

Document:-  
**A/CN.4/400**

**Seventh 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:-  
**1986, vol. II(1)**

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

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

[Agenda item 4]

DOCUMENT A/CN.4/400

## Seventh 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]  
[2 April 1986]

### CONTENTS

|  | <i>Page</i>       |
|--|-------------------|
| <i>Note</i> .....  | 40                |
|  | <i>Paragraphs</i> |
| INTRODUCTION.....  | 1-6 40            |
| <i>Section</i>   |                   |
| I. DRAFT ARTICLES PROVISIONALLY ADOPTED SO FAR BY THE COMMISSION .....   | 7-21 41           |
| A. Texts of the draft articles adopted by the Commission .....   | 7-8 41            |
| B. Comments and observations made in the Sixth Committee of the General Assembly on the draft articles adopted by the Commission .....   | 9-21 43           |
| II. DRAFT ARTICLES CONSIDERED BY THE COMMISSION AND REFERRED TO THE DRAFTING COMMITTEE .....   | 22-66 45          |
| A. Introductory note .....   | 22-23 45          |
| B. Inviolability of the diplomatic bag (art. 36) .....   | 24-42 45          |
| 1. Comments and observations made in the Sixth Committee of the General Assembly .....   | 25-38 45          |
| 2. Proposed revised text of article 36 .....   | 39-42 47          |
| C. Exemption from customs inspection, customs duties and all dues and taxes (art. 37).....   | 43-45 47          |
| 1. Comments and observations made in the Sixth Committee of the General Assembly .....   | 43-44 47          |
| 2. Proposed revised text of article 37 .....   | 45 47             |
| D. Protective measures in circumstances preventing the delivery of the diplomatic bag (art. 39) and obligations of the transit State in case of <i>force majeure</i> or fortuitous event (art. 40) ..... | 46-49 48          |
| 1. Comments and observations made in the Sixth Committee of the General Assembly .....   | 48 48             |
| 2. Proposed new article 39 to replace draft articles 39 and 40 .....   | 49 48             |
| E. Non-recognition of States or Governments or absence of diplomatic or consular relations (art. 41) .....   | 50-55 48          |
| 1. Comments and observations made in the Sixth Committee of the General Assembly .....   | 51-53 49          |
| 2. Proposed revised text of article 41 .....   | 54-55 49          |
| F. Relation of the present articles to other conventions and international agreements (art. 42) .....  | 56-62 49          |
| 1. Comments and observations made in the Sixth Committee of the General Assembly .....   | 57-61 49          |
| 2. Proposed revised text of article 42 .....   | 62 49             |
| G. Declaration of optional exceptions to applicability in regard to designated types of couriers and bags (art. 43) .....  | 63-66 50          |
| 1. Comments and observations made in the Sixth Committee of the General Assembly .....   | 63-65 50          |
| 2. Proposed revised text of article 43 .....   | 66 50             |
| CONCLUSION.....  | 67-68 51          |

## NOTE

## Multilateral conventions cited in the present report:

|  | <i>Source</i>  |
|--|--|
| Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)  | United Nations, <i>Treaty Series</i> , vol. 500, p. 95.                      |
| Vienna Convention on Consular Relations (Vienna, 24 April 1963)  | <i>Ibid.</i> , vol. 596, p. 261.   |
| Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)   | <i>Ibid.</i> , vol. 1155, p. 331.  |
| Convention on Special Missions (New York, 8 December 1969)   | United Nations, <i>Juridical Yearbook 1969</i> (Sales No. E.71.V.4), p. 125. |
| Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975) | United Nations, <i>Juridical Yearbook 1975</i> (Sales No. E.77.V.3), p. 87.  |

---

**Introduction**

1. The present report is the seventh in a series of reports on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier submitted by the Special Rapporteur to the International Law Commission since 1980.<sup>1</sup> With the submission of the sixth report, a set of 43 draft articles had been presented by the Special Rapporteur, completing the series of 42 draft articles submitted in his previous reports.

2. By the end of its thirty-seventh session, in 1985, the Commission had provisionally adopted articles 1 to 27 on first reading, on the basis of draft articles 1 to 35 submitted by the Special Rapporteur. The remaining seven draft articles (arts. 36, 37 and 39 to 43) had been considered by the Commission and referred to the Drafting Committee, but, due to pressure of work, the Committee was unable to consider them before the end of that session.<sup>2</sup>

<sup>1</sup> For further details on the consideration of the topic by the Commission up to 1985, 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; (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. VII; (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; (vii) on its thirty-seventh session, *Yearbook . . . 1985*, vol. II (Part Two), pp. 28 *et seq.*, chap. IV.

(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; (vi) sixth report, *Yearbook . . . 1985*, vol. II (Part One), p. 49, document A/CN.4/390.

<sup>2</sup> *Yearbook . . . 1985*, vol. II (Part Two), p. 30, paras. 175-176.

3. It is hoped that the Commission may complete the first reading of the entire set of draft articles at its thirty-eighth session, in accordance with its decision at the previous session on its programme of work,<sup>3</sup> as approved by the General Assembly.<sup>4</sup>

4. In submitting the complete set of draft articles, the Special Rapporteur felt that it would not be appropriate at the present stage to propose further provisions by way of final clauses or on the settlement of disputes. Guided by the established practice of the Commission on that matter, he thought that such proposals should be examined only in conjunction with a decision concerning the final form to be given to the draft.

