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

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

[Agenda item 5]

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* Incorporating document A/CN.4/390/Corr.1.

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NOTE

Multilateral conventions referred to in the present report:

	<i>Source</i>
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961) Hereinafter referred to as the 1961 Vienna Convention	United Nations, Treaty Series, 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. 1975</i> (Sales No. E.77.V.3), p. 87.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	<i>Official Records of the Third United Nations Conference on the Law of the Sea</i> , vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

Introduction

1. The present report is the sixth submitted by the Special Rapporteur on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The last two reports, namely the fourth and the fifth,¹ contained a complete set of 42 draft articles proposed by the Special Rapporteur. Some of these draft articles were provisionally adopted by the Commission, while others were considered by the Commission and referred to its Drafting Committee. Some draft articles

were partially examined by the Commission but are still to be considered at the thirty-seventh session.²

2. Therefore, one of the objectives of this report is to update the present status of the draft articles and indicate the attitudes of Governments towards the proposed draft as evidenced by the debates in the Sixth Commit-

¹ For further details on the consideration of the topic by the Commission up to 1984, see:

(a) The reports of the Commission: (i) on its thirty-first session, *Yearbook ... 1979*, vol. II (Part Two), pp. 170 *et seq.*, chap. VI;

² See footnote 2 (b) (iv) and (v) below.

tee at the thirty-ninth session of the General Assembly. It is the Special Rapporteur's view that at this stage of the work priority should be given to identifying the comments and observations by Governments with re-

(ii) on its thirty-second session, *Yearbook ... 1980*, vol. II (Part Two), pp. 162 *et seq.*, chap. VIII; (iii) on its thirty-third session, *Yearbook ... 1981*, vol. II (Part Two), pp. 159 *et seq.*, chap. VI; (iv) on its thirty-fourth session, *Yearbook ... 1982*, vol. II (Part Two), pp. 112 *et seq.*, chap. VI; (v) on its thirty-fifth session, *Yearbook ... 1983*, vol. II (Part Two), pp. 44 *et seq.*, chap. V; (vi) on its thirty-sixth session, *Yearbook ... 1984*, vol. II (Part Two), pp. 18 *et seq.*, chap. III.

(b) The previous reports of the Special Rapporteur: (i) preliminary report, *Yearbook ... 1980*, vol. II (Part One), p. 231, document A/CN.4/335; (ii) second report, *Yearbook ... 1981*, vol. II (Part One), p. 151, document A/CN.4/347 and Add.1 and 2; (iii) third report, *Yearbook ... 1982*, vol. II (Part One), p. 247, document A/CN.4/359 and Add.1; (iv) fourth report, *Yearbook ... 1983*, vol. II (Part One), p. 62, document A/CN.4/374 and Add.1-4; (v) fifth report, *Yearbook ... 1984*, vol. II (Part One), p. 72, document A/CN.4/382.

gard to pending issues and draft articles on which consideration has not been completed. It is believed that such a consistent review will reveal the consolidated trends emerging from the debate in the Sixth Committee, with a view to providing possible options for formulae that would enjoy wider acceptance.

3. The evolving work of the Commission will thus follow closely the progress made during the debate in the Sixth Committee, where the views of Governments are expressed on matters under consideration.

4. In conformity with such an approach, it is suggested first of all to establish the various categories of draft articles in accordance with their present status. Taking into account the comments and observations made both in the Commission and in the Sixth Committee, the Special Rapporteur will attempt to offer his suggestions with regard to the remaining draft articles still to be examined by the Commission.

I. Present status of the draft articles

5. The draft articles submitted by the Special Rapporteur in his fourth report, in 1983, and further elaborated in his fifth report, in 1984, may be classified, according to their present status, in the following categories:

(a) Draft articles provisionally adopted by the Commission on first reading: articles 1 to 17, 19 and 20;

(b) Draft articles considered by the Commission and referred to the Drafting Committee; articles 28 to 35;

(c) Draft articles completing the series, consideration of which is to be resumed by the Commission: articles 23 and 36 to 42.

A. Draft articles provisionally adopted by the Commission on first reading

6. The 19 draft articles (1 to 17, 19 and 20) provisionally adopted by the Commission on first reading are in fact derived from draft articles 1 to 27 successively submitted by the Special Rapporteur in his second, third and fourth reports. Their number has been reduced as a result of the deletion of certain articles and the merging of others. That is the case with draft articles 9, 12, 22, 26 and 27,³ which were deleted, and draft ar-

³ Draft articles 9 and 12, submitted by the Special Rapporteur in his third report, read as follows:

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

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

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

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

Draft articles 22, 26 and 27 submitted by the Special Rapporteur in his fourth report read as follows:

"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

ticles 15, 18 and 19,⁴ which were merged during their consideration by the Drafting Committee.

7. The texts of draft articles 1 to 17, 19 and 20, provisionally adopted by the Commission on first reading at its thirty-fifth and thirty-sixth sessions,⁵ are reproduced below.

Article 1. Scope of the present articles

The present articles apply to the diplomatic courier and the diplomatic bag employed for the official communications of a State with its missions, consular posts or delegations, wherever situated, and for the official communications of those missions, consular posts or delegations with the sending State or with each other.

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."

"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."

"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."

* Some provisions of draft articles 18 (Freedom of communication) and 19 (Temporary accommodation) were incorporated in draft article 15 (General facilities), which was provisionally adopted as article 13.

* The texts of articles 1 to 8 and the commentaries thereto, provisionally adopted at the thirty-fifth session, are reproduced in *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*; the texts of articles 9 to 17, 19 and 20 and the commentaries thereto, provisionally adopted at the thirty-sixth session, are reproduced in *Yearbook ... 1984*, vol. II (Part Two), pp. 43 *et seq.*

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

The fact that the present articles do not apply to couriers and bags employed for the official communications of international organizations shall not affect:

- (a) the legal status of such couriers and bags;
- (b) the application to such couriers and bags of any rules set forth in the present articles which would be applicable under international law independently of the present articles.

Article 3. Use of terms

1. For the purposes of the present articles:

(1) "diplomatic courier" means a person duly authorized by the sending State, either on a regular basis or for a special occasion as a courier *ad hoc*, as:

- (a) a diplomatic courier within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;
- (b) a consular courier within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;
- (c) a courier of a special mission within the meaning of the Convention on Special Missions of 8 December 1969; or
- (d) a courier of a permanent mission, of a permanent observer mission, of a delegation or of an observer delegation, within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975,

who is entrusted with the custody, transportation and delivery of the diplomatic bag, and is employed for the official communications referred to in article 1;

(2) "diplomatic bag" means the packages containing official correspondence, documents or articles intended exclusively for official use, whether accompanied by diplomatic courier or not, which are used for the official communications referred to in article 1 and which bear visible external marks of their character as:

- (a) a diplomatic bag within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;
- (b) a consular bag within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;
- (c) a bag of a special mission within the meaning of the Convention on Special Missions of 8 December 1969; or
- (d) a bag of a permanent mission, of a permanent observer mission, of a delegation or of an observer delegation, within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

(3) "sending State" means a State dispatching a diplomatic bag to or from its missions, consular posts or delegations;

(4) "receiving State" means a State having on its territory missions, consular posts or delegations of the sending State which receive or dispatch a diplomatic bag;

(5) "transit State" means a State through whose territory a diplomatic courier or a diplomatic bag passes in transit;

(6) "mission" means:

- (a) a permanent diplomatic mission within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;
- (b) a special mission within the meaning of the Convention on Special Missions of 8 December 1969; and
- (c) a permanent mission or a permanent observer mission within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

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

(8) "delegation" means a delegation or an observer delegation within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

(9) "international organization" means an intergovernmental organization.

2. The provisions of paragraph 1 of the present article regarding the use of terms in the present articles are without prejudice to the use

of those terms or to the meanings which may be given to them in other international instruments or the internal law of any State.

Article 4. Freedom of official communications

1. The receiving State shall permit and protect the official communications of the sending State, effected through the diplomatic courier or the diplomatic bag, as referred to in article 1.

2. The transit State shall accord to the official communications of the sending State, effected through the diplomatic courier or the diplomatic bag, the same freedom and protection as is accorded by the receiving State.

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

1. The sending State shall ensure that the privileges and immunities accorded to its diplomatic courier and diplomatic bag are not used in a manner incompatible with the object and purpose of the present articles.

2. Without prejudice to the privileges and immunities accorded to him, it is the duty of the diplomatic courier to respect the laws and regulations of the receiving State or the transit State, as the case may be. He also has the duty not to interfere in the internal affairs of the receiving State or the transit State, as the case may be.

Article 6. Non-discrimination and reciprocity

1. In the application of the provisions of the present articles, the receiving State or the transit State shall not discriminate as between States.

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

(a) where the receiving State or the transit State applies any of the provisions of the present articles restrictively because of a restrictive application of that provision to its diplomatic courier or diplomatic bag by the sending State;

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

Article 7. Documentation of the diplomatic courier

The diplomatic courier shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag which is accompanied by him.

Article 8. Appointment of the diplomatic courier

Subject to the provisions of articles 9 and 12, the diplomatic courier is freely appointed by the sending State or by its missions, consular posts or delegations.

Article 9. Nationality of the diplomatic courier

1. The diplomatic courier should in principle be of the nationality of the sending State.

2. The diplomatic courier may not be appointed from among persons having the nationality of the receiving State except with the consent of that State, which may be withdrawn at any time.

3. The receiving State may reserve the right provided for in paragraph 2 of this article with regard to:

(a) nationals of the sending State who are permanent residents of the receiving State;

(b) nationals of a third State who are not also nationals of the sending State.

Article 10. Functions of the diplomatic courier

The functions of the diplomatic courier consist in taking custody of, transporting and delivering at its destination the diplomatic bag entrusted to him.

Article 11. End of the functions of the diplomatic courier

The functions of the diplomatic courier come to an end, *inter alia*, upon:

(a) notification by the sending State to the receiving State and, where necessary, to the transit State that the functions of the diplomatic courier have been terminated;

(b) notification by the receiving State to the sending State that, in accordance with article 12, it refuses to recognize the person concerned as a diplomatic courier.

Article 12. The diplomatic courier declared persona non grata or not acceptable

1. The receiving State may at any time, and without having to explain its decision, notify the sending State that the diplomatic courier is persona non grata or not acceptable. In any such case, the sending State shall, as appropriate, either recall the diplomatic courier or terminate his functions to be performed in the receiving State. A person may be declared non grata or not acceptable before arriving in the territory of the receiving State.

2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this article, the receiving State may refuse to recognize the person concerned as a diplomatic courier.]

Article 13. Facilities

1. The receiving State or, as the case may be, the transit State shall accord to the diplomatic courier the facilities necessary for the performance of his functions.

2. The receiving State or, as the case may be, the transit State shall, upon request and to the extent practicable, assist the diplomatic courier in obtaining temporary accommodation and in establishing contact through the telecommunications network with the sending State and its missions, consular posts or delegations, wherever situated.

Article 14. Entry into the territory of the receiving State or the transit State

1. The receiving State or, as the case may be, the transit State shall permit the diplomatic courier to enter its territory in the performance of his functions.

2. Visas, where required, shall be granted by the receiving State or the transit State to the diplomatic courier as promptly as possible.

Article 15. Freedom of movement

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State or, as the case may be, the transit State shall ensure to the diplomatic courier such freedom of movement and travel in its territory as is necessary for the performance of his functions.

Article 16. Personal protection and inviolability

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

Article 17. Inviolability of temporary accommodation

1. The temporary accommodation of the diplomatic courier shall be inviolable. The agents of the receiving State or, as the case may be, of the transit State may not enter the temporary accommodation, except with the consent of the diplomatic courier. Such consent may, however, be assumed in case of fire or other disaster requiring prompt protective action.

2. The diplomatic courier shall, to the extent practicable, inform the authorities of the receiving State or the transit State of the location of his temporary accommodation.

3. The temporary accommodation of the diplomatic courier shall not be subject to inspection or search, unless there are serious grounds for believing that there are in it articles the possession, import or export of which is prohibited by 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 and on condition that the inspection or search be effected 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 or impediments to the delivery of the diplomatic bag.

Article 19. Exemption from personal examination, customs duties and inspection

1. The diplomatic courier shall be exempt from personal examination.

2. The receiving State or, as the case may be, the transit State shall, in accordance with such laws and regulations as it may adopt, permit entry of articles for the personal use of the diplomatic courier imported in his personal baggage and shall grant exemption from all customs duties, taxes and related charges on such articles other than charges levied for specific services rendered.

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 for the personal use of the diplomatic courier or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or, as the case may be, of the transit State. Such inspection shall be conducted only in the presence of the diplomatic courier.

Article 20. Exemption from dues and taxes

The diplomatic courier shall, in the performance of his functions, be exempt in the receiving State or, as the case may be, in the transit State from all those dues and taxes, national, regional or municipal, for which he might otherwise be liable, 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.

B. Draft articles considered by the Commission and referred to the Drafting Committee

8. The second category comprises draft articles 28 to 35, which were submitted by the Special Rapporteur in his fourth report and which, after consideration by the Commission at its thirty-sixth session, were referred to the Drafting Committee.⁶ Three of these draft articles relate to the status of the diplomatic courier and the captain of a commercial aircraft or the master of a merchant ship, namely: "Duration of privileges and immunities" (art. 28),⁷ "Waiver of immunity" (art. 29)⁸

⁶ Yearbook ... 1984, vol. II (Part Two), p. 20, para. 76.

⁷ Draft article 28 submitted by the Special Rapporteur read:

"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."

⁸ Draft article 29 submitted by the Special Rapporteur read:

"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.

and “Status of the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew” (art. 30).⁹ The remaining draft articles concern the status of the diplomatic bag, namely: “Indication of status of the diplomatic bag” (art. 31),¹⁰ “Content of the diplomatic bag” (art. 32),¹¹ “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” (art. 33),¹² “Status of the diplo-

(footnote 8 continued.)

“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.”

⁹ Draft article 30 submitted by the Special Rapporteur read:

“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.”

¹⁰ Draft article 31 submitted by the Special Rapporteur read:

“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.”

¹¹ Draft article 32 submitted by the Special Rapporteur read:

“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.”

¹² Draft article 33 submitted by the Special Rapporteur read:

“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*

matic bag dispatched by postal services or other means” (art. 34)¹³ and “General facilities accorded to the diplomatic bag” (art. 35).¹⁴

C. Draft articles the consideration of which is to be resumed by the Commission

9. The third category comprises draft articles the consideration of which the Commission decided to resume at the thirty-seventh session, namely draft article 23 (Immunity from jurisdiction), which was considered by the Drafting Committee, but on which the Commission could reach no agreement at its thirty-sixth session;¹⁵ and draft articles 36 to 42, consideration of which was begun at the thirty-sixth session and is to be resumed.¹⁶ Having in mind the unsettled position of these draft articles, it is the intention of the Special Rapporteur to focus the Commission’s attention on them and to try to offer certain modifications, taking into consideration the comments and suggestions advanced in the debate both in the Commission and in the Sixth Committee of the General Assembly.

“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.

¹³ Draft article 34 submitted by the Special Rapporteur read:

“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.

“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.”

¹⁴ Draft article 35 submitted by the Special Rapporteur read:

“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.”

¹⁵ Yearbook ... 1984, vol. II (Part Two), p. 42, para. 193.

¹⁶ Ibid., p. 41, para. 186.

II. Consideration of the draft articles at the thirty-seventh session of the Commission

A. Introductory note

10. Perhaps due to the fact that a complete set of draft articles on the topic had been submitted by 1983 and that a significant number of those articles had been provisionally adopted on first reading, the debate which took place in the Sixth Committee during the thirty-ninth session of the General Assembly covered the topic as a whole, including specific draft articles. This comprehensive discussion encompassed the general aspects of the topic and the draft articles provisionally adopted, as well as the draft articles considered by the Commission and referred to the Drafting Committee or those whose examination was to be resumed at the thirty-seventh session.¹⁷

11. The significant progress achieved so far in the consideration of the topic and in the elaboration of draft articles was acknowledged with appreciation. The view was expressed that, within its present term of membership, the Commission might be in a position to complete a first reading of the full set of draft articles on the topic.

12. The comments and observations made on the topic as a whole and on individual draft articles are of great benefit to the work of the Commission. However, it is suggested that at this stage the reference be confined to the draft articles which are to be examined at the thirty-seventh session, namely draft articles 23 and 36 to 42 of the set of articles submitted by the Special Rapporteur in his fourth report.

B. The jurisdictional immunity of the diplomatic courier (art. 23)¹⁸

1. COMMENTS AND OBSERVATIONS MADE IN THE COMMISSION AND IN THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY

13. Draft article 23 was the subject of prolonged discussion, both in the Commission and in the Sixth Com-

¹⁷ See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-ninth session of the General Assembly" (A/CN.4/L.382), sect. C.

¹⁸ Draft article 23 as proposed by the Drafting Committee read:

"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, as the case may be, the transit State in respect of all acts performed in the exercise of his functions. This immunity shall not extend to an action for damages arising from an accident caused by a vehicle the use of which may have involved the liability of the courier where those damages are not recoverable from insurance.

"3. No measures of execution may be taken in respect of the diplomatic courier, except in cases where he does not enjoy immunity under 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.

mittee.¹⁹ It was generally recognized that the draft article was an important and complex provision concerning the privileges and immunities to be accorded to the diplomatic courier. Immunity from the criminal jurisdiction of the receiving State or the transit State constituted the most essential element of the degree of legal protection that the diplomatic courier should enjoy.

14. The discussion centred mainly on paragraph 1, concerning immunity from criminal jurisdiction, and to a lesser extent on paragraph 4, which provided that the diplomatic courier was not obliged to give evidence as a witness. Comments and observations of a drafting nature were made on some other paragraphs and on the article as a whole.

15. Opposing views on the necessity, importance and scope of draft article 23 and, more specifically, on paragraph 1, were expressed both in the Commission and in the Sixth Committee.

16. According to one view, the diplomatic courier was an official agent of the sending State, exercising official State functions in connection with the custody and transportation of the diplomatic bag. It was stressed that the protection of the courier was a functional necessity enabling the courier to carry out his official mission. Absolute immunity from criminal jurisdiction was considered as a guarantee of adequate legal protection in line with prevailing State practice and in accordance with the four conventions codifying diplomatic and consular law.²⁰ It was also maintained that draft article 23 completed draft article 16, on the personal protection and inviolability of the diplomatic courier, who should not be liable to any form of arrest or detention. According to this view, denial of immunity from jurisdiction would seem to run counter to the personal inviolability which the courier enjoyed under article 27, paragraph 5, of the 1961 Vienna Convention on Diplomatic Relations, which stipulated that the diplomatic courier was not liable to any form of arrest or detention. It was further pointed out that, if draft article 23 was intended to be complementary to the codification conventions, including the 1961 Vienna Convention, it would be logical to grant to the courier not only personal protection and inviolability, but also immunity from criminal juris-

"[4. The diplomatic courier is not obliged to give evidence as a witness.]

"5. Any immunity of the diplomatic courier from the jurisdiction of the receiving State or the transit State does not exempt him from the jurisdiction of the sending State."

¹⁹ For the discussion in the Commission at its thirty-sixth session, see *Yearbook ... 1984*, vol. II (Part Two), pp. 21, 29-30, 38 and 41-42, paras. 84, 122, 162 and 188-193. For the comments and observations made in the Sixth Committee at the thirty-ninth session of the General Assembly, see "Topical summary ..." (A/CN.4/L.382), paras. 141-159.

²⁰ These four conventions adopted under the auspices of the United Nations (hereinafter referred to as "codification conventions") are: 1961 Vienna Convention on Diplomatic Relations; 1963 Vienna Convention on Consular Relations; 1969 Convention on Special Missions; 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

dition. In many cases, it was further argued, the courier's mission was not confined to one destination and he had to provide communications in both directions; therefore the grounds for protecting the diplomatic courier from arrest and detention were also grounds for granting him immunity from the criminal jurisdiction of the receiving or the transit State.

17. Opposing that view, serious doubts and reservations were expressed concerning draft article 23 as a whole, and particularly its paragraph 1. It was pointed out that draft article 16, on personal protection and inviolability, was sufficient to ensure that the courier would not be disturbed in the fulfilment of his mission to deliver the bag safely and speedily. Jurisdictional immunity had to be justified by functional need. Consequently, the courier's immunity from criminal jurisdiction had to be limited to acts committed in the performance of his functions, as was the case in respect of immunity from civil and administrative jurisdiction. According to that view, the status of the diplomatic courier should not be assimilated to that of a diplomatic staff member. Therefore, to grant a diplomatic courier immunity from criminal jurisdiction would exceed what the discharge of his duties warranted. On the basis of those considerations, the deletion of paragraphs 1 and 4 was suggested, or even of draft article 23 as a whole. There were some suggestions that immunity from criminal jurisdiction should be limited only in regard to "serious offences" committed by the diplomatic courier. Some representatives, however, considered that such limitations would appear to be inconsistent with article 27, paragraph 5, of the 1961 Vienna Convention.²¹

18. Paragraph 2 of draft article 23, providing that the courier enjoys immunity from the civil and administrative jurisdiction of the receiving State or the transit State, was generally acceptable. Most of the specific comments made were in favour of the draft.

19. The same attitude was shown with regard to paragraph 3, dealing with immunity from measures of execution in respect of the diplomatic courier.

20. Paragraph 4, providing that the diplomatic courier shall be dispensed from the obligation to give evidence as a witness, was the subject of a number of comments and observations on the part of representatives in the Sixth Committee.

21. Some representatives expressed support for the text as proposed by the Special Rapporteur. They thought that it was a logical consequence of the jurisdictional immunity accorded to the courier, which otherwise would become meaningless.²² This view was advanced particularly in relation to immunity from criminal jurisdiction. It was maintained that, without the provisions of paragraphs 1 and 4 of draft article 23, the sending State would suffer considerable injury because its messenger would be forbidden to exercise his mission completely in several destinations, since he might be called upon to appear in courts of a transit State or a re-

²¹ See "Topical summary ..." (A/CN.4/L.382), paras. 144-147; see also *Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 35th meeting, para. 34 (Jamaica).

²² See "Topical summary ..." (A/CN.4/L.382), para. 151; see also *Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 43rd meeting, para. 51 (Romania).

ceiving State as a witness²³. Thus the provision set forth in paragraph 4 was justified by functional necessity.

21. Some representatives expressed support for the text as proposed by the Special Rapporteur. They thought that it was a logical consequence of the jurisdictional immunity accorded to the courier, which otherwise would become meaningless.²² This view was advanced particularly in relation to immunity from criminal jurisdiction. It was maintained that, without the provisions of paragraphs 1 and 4 of draft article 23, the sending State would suffer considerable injury because its messenger would be forbidden to exercise completely his mission in several destinations, since he might be called upon to appear in courts of a transit State or a receiving State as a witness²³. Thus the provision set forth in paragraph 4 was justified by functional necessity.

22. Other representatives were of the view that, since immunity from criminal jurisdiction should be confined to acts performed in the exercise of official functions, there was no reason why the diplomatic courier should not be called upon to give evidence as a witness, as long as that did not interfere with the performance of those functions.²⁴ It was therefore suggested that paragraph 4 should be considerably attenuated by limiting the exemption to evidence on questions relating to the exercise of his functions and that, in requesting him to give evidence, the competent authorities should avoid interfering with the exercise of those functions.²⁵

23. Taking into consideration some practical reasons, one representative thought that the principle that the courier did not have to give evidence as a witness should be retained, but that the commentary to that provision should indicate that it would be desirable for a diplomatic courier who had witnessed a traffic accident to leave a letter explaining the circumstances.²⁶ It was also suggested that the words "except in the cases envisaged in paragraph 2" be added at the end of paragraph 4.

24. As has been pointed out (para. 17 above), it was suggested that paragraph 4, together with paragraph 1, should be deleted.²⁷

25. The comments on the substance of paragraph 5 were altogether favourable, although there were some critical observations of a drafting nature.²⁸

2. PROPOSED REVISED TEXT OF ARTICLE 23

26. As has been pointed out, draft article 23 was the subject of lengthy debates in 1983 and 1984 both in the

²³ See "Topical summary ..." (A/CN.4/L.382), para. 152; see also *Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 39th meeting, para. 9 (Algeria).

²⁴ See "Topical summary ..." (A/CN.4/L.382), para. 153; see also *Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 36th meeting, para. 41 (Italy).

²⁵ See "Topical summary ..." (A/CN.4/L.382), para. 153; see also *Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 37th meeting, para. 5 (Greece).

²⁶ See "Topical summary ..." (A/CN.4/L.382), para. 154; see also *Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 38th meeting, para. 53 (Madagascar).

²⁷ See "Topical summary ..." (A/CN.4/L.382), para. 155; see also *Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 36th meeting, para. 31 (United States of America).

²⁸ See "Topical summary ..." (A/CN.4/L.382), paras. 157-159.

Commission and in the Sixth Committee of the General Assembly, and gave rise to numerous comments, observations and suggestions.²⁹

27. From an analysis of the debates on draft article 23 in the Commission and in the Sixth Committee, the following trends of opinion emerge:

(a) To maintain the text submitted by the Special Rapporteur or the amended version proposed by the Drafting Committee with the deletion of the square brackets in paragraphs 1 and 4;

(b) To delete draft article 23 altogether;

(c) To amend the text proposed by the Drafting Committee, especially with regard to paragraphs 1 and 4. Accordingly, with regard to paragraph 1, it was suggested that the words "except for serious offences" or "in respect of all acts performed in the exercise of his functions" should be added at the end of the paragraph. As to the text of paragraph 4, several suggestions were advanced, namely the addition of the words "in cases involving the exercise of his functions" or "except in the cases envisaged in paragraph 2". One representative suggested that paragraph 4 should be redrafted to provide that the diplomatic courier might be called upon to give evidence on condition that he was not obliged to do so concerning matters connected with the exercise of his functions, and that the competent authorities of the receiving State or the transit State avoided interfering with the exercise of his functions so as not to cause unreasonable delays or impediments to the delivery of the diplomatic bag.

28. The Special Rapporteur, who expressed his views on the question in his fourth and fifth reports,³⁰ is of the view that the Commission, in its effort to achieve an appropriate solution to the critical issues relating to the jurisdictional immunities of the diplomatic courier, should endeavour to strike a balance between the legal protection of the courier and the bag and the legitimate interests of the States concerned. In so doing, special attention should be given to the intrinsic relationship between the principle of the personal inviolability of the courier and the principle of the courier's immunity from criminal jurisdiction. The draft articles should be considered as a coherent legal framework relating to the status of the courier and the bag, in which there should be consistency between the various provisions. It is also understood that, in the search for a practical solution, the Commission should take into account the comments of Member States with a view to achieving wider acceptance of the draft articles on the topic.

29. In view of the above general considerations, the Special Rapporteur would venture to suggest that the most appropriate option would perhaps be the adoption of draft article 23 as proposed by the Drafting Committee,³¹ by deleting the brackets in paragraph 1 and amending paragraph 4 to read:

4. The diplomatic courier is not obliged to give evidence as a witness in cases involving the exercise of his

functions. He may be required to give evidence in other cases, provided that this would not cause unreasonable delays or impediments to the delivery of the diplomatic bag.

C. Inviolability of the diplomatic bag (art. 36)³²

1. COMMENTS AND OBSERVATIONS MADE IN THE COMMISSION AND IN THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY

30. Draft article 36 on the inviolability of the diplomatic bag was called by some members of the Commission the key provision of the whole set of draft articles.³³ Considering the significance of the inviolability of the diplomatic bag for the proper functioning of official communications, both the Commission and the Sixth Committee devoted much of the debate to the substance and drafting of draft article 36. Here again conflicting opinions were expressed and numerous comments and suggestions were made.³⁴

31. Some representatives supported the text of draft article 36 as submitted by the Special Rapporteur in his fourth report.³⁵ It was maintained that the principle of absolute inviolability was set forth in the 1961 Vienna Convention on Diplomatic Relations and fully conformed to customary law and the established practice of States. The possibility of opening the bag was envisaged only in the 1963 Vienna Convention on Consular Relations and only under special circumstances and with special guarantees. It was pointed out in that connection that the unification of the law applicable to all types of official bags implied a choice between the régime of inviolability under the 1961 Vienna Convention and the régime of the 1963 Vienna Convention. Such a choice created uncertainty affecting official communications, which had to be avoided.

32. Some of the representatives who favoured the absolute inviolability of the diplomatic bag expressed opposition to the possibility of subjecting the bag to examination by means of electronic or mechanical devices. They maintained that the use of modern electronic technology would make it possible to extract confidential information from the diplomatic bag, thus undermining the very foundation and main objective of the

²⁹ See footnote 19 above.

³⁰ Document A/CN.4/374 and Add.1-4 (see footnote 2 (b) (iv) above), paras. 81-139; and document A/CN.4/382 (see footnote 2 (b) (v) above), para. 39.

³¹ See footnote 18 above.

³² Draft article 36 submitted by the Special Rapporteur read:

"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."

³³ *Yearbook ... 1984*, vol. II (Part Two), p. 34, para. 136.

³⁴ For the discussion in the Commission, *ibid.*, pp. 25-26, paras. 101-103, and pp. 34-35, paras. 136-143. For the discussion in the Sixth Committee of the General Assembly, see "Topical summary ..." (A/CN.4/L.382), paras. 184-191.

³⁵ Document A/CN.4/374 and Add.1-4 (see footnote 2 (b) (iv) above), paras. 326-349.

principle of the inviolability of the bag as a prerequisite for the confidentiality of its contents. It was also pointed out that the prohibition to subject the bag to electronic screening properly addressed also the legitimate interests of the developing countries, which were not in a position to acquire sophisticated electronic devices; such prohibition reaffirmed the principle of equality between all States and avoided any discrimination against States that did not possess advanced technology.

33. Other representatives considered that draft article 36 should be worded in such a manner as to reflect a more adequate balance between the interests of the sending State and those of the receiving and transit States. In that connection, it was argued that the main difficulty in dealing with the crucial issue of the inviolability of the diplomatic bag lay in balancing the need to protect diplomatic communications and the need to prevent abuse.³⁶ Therefore, a more balanced solution, similar to that embodied in article 35 of the 1963 Vienna Convention, was preferable. It was also maintained that States tempted to abuse the inviolability of the bag would be deterred by the possibility that the diplomatic bag could be either opened with the consent of the sending State or, if the latter refused, returned to its place of origin. In that case the effectiveness of the rule of reciprocity would probably prevent a State from making improper use of the inviolability of the diplomatic bag. It was also thought that a compromise solution might be found in certain bilateral consular conventions which provided that, if there was serious reason to believe that a consignment contained something other than official correspondence, documents or articles for official use, it could be returned to its place of origin.³⁷

34. The provision relating to the examination of the bag directly or through screening or other electronic or mechanical devices was the subject of particular discussion. On that issue views were also divided.

35. One body of opinion supported the present text as proposed by the Special Rapporteur for the reasons already indicated (para. 32 above).

36. Other representatives considered that the diplomatic bag might be subjected to electronic or mechanical screening or examination. It was pointed out that the well-known abuses which had taken place involving diplomatic bags and the safety of air navigation justified the recognition of a certain right of verification of the bag by the competent authorities of the receiving or transit States. It was argued that only in the most exceptional cases would the passage of the diplomatic bag be delayed.

37. Some representatives who could accept an extension to all bags of the provision set forth in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations found it difficult to support the idea that the diplomatic bag might be subjected to electronic or

other mechanical devices, since that might infringe the confidentiality of the bag.³⁸

38. Having in mind the two different régimes in respect of the inviolability of the bag established under article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations and article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations, some representatives suggested that States parties to a convention on the status of the diplomatic courier and the diplomatic bag should have the right to make a declaration to the effect that they would apply to all bags the provision contained in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations.³⁹ This issue will be further considered in the present report (paras. 60-63 below).

2. PROPOSED REVISED TEXT OF ARTICLE 36

39. In order to take account of the comments and observations advanced during the debates in the Commission and in the Sixth Committee and to propose a possible compromise, the Special Rapporteur submits for examination a revised version of draft article 36, relating to the inviolability of the diplomatic bag.

40. First of all, it should be pointed out that the inviolability of the diplomatic bag should be considered as a fundamental principle. The modalities of its practical implementation should not conflict with its main objective, namely the normal functioning of official communications. At the same time, the implementation of the principle of the inviolability of the diplomatic bag should not be prejudicial to the legitimate interests of the receiving State or the transit State and should not provide an opportunity for making improper use of that principle. In exceptional circumstances, when there are serious grounds for believing that the bag contains something other than correspondence, documents or articles for official use, the bag may be returned to its place of origin without being examined or opened.

41. Taking account of some suggestions for drafting improvements, such as the deletion of paragraph 2, the Special Rapporteur is of the view that paragraph 2 of the present text could be deleted.

42. In the light of the above considerations, the Special Rapporteur submits for examination and approval the following revised text of draft article 36:

*Article 36. Inviolability of the diplomatic bag**

1. The diplomatic bag shall be inviolable at all times and wherever it may be; 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. Nevertheless, if the competent authorities of the receiving State or the transit State have serious reason to believe that the bag contains something other than of-

³⁶ See "Topical summary ..." (A/CN.4/L.382), para. 189; see also *Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 36th meeting, para. 43 (Italy).

³⁷ See "Topical summary ..." (A/CN.4/L.382), para. 189; see also *Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 42nd meeting, para. 81 (Austria).

* Text orally amended by the Special Rapporteur at the 1903rd meeting of the Commission (see *Yearbook ... 1985*, vol. 1, p. 166, para. 9).

³⁸ See *Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 40th meeting, para. 27 (Spain).

³⁹ See "Topical summary ..." (A/CN.4/L.382), para. 189.

ficial correspondence, documents or articles intended for official use, referred to in article 32,⁴⁰ they may request that the bag be returned to its place of origin.

D. Exemption from customs and other inspections, customs duties and dues and taxes (arts. 37 and 38)⁴¹

1. COMMENTS AND OBSERVATIONS MADE IN THE COMMISSION AND IN THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY

43. In the debate held in the Commission,⁴² the view was expressed that draft article 37 was unnecessary, since the diplomatic bag was inviolable. It was also suggested that draft article 37 should be brought into line with article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations. With regard to draft article 38, it was stated that such a provision was not necessary, since by definition the bag contained only official correspondence or documents and articles for official use which were, in principle, exempt from customs duties. Taking into consideration the close connection between the subject-matters of draft articles 37 and 38, dealing respectively with customs inspection and customs duties and taxes, it was suggested that they might be merged into one article.

44. Similar views were expressed by representatives in the Sixth Committee. The comments and suggestions focused on possible abuses of the facilities and exemptions accorded to the diplomatic bag, including customs and other inspections, and fiscal privileges. It was pointed out that measures had to be taken to avoid such abuses as the use of the bag for the illicit importation of guns, explosives and drugs. At the same time, there was recognition of the general need for the protection of communications between States and their diplomatic posts abroad and for Governments to engage in friendly relations and deal with one another on a basis of trust.⁴³

2. PROPOSED NEW ARTICLE 37 TO REPLACE PRESENT DRAFT ARTICLES 37 AND 38

45. The considerations on the substance and drafting of draft articles 37 and 38 were contained in the fourth

⁴⁰ Draft article 32 (Content of the diplomatic bag) was referred by the Commission to the Drafting Committee at its thirty-sixth session (see *Yearbook ... 1984*, vol. II (Part Two), p. 20, para. 76).

⁴¹ Draft articles 37 and 38 submitted by the Special Rapporteur read:

"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."

"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."

⁴² *Yearbook ... 1984*, vol. II (Part Two), pp. 35-36, paras. 145-146.

⁴³ See *Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 40th meeting, para. 22 (United Kingdom).

and fifth reports of the Special Rapporteur.⁴⁴ In submitting a revised text, the Special Rapporteur took into consideration the comments and observations made in the Commission and in the Sixth Committee of the General Assembly.⁴⁵

46. In the light of the above considerations, the Special Rapporteur submits for examination and approval a revised text embracing the two draft articles in a new draft article 37, which reads:

Article 37. Exemption from customs inspection, 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 the diplomatic bag and shall exempt it from customs and other inspections, 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.

E. Protective measures in circumstances preventing the delivery of the diplomatic bag (art. 39)⁴⁶

1. COMMENTS AND OBSERVATIONS MADE IN THE COMMISSION AND IN THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY

47. Draft article 39 did not give rise to substantive objections in the Commission or in the Sixth Committee.⁴⁷ Most of the comments and observations related to possible drafting improvements. There were some suggestions that the text should be shortened and the two paragraphs merged in one.

48. During the debates both in the Commission and in the Sixth Committee, the considerations advanced by the Special Rapporteur in his fourth report⁴⁸ met with general support. Perhaps it would be appropriate to explain the exceptional circumstances, such as an illness or an accident, that might prevent the diplomatic

⁴⁴ Document A/CN.4/374 and Add.1-4 (see footnote 2 (b) (iv) above), paras. 350-360; and document A/CN.4/382 (see footnote 2 (b) (v) above), paras. 80-81.

⁴⁵ See footnote 42 above; see also "Topical summary ..." (A/CN.4/L.382), paras. 192-193.

⁴⁶ Draft article 39 submitted by the Special Rapporteur read:

"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."

⁴⁷ See *Yearbook ... 1984*, vol. II (Part Two), p. 36, para. 147; see also "Topical summary ..." (A/CN.4/L.382), para. 194.

⁴⁸ Document A/CN.4/374 and Add.1-4 (see footnote 2 (b) (iv) above), paras. 361-365.

courier from performing his functions. It might also be necessary to clarify the position of a professional courier or an *ad hoc* courier who was declared *persona non grata* or not acceptable by the receiving State or the transit State while in its territory. The words "appropriate measures to ensure the integrity and safety of the diplomatic bag", in paragraph 1, referred only to measures to protect the diplomatic bag, not measures designed to facilitate the courier's own journey, which were dealt with in draft article 40. The wording of the draft article should make it clear that the obligation provided for in article 39 was an obligation only under civil law, not one that would entail the international responsibility of the receiving State or the transit State.

2. PROPOSED REVISED TEXT OF ARTICLE 39

49. Taking into consideration the comments and observations made during the debates in the Commission and the Sixth Committee, the Special Rapporteur submits for examination and approval the following text of draft article 39:

Article 39. Protective measures in circumstances preventing the delivery of the diplomatic bag

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 in the event of termination of the functions of the diplomatic courier, which prevents him from delivering the diplomatic bag to its destination, or in circumstances preventing the captain of a commercial aircraft or the master of a merchant ship from delivering the diplomatic bag to an authorized member of the diplomatic mission of the sending State.

F. Obligations of the transit State in case of force majeure or fortuitous event (art. 40)

1. COMMENTS AND OBSERVATIONS MADE IN THE COMMISSION AND IN THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY

50. Draft article 40, dealing with the obligations of the transit State in case of *force majeure* or fortuitous event, was submitted by the Special Rapporteur in his fourth report.⁴⁹

51. The debate on this draft article in the Commission⁵⁰ was concentrated on drafting points. The comments were directed towards the clarification of the scope and content of the obligations incumbent on a State which had not been initially foreseen as a transit State, but which, due to *force majeure* or fortuitous event had to extend certain facilities in order to ensure the inviolability and protection of the diplomatic bag and the continuation of the journey of the diplomatic courier.

52. Support was expressed for draft article 40 in its present form during its consideration in the Sixth Committee.⁵¹ A comment was also made to the effect that

the element of protection of the bag and its movement provided for in the case of non-recognition of States or Governments (draft article 41) should be extended to the situations envisaged in draft article 40.⁵²

2. PROPOSED TEXT OF ARTICLE 40

53. In view of the general acceptance of draft article 40 in substance, the Special Rapporteur submits it for consideration and approval in its present form:

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.

G. Non-recognition of States or Governments or absence of diplomatic or consular relations (art. 41)

1. COMMENTS AND OBSERVATIONS MADE IN THE COMMISSION AND IN THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY

54. During the debate in the Commission, the need for such a provision was stressed, especially in the case where the diplomatic bag, whether accompanied or not by a diplomatic courier, was dispatched to or by a special mission or delegation in the receiving State. Furthermore, that provision might acquire special significance in a situation of non-recognition of States or Governments or of absence of diplomatic or consular relations between the transit State, on the one hand, and the sending State or the receiving State, on the other, when the territory of the transit State had to be used for the dispatch of the diplomatic bag.⁵³

55. During the debate in the Sixth Committee, it was pointed out that the provisions of draft article 41 were necessary to guarantee the freedom of communication of a State with its missions or delegations abroad. It was also stressed that cases where those provisions would apply were not rare in practice, particularly in communications of States with their missions to international organizations.⁵⁴

2. PROPOSED TEXT OF ARTICLE 41

56. In view of the support expressed for draft article 41 both in the Commission and in the Sixth Committee, the Special Rapporteur submits it for examination and approval in its present form:

⁴⁹ *Ibid.*, paras. 369-380.

⁵⁰ *Yearbook ... 1984*, vol. II (Part Two), p. 36, para. 148.

⁵¹ See "Topical summary ..." (A/CN.4/L.382), para. 195.

⁵² *Ibid.*, para. 196.

⁵³ *Yearbook ... 1984*, vol. II (Part Two), p. 36, para. 149.

⁵⁴ See "Topical summary ..." (A/CN.4/L.382), para. 197.

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.

**H. Relation of the present articles to other conventions and international agreements
(art. 42)⁵⁵**

1. COMMENTS AND OBSERVATIONS MADE IN THE COMMISSION AND IN THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY

57. Draft article 42 was submitted by the Special Rapporteur in his fourth report.⁵⁶

58. The comments and observations made in the Commission on draft article 42⁵⁷ emphasized its supplementary nature. It was pointed out that its provisions should make clear what would be the effect of the agreements that might be concluded on matters relating to the status of the diplomatic courier and the diplomatic bag. A suggestion was made that the text be simplified by deleting paragraph 1 and that paragraph 2 be redrafted as follows:

“2. The provisions of the present articles are without prejudice to the relevant provisions in other conventions or to those in international agreements in force as between States parties thereto.”

⁵⁵ Draft article 42 submitted by the Special Rapporteur read:

“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.”

⁵⁶ Document A/CN.4/374 and Add.1-4 (see footnote 2 (b) (iv) above), paras. 396-403.

⁵⁷ Yearbook ... 1984, vol. II (Part Two), pp. 36-37, para. 150.

59. In the discussion in the Sixth Committee, one representative, while acknowledging the importance of draft article 42, raised certain doubts concerning its current version and said that the text required further thorough examination, especially in the light of the 1969 Vienna Convention on the Law of Treaties.⁵⁸ It was also stated that certain improvements needed to be introduced in paragraph 1 of the draft article.⁵⁹

60. Draft article 42 could be modelled on article 73 of the 1963 Vienna Convention on Consular Relations, which refers to the Convention’s relationship with other international agreements.

2. PROPOSED REVISED TEXT OF ARTICLE 42

61. In the light of the above considerations, and taking into account the suggestion made in the Commission that the present text of draft article 42 should be shortened, the Special Rapporteur submits for examination the following revised text:

Article 42. Relation of the present articles to other conventions and international agreements

1. The provisions of the present articles are without prejudice to the relevant provisions in other conventions or those in international agreements in force as between States parties thereto.

2. Nothing in the present articles shall preclude States from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag confirming or supplementing or extending or amplifying the provisions thereof.

I. Declaration of optional exceptions to applicability in regard to designated types of couriers and bags: proposed new article 43

62. In the course of the examination of the scope of the draft articles and the régimes to be applied in respect of various types of couriers and bags, the question was raised as to the possibility of introducing some flexibility which would permit States to designate those types of couriers and bags to which they wished the articles to apply. Reference to that option was explicitly made in the commentary to article 1 of the present set of draft articles, and it was suggested that an article along the lines of article 298 of the 1982 United Nations Convention on the Law of the Sea should be included in the draft articles.⁶⁰

63. An article providing for optional exceptions to applicability with regard to designated types of couriers and bags would be justified also in view of the fact that not all parties to the instrument on the status of the diplomatic courier and the diplomatic bag would be parties to all the codification conventions.

⁵⁸ See “Topical summary ...” (A/CN.4/L.382), para. 198; see also *Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 42nd meeting, para. 43 (Poland).

⁵⁹ See “Topical summary ...” (A/CN.4/L.382), para. 199; see also *Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 36th meeting, para. 66 (Bulgaria).

⁶⁰ *Yearbook ... 1983*, vol. II (Part Two), p. 54, para. (2) of the commentary to article 1 (Scope of the present articles).

64. The declaration of optional exceptions to applicability with regard to designated types of couriers and bags should be in written form. Such a declaration could be withdrawn at any time by the State author of that declaration. The optional exceptions should be applied as between States parties on the basis of reciprocity.

65. In the light of the above considerations, the Special Rapporteur submits for examination a new draft article 43, to read as follows:

Article 43. Declaration of optional exceptions to applicability in regard to designated types of couriers and bags

1. A State may, without prejudice to the obligations arising under the provisions of the present articles, when signing, ratifying or acceding to these articles, designate by written declaration those types of couriers and bags to which it wishes the provisions to apply.

2. A State which has made a declaration under paragraph 1 of this article may at any time withdraw it.

3. A State which has made a declaration under paragraph 1 of this article shall not be entitled to invoke the provisions relating to any of the excepted types of couriers and bags as against another State Party which has accepted the applicability of those provisions.

J. Conclusion

66. The draft articles submitted for consideration in the present report should be regarded as a continuation of their presentation in the Special Rapporteur's fourth and fifth reports. In order to avoid repetition of the arguments and analysis of State practice already contained in the preceding reports, it was considered that mere reference to the specific parts of those reports would be sufficient.

67. It is hoped that, pursuant to suggestions and recommendations made in the Commission and in the Sixth Committee of the General Assembly, the Commission may be in a position to complete the examination of all the remaining draft articles and adopt them on first reading in the course of its thirty-seventh session.