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Comments and observations received from Governments

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

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

[Agenda item 4]

DOCUMENT A/CN.4/409 and Add.1-5 *

Comments and observations received from Governments

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* The reply submitted jointly by Denmark, Finland, Iceland, Norway and Sweden is reproduced under Nordic countries.

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NOTE

Multilateral conventions referred to in the present document

	<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.
Convention on Special Missions (New York, 8 December 1969)	United Nations, <i>Juridical Yearbook 1969</i> (Sales No. E.71.V.4), p. 125.
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975)—(hereinafter referred to as the "1975 Vienna Convention on the Representation of States")	<i>Ibid.</i> , 1975 (Sales No. E.77.V.3), p. 87.

The four above-mentioned conventions are referred to in the present document as the "codification conventions".

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* *

	<i>Source</i>
Convention on the Privileges and Immunities of the United Nations (New York, 13 February 1946)	United Nations, <i>Treaty Series</i> , vol. 1, p. 15
Convention on the Privileges and Immunities of the Specialized Agencies (New York, 21 November 1947)	<i>Ibid.</i> , vol. 33, p. 261.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	<i>Ibid.</i> , vol. 1155, p. 331.

Introduction

1. At its thirty-eighth session, held in 1986, the International Law Commission adopted provisionally, on first reading, the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The Commission decided that, in accordance with articles 16 and 21 of its statute, the draft articles should be transmitted through the Secretary-General to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 1988.¹

2. By paragraph 9 of resolution 41/81 of 3 December 1986, and again by paragraph 10 of resolution 42/156 of

¹ *Yearbook* . . . 1986, vol. II (Part Two), p. 24, para. 32.

7 December 1987, both entitled "Report of the International Law Commission", the General Assembly urged Governments to give full attention to the request of the International Law Commission for comments and observations on the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

3. Pursuant to the Commission's request, the Secretary-General addressed circular letters, dated respectively 25 February 1987 and 22 October 1987, to Governments inviting them to submit their comments and observations by 1 January 1988.

4. The replies received from 28 Member States and one non-member State appear in the present document. For the convenience of the reader, the text of the draft articles adopted by the Commission is reproduced below.

DRAFT ARTICLES ON THE STATUS OF THE DIPLOMATIC COURIER AND THE DIPLOMATIC BAG NOT ACCOMPANIED BY DIPLOMATIC COURIER

PART I

GENERAL PROVISIONS

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;

(2) "diplomatic bag" means the packages containing official correspondence, and 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.

PART II

STATUS OF THE DIPLOMATIC COURIER AND THE CAPTAIN OF A SHIP OR AIRCRAFT ENTRUSTED WITH THE DIPLOMATIC BAG

Article 7. 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 8. 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 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 accorded to the diplomatic courier

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.

PART III

STATUS OF THE DIPLOMATIC BAG

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.

Article 28. Protection 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 technical devices].

2. Nevertheless, if the competent authorities of the receiving [or transit] State have serious reasons to believe that the [consular] bag contains something other than the correspondence, documents or articles referred to in article 25, they may request [that the bag be subjected to examination through electronic or other technical devices. If such examination does not satisfy the competent authorities of the receiving [or transit] State, they may further request] that the bag be opened in their presence by an authorized representative of the sending State. If [either] [this] request is refused by the authorities of the sending State, the competent authorities of the receiving [or transit] State may require that the bag be returned to its place of origin.

Article 29. Exemption from customs duties, dues and taxes

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 the entry, transit and departure of the 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 similar services.

PART IV

MISCELLANEOUS PROVISIONS

Article 30. Protective measures in case of force majeure or other circumstances

1. In the event that, due to *force majeure* or other circumstances, the diplomatic courier, or the captain of a ship or aircraft in commercial service to whom the bag has been entrusted or any other member of the crew, is no longer able to maintain custody of the diplomatic bag, the receiving State or, as the case may be, the transit State shall take appropriate measures to inform the sending State and to ensure the integrity and safety of the diplomatic bag until the authorities of the sending State take repossession of it.

2. In the event that, due to *force majeure*, the diplomatic courier or the diplomatic bag is present in the territory of a State which was not initially foreseen as a transit State, that State shall accord protection to the diplomatic courier and the diplomatic bag and shall extend to them the facilities necessary to allow them to leave the territory.

Article 31. Non-recognition of States or Governments or absence of diplomatic or consular relations

The facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag under the present articles shall not be affected either by the non-recognition of the sending State or of its Government or by the non-existence of diplomatic or consular relations.

Article 32. Relationship between the present articles and existing bilateral and regional agreements

The provisions of the present articles shall not affect bilateral or regional agreements in force as between States parties to them.

Article 33. Optional declaration

1. A State may, at the time of expressing its consent to be bound by the present articles, or at any time thereafter, make a written declaration specifying any category of diplomatic courier and corresponding category of diplomatic bag listed in paragraph 1 (1) and (2) of article 3 to which it will not apply the present articles.

2. Any declaration made in accordance with paragraph 1 shall be communicated to the depositary, who shall circulate copies thereof to the Parties and to the States entitled to become Parties to the present articles. Any such declaration made by a Contracting State shall take effect upon the entry into force of the present articles for that State. Any such declaration made by a Party shall take effect upon the expiry of a period of three months from the date upon which the depositary has circulated copies of that declaration.

3. A State which has made a declaration under paragraph 1 may at any time withdraw it by a notification in writing.

4. A State which has made a declaration under paragraph 1 shall not be entitled to invoke the provisions relating to any category of diplomatic courier and diplomatic bag mentioned in the declaration as against another Party which has accepted the applicability of those provisions to that category of courier and bag.

I. Comments and observations received from Member States

Australia

{Original: English}
{30 December 1987}

GENERAL COMMENTS

1. Australia's views on this topic have been expressed in the Sixth Committee of the General Assembly on various occasions. Essentially, Australia believes there is no need for a new convention, nor does it believe that the international community is ready for progressive development in this area. It considers that the existing conventions dealing with this question, in particular the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, cover the field adequately. The addition of a new convention or protocol would result in a plurality of régimes applicable to the same bag which would only create difficulties and confusion. Australia considers that it is more important to concentrate on the observance of the existing laws and conventions. Australia also observes that the draft articles are not based on any survey of existing State practice, nor is there any clear identification of aspects of State practice generally recognized as requiring revision.

2. As an attempted code in relation to diplomatic couriers and bags, the draft articles are essentially flawed. They set out a general scheme for couriers and bags within the meaning of the four codification conventions (listed in art. 3) which have relevant provisions. However, article 33 provides for the making of declarations specifying any category of diplomatic courier or diplomatic bag to which States will not apply the articles. This could result in a plurality of régimes leading to uncertainty and, possibly, an overall diminution in standards of orderly behaviour and administration. It would be difficult to expect couriers to be familiar with various régimes and to know which applied to each country visited. The plurality of régimes would similarly be confusing for immigration and customs officials of receiving States.

3. The approach of setting out a general scheme for the four conventions can itself be criticized. While the legal validity and acceptance of the 1963 Vienna Convention is beyond question, neither the 1969 Convention on Special Missions nor the 1975 Vienna Convention on the Representation of States has attained anything near general acceptance. To include couriers and bags to which they relate within the general scheme of the draft articles increases the prospect that, even if the draft articles are ever accepted by a reasonable number of States, there would be numerous declarations pursuant to article 33.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 16

4. Australia considers personal inviolability to be unnecessary. Any arbitrary interference with the courier can be dealt with on the basis that it is also an interference with the bag. The formulation in article 27, paragraph 3, of the 1961 Vienna Convention is considered preferable.

Article 17

5. Australia considers it unnecessary to grant inviolability to the temporary accommodation of the courier. Although qualified by its paragraph 3, article 17 could lead to *ad hoc* enclaves of inviolability in receiving or transit States established at the discretion of the courier. There is also the related problem of the practical difficulties of requiring the diplomatic courier to inform local authorities of the location of his temporary accommodation. The inviolability could also be used for activities inconsistent with the reasons for granting such inviolability.

Article 18

6. Apart from being unnecessary, article 18 is also unclear. Paragraph 2 purports to remove immunity from civil jurisdiction for certain vehicle accidents where damages are not recoverable from insurance. It is probable that the interpretation of this article will depend upon both the procedural rules of the jurisdiction concerned—which, would, of course, vary across jurisdictions—and upon the provisions of the relevant insurance policy.

Articles 19 to 22

7. Articles 19 to 22 confer personal inviolability and privileges and immunities on diplomatic couriers which are in some respects greater than those granted to consular officers under the 1963 Vienna Convention. Australia's view is that these are not necessary for the proper performance of the courier's functions and would be open to abuse.

Article 28

8. Both article 27, paragraph 3, of the 1961 Vienna Convention and article 35, paragraph 3, of the 1963 Vienna Convention provide that the diplomatic bag shall not be opened or detained. In Australia's view, which it believes is the generally accepted view, these articles prevent any interference with the bag or any examination of the bag either directly or through electronic or X-ray means. Consequently, paragraph 1 of article 28 is unnecessary and possibly raises doubts about the interpretation of the other conventions.

9. The provision for a request to open the bag if there is serious reason to believe that it is being used for improper purposes and to require its return if the request is not complied with is found in the 1963 Vienna Conventions but not in the 1961 Vienna Convention. However, the distinction is largely academic because under article 35, paragraph 1, of the 1963 Vienna Convention a consular post may employ diplomatic bags to communicate, and this seems to be common practice. No Government is known to employ "consular bags". In our view, it would be a retrograde step to apply such a provision to diplomatic bags. It is more likely to be abused than to be generally beneficial. If it is apparent that a flagrant and intolerable breach is occurring under the present régime, appropriate action could be taken and excused after the event.

10. On 22 February 1983, Australia objected to reservations to the 1961 Vienna Convention made by a number of States.¹ Those States had attempted to reserve the right to request opening of the diplomatic bag and to return it if the request was not complied with. One State had attempted to reserve the right to open the diplomatic bag.

11. The screening of diplomatic bags by X-rays has been the subject of some recent international discussion. Such screening would enable some identification of the contents of a bag and, as technology improves, it is suspected that it may enable the reading of some of the contents. Australia has formally objected to a preliminary decision by another Government to X-ray diplomatic bags.

¹ See United Nations, *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1988* (Sales No. E.89.V.3), pp. 57-58.

Austria

[Original: English]
[3 February 1988]

GENERAL COMMENTS

1. At the outset, Austria wishes to pay tribute to the Special Rapporteur for this topic, Mr. Yankov, whose great skill and untiring efforts have made it possible for the Commission to adopt provisionally, at its thirty-eighth session, held in 1986, the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

2. As the work of the Commission on this topic has progressed over the years, Austria has consistently made known its view that the question of the diplomatic courier and the diplomatic bag has already been basically dealt with by several multilateral conventions and that State practice has developed in those areas where legal questions had been left undecided. At the same time, however, Austria has repeatedly pointed out that there is a certain usefulness in an endeavour to consolidate the various rules existing in this field into a single instrument, making the rules so developed more precise and supplementing them where necessary.

3. Austria notes with appreciation that the draft articles adopted by the Commission constitute an improvement over previous drafts, as observations made by various delegations, including the Austrian delegation, during the debates in the Sixth Committee of the General Assembly have been taken into account. There remain, however, certain questions which in the view of Austria have not been resolved in an entirely satisfactory manner.

4. As already stated, Austria sees the major benefit to be drawn from this codification exercise in the consolidation of existing rules into a single instrument, thereby avoiding any problems of interpretation as to the scope of a particular rule applicable in a specific case. Austria therefore finds the retention of the concept laid down in article 33, providing for optional declarations specifying the category of diplomatic courier and corresponding category of diplomatic bag to which this provision should be applied, disappointing. Although Austria is aware of the motives for such an approach and the need for flexibility, it nevertheless feels that such a plurality of régimes, if not restricted

to the absolute necessary minimum, would tend to undermine the very purpose of the whole codification exercise. Austria therefore believes that maintaining the present solution would invariably raise the question as to whether a new international instrument, adding further to the already existing plurality, would serve any useful purpose.

5. The draft considerably expands the privileges and immunities of the diplomatic courier in comparison to the rules already in existence. The diplomatic courier is being elevated, in many respects, to the level of a "temporary diplomat" for which Austria sees no compelling reason. It would seem that the focus of attention should rather be directed to the bag, for the courier is only a means used by Governments for the delivery of the bag. Any status accorded to the courier should be exclusively defined according to functional necessities. A State may, at any time, designate a member of a diplomatic mission as a courier should the need be felt that such courier should enjoy full diplomatic protection. The guiding principle should be the extent to which the protection accorded to the courier who is not a member of the diplomatic staff of a mission is necessary for the performance of his function—which is the delivery of the bag. Consideration must be given to the delicate balance between the sending State's interest in maintaining free communication with and between its missions and the receiving State's legitimate interest in preserving its integrity and security.

6. Austria therefore believes that it should be sufficient to accord the diplomatic courier personal protection and inviolability as provided for in draft article 16. Although it is noted that article 18, relating to immunity from jurisdiction, has been considerably improved in restricting such immunity to acts performed in the exercise of the courier's function, Austria still has doubts as to whether such jurisdictional immunities are really necessary. These doubts extend to the provision of article 19, paragraph 2, according the courier the right to import articles for his personal use free of customs duties, taxes and related charges.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 13

7. Draft article 13, relating to facilities accorded to the diplomatic courier, is too vague and could be interpreted much too broadly, making this provision difficult to accept. The article could be deleted altogether or at least be redrafted so as just to lay down the general duty of the receiving or transit State to assist the diplomatic courier in the performance of his functions.

Article 17

8. Draft article 17, providing for the inviolability of the temporary accommodation of the diplomatic courier, remains unacceptable to Austria. As already pointed out repeatedly during the debates on the present topic in the Sixth Committee, such an extension of inviolability is neither necessary nor practicable. It seems that in most cases the diplomatic courier would either stay at the premises of the mission or, if a hotel or similar accommodation is used, would not have the diplomatic bag with him in such temporary accommodation. In any event, the protection

accorded to the courier in draft article 16 and the protection provided for the bag under part III of the draft would be quite sufficient to prevent any breach of confidentiality.

Belgium

[Original: French]
[13 January 1988]

GENERAL COMMENTS

Article 28

9. As already mentioned, Austria holds the view that the provision relating to the protection of the bag should be the central stipulation of the whole draft. Undoubtedly, the most important provision in part III dealing with the status of the diplomatic bag is draft article 28, concerning its protection. It is noted with disappointment that the Commission was not able to reach a consensus on the formulation of this provision and left certain expressions in brackets.

Paragraph 1

10. Austria considers the categorization of the obligation contained in paragraph 1 of this article not to open or detain the bag as "inviolability of the diplomatic bag" acceptable. It is, however, against the retention of the expression in paragraph 1 that is now between square brackets. Austria has repeatedly stated its point of view that the screening of diplomatic bags by electronic means is in principle admissible in connection with security checks at international airports and that in any case the risk of transporting diplomatic bags without any previous examination cannot be imposed on airlines. At the same time, Austria is appreciative of the concern voiced in this connection that an electronic examination might violate the confidentiality of the contents of the bag. Austria shares the view of those who are of the opinion that the protection of the confidentiality of the contents of the bag constitutes a fundamental principle from which no deviation can be allowed. A possible compromise would be to oblige the receiving State to notify the diplomatic mission of the State concerned that an electronic examination of the bag is envisaged in order to give a representative of the sending State the possibility to be present when such examination is carried out. Austria would also be prepared, if a majority of States so desires, to accept the restriction of such examination by electronic means to cases where the receiving State has convincing reasons to believe that objects which might be jeopardizing the security of the receiving State, or the importation of which is prohibited, are contained in the bag.