5. The main objective of the present report is to update the current status of the draft articles and present a brief analytical survey of the comments and observations made thereon in the Sixth Committee at the fortieth session of the General Assembly. Priority will be given to observations relating to the remaining seven draft articles, which are still before the Drafting Committee, in the hope that they may be provisionally adopted by the Commission on first reading at its thirty-eighth session before the conclusion of the term of office of its current membership.

6. In order to facilitate the completion of the first reading of the draft articles, the texts of articles 1 to 27 already provisionally adopted by the Commission are reproduced below for greater clarity. A brief account follows of the comments and observations made in the Sixth Committee on these and on the remaining draft articles 36, 37 and 39 to 43, with revised texts being introduced for some of these latter draft articles, as appropriate.

<sup>3</sup> *Ibid.*, p. 72, paras. 298-299.

<sup>4</sup> General Assembly resolution 40/75 of 11 December 1985, paras. 3-4.

## I. Draft articles provisionally adopted so far by the Commission

### A. Texts of the draft articles adopted by the Commission

7. Draft articles 1 to 27 already provisionally adopted by the Commission on first reading are derived from articles 1 to 35 of the series of draft articles submitted by the Special Rapporteur in his previous reports. The total number of these articles was reduced as a result of the deletion of some (arts. 9, 12, 22, 26 and 27) and the merging of others (arts. 15, 18 and 19).<sup>5</sup>

8. The texts of articles 1 to 27, provisionally adopted by the Commission on first reading at its thirty-fifth, thirty-sixth and thirty-seventh sessions, are reproduced below.<sup>6</sup>

#### 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.

#### 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;

<sup>5</sup> See the Special Rapporteur's sixth report, document A/CN.4/390 (see footnote 1 (b) (vi) above), para. 6 and footnotes 3 and 4.

<sup>6</sup> For the commentaries to articles 1 to 7, provisionally adopted by the Commission at its thirty-fifth session, see *Yearbook . . . 1983*, vol. II (Part Two), pp. 53 *et seq.* For the commentary to article 8, provisionally adopted at the thirty-fifth and thirty-sixth sessions, and the commentaries to articles 9 to 17, 19 and 20, provisionally adopted at the thirty-sixth session, see *Yearbook . . . 1984*, vol. II (Part Two), pp. 45 *et seq.* For the commentary to paragraph 2 of article 12 (from which paragraph the Commission decided at its thirty-seventh session to remove the square brackets appearing in the text provisionally adopted at the thirty-sixth session) and the commentaries to articles 18 and 21 to 27, provisionally adopted at the thirty-seventh session, see *Yearbook . . . 1985*, vol. II (Part Two), pp. 39 *et seq.*

(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.

\* Provisional numbering.

*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 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 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 18. Immunity from jurisdiction*

1. The diplomatic courier shall enjoy immunity from the criminal 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.

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.

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.

5. The 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.

*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.

*Article 21. 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, as the case may be, the transit State in order to perform his functions, or, if he is already in the territory of the receiving State, from the moment he begins to exercise his functions. Such privileges and immunities shall normally cease at the moment when the diplomatic courier leaves the territory of the receiving State or the transit State. However, the privileges and immunities of the diplomatic courier *ad hoc* shall cease at the moment when the courier has delivered to the consignee the diplomatic bag in his charge.

2. When the functions of the diplomatic courier come to an end in accordance with article 11 (b), his privileges and immunities shall cease at the moment when he leaves the territory of the receiving State, or on the expiry of a reasonable period in which to do so.

3. Notwithstanding the foregoing paragraphs, immunity shall continue to subsist with respect to acts performed by the diplomatic courier in the exercise of his functions.

*Article 22. Waiver of immunities*

1. The sending State may waive the immunities of the diplomatic courier.

2. Waiver must always be express, except as provided in paragraph 3 of this article, and shall be communicated in writing.

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. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held 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 action, it shall use its best endeavours to bring about a just settlement of the case.

*Article 23. Status of the captain of a ship or aircraft entrusted with the diplomatic bag*

1. The captain of a ship or aircraft in commercial service which is scheduled to arrive at an authorized port of entry may be entrusted with the diplomatic bag of the sending State or of a mission, consular post or delegation of that State.

2. The captain shall be provided with an official document indicating the number of packages constituting the bag entrusted to him, but he shall not be considered to be a diplomatic courier.

3. The receiving State shall permit a member of a mission, consular post or delegation of the sending State to have unimpeded access to the ship or aircraft in order to take possession of the bag directly and freely from the captain or to deliver the bag directly and freely to him.

*Article 24. Identification of the diplomatic bag*

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

*Article 25. 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.

*Article 26. Transmission of the diplomatic bag by postal service or by any mode of transport*

The conditions governing the use of the postal service or of any mode of transport, established by the relevant international or national rules, shall apply to the transmission of the packages constituting the diplomatic bag.

*Article 27. Facilities accorded to the diplomatic bag*

The receiving State or, as the case may be, the transit State shall provide the facilities necessary for the safe and rapid transmission or delivery of the diplomatic bag.

**B. Comments and observations made in the Sixth Committee of the General Assembly on the draft articles adopted by the Commission**

9. At the fortieth session of the General Assembly, a number of representatives in the Sixth Committee made general comments on the topic as a whole and on specific draft articles provisionally adopted by the Commission or proposed by the Special Rapporteur.<sup>7</sup>

10. Note was taken with satisfaction of the substantial progress made by the Commission in its work on the topic with a view to elaborating an appropriate legal instrument. Several representatives expressed the hope that the Commission would complete the first reading of the draft articles at its thirty-eighth session, and some of them considered that the topic should therefore be accorded priority during this session.<sup>8</sup>

<sup>7</sup> See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fortieth session of the General Assembly" (A/CN.4/L.398), sect. D.

<sup>8</sup> *Ibid.*, paras. 247 and 259.

11. It was also indicated that the Commission's task was to consolidate the provisions of the existing conventions codifying diplomatic and consular law;<sup>9</sup> to unify the rules so as to ensure similar treatment for all diplomatic couriers and bags; and to develop rules to solve practical problems not covered by the existing conventions.<sup>10</sup>

12. Some representatives considered that further efforts should be made to simplify the texts of the draft articles, adhering to the principle of functional necessity and maintaining a proper balance between the sending State's interest in the confidentiality and safety of its communications, on the one hand, and the security and other legitimate interests of receiving or transit States, on the other.<sup>11</sup>

13. Most of the comments made on draft articles provisionally adopted by the Commission acknowledged the improvements made and expressed general support. At the same time, it was pointed out that there was a need in some instances for further drafting ameliorations in order to achieve greater clarity and precision. It was hoped that these observations would be taken into consideration during the second reading of the draft articles.

14. Some representatives remained unconvinced of the need to provide for the inviolability of the temporary accommodation of the diplomatic courier. They thought that the provisions of article 17 on this matter were not justified and could give rise to legal and practical problems.<sup>12</sup> The Special Rapporteur has on several occasions elaborated on the functional necessity of providing for adequate protection of the temporary accommodation of the courier.<sup>13</sup>

15. Most of the comments made were on article 18 (Immunity from jurisdiction) and more specifically on paragraph 1, regarding the immunity of the diplomatic courier from the criminal jurisdiction of the receiving State or the transit State. As on previous occasions when this issue was discussed, three main trends emerged from the discussion: (a) deletion of the special provision on immunity from criminal jurisdiction, since it was unnecessary; (b) according the courier absolute immunity from the criminal jurisdiction of the receiving or transit State; (c) adoption of a compromise solution to the effect that the immunity of the courier from the criminal jurisdiction of the receiving or transit

State should be confined to acts performed by him in the exercise of his functions.<sup>14</sup>

16. Some representatives were of the view that a special provision on the immunity of the diplomatic courier from criminal jurisdiction was unnecessary since, under article 16 (Personal protection and inviolability), the courier would enjoy personal inviolability and would not be liable to any form of arrest or detention. Thus the protection accorded a diplomatic courier under article 16 would be sufficient.<sup>15</sup>

17. Several representatives considered that the limitation of the courier's immunity from criminal jurisdiction to "acts performed in the exercise of his functions" was not a compromise, but a retreat from customary practice as reflected in the 1961 Vienna Convention on Diplomatic Relations, and would give rise to problems of interpretation and application. It was further argued that the diplomatic courier was an official of the sending State who performed official State functions connected with the protection and transportation of the diplomatic bag. Thus the safety of the diplomatic courier was a prerequisite for the normal exercise of his functions. Accordingly, it was necessary that the courier enjoy the same immunity from criminal jurisdiction as that enjoyed by members of the administrative and technical staff of missions and their families under the 1961 Vienna Convention and other relevant codification conventions.<sup>16</sup>

18. A number of representatives supported the provisions of paragraph 1 of article 18 as an acceptable compromise between the concept of absolute immunity of the courier from criminal jurisdiction and the proposition that the courier should not be accorded any immunity from such jurisdiction.<sup>17</sup>

19. Some comments were made on the expression "all acts performed in the exercise of his functions", used in paragraphs 1 and 2 of article 18, with a view to avoiding possible ambiguity and potential difficulties in its interpretation and application.<sup>18</sup>

20. There were some reservations with regard to paragraph 4 of article 18 containing a provision which made it mandatory for the diplomatic courier to give evidence.<sup>19</sup>

21. In summing up the discussion in the Sixth Committee on articles 1 to 27 provisionally adopted by the Commission on first reading,<sup>20</sup> it may be pointed out that, with a few exceptions, as indicated above, most of the comments and suggestions made concerned drafting points, and that, in substance, most of the articles were approved. It goes without saying that the specific observations on various articles will be taken into account during the second reading of the draft articles.

<sup>9</sup> 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; and 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

<sup>10</sup> "Topical summary . . ." (A/CN.4/L.398), para. 251.

<sup>11</sup> *Ibid.*, paras. 250 and 252.

<sup>12</sup> *Ibid.*, paras. 267-268.

<sup>13</sup> See the Special Rapporteur's fourth report, document A/CN.4/374 and Add.1-4 (see footnote 1 (b) (iv) above), paras. 69-79; and his fifth report, document A/CN.4/382 (see footnote 1 (b) (v) above), para. 52.

<sup>14</sup> "Topical summary . . ." (A/CN.4/L.398), paras. 271-278.

<sup>15</sup> *Ibid.*, para. 273.

<sup>16</sup> *Ibid.*, para. 275.

<sup>17</sup> *Ibid.*, para. 271.

<sup>18</sup> *Ibid.*, paras. 274, 276 and 280.

<sup>19</sup> *Ibid.*, paras. 281-282.

<sup>20</sup> *Ibid.*, paras. 260-315.

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

### A. Introductory note

22. In this section, the Special Rapporteur presents a brief analytical survey of the comments and observations made in the Sixth Committee at the fortieth session of the General Assembly on the remaining seven draft articles referred to the Drafting Committee (arts. 36, 37 and 39 to 43).<sup>21</sup> The Special Rapporteur feels that it might be advisable, before adopting these articles on first reading, to examine the observations and suggestions made by representatives in the Sixth Committee. Such a procedure may provide an opportunity to make further improvements to the texts already considered by the Commission at its previous session.

23. Since these seven draft articles are still before the Drafting Committee, the Special Rapporteur suggests below certain amendments and proposes revised texts, as appropriate, in order to facilitate the Commission's work with a view to completing the first reading of the whole set of draft articles on the topic at the thirty-eighth session.

### B. Inviolability of the diplomatic bag (art. 36)<sup>22</sup>

24. The question of the inviolability of the diplomatic bag has given rise to much discussion, and opposing views have been expressed on the issue both in the Commission and in the Sixth Committee since the introduction of draft article 36 at the Commission's thirty-fifth session, in 1983.<sup>23</sup> This interest is well justified, since the legal protection of the diplomatic bag in general, and its

<sup>21</sup> See footnote 2 above.

<sup>22</sup> Draft article 36 as revised by the Special Rapporteur in his sixth report read:

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

<sup>23</sup> See the Special Rapporteur's fourth report, document A/CN.4/374 and Add.1-4 (see footnote 1 (b) (iv) above), paras. 326-349; his fifth report, document A/CN.4/382 (see footnote 1 (b) (v) above), paras. 73-79; and his sixth report, document A/CN.4/390 (see footnote 1 (b) (vi) above), paras. 30-42.

For the debate on draft article 36 in the Commission, see *Yearbook . . . 1984*, vol. II (Part Two), pp. 25 *et seq.*, paras. 101-102 and 136-143; and *Yearbook . . . 1985*, vol. II (Part Two), pp. 30 *et seq.*, paras. 179-184.

For the debate on the article in the Sixth Committee, 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), paras. 184-191; and "Topical summary . . . fortieth session of the General Assembly" (A/CN.4/L.398), paras. 317-336.

inviolability in particular, have always been considered as among the most significant provisions of the whole set of draft articles on the present topic.<sup>24</sup>

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

25. Several representatives expressed support for the revised text of draft article 36 submitted by the Special Rapporteur. It was pointed out that the new formulation went a long way towards striking a fine balance between the interests of sending, receiving and transit States, especially since the article would be applied on the basis of reciprocity. Some representatives considered the revised text a good basis for further efforts to find a generally acceptable formula by enabling a *rapprochement* between various positions. It was further noted that the merits of the revised text consisted in maintaining the principle of inviolability of the diplomatic bag as well-established State practice, while providing for some flexibility in its application.<sup>25</sup>

26. Some representatives expressed reservations and opposing views regarding draft article 36. It was pointed out that the Commission should reconsider some of the main features of the rule of inviolability of the diplomatic bag, its scope and modalities for practical application.<sup>26</sup>

27. The expression "unless otherwise agreed by the States concerned", in paragraph 1, was the subject of differing comments. Some representatives welcomed the inclusion of this expression as a practical means for reaching a reasonable compromise in the case of doubts concerning the contents of the bag. Other representatives, however, were of the view that such an expression was a departure from the principle of inviolability of the bag, and would have serious implications for the régime governing the diplomatic courier and the diplomatic bag established under the 1961 Vienna Convention on Diplomatic Relations. One representative favoured the deletion of the expression, since the residual entitlement to make contrary agreements was already set out in article 6, paragraph 2 (b).<sup>27</sup>

28. The inclusion of the words "and shall be exempt from any kind of examination directly or through electronic or other mechanical devices", at the end of paragraph 1, also gave rise to differing comments. Several representatives supported the inclusion of the phrase and, in particular, considered electronic scanning of the bag not permissible. It was said, in this connection, that the full inviolability of the diplomatic bag was a basic guarantee of the freedom of official communications between States and their missions, and that that prin-

<sup>24</sup> See the Special Rapporteur's sixth report, document A/CN.4/390 (see footnote 1 (b) (vi) above), para. 30.

<sup>25</sup> "Topical summary . . ." (A/CN.4/L.398), paras. 317 and 319.

<sup>26</sup> *Ibid.*, paras. 318 and 327.

<sup>27</sup> *Ibid.*, para. 320.

ciple should therefore be set forth in the draft article. Prohibition of any kind of examination or inspection, whether direct or indirect, was of particular importance, since the use of electronic or mechanical devices might infringe the confidential character of the contents of the bag, especially in view of the rapid technological advances in that field. The use of such sophisticated devices would also, it was stated, place a number of countries, in particular developing countries which did not have such devices, at a disadvantage. In view of these considerations, it was suggested that examination of the diplomatic bag through electronic or other mechanical devices should be expressly prohibited. However, some representatives were of the view that the formulation "exempt from any kind of examination", in paragraph 1, was too broad in scope in that all forms of external examination would then be excluded.<sup>28</sup>

29. Other representatives had serious reservations about the above-mentioned provision and were in favour of allowing electronic scanning of the bag. Some of them felt that scanning was designed solely to detect metallic objects in the bag and could not jeopardize diplomatic communications. It was also pointed out that electronic screening was in the interests of the safety of civil aviation. In the view of another representative, although electronic scanning should not be practised as a matter of routine, it should be allowed under specific circumstances when the grounds for suspicion were sufficiently strong.<sup>29</sup>

30. Without underestimating the divergence of opinion on paragraph 1 of draft article 36 as revised by the Special Rapporteur, and the reservations expressed thereon, the discussion in the Sixth Committee seems to indicate that the well-established principle of complete inviolability of the diplomatic bag should be respected as a ground rule, with some flexibility being allowed in its application, as provided for in the article.<sup>30</sup>

31. Paragraph 2 of the revised draft article 36 was also the subject of specific comments and suggestions for improvements.

32. Several representatives considered the provisions of paragraph 2 a step forward and an acceptable compromise solution. It was felt that the text ensured sufficient flexibility of application, and seemed to provide a reasonable safeguard against possible abuse by the sending State, in so far as it allowed the receiving State or the transit State to request the return of the bag to its place of origin if the authorities of those States had serious reason to believe that it contained something other than official correspondence, documents or articles intended for official use.<sup>31</sup>

33. Some representatives, although agreeing in substance with the principle underlying paragraph 2, indicated that the text should perhaps be improved to comprise as another option the opening of the bag in the

presence of representatives of the sending State. In this connection, it was proposed that the paragraph should be modelled along the lines of article 35 of the 1963 Vienna Convention on Consular Relations.<sup>32</sup>

34. Some other representatives were critical of paragraph 2 as revised by the Special Rapporteur. Some of them thought that, in its current wording, the provision gave the receiving or transit State discretionary power to return a diplomatic bag to its place of origin, which amounted to extending the régime of the consular bag to all types of bag, including the diplomatic bag, dealt with by the 1961 Vienna Convention on Diplomatic Relations. It was further pointed out that paragraph 2 seemed to negate one of the principles governing the freedom of diplomatic communications and would modify the régime of the diplomatic bag *stricto sensu* by infringing its inviolability through a substantive derogation from the relevant provisions of the 1961 Vienna Convention. Therefore there were several suggestions to delete paragraph 2.<sup>33</sup>

35. Several representatives referred to the interaction between draft article 36 and draft articles 42 and 43, particularly the possible legal implications of the optional declaration of exceptions under draft article 43 with regard to the status of bags under the 1961 and 1963 Vienna Conventions.<sup>34</sup>

36. In connection with those legal implications, some representatives referred to the new text of draft article 36 proposed by one member of the Commission at its thirty-seventh session.<sup>35</sup>

37. Several representatives expressed their support for that proposal. It was stated that the proposed new text was preferable for its clarity and more simplified wording, which avoided the controversial question of examination of the diplomatic bag by electronic devices. The explicit reference to the régime applicable to the consular bag under article 35 of the 1963 Vienna Convention was also noted.<sup>36</sup>

<sup>28</sup> *Ibid.*, para. 326.

<sup>29</sup> *Ibid.*, para. 327.

<sup>30</sup> *Ibid.*, para. 328.

<sup>31</sup> The proposed new text of draft article 36 read:

"1. The diplomatic bag shall not be opened or detained.

"2. However, in the case of a consular bag within the meaning of article 35 of the Vienna Convention on Consular Relations, the competent authorities of the receiving State may, if they have serious reason to believe that the bag contains something other than the official correspondence, documents or articles referred to in article 25 of these articles, request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.

"3. Notwithstanding paragraph 1 of this article, a State may, when signing, ratifying or acceding to these articles or at any time thereafter, make a written declaration that it will apply to the diplomatic bag the rule applicable to the consular bag by virtue of paragraph 2 of this article.

"4. In relation to other States Parties to these articles, a State which has made a written declaration under paragraph 3 of this article shall not be entitled to raise objection to the application to its diplomatic bags of the rule stipulated in paragraph 2 of this article." (*Yearbook . . . 1985*, vol. II (Part Two), p. 31, para. 182.)

<sup>36</sup> "Topical summary . . ." (A/CN.4/L.398), paras. 329 and 331-333.

<sup>28</sup> *Ibid.*, paras. 321-322.

<sup>29</sup> *Ibid.*, para. 323.

<sup>30</sup> *Ibid.*, para. 324. See also *Official Records of the General Assembly, Fortieth Session, Sixth Committee, 25th meeting, para. 29 (Turkey)*.

<sup>31</sup> "Topical summary . . ." (A/CN.4/L.398), paras. 325-326.

38. The application of the rules of reciprocity provided for in paragraphs 3 and 4 of the proposed new text of draft article 36 was the subject of thorough examination. Some representatives who were in favour of that text as a whole felt that the provisions on reciprocity would require further elaboration.<sup>37</sup> Most of the reservations expressed with regard to the proposed new text concerned two main points: first, the plurality of régimes, which might lead to complications and confusion in practice; and secondly, the derogation from the general régime established for the diplomatic bag in the 1961 Vienna Convention and international customary law.<sup>38</sup> One representative stressed that his delegation could not agree to a State being given the possibility of making a unilateral declaration that it would apply to the diplomatic bag the rule applicable to the consular bag, for such an option would be absolutely contrary not only to the 1961 Vienna Convention, but also to international customary law. His delegation was also opposed to any agreement *inter se* and to any optional régime in that field.<sup>39</sup> Another representative stated that the proposed new formulation of article 36 would make part of the future convention dependent on declarations by the parties, possibly leading to uncertainty. He hoped that the Commission would decide on a provision applicable to all cases, along the lines of the revised text submitted by the Special Rapporteur, provided that the law concerning the contents of the bag was respected.<sup>40</sup>

## 2. PROPOSED REVISED TEXT OF ARTICLE 36

39. This analysis of the debate in the Sixth Committee on draft article 36 indicates that the modalities for application of the principle of inviolability of the diplomatic bag deserve particular consideration. The existing proposals may provide a basis for further efforts to consolidate in a single instrument the existing rules of international law, as evidenced by prevailing State practice, concerning the legal protection of the diplomatic bag. In the view of the Special Rapporteur, article 36 should formulate the *general rule* that the diplomatic bag shall be inviolable and shall not be opened or detained and that it should be exempt from any examination which might be prejudicial to its inviolability and to the confidential character of its contents. The article could also contain a provision concerning the consular bag and the application of the rule embodied in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations. Thus a dual régime would be established corresponding to the existing codification conventions. Such a solution may have certain merits, but it would not be consistent with the idea of a uniform régime applicable to all types of bag underlying paragraph 2 of the revised text submitted by the Special Rapporteur, which was considered favourably by several representatives during the discussion in the Sixth Committee.

40. It is hoped that members of the Commission will express their views on the above-mentioned questions

<sup>37</sup> *Ibid.*, para. 330.

<sup>38</sup> *Ibid.*, paras. 334-336.

<sup>39</sup> *Official Records of the General Assembly, Fortieth Session, Sixth Committee, 34th meeting, para. 45 (France).*

<sup>40</sup> *Ibid.*, 31st meeting, para. 26 (Australia).

relating to draft article 36 before its consideration by the Drafting Committee.

41. Taking into account the comments and observations made in the Commission and the Sixth Committee, and in view of the fact that draft article 36 has not yet been examined by the Drafting Committee, the Special Rapporteur submits a new revised text of the article. The amendments relate mainly to paragraph 1. In paragraph 2, only the reference to article 32 is amended as a result of the renumbering of the preceding draft articles.

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 wherever it may be; it shall not be opened or detained and shall be exempt from 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 official correspondence, documents or articles intended for official use, referred to in article 25, they may request that the bag be returned to its place of origin.

## C. Exemption from customs inspection, customs duties and all dues and taxes (art. 37)<sup>41</sup>

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

43. The new draft article 37 submitted by the Special Rapporteur in his sixth report, which was an amalgamation of former draft articles 37 and 38, was considered an improvement. The comments and suggestions made were mainly of a drafting nature.

44. The main proposed change to the article, which might affect its field of application, was the suggestion to confine its provisions to matters relating to exemption of the diplomatic bag from customs duties, dues and taxes. Consequently, all matters relating to customs control and inspection would fall under article 36.<sup>42</sup>

### 2. PROPOSED REVISED TEXT OF ARTICLE 37

45. Taking into consideration the comments and drafting suggestions made during the discussion in the Sixth Committee, the Special Rapporteur submits for

<sup>41</sup> The new draft article 37 submitted by the Special Rapporteur in his sixth report read:

*"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."

<sup>42</sup> "Topical summary . . ." (A/CN.4/L.398), para. 339.

examination and approval the following revised text of draft article 37:

**Article 37. Exemption from customs duties, dues and taxes**

The receiving State or, as appropriate, the transit State shall, in accordance with such laws and regulations as it may adopt, permit the free entry, transit or exit of the diplomatic bag and shall exempt it from customs duties and all national, regional or municipal dues and taxes and other related charges, other than charges for storage, cartage and other specific services rendered.

**D. Protective measures in circumstances preventing the delivery of the diplomatic bag (art. 39) and obligations of the transit State in case of force majeure or fortuitous event (art. 40)<sup>43</sup>**

46. Draft articles 39 and 40 are considered together since there were several proposals in the Sixth Committee to merge them into one article.

47. It may be recalled that, during the consideration of draft articles 39 and 40 by the Commission at its thirty-seventh session, it was also suggested that they be combined in a single article.<sup>44</sup>

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

48. With regard to draft article 39, it was felt that the expression "in the event of termination of the functions of the diplomatic courier" might give rise to practical difficulties. It was further suggested that article 39 should cover all circumstances preventing the diplomatic courier from delivering the diplomatic bag to its destination, since article 11 (End of the functions of the

<sup>43</sup> Draft article 39 as revised by the Special Rapporteur in his sixth report and draft article 40, submitted in the fourth report and orally amended by the Special Rapporteur at the Commission's thirty-seventh session (see *Yearbook . . . 1985*, vol. II (Part Two), p. 33, para. 190), read:

"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."

"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 to the diplomatic courier or the diplomatic bag 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."

<sup>44</sup> *Yearbook . . . 1985*, vol. II (Part Two), p. 33, paras. 188-189 and 191.

diplomatic courier) and article 12 (The diplomatic courier declared *persona non grata* or not acceptable) contained specific reference to notification about the termination of the courier's functions. In that connection, it was suggested that draft article 39 be amended so as to cover other cases in which the courier might be temporarily unable to perform his functions, such as illness or accident.<sup>45</sup>

**2. PROPOSED NEW ARTICLE 39 TO REPLACE DRAFT ARTICLES 39 AND 40**

49. In the light of the above considerations, the Special Rapporteur submits for examination and approval the following new draft article 39 combining and replacing draft articles 39 and 40:

**Article 39. Protective measures in case of force majeure**

1. 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 cases of illness, accident or other events preventing the diplomatic courier from delivering the diplomatic bag to its destination, or in circumstances preventing the captain of a ship or aircraft from delivering the diplomatic bag to an authorized member of the diplomatic mission of the sending State.

2. If, as a consequence of *force majeure*, the diplomatic courier or the diplomatic bag is compelled to pass through the territory of a State which was not initially foreseen as a transit State, that State shall accord to the diplomatic courier and the diplomatic bag inviolability and protection and shall extend to the diplomatic courier and the diplomatic bag the necessary facilities to continue their journey to their destination or to return to the sending State.

**E. Non-recognition of States or Governments or absence of diplomatic or consular relations (art. 41)<sup>46</sup>**

50. When introducing draft article 41 in his fourth report, the Special Rapporteur pointed out that it was primarily intended to cover the exceptional circumstances in which a host State on whose territory an international conference was held, or a transit State, did not recognize the sending State or its Government or in

<sup>45</sup> "Topical summary . . ." (A/CN.4/L.398), paras. 341-343.

<sup>46</sup> Draft article 41 as resubmitted by the Special Rapporteur in his sixth report read:

"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 their Governments, nor shall it imply recognition by the receiving State, the host State or the transit State of the sending State or of its Government."

which diplomatic or consular relations did not exist between them.<sup>47</sup> The purpose of the article was again emphasized by the Special Rapporteur in his sixth report.<sup>48</sup> However, the wording of the article proposed by the Special Rapporteur went somewhat further, referring not only to "host State", but also to "receiving State". This broadening of the scope of the article gave rise to some misgivings both in the Commission and in the Sixth Committee.

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

51. A number of representatives expressed approval of draft article 41. One representative considered the inclusion of the article essential since, although many States still did not maintain diplomatic or consular relations with other States, diplomatic couriers continued to maintain communications between the States concerned and their various representatives and missions abroad. It was further pointed out that the article met an important practical need.<sup>49</sup>

52. Some representatives, while agreeing with the draft article in substance, felt that its wording could be improved.<sup>50</sup>

53. Other representatives considered the draft article superfluous or out of place.<sup>51</sup>

#### 2. PROPOSED REVISED TEXT OF ARTICLE 41

54. The Special Rapporteur feels that a provision on the legal protection of the diplomatic courier and the diplomatic bag in the circumstances described above is both necessary and useful, especially in relation to official communications between the sending State and its delegations to international conferences, special missions or permanent missions to international organizations in the territory of a State with which it does not maintain diplomatic or consular relations. It is hoped that redrafting the text of article 41 along these lines may provide a generally acceptable formulation.

55. Taking into consideration the above-mentioned comments and suggestions, the Special Rapporteur submits for examination and approval the following revised text of draft article 41:

#### *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 host State or the transit State or by the non-existence of diplomatic or consular relations between them.**

<sup>47</sup> Document A/CN.4/374 and Add.1-4 (see footnote 1 (b) (iv) above), para. 382.

<sup>48</sup> Document A/CN.4/390 (see footnote 1 (b) (vi) above), paras. 54-55. See also *Yearbook . . . 1985*, vol. II (Part Two), p. 34, para. 192.

<sup>49</sup> "Topical summary . . ." (A/CN.4/L.398), paras. 348-350.

<sup>50</sup> *Ibid.*, para. 351.

<sup>51</sup> *Ibid.*, paras. 352-353.

**2. The granting of facilities, privileges and immunities to the diplomatic courier and the diplomatic bag, under these articles, by the host State or the transit State shall not by itself imply recognition by the sending State of the host State or the transit State, or of their Governments, nor shall it imply recognition by the host State or the transit State of the sending State or of its Government.**

#### F. Relation of the present articles to other conventions and international agreements (art. 42)<sup>52</sup>

56. The relationship between the present draft articles and the four codification conventions has always been considered as a common legal basis for a coherent and as uniform as possible a régime governing the status of the diplomatic courier and the diplomatic bag.<sup>53</sup> Therefore the main objective of a provision regarding this relationship should be to achieve harmonization and uniformity between the existing provisions and the new draft articles dealing with the legal régime of official communications through the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The progressive development and codification of the rules governing this régime should be based on the existing conventions and complement them with more specific provisions. The legal relationship should also encompass, as much as practicable, other international agreements in the field of diplomatic law. The legal relationship between the present draft articles and other international treaties in the field of diplomatic law has been considered within a certain framework of flexibility, as contemplated by articles 30 and 41 of the 1969 Vienna Convention on the Law of Treaties, regarding the application of successive treaties relating to the same subject-matter, and agreements to modify multilateral treaties between certain of the parties only, respectively. This flexible approach was emphasized by the Special Rapporteur in his fourth report in 1983, when he introduced the original text of draft article 42.<sup>54</sup>

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

57. Several representatives expressed agreement with the revised text of draft article 42 submitted by the Special Rapporteur in his sixth report. It was pointed out that the main objective of the article was to indicate that the present articles should be considered as *lex*

<sup>52</sup> Draft article 42 as revised by the Special Rapporteur in his sixth report read:

"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."

<sup>53</sup> See the Special Rapporteur's fourth report, document A/CN.4/374 and Add.1-4 (see footnote 1 (b) (iv) above), paras. 397-402.

<sup>54</sup> *Ibid.*, paras. 401 and 403.

*specialis* complementing the existing conventions relating to the status of the diplomatic courier and the diplomatic bag, and that there should be a measure of flexibility in their application.<sup>55</sup>

58. With regard to paragraph 1, the view was expressed that it should be more clearly worded. Several observations were made on the expression "without prejudice to the relevant provisions in other conventions or those in international agreements". One representative submitted that this expression meant that the present articles were intended to complement the four codification conventions. However, another representative questioned whether "the provisions of the present articles" were really "without prejudice to the relevant provisions in other conventions or those in international agreements".<sup>56</sup>

59. Some representatives, considering that the revised text of paragraph 1 contained certain ambiguities,<sup>57</sup> expressed their preference for the original text submitted by the Special Rapporteur in his fourth report.<sup>58</sup> Similar observations had also been advanced in the Commission.<sup>59</sup>

60. With regard to paragraph 2, it was stated that its terms should be made more flexible.<sup>60</sup> It was further suggested that express reference should be made to article 6, paragraph 2 (b), requiring that a modification of the extent of facilities, privileges and immunities should not be "incompatible with the object and purpose of the present articles" and should not "affect the enjoyment of the rights or the performance of the obligations of third States".

61. One representative expressed the view that draft article 42 should be deleted altogether.<sup>61</sup>

## 2. PROPOSED REVISED TEXT OF ARTICLE 42

62. Considering the usefulness of a special provision on the relationship between the present articles and the codification conventions and other international agreements, the Special Rapporteur believes that draft article 42 has its *raison d'être* and a place in the set of draft articles. In the light of the above-mentioned comments and suggestions, the Special Rapporteur submits for examination and approval the following revised text of draft article 42:

### *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

<sup>55</sup> "Topical summary . . ." (A/CN.4/L.398), para. 354.

<sup>56</sup> *Ibid.*, para. 356.

<sup>57</sup> *Ibid.*, para. 357.

<sup>58</sup> Document A/CN.4/374 and Add.1-4 (see footnote 1 (b) (iv) above), para. 403.

<sup>59</sup> See *Yearbook . . . 1985*, vol. II (Part Two), pp. 34-35, para. 196.

<sup>60</sup> "Topical summary . . ." (A/CN.4/L.398), para. 359.

<sup>61</sup> *Ibid.*, para. 360.

### **Representation of States in 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 to them.

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 and from modifying the provisions thereof, provided that such modifications are in conformity with article 6 of the present articles.

### **G. Declaration of optional exceptions to applicability in regard to designated types of couriers and bags (art. 43)<sup>62</sup>**

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

63. Several representatives agreed with the approach taken by the Special Rapporteur in draft article 43, which was designed to introduce a certain degree of flexibility in the application of the present articles. It was pointed out that the article made allowance for the fact that only two of the four codification conventions had so far come into force, and that it provided for the possibility of applying to the present articles reservations made in relation to the two conventions not yet in force.<sup>63</sup>

64. A number of representatives expressed specific reservations concerning draft article 43, which they believed would introduce a plurality of régimes and uncertainty as to the interpretation and application of the present articles.<sup>64</sup>

65. There were some comments and suggestions relating to the wording of the article.

#### 2. PROPOSED REVISED TEXT OF ARTICLE 43

66. In addition to the suggestions made in the Sixth Committee, the Special Rapporteur has taken into account the proposals for drafting improvements made during the discussion in the Commission.<sup>65</sup> In the light

<sup>62</sup> Draft article 43 as submitted by the Special Rapporteur in his sixth report read:

"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."

<sup>63</sup> "Topical summary . . ." (A/CN.4/L.398), paras. 361-362.

<sup>64</sup> *Ibid.*, paras. 363-368.

<sup>65</sup> See *Yearbook . . . 1985*, vol. II (Part Two), p. 35, para. 199.

of the above considerations, the Special Rapporteur submits for examination and approval the following revised text of draft article 43:

**Article 43. *Optional declaration of exceptions to applicability in regard to designated types of couriers and bags***

1. A State may, when signing, ratifying or acceding to the present articles, or at any time thereafter, designate by written declaration those types of cour-

iers 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; the withdrawal must be in writing.

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.

## Conclusion

67. In submitting the revised texts of draft articles 36, 37, 39 and 41 to 43, the Special Rapporteur believes that their consideration by the Commission will facilitate the work of the Drafting Committee with a view to their subsequent adoption by the Commission on first reading.

68. It is hoped that, following the consideration of these remaining draft articles and any further improvements that may be made, the whole set of draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier will be provisionally adopted by the Commission on first reading at its thirty-eighth session.