holes or tears. Documentation, including visaed courier letters, must be precisely accurate.

In respect of Spain, the memorandum states:

This country has a past history of requiring absolutely correct documentation on pouches entering or leaving as well as a fairly regular inspection of the personal baggage of couriers ...

In the case of Czechoslovakia, the memorandum states:

The air waybills covering unaccompanied air pouches destined for the American Embassy, Prague, must bear a special certification that the contents are official correspondence and documents. This requirement exists with no other country.

As far as Switzerland is concerned, the memorandum draws attention to the fact that the Swiss authorities insist upon absolutely correct documentation on all types of pouches entering or leaving the country. The same comment is applied to Austria. In respect to Argentina, the memorandum states:

The Argentine customs officials frequently inspect the personal baggage of United States diplomatic couriers. As a result, the country reciprocates. To date, they have given us no trouble in moving diplomatic pouches in and out of the country, except when these pouches take the form of wooden crates. Other countries such as Switzerland and India also object to documentation of sealed crates as diplomatic pouches.

²²² Art. 29, para. 4, of the Regulation on the treatment of official documents, enacted in 1962 (*ibid.*, p. 238).

²²³ Para. 2 of the Rules (*ibid.*, p. 242).

²²⁴ Circular note 949/80 of 12 May 1980 (*ibid.*, p. 245).

²²⁵ See in Whiteman, *op. cit.* (footnote 36 above), pp. 218-219, the rules cited in paras. 270-271 of the present report.

271. The memorandum of the Department of State also contains some general rules. For example, it provides:

The use of international mails for the dispatch of official materials is limited by the possibility of censorship in the country of addressor and addressee as well as in those countries through which the mail must pass. The Department uses open mail for official materials on a very small scale ...

272. In conclusion, it may be pointed out that domestic regulations on indication of the status of the bag, supported by State practice, are in conformity with the existing general rules of conventional international law. It is also evident that harmonization of these rules and their further elaboration might serve a useful practical purpose.

273. In the light of these considerations on indication of the status of the diplomatic bag, the Special Rapporteur submits the following draft article for examination and provisional approval:

PART III

STATUS OF THE DIPLOMATIC BAG

Article 31. Indication of status of the diplomatic bag

1. The packages constituting the diplomatic bag shall bear visible external marks of their official character.

2. The packages constituting the diplomatic bag, if unaccompanied by a diplomatic courier, shall also bear a visible indication of their destination and consignee, as well as of any intermediary points on the route or transfer points.

3. The maximum size or weight of the diplomatic bag allowed shall be determined by agreement between the sending State and the receiving State.

C. Content of the diplomatic bag

1. SCOPE AND PRACTICAL SIGNIFICANCE OF THE RULES DETERMINING THE CONTENT OF THE DIPLOMATIC BAG

274. The rules governing the content of the diplomatic bag may comprise two kinds of provisions. First, there are those provisions that indicate, in general terms and in accordance with paragraph 4 of article 27 of the 1961 Vienna Convention, the permissible content of an official bag. Secondly, there are those concerning the appropriate preventive measures to be taken in order to ensure compliance with the rules on the content of the diplomatic bag and to avoid any abuses of the facilities, privileges and immunities accorded by international and domestic law to the diplomatic bag.

275. These two elements, namely the rule on the legally admissible content of the bag and its efficient implementation, have undeniable practical significance for the proper functioning of official communications in the interests of international co-operation and understanding. Their strict observance would prevent

suspicious on the part of the receiving State when the diplomatic bag is admitted into its territory, as well as on the part of the sending State when procedures for inspection, including the use of sophisticated devices for examination, are required by the receiving State. At present, none of the multilateral conventions in the field of diplomatic law has offered a viable solution to the problem of verification of the legally admissible content of the diplomatic bag. The increasing number of abuses has given particular importance to this problem, with certain political, economic and other implications.

2. STATE PRACTICE REGARDING THE REQUIREMENTS IN RESPECT OF THE CONTENT OF THE DIPLOMATIC BAG

276. The question of the permissible content of the diplomatic bag was the subject of special consideration in the preparation of the first two Vienna conventions, in 1961 and 1963. Subsequently, the Convention on Special Missions and the 1975 Vienna Convention simply followed the pattern established by the two earlier conventions. The groundwork on this issue was done by the Commission at its ninth and tenth sessions, in 1957 and 1958. Article 21, paragraph 2, of the draft articles on diplomatic intercourse and immunities submitted by the Special Rapporteur in 1958 provided:

2. The diplomatic bag ... may contain only diplomatic documents or articles of a confidential nature intended for official use ...²²⁶

277. Article 35, paragraph 4, of the final draft articles on consular relations, adopted by the Commission at its thirteenth session, in 1961, contained similar wording. It provided that packages constituting the consular bag "may contain only official correspondence and documents or articles intended for official use".²²⁷ In the commentary to this article, the Commission noted that the consular bag

... may be defined as a bag (sack, box, wallet, envelope or any sort of package) containing the official correspondence, documents or articles intended for official purposes or all these together.²²⁸

278. During the discussion on article 35, paragraph 3, at the United Nations Conference on Consular Relations, in 1963, the representative of the Philippines stated that paragraph 3

... provided safeguards against abuse of the bag, which must not contain anything other than official correspondence, and could be opened if there was reasonable cause to suspect that it did.²²⁹

279. Article 28, paragraph 5, of the Convention on Special Missions was adapted *mutatis mutandis* from article 27, paragraph 4, of the 1961 Vienna Convention. The same was true of article 27, paragraph 4, and article 57, paragraph 5, of the 1975 Vienna Convention, with particular reference to delegations to an organ or to a conference.

²²⁶ See footnote 211 above.

²²⁷ See *Official Records of the United Nations Conference on Consular Relations*, vol. II, p. 22.

²²⁸ *Ibid.*, p. 23, commentary to article 35, para. (5).

²²⁹ *Ibid.*, vol. I, p. 29, 10th plenary meeting, para. 8. See also the observations to the same effect of the representative of the Byelorussian SSR (*ibid.*, p. 31, para. 27).

280. The four codification conventions use almost the same language concerning the requirements in respect of the content of diplomatic, consular or other official bags. Thus there seems to be no objection with regard to the scope of the rule contained in article 27, paragraph 4, of the 1961 Vienna Convention and the corresponding provisions in the other codification conventions. Under this rule, the bags may include not only official letters, reports, instructions, information and other official documents but also cypher or other coding or decoding equipment and manuals, office materials such as rubber stamps or other articles used for office purposes, wireless equipment, medals, books, pictures, cassettes, films and *objets d'art* which could be used for the promotion of cultural relations. It is common practice in the case of books, films, exhibits etc., to use ordinary open consignments with the indication that they are intended for the official purposes of the mission.

281. The treaty practice of States basically conforms to the rules governing the content of the diplomatic bag embodied in the codification conventions. Some consular conventions specifically state that the pouches, bags and other containers "shall contain only official correspondence and objects intended exclusively for official use".²³⁰ Some use the term "may contain"²³¹ instead of "shall contain", while others use the term "must contain".²³² Besides "correspondence and objects", some include "documents" exclusively intended for the official use of the consulate.²³³

282. In some conventions, reference is made to the contents of the consular bag only in the context of the inviolability of the consular bag itself. It is provided, for example, in article 12, paragraph 2, of the Consular Convention between the United Kingdom and Spain

²³⁰ See, for example, the consular conventions concluded between the following States: France and Tunisia (1972), art. 12, para. 4; Hungary and United States of America (1972), art. 14, para. 3; Romania and Belgium (1970), art. 32, para. 4; Romania and United Kingdom (1968), art. 34, para. 4; United Kingdom and Czechoslovakia (1975), art. 16, para. 2; United Kingdom and German Democratic Republic (1976), art. 17, para. 3; United Kingdom and Hungary (1971), art. 14, para. 3; United Kingdom and Mongolia (1975), art. 16, para. 2; United States of America and Ireland (1950), art. 10, para. 3; United States of America and Republic of Korea (1963), art. 9, para. 2.

²³¹ See, for example, the consular conventions concluded between the following States: Austria and Romania (1970), art. 31, para. 3; Czechoslovakia and Cyprus (1976), art. 16, para. 3; Czechoslovakia and Italy (1975), art. 26, para. 3; France and Romania (1968), art. 25, para. 4; Poland and Romania (1973), art. 31, para. 4; Romania and Cuba (1971), art. 23, para. 3; Romania and Democratic People's Republic of Korea (1971), art. 20, para. 3; Romania and Italy (1967), art. 28, para. 4; United States of America and China (1980), art. 12, para. 2.

²³² See, for example, the consular conventions concluded between Hungary and Cuba (1969), art. 25, para. 4; Romania and United States of America (1972), art. 21, para. 4; United States of America and Poland (1972), art. 12, para. 3.

²³³ See, for example, the consular conventions concluded between the following States: Belgium and Czechoslovakia (1976), art. 18, para. 4; Belgium and Hungary (1976), art. 15, para. 4; France and Poland (1976), art. 18, para. 3; Greece and Hungary (1977), art. 14, para. 3; Greece and Poland (1977), art. 18, para. 3; Romania and Cuba (1971), art. 23, para. 3; Romania and Mongolia (1967), art. 18, para. 3; Romania and United Kingdom (1968), art. 34, para. 4.

(1961) that the consular bag is inviolable and may be opened only in the presence of authorized representatives of the sending State, "with a view to satisfying themselves that [it does] not contain anything other than official correspondence".²³⁴ It may be inferred from this that the consular bag may contain only official correspondence and objects intended exclusively for official use.

283. The Order issued by the Federal Ministry of Foreign Trade of Czechoslovakia implementing the 1974 Customs Act provides that diplomatic bags "may contain only diplomatic documents or articles intended for the official use of the mission".²³⁵ On the other hand, the ministerial directive regulating the treatment of official documents of the Government of the Republic of Korea provides that the diplomatic bag "shall contain documents and articles intended only for official use", and goes on to define the meaning of "official use" as covering:

(a) Official documents and materials necessary for the management of the missions abroad and for their diplomatic negotiations;

(b) Letters and other materials required for the maintenance of security;

(c) Semi-official correspondence and communications; and

(d) Other matters recognized as important by the Minister of Foreign Affairs and the heads of the missions.²³⁶

Some consular conventions choose to define the term "official correspondence". For example, the Consular Convention between Romania and Italy (1967) provides in article 28, paragraph 2, that "official correspondence" means "all correspondence relating to the consular post and its functions".²³⁷

284. The Government of Yugoslavia, on this point, expressed the following view:

... As to the contents, the existing conventions laconically stipulate that a diplomatic bag "may contain only diplomatic documents or articles intended for official use". Prior to the adoption of the 1961 Vienna Convention on Diplomatic Relations, there prevailed the notion that the diplomatic bag could contain only "diplomatic documents" and not "articles intended for official use". Obviously

²³⁴ See also the corresponding provisions in the consular conventions concluded between the following States: Belgium and Turkey (1972), art. 22, para. 3; Belgium and United Kingdom (1961), art. 17, para. 4; Belgium and United States of America (1969), art. 18, para. 3; Bulgaria and Austria (1975), art. 30, para. 3; Finland and Poland (1971), art. 10, para. 2; Finland and Romania (1971), art. 29, para. 2; France and Algeria (1974), art. 13, para. 3; France and Bulgaria (1968), art. 13, para. 3; France and Senegal (1974), art. XI, para. 3; Greece and Bulgaria (1973), art. 13, para. 2; Japan and United States of America (1963), art. 10, para. 2; Sweden and Romania (1974), art. 30, para. 3; United Kingdom and France (1951), art. 13, para. 4; United Kingdom and Japan (1964), art. 13, para. 3; United Kingdom and Norway (1951), art. 12, para. 4; United States of America and Bulgaria (1974), art. 14, para. 3; United States of America and France (1966), art. 15, para. 3; United States of America and Poland (1972), art. 12, para. 3.

²³⁵ Art. 7, para. 3, of the Order of 25 November 1974, reproduced in *Yearbook ... 1982*, vol. II (Part One), p. 236, document A/CN.4/356 and Add.1-3.

²³⁶ Art. 25 of the Regulation on the treatment of official documents (*ibid.*, p. 238).

²³⁷ See also the consular conventions between France and Algeria (1974), art. 13, para. 2, and between France and Bulgaria (1968), art. 13, para. 2.

there are reasons why almost all States have accepted the solution outlined in article 27, paragraph 4, of the 1961 Vienna Convention. The Yugoslav Government nevertheless is of the opinion that there exist underlying causes for the reassessment of this provision in terms of having only some articles serving official purposes dispatched by diplomatic bag. It is well known that some States parties to the 1961 Vienna Convention have adopted internal regulations listing each article separately and limiting the number to three or four articles; obviously they are not satisfied with the solution contained in the existing conventions.²³⁸

285. Apart from treaty practice and national regulations, there have been a few cases relating to the content of the diplomatic bag. Some of them occurred prior to the United Nations codification conventions, while others were the subject of diplomatic correspondence and negotiations after the Vienna Conventions of 1961 and 1963 entered into force.

286. For example, in 1938, an American film producer, Mr. de la Varre, used the French diplomatic pouch to bring films into the United States without paying customs duties. The case was brought before a grand jury in the jurisdiction of the Federal District Court of the Southern District of New York. The issue became the subject of diplomatic correspondence between the French Ambassador to the United States, Mr. Saint-Quentin, and the Acting Secretary of State of the United States, Mr. Welles. The French Ambassador presented his regrets on this account and gave an assurance that the misuse of the bag was due to "ignorance of the American regulations or lack of surveillance on the part of certain French officials who handled the shipment by pouch of the films in question" and not to the deliberate intention to facilitate "the usage of the diplomatic pouch by an American businessman in order to permit him to defraud the Federal Customs". At the same time, the Ambassador admitted the responsibility of the French authorities and stated that "the French Government has taken all measures necessary to correct the irregularities which may have been committed in the use of the diplomatic pouch and prevent their occurrence".²³⁹

287. In 1973, the Nigerian Government, in order to combat trafficking in Nigerian currency, introduced, for a period of six weeks beginning 1 January 1973, search by the customs authorities with a view to preventing the illegal import into the country of local currency. In its notes to the heads of diplomatic and consular missions accredited to Nigeria, the Ministry of External Affairs stated that those measures were "without prejudice to their immunities and privileges, which the Federal Republic of Nigeria respectfully upholds under the Vienna Convention on Diplomatic Relations, 1961, as well as the Vienna Convention on Consular Relations, 1963", but that the Ministry wished to confirm that "no packages or articles consigned to any person, diplomatic agent, diplomatic or consular mission, organization or institution may be immune from

search". In its note of protest against the Nigerian decision to search diplomatic bags, dated 19 January 1973, the United States Embassy pointed out that "sealed consular pouches, bags and other containers shall be inviolable when they contain nothing but official communications and are so certified by a responsible office of the sending State".²⁴⁰ This case related more to the problem of the inviolability of the diplomatic bag, but it also raised some issues regarding the content of the bag.

288. Since none of the four codification conventions contains provisions aimed at the solution of the problems of verification of the content of the bag, it is perhaps advisable to provide a possible legal remedy against abuses, for example by creating an obligation for the sending State to take appropriate measures to prevent abuses and, in cases when they occur, to prosecute and punish any person under its jurisdiction responsible for the abuse. Such a provision would add to the responsibility of the sending State. In case of abuse of the bag, the sending State not only has a general responsibility to the receiving State for violation of its treaty obligation under international law, but it is also responsible under its domestic law, for prosecuting and punishing the person who abused the bag. Hence States should enact domestic rules and regulations to provide for the prosecution and punishment of their officials for misuse of the diplomatic bag. Such measures could be of a legislative and administrative nature and would be undertaken in conformity with the domestic law and international obligations of the State.

289. In the light of these considerations regarding the requirements for the content of the diplomatic bag, the Special Rapporteur submits the following draft article for examination and provisional approval:

Article 32. Content of the diplomatic bag

1. The diplomatic bag may contain only official correspondence and documents or articles intended exclusively for official use.

2. The sending State shall take appropriate measures to prevent the dispatch through its diplomatic bag of articles other than those referred to in paragraph 1, and shall prosecute and punish any person under its jurisdiction responsible for misuse of the diplomatic bag.

D. Status of the diplomatic bag entrusted to the captain of a commercial aircraft or the master of a merchant ship

1. PRACTICAL SIGNIFICANCE OF THIS TYPE OF DIPLOMATIC BAG

290. The diplomatic bag not accompanied by diplomatic courier has acquired a prominent place in modern diplomatic communications. The frequency of

²³⁸ Sect. I, para. 3 (b) of the information communicated by Yugoslavia (*Yearbook ... 1982*, vol. II (Part One), p. 245, document A/CN.4/356 and Add.1-3).

²³⁹ See Whiteman, *op. cit.* (footnote 36 above), pp. 217-218.

²⁴⁰ See 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. 537-538.

the use of this kind of diplomatic bag is evidence of a widespread State practice of increasing dimensions and significance. There is no doubt that among the various types of unaccompanied diplomatic bags the most widely used is diplomatic mail entrusted to the captain of a commercial aircraft or an authorized member of the crew. It has proved its practical advantages and viability in terms of economy, speed and reasonable safety, for although not accompanied by a courier it is still in the custody of a responsible person. The employment of the master of a passenger or other merchant ship or of an authorized member of the crew has not been so frequent, but it has occurred where seaborne transport is the most convenient means of communication or where the shipment of sizeable consignments is more economical by sea. In some instances the diplomatic bag may be entrusted to the driver of a truck used for the international transport of goods.²⁴¹

291. The practical importance of the diplomatic bag not accompanied by a professional diplomatic courier or a diplomatic courier *ad hoc* was emphasized by Governments in written comments and during the discussions on this topic in the Sixth Committee of the General Assembly.²⁴² The use of diplomatic bags entrusted to the captain of a commercial aircraft or a member of its crew has become an almost regular practice of developing countries, for economic considerations. At present this kind of diplomatic bag is also widely used by many other States.

292. As has been pointed out above (paras. 229-237) in connection with the status of the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew, there has been a growing number of bilateral agreements containing special provisions on the dispatch of a diplomatic or consular bag entrusted to the captain of an aircraft or the master of a ship.²⁴³ Following the rule established by article 27, paragraph 7, of the 1961 Vienna Convention, the bilateral agreements in question contain special provisions concerning the unaccompanied bag. Most of them refer specifically to: (a) the official document indicating the number of packages constituting the diplomatic bag, and (b) the procedures to be followed for the taking of free and direct possession of the bag by an authorized member of the mission from the captain of the aircraft or the master of the ship.²⁴⁴ In conformity with these basic rules, some States have adopted national rules and regulations on this matter. In some instances, the regular utilization of the services of airlines for the dispatch of diplomatic bags is based on long-term contracts or special arrangements between the Ministry for

Foreign Affairs and the airlines.²⁴⁵ As has been pointed out above (para. 235), some States have entered into special agreements governing the practical procedures to be used for the delivery of diplomatic bags entrusted to the captain of a civil aircraft.

2. MAIN CHARACTERISTICS OF THE DIPLOMATIC BAG ENTRUSTED TO THE CAPTAIN OF A COMMERCIAL AIRCRAFT, THE MASTER OF A MERCHANT SHIP OR A MEMBER OF THE CREW

293. Taking into consideration the practical significance of the diplomatic bag entrusted to the captain of an aircraft, the master of a ship or a member of the crew, it would be well justified to elaborate more specific rules relating to the status of such a bag and to its legal protection, which would entail certain obligations on the part of the receiving and the transit States. These rules should be considered in conjunction with those on the status of the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew under his command, as proposed in article 30 of the present draft articles (see paras. 238-243 above). Furthermore, they should contain a special reference to the relevance of the general requirements applicable to any diplomatic bag regarding proof of status and content, as dealt with in articles 31 and 32 proposed above (paras. 250-289), as well as its legal protection, including the facilities, privileges and immunities accorded to the diplomatic bag whether or not accompanied by diplomatic courier or diplomatic courier *ad hoc* (see paras. 322-365 below).

294. The diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew must meet the same requirements in respect of its external features as that accompanied by a courier. It should be sealed with wax or lead seals bearing the official stamp by the competent authority of the sending State. Because the bag is not carried by a professional or an *ad hoc* courier, even greater care may be required to ensure proper fastening, or closing with special padlocks, since it is forwarded as a consignment entrusted to the captain of an aircraft, the master of a ship or a member of the crew. As far as the *visible external marks* are concerned, they are also absolutely necessary for proof of the official status of the unaccompanied bag, together with the document indicating the number of packages constituting the diplomatic bag and its consignee. It is also mandatory to provide the bag with a tag or stick-on label indicating its character as official mail, as well as the sender and the addressee. It has been suggested that a special colour be established for the non-accompanied diplomatic bag to make it easily identifiable and facilitate customs clearance and other formalities at the frontier of the transit or the receiving State.

295. It is absolutely clear that the requirements for the legally permissible content of the diplomatic bag in general, set out in article 27, paragraph 4, of the 1961

²⁴¹ See the Finnish practice referred to in para. 234 above.

²⁴² *Yearbook ... 1979*, vol. II (Part Two), pp. 180-181, report of the Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, item 15 (a).

²⁴³ See footnote 194 above.

²⁴⁴ Most of the bilateral consular conventions also provide explicitly that the captain of an aircraft or the master of a ship shall not be considered to be a diplomatic courier.

²⁴⁵ This is the case, for example, in Spain and Colombia (see para. 234 above).

Vienna Convention and incorporated in paragraph 1 of article 32 of the present draft articles, must be fully applicable in regard to all kinds of unaccompanied bags, including those that are entrusted to the captain of an aircraft or the master of a ship. Nevertheless, this rule is of such paramount significance for the proper functioning of official communications and prevention of abuses in connection with the diplomatic bag that the draft article on the status of this type of diplomatic bag should include a specific reference to the mandatory requirement that the bag must contain only official correspondence and documents or articles intended exclusively for official use.

296. The diplomatic bag entrusted to the captain of an aircraft, the master of a ship or an authorized member of the crew should be given the same measure of legal protection and be accorded the same facilities, privileges and immunities as are granted by the receiving or the transit State to the bag accompanied by a professional or *ad hoc* diplomatic courier. As was pointed out in the second report submitted by the Special Rapporteur, the diplomatic bag which is not in the direct and permanent custody of a diplomatic courier requires an even greater measure of protection and preferential treatment in order to ensure its safe and unimpeded transportation and delivery.²⁴⁶ This aspect of the status of the unaccompanied bag has been indicated in the comments by Governments. The rule relating to the legal protection and inviolability of such a bag has been widely upheld by the practice of States during the last decades.²⁴⁷

297. One of the prerequisites for the appropriate custody of the unaccompanied diplomatic bag is to entrust such a bag to the captain of an aircraft or the master of a ship, as the commanding officer, or to an authorized member of the crew. Some Governments in their written comments explicitly pointed out that, in that case, the bag should be entrusted to the highest ranking officer of the aircraft or the ship.²⁴⁸

3. OBLIGATIONS OF THE RECEIVING OR THE TRANSIT STATE

298. It is obvious that the main requirement for the safe delivery of the unaccompanied diplomatic bag is the obligation of the transit State or the receiving State to take appropriate measures to ensure the protection of the diplomatic bag and its expeditious transmission to its destination. These measures may be of a legislative or an administrative character. Their scope should be determined by the functional necessity underlying the status of the diplomatic bag and should comprise facilities for the safe and speedy transportation and delivery of the bag, its inviolability, exemption from customs inspection, duties and all dues and taxes, as

²⁴⁶ Document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), para. 175.

²⁴⁷ See footnote 242 above.

²⁴⁸ See, for example, the written comments of Chile, para. 15, in *Yearbook ... 1979*, vol. II (Part One), p. 220, document A/CN.4/321 and Add.1-7; and the second report of the Special Rapporteur, document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), para. 177.

well as some other protective measures that might be necessary in special circumstances. As has been pointed out above (paras. 229-237), the practice of States, as evidenced by international agreements and national laws and regulations, shows conclusively that the above-mentioned rules are implemented. It should be pointed out, however, that, on the subject matter under consideration, i.e. the safe delivery of the bag, these rules are confined to general rules regarding the inviolability of the bag and the procedures to be followed for the taking possession of the bag by authorized members of the mission of the sending State at the apron of the airfield, the airport arrival platform or on board the aircraft.²⁴⁹ Thus it might be desirable to elaborate some more specific rules.

299. In the light of the above considerations concerning the status of the diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew, the Special Rapporteur submits the following draft article for examination and provisional approval:

Article 33. Status of the diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew

The diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew shall comply with all the requirements set out in articles 31 and 32, and shall enjoy the facilities, privileges and immunities, specified in articles 35 to 39, accorded to the diplomatic bag by the receiving State or the transit State while on its territory.

E. Status of the diplomatic bag dispatched by postal services or other means

1. INTRODUCTION

300. The diplomatic bag dispatched by postal channels or other means, whether by land, air or sea, constitutes another type of unaccompanied diplomatic bag. The common feature of these diplomatic bags is that they are dispatched either by public postal services or by other ordinary means of communication or transportation used for commercial purposes: surface (road, rail or boat), air or maritime transport. Nevertheless, the conveyance of a diplomatic bag by the postal services as postal mail, letter-post item or postal parcel, on the one hand, and the transmission of the bag as a consignment by other means of transportation, on the other, present certain specific features that should be taken into account. It is therefore suggested that the dispatch of a diplomatic bag by public postal channels should be considered separately from the use of other means of transportation, whether by land, air or sea, it being understood that in both instances the subject of the examination is the unaccompanied diplomatic bag.

²⁴⁹ See the Indonesian practice, para. 237 above.

2. USE OF POSTAL SERVICES FOR THE DISPATCH OF DIPLOMATIC BAGS

301. The use of public postal services and other ordinary means of transportation of goods for the dispatch of an unaccompanied diplomatic bag had been established in the practice of States long before the 1961 Vienna Convention. The rules governing the sending of this kind of diplomatic bag formed part of customary international law and were embodied in a considerable number of bilateral agreements and domestic regulations. At the same time, the dynamic development and intensification of modern diplomatic communications have increased the practical significance of the rules governing the forwarding of diplomatic bags through postal services and other means. However, it may be pointed out that the United Nations Conference on Diplomatic Intercourse and Immunities tended to concentrate its attention on the diplomatic bag entrusted to the captain of a commercial aircraft. Thus, while the 1961 Vienna Convention contains a special provision, in paragraph 7 of article 27, on this kind of diplomatic bag not accompanied by diplomatic courier, it refers in only very general terms, in paragraph 1 of the same article, to the right of the sending State and its missions to "employ all appropriate means" of communication. This broad notion of *all appropriate means* would certainly cover the postal services and other means of communication and transportation. However, the absence of specific provisions relating to such means of transport of the unaccompanied diplomatic bag would justify the elaboration of a draft article dealing with the status of this kind of diplomatic bag.

302. Before proceeding to the examination of the specific features of the diplomatic bag conveyed by public postal channels and of the bag dispatched by other means, it should be emphasized first of all that the basic requirements concerning proof of official status and content of the diplomatic bag must apply fully to this type of unaccompanied bag. Secondly, the diplomatic bag should enjoy the same régime of protection, particularly regarding its inviolability and expeditious forwarding, as that established for the diplomatic bag carried by professional or *ad hoc* diplomatic courier or the diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew. For it is absolutely essential for the proper functioning of official communications that the unaccompanied bag dispatched by postal channels or other means should reach its final destination as expeditiously as possible and without any infringement of its inviolability.

3. PRACTICE OF STATES, INCLUDING INTERNATIONAL AGREEMENTS AND DOMESTIC REGULATIONS, REGARDING USE OF POSTAL SERVICES

303. A brief analytical survey of the practice of States in respect of the use of ordinary postal services for the conveyance of diplomatic bags may provide the background for the specific provisions on this matter to be suggested by the Special Rapporteur. This practice

has been confirmed by several international agreements, domestic rules and regulations and diplomatic correspondence. It should be noted that the bilateral agreements in question may be placed in three main categories: (a) a significant number of consular conventions which contain only a general reference to the use of public or ordinary means of communication;²⁵⁰ (b) consular or other bilateral agreements which simply mention the postal services among the means of communication without further elaborating on the functioning of this kind of diplomatic communication;²⁵¹ (c) special agreements for the transmission by post of diplomatic correspondence or the exchange of diplomatic correspondence through postal channels by airmail.²⁵² Some States have also adopted special administrative and postal regulations which have a certain bearing on the subject matter under consideration.²⁵³ Another pertinent source of information regarding the treatment of diplomatic correspondence conveyed by postal mail as letter-post items or postal parcels is the decisions of the governing bodies of UPU, which will be briefly examined in the present report.

²⁵⁰ Nearly all the consular and other bilateral agreements mentioned in the study of the topic under consideration in the previous reports and the present report contain a general provision about the use of "ordinary means of communication", "public means of communication", "appropriate means of communication" or "suitable means of communication". See e.g. the consular conventions referred to in footnotes 174, 218, 219 and 233 above.

²⁵¹ See, for example, the consular conventions concluded between the following States: Belgium and United Kingdom (1961), art. 17, para. 1; Czechoslovakia and Yugoslavia (1963), art. 15; France and Cameroon (1960), art. 12; Sweden and United Kingdom (1952), art. 12, para. 3; United Kingdom and France (1951), art. 13, para. 3; United States of America and Ireland (1950), art. 10, para. 2.

²⁵² See, for example, the exchanges of notes concerning diplomatic correspondence between the following States: *Brazil and Argentina*—Exchange of notes constituting an agreement for the exchange of official mail by diplomatic pouch (6 July 1961); *Brazil and Uruguay*—Exchange of notes constituting an administrative agreement for the exchange of diplomatic correspondence by airmail in special bags (16 December 1944); *Brazil and Venezuela*—Exchange of notes constituting an administrative agreement for the exchange of official correspondence by airmail (30 January 1946); *Ecuador and Brazil*—Exchange of notes constituting an agreement for the exchange of diplomatic correspondence by airmail in special diplomatic bags (15 November 1946 and 31 May 1947); *United Kingdom and Dominican Republic*—Exchange of notes constituting an agreement for the exchange through postal channels without prepayment of postage of diplomatic bags containing non-confidential correspondence (1 and 9 August 1956); *United Kingdom and Mexico*—Exchange of notes constituting an agreement for the transmission of diplomatic correspondence between London and Mexico City (27 September 1946); *United Kingdom and Netherlands*—Exchange of notes constituting a reciprocal agreement for the exchange through postal channels without prepayment of postage of diplomatic bags containing non-confidential correspondence (30 November 1951); *United Kingdom and Norway*—Exchange of notes constituting an agreement concerning the transmission by post of diplomatic correspondence (23 December 1946 and 15 January 1947).

²⁵³ See, for example, United States of America, *Code of Federal Regulations, Title 39—Postal Service (Revised as of August 1973)* (Washington, D.C., 1973), p. 63, part 56, para. 56.1, "Consular and commercial invoices"; Colombia, art. 49 of decree No. 3135 of 20 December 1956 (Pan American Union, *op. cit.* (footnote 200 above), p. 270); Ecuador, art. 13 of order No. 1422 of 31 December 1963 of the Supreme Court (*idem.*, p. 292).

304. The special agreements for the transmission of diplomatic bags through postal channels usually contain specific provisions relating to *external features*, including visible external marks, seals and safety devices such as locks, padlocks and safety bolts. The Agreement of 27 September 1946 between the United Kingdom and Mexico stipulates:

The bag shall bear the appropriate seals, and may be locked if desired, the keys resting in the custody of the respective Foreign Offices and embassies.

Identical provisions are incorporated in the agreements between the United Kingdom and the Netherlands and between the United Kingdom and the Dominican Republic. The note of 2 September 1947 of the United Kingdom Embassy in Oslo addressed to the Ministry for Foreign Affairs of Norway, constituting part of the Exchange of notes between the Governments of the two countries concerning the transmission by postal services of diplomatic correspondence, states:

It is understood that bags intended for transmission by airmail should be clearly marked for conveyance in this manner, and that, so far as bags to be dispatched by the Norwegian Embassy in London are concerned, they shall be conveyed by aircraft of British European Airways or Norwegian Airlines operating from London to Oslo.

For its part, the Ministry for Foreign Affairs of Norway, in its note of 30 October 1947, confirmed that understanding concerning the transmission by air of diplomatic bags clearly marked and sealed. The agreements concluded by Brazil with Argentina, Ecuador, Venezuela and Uruguay also provide that the "special diplomatic pouches" or "special bags" must be provided with locks, padlocks, safety bolts or other safety devices by the Ministry for Foreign Affairs of the sending State or its embassies, which shall retain possession of the keys or pliers of their bags. The use of such safety equipment is optional in the prevailing practice of States, the general rule being that the diplomatic bag dispatched through postal channels must bear visible external marks and seals testifying to its official character.

305. Most of the special agreements on the transmission of diplomatic bags by the postal services contain specific provisions regarding the maximum size and weight of the consignments.²⁵⁴ In some agreements, the type of container (sacks, pouches, bags, etc.), or the material of which those containers are made, e.g. canvas or other lighter material, light bags or envelopes, is specified.²⁵⁵ The Agreement between Ecuador and

²⁵⁴ The mutually agreed standards regarding weight and size range from 2 kg to 30 kg or more, and from 30 × 40 cm to 124 × 66 cm. In some instances there are different standards for dispatches by air and for dispatches by surface or parcel post. In the agreements between Brazil and Argentina, the maximum weight of the diplomatic bag is set at 15 kg and its size at 50 × 50 cm; between Brazil and Uruguay, at 2 kg and 40 × 30 cm; between Brazil and Venezuela, at 5 kg and 60 × 40 cm; between Ecuador and Brazil, at 2 kg and 40 × 60 cm. In the practice of the United Kingdom, as evidenced by several special agreements, it is generally provided that the weight of the diplomatic bag must not exceed 66 pounds avoirdupois (30 kg) and the size 49 × 26 inches (124 × 66 cm) (see the exchanges of notes between the United Kingdom and several States referred to in footnote 252 above).

²⁵⁵ See, for example, the exchanges of notes between Brazil and Venezuela, between Ecuador and Brazil, and between the United Kingdom and Norway (*ibid.*).

Brazil stipulates that each of the parties shall "be authorized to dispatch airmail not more than four bags per month".²⁵⁶ Some of the agreements refer specifically to compliance with the international postal regulations established by UPU.

306. All the special agreements under consideration refer explicitly to the content of the diplomatic bag in general terms as "diplomatic correspondence", "official correspondence", "diplomatic mail", etc., without specifically indicating any requirements regarding the admissible content of the bag. Perhaps one of the reasons is that most of these agreements were concluded prior to the 1961 Vienna Convention. It is however obvious that the rule contained in paragraph 4 of article 27 of that Convention, in respect of the content of the diplomatic bag, was a rule of customary international law that was generally recognized prior to the adoption of the Convention. The bilateral agreements referred to above usually employ the term "diplomatic correspondence", or "diplomatic mail", but it is certain that they also cover articles used for official purposes. The special agreements on the dispatch of diplomatic mail through postal channels provide that the States parties and their postal administrations must facilitate the transmission and delivery of the bag. The Agreement of 6 July 1961 between Brazil and Argentina for the exchange of official mail in diplomatic pouches provides:

The postal authorities of the two countries shall take the necessary complementary measures for the performance of the service, and by common agreement and in the light of practical experience in Brazil and Argentina respectively, shall fix the date, time and place for handing over the pouches, which shall be dispatched by local post offices in the same mail bags as are used for regular mail between the two countries.

307. Most of the special agreements also provide for the procedures to be followed to facilitate the transmission of the unaccompanied diplomatic bag. In conformity with these agreements, the States concerned undertake to make the necessary administrative arrangements with their national or foreign airline companies to ensure the expeditious transmission of the diplomatic bag dispatched through postal channels.²⁵⁷ In some instances, special provision is made for the dispatch of urgent letters, letter packets and other items for which such transmission is justified, subject to the according of reciprocal facilities.²⁵⁸

308. The domestic rules and regulations adopted by some States regarding the transmission of diplomatic bags through postal channels or other means are along the lines of the special agreements referred to above. In some instances, the national administrative rules and regulations derive from or are aimed at the implementa-

²⁵⁶ See, for example, the exchanges of notes between the United Kingdom and the Netherlands and between the United Kingdom and the Dominican Republic (*ibid.*).

²⁵⁷ See, for example, in the Exchange of notes between Brazil and Uruguay (*ibid.*), paragraph 6 of note 83 of 16 December 1944 of the Brazilian Embassy at Montevideo.

²⁵⁸ See the Exchange of notes between the United Kingdom and the Netherlands (*ibid.*).

tion of these agreements. This is the case with Decree No. 3135 of Colombia of 20 December 1956, which stipulates in article 49:

The exchange of diplomatic pouches is governed by special agreements between Colombia and the nations that have diplomatic representation in Bogotá or by the current provisions of the Universal Postal Union. In all cases it is to be understood that a pouch contains only official documents or publications and that appendages to diplomatic pouches arriving in Colombia cannot be accepted.²⁵⁹

309. The documents indicating the official character of the diplomatic bag dispatched as postal mail are the papers issued by the post office upon receipt of the consignment and sent to the consignee. For example, the *Code of Federal Regulations, Title 39—Postal Service* contains a special provision (para. 56.1) on “consular and commercial invoices”, which states:

Many countries require special documents to be prepared by the sender and either presented by the addressee or enclosed within the package.²⁶⁰

310. This survey of the practice of States reveals some important aspects of the question under consideration. It shows (a) that certain rules governing the transmission of diplomatic bags by ordinary postal services are contained in international agreements and national regulations; (b) that those rules are applied on a reciprocal basis by the States parties to special agreements; (c) that a further effort might be advisable to harmonize the existing rules and amplify their scope. This objective could be achieved by concerted codification measures undertaken both within and outside UPU in respect of the international rules and regulations governing the transmission of diplomatic correspondence by the postal services.

311. The action to be taken within UPU would be to amend the international regulations so that they provide for special treatment for the conveyance of the diplomatic bag. The codification effort to be undertaken outside UPU would be to provide a general legal framework aimed at enhancing the protection of the diplomatic bag through bilateral arrangements between States. These two methods are not only mutually compatible but are also necessarily interdependent. The lack of progress in respect of the first, as will be explained in the following lines, may require that emphasis be placed on the second, namely, codification and development of certain rules governing the dispatch of diplomatic bags through postal channels. This is all the more necessary as there are no specific provisions on this matter in the 1961 Vienna Convention or in the other conventions codifying diplomatic law.

4. POSITION OF THE UNIVERSAL POSTAL UNION

312. The question of the transmission of diplomatic correspondence by postal services in the special category of “diplomatic mail” already has its history. Reference to the study of this question by various organs of UPU will be confined to a very brief account of the action

taken by the Congress and the Executive Council of UPU relating to the topic under examination. The question was first raised in 1972 and has been under consideration ever since. The last time a governing body of UPU was seized with it was at the Congress in 1979, held in Rio de Janeiro.

313. The UPU Congress, held in 1974 in Lausanne, instructed the Executive Council to “continue the study of transmission by post of official correspondence of diplomatic missions, consulates and intergovernmental international organizations”.²⁶¹ The study was based on a special questionnaire²⁶² adopted by Committee 4, dealing with letter post, and was carried out by the Netherlands in co-operation with the International Bureau of UPU. Sixty-one national postal administrations took part in the consultation. The main problem under examination was whether it was possible to draw up international regulations on the conveyance of diplomatic mail by creating a *new category of postal items* under the denomination of “diplomatic bags” in the international postal service. Closely connected with this problem was that of the special treatment to be accorded to the new category of postal items.

314. The great majority (72 per cent) of the postal administrations consulted expressed the view that “diplomatic bags” could be transmitted by the postal service, taking into account article 27, paragraph 1, of the 1961 Vienna Convention. One administration pointed out that for security reasons it would like the anonymity of these items during the handling of the mail to be guaranteed. However, by a still larger majority (80 per cent), the administrations consulted refused to associate acceptance of “diplomatic bags” in the international postal service with the creation of a new category of postal items. The 13 postal administrations favouring the creation of a new category of items expressed the view that the maximum weight to be allowed for such items should vary between 2 kg and 30 kg, with a clear preference for 10 kg. Only two administrations were in favour of granting the diplomatic bag exemption from postage, one of them on a reciprocal basis, while the other 59 administrations were against such exemption. With regard to special treatment, views were divided, but with negative positions prevailing. The proposal that diplomatic bags be inserted in mailbags of a special colour was also rejected.

315. It was also suggested that international regulations be laid down by inserting optional provisions in the Acts regarding the special category of “diplomatic bags”. On that issue there was a clear division of views (31 in favour, 27 against, with 3 abstentions), which proved that such a suggestion would not receive substantial support from the postal administrations. At

²⁶¹ See *Acts of the Universal Postal Union, revised at Lausanne in 1974 and annotated by the International Bureau, volume II* (Bern, 1975), p. 284, decision C 42 (III 875).

²⁶² See UPU, document CE/C 4 — Doc 22 (agenda item 8 of the May 1977 session of the Executive Council), in particular the comments of the postal administrations consulted (paras. 12-19 of the document).

²⁵⁹ See footnote 253 above.

²⁶⁰ *Ibid.*

the same time, a fairly large majority was in favour of international postal conveyance of diplomatic mail under bilateral and multilateral agreements.

316. The results of the study were submitted to the UPU Congress held in 1979 in Rio de Janeiro in connection with the consideration of possible amendments to article 18, dealing with the conveyance of letter items. It was pointed out that the postal administrations had the duty to respect the facilities for communication accorded to diplomatic missions, consular posts, special missions, permanent missions and delegations of States to international organizations, in conformity with the 1961 Vienna Convention (art. 27); the 1963 Vienna Convention (art. 35); the Convention on Special Missions (art. 28); and the 1975 Vienna Convention (art. 27). The Congress took note of the conclusions contained in the report of the Executive Council, based on the study undertaken by decision of the Lausanne Congress. The Executive Council stated in its report that the majority of the postal administrations consulted were opposed to the creation of a new category of postal items, but that they accepted the transmission by the postal service of "official correspondence" as well as of the "diplomatic bag", to be treated in the same way as other letter-post items. It indicated finally that the international conveyance of diplomatic mail should continue to be governed by bilateral or multilateral agreements that the postal administrations could enter into.²⁶³ In its conclusions submitted to the Congress, the Executive Council emphasized that

... the dispatch of diplomatic mail on the basis of bilateral agreements as practised hitherto has never given rise to complaints from the missions concerned, neither has this procedure caused their services any difficulties.²⁶⁴

317. This brief survey of the deliberations that took place in various organs of UPU with regard to the status of the diplomatic bag dispatched through postal channels indicates that, while the majority of the postal administrations did not favour the creation of a special category of letter post items for the diplomatic bag, they accepted the conveyance of diplomatic mail by international postal service and favoured the operation of such a service on the basis of bilateral or multilateral agreements. In this connection, it may be pointed out that the present work of the Commission on the topic under consideration might well provide the basis for a general legal framework for the transmission of diplomatic bags through postal channels.

5. DIPLOMATIC BAGS DISPATCHED THROUGH ORDINARY MEANS OF TRANSPORT BY LAND, AIR OR SEA

318. The dispatch of diplomatic bags as cargo consignments by commercial means of transportation, whether by land, air or sea, was a common practice of

²⁶³ See *Acts of the Universal Postal Union revised at Rio de Janeiro in 1979 and annotated by the International Bureau, volume 2* (Bern, 1980), p. 24.

²⁶⁴ UPU, document CE/C 4 — Doc 22 (see footnote 262 above), para. 22.

States long before the adoption of the 1961 Vienna Convention. This kind of official communication was used in particular for heavy and sizeable consignments or for non-confidential correspondence, documents and other articles, such as books, exhibits, films and other items for the official use of diplomatic missions, consular posts and other missions.

319. The four conventions codifying diplomatic law contain no specific provisions regarding this type of non-accompanied diplomatic bag. Its use might nevertheless be deduced from article 27, paragraph 1, of the 1961 Vienna Convention and the corresponding provisions in the other codification conventions, which refer to "all appropriate means" that may be employed for official communications. There are however certain aspects of the legal status of the non-accompanied diplomatic bag dispatched by normal commercial means of transportation that deserve special consideration.

320. The rules applicable to proof of status, external features, requirements in regard to the content of the bag and the régime of its treatment must be applied *mutatis mutandis* to this kind of unaccompanied diplomatic bag. In accordance with established practice, diplomatic bags dispatched as railroad or truck consignments, air freight or shipments by sea, must bear official seals and other visible external marks and, when appropriate, be provided with the necessary safety devices such as locks, padlocks and safety bolts. The bill of lading attached to the consignment could be used as a document indicating the status of the diplomatic bag, the sender and the addressee. Some domestic regulations explicitly require that the official character of the shipment should be declared on the bill of lading.²⁶⁵ Unaccompanied diplomatic bags dispatched by surface or air must enjoy the inviolability and other privileges and immunities accorded to any diplomatic bag. The transmission of such an unaccompanied bag would impose certain obligations upon the receiving or the transit State and their port authorities, as well as upon the customs, transport, public health and other authorities, for the safe and expeditious delivery of the bag.

321. In the light of the above considerations on the status of the diplomatic bag dispatched by postal services or other means, the Special Rapporteur submits the following draft article for examination and preliminary approval:

Article 34. Status of the diplomatic bag dispatched by postal services or other means

1. The diplomatic bag dispatched by postal services or other means, whether by land, air or sea, shall comply with all the requirements set out in article 31, and shall enjoy the facilities, privileges and immunities, specified in articles 35 to 39, accorded to the diplomatic bag by the receiving State or the transit State while on its territory.

²⁶⁵ See, for example, article 22 of Decree No. 4891 of 21 June 1961 of the Government of Argentina, as amended by Decree No. 3408 of 12 April 1966 (para. 235 above).

2. The conditions and requirements for the international conveyance of the diplomatic bag by postal services, including its visible external marks, maximum size and weight, shall conform to the international regulations established by the Universal Postal Union or be determined in accordance with bilateral or multilateral agreements between the States or their postal administrations. The postal authorities of the receiving State or the transit State shall facilitate the safe and expeditious transmission of the diplomatic bag conveyed through their postal services.

3. The conditions and requirements for the dispatch of diplomatic bags by ordinary means of transportation, whether by land, air or sea, shall conform to the rules and regulations applicable to the respective means of transportation, and the bill of lading shall serve as a document indicating the official status of the diplomatic bag. The competent authorities of the receiving State or the transit State shall facilitate the safe and expeditious transmission of the diplomatic bag dispatched through the ports of those States.

F. General facilities accorded to the diplomatic bag

322. The provision on general facilities should be applied to all kinds of diplomatic bags, whether accompanied or not accompanied by diplomatic courier. It may only be added that, in practice, unaccompanied diplomatic bags, particularly those that are dispatched by postal services or other means of transport, require greater care for their safe and expeditious delivery. Therefore the general facilities accorded to the diplomatic bag should always be considered in the light of functional necessity and actual need for assistance, depending on the various means of transport and the concrete circumstances.

323. The general facilities should also be conceived in close relation with all other provisions that contain explicit or implicit reference to the need, on the part of the receiving or the transit State and its authorities, to grant a certain assistance or extend co-operation to ensure the proper functioning of official communications through the use of the diplomatic bag. The scope of the general facilities should be determined by the official function of the diplomatic bag and the conditions required for the safe and expeditious delivery of the bag to its final destination. Since it is neither advisable nor possible to indicate in more concrete terms what those facilities are, it would seem preferable not to attempt to list them but to provide a general rule. In conformity with such a general rule, the receiving and the transit States are under an obligation to accord to the diplomatic bag, whether accompanied or not by diplomatic courier, all the facilities that are necessary for the proper delivery of the bag.

324. It is obvious that the facilities in question should be accorded first of all, when necessary, for the *transportation and delivery of the bag* as expeditiously as possible. In certain circumstances, the unaccom-

panied diplomatic bag may require favourable or even preferential treatment, in case of heavy traffic or other transportation problems. Another very probable instance of the need to accord special facilities to the diplomatic bag might be in connection with the *clearance procedures and formalities* applied to incoming and outgoing consignments. The most important provisions relating to the protection of the diplomatic bag, and the immunities, privileges and exemptions granted to the bag, should be specified in corresponding draft articles.

325. In the light of the above considerations on the general facilities to be accorded to all kinds of diplomatic bags, the Special Rapporteur submits the following draft article for examination and provisional adoption:

Article 35. General facilities accorded to the diplomatic bag

The receiving State and the transit State shall accord all necessary facilities for the safe and speedy transportation and delivery of the diplomatic bag.

G. Inviolability of the diplomatic bag

1. INTRODUCTION

326. The inviolability of the diplomatic bag has always constituted the most essential aspect of the status of this important means of communication. The principle that the diplomatic bag shall not be opened, examined or detained has been upheld as a long-standing and widely recognized rule, yet it has been challenged on the grounds of the abuses to which it can give rise. The immunity of the bag from search has been considered as the reflection of the basic principle of the inviolability of the archives and documents of the mission, generally recognized by customary international law. Nevertheless, alleged abuses, on the part either of the sending State or of the receiving State, have often given rise to disputes. Diplomatic bags have on occasion been used for the illicit import or export of foreign currency, narcotic drugs, arms or other items that contravene the established rules regarding the admissible content of the bag, which has adversely affected the legitimate interests of the receiving States. On the other hand, in some instances the sending States have suspected that the claim to open the diplomatic bag or to examine or screen it by sophisticated electronic and other mechanical devices, on the presumption of the unlawful content of the bag, is motivated by attempts to penetrate State secrets. It would therefore be advisable to suggest a formula that, while maintaining the principle of inviolability, would contain safeguard provisions of a preventive nature that would satisfy the genuine concern of the receiving or the transit State.

327. The basic rules underlying the legal protection of the diplomatic bag and its inviolability are the relevant provisions of the 1961 Vienna Convention—article 24, on the inviolability of the archives and documents of the

diplomatic mission, and article 27, paragraph 3, which states that "the diplomatic bag shall not be opened or detained"—and the corresponding articles in the other conventions codifying diplomatic law. The other important source for the rules to be submitted for examination is the treaty practice of States and domestic legislation.

2. LEGISLATIVE BACKGROUND OF THE PRINCIPLE OF THE INVIOABILITY OF THE DIPLOMATIC BAG

328. The previous reports on this topic contained a comprehensive survey of the preparatory work for the 1961 Vienna Convention and the other codification conventions relating to the legal status of the diplomatic and other bags and their inviolability.²⁶⁶ The examination of the legislative background of the provisions on the inviolability of the diplomatic bag will therefore be confined to other more significant aspects of the evolving codification process on this subject.

329. The initial draft article 16, paragraph 2, submitted by the Special Rapporteur on the topic of diplomatic intercourse and immunities to the Commission at its seventh session, in 1955, read as follows:

2. The diplomatic pouch shall be exempt from inspection unless there are very serious grounds for presuming that it contains illicit articles. The pouch may be opened for inspection only with the consent of the Ministry for Foreign Affairs of the receiving State and in the presence of an authorized representative of the mission.²⁶⁷

330. This draft article was extensively discussed by the Commission. As a result, the Special Rapporteur withdrew the initial text and, after reconsidering it, submitted a revised text to the Commission at its ninth session, in 1957, based on the concept of absolute inviolability, which provided simply that "the diplomatic pouch shall be exempt from inspection".²⁶⁸ The Special Rapporteur explained the reasons for this radical change in the following terms:

... it was drafted before he had been able to study the municipal laws on the subject. On discovering that *none of the many municipal laws dealing with the question of the diplomatic bag provided for any exception to the principle of inviolability*,* he had come to the conclusion that it would be better to state the bare principle in the article, and see whether the Commission wished to include in the commentary qualifications on the lines of those made in his original text.²⁶⁹

331. During the consideration of the revised text, in 1957, some members of the Commission favoured the complete inviolability of the bag in all circumstances, while others stressed the danger of abuse of the bag. Finally a compromise was reached along the lines suggested by the Special Rapporteur, to the effect that the draft article should set out the general principle of inviolability, while the commentary should contain a qualifying passage.²⁷⁰

²⁶⁶ See the Special Rapporteur's second report, document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), paras. 126-186.

²⁶⁷ *Yearbook ... 1955*, vol. II, p. 11, document A/CN.4/91.

²⁶⁸ *Yearbook ... 1957*, vol. I, p. 74, 398th meeting, para. 27.

²⁶⁹ *Ibid.*, p. 80, 399th meeting, para. 29.

²⁷⁰ *Ibid.*, pp. 77-83, 398th meeting, paras. 84-100, and 399th meeting, paras. 1-77.

332. Consequently, the provision finally adopted by the Commission on the inviolability of the diplomatic bag read as follows:

Article 25. Freedom of communication

...

3. The diplomatic bag shall not be opened or detained.²⁷¹

The relevant part of the commentary to this provision stated:

... The Commission considered it desirable that the statement of the inviolability of the diplomatic bag should be preceded by the more general statement that the official correspondence of the mission, whether carried in the bag or not, is inviolable ...

The Commission has noted that the diplomatic bag has on occasion been opened with the permission of the Ministry for Foreign Affairs of the receiving State, and in the presence of a representative of the mission concerned. While recognizing that States have been led to take such measures in exceptional cases where there were serious grounds for suspecting that the diplomatic bag was being used in a manner contrary to paragraph 4 of the article, and with detriment to the interests of the receiving State, the Commission wishes nevertheless to emphasize the overriding importance which it attaches to the observance of the principle of the inviolability of the diplomatic bag.²⁷²

333. At the United Nations Conference on Diplomatic Intercourse and Immunities, in 1961, several proposals were made aimed at restricting in one way or another the unconditional inviolability of the diplomatic bag as provided for in the draft article submitted by the Commission.²⁷³ One of them, namely, the amendment by Ghana, provided for the right of the sending State to withdraw an unopened bag that was suspected of containing articles other than those intended for official use.²⁷⁴ All those amendments were rejected by the Conference,²⁷⁵ and the draft text as proposed by the Commission was thus adopted as paragraph 3 of article 27.

334. In the course of its preparatory work on the Convention on Consular Relations, from 1957 to 1961, the Commission discussed extensively the question of the inviolability of the consular bag. There were divergent views on this matter. Some members of the Commission maintained that consular bags also contained official correspondence and were therefore entitled to receive the same treatment as diplomatic bags.²⁷⁶ Some took the view that in exceptional circumstances the consular bag might be opened. However, the prevailing trend was in favour of the complete inviolability of the consular bag. Thus the final draft article 35, paragraph 3, adopted by the Commission at its thirteenth session, in 1961, read as follows:

²⁷¹ *Yearbook ... 1958*, vol. II, p. 96, document A/3859, chap. III, sect. II.

²⁷² *Ibid.*, p. 97, paras. (4) and (5) of the commentary.

²⁷³ *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II, p. 20, document A/CONF.20/C.1/L.125 (France); p. 22, document A/CONF.20/C.1/L.151/Rev.2 (United Arab Republic); p. 23, document A/CONF.20/C.1/L.154 (United States of America); pp. 38-39, document A/CONF.20/C.1/L.286 (France and Switzerland).

²⁷⁴ *Ibid.*, p. 42, document A/CONF.20/C.1/L.294.

²⁷⁵ *Ibid.*, vol. I, pp. 180-181, *Committee of the Whole*, 29th meeting, paras. 72-79.

²⁷⁶ *Yearbook ... 1960*, vol. I, pp. 27-28, 531st meeting, paras. 37-53.

3. The consular bag, like the diplomatic bag, shall not be opened or detained.²⁷⁷

In its commentary to that provision, the Commission stated:

... The consular bag must not be opened or detained. This rule, set forth in paragraph 3, is the logical corollary of the rule providing for the inviolability of the consulate's official correspondence, archives and documents ...²⁷⁸

It was further explained by the Chairman of the Drafting Committee that the words "like the diplomatic bag" had been inserted because consular papers were sometimes sent in the diplomatic bag.²⁷⁹

335. At the United Nations Conference on Consular Relations, in 1963, there were several amendments to paragraph 3 of draft article 35 designed to restrict the unconditional inviolability of the consular bag.²⁸⁰ Those amendments were emphatically opposed by representatives who favoured the text proposed by the Commission upholding the principle of absolute inviolability of the consular bag. It was pointed out, for instance, that such phrases as "serious reasons" used in those amendments left wide scope for interpretation by the receiving State and could lead to abuse and to the restriction of the sending State's freedom of communication.²⁸¹ It was further argued that the amendments would only add to the possibility of friction, suspicion and misunderstanding.²⁸²

336. The Conference adopted, by 46 votes to 15, with 3 abstentions,²⁸³ a joint amendment proposed by the Federal Republic of Germany. Article 35, paragraph 3, thus provides that "the consular bag shall be neither opened nor detained", but admits that, "nevertheless, if the competent authorities of the receiving State have serious reasons to believe that the bag contains something other than the correspondence, documents or articles" intended exclusively for official use, "they may, with the authorization of the Ministry for Foreign Affairs of the receiving State, request that the bag be opened in their presence by an authorized representative of the sending State". It further provides that, in case of a refusal of this request by the authorities of the sending State, the bag shall be returned to its place of origin.²⁸⁴ It is obvious that the 1963 Vienna Convention introduces a restriction on the principle of the inviolability of the consular bag. As was pointed out by the Special Rapporteur in his second report, this restriction "con-

stitutes an important deviation from the principle of free communication for all official purposes, affecting the inviolability of the consular bag".²⁸⁵

337. The two other codification conventions adopted subsequently, namely the Convention on Special Missions and the 1975 Vienna Convention, did not adopt the approach of the 1963 Vienna Convention on this matter. On the contrary, they adhered to the principle of the absolute inviolability of the bag of the special mission (art. 28, para. 4) and of the bag of the permanent mission or delegation (art. 27, para. 3, and art. 57, para. 4), and reproduced *mutatis mutandis* paragraph 3 of article 27 of the 1961 Vienna Convention.

3. RECENT PRACTICE OF STATES RELATING TO THE INVIOABILITY OF THE DIPLOMATIC BAG

338. Most bilateral consular conventions, including those concluded after the 1963 Vienna Convention entered into force, provide that the consular bag is inviolable and may neither be examined nor detained by the authorities of the receiving State.²⁸⁶ Thus, despite the provision contained in article 35, paragraph 3, of the 1963 Vienna Convention, they adhere to the principle of the unconditional inviolability of the diplomatic bag set forth in article 27, paragraph 3, of the 1961 Vienna Convention. This seems to be the prevailing trend in the recent practice of States, as evidenced by a significant number of bilateral agreements entered into by States that are also parties to the Vienna Conventions of 1961 and 1963.

339. However, some bilateral conventions provide that the authorities of the receiving State may, in special cases, request the sealed consular bags to be opened in their presence in order to determine that they do not contain anything other than official correspondence. For example, article 12, paragraph 4, of the Consular Convention between the United Kingdom and Norway (1951) provides:

4. The official consular correspondence ... shall be inviolable and the authorities of the territory shall not examine or detain it. In special

²⁷⁷ Document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), para. 168.

²⁷⁸ See, for example, the consular agreements referred to in footnotes 251 and 252 above, concluded by Argentina, Belgium, Brazil, Cameroon, Czechoslovakia, Dominican Republic, Ecuador, France, Ireland, Mexico, Netherlands, Norway, Sweden, United Kingdom, United States of America, Uruguay, Venezuela and Yugoslavia. See also the consular conventions concluded between the following States: Czechoslovakia and German Democratic Republic (1957), Japan and United States of America (1963), Poland and Austria (1974), Romania and German Democratic Republic (1958), Romania and Hungary (1959), USSR and Bulgaria (1957), USSR and Hungary (1957), USSR and Romania (1957), United States of America and Republic of Korea (1963). While most of these bilateral agreements simply state that "consular bags shall be inviolable and shall not be subject to examination", some are more specific. Thus the Consular Convention between Japan and the United States of America (1963) provides that "sealed official pouches and other official containers shall be inviolable when they are certified by a responsible officer of the sending State as containing only official documents" (art. 10, para. 2), and the Consular Convention between the United States of America and the Republic of Korea (1963) contains the same provision (art. 9, para. 2).

²⁷⁹ *Yearbook ... 1961*, vol. II, p. 111, document A/4843, chap. II, sect. IV.

²⁸⁰ *Ibid.*, p. 112, para. (5) of the commentary.

²⁸¹ *Yearbook ... 1961*, vol. I, p. 242, 619th meeting, para. 24.

²⁸² *Official Records of the United Nations Conference on Consular Relations*, vol. II, p. 81, document A/CONF.25/C.2/L.73 (Federal Republic of Germany), and document A/CONF.25/C.2/L.75 (South Africa); p. 83, document A/CONF.25/C.2/L.91 (Spain); p. 85, document A/CONF.25/C.2/L.108 (Nigeria).

²⁸³ *Ibid.*, vol. I, pp. 322-323, *Second Committee*, 13th meeting, para. 40.

²⁸⁴ *Ibid.*, p. 324, para. 67.

²⁸⁵ *Ibid.*, p. 325, para. 79.

²⁸⁶ Document A/CONF.25/C.2/L.73 (see footnote 280 above).

cases they may, however, request that sealed consular pouches, bags, and other containers shall be opened by a consular officer in their presence in order to satisfy themselves that the containers do not hold anything but official correspondence.²⁸⁷

Some consular conventions provide further that, if the request to open the official pouch is refused, "the pouch or container shall be returned forthwith by the sending State to its place of origin".²⁸⁸

340. The positions of States in respect of the inviolability of the diplomatic bag was further evidenced in connection with some reservations made to article 27, paragraph 3, of the 1961 Vienna Convention by Bahrain, Kuwait and the Libyan Arab Jamahiriya. The Government of Bahrain stated that it reserved "its right to open the diplomatic bag if there are grounds for presuming that it contains articles the import or export of which is prohibited by law".²⁸⁹ The reservations made by Kuwait and the Libyan Arab Jamahiriya provide that those Governments have the right to request the opening of the bag in the presence of an official representative of the diplomatic mission concerned and that, if such request is denied by the authorities of the sending State, "the diplomatic pouch shall be returned to its place of origin".²⁹⁰

341. The above-mentioned reservations with respect to article 27, paragraphs 3 and/or 4, were objected to by a number of States parties to the Convention, including Belgium, Bulgaria, Czechoslovakia, France, the Federal Republic of Germany, Haiti, Hungary, Mongolia, Poland, the USSR, the United Kingdom and the United States of America.²⁹¹ This reaction is indicative of the importance attached to the principle of the inviolability of the diplomatic bag.

4. SCOPE OF THE PRINCIPLE OF THE INVIOABILITY OF THE DIPLOMATIC BAG

342. The scope and legal implications of the principle of the inviolability of the diplomatic bag has to be con-

²⁸⁷ See also the consular conventions concluded between Greece and the United Kingdom (1953), art. 12, para. 4; United Kingdom and Denmark (1962), art. 11, para. 4; United Kingdom and France (1951), art. 13, para. 4; United Kingdom and Mexico (1954), art. 12, para. 4; United Kingdom and Spain (1961), art. 12, para. 2.

²⁸⁸ See the consular conventions concluded between the following States: Austria and Romania (1970), art. 31, para. 2; Belgium and Poland (1972), art. 15, para. 3; Belgium and Turkey (1972), art. 22, para. 3; Belgium and United States of America (1969), art. 18, para. 3; Bulgaria and Austria (1975), art. 30, para. 2; Finland and Poland (1971), art. 10, para. 2; Finland and Romania (1971), art. 29, para. 2; France and Algeria (1974), art. 13, para. 3; France and Bulgaria (1968), art. 13, para. 4; France and Czechoslovakia (1969), art. 25, para. 3; France and Senegal (1974), art. XI, para. 3; Greece and Bulgaria (1973), art. 13, para. 2; Romania and Italy (1967), art. 28, para. 3; Romania and United States of America (1972), art. 21, para. 3; Sweden and Romania (1974), art. 30, para. 3; United Kingdom and Japan (1964), art. 13, para. 3; United States of America and France (1966), art. 15, para. 3; United States of America and Poland (1972), art. 12, para. 3.

²⁸⁹ United Nations, *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1982* (Sales No. E.83.V.6), p. 53.

²⁹⁰ *Ibid.*, p. 54.

²⁹¹ *Ibid.*, pp. 57 *et seq.*

sidered in close connection with the broader principle of the inviolability of the archives and documents of the diplomatic mission. This fundamental rule of international law, incorporated in article 24 of the 1961 Vienna Convention, stipulates that "the archives and documents of the mission shall be inviolable at any time and wherever they may be". Furthermore, paragraph 2 of article 27 of the same Convention provides that "the official correspondence of the mission shall be inviolable".

343. The principle of the inviolability of the official correspondence of the mission applied in respect of the diplomatic bag would mean that the diplomatic bag should not be opened or detained. This obligation of the transit or the receiving State constitutes an essential prerequisite for the protection of the inviolability of the bag and the confidential nature of its content. For it is obvious that the opening of the bag is already an infringement of its inviolability and secrecy.

344. *The opening of the diplomatic bag* by the authorities of the receiving State, upon their request, could take place only with the consent of the sending State. In this case, however, the sending State has exercised its sovereign right of renunciation of immunity, or voluntary submission to the jurisdiction of the receiving State, with clear cognizance of all the risks entailed in respect of the confidential character of the diplomatic bag. The opening of the diplomatic bag constitutes a method of direct examination of its content. It is therefore considered to be incompatible with the principle of the inviolability of diplomatic correspondence.

345. In recent times, the occurrence of international terrorism through the unlawful seizure of aircraft and other acts of air piracy, as well as the increase in illicit traffic in narcotic drugs, have warranted the undertaking of special measures of examination of passengers and their luggage at airports and frontier checkpoints. Sophisticated technical security devices have been put into service. These devices include X-rays for hand baggage, magnetometers to identify metal articles, and other electronic and mechanical means of examination and screening. The diplomatic bag could thus *be inspected at a distance without being opened*. In that case, the question would arise whether this kind of examination would be compatible with articles 24 and 27 of the 1961 Vienna Convention. The view has been expressed that, since the inspection would not involve manual search, electronic screening would be admissible under the said Convention.²⁹²

346. It is however doubtful whether this interpretation would be satisfactory. There might be a justified suspicion that modern sophisticated devices possessed a wide range of technical capacity to record and acquire all kinds of data that might jeopardize the confidential character of the diplomatic bag. Whether the inspection

²⁹² See the views expressed by the Austrian Ministry for Foreign Affairs in the circulars addressed to the diplomatic missions accredited to Austria, reproduced in *Yearbook ... 1982*, vol. II (Part One), p. 233, document A/CN.4/356 and Add.1-3.

is carried out as a manual search or through mechanical devices, it is in fact an examination aimed at establishing the content of the diplomatic bag and therefore affects the inviolability of official correspondence. As has been mentioned above (para. 332), the Commission, in its commentary to paragraph 3 of article 25 (which became article 27 of the 1961 Vienna Convention), while recognizing that in exceptional cases States had been led to request the opening of the bag in the presence of a representative of the mission concerned when there were serious grounds for suspecting that the bag in question was being used in a manner contrary to paragraph 4 of the draft article, nevertheless emphasized the overriding importance which it attached to the observance of the principle of the inviolability of the diplomatic bag.

347. It is therefore suggested that inviolability of the bag should be adopted as a uniform rule. This rule should be generally applied, unless the States concerned have agreed to introduce exceptions, by way of reciprocity, on the basis of multilateral or bilateral agreements. In that case, draft article 6 on non-discrimination and reciprocity²⁹³ would apply in any event, as evidenced by recent State practice. In the case of dispute between the authorities of the receiving State or the transit State, on the one hand, and those of the sending State, on the other hand, concerning the legally admissible content of the bag, the solution might be the return of the bag to its place of origin. In this way the inviolability of the bag would be observed and at the same time the legitimate concern of the receiving or the transit State would receive due consideration. Such an arrangement could be arrived at through agreement between the States concerned.

348. The other substantive element of the rule of the inviolability of the diplomatic bag is the obligation of the transit or the receiving State not to detain the diplomatic bag while on its territory. Detention of the bag constitutes an infringement of the inviolability of diplomatic correspondence and inevitably delays its delivery. Detention of the bag, which means that for a certain period of time it is under the direct control of the authorities of the transit or the receiving State, may give rise to a suspicion that within that period the bag is undergoing an unauthorized examination which is incompatible with the requirements for the observance of its confidential character. It is also obvious that any detention of the bag may upset the initial time schedule for its transportation and thus delay its delivery.

349. In the light of the above considerations regarding the inviolability of the diplomatic bag, the Special Rapporteur submits the following draft article for examination and provisional approval:

Article 36. Inviolability of the diplomatic bag

1. The diplomatic bag shall be inviolable at all times and wherever it may be in the territory of the receiving

State or the transit State; unless otherwise agreed by the States concerned, it shall not be opened or detained and shall be exempt from any kind of examination directly or through electronic or other mechanical devices.

2. The receiving State or the transit State shall take all appropriate measures to prevent any infringement of the inviolability of the diplomatic bag, and shall also prosecute and punish persons under its jurisdiction responsible for such infringement.

H. Exemption from customs and other inspections

1. LEGAL GROUNDS AND SCOPE OF THE EXEMPTION FROM CUSTOMS AND OTHER INSPECTIONS

350. Exemption of the diplomatic bag from customs and other kinds of inspection was established as a rule of customary international law long before the 1961 Vienna Convention. It has always been considered as an important component of the privileges and immunities granted to diplomatic correspondence. There is no specific rule on such exemption in that Convention or in the other conventions codifying diplomatic law. However, it could be derived from the general principle of the inviolability of the diplomatic bag. This conclusion is also supported by the *travaux préparatoires* relating to the draft article which became article 27 of the 1961 Vienna Convention and by the practice of States.

351. Article 16, paragraph 2, of the draft articles on diplomatic intercourse and immunities, which constitutes the basis for the relevant provision of article 27, and which was submitted by the Special Rapporteur to the Commission at its ninth session, in 1957, provided:

2. The diplomatic pouch shall be exempt from inspection.²⁹⁴

The discussions on this provision always encompassed all means of examination of the bag, whether customs inspection or inspection carried out by other authorities, such as public health, phytosanitary or veterinary authorities.

352. Exemption from customs and other inspection, although included within the broader scope of inviolability, deserves to be specifically mentioned by reason of its practical significance. Several bilateral agreements and the domestic laws of some States indicate that it would be advisable to formulate a special provision on exemption from customs inspection. The legal grounds for such a rule would be the principle of the inviolability of diplomatic correspondence in general and of the diplomatic bag in particular. The scope and legal implications of the exemption should be determined by functional necessity, that is, by the functions of the diplomatic bag as an instrument of official communications.

²⁹³ For text, see *Yearbook ... 1982*, vol. II (Part Two), p. 114, footnote 309.

²⁹⁴ *Yearbook ... 1957*, vol. I, p. 74, 398th meeting, para. 27.

2. RECENT PRACTICE OF STATES

353. Some States have established special rules and regulations regarding exemption from customs inspection or free customs clearance of diplomatic bags. For example, in Argentina, article 17 of Decree No. 3437 of 22 November 1955 states that "the customs authorities shall give free clearance to closed and sealed packages which contain diplomatic correspondence which are brought in by a diplomatic courier".²⁹⁵ A similar procedure is provided for in article 22 of Decree No. 4891 of 21 June 1961 in respect of diplomatic bags not accompanied by diplomatic courier which arrive at the airport.²⁹⁶ In Austria, article 172 of the Federal Act of 15 June 1955 concerning customs regulations stipulates:

Provided that it is officially sealed in the prescribed manner, the official luggage of diplomatic couriers shall be cleared through customs without inspection if the nature, number and bulk of the packages and the address correspond to the description given in the list, which the courier must produce, prepared by the consigning authority.²⁹⁷

The legislation of Colombia concerning the diplomatic bag accompanied by courier, or the diplomatic bag dispatched by air, provides for certain privileges and immunities, including exemption from customs inspection, on a reciprocal basis, in conformity with special bilateral agreements.²⁹⁸ In Finland, article 92, paragraph 3, of Customs Act No. 271 of 8 September 1939 provides:

Any package, bag, bundle, suitcase, chest or the like addressed to the head of the embassy or the embassy itself and carried by foreign diplomatic courier may be brought into the customs territory free of duty and inspection if duly sealed with an official seal and entered in the courier's list.

The same régime is provided for in article 92, paragraph 4, for consular bags.²⁹⁹ Similar regulations have been established by many other States.³⁰⁰

354. Exemption from customs inspection and other kinds of inspection at the frontier is also provided for in some bilateral agreements relating to the exchange of diplomatic mail, whether or not accompanied by diplomatic courier.

355. In the light of the above considerations on exemption of the diplomatic bag from customs and other inspection, the Special Rapporteur submits for examination and provisional approval the following draft article:

²⁹⁵ Reproduced (in English) in United Nations, Legislative Series, vol. VII ..., p. 7.

²⁹⁶ See footnote 200 above.

²⁹⁷ Reproduced (in English) in United Nations, Legislative Series, vol. VII ..., p. 20.

²⁹⁸ Pan American Union, *op. cit.* (footnote 200 above), pp. 270-271.

²⁹⁹ Reproduced (in English) in United Nations, Legislative Series, vol. VII ..., pp. 118-119.

³⁰⁰ See, for example, the relevant regulations adopted by the Philippines (*ibid.*, p. 237), Sweden (*ibid.*, p. 302) and Paraguay (Pan American Union, *op. cit.* (footnote 200 above), p. 338).

Article 37. Exemption from customs and other inspections

The diplomatic bag, whether accompanied or not by diplomatic courier, shall be exempt from customs and other inspections.

I. Exemption from customs duties and all dues and taxes

1. SCOPE OF THE EXEMPTIONS

356. Exemption from customs duties, taxes and related charges on articles for the official use of the diplomatic mission, as has been pointed out above (paras. 155 and 166), formed part of customary international law long before the 1961 Vienna Convention. Usually such exemptions were considered as customs or fiscal privileges accorded to the diplomatic mission and its members on the basis of *comitas gentium* and by way of reciprocity. Article 36 of the 1961 Vienna Convention codified this rule of customary law and transformed it into a conventional rule of modern international law. This provision has a direct bearing on the status of the diplomatic bag, particularly in respect of the financial privileges and immunities accorded to the bag by reason of its official functions. Thus, among the articles exempt from all customs duties, taxes and dues levied by the receiving State, and referred to in paragraph 1 of article 36, "articles for the official use of the mission" are listed first. This is exactly the case of the diplomatic bag, which contains official correspondence, documents or articles intended for official use.

357. The exemptions cover customs and other fiscal dues and taxes levied by the transit or the receiving State on the import or export of goods. They also usually cover related charges for customs clearance or other formalities. They are granted in accordance with the laws and regulations of the States concerned. The exemptions may refer to national, regional or municipal dues and taxes, as provided for in the domestic rules and regulations of the receiving or the transit State. The exemptions from customs duties and related charges, as well as from other dues and taxes levied by the transit or the receiving State, do not include charges for storage, cartage, transportation, postage or similar services rendered in connection with the transmission or delivery of the diplomatic bag. Some of these charges for services, such as postage or transportation, may also be exempted, but only on the basis of reciprocal arrangements between the sending State and the receiving or the transit State.

2. TREATY PRACTICE AND NATIONAL LEGISLATION OF STATES REGARDING EXEMPTION FROM CUSTOMS DUTIES AND DUES AND TAXES

358. The practice of States in respect of exemption from customs and other charges relating to the diplomatic bag is relatively limited, but nevertheless quite indicative of the existence of a common trend

in this matter. Most bilateral agreements³⁰¹ refer specifically to the exchange of diplomatic bags by air-mail and other postal channels or by entrusting the bags to the captain of a commercial aircraft or the master of a merchant ship. In the Exchange of notes between Brazil and Argentina (1961), it was agreed that "the diplomatic pouches of both countries conveyed by regular mail shall be exempt from duties and charges of any kind". Similarly, the Exchange of notes between Brazil and Uruguay (1944) provides: "The diplomatic bags of Brazil and Uruguay ... shall enjoy complete exemption from imposts and duties of every kind ...". Several bilateral agreements provide for exemption from payment of postage. It should be emphasized at the outset that these are arrangements on a reciprocal basis. Thus the Exchange of notes between the United Kingdom and Norway (1946 and 1947) provides: "There shall be no charge for the acceptance or conveyance of these diplomatic bags, which shall enjoy all the immunities customarily granted by the British and Norwegian authorities respectively to official mails and shall be inviolable." The Exchange of notes between the United Kingdom and the Netherlands (1951) also provides: "There shall be no charges for the acceptance or conveyance of these diplomatic bags ...". Identical provisions are contained in other agreements concluded by the United Kingdom, with Mexico in 1946 and with the Dominican Republic in 1956.

359. Some States have enacted special rules and regulations regarding exemption of the diplomatic bag from customs duties. A cogent example is article 92, paragraph 3, of the Customs Act of Finland of 1939, which provides that diplomatic bags "may be brought into the customs territory free of duty and inspection if duly sealed with an official seal and entered in the courier's list".³⁰² Similar rules and regulations exist in the domestic law of many other countries.

360. In the light of the above considerations, the Special Rapporteur submits the following draft article for examination and provisional approval:

Article 38. Exemption from customs duties and all dues and taxes

The receiving State or the transit State shall, in accordance with such laws and regulations as it may adopt, permit the entry, transit or exit of a diplomatic bag and shall exempt it from customs duties and all national, regional or municipal dues and taxes and related charges, other than charges for storage, cartage and other specific services rendered.

J. Protective measures in circumstances preventing the delivery of the diplomatic bag

361. It might be advisable to consider certain protective measures that must be taken by the receiving or the

transit State in respect of the diplomatic bag while on its territory and in circumstances when the bag could not be in the custody of an authorized person of the sending State. This would be the case if the function of the diplomatic courier were terminated before he had delivered the bag to its final destination. Another situation that might call for protective measures on the part of the receiving or the transit State would be when, owing to accident, death or another cause, the courier was unable to take care of the diplomatic bag entrusted to him. Similar circumstances might also occur with a diplomatic bag entrusted to the captain of a commercial aircraft or the master of a merchant ship.

362. Such circumstances would not necessarily come under the heading of *force majeure* or fortuitous event, *stricto sensu*, although the most probable cases might be of such a nature. The rationale of the protective measures is that, whatever the factors preventing the courier from performing his functions, the diplomatic bag should not be left without appropriate custody and protection, bearing in mind its significance as an instrument for official communications. The same considerations would apply with regard to the case where the captain of an aircraft or the master of a ship were prevented by events beyond his control to accomplish his task, namely, to carry the diplomatic bag to an authorized port of entry on his scheduled itinerary and hand over the bag to an authorized representative of the mission of the sending State on the territory of the receiving State.

363. The circumstances alluded to above are of an exceptional character. However, the rare occurrence of a special situation should not prevent the elaboration of a rule that might be both indispensable and useful. In practice, special measures of protection for the safety of the diplomatic bag, however extraordinary or sporadic they might be, would be warranted by the importance of the interests protected. In exceptional circumstances, when the bag could not be in the custody of the person to whom it had been entrusted, it would need the protection of the transit or the receiving State. This obligation could be justified as an expression of international cooperation and solidarity of States in the promotion of diplomatic communications. It could derive from the general principle of freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags. In conformity with this principle, the receiving or the transit State is under the obligation to facilitate official communications and to protect them within its territory.

364. The action to be undertaken by the transit or the receiving State in special circumstances would entail first of all appropriate measures to protect the safety of the bag and its integrity. This would require provision of the necessary conditions for the proper storage or custody of the bag. Secondly, the transit State or the receiving State must inform the competent authorities of the sending State that the bag dispatched by that State is in its custody, owing to special circumstances. When the sending State has its diplomatic mission or consular post in the receiving or the transit State, such

³⁰¹ See the exchanges of notes referred to in footnote 252 above.

³⁰² See footnote 299 above.

notification should be addressed to that mission or post. In the absence of such a mission or consular post on their territories, the authorities of the receiving or the transit State in which the diplomatic bag is found must notify either the Ministry for Foreign Affairs of the sending State or the mission of another State on the territory which is charged with the protection of the interests of the sending State. Similar procedures should be followed in exceptional circumstances when the bag entrusted to the captain of a commercial aircraft or the master of a merchant ship is not in his custody and cannot be handed over to an authorized person of the sending State.

365. In the light of the above considerations concerning protective measures in circumstances preventing the delivery of the diplomatic bag, the Special Rapporteur submits the following draft article for examination and provisional adoption:

V. Draft articles on part IV: miscellaneous provisions

A. Introduction

366. In conformity with the structure of the present draft articles as tentatively agreed by the Commission and generally supported by the Sixth Committee of the General Assembly, part IV of the draft articles consists of a number of miscellaneous provisions of a general character (see para. 4 above). In accordance with prevailing treaty-making practice, as evidenced by a number of multilateral agreements, including the 1963 Vienna Convention and the 1975 Vienna Convention, these matters are usually dealt with in a chapter entitled "General provisions".³⁰³

367. As was indicated in the introduction to the present report (*ibid.*), it is intended to deal with only three items under the heading of miscellaneous provisions: (a) obligations of a transit State regarding the courier and the bag in case of *force majeure* or fortuitous events; (b) treatment of the courier and the bag in the case of non-recognition of the sending State or its Government by the receiving or the transit State, or in the case of absence of diplomatic or consular relations between them; (c) relation of the present draft articles to other conventions in the field of diplomatic or consular, particularly the four codification conventions and certain other agreements relating to the topic under consideration.

368. The scope of the draft articles in part IV is selective since they are confined to issues of a general character directly relating to both the status of the diplomatic courier and to that of the diplomatic bag.

³⁰³ For example, the 1963 Vienna Convention, "Chapter IV. General provisions" (arts. 69-73); the 1975 Vienna Convention, "Part V. General provisions" (arts. 73-85); the Vienna Convention on the Law of Treaties, "Part VI. Miscellaneous provisions" (arts. 73-75).

Article 39. Protective measures in circumstances preventing the delivery of the diplomatic bag

1. In the event of termination of the functions of the diplomatic courier before the delivery of the diplomatic bag to its final destination, as referred to in articles 13 and 14, or of other circumstances preventing him from performing his functions, the receiving State or the transit State shall take the appropriate measures to ensure the integrity and safety of the diplomatic bag, and shall immediately notify the sending State of that event.

2. The measures provided for in paragraph 1 shall be taken by the receiving State or the transit State with regard to the diplomatic bag entrusted to the captain of a commercial aircraft or the master of a merchant ship in circumstances preventing the delivery of the diplomatic bag to its final destination.

Thus other matters of a general character, such as provisions on the settlement of disputes and final clauses, have been deliberately left outside the purview of this part of the draft articles at this stage of the work on the present topic. The main reason for this restrictive approach is that matters of such a nature would best be considered once the whole set of draft articles constituting the *sedes materiae* of the topic has been examined. It is also submitted that there might be some other provisions of a general nature relating to the status of the courier and the bag which might be added to the list suggested by the Special Rapporteur and which are not within the scope of procedures for the settlement of disputes, of the application of special rules in the case of a state of war or armed conflict, or of provisions relating to signature, ratification, accession, entry into force and other routine final clauses.

B. Obligations of a transit State in case of *force majeure* or fortuitous event

369. For the purpose of the present draft articles, the term "transit State" means a State through whose territory the diplomatic courier and the diplomatic bag accompanied by him or the unaccompanied diplomatic bag pass *en route* to or from the receiving State. This definition of "transit State" was advanced in article 3, paragraph 1, sub-paragraph (6), of the present draft articles.³⁰⁴ As the Special Rapporteur pointed out in his second report,³⁰⁵ the four codification conventions do not contain a definition of the term "transit State", nor do they use an expression. However, they employ in-

³⁰⁴ See *Yearbook ... 1982*, vol. 11 (Part Two), p. 116, footnote 318.

³⁰⁵ Document A/CN.4/347 and Add.1 and 2 (see footnote 1 above), para. 198.

stead the term "third State" as the State through which the courier or the bag passes in transit. Thus article 40, paragraph 3, of the 1961 Vienna Convention and the corresponding articles in the other codification conventions³⁰⁶ provide:

3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving State. They shall accord to diplomatic couriers, who have been granted a passport visa if such visa was necessary, and diplomatic bags in transit the same inviolability and protection as the receiving State is bound to accord.

370. It is evident that by "third State" is meant not the usual notion of a State not involved in a given legal relationship or not a party to a treaty, as defined by article 2, paragraph 1 (*h*), of the Vienna Convention on the Law of Treaties of 1969, but a State through whose territory the diplomatic courier or the bag not accompanied by diplomatic courier pass *en route* to or from the receiving State.

371. Following the discussions on this topic in the Sixth Committee of the General Assembly and later in the Commission, the Special Rapporteur felt that, for the purpose of this topic, there should be a definition of the term "transit State". He therefore pointed out in his second report that the "transit State should be defined as such and not merely be assimilated to third State, i.e. a State which is neither a sending nor a receiving State".³⁰⁷

372. It is submitted that in normal circumstances the transit State is known in advance according to the established itinerary of the courier, and provided, if so required, with a transit visa. In the case of the bag not accompanied by courier and entrusted to the captain of a commercial aircraft of a regular air service, or to the master of a merchant ship, the journey of the unaccompanied bag is also known in advance, including the countries through whose territories the bag will pass in transit.

373. The Special Rapporteur thought that the term "transit State" might be more appropriate, bearing in mind the particular features inherent in the functions of the diplomatic courier and the diplomatic bag. The courier is a travelling official whose function is to transmit the diplomatic bag from one place to another. Thus in the performance of the functions of the courier the transit State may acquire the same importance as the receiving State, and may sometimes appear on the courier's waybill even more often than the receiving State. It would be preferable in this case not to call such a State a "third State", but to indicate its proper significance for the operation of official communications as the State of transit of the means of these communications.

³⁰⁶ See art. 54, para. 3, of the 1963 Vienna Convention; art. 42, paras. 3-4, of the Convention on Special Missions; art. 81, para. 4, of the 1975 Vienna Convention.

³⁰⁷ See footnote 305 above.

374. It has also been submitted that the term "third State" has acquired such a well-established legal meaning that its use in another sense may lead to confusion. A view to this effect was expressed during the discussions in the Sixth Committee, when it was suggested that the term "third State" might be misleading for the purposes of the present draft articles.

375. Taking into consideration the practical importance of the facilities, privileges and immunities granted by the transit State to the diplomatic courier and the diplomatic bag, the reference to the transit State has been made side by side with the reference to the receiving State throughout the whole set of the draft articles. For it is obvious that, for the proper operation of official communications, through diplomatic couriers and diplomatic bags, their protection by the transit State is of the same nature and significance as the treatment that they have to be granted by the receiving State.

376. The definition of the transit State, although referring first of all to the State whose territory is used for transit to or from the receiving State in conformity with the normal itinerary, would also refer to a State that was not initially anticipated for the transit passage of the courier or the unaccompanied bag. This would be the case with a transit State whose territory the diplomatic courier or the unaccompanied diplomatic bag were compelled to enter, or in which they would have to remain for some time, in a case of *force majeure* or fortuitous event, such as the forced landing of an aircraft, the breakdown of the means of transport, a natural disaster or another event beyond the control of the courier or the carrier of the bag. In distinction from the transit State known in advance, and which has granted a transit visa, if so required, the identity of the transit State in the case of *force majeure* or fortuitous event cannot be known in advance. It comes into the picture only in an extraordinary situation.

377. In such a case, the problem may arise whether or not such a transit State should accord the necessary protection and facilities, privileges and immunities as are accorded by the receiving or the transit State initially envisaged. Prior to the 1961 Vienna Convention, legal doctrine and State practice did not adhere to a firm position on the right of transit of the diplomatic agent and the scope of the privileges accorded to him by the transit State. Sometimes the right of transit, i.e. *jus transitus innoxii*, was based on bilateral agreements, because the customary rules to that effect were not generally recognized. With the evolving process of intensified diplomatic communications, the right of transit has acquired its legitimacy.

378. The 1961 Vienna Convention, however, was the first multilateral treaty that established the rule of transit passage of the members of the diplomatic mission and their families, as well as of the diplomatic courier and the diplomatic bag whose presence in the territory of the transit State was due to *force majeure*. In conformity with this rule, the transit State is under the obligation to accord to the diplomatic courier and the

diplomatic bag in transit the same freedom of movement, inviolability and protection as are accorded by the receiving State.

379. It may be assumed that in practice the scope of the facilities, privileges and immunities accorded by the transit State to the diplomatic courier and the diplomatic bag in exceptional circumstances, as a result of *force majeure* or fortuitous event, would be more limited. Chief among these facilities, privileges and immunities would be the inviolability and protection of the diplomatic courier and the diplomatic bag. Among the facilities, privileges and immunities to be accorded to the courier and the bag, priority would be given to any measures that facilitated the prompt resumption of the journey of the courier or the transportation of the unaccompanied bag. In such conditions of distress a transit visa, if required, should be issued promptly, on the spot, without adherence to the normal procedures and formalities usually applied.

380. In the light of the above considerations regarding the obligations of the transit State in case of *force majeure* or fortuitous event, the Special Rapporteur submits the following draft article for examination and provisional adoption:

PART IV

MISCELLANEOUS PROVISIONS

Article 40. Obligations of the transit State in case of force majeure or fortuitous event

If, as a consequence of *force majeure* or fortuitous event, the diplomatic courier or the diplomatic bag is compelled to deviate from his or its normal itinerary and remain for some time in the territory of a State which was not initially foreseen as a transit State, that State shall accord the inviolability and protection that the receiving State is bound to accord and shall extend to the diplomatic courier or the diplomatic bag the necessary facilities to continue his or its journey to his or its destination or to return to the sending State.

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

381. Having examined the possible effects of *force majeure* or fortuitous event on the treatment of the diplomatic courier and the diplomatic bag in emergency situations, it might be appropriate to consider also the impact of other extraordinary situations, such as *non-recognition* of a State or Government and *absence or severance of diplomatic or consular relations*. In this case again we are faced with the effects of exceptional circumstances on the functioning of official communications through diplomatic couriers and diplomatic bags. The state of war or armed conflict has been deliberately excluded from the scope of the present topic, although it also falls within the broader concept of extraordinary situations. The main reason for such a restrictive approach has been the fact that the problem

of armed conflict or of a state of war would require not only the elaboration of a general rule but also of a set of special rules applicable to various situations of armed conflict or state of war, constituting *jus ad bellum*.

382. The main problem arising in the above-mentioned exceptional situations is whether the obligation to accord legal protection and other facilities, privileges and immunities to the diplomatic courier and the diplomatic bag should apply as between parties to the instrument resulting from the present draft articles even in cases where the host State on whose territory an international organization has its headquarters or an international conference is held, or a transit State, do not recognize the sending State or its Government. The same problem would arise also as between the States referred to above in the absence or severance of diplomatic or consular relations between them. Although the possible effects of these exceptional situations on the treatment of the courier and the bag are common to both, there are some specific features which require that separate consideration be given to non-recognition as distinct from non-existence or severance of diplomatic or consular relations.

383. The rule of non-recognition of States or Governments was not considered by the codification conferences on diplomatic and consular relations in 1961 and 1963. The Commission dealt with the problem in connection with the draft articles on special missions at its nineteenth session, in 1967, and proposed a special provision, incorporated in draft article 7, paragraph 2, which stated:

2. A State may send a special mission to a State, or receive one from a State, which it does not recognize.³⁰⁸

However, this provision was not adopted by the Sixth Committee, and consequently was not included in the Convention on Special Missions.

384. The problem of non-recognition was also considered by the Commission in a different context, when elaborating the draft articles on the law of treaties. In its commentary to draft article 60, the Commission stated that

... any problems that may arise in the sphere of treaties from the absence of recognition of a Government do not appear to be such as should be covered in a statement of the general law of treaties.³⁰⁹

385. It was not until its twenty-third session, in 1971, that the Commission considered it necessary, in connection with the draft articles on relations between States and international organizations, to formulate a special rule on non-recognition of States or Governments and on absence and severance of diplomatic or consular relations.³¹⁰ The decision to that effect resulted from the consideration, at its twenty-first and twenty-second ses-

³⁰⁸ *Yearbook ... 1967*, vol. II, p. 350, document A/6709/Rev.1, chap. II, sect. D.

³⁰⁹ *Yearbook ... 1966*, vol. II, p. 260, document A/6309/Rev.1, part II, chap. II, para. (1) of the commentary.

³¹⁰ *Yearbook ... 1971*, vol. II (Part Two), pp. 101-105, document A/CN.4/L.166.

sions, in 1969 and 1970, of draft articles referring to exceptional situations.³¹¹

386. In its commentary to article 79 (Non-recognition of States or Governments or absence of diplomatic or consular relations) of the final draft articles on the representation of States in their relations with international organizations, the Commission expressed the view that the formulation of the provision should not follow that of the relevant provisions of the conventions previously adopted, namely the 1961 Vienna Convention, the 1963 Vienna Convention and the Convention on Special Missions. Given the specific features of relations between States and international organizations as distinct from bilateral relations between States, the Commission deemed it necessary to give special consideration to this problem, and stated that:

... The non-recognition or the absence of diplomatic or consular relations between a host State and a sending State cannot therefore have the same effects as it would have in their mutual relations.³¹²

The conclusion reached by the Commission was that:

... the non-recognition by the host State or the sending State of the other State or of its government or the non-existence or severance of diplomatic or consular relations between them does not affect their respective "rights and obligations" under the present articles. In other words, the rights and obligations of the host State and the sending State under the present articles are not dependent upon recognition or upon the existence of diplomatic or consular relations at the bilateral level.³¹³

387. These considerations seem very relevant to the status of the diplomatic courier and the diplomatic bag in the exceptional situations where the sending State and the transit or host State do not recognize each other. Consequently, the non-recognition of a State or a Government should not be invoked to prevent the functioning of diplomatic communications and the granting of protection to the diplomatic courier or the diplomatic bag. The obligation to accord the facilities, privileges and immunities provided for in the present draft articles should not be affected by the absence of mutual recognition between the States concerned.

388. On the other hand, the granting of facilities, privileges and immunities to the diplomatic courier and the diplomatic bag does not of itself imply recognition by the sending State of the receiving or the transit State or of its government, nor does it imply recognition by the host State or the transit State of the sending State or of its government. The protection and special treatment accorded to the diplomatic courier and the diplomatic bag should be considered as observance of the principle of freedom of official communications, which is independent of recognition of a State or Government. Of course this does not mean that the application of this principle may not be politically influenced by the attitude of one State *vis-à-vis* another State or Government. However, if a State is bound by an international

treaty to respect the status of a diplomatic courier or a diplomatic bag duly authorized to perform an official function, that State must be under the obligation to grant legal protection, despite the non-recognition of the sending State or of its Government. This fact of itself implies no form of recognition.

389. Absence or severance of diplomatic or consular relations, as another exceptional situation with possible effect on the functioning of relations between States, was considered during the preparation of the four codification conventions. In some instances the impact of diplomatic or consular relations is implied by the relevant provisions of the conventions, while in other instances it is explicitly stated. The 1961 Vienna Convention provides that the establishment of diplomatic relations is a prerequisite for the establishment by mutual consent of permanent diplomatic missions. Consequently article 45 of the Convention states what would be the effect of severance of diplomatic relations or the temporary or permanent recall of the mission on its premises, property and archives. Article 2, paragraph 3, of the 1963 Vienna Convention provides:

3. The severance of diplomatic relations shall not *ipso facto* involve the severance of consular relations.

For its part, the Convention on Special Missions states in article 7:

The existence of diplomatic or consular relations is not necessary for the sending or reception of a special mission.

390. The effect of severance of diplomatic or consular relations was also considered in regard to the operation of a treaty between the parties concerned. Thus article 63 of the Vienna Convention on the Law of Treaties of 1969 explicitly provides:

The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

Article 74 of the same Convention further stipulates:

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

391. As has already been pointed out (paras. 384-386 above), the Commission and, later, the United Nations Conference on the Representation of States, accorded special attention to the legal effects of non-recognition of States or Governments and of absence or severance of diplomatic or consular relations on the mutual relations between the sending State and the host State. Article 82 of the 1975 Vienna Convention reads as follows:

1. The rights and obligations of the host State and of the sending State under the present Convention shall be affected neither by the non-recognition by one of those States of the other State or of its government nor by the non-existence or the severance of diplomatic or consular relations between them.

2. The establishment or maintenance of a mission, the sending or attendance of a delegation or of an observer delegation or any act in application of the present Convention shall not by itself imply recognition by the sending State of the host State or its government or by the host State of the sending State or its government.

³¹¹ *Ibid.*, p. 101, para. 21, and p. 105, para. 24.

³¹² *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II, p. 52, para. (5) of the commentary.

³¹³ *Ibid.*, pp. 52-53, para. (7) of the commentary.

392. The rules relating to the legal effect of non-recognition of a State or Government or absence or severance of diplomatic or consular relations contained in the codification conventions are applicable to the status of the diplomatic courier and the diplomatic bag. The courier and the bag being practical means for the operation of official communications, they need special protection and treatment independently of the existence or absence of diplomatic or consular relations between the sending State and the host State, the receiving State (in the case of a special mission) or the transit State. The official function of the courier and the bag is of such significance that it should not be prevented from performing its functions by the absence of diplomatic relations. The proper functioning of official communications is in the interests of the maintenance of international co-operation and understanding and should therefore be facilitated even in exceptional circumstances.

393. Consequently the receiving State, the host State or the transit State should be under the obligation to accord to the diplomatic courier and the diplomatic bag the necessary facilities, privileges and immunities for the proper performance of their functions. In this respect a comment made by one Government on the topic under consideration in 1979 seems to be of special relevance. It was pointed out that:

The function of the diplomatic courier, although he is accorded privileges and immunities similar to those of the diplomatic agent, is of a procedural rather than a substantively political nature. Consequently, the severance or suspension of diplomatic relations or the recall of missions should not influence decisively the functions of the courier during his passage through transit States. In strict law, the same would be true even in the event of an armed conflict with such States. In the event of the severance or suspension of diplomatic relations with the receiving State, or the recall of diplomatic missions, the diplomatic courier would act as a liaison between the sending State and the diplomatic mission agreeing to look after the interests of that State; such situations of bilateral abnormality would not then interfere with the performance of the courier's functions. In the event of armed conflict, the *de facto* situation would prevent the courier from continuing to perform his functions.³¹⁴

394. Leaving aside the problem of the effect of a state of war or armed conflict for the reasons already indicated (para. 381), it seems that, in exceptional situations such as non-recognition or non-existence or severance of diplomatic relations, the courier may accomplish the modest but noble function of a "messenger", a well deserved denomination having its roots in history. It should be added that, prior to the codification conventions, and more specifically up to the Second World War, certain cases occurred relating to the consequences, in respect of observance of the inviolability of the diplomatic bag, of the recall of diplomatic missions, of severance or suspension of diplomatic relations, or of armed conflict.³¹⁵ The practice of States was not very coherent, particularly during

armed conflicts or state of war, which is understandable.

395. In the light of the above considerations, the Special Rapporteur submits the following draft article for examination and provisional approval:

Article 41. Non-recognition of States or Governments or absence of diplomatic or consular relations

1. The facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag under these articles shall not be affected either by the non-recognition of the sending State or of its Government by the receiving State, the host State or the transit State or by the non-existence or severance of diplomatic or consular relations between them.

2. The granting of facilities, privileges and immunities to the diplomatic courier and the diplomatic bag, under these articles, by the receiving State, the host State or the transit State shall not by itself imply recognition by the sending State of the receiving State, the host State or the transit State, or of its Government, nor shall it imply recognition by the receiving State, the host State or the transit State of the sending State or of its Government.

D. Relation of the draft articles to other conventions and international agreements

396. At this stage, consideration of the relation between the present draft articles and the four codification conventions and other international agreements in the field of diplomatic or consular law having a bearing on the status of the diplomatic courier and the diplomatic bag should be of a preliminary and very provisional character. Pending a final decision regarding the form and legal nature of these articles, the question of their relation to other treaties should remain open. Nevertheless, it might be advisable to submit for preliminary examination some draft provisions which could be considered when the draft provisions on this issue are finalized.

397. The *main objective* of a provision regarding the relation of the present draft articles to existing international treaties in the field of diplomatic and consular law should be to establish the *legal relationship* between the rules governing the status of the diplomatic courier and the diplomatic bag and the four codification conventions. This legal relationship may be expressed in several ways.

398. First of all, the provision should attempt to establish a *common legal basis* for a *coherent* and as uniform as possible a régime of the courier and of the bag. This could be achieved through *harmonization of the existing legal provisions* governing the status of various kinds of couriers and bags employed by States for official communications. The rationale of this approach is the assumption that couriers and bags are used for multipurpose functions in respect to various mis-

³¹⁴ See the written comments of Chile, para. 9, in *Yearbook ... 1979*, vol. II (Part One), p. 219, document A/CN.4/321 and Add.1-7.

³¹⁵ See the cases occurring between 1869 and 1940 in Moore, *op. cit.* (footnote 108 above), pp. 696-701; and Hackworth, *op. cit.* (footnote 59 above), pp. 624-629.

sions. Diplomatic couriers and bags are employed by States for the exercise of their right of communication with permanent diplomatic missions, consular posts, permanent missions to international organizations and delegations to international conferences. Basically, however, they serve the same right of States and should therefore be accorded the same degree of legal protection.

399. Secondly, the present draft articles are intended to *complement* the four codification conventions in so far as the status of the diplomatic courier and the diplomatic bag is concerned, especially regarding the use of the unaccompanied diplomatic bag. The rules governing the dispatch of the diplomatic bag by civil aircraft, merchant ship, postal services and other means should be elaborated, taking into consideration the practice of States as evidenced by the four codification conventions and other international agreements, as well as by national rules and regulations. Thus the present draft articles have to be considered in their relationship with the ground rules established by treaty practice and national legislation. In this connection it is suggested that the present draft articles be conceived as *accessory rules*, especially in respect of the 1961 Vienna Convention and the other codification conventions.

400. The codification and progressive development of the rules governing the operation of official communications through diplomatic couriers and diplomatic bags should therefore always take as its basis and starting point the existing multilateral conventions and other international agreements. At the same time, these draft articles should not prevent States from concluding international agreements relating in one way or another to the status of the diplomatic courier and the diplomatic bag.

401. This flexible approach to the relation of the present draft articles to other international treaties in the field of diplomatic or consular law seems to be supported by international law, and particularly by the relevant provisions of the 1969 Vienna Convention on the Law of Treaties and the codification conventions. In this connection, article 30 of the Vienna Convention on the Law of Treaties, on the application of successive treaties to the same subject-matter, and article 41 of the same Convention on agreements to modify multilateral treaties between parties to such treaties, appear to have a certain relevance. However, for the purposes of the present draft articles, especial significance should be attached to those codification conventions that contain explicit provisions on their relationship with other international agreements. In this connection reference should be made to article 73 of the 1963 Vienna Convention, which stipulates that the Convention shall not affect other international agreements in force between the

State parties, and that it shall not preclude those States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof. A similar provision is incorporated in article 4 of the 1975 Vienna Convention, which states that the provisions of the Convention are without prejudice to other international agreements in force between States or between States and international organizations of a universal character, and that it shall not preclude the conclusion of other international agreements regarding the representation of States.

402. The draft provision regarding the relation of the present draft articles to the codification conventions and other international agreements may be considered not only as a *legal connection* with those conventions and agreements but also as a *safeguard clause* in respect of the rights and obligations of States deriving from them and their inherent sovereign right to enter into other agreements. It should be assumed that, in the latter case, successive agreements may modify the articles on the status of the diplomatic courier and the diplomatic bag as between the parties concerned without affecting the rights and obligations of other States parties to those articles, providing that the modifications do not relate to a provision in respect of which derogation would be incompatible with the effective realization of the object and purpose of the articles on the courier and the bag.

403. In the light of the above considerations regarding the relation of the present draft articles to the codification conventions and the other international agreements in this field, the Special Rapporteur submits the following draft article for examination and provisional adoption:

Article 42. Relation of the present articles to other conventions and international agreements

1. The present articles shall complement the provisions on the courier and the bag in the Vienna Convention on Diplomatic Relations of 18 April 1961, the Vienna Convention on Consular Relations of 24 April 1963, the Convention on Special Missions of 8 December 1969 and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975.

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

3. Nothing in the present articles shall preclude States from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier,

Conclusion

404. With the presentation of the draft articles of part IV, Miscellaneous provisions, the set of draft articles on the topic under consideration, as initially contemplated by the Special Rapporteur, is completed. Throughout the study of the topic an attempt has been made to follow a pragmatic method in the examination of the practice of States with a view to ascertaining the areas of emerging positive law, based on functional necessity. The proposals for codification of existing rules and proposals *de lege ferenda* have been motivated by the practical requirements of providing a comprehensive legal basis for the operation of official communications. In so doing, especial attention has been given to the in-

creasing role of the diplomatic bag carried by *ad hoc* couriers, or entrusted to the captain or an authorized member of the crew of a commercial aircraft, as well as the diplomatic bag dispatched through postal channels or other means of transportation. The purpose of the whole set of draft articles has been to try to elaborate a coherent legal régime governing the various kinds of couriers and bags which would provide a proper balance between the legitimate interests of the sending and the receiving or transit States. It was felt that this would be the basis for a viable international régime governing modern diplomatic communications.