Paragraph 2

11. Austria welcomes paragraph 2 of article 28, which provides for the possibility of returning the bag, under certain circumstances, to its place of origin. It should, in particular, be the right of the receiving State to return the bag if permission for its examination is refused. In view of the applicability of the principle of reciprocity, Austria believes that such a right would in practice not be abused. Austria sees, however, no merits in providing for consecutive measures of control, as foreseen in the expression now between square brackets.

12. Austria does not favour the restriction of the principle contained in paragraph 2 to consular bags. As already stated, Austria is in favour of uniform rules to be developed for all types of diplomatic bags.

1. The Belgian Government has the strongest of reservations concerning the draft articles. It is not obvious that a uniform régime for the bag and the courier is desirable. The situations are different: the diplomatic bag is governed by the 1961 Vienna Convention on Diplomatic Relations, whereas the consular bag is governed by the 1963 Vienna Convention on Consular Relations. Furthermore, there is also the case of bags used by special missions or by representatives of States to international organizations.

2. Aware of the difficulties, the Commission has provided for a system of declarations in writing which would permit States to designate any category of diplomatic courier and corresponding category of diplomatic bag to which they would not apply the provisions of the convention. That possibility may give rise to confusion in the applicable law. Care should be taken not to undermine the rules established by the Vienna Conventions of 1961 and 1963. The aim should be to supplement those rules to the extent that appears necessary.

3. It is in this light that the question of scanning should be studied. Although, clearly, a State must have available to it the necessary means to protect itself against any abuse of the diplomatic bag, nevertheless the measures taken must not be prejudicial to the legitimate activities of States.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 3

4. There is no reason to broaden the scope of the envisaged convention to encompass the status of consular couriers and bags or couriers and bags of special missions.

Article 5

5. The second sentence of article 5, paragraph 2, concerning the duty of the courier not to interfere in the internal affairs of the receiving State or the transit State, is superfluous. The category of officials concerned is quite different from the category covered by the 1961 Vienna Convention.

Article 17

6. The inviolability of the temporary accommodation of the courier is unacceptable. It is, moreover, impracticable to ask the courier to inform the authorities of the receiving State of the location of his temporary accommodation. Article 27, paragraph 5, of the 1961 Vienna Convention is more appropriate.

Article 18

7. The comment on article 18 is the same as that on article 17.

Article 28

8. The present formulation of the provision on scanning does not provide adequate safeguards with respect to the confidentiality of the correspondence. The question is whether, in view of the increasing sophistication of technical devices, provision for safeguards can be made.

Article 32

9. It is absolutely essential to look more closely at the implications of the present draft articles in connection with the 1961 Vienna Convention and the 1963 Vienna Convention, bearing in mind article 30 of the 1969 Vienna Convention on the Law of Treaties (Application of successive treaties relating to the same subject-matter).

Article 33

10. The possibility of making optional declarations might give rise to confusion as to the status applicable.

Brazil

[Original: English]
[4 February 1988]

GENERAL COMMENTS

1. An observation of a general character relates to the approach taken by the Commission in the elaboration of the articles. In elaborating general rules, applicable to all categories of couriers and bags used for official communications, the Commission adhered mainly to existing law, as expressed in the codification conventions. In the view of the Brazilian Government, the Commission could have also taken more fully into account emerging practices and needs. The articles could, for example, cover the status of bags and couriers of international organizations.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 18

2. Article 18, which deals with immunity from jurisdiction, determines that, in addition to civil and administrative immunity, recognized on a functional basis, the diplomatic courier shall be entitled to immunity from criminal jurisdiction, which would be granted according to the same functional criterion. The Brazilian Government is of the view that recognition of immunity from criminal jurisdiction is not strictly necessary since, according to article 16, the courier enjoys personal inviolability and shall not be liable to any form of arrest or detention, thus limiting considerably the extent to which a courier is subject to the criminal jurisdiction of the receiving or transit State. Although the protection thus granted would be sufficient, the Brazilian Government would accept article 18 as proposed by the Commission in order to accommodate the position of those who insist on the need to grant the courier immunity from criminal jurisdiction.

Article 21

3. Article 21 states that the privileges and immunities that apply to the courier begin when the courier enters the territory of the receiving or the transit State and, if he is already in that territory, when he is appointed as a courier. In the latter case, the article is not clear as to the actual moment at which the courier begins to exercise his functions, which could be the moment of the appointment or the moment at which the courier actually takes custody of the bag. Clarification of this point is necessary in order to avoid possible difficulties that could arise in the interpretation of article 21.

4. With regard to the cessation of privileges and immunities, the Brazilian Government finds the article satisfactory, with the exception of the provision contained in the last sentence of paragraph 1, according to which the privileges and immunities of the diplomatic courier *ad hoc* shall cease at the moment at which the courier has delivered to the consignee the diplomatic bag in his charge. This provision should be revised in order to accord to the *ad hoc* courier, in this particular situation, the same treatment as that given to the regular courier. In other words, if the *ad hoc* courier is not a resident of the territory of the receiving State and is supposed to leave that territory after delivering the bag, his privileges and immunities should apply until the moment of his departure from the receiving State, as is the case with the regular courier.

Article 25

5. Paragraph 1 of article 25, modelled on the second part of paragraph 4 of article 35 of the 1963 Vienna Convention on Consular Relations, is also closely related to article 27, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations. Paragraph 2 of article 25, on the other hand, which is not to be found in either of those two Vienna Conventions, covers the necessity of preventive measures, on the part of the sending State, to ensure compliance with the rules of the contents of the diplomatic bag. In the view of the Brazilian Government, article 25, as a whole, should be read in conjunction with article 28 and should not expand or restrict the provisions of the Vienna Conventions concerning the rights and obligations of the sending and receiving States.

Article 28

6. In relation to article 28, dealing with the protection of the diplomatic bag, the Brazilian Government is of the view that the text of paragraphs 1 and 2 should be adopted with the inclusion of the expressions currently between brackets. In paragraph 1 the concept of the inviolability of the diplomatic bag, although not to be found in the existing conventions that refer to the matter, would be a logical extension of the inviolability of the archives, documents and official correspondence of the diplomatic mission, as reflected in article 24 and article 27, paragraph 2, of the 1961 Vienna Convention.

7. The question whether to include the provision that the bag "shall be exempt from examination directly or through electronic or other technical devices" arises in relation to the possible use of sophisticated means of examination

which may result in violation of the confidentiality of the bag. In the view of the Brazilian Government, no such examination should be permitted. Although not unaware that abuses may be committed in the utilization of the diplomatic bag, the Brazilian Government believes that the provision contained in paragraph 2 of article 28 affords sufficient protection for the security interests of the States concerned. According to that paragraph, if the authorities of a receiving (or transit) State have serious reason to believe that the diplomatic bag is being improperly used, they are entitled to request the sending State to open the bag. If that request is refused, they can require that the bag be returned to its place of origin. This system, rather than the admissibility of examination through electronic or other technical devices, would strike a reasonable balance between the security interests of the receiving State and the confidentiality interests of the sending State.

Article 31

8. Article 31, concerning the non-recognition of States or the absence of diplomatic or consular relations, is relevant particularly to the cases in which a State is a "host State", that is, a State in whose territory an international organization or conference has its seat or an office. In this case, protection under the articles should be given to the diplomatic courier or bag of a State not recognized by the host State or with which the host State has no diplomatic or consular relations. This is the sense of article 82, paragraph 1, of the 1975 Vienna Convention on the Representation of States. As currently drafted, however, article 31 is not sufficiently clear as to its scope. A more precise language would be necessary in order to clarify the sense of the article. In addition, article 31 could also be revised in order to include special missions, which may be exchanged between States that do not recognize each other or have no relations. The couriers and bags of such missions should likewise be protected under the present articles.

Article 33

9. Article 33, dealing with optional declarations, which gives the possibility to States to decide that they will not apply the articles to certain categories of diplomatic couriers and bags, would, by providing greater flexibility, assure wider acceptance of the whole draft. In the view of the Brazilian Government, however, this article compromises to a certain extent the achievement of one of the most important purposes of the articles prepared by the Commission, which is the creation of a uniform legal régime for all diplomatic couriers and bags.

Bulgaria

{Original: English}
{29 January 1988}

GENERAL COMMENTS

1. The Government of Bulgaria is pleased to note the growing role of the diplomatic courier and the diplomatic bag as a basic means of free communication between States and their missions abroad. The possibility of such free communication is one of the fundamental principles of

international law without which the normal functioning of diplomatic missions would be impossible. The elaboration of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, with a view to adopting an international legal instrument which would develop and codify the norms thereof, is of major importance for ensuring the practical implementation of this principle. In this respect, the draft articles prepared by the Commission constitute a comprehensive draft which finalizes the process of codification and progressive development of international diplomatic and consular law.

2. The draft articles on this topic prepared by the Commission constitute an independent and definite system of legal norms which regulates the legal status of the diplomatic courier and the diplomatic bag. In their entirety, they provide a uniform and harmonious régime for all couriers and official bags of States. As a whole, the draft articles synthesize, unify and harmonize the existing legal régime in this area, which is presently regulated by the four multilateral conventions adopted under the auspices of the United Nations, namely the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States, as well as by State practice in this field.

3. The draft articles not only complement the existing conventional norms of diplomatic and consular law but also further develop and specify the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier in a way which constitutes a comprehensive regulation of the régime thereof. The Government of Bulgaria is of the opinion that these draft articles are a propitious basis for the elaboration and adoption of a universal multilateral convention, which, in its capacity as *lex specialis*, would have precedence over the general conventional norms of diplomatic and consular law.

4. In spite of the Bulgarian Government's positive assessment of the proposed draft articles, which would remove many difficulties in the interpretation and implementation of their relevant provisions, it still feels it necessary to make some critical comments and observations on the draft articles and to introduce certain improvements in them.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

5. In elaborating the draft articles, the Commission has quite justifiably proceeded from the necessity to strike and ensure an acceptable balance between the interests of the receiving State and those of the sending State. This tendency can be discerned in all the draft articles. In this connection, the Government of Bulgaria views draft articles 5, 12 and 25 as a necessary and sufficient guarantee for safeguarding the interests of the receiving State and those of the transit State. Their provisions explicitly stipulate the duty of the diplomatic courier to respect the laws and regulations of the receiving State or the transit State and not to interfere in the internal affairs of those States. They also explicitly regulate the content of the diplomatic bag. These guarantees become even more concrete in view of the obligations which the sending State undertakes under article 5, paragraph 1, and article 25, paragraph 2.

Moreover, the draft articles envisage that the receiving State may take certain steps to protect its interests, namely by declaring the diplomatic courier *persona non grata* or through seeking to engage his responsibility in accordance with draft article 18, paragraph 5. As a whole, this provides and lays down a sufficient guarantee for protecting the interests of the receiving State or those of the transit State.

6. However, it would be impossible to strike an acceptable balance between the interests of the receiving State and those of the sending State if the diplomatic courier did not enjoy a sufficient degree of protection from the jurisdiction of the receiving State and if the inviolability of the diplomatic bag were not ensured in practice. The lack of such guarantees undoubtedly impairs the interests of the sending State and constitutes a serious departure from the principle of free communication between the State and its missions abroad.

Article 18

7. Draft article 18, which deals with immunity from jurisdiction, is a deviation from the full immunity of the diplomatic courier from the criminal jurisdiction of the receiving State or the transit State. This provision undoubtedly impairs the rights and interests of the sending State and fails to ensure free communication between States and their missions. The submission of the diplomatic courier to local criminal jurisdiction could cause unreasonable delays and impediments to the execution of his functions. The courier is an official representative of the sending State and performs functions which by their nature and importance are by no means inferior to those performed by the staff members of diplomatic missions, who enjoy full immunity from the criminal jurisdiction of the receiving State. The fact that the mission of the courier is a temporary one and of very brief duration only increases the necessity of clear-cut and effective guarantees which would ensure the timely performance of his functions. In this connection, article 18 should explicitly provide for full immunity of the diplomatic courier from the criminal, civil and administrative jurisdiction of the receiving State or the transit State.

Article 28

8. Equally unacceptable are the provisions of draft article 28, regulating the status of the diplomatic bag. With a view to ensuring a safe, unimpeded and timely delivery of the diplomatic bag, or, more broadly, free communication between the State and its missions abroad, the status of the diplomatic bag not accompanied by the diplomatic courier should be elaborated proceeding from the only appropriate basis, namely the principle of absolute inviolability of the diplomatic bag. This principle conforms with the norms of customary international law and State practice in this field. It also follows from the provisions of the 1961 Vienna Convention that concern the inviolability of the official correspondence and documents of the diplomatic mission (art. 24 and art. 27, para. 2). The inviolability of the diplomatic bag is explicitly set forth in article 27, paragraph 3, of the 1961 Vienna Convention. This principle is also laid down in the 1969 Convention on Special Missions and in the 1975 Vienna Convention on the Representation of States.

9. The possibility of opening the diplomatic bag, envisaged only in the 1963 Vienna Convention, is an exception which should not be translated into a general rule, since it constitutes a departure from the principle of inviolability of official documents delivered by the diplomatic courier or official bag. It is this deviation from the principle of free communication that has prevented the 1963 Vienna Convention from receiving wider acceptance. For this reason, and also taking into consideration the fact that a comprehensive approach to regulating the régime of all types of diplomatic bags has been applied in the elaboration of the draft articles adopted by the Commission on first-reading, this régime should not contain a deviation from the generally recognized principle of inviolability of the diplomatic bag. The strict implementation of this principle is the only guarantee for safe and unimpeded delivery of the bag.

10. The full inviolability of the bag implies and is designed, first of all, to ensure the full inviolability of its contents. This requires that article 28 include an explicit prohibition against the opening of the diplomatic bag, as well as its examination from a distance through electronic or other technical devices. The rapid progress in science and technology can create the potential for revealing the contents of the diplomatic bag through various technical devices, including examination from a distance. This would put States that lack advanced technology at a disadvantage. It is therefore necessary to provide for the explicit prohibition of any examination of the diplomatic bag, including examination from a distance. Equally unacceptable and unwarranted is the provision of draft article 28, paragraph 2, which allows the opening of the bag in the presence of the diplomatic courier or its return to the sending State. This possibility is envisaged only under the 1963 Vienna Convention; the other three codification conventions do not include such a provision. Bulgaria deems it advisable, therefore, to delete paragraph 2 of draft article 28.

Articles 32 and 33

11. Draft articles 32 and 33 contribute in no way to the improvement of the text. Hence, the Government of Bulgaria is of the view that the draft would lose nothing if those two articles were also deleted.

Byelorussian Soviet Socialist Republic

[Original: Russian]

[5 May 1988]

GENERAL COMMENTS

1. In the view of the Byelorussian SSR, the Commission's draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier constitute an acceptable basis for the subsequent adoption of an international legal instrument on the subject.

2. In response to previous inquiries in connection with the present topic, the Byelorussian SSR has submitted written comments and concrete proposals.¹

¹ See A/31/145 of 1 September 1976; A/33/224 of 5 September 1978; and *Yearbook . . . 1979*, vol. II (Part One), pp. 216 *et seq.*, document A/CN.4/321 and Add.1-7.

3. The practical significance of the future international legal instrument, the purpose of which is to increase the effectiveness of legal regulation of matters relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, will to a considerable extent depend on the proper confirmation and development in that instrument of rules ensuring freedom of communication by bag between a mission and a sending State. In these circumstances, it appears advisable that some of the draft articles should be clarified and expanded.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 17

Paragraph 1

4. Article 17, paragraph 1, should be amended in such a manner as to stipulate that the agents of the receiving State or of the transit State may not enter the temporary accommodation of the diplomatic courier, except with the express consent of the diplomatic courier. It must also be made clear that such consent may be assumed in case of fire or other disaster, provided that all necessary measures are taken to ensure the protection of the diplomatic bag.

Paragraph 3

5. Article 17, paragraph 3, should stipulate that, in the event of inspection or search of the temporary accommodation of the diplomatic courier, the receiving State or the transit State is obliged to guarantee to the diplomatic courier the opportunity to communicate with the mission of the sending State so that its representative can be present during such inspection or search.

Article 28

Paragraph 1

6. The draft provisions relating to protection of the diplomatic bag must be based on the existing rules governing diplomatic bags, which specifically stipulate that the bag shall not be opened or detained and shall be exempt from examination directly or through electronic or other technical devices. In other words, the principle of the inviolability of the diplomatic bag and the confidentiality of its contents must be respected. The brackets should accordingly be removed from article 28, paragraph 1.

Paragraph 2

7. Exclusion from the general legal régime for communication by bag of one type of such communication—the consular bag, as provided for in article 28, paragraph 2—appears unjustified, since it runs counter to the purpose of harmonizing existing international rules on the subject. Accordingly, paragraph 2 should be deleted from the draft.

Article 33

8. In the view of the Byelorussian SSR, draft article 33, which grants States the right to exclude certain categories of couriers and bags from the scope of the articles, is inconsistent with the purpose of establishing an agreed

uniform régime for couriers and bags of all categories and could result in major disparities in the practice of States, thus seriously complicating free communication by bag between missions and sending States. It is therefore suggested that draft article 33 be deleted.

Cameroon

[Original: French]

{14 March 1988}

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 17

1. The Government of Cameroon feels that the present wording of paragraph 3 of article 17 is ponderous and ambiguous, and it suggests that the first sentence of the paragraph should be reworded as follows:

“The temporary accommodation of the diplomatic courier shall not be subject to inspection or search, *unless there are serious grounds for believing that the possession, import or export of the articles contained therein is prohibited by the law* or controlled by the quarantine regulations of the receiving State or the transit State . . .”

Article 28

Paragraph 1

2. The Government of Cameroon agrees with the approach taken in article 28, which consists in striking a reasonable balance between, on the one hand, the interests of the sending State with regard to the confidential nature of its bags and, on the other hand, the security interests of the receiving State. It feels, however, that the inclusion in the article of the notion of “inviolability” or the phrase “and shall be exempt from examination directly or through electronic or other technical devices” would make it impossible to maintain that balance. Consequently, the said notion and phrase should not be retained in the final text.

Paragraph 2

3. Similarly, Cameroon is in favour of applying the provision set forth in paragraph 2 of article 28 to all bags, both consular and diplomatic, but considers it undesirable to extend to the State of transit the rights of the receiving State as recognized in this paragraph.

4. With regard to the bracketed words “that the bag be subjected to examination through electronic or other technical devices. If such examination does not satisfy the competent authorities of the receiving [or transit] State, they may further request”, Cameroon is of the opinion that the idea of an “option” between the various measures of control being left to the discretion of the receiving State is not clearly shown by the present wording of the passage, which could be revised to read as follows:

“2. Nevertheless, if the competent authorities of the receiving State have serious reasons to believe that the bag contains something other than the correspondence, documents or articles referred to in article 25, *they may request that the bag be subjected to examination through electronic or other technical devices or, failing that,*

that the bag be opened in their presence by an authorized representative of the sending State. If either request is refused by the authorities of the sending State, the competent authorities of the receiving State may require that the bag be returned to its place of origin.”

Canada

[Original: French]
[31 December 1987]

GENERAL COMMENTS

1. The Canadian authorities have studied the text of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Generally speaking, Canada considers that the conventions currently in force, in particular the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, are clear and adequate. The adoption of an additional instrument might give rise to confusion in the application of the existing conventions.
2. Canada has studied the draft articles relating to the diplomatic bag with three concerns in mind. In the first place, the articles should not limit the dimensions of the diplomatic bag. Secondly, the facilities available to diplomatic couriers should be adequate to enable them to monitor the loading and unloading of the diplomatic bag onto or off the aircraft or other means of transport. Thirdly, the articles should preserve the inviolability of the diplomatic bag.
3. Canada is therefore pleased that the Commission has not specified dimensions for the diplomatic bag. Furthermore, article 28, paragraph 1, reaffirms the fundamental principle of inviolability of the diplomatic bag. Canada understands the desire of the receiving or transit State to protect itself against any abuse or damage which might be caused by the transmission of material not intended exclusively for official use. At the same time, the measures taken to prevent abuse in a few cases should not affect the legitimate activities of the vast majority of States which make proper use of the diplomatic bag. Canada cannot therefore accept examination of the diplomatic bag through radiographic, electromagnetic, electronic or technical devices whose effect would be to jeopardize the confidentiality of the official correspondence. Canada cannot agree to any curtailment of the inviolability provided by the Vienna Conventions.

Chile

[Original: Spanish]
[2 May 1988]

GENERAL COMMENTS

1. The application in Chile of the relevant provisions of the 1961 Vienna Convention on Diplomatic Relations has not caused any difficulty. While it is the view of Chile that that Convention offers fairly reasonable approaches and solutions to the problems relating to the matter under consideration, it would be advantageous to formulate a treaty text containing detailed regulations, particularly in respect of article 27 of the above mentioned Convention, so as to adapt the Convention to contemporary requirements

and means of communication, thus facilitating transport, preventing loss and ensuring inviolability.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 18

2. With regard to article 18, it is the view of Chile that given the diplomatic courier's status and functions, his immunity from criminal jurisdiction should be absolute, and that, accordingly, the phrase in paragraph 2 "in respect of all acts performed in the exercise of his functions" should be deleted. Moreover, the phrase might lead to problems of interpretation as to what should be understood by such acts and whether the sending State, the receiving State or the transit State would be competent to decide the matter.

Article 21

3. With regard to article 21, it should be noted that the regular courier and the courier *ad hoc* are normally called upon to exercise the same functions, justifying the granting of their prerogatives. Chile therefore suggests eliminating the difference in their treatment by deleting the final sentence of article 21, paragraph 1, from the word "However" to the word "charge".

Article 28

Paragraph 1

4. With respect to article 28, while the obligation not to open or detain the diplomatic bag must be categorized as inviolability of the diplomatic bag, the concept of inviolability must be brought into consonance with the security interests of the receiving and transit States. Hence the inclusion of the phrase "and shall be exempt from examination directly or through electronic or other technical devices", contained within brackets in paragraph 1, would be at variance with the fair balance that should be struck between the interest of the sending State in guaranteeing the confidentiality of its bag and the security interest of the receiving and transit States.

Paragraph 2

5. Since there is no agreement on whether the exception made in paragraph 2 applies to all bags or only to the consular bag, the word "consular", contained within brackets in that paragraph should be deleted. It would be unacceptable to limit the scope of paragraph 2 to the consular bag, for apart from the fact that a balance is being sought between the principle of inviolability of the diplomatic bag and the security interests of the receiving State, one of the aims of the draft articles has been precisely to standardize legal norms relating to couriers and bags.
6. The other words contained within brackets in paragraph 2 should be retained so as to maintain an intermediate stage, which would offer the receiving State the possibility of using other means of checking the bag before requesting that it be opened and which would also extend to the transit State the rights and obligations which article 28 establishes in respect of the receiving State.

Article 32

7. In article 32, the term "regional" should be replaced by some other term that would better reflect the Commission's intent.

Czechoslovakia

[Original: English]

[19 April 1988]

GENERAL COMMENTS

1. The overall position of Czechoslovakia on the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier as provisionally adopted by the Commission at its thirty-eighth session is, in principle, positive. The draft as it now stands constitutes a good starting-point for confirmation and further development of the rules of diplomatic and consular law. Czechoslovakia submits the following comments and suggestions for the second reading of the draft articles by the Commission.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 18

2. Czechoslovakia advocates the establishment of full immunity of the diplomatic courier from the criminal jurisdiction of the receiving State or transit State as opposed to the functional immunity suggested in article 18, paragraph 1. Full immunity would be more appropriate to the functions exercised by the courier. Czechoslovakia is of the opinion that the status of the diplomatic courier is comparable rather to the status of the administrative and technical staff than to the status of the service staff of the diplomatic mission. Accordingly, couriers, too, should be guaranteed full immunity from criminal jurisdiction, as is granted to the administrative and technical staff on the basis of article 37 of the 1961 Vienna Convention on Diplomatic Relations.

*Article 28**Paragraph 1*

3. As far as the question of the inviolability of the diplomatic bag is concerned, Czechoslovakia is of the opinion that freedom of communication together with strict respect for the confidential nature of the diplomatic bag are indispensable prerequisites for proper implementation of the functions of diplomatic and consular missions as well as permanent missions of States to international organizations, which has been confirmed by many years of experience in international practice. It would be an inexcusable mistake to take a step backwards in this field and to give way to such practice as might cast doubt on the confidential nature of diplomatic correspondence. That is why Czechoslovakia considers it of crucial importance that article 28 should contain the explicit statement that the diplomatic bag shall be inviolable wherever it may be as well as the statement that it shall be exempt, on principle, from any examination, either directly or through electronic or other technical devices. The square brackets in the text of article 28, paragraph 1, should therefore be eliminated.

Paragraph 2

4. As far as the text of paragraph 2 of article 28 is concerned, Czechoslovakia understands the efforts of the Commission to be aimed at introducing a balance between the interests of the sending State and those of the receiving State in cases of reasonable suspicion that a diplomatic bag contains something other than the objects referred to in article 25. Security reasons could justify extension of the application of the régime set forth in the 1963 Vienna Convention on Consular Relations to all types of diplomatic bag. Czechoslovakia believes that awareness of possible measures of reciprocity will be a sufficient safeguard against abuse of the possibilities foreseen in article 28, paragraph 2. However, the above-mentioned possibilities should not be granted—at least not to such an extent—to the transit State.

Article 30

5. Czechoslovakia suggests modifying paragraph 2 of article 30 so as to anticipate in it, besides *force majeure*, also other circumstances as a result of which a diplomatic courier may be present in the territory of a State which was not initially foreseen as a transit State. Thus, the above-mentioned provision would correspond with the provision of article 30, paragraph 1, which foresees both *force majeure* and other circumstances.

Article 33

6. Article 33 could lead to actual atomization of the legal régime relating to the status of diplomatic couriers and bags, which is at variance with the objective originally pursued through the elaboration of the draft articles. This situation could result in a total lack of order in international practice and in the establishment of a practical standard that would devalue not only the present but also previous achievements in codification. That is why the Commission should once again give careful consideration to whether the possibility of optional declarations could not be limited or even excluded altogether.

Denmark

[See *Nordic countries*]

Finland

[See *Nordic countries*]

France

[Original: French]

[1 March 1988]

The French Government has studied with attention and interest the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, which the Commission adopted on first reading. It has the following observations to make concerning them.

GENERAL COMMENTS

1. The French Government has serious doubts about the feasibility and advisability of establishing, as the Commission's draft articles do in principle, a coherent and uniform régime governing the status of the courier and the bag, regardless of whether it is a question of the diplomatic bag, governed by the 1961 Vienna Convention on Diplomatic Relations; the consular bag, governed by the 1963 Vienna Convention on Consular Relations; or bags which may be used by special missions or delegations of States to international organizations.

2. The Commission, aware of the difficult nature of its undertaking, has provided, in draft article 33, for a system of optional declarations which would allow States to specify categories of bags to which they would not apply the provisions set forth. Although this article lends a useful flexibility to the system, the French Government does not believe that it constitutes a satisfactory solution, because it may introduce a great deal of confusion into the applicable law. In such a system, the status of each bag would depend, from one instance to the next, on the position adopted by the sending State, the transit State and the receiving State. Its status could vary during the same journey. Such a situation would not constitute progress in the field of law and might create serious complications for diplomatic communications. It would therefore be very useful if the Commission, during its second reading of the draft articles, confined itself to considering, *stricto sensu*, the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

3. In so doing, the Commission should take care not to impair the rules established by the 1961 Vienna Convention. In the view of the French Government, without interfering with the basic rules that are already applicable, the Commission should adopt a pragmatic approach to the problem and, with a view to laying down additional rules, identify any shortcomings which have emerged in practice.

4. The French Government also feels that the Commission should not lose sight of the fact that, as was stressed by some of its members during the elaboration of the draft articles, the protection provided to the diplomatic courier is designed to facilitate free communication on the part of diplomatic missions. The criterion to be taken into consideration is, in this respect, a functional one, particularly in view of the temporary nature of the courier's mission.

5. The French Government makes the following comments on some of the draft articles and reserves the right to submit more comprehensive and detailed observations when the Commission embarks on its second reading of the draft.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Articles 1 and 3

6. The French Government's point of view with regard to articles 1 and 3 is based on the general position put forward in paragraphs 1 and 2 above. It is to be hoped that these provisions will not contain any reference, direct or indirect, to the consular bag or the bags of special missions and delegations to international organizations.

7. The specific points made in these observations on the various provisions of the draft where the general term "diplomatic bag" is used are therefore based on the principle that these provisions are meant to apply only to the diplomatic bag *stricto sensu*.

*Article 3**Paragraph 1*

8. The French Government notes that under article 3, paragraph 1 (2), the term "diplomatic bag" means the packages containing official correspondence, and documents or articles intended exclusively for official use. This provision thus transforms the obligations arising out of article 27, paragraph 4, of the 1961 Vienna Convention into elements for the definition of the bag. There is no guarantee that such a transformation will not cause problems. In any case, the wording of article 27, paragraph 4, should be respected.

Article 6

9. The French Government notes that article 6, which is justified in principle only if another convention is elaborated, appears to prejudge the ultimate fate of the draft articles, which seems premature.

Article 9

10. Article 9, which is based on article 8 of the 1961 Vienna Convention, contains in paragraph 3 additional conditions which are not laid down in article 8 of that Convention. The French Government therefore finds it necessary to reserve its position on article 9 as a whole.

Article 10

11. Article 10 seems satisfactory to the French Government.

Article 11

12. The French Government is not convinced of the need for article 11, concerning the end of the functions of the diplomatic courier upon notification. Such notification, which is provided for under article 43 of the 1961 Vienna Convention in respect of diplomatic agents, is necessary in their case because of the permanent nature of their functions. This, however, does not hold true for couriers, whose functions are essentially temporary. What is important here is a clear definition of the duration of the privileges and immunities of those concerned, a question which was resolved by article 27, paragraphs 5 and 6, of the 1961 Vienna Convention and referred to again in article 21 of the Commission's draft.

Article 12

13. Article 12, concerning the diplomatic courier declared *persona non grata* or not acceptable, should be read in conjunction with article 21, paragraph 2, concerning the duration of privileges and immunities.

14. The French Government is inclined to think that, prior to the start of a mission, the problem posed by a courier who might be personally undesirable would be solved in most cases by the denial of a visa. With regard to any decisions taken during a mission, it would seem necessary to indicate clearly that a diplomatic courier found unacceptable under article 12 must be able to carry out his task, that is, deliver the bag in his custody to its destination. The combination of article 12, paragraph 1, and article 21, paragraph 2, as noted by the Commission in the commentary,¹ could create the impression that since the functions—if not the privileges and immunities—might cease before departure from the territory, the courier could thereby be prevented from carrying out his mission.

Article 16

15. Article 16 repeats the corresponding provisions of the 1961 Vienna Convention (art. 27, para. 5, and art. 40, para. 3). This does not give rise to any objection on the part of the French Government. It notes, however, that article 40, paragraph 3, of the 1961 Vienna Convention, which defines the obligations of the transit State in this field, specifies that, as a general rule, these obligations are applicable only if a transit visa has been granted and if such a visa was necessary (the case of *force majeure*, which is the subject of art. 30 of the Commission's draft, having been dealt with in art. 40, para. 4, of the 1961 Vienna Convention).

Article 17

16. The French Government does not consider it necessary to establish, as article 17 does, inviolability of the temporary accommodation of the diplomatic courier. Furthermore, as the French delegation stressed during the discussion on the Convention on Special Missions, such a provision is difficult to apply, particularly in States where any individual, even an alien, can choose the hotel in which he will stay. Article 17 should therefore be deleted.

Article 18

17. Inviolability and immunity from arrest or detention, provided for under article 27 of the 1961 Vienna Convention and under article 16 of the Commission's draft, appear to offer adequate protection to the diplomatic courier. Accordingly, the French Government cannot support draft article 18 or, consequently, article 21, paragraph 3 (retention, following the cessation of functions, of immunity with respect to acts performed in the exercise of the said functions) or article 22, paragraphs 3, 4 and 5 (waiver of immunity from jurisdiction).

Article 19

18. Article 19 raises two kinds of problems: that of the personal examination of the diplomatic agent and that of the possible extension to the agent of customs immunity.

With regard to personal examination, the problem is not expressly referred to in the 1961 Vienna Convention. It is common knowledge that this problem arises essentially at airports. It is the view of the French Government that personal inviolability means that the beneficiaries of such inviolability should not be constrained to undergo such an examination. On the other hand, the Government holds the view that examination of the diplomatic courier (but not of the accompanied bag) by electronic means is acceptable.

19. With regard to the customs exemption and the exemption from inspection of personal baggage provided for under paragraphs 2 and 3 of article 19, these provisions go beyond the 1961 Vienna Convention and do not have the support of the French Government. For that reason, the Government considers it necessary to repeat in this article the wording of article 27, paragraph 5, of that Convention.

Article 20

20. The French Government is also opposed to article 20, relating to exemption from dues and taxes, which seeks to institute privileges and immunities not provided for under the 1961 Vienna Convention. Further, the article seems to be superfluous, in that the brevity of the courier's presence in the receiving or transit State appears to make it improbable that the courier would engage in activities subject to taxation in those States.

Article 21

21. The French Government has no objection to article 21, paragraph 1. With regard to paragraph 2, reference should be made to the comments on article 12 (see paras. 13-14 above). Finally, the French Government does not support the retention of paragraph 3 (see para. 17 above).

Article 22

22. The French Government does not object to paragraphs 1 and 2. With regard to paragraphs 3, 4 and 5, reference should be made to the comments on article 18 (see para. 17 above).

Article 23

23. The French Government has some doubt as to the usefulness of article 23, since the question was essentially settled by article 27, paragraph 7, of the 1961 Vienna Convention. Nevertheless, the French Government would not oppose retention of the article, if such was the general desire. If that is the case, the text retained should not be more restrictive than the 1961 Vienna Convention. The French Government would thus oppose the restriction introduced into the French text of paragraph 1 of the Commission's draft by the words *d'une ligne régulière*.

24. On the other hand, unimpeded access to the ship or aircraft in order to take possession of the bag seems essential, and the clarification of this point in paragraph 3 is welcome.

¹ *Yearbook* . . . 1985, vol. II (Part Two), p. 43, para. (4) of the commentary to article 21.

Article 24

25. The French Government has no objection to article 24, paragraph 1, since it reproduces the formulation employed in article 27, paragraph 4, of the 1961 Vienna Convention. The wording of paragraph 2 should be revised by substituting the term "moreover" for "also".

Article 25

26. The French Government considers it essential to reproduce in paragraph 1 of article 25 the exact wording of article 27, paragraph 4, of the 1961 Vienna Convention ("diplomatic documents or articles intended for official use"), if only to avoid uncertainty as to the scope of the latter provision. Paragraph 2 of the article could, it seems, be safely deleted. Nevertheless, the French Government would not object to its retention, if such was the general sentiment.

Article 28

27. The French Government considers that the rules formulated on the protection of the diplomatic bag by the 1961 Vienna Convention are clear. Article 27, paragraph 2, of the Convention states: "The official correspondence of the mission shall be inviolable". Moreover, the diplomatic bag shall not, in the terms of paragraph 3 of the same article, "be opened or detained". Accordingly, the French Government shares the view of several members of the Commission that the bag is "inviolable wherever it may be". The Government notes, however, that this formulation is not used in the 1961 Vienna Convention; it therefore considers that, in the circumstances, it would be unwise to include it in a new text that might not be so universally accepted, since it might raise doubts as to the scope of existing law.

28. It remains to be determined whether the draft articles should deal with the electromagnetic inspection of bags, as various members of the Commission would like. As matters stand, it is the view of the French Government that such inspection of the diplomatic bag is excluded under the 1961 Vienna Convention, since the outcome could only be the opening or return of the bag, measures which would seem to contravene article 27. Furthermore, account must be taken of the implications of such inspection, sooner or later, for the confidentiality of the content of the bag.

29. Here too, the French Government is in agreement with the substance of the words contained between the second set of brackets in article 28, paragraph 1, which simply spell out the current state of international law. It remains to be determined whether some further development of the law would be appropriate. The guarantees accorded diplomatic communications under article 27 of the 1961 Vienna Convention must be reconciled with the right of the receiving State to guard against possible abuse. Any development of the law in this area must, as stated at the forty-second session of the General Assembly, guard against the abuses of the few, while not impeding the legitimate activities of the great majority. This is the proper context for consideration of the proposals to extend to the diplomatic bag the treaty rule in effect for the consular

bag. The French Government must make it clear that, as it now sees it, the possibility of opening the bag must be excluded.

Article 29

30. The wording of article 29 should be revised so as to make it perfectly clear that its provisions will not result in any impediment to the free movement of the bag.

Article 30

31. The French Government notes that the wording of paragraph 2 of article 30 is not explicit enough, when compared with article 40, paragraph 4, of the 1961 Vienna Convention.

Article 31

32. The French Government has noted that, according to the Commission's commentary, this provision should be applied in case of non-recognition or absence of diplomatic relations between a sending State and a host State of a conference or an international organization, or where a special mission is sent to establish diplomatic relations, or in the case of a transit State which does not recognize a sending State.² These clarifications are not given in the text of the article. In any event, the French Government, in view of its general position on the scope of the draft, considers that there is no place in the draft for this article, if its aim relates to the first two cases mentioned above.

33. With regard to a transit State that does not recognize a sending State, the French Government's view is that, pending further consideration of the matter, no obligations should be imposed on such a State. It therefore suggests the deletion of article 31.

² *Yearbook . . . 1986*, vol. II (Part Two), p. 32, para. (4) of the commentary to article 31.

German Democratic Republic

[Original: English]

[27 January 1988]

GENERAL COMMENTS

1. The German Democratic Republic has carefully noted the draft legal instrument prepared by the Commission with regard to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

2. In the course of the deliberations on the topic, the German Democratic Republic has repeatedly explained its position, both orally in the Sixth Committee of the General Assembly and in written comments. The German Democratic Republic attaches great significance to this project and its earliest possible conclusion in the form of an internationally binding document.

3. The German Democratic Republic continues to proceed from the premise that strict and unconditional observance of the existing instruments of international diplomatic and consular law, notably the 1961 Vienna Convention on Diplomatic Relations, which is particularly im-

portant because of its comprehensive and balanced character, constitutes a major prerequisite for the further codification of the status of the topic under consideration.

4. The international practice of States has confirmed the need for the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier to be codified in a more comprehensive manner through internationally binding regulations in accordance with present-day requirements. Such regulations, however, should not be confined to the diplomatic courier and the diplomatic bag. Rather, a future codification instrument on this subject should be applicable to all official couriers and all official bags employed for the official communications between States. The German Democratic Republic believes that unrestricted exercise of the right of free communication between States and their missions abroad, based on the generally recognized fundamental principles of international law and the principle of reciprocity, is an indispensable condition for the unimpeded performance of the functions of these official missions and their members. Therefore, the official courier as a person duly authorized by the sending States should be comprehensively protected by international law so as to safeguard independent and non-discriminatory communications between the respective State and its missions abroad. The same should apply to the bag, whether it is accompanied by courier or not.

5. The present draft elaborated by the Commission provides a solid basis for the preparation of an international instrument on the subject-matter. However, some provisions of the draft appear to require further consideration. At this stage, the German Democratic Republic would therefore like to make some specific remarks, while reserving for itself the right to state its position more fully in due course.

6. To codify the status of the courier, providing the required facilities, immunities and privileges, is what the German Democratic Republic regards as having key importance for the future agreement. Due to the significance of these prerogatives, it is deemed necessary to put them in as detailed language as possible so as to obtain unambiguous formulations.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Articles 6 and 33

7. The provisions of the 1961 Vienna Convention constitute the minimum standard that should be strictly maintained. As regards the possibility envisaged in article 6, paragraph 2 (b), and in article 33, i.e. of making declarations concerning the applicability of provisions of the future legal instrument and of modifying any of its provisions by custom or agreement, the German Democratic Republic takes a negative position. Such an approach would not guarantee a uniform application of the instrument's provisions and thus fails to meet the purpose of codification.

Article 12

8. As regards article 12, which provides for the possibility of declaring a courier *persona non grata*, the term "within a reasonable period" in paragraph 2 should be concretized so that the courier in question can perform his functions, i.e. is in any case given an opportunity to deliver at its destination the bag entrusted to him and/or transmit the information carried by him to the recipient.

9. Moreover, article 12 should include clear language to the effect that any decision to declare a courier *persona non grata* must have no influence whatsoever on the status of the bag concerned. A formulation to this effect could be added to this article as paragraph 3.

Article 18

10. As regards article 18, paragraph 2, according to which the diplomatic courier's immunity from civil and administrative jurisdiction shall not extend to damages arising from a vehicle accident where those damages are not recoverable from insurance, this provision is in principle acceptable.

11. In the interest of protecting the courier's inviolability, article 18 should, however, include a provision calling at least for observance of all the obligations under the laws and regulations of the receiving or transit State with regard to the conclusion of third-party liability insurance for motor vehicles used by the courier. Following the line of article 78 of the 1975 Vienna Convention on the Representation of States, consideration could be given to amending article 18 by adding the following sentence to paragraph 2:

"Pursuant to the laws and other legal regulations of the receiving or transit State, the courier when driving a motor vehicle shall be required to have insurance coverage against third-party risks."

Article 28

12. Article 28 involves problems of a fundamental nature. The German Democratic Republic is opposed to any regulation contradictory to article 27 of the 1961 Vienna Convention. Article 28 should contain an unambiguous formulation regarding the inviolability of the bag to the effect that the bag shall not be examined through any means or detained.

Article 33

13. The debate hitherto held on the form and legal effect of the future legislative instrument has shown that the assurance of universal legal security is of decisive importance. The German Democratic Republic holds that a document which would enable States to apply provisions at variance with what is set therein as the minimum standard, or which would only be of a recommendatory nature, will not be responsive to international requirements in a matter as sensitive as free communication between States and their missions abroad.

Germany, Federal Republic of

[Original: English]

[22 December 1987]

GENERAL COMMENTS

1. The Federal Republic of Germany welcomes the conclusion of the Commission's intensive efforts to establish a set of rules governing the diplomatic courier and bag. It feels, however, that the draft articles are still in need of improvement and supplementation.
2. Most countries convey the major part of their diplomatic and consular items by air or sea as unaccompanied bag. Any new arrangement should therefore take special account of the modern method of conveying diplomatic and consular items. Therefore, the Federal Republic of Germany considers better protection of the unaccompanied bag under international law to be particularly important.
3. At an early stage, the Federal Republic of Germany had raised in the Sixth Committee of the General Assembly the question whether such extensive codification of other subject-matters as was contained in the draft articles was necessary and expedient. Numerous provisions merely reiterate principles already enshrined in the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, e.g. the inviolability of the courier (art. 16). Other provisions contain arrangements for which there is no obvious genuine need or which do not appear practicable. It is questionable whether there is a concrete need for articles 20 and 29. Since the courier normally stays only briefly in the receiving or transit State, virtually no tax liability arises in connection with the performance of his functions (art. 20). Under article 36, paragraph 1 (a), of the 1961 Vienna Convention and article 50, paragraph 1 (a), of the 1963 Vienna Convention the bag is already exempt from customs duties, taxes and other charges (art. 29). The inviolability of (hotel) accommodation temporarily occupied by the courier does not appear necessary or practicable (art. 17).

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 18

4. As regards article 18, the Federal Republic of Germany considers problematic the question of determining the degree of immunity of the courier from the jurisdiction of the receiving or transit State. Reservations exist about the provisions of paragraphs 2, 3 and 4 of this article.
5. In the case of the second sentence of paragraph 2, it does not appear practicable to subject the courier to national jurisdiction only when it becomes clear that damages are not recoverable from insurance. If the provision is to have a different meaning, this should be expressed more clearly.
6. Pursuant to paragraph 3, measures of execution may be taken in respect of the courier only in those extremely rare cases where he owns land or attachable claims or rights in the receiving or transit State. In the final analysis, this arrangement is tantamount to the preclusion of execution on account of pecuniary claims.
7. Paragraph 4 exempts the courier from the duty to give evidence as a witness in all cases "involving the

exercise of his functions". This may preclude the courier's being heard as a witness on chance perceptions which are superficially, but not substantively, connected with the exercise of his functions (e.g. as an eyewitness to an accident that the courier may have observed during his trip). The courier's immunity would thus go beyond the exemption of the staff of foreign consular missions from the duty to give evidence as a witness, which is confined to so-called immunity in office under article 44 of the 1963 Vienna Convention. Such a degree of immunity of the courier, for which there is no substantive need, runs counter to the interest in making the greatest possible use of available evidence for the sake of the effective administration of justice.

8. The Federal Republic of Germany has repeatedly pointed out that it would appear advisable not to widen the range of privileges and immunities existing under the 1961 and 1963 Vienna Conventions but to focus in the draft articles on eliminating the lacunae of practical relevance.

PART III

9. As regards the articles in part III, relating to the status of the diplomatic bag, while they define some existing norms more precisely, as is indeed necessary and desirable, they contain only a few specific provisions on the unaccompanied bag, which is a subject primarily requiring more detailed arrangements. Draft articles 24 to 29 are partly identical with provisions of the 1961 Vienna Convention and of the 1963 Vienna Convention. On the other hand, there remain lacunae which should be the particular focus of further discussion of the draft articles. The wording of articles 26 and 27 is too general to prevent the practice, unfortunately encountered fairly often, of citing scarcely convincing technical reasons as a pretext for lengthy delays. In particular, article 27 ought to express even more clearly that excessive formalities are inadmissible. This applies particularly to formalities which hamper the immediate delivery of the bag or greatly delay its transmission.

Article 28

10. The attempt undertaken in draft article 28 to prevent abuse of courier privileges by creating means of inspection would still appear to be problematic. The proposed wording discussed by the Commission does not yet do justice to the problem involved. Any normative inspection proviso can itself be unduly resorted to or even abused. At the minimum, there is the danger of an escalation of reciprocal actions which may cause permanent disruption of international courier traffic.

11. While article 28 envisages a differentiated procedure, in the final analysis this amounts to the diplomatic bag being treated in the same way as the consular bag, which enjoys less protection. Unless paragraph 2 of article 28 is dispensed with completely, the wording of this paragraph would have to define much more precisely the exceptional situations justifying inspection of the bag and the scope of such inspection. In particular, it would appear necessary to make it clear that an inspection may in no circumstances jeopardize the confidentiality of the legitimate contents of

the bag and may take place only with the express knowledge and consent of the sending State. The Federal Republic of Germany considers such an express provision to be the indispensable prerequisite for limiting the absolute protection of the bag as envisaged in paragraph 2 of article 28.

12. The indispensable elements could be incorporated in the present text of article 28 as follows:

“Article 28. Protection of the diplomatic bag

“1. [Text unchanged, without brackets.]

“2. If the competent authorities of the receiving or the transit State have serious reasons to believe that the diplomatic bag contains *any articles which are not intended for official use only and which heavily endanger either the public security of the receiving or transit State or the safety of individuals*, they may, *after giving the sending State sufficient opportunity to dissipate suspicion*, request that the bag be subjected to examination through electronic or other technical devices.

“Examination may only take place if the sending State consents and a representative of the sending State is invited to be present. The examination may in no circumstances jeopardize the confidentiality of the documents and other legitimate articles in the bag.

“If such examination does not satisfy the competent authorities of the receiving or transit State, they may further request that the bag be opened in their presence by an authorized representative of the sending State.

“If either request is refused by the authorities of the sending State, the competent authorities of the receiving or transit State may require that the bag be returned to its place of origin.”

Article 33

13. Draft article 33, which permits acceding States to confine the new courier law by an optional declaration to the traditional categories of law governing diplomatic and consular couriers and bags, affords a certain degree of flexibility and is likely to make it easier for numerous countries to accept the new arrangements. Yet one must bear in mind that such an option may divide the existing system of law and cause fragmentation of binding international rules.

Greece

[Original: French]
[6 February 1988]

GENERAL COMMENTS

1. Although it commends the quality of the work which the Commission has performed on the basis of the well-documented reports of the Special Rapporteur, Mr. A. Yankov, Greece has some doubts as to the real value of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

2. Greece has always been in favour of regulating the status of the unaccompanied diplomatic bag. It remains

sceptical, however, about the usefulness of dealing with the status of the diplomatic courier, since it considers that the conventions governing this matter are satisfactory. It fears, moreover, that the adoption of a new status for the diplomatic courier might, by establishing a plurality of régimes, lead to confusion and, in some cases, to the undermining of the well-established rules applicable to the matter.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 1

3. The final words of article 1, namely “or with each other”, should be deleted. Although consistent with the existing texts, this phrase goes far beyond the functional needs and may give rise to abuse. Moreover, judging by Greek practice, it serves no useful purpose.

Article 5

4. The last sentence of article 5, paragraph 2, beginning with the words “He also has the duty . . .” seems superfluous and excessive: Greece therefore believes that it should be deleted.

Article 6

5. In particular because of its restrictive character, which limits for no valid reason the contractual freedom of States, Greece would like the last part of article 6, paragraph 2 (b), reading “provided that . . . of third States”, to be deleted.

Article 9

6. In article 9, paragraph 2, the following sentence should be added: “However, if the withdrawal of consent occurs during the journey, it shall not take effect until the mission of the diplomatic courier has been completed.”

Article 17

7. The provisions of article 17 seem excessive and superfluous. Paragraph 3, in particular, is extremely complex and conflicts with paragraph 1. Greece is therefore in favour of deleting the entire article.

Article 18

8. In article 18, paragraph 1, the word “all” should be deleted, and the terminology of the codification conventions should be used, namely “official acts performed in the exercise of his functions”.

Article 20

9. Article 20 seems to be superfluous because of the temporary nature of the functions of the diplomatic courier.

Article 28

10. As regards article 28, Greece considers that the régime relative to the protection of the diplomatic bag and the consular bag established by the 1961 and 1963 Vienna Conventions should continue to be applied unchanged.

Iceland

[See *Nordic countries*]

Italy

[Original: English]
[28 January 1988]

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

1. It would seem necessary to include in the text—preferably between articles 1 and 2—a safeguard clause which would indicate that the new instrument is without prejudice to existing international law, in particular, to the 1961 and 1963 Vienna Conventions. This would eliminate any possible doubt that the text might modify or abrogate existing rules.

Article 21

2. In article 21, paragraph 1, it seems necessary to delete the adverb “normally” in the second sentence. According to the Italian Government, there is no doubt that, apart from the case envisaged in paragraph 2 of the same article, there are no further exceptions to the rule according to which the privileges and immunities of the diplomatic courier cease to exist at the moment at which the courier leaves the territory of the country of reception or transit.

Article 28

3. As regards article 28, the Italian Government is of the opinion that it should be formulated adopting, among the various alternatives, one of those that make it lawful to submit the diplomatic bag to examination by electronic means. These means must, however, be such as to guarantee that it is impossible to read the diplomatic correspondence contained in the bag. The position of the Italian Government is based on the conviction, which was communicated, *inter alia*, to all diplomatic missions accredited in Rome, that the correct interpretation of the rules of international law now in force permits a State to resort to inspection of the bag by electronic means (for instance, the so-called scanning method).

4. It is the opinion of the Italian Government that, as far as the opening of the bag with the appropriate safeguards is concerned, the distinction between diplomatic and consular bags has become obsolete in international practice.

Netherlands

[Original: English]
[1 February 1988]

GENERAL COMMENTS

1. In practice, the Netherlands experiences virtually no problems with its courier communications. Occasional difficulties reported by other States generally involve in-

stances where existing rules of international law concerning courier communications have not been respected. The Netherlands Government is of the opinion that occasional non-compliance with rules of law cannot be prevented by repeating those rules in a new treaty or by adding further rules. It therefore sees no need for the draft articles.

2. On the contrary, if courier communications were governed by an additional treaty, which inevitably would not be ratified by all the same States as are party to the codification conventions, there would be a risk of the prevailing law becoming fragmented, and this would undermine clarity.

3. The optional declaration provided for in draft article 33 might further contribute to this fragmentation. In that situation, the courier and the diplomatic bag might well be subjected to different provisions when crossing borders during one and the same trip.

4. If the draft articles are none the less incorporated in a treaty, it is particularly desirable that the treaty contain binding regulations concerning the settlement of disputes on its interpretation or application. In the opinion of the Government of the Netherlands, it should also be possible for the parties to this treaty to invoke these regulations to settle disputes relating partly to the provisions concerning courier communications of the four codification conventions.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 17

5. The courier is nothing more, and nothing less, than one who accompanies a diplomatic bag (cf. art. 10). His privileges and immunities emanate from the need to allow him to perform his function without hindrance. They should therefore be strictly related to this function. Looked at in this light, inviolability of the hotel room, station waiting-room or other temporary or non-temporary accommodation of the courier would appear quite unnecessary. The article should therefore be deleted in its entirety.

6. The Government of the Netherlands would also like to point out that the attribution of unnecessary privileges and immunities can encourage abuse.

Article 19

7. The scope of paragraph 1 of article 19 is unclear. In so far as exemption from personal examination can be considered to be included under personal inviolability within the meaning of article 16, it does not need to be repeated here.

8. On the other hand, if the intention is to exempt the courier from the personal examination to which all travellers, including diplomats, are nowadays subjected at most airports, paragraph 1 of article 19 is undesirable.

9. Concerning paragraph 3, a courier requires no exemption from baggage inspection for the proper discharge of his functions.

Article 21

10. As regards paragraph 1 of article 21, the privileged status of the courier can, and therefore should, come to an

end as soon as he has finished carrying out his function as described in article 10. Furthermore, there is no good reason in this regard to make a distinction between couriers and couriers *ad hoc* (see para. 12 below).

11. For both the courier and the courier *ad hoc*, the privileged status attached to their function as a courier should come to an end either when the person concerned has delivered the diplomatic bag in his charge at the place of destination in the receiving State and a reasonable period (cf. art. 21, para. 2) has elapsed for him to leave that State or the transit State, or when the person concerned has left the territory of the said States with the bag in his charge.

Article 23

12. Proceeding from the view that the privileges and immunities of the courier should be related to his function (see para. 5 above), it is inexplicable why couriers *ad hoc*, such as the captain of a ship or aircraft, do not enjoy the same legal position as the ordinary courier. The Government of the Netherlands also wishes to point out that in practice the function of courier *ad hoc* is also entrusted to crew members other than the captain.

Article 28

13. The Government of the Netherlands cannot accept that the diplomatic bag should enjoy an inviolability which goes beyond the prohibition of opening or detaining the bag. It is sufficient that the official correspondence is inviolable. Checks to establish the presence of illegal articles in the bag, e.g. by using X-ray equipment or sniffer dogs, are permissible as long as the bag is not opened or detained and the inviolability of the correspondence is not jeopardized.

14. If the bag is accompanied by a courier, the latter should, at most, be able to withhold his consent to the examination, with the possible result that the courier and his bag will not be able to continue their journey via that route.

15. With regard to the words "or transit" between square brackets in paragraph 2 of article 28, the Government of the Netherlands wishes to point out that in its opinion the authorities of the transit State are equally entitled to the right referred to therein. This is the case, for instance, if the transit State has undertaken under international law to carry out border controls for the receiving State.

16. With regard to the word "consular" between square brackets in paragraph 2, it should be pointed out that it would not seem practicable to make a distinction between the provisions for consular bags and those for other diplomatic bags.

Article 31

17. In the opinion of the Government of the Netherlands, the proposed wording of article 31 gives it too broad a scope. On the one hand, its application seems acceptable in the relations between the sending State and the receiving State. (The term "host State", employed in paragraph

(3) of the commentary to this article,¹ does not occur in article 3 of the draft articles.) On the other hand, a transit State should retain the right not to admit couriers and diplomatic bags from a sending State which it has not recognized as a State or whose current rulers it has not recognized as the lawful government, or with whom it maintains no diplomatic relations, e.g. because a state of war exists between the two States. It is not sufficient to refer to the restrictions of scope advocated in the commentary; the restrictions should be contained in the text of the article itself.

¹ *Yearbook* . . . 1986, vol. II (Part Two), p. 31.

New Zealand

{Original: English}

[22 January 1988]

COMMENTS ON ARTICLE 28

1. The New Zealand Government wishes to focus its comments with regard to the draft articles on the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier on article 28 (Protection of the diplomatic bag), since this provision is, in its view, the most important.

2. Paragraph 1 of article 28 retains much of its language in square brackets. Some of this bracketed language would make it clear that diplomatic bags may not be examined by electronic devices. It is the New Zealand Government's view that this statement accords with the present position of international law whereby Governments are not permitted to screen diplomatic bags by electronic means. This is consistent with the practice followed by New Zealand and with its refusal to permit foreign Governments to screen its diplomatic bags. This position of the New Zealand Government is based on its acknowledgement of the fact that electronic screening could, in certain circumstances, result in a violation of the confidentiality of the documents contained in a diplomatic bag.

3. The functional basis for the immunities accorded to the diplomatic bag and courier has always rested on the need to guarantee the confidentiality of diplomatic communications. In order to ensure that there can be no violation of this confidentiality, New Zealand would wish article 28, paragraph 1, to make it clear that the use of electronic screening devices is impermissible. In all other respects with regard to article 28, paragraph 1, the New Zealand Government would prefer to see the retention of the language of article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations.

4. Paragraph 2 of article 28 contains a useful means of balancing the competing interests, on the one hand, of sending States as regards the security of their communications and, on the other, of receiving States in restraining possible abuses of the diplomatic bag. The New Zealand Government supports the retention of language in article 28, paragraph 2, which would make it clear that the right to request the return of a bag to its place of origin should relate both to diplomatic as well as to consular bags. It should be made clear in this provision, however, that the right to challenge a diplomatic bag can exist only "in exceptional circumstances" and when there are "serious reasons" to believe that a particular bag contains

something other than official correspondence, documents or articles intended for official use. The right to challenge should extend to both sending and receiving States.

Nordic countries

(Denmark, Finland, Iceland, Norway and Sweden)*

[Original: English]
[21 December 1987]

GENERAL COMMENTS

1. It could be argued that the subject of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier is not adequately covered by existing international conventions. The diplomatic courier is an important link in diplomatic relations. The Governments of the Nordic countries, however, are inclined to express the view that the privileges and immunities of the courier embodied in the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations are well balanced. The specific provisions of these two conventions relating to couriers and their bags are supplemented by a body of non-codified rules which reflects customary international usage. In their opinion, the draft articles concerning the status of the diplomatic courier should not go far beyond the protection already provided for.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

2. In the light of the wide acceptance of the 1961 and 1963 Vienna Conventions, caution should be exercised in dealing with matters that touch them, especially when making new provisions exceeding the limits of the existing rules. In this connection, reference is made to draft articles 17 to 20 and 28 dealing with the privileges and immunities to be granted to the courier and the protection to be accorded to the bag, on which the following comments are concentrated.

Article 1

3. However, before commenting on those draft articles, the Governments of the Nordic countries would like to make a brief comment on draft article 1. They are of the opinion that the last words of the article, "or with each other", ought to be deleted. To retain the words, i.e. to accept the *inter se* character of the communications between missions, consular posts or delegations, would be to go beyond the traditionally accepted two-way communications between the sending State and its missions, consular posts or delegations.

Article 16

4. As regards the question of immunities for diplomatic couriers, the Governments of the Nordic countries are of the view that these should be granted on the basis of

functional criteria. The purpose of the draft articles should not be to give a diplomatic courier the same legal status as a permanently accredited diplomat. The draft articles should provide for the immunity and inviolability necessary to ensure smooth functioning of diplomatic communications but, on the other hand, should not exceed what is actually necessary for the functions of the diplomatic courier with regard to the custody, transportation and delivery of the diplomatic bag. This point of view is reflected in draft article 16, according to which the courier shall not be liable to arrest or detention or, according to paragraph (3) of the commentary to this article,¹ any other form of restriction on his person, and is exempted from measures that would amount to direct coercion.

5. On the basis of its wording and of an interpretation founded *inter alia* on article 27, paragraph 5, and article 40, paragraph 3, of the 1961 Vienna Convention, it has been argued that draft article 16 provides the courier with all the protection he needs to perform his functions and, consequently, that draft articles 17 to 20 on various privileges and immunities for diplomatic couriers are not strictly necessary and, on some points, too far-reaching.

Article 17

6. To some extent the Governments of the Nordic countries share this opinion, and this is particularly true as far as draft article 17 on inviolability of temporary accommodation is concerned. Since the temporary accommodation of a diplomatic courier is usually hotel accommodation, a provision along the lines of draft article 17 could give rise to serious legal and practical difficulties. In this connection the Governments of the Nordic countries fully subscribe to the views summarized in paragraph (3) of the commentary to this article.²

Article 18

7. With regard to draft article 18 on immunity from jurisdiction, the Governments of the Nordic countries are pleased to note that a more functional approach has been followed, and this text should not present major difficulties.

Article 19

8. Draft article 19, paragraph 1, establishes a complete exemption from personal examination. As described in paragraph (3) of the commentary to this article,³ the development of international terrorism has *inter alia* led to special measures of inspection of passengers and their baggage, including the regular use of electronic and mechanical devices. The Governments of the Nordic countries do not find it justified to create in favour of diplomatic couriers an exemption from such security measures adopted by almost all States and to which, in usual practice, even diplomatic agents submit without protest.

* Reply submitted jointly by the Governments of the five Nordic countries.

¹ *Yearbook* . . . 1984, vol. II (Part Two), p. 53.

² *Ibid.*, p. 54.

³ *Ibid.*, p. 56.

Article 20

9. The need for draft article 20 on exemption from dues and taxes might be questioned, since the courier will normally remain in the receiving or transit State for a very short time. In that respect article 19, paragraph 2, on exemption from customs duties etc. seems to be of more relevance.

Article 28

10. Among the set of draft articles produced, the key provision is probably article 28, dealing with the question of the inviolability of the diplomatic bag. The Governments of the Nordic countries certainly agree that inviolability is and must be the governing principle. However, with the growing problem of abuse of the diplomatic bag, it is essential to find means of safeguarding the legitimate interests of the receiving State. It could be alleged that, although the original intention was to develop rules to enhance the protection of the bag, the circumstances have, in a way, now changed.

11. Although today there is pronounced alarm in the international community as regards international terrorism and a search for ways and means to combat it, the inviolability of the diplomatic bag must still be preserved. The Governments of the Nordic countries recognize, however, that the delicate position in which the international community finds itself today calls for a certain flexibility in the application of that principle in order to prevent abuses regarding the contents of the bag and to enhance the safety of international communications.

12. The Governments of the Nordic countries see no obstacle to subjecting the diplomatic bag to such non-intrusive security checks as, for instance, the use of sniffer dogs or other methods of external examination. Obviously, a more delicate problem is security checks by means of scanning through electronic or other technical devices. The use of electronic scanning might, at least with future, advanced technology, infringe upon the confidential character of the contents of the diplomatic bag and thus jeopardize the principle of inviolability.

Paragraph 1

13. A thorough further study and discussion of this question is therefore required in order to reach a well-balanced and broadly acceptable solution. In paragraph 1, the present formulation "and shall be exempt from examination directly or through electronic or other technical devices" is, in any case, too broad in the sense that it would exclude such non-intrusive external security examination as the use of sniffer dogs as well as other similar methods of external examination.

Paragraph 2

14. The Governments of the Nordic countries consider that paragraph 2 of draft article 28 should not be confined to consular bags but should apply also to diplomatic bags. They share the opinion, voiced in the Commission, that this paragraph should be modelled on article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations, i.e. it should be up to the sending State either to allow the

suspected bag to be opened in the presence of its representatives or to return it to its place of origin.

Article 33

15. Finally, the Governments of the Nordic countries would like to make a brief comment on draft article 33. They appreciate that the provision in question might, as it were, introduce some flexibility into the draft, but since one of the purposes of the elaboration of the draft is to unify and harmonize the rules governing the status of the diplomatic courier and the diplomatic bag, this provision seems, in its present formulation, very unfortunate.

Norway

[See *Nordic countries*]

Spain

[Original: Spanish]
[21 December 1987]

GENERAL COMMENTS

1. The Government of Spain has studied with the greatest care and interest the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, which the Commission adopted on first reading at the thirty-eighth session, and in response to the requests of the Commission and of the General Assembly, particularly in resolution 41/81 of 3 December 1986, submits the following preliminary comments and observations.

2. In elaborating the draft articles, the Commission has displayed skill and flexibility and the necessary responsiveness to differing points of view and tendencies. Such responsiveness has, however, led to the existence of alternative (bracketed) texts in provisions like the extremely sensitive and delicate article 28.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

3. There is in the draft articles a tendency to assimilate the status of the diplomatic courier to the status of members of the staff of diplomatic missions, as though the courier were a professional diplomat with permanent functions. That tendency is particularly evident in articles 9, 11 and 12.

Article 9

4. Article 9, paragraphs 2 and 3, require the consent of the receiving State for the designation of a diplomatic courier who has the nationality of that State or of a third State or has his permanent residence in the receiving State. The Government of Spain regards these provisions as unrealistic, since they assume that the diplomatic courier is a person called upon to reside permanently in a receiving State, whereas, in actual fact, in the majority of cases the receiving State has no advance knowledge of his appointment or arrival.

Article 11

5. Article 11, concerning the end of the functions of the diplomatic courier, reflects the idea that those functions begin with his appointment and end with the notifications provided for in subparagraphs (a) and (b), whereas what normally happens in reality is that the functions begin with the courier's entry into the receiving State and end with his departure. In the view of the Government of Spain, article 11 provides for exceptional situations instead of normal and daily ones.

Article 12

6. The provisions of article 12, concerning the diplomatic courier declared *persona non grata* or not acceptable, are also unrealistic, since in principle and in the majority of cases the receiving State is not aware of the appointment of a diplomatic courier.

Article 18

7. Article 18 recognizes as immune from criminal jurisdiction solely "acts performed in the exercise of [the] functions" of the diplomatic courier. Bearing in mind the functional view of privileges and immunities embodied in the preamble to the 1961 Vienna Convention on Diplomatic Relations and in other conventions, the Government of Spain considers this to be an appropriate and apt solution.

Article 23

8. Article 23, paragraph 1, contemplates the possibility that the bag might be entrusted to the captain of a ship or aircraft in commercial service which is scheduled to arrive at an authorized port of entry. The Government of Spain considers that the bag might also be entrusted to a duly authorized member of the crew other than the captain of the ship or aircraft. It notes in this respect that the commentary to article 23 states the Commission's view that the wording of the paragraph does not preclude the existing practice of several States of entrusting the bag to a member of the crew.¹ It also points out that draft article 30, in establishing protective measures in case of *force majeure* or other circumstances, expressly provides for the situation in which the bag has been entrusted to "any other member of the crew".

Article 28

9. Article 28, concerning protection of the diplomatic bag, is presented in the draft with a series of brackets containing alternative elements. The Government of Spain considers that, in selecting the wording to be retained, a suitable balance should be struck between, on the one hand, preserving the principle of the freedom and inviolability of communications of diplomatic missions and, on the other, the need for observance of any laws and regulations which the receiving States have adopted with a view to the protection of their legitimate interests. In the light

¹ *Yearbook . . . 1985*, vol. II (Part Two), p. 46, para. (5) of the commentary to article 23.

of those considerations, the position of the Government of Spain regarding article 28 is as follows:

Paragraph 1

10. In paragraph 1, the bracketed words should be deleted, so that the text would read:

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

The absolute inviolability of the bag which would result from the first bracketed portion is not in keeping with the requirement of due observance of the laws and regulations which the receiving State has adopted for the protection of its legitimate interests. As to the second bracketed portion, the Government considers its deletion advisable for the reasons given in the commentary to paragraph 2 of the article.²

Paragraph 2

11. In paragraph 2, the bracketed portion referring to the transit State should be deleted, since the accompanied bag holds no danger for that State and the unaccompanied bag which is trans-shipped in the territory of the transit State will be treated in the same way as the rest of the freight or correspondence in the consignment. The Government of Spain believes that the bracketed word "consular" should also be deleted. As regards the words in square brackets that would enable the receiving State to request the bag's subjection to examination through electronic or other technical devices, the Government of Spain does not favour such a provision, since modern detection equipment is capable of penetrating secrets protected by the inviolability of the official correspondence of the mission. Instead, it would prefer to provide for the authorized opening of the bag if the competent authorities of the receiving State have good reason to believe that the bag contains something other than correspondence, documents or articles intended exclusively for official use, on the understanding that if the authorities of the sending State turn down this request the receiving State may require the return of the bag to its place of origin. Accordingly, the relevant bracketed portions of article 28, paragraph 2, should be deleted.

² *Yearbook . . . 1986*, vol. II (Part Two), p. 29, paras. (8) and (9) of the commentary to article 28.

Sweden

[*See Nordic countries*]

Thailand

[*Original: English*]
[17 November 1987]

GENERAL COMMENTS

1. Thailand would like to praise the efforts of the Commission and the Special Rapporteur, Mr. Alexander Yankov, for having produced this commendable draft.

2. With respect to the draft articles, Thailand wishes to make it very clear from the outset that its comments and observations herein are merely preliminary, without prejudice to its right to make any further comments and obser-

vations if and when the occasion presents itself, or to its final position either to accept or to reject the final version of the draft.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 5

3. The title of article 5 should also mention "the sovereignty" of the receiving State and the transit State. This is because the duties mentioned in the article include that of non-interference in the internal affairs, or, phrased differently, the duty to respect the sovereignty, of the receiving State and the transit State.

4. In addition, there should be a paragraph 3 providing that the sending State shall incur State responsibility if it fails to comply with the obligations set forth in paragraphs 1 and 2, and shall owe the injured State the duty to make amends. Such a stipulation would reinforce the credibility of the draft articles in the light of certain abuses of privileges and immunities relating to diplomatic bags and diplomatic couriers.

Article 11

5. Termination of the functions of the diplomatic courier as specified in subparagraph (a) of article 11 is quite rare in practice. This subparagraph has its source in, *inter alia*, article 43 (a) of the 1961 Convention on Diplomatic Relations. However, the tour of duty of diplomatic agents lasts a few years or more, whereas that of diplomatic couriers is transient. It would be much better for article 11 to specify that the functions of the diplomatic courier normally come to an end at the moment his privileges and immunities cease in accordance with article 21, paragraph 1, of the draft.

Article 14

6. It may be the practice of the sending State to delay the granting of any type of visa to nationals of the receiving or the transit State concerned. To be fair, therefore, the expression "as promptly as possible" in paragraph 2 should be followed by the clause

"duly taking into account the practice of the sending State in relation to the granting of visas to the diplomatic courier of the State from which the visa is being requested, or, if this latter State does not normally use diplomatic couriers, the practice of the sending State in relation to the granting of visas to the nationals of the State from which the visa is being requested".

Article 17

7. For the sake of clarity in terms of wording and better protection of the inviolability of the diplomatic courier, the phrase "except with the consent of the diplomatic courier" in paragraph 1 should be amended to read: "except when the diplomatic courier has freely given his consent to the entry for a specific purpose." It may also be wise to replace "other disaster" by "other serious disaster".

8. Paragraph 3 clearly contradicts paragraph 1. It is believed that the inviolability in paragraph 1 should be secondary to the protection of the national interests of the receiving State and the transit State as stipulated in paragraph 3. Hence, paragraph 1 should be amended so as to begin with the phrase

"1. Subject to the provision in paragraph 3 of this article, the temporary accommodation . . .".

Article 27

9. For practical reasons, the words "as permitted by local circumstances" should be inserted between commas after the word "shall".

Article 28

Paragraph 1

10. The interest of the sending State, on the one hand, and that of the receiving State and the transit State, on the other, must be evenly balanced. Therefore, the clauses in square brackets in paragraph 1 should be deleted.

Paragraph 2

11. With regard to paragraph 2, it should read as follows:

"2. Nevertheless, if the competent authorities of the receiving or the transit State have serious reasons to believe that the bag contains something other than the correspondence, documents or articles referred to in article 25, they may request that the bag be subjected to examination through electronic or other technical devices. If such examination does not satisfy the competent authorities of the receiving or the transit State, they may further request that the bag be opened in their presence by an authorized representative of the sending State. If either of these requests is refused by the authorities of the sending State, the competent authorities of the receiving or transit State may require that the bag be returned to its place of origin."

Article 30

12. In keeping with the wording of paragraph 1, and to prevent any lacunae, the words "or other circumstances" should be added after the words "due to *force majeure*" in paragraph 2.

Article 31

13. It is unjustifiable and unacceptable to extend the application of the draft articles even to the case where the sending State is not recognized by the receiving State or the transit State. There are no clear examples of such a practice. Moreover, such a provision would run counter to the well-entrenched rule of international law concerning non-recognition of States or Governments. With respect, Thailand declines to follow the view expressed by the Commission in the commentary that article 31 would not give rise to *de facto* recognition of the sending State or Government in question.¹

¹ *Yearbook* . . . 1986, vol. II (Part Two), p. 32, para. (6) of the commentary to article 31.

Article 33

14. Article 33 is necessary if the draft articles as a whole are to have any chance of becoming widely accepted.

Union of Soviet Socialist Republics

[Original: Russian]

[14 April 1988]

GENERAL COMMENTS

1. In the view of the USSR, the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier elaborated by the Commission constitute on the whole an acceptable basis for the completion of the work in this area and the adoption of an international legal instrument on the subject. Certain provisions of the draft, however, require clarification.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

2. In the view of the USSR, the future instrument, the purpose of which is to improve the international legal regulation of communications by bag between a mission and the sending State, must confirm and develop the rules ensuring freedom of such communication. Of particular importance in this connection is the principle of personal inviolability of the diplomatic courier.

*Article 17**Paragraph 1*

3. Respect for personal inviolability in many cases obviously depends upon respect for the inviolability of accommodation. Article 17, paragraph 1, should therefore be amended as follows:

“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 express consent of the diplomatic courier. Such consent may be assumed in the event of fire or other disaster requiring prompt protective action, provided that all necessary measures are taken to ensure the protection of the diplomatic bag, as stipulated in article 28, paragraph 1.”

Paragraph 3

4. Paragraph 3 of article 17 should stipulate the obligation of the receiving State or the transit State, in the event of inspection or search of the accommodation of the diplomatic courier, to guarantee him the opportunity to communicate with the mission of the sending State so that its representative can be present during such inspection or search.

*Article 28**Paragraph 1*

5. The future instrument must also reflect consistently the principle of the inviolability of the diplomatic bag.

The brackets should accordingly be removed from article 28, paragraph 1, which should read as follows:

“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 technical devices.”

This formulation would in essence be an adaptation to modern conditions of the well-known provision of article 27 of the 1961 Vienna Convention on Diplomatic Relations, the most authoritative source of diplomatic law.

6. It is essential that the inadmissibility of examination of the bag, including through electronic or other technical devices, should be clearly indicated. The use of such devices can damage correspondence and material sent by the bag, for example on microfilm, and can breach the confidentiality of the bag.

Paragraph 2

7. Article 28, paragraph 2, deals with only one kind of bag, the consular bag, for which it establishes a special régime permitting examination or return to its place of origin. Exclusion from the general legal régime for communication by bag of any one type of such communication cannot be justified. Such action would run counter to the main purpose of the draft articles, namely uniformization of the existing international rules on the subject with a view to improving communications between States and their missions abroad. Accordingly, it would appear advisable to delete article 28, paragraph 2.

Article 33

8. Similarly, draft article 33 (Optional declaration) is also inconsistent with the establishment of an agreed uniform régime for couriers and bags of all the categories listed in draft article 3 (diplomatic, consular etc.). Article 33, granting States the right to exclude certain categories of couriers and bags from the scope of the articles, could result in serious disparities in the practice of States and significantly complicate communication by bag between sending States and their missions, particularly in cases when the bag is in transit. The provisions of article 33 are thus essentially contrary to the idea embodied in the draft, which is the universalization of international legal rules in order to enhance the status of diplomatic courier and bag and ensure free communication by bag between the mission and the sending State. In the light of these considerations, article 33 should be deleted.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

[22 January 1988]

GENERAL COMMENTS

1. The United Kingdom Government commend the Commission and in particular its Special Rapporteur, Mr. Alexander Yankov, for the draft articles which the Commission provisionally adopted on first reading at its thirty-eighth session, held in 1986. They recognize that to a certain extent, in producing the draft articles in their present

form, the Commission has already responded to some of the criticisms that were expressed in relation to earlier drafts. Nevertheless, there are still a number of provisions in the current draft which, in the view of the United Kingdom Government, are unnecessary or inappropriate or are unsatisfactorily formulated; and there are others which, at least in their present form, the United Kingdom would be unable to accept. The United Kingdom Government's specific observations on these provisions are set out below.

2. As the United Kingdom Government have made clear on previous occasions, they approach the Commission's work on this topic on the basis that, for the most part, and for practical purposes, the relevant rules of international law concerning diplomatic and consular bags and diplomatic and consular couriers (hereinafter referred to simply as "the bag" and "the courier") are already adequately established by the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, as supplemented by customary international law and in particular the rules of customary international law relating to the right of States to self-defence and their duty to protect life. They therefore see the principal purpose of these draft articles, and the principal justification for the Commission's work on the topic, as being to enunciate more precise and specific rules aimed at facilitating the detection and prevention of certain practices involving the abuse of the bag that have, unfortunately, disfigured international relations in recent years.

3. The United Kingdom Government are, of course, mindful of the fact that the United Kingdom, like all other States, is both a sending State and a receiving State (to use the terminology of the draft articles). It is also—and this is not true of all States—an important and busy transit State. The United Kingdom Government are therefore well aware that it is essential to strike a proper balance between, on the one hand, the need for sending States to enjoy secure communications with their missions and posts and, on the other hand, the need—and indeed the duty—of receiving and transit States to protect their national security and ensure the safety of their own population. In formulating their comments, therefore, the United Kingdom Government have been very conscious, in every context, of the need for the draft articles themselves to find and express that balance.

4. Before turning to the details of the specific provisions in the draft articles, the United Kingdom Government would make one further general observation. As has been said above, the United Kingdom Government see the greater part of the relevant international law on this topic as already adequately covered by the 1961 and 1963 Vienna Conventions (on diplomatic and consular relations respectively) and by certain rules of customary international law. The United Kingdom is not a party to the 1969 Convention on Special Missions or to the 1975 Vienna Convention on the Representation of States, and the United Kingdom Government, for their part, could not by virtue of these articles accept an obligation to accord the treatment provided by the draft articles to couriers of special missions or of missions and delegations to international organizations (or to the bags of such missions and delegations). The United Kingdom Government note the relevance, in this

context, of draft article 33 and of paragraph (2) of the commentary to article 1.¹

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

5. Against the background of these introductory remarks, the United Kingdom Government have a number of detailed comments to offer on the draft articles, while reserving the right to offer further comments at a later stage. By way of general preface to those comments, it may be helpful to explain that the United Kingdom Government have identified four categories of provisions among the current set of draft articles in their present form:

(a) Provisions which are unnecessary in that their substance appears to be already adequately dealt with by provisions in earlier instruments, such as the 1961 and 1963 Vienna Conventions. The Commission may wish to reconsider the utility and the appropriateness of the present draft articles that seek to traverse, to the same effect, the ground already covered by existing Conventions. Provisions in this category include articles 4, 5, 16 and 23;

(b) Provisions which seem to the United Kingdom Government unnecessary in that they enunciate rules on matters which have heretofore not been regulated by international agreement and which in the experience of the United Kingdom Government have not caused practical problems such as to require such regulation. Provisions in this category include articles 7, 9, 10, 11, 15, 19 (paras. 2 and 3), 20, 21 and 29;

(c) Provisions which are open to objection because, at least in their present form, they impose unreasonable burdens on receiving States and on transit States. Provisions in this category include articles 13, 17, 18, 19 (para. 1), 27, 30 and 31;

(d) Provisions whose essential objective is to facilitate the detection and prevention of abuse of the bag (which, as explained above, the United Kingdom Government see as the principal justification for elaborating a set of articles on this topic). The United Kingdom Government welcome the inclusion of provisions having this objective but consider that the present drafts are not satisfactory as they need further expansion or modification. Provisions in this category include articles 8, 24 and 25.

Article 2

6. In response to the Commission's commentary to article 2,² the United Kingdom Government must record their considered view that it would be very damaging to the prospect of these draft articles as a whole attracting wide international acceptance if their scope were to be extended beyond questions strictly relating to diplomatic and consular couriers of States (and their corresponding bags) and in particular if they attempted to deal with the couriers and bags of international organizations and other non-State entities. In any event, the United Kingdom Government do not see that article 2 (which appears to enunciate a truism) fulfils any concrete legal function within the

¹ *Yearbook* . . . 1983, vol. II (Part Two), p. 54.

² *Ibid.*

context of the draft articles as a whole, and they consider that nothing would be lost, and some risk of unnecessary confusion might be avoided, if it were omitted.

Article 3

7. As regards the various references in paragraph 1 of article 3 (and in certain other draft articles) to the couriers and bags of special missions and of missions and delegations to international organizations, the United Kingdom Government draw attention to what has been said above (para. 4) about their inability to accept any obligation, by virtue of these articles, in respect of such couriers and bags.

8. The United Kingdom Government consider it undesirable to use the terms "diplomatic courier" and "diplomatic bag" to embrace also consular bags. They therefore suggest that the terms to be defined should be "the courier" and "the bag".

Article 8

9. In paragraph (2) of the commentary to article 8 (then numbered article 7) the Commission points out that while

the form of the document [to which the article refers], its formal particulars and its denomination are entirely within the jurisdiction and discretion of the sending State in accordance with its laws, regulations and established practices,³

the prevailing State practice has been that the document indicates not only the courier's status as such but also the essential personal data about him and also includes particulars about the packages constituting the bag which he accompanies, for example their serial numbers, their destination, their size and their weight. The United Kingdom Government are strongly of the opinion that it would be advantageous, from the point of view of strengthening this important safeguard against abuse of the bag, if article 8 were to elaborate with greater precision, and in terms which imposed a specific and unambiguous obligation in that respect on sending States, the particulars (relating both to the courier himself and to the packages) which should in every case be spelt out in the document.

Article 9

10. The United Kingdom Government question the appropriateness of assimilating the rules relating to the nationality, etc., of couriers to those relating to the nationality, etc., of diplomatic agents and consular officers. The same considerations do not necessarily apply. In any event, the rules set out in paragraph 3 of article 9 do not appear to be compatible with the corresponding rules in respect of consular couriers that are set out in article 35, paragraph 5, of the 1963 Vienna Convention.

Article 10

11. The United Kingdom Government have no objection to the formulation of article 10 but, in connection with paragraph (5) of the commentary to this article,⁴ they re-

iterate their reservation in respect of the bags of special missions or of missions or delegations to international organizations (see para. 4 above).

Article 11

12. While accepting what is said in paragraph (5) of the commentary to article 11⁵ about the undesirability of attempting to define exhaustively all the circumstances which might lead to the termination of a courier's functions and about the significance which therefore attaches to the phrase "*inter alia*", the United Kingdom Government consider that it would be helpful if a specific reference to the fulfilment of the courier's functions were added to this article since, as the commentary recognizes, that is in fact the most frequent and most typical cause of the termination.

Article 12

13. The United Kingdom Government welcome article 12, which they consider usefully clarifies the position and will assist States in dealing with cases where couriers abuse their status or abuse the bag.

Article 13

Paragraph 1

14. The United Kingdom Government cannot support article 13 as it is at present formulated and indeed are not convinced that any provision of this kind is necessary. As regards paragraph 1, they find the reference to "the facilities necessary for the performance of his functions" vague and unsatisfactory: they do not accept that the context within which this article operates can validly be compared with the contexts of article 25 of the 1961 Vienna Convention and of article 28 of the 1963 Vienna Convention.

Paragraph 2

15. The United Kingdom Government have even stronger objections to paragraph 2, which they consider would impose a heavy and unjustifiable burden on receiving States and in particular on transit States. Given the accepted obligations of receiving and transit States in respect of such matters as the freedom of movement and personal inviolability of the courier and the protection to be afforded to the bag, they see no reason why legal responsibility for the additional matters referred to in this paragraph should, even in the circumstances referred to in the commentary to this article,⁶ be made to devolve on anybody other than the sending State.

Article 14

16. While the United Kingdom Government can accept article 14, it must be made clear that they do so only on the understanding that it is to be read together with, and subject to, article 12, which entitles a receiving or a transit State to refuse to accept a particular person as a courier (in which case this article would not be applicable to him).

³ *Ibid.*, p. 60.

⁴ *Yearbook* . . . 1984, vol. II (Part Two), p. 47.

⁵ *Ibid.*, p. 48.

⁶ *Ibid.*, pp. 50-51, para. (6) of the commentary to article 13.

Article 15

17. While not objecting to article 15 in itself, the United Kingdom Government must record that they do not accept the possible implication in paragraph (2) of the commentary to this article that "in exceptional circumstances" a receiving or a transit State has some sort of obligation to assist the courier "to obtain an appropriate means of transportation when he has to face insurmountable obstacles which may delay his journey and which could be overcome, to the extent practicable, with the help or co-operation of the local authorities".⁷ The United Kingdom Government recognize no exception to the rule expressed in the previous sentence of the commentary, i.e. that "the diplomatic courier has to make all the necessary travel arrangements for his entire journey in the exercise of his tasks".

Article 17

18. The United Kingdom Government must register their strenuous objection to article 17. It would, in their view, impose a wholly unreasonable and burdensome obligation on receiving and transit States, and no case for imposing any such obligation at all is made out, on functional grounds, in the commentary.⁸ Certainly, there is no evidence that the previous absence of such an obligation in international law has occasioned any difficulty or abuse. The United Kingdom Government recognize that, by including paragraph 2 of this article, the Commission has attempted to mitigate the burden on receiving and transit States which would be imposed by paragraph 1. But they must record that, for a country such as the United Kingdom which at any one time acts as a receiving State or a transit State to a very large number of couriers, the task of handling the notifications required by paragraph 2 would actually increase rather than diminish the burden.

19. For all these reasons, article 17 is unacceptable to the United Kingdom Government. They must make clear that their objections to it apply equally to any suggestion (see para. (11) of the commentary to this article⁹) that a receiving or a transit State is under any comparable obligation in respect of the means of transport employed by the courier.

Article 18

20. The United Kingdom Government are not persuaded of the need for article 18. No such express provision in international law has hitherto been found necessary, and no evidence of functional need for such a provision has been adduced. The numerous and complicated exceptions and qualifications to the proposed immunity which are provided for in the draft article itself, or which the commentary suggests should be read into it by way of interpretative glosses, demonstrate the practical inconvenience and uncertainties which the rule enunciated by the article would produce. For example, the proposition in the second sentence of paragraph 2 (that the courier should be liable to civil proceedings even in respect of an act per-

formed in the exercise of his official functions if that act involved damage arising from a motor accident and if "damages are not recoverable from insurance") is simply not workable in United Kingdom law (or, it is believed, in the law of many other countries). In United Kingdom law the plaintiff in a vehicle accident case (as in any other case) must bring his action against the alleged tort-feasor himself (for example, the driver of the other vehicle) and not his insurer: neither he nor the tort-feasor can always be certain, when the action is instituted, that the insurer will indeed be under a liability to indemnify the tort-feasor in respect of the damages awarded against him.

Paragraph 5

21. On another aspect of draft article 18, the United Kingdom Government can take no comfort from the safeguard against misconduct by a courier, who would be protected by immunity, which is supposed to be provided by paragraph 5, given that the Commission itself, in paragraph (17) of the commentary, regards it as "not as effective as would be desirable" and puts it forward only as "[constituting] a subtle suggestion to the sending State that it should exercise its jurisdiction in cases which otherwise might constitute a denial of justice".¹⁰

Article 19

22. The United Kingdom Government question the validity of the analogy which the Commission seeks to draw (see, for example, paras. (1) and (4) of the commentary to article 19¹¹) between the position, in relation to the matters dealt with by this article, of a courier entering a receiving or transit State where, by definition, his stay will be of very short duration and the position of a diplomatic agent or consular officer arriving in a receiving State to take up his long-term post there. Indeed, given the transitory nature of the courier's presence in a receiving or a transit State, the United Kingdom Government doubt the necessity for any provision at all on the lines of article 19 and in particular of its paragraphs 2 and 3.

23. The United Kingdom Government find it difficult to see any legitimate need for paragraph 1, given the provision for a courier to enjoy personal inviolability under article 16. Moreover, the United Kingdom Government believe that the draft should make it clear that a courier ought to co-operate in the normal security checks which operate at airports. Accordingly, the United Kingdom Government would wish it to be made clear, first, that the courier ought not to refuse to undergo reasonable measures (not merely "examination carried out at a distance by means of electronic or other mechanical devices") designed to detect abuses of the kind mentioned in paragraph (3) of the commentary to article 19.¹² It also needs to be made clear that the "laws and regulations" mentioned in paragraph 2 of the article may include laws and regulations substantively prohibiting or controlling the import or export of prohibited articles or substances and are not confined to "formal and other procedural requirements": para-

⁷ *Ibid.*, p. 52.

⁸ *Ibid.*, pp. 53 *et seq.*

⁹ *Ibid.*, p. 55.

¹⁰ *Yearbook . . . 1985*, vol. II (Part Two), p. 42.

¹¹ *Yearbook . . . 1984*, vol. II (Part Two), p. 56.

¹² *Ibid.*

graph (6) of the commentary to article 19¹³ is not entirely clear on this point.

Article 20

24. Given the brief and transitory nature of the courier's stay in a receiving or transit State, the United Kingdom Government see no need for this article and are opposed to its retention. They do not accept the validity of the reasoning which apparently led the Commission to include it: see the remark in paragraph (1) of the commentary to this article that:

Article 20 is based on the consideration that the diplomatic courier should be accorded in all aspects a treatment befitting his status as a person exercising official functions and that, with reference to tax exemption, the courier's level should therefore not be inferior to that of a member of the administrative or technical staff of a mission . . .¹⁴

If new exemptions are to be created—and the first sentence of the same paragraph of the commentary recognizes that this would be a new exemption—the justification for them must be sought in considerations of functional need and not in considerations of status and relative dignity.

Article 21

25. The United Kingdom Government cannot support this article, which, to the extent that it states rules which they find acceptable at all, appears merely to spell out, in a somewhat complicated manner, what is already clearly implicit in other provisions of the draft articles (for example, articles 12 and 16) or is expressly stated in provisions of the 1961 Vienna Convention or the 1963 Vienna Convention. In view of the objection which they have recorded above (see paras. 20-21) to conferring any immunity from jurisdiction on the courier, they of course equally object to paragraph 3 of article 21 (see para. (6) of the commentary¹⁵).

Article 22

26. The United Kingdom Government have serious reservations about article 22, at least in its present form. They accept, of course, the general principle that any immunity which may be enjoyed by the courier is conferred on him not for his personal benefit but for the benefit of the sending State and for the proper discharge of his functions on its behalf and may therefore be waived by that State. But they question the utility of the various specific propositions set out in this article. In so far as these relate to waiver of immunity from jurisdiction (and paras. 3, 4 and 5 appear to have no other relevance), it is sufficient here to refer to the United Kingdom Government's comments on article 18 (paras. 20-21 above) where they have recorded their strong doubts about the need for a provision conferring immunity on the courier. In so far as they relate to the courier's personal inviolability as well as, if this is properly to be regarded as a separate matter, his exemption from personal examination, the United Kingdom Government cannot accept that waiver must always

be expressed and communicated in writing, since this would impede reasonable measures of protection against abuse, such as the compliance by a courier with security measures at ports and airports.

Articles 24 and 25

27. Articles 24 and 25 essentially reproduce the substance (express or implied) of article 27, paragraph 4, of the 1961 Vienna Convention and article 35, paragraph 4, of the 1963 Vienna Convention. In view, however, of the United Kingdom Government's approach to the Commission's work on this matter, that is to say, that its principal purpose and justification is the enunciation of "more precise and specific rules aimed at facilitating the detection and prevention of . . . practices involving the abuse of the bag" (see para. 2 above), they do not object to the inclusion of these two articles but, on the contrary, would wish to see them strengthened and made more concrete and specific. The more the obligations laid on sending States to ensure that the bags are used only for legitimate purposes can be made certain and firm, the less scope there will be for abuses to be committed (with or without official connivance and acquiescence). The United Kingdom Government would therefore urge the Commission, in its further deliberations on these two articles, to explore all possible ways of strengthening them to this end.

28. On a point of detail but of some importance, the United Kingdom Government would certainly wish to see the word "exclusively" retained both in article 25, paragraph 1, and in article 3, paragraph 1 (2) (see para. (3) of the commentary to article 25¹⁶), and they also strongly endorse the comment (see para. (4) of the same commentary) that the provision in article 3 should be aligned with that in article 25 so as to make clear that the phrase "intended exclusively for official use" applies both to "documents" and to "articles".

29. The United Kingdom Government would also wish the revised formulation of article 25 to make clear that the bag may not contain any article whose importation or possession is prohibited by the law of the receiving or transit State even if, on one interpretation, it could be said to be intended for official use (for example, a firearm to be carried by a member of the sending State's mission).

30. The United Kingdom Government's comments on these two articles must be read together with their comments, below, on article 28 (see paras. 34-38).

Article 26

31. The United Kingdom Government welcome article 26, which usefully recognizes, and establishes the rules relevant to, what is now the common practice of dispatching unaccompanied bags by ordinary postal means or by commercial means of transport.

Article 27

32. As in the case of article 13 (see para. 14 above), the United Kingdom Government cannot support article 27,

¹³ *Ibid.*

¹⁴ *Ibid.*, p. 57.

¹⁵ *Yearbook* . . . 1985, vol. II (Part Two), p. 44.

¹⁶ *Ibid.*, p. 48.

at least in its present form. They find the phrase “the facilities necessary . . .” dangerously vague and they do not accept that the considerations discussed in the commentary to the article¹⁷ justify relieving a sending State of the responsibility for making adequate arrangements for the transmission and delivery of its own bags or justify imposing on receiving and transit States any obligations in that regard beyond the basic obligation to respect the status of the bag and not deliberately to delay or impede its transmission and delivery.

Article 28

33. The United Kingdom Government share the Commission’s view, recorded in paragraph (1) of the commentary to article 28,¹⁸ that the article is a key provision within the set of draft articles. In defining the extent to which, and the conditions subject to which, the bag is entitled to protection, it goes to the heart of the problem—which, as has been stated above, the United Kingdom regards as the principal purpose and justification for the Commission’s work on the topic—of the measures which a receiving or a transit State may properly take in order to prevent abuses of the bag.

34. The United Kingdom Government have no difficulty with the core of article 28, i.e. the proposition that, as a general rule, a receiving or a transit State may not open or detain the bag. That, indeed, is settled law: see article 27, paragraph 3, of the 1961 Vienna Convention and article 35, paragraph 3, of the 1963 Vienna Convention. However, the United Kingdom Government do not regard these provisions of the two Vienna Conventions as preventing—nor is there any rule of customary international law which prevents—a receiving or transit State from subjecting a bag, in appropriate circumstances, to “scanning”, i.e. to what the draft article describes as “examination through electronic or other technical devices”.

35. The United Kingdom Government accept, of course, that there are limits to the right of a receiving or transit State to subject a bag to scanning. Thus, the scanning must not be of a kind which would reveal the contents of the communications which are being transmitted in the bag; the right to require the bag to be scanned may be exercised only when there is good reason to suspect that the bag is being used for an improper purpose; there should be no general and routine practice of scanning bags and each case should be treated on its individual merits; a representative of the sending State should have the opportunity to be present while the scanning is taking place; and, if the sending State objects to the proposed scanning, it should have the option of having the bag returned, unexamined, to its originator.

36. The United Kingdom Government also see no reason why the ultimate step of calling for the bag to be opened by a representative of the sending State in the presence of the competent authorities of the receiving or transit State (failing which it is to be returned to its originator) should be available only in respect of consular bags and not in respect of diplomatic bags. They would wish article 28 to

make it clear that the relevant provisions on this matter should apply to both kinds of bag.

37. It will also be apparent from the above comments that the United Kingdom Government consider that the right to invoke all or any of these safeguards against suspected abuse of the bag should inure for the benefit of transit States as well as receiving States.

38. The United Kingdom Government hope that, in the light of its further deliberations on this matter, the Commission will be able to submit a revised draft article which gives full effect to the above comments. The United Kingdom Government consider that only such a revised draft will achieve the appropriate balance (referred to in para. 3 above) between, on the one hand, the need of sending States to enjoy secure communications with their missions and posts and, on the other hand, the need of receiving and transit States to be able to protect themselves against abuses of the bag which threaten their national security or the safety of their populations. The United Kingdom Government suggest that, when draft article 28 has been revised in this way, the Commission may consider that the term “inviolable” (at present featured in square brackets) is not an appropriate categorization of the protected status of the bag and should be omitted or replaced lest it give rise to confusion. In any event, it must be made clear that any so-called inviolability is subject to the legitimate rights of receiving and transit States as described above.

Article 30

39. The United Kingdom Government accept that, in the circumstances referred to in paragraph 1 of article 30, the obligations of a receiving or a transit State in respect of the bag do not cease to apply and that, in the circumstances referred to in paragraph 2, the “unforeseen” transit State has the same obligations in respect of the courier and the bag as if it had been an intended transit State. In both contexts, the requirements of articles 8 and 24 take on an added importance and the United Kingdom Government draw attention to the comments which they have made on those articles (see paras. 9 and 27 above). The United Kingdom Government do not think it reasonable, however, that, in either set of circumstances, additional and positive obligations should be imposed on a receiving or a transit State to act as a custodian of the bag and to “ensure [its] integrity and safety”. The United Kingdom Government cannot therefore accept this article as it is at present formulated.

Article 31

40. Article 31, too, is one with which the United Kingdom Government have difficulties. They do not agree that there is any valid analogy (as is suggested by the Commission in the commentary to this article¹⁹) with article 45 of the 1961 Vienna Convention or with article 2, paragraph 3, of the 1963 Vienna Convention. The former of these provisions, in so far as it imposes obligations on a receiving State in respect of the premises, property and archives of a sending State, deals with what is essentially a transitional

¹⁷ *Ibid.*, p. 50.

¹⁸ *Yearbook* . . . 1986, vol. II (Part Two), p. 28.

¹⁹ *Ibid.*, pp. 31-32.

situation, i.e. the consequences of the severance of diplomatic relations or the recall of missions between two States who have, immediately previously, maintained such relations and recognized each other and each other's Governments. The corresponding provision in the 1963 Convention is, of course, not article 2, paragraph 3, but article 27, to which the same considerations apply. So far as article 2, paragraph 3, is concerned it imposes no obligation on a receiving State. It merely declares, as a rider to article 2, paragraph 1 (which provides that consular relations between States depend on mutual consent), and to article 2, paragraph 2 (which treats such consent as the *prima facie* implication of the establishment of diplomatic relations), that the severance of diplomatic relations does not automatically entail the withdrawal of consent for the maintenance of consular relations. Thus, neither of these provisions can be regarded as a precedent for imposing on a receiving or a transit State, without reference to its consent, a legal obligation to accord favourable treatment to couriers and bags belonging to a State which it does not recognize (and may never have recognized) or with whose Government it has chosen, as a matter of its sovereign policy, not to have (and it may never have had) any relations.

41. In any event the three situations envisaged in draft article 31—namely non-recognition of a State, non-recognition of a Government and absence of diplomatic relations—give rise to differing considerations which the Commission might wish to consider further. Thus a transit State's position *vis-à-vis* a sending authority can reasonably be seen to be quite different in the case where it does not recognize the sending authority as a State from its position in the case where it recognizes that authority as a State but does not maintain diplomatic relations with it: in the former case, but not in the latter, the transit State does not accept that there exists an international person capable of enjoying such international rights as that of sending diplomatic bags. Similarly, the reference to non-recognition of a Government may require further consideration in this context, in the light of the practice of a number of States (including the United Kingdom) whereby they recognize States, not Governments. Even where the non-recognition of a Government is a relevant consideration, the circumstance that the transit State may recognize the sending State as a State, but not any particular authority as constituting the Government of that State and entitled to authorize action (such as sending diplomatic bags) in its name, may require further consideration.

42. As regards the application of article 31 to the couriers and bags of missions or delegations to international organizations or of special missions (see para. (4) of the commentary²⁰), the United Kingdom Government draw attention again to their reservations on this point expressed above (see para. 4).

Article 32

43. The United Kingdom Government have no objection to the substance of article 32 so far as it goes. They consider, however, that, in view of what is said in the commentary to this article,²¹ the term "regional" is not appro-

priate and should be replaced by language more apt to express the Commission's intentions. More important, the United Kingdom Government are not persuaded by the Commission's exposition, in paragraph (3) of the commentary, of the relationship between these draft articles as a whole and the four codification conventions referred to. They do not consider that article 32, or any of the other draft articles, adequately grapples with that problem, and they would urge the Commission to give more thought to that matter, which, as they see it, needs to be dealt with by express provision.

Article 33

44. The United Kingdom Government draw attention again, in relation to article 33, to the reservations which they have expressed (see para. 4 above) concerning references in this set of draft articles to the 1969 Convention on Special Missions and to the 1975 Vienna Convention on the Representation of States. They are not convinced that the arrangements envisaged by article 33 will in practice provide a workable way of dealing with the problem of the varying application of the codification conventions as between different combinations of States, and they have misgivings in principle about the deliberate creation of a number of different régimes deriving from a single instrument.

Venezuela

[Original: Spanish]
[28 December 1987]

GENERAL COMMENTS

1. Although Venezuela has always maintained that the work on this topic is lacking in substantive importance for the international community and that it should not have priority in view of other extremely important topics in the programme of work of the Commission, it is bound to recognize that the provisions which have been drafted supplement and improve the régime governing the diplomatic courier and that, on the basis of the draft which has been adopted on first reading, States may decide to adopt an instrument which would undoubtedly determine more clearly and precisely the regulation and legal protection of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 12

2. At the end of article 12, paragraph 1, the possibility of declaring the diplomatic courier *persona non grata* or not acceptable before his arrival in the territory of the receiving State should be linked to the content more clearly. This could be achieved by the following wording: "The declaration to which this paragraph refers may be made before the person arrives in the territory of the receiving State."

²⁰ *Ibid.*, p. 32.

²¹ *Ibid.*, pp. 32-33.

Article 28

3. Article 28 is one of the most important articles of the draft, and it has given rise to major doubts and difficulties. Although the differences of opinion and the conflicting positions may persist, Venezuela considers that the provision should be based on the idea that the protection of the diplomatic bag, as defined in article 3, paragraph 1 (2), should be as broad as possible and that limits or restrictions which would undermine its intention and purpose should not be added. To this end, the bracketed words in paragraph 1 of article 28 should be retained and the brackets eliminated.

OTHER PROVISIONS

4. Lastly, thought should be given to the possibility of including in the proposed instrument a chapter on the settlement of disputes or conflicts arising from the interpretation or application of the provisions. If such a chapter is decided upon, it should be of a flexible nature and should supplement the settlement machinery in the form of negotiations between States through the diplomatic channel.

Yugoslavia

[Original: English]

[4 February 1988]

GENERAL COMMENTS

1. In view of the highly developed diplomatic relations in the international community today and of a considerable number of new problems arising in diplomatic communication among States, in particular as regards the status and protection of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (hereinafter referred to as the courier and the bag), the Government of Yugoslavia considers that the work of the Commission on the codification of the rules of international law in this field is of major importance. The status of the courier and the bag is regulated only partially by the existing conventions relating to diplomatic law and consular law. Yugoslavia considers that the draft articles prepared by the Commission constitute a sound basis for their further elaboration. It is convinced that the future convention to be concluded on the basis of the above-mentioned draft could contribute to the promotion of diplomatic relations among States, to the harmonization of frequently opposing interests of the receiving and the sending States *vis-à-vis* couriers and bags, as well as to overcoming the problems arising among States in making use of this means of diplomatic communication.

2. In its first reply to the Secretary-General on this topic, in 1982,¹ Yugoslavia pointed out some important issues which should be included in the draft articles. Yugoslavia considers that the work of codification of rules on the topic should be completed as soon as possible. Wishing to contribute to more efficient further work on the codification of rules relating to couriers and bags, the Yugoslav Government would like to make some suggestions concerning the final drafting of certain articles.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 9

Paragraph 2

3. Paragraph 2 of article 9 provides for the right of the receiving State to withdraw at any time the consent already given to one of its citizens to be appointed as diplomatic courier of another State. This may hinder the courier in the performance of his official functions, particularly in the case of abuse of this right by the receiving State. Since the right of States to dispatch diplomatic bags could be violated in this way, an additional provision should be inserted stipulating that the given consent may not be withdrawn in the course of the performance of the official functions of the diplomatic courier.

Article 25

4. In its first reply to the Secretary-General, Yugoslavia stressed the need to define more precisely the contents of the diplomatic bag and to determine the limits of its weight.² It is quite understandable that it will not be possible to determine the maximum weight of the diplomatic bag in the future convention since it depends on a number of factors, *inter alia* on the needs and the size of a particular diplomatic mission. However, faced in practice with the problem arising from the considerable volume and weight of the diplomatic bag, Yugoslavia considers it necessary to regulate this matter in an appropriate way. In this respect, a method analogous to that of determining the size of the diplomatic mission could be applied (see art. 11 of the 1961 Vienna Convention on Diplomatic Relations) by providing in article 25 of the draft articles for an obligation of States to keep the weight of the diplomatic bag within limits "considered to be reasonable and normal having regard to the size and needs of the particular mission".

Article 28

5. The protection of the diplomatic bag is one of the most sensitive subject-matters of the future convention. It is quite understandable therefore that the Commission has envisaged alternative solutions, whose adoption will depend on the positions of States. In the present-day conditions of highly developed diplomatic communication and frequent cases of abuse of the diplomatic bag, Yugoslavia feels that claims to absolute inviolability of the diplomatic bag are untenable. The solution provided for in the draft articles (which was adopted in para. 3 of art. 35 of the 1963 Vienna Convention on Consular Relations) could also be accepted in the case of the diplomatic bag. Thus, if the competent authorities of the receiving State have serious doubts as regards the contents of the bag, they may request that the bag be opened in their presence by an authorized representative of the sending State and, if this request is refused, that it be returned to its place of origin.

6. However, the intermediate option (subjecting the bag to examination through electronic or other technical devices) involves many risks, including, *inter alia*, the pos-

¹ Yearbook . . . 1982, vol. II (Part One), pp. 244-246, document A/CN.4/356 and Add.1-3.

² *Ibid.*, p. 245, para. 3.

sibility of violation of the confidentiality of documents and official correspondence and of the destruction of documents by scanning. These risks could become even greater, as the evolution of technology has created rather sophisticated means of examination, particularly in the countries with the most advanced technology. Prior to the final adoption of this solution it should be taken into account that it might be very difficult for the less developed countries to obtain scanning devices, a circumstance which could place them in an inequitable position *vis-à-vis* the developed countries. The Yugoslav Government considers that the above-mentioned arguments should be taken into consideration with regard to the solutions provided for in draft article 28. If, nevertheless, both scanning and examination of the diplomatic bag are accepted, as envisaged in the draft, the sending State should be provided with the possibility of deciding whether or not its diplomatic bag could be scanned or opened. If it refuses to accept either request for examination of the contents of the bag, the bag should be returned to its place of origin. This solution is also suggested in view of the rather imprecise wording of article 28, which stipulates that, if such examination through electronic or other technical devices does not satisfy the competent authorities, they may request that the bag be opened.

7. The above-mentioned rights relate to the receiving State. Granting these rights to the transit State (bracketed element) would not be acceptable. In view of the fact that the diplomatic bag only passes through the territory of the transit State, and that it is not intended to be used in its territory, the transit State should not be accorded the same

status as that of the receiving State with respect to the right to examine the bag.

Article 32

8. Taking into account the fact that the status of the diplomatic courier and the bag is regulated by the provisions of the four codification conventions, the question of the relationship between the future convention and these conventions may be raised. It is felt that this relationship should be defined more precisely in article 32, which deals with the relationship between the present articles and the existing bilateral and regional agreements, or in a separate article in the general or final provisions.

Article 33

9. The possibility envisaged in article 33 for a State to make an optional declaration specifying the particular categories of diplomatic couriers and bags to which it will not apply the present articles might not be the best solution. The States not wishing to accept the future convention in its entirety may continue to regulate the status and protection of diplomatic couriers and bags on the basis of the existing conventions on diplomatic and consular relations. If the optional declaration were to be accepted, such a solution would affect the uniform and coherent system of protection of all categories of couriers and bags provided for in the draft articles, the creation of which was the main purpose of codification in this field.

II. Comments and observations received from non-member States

Switzerland

[Original: French]
[19 January 1988]

GENERAL COMMENTS

1. Before commenting on the draft articles as a whole, and then on some of the individual provisions, the Swiss Government would like, first of all, to pay tribute to the Commission and, more especially, to Ambassador Yankov, the Special Rapporteur, for accomplishing a delicate task with rigour and skill. That task was to prepare detailed rules governing the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, which, while innovative in some respects, harmonize with existing instruments, in particular the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States. The Commission's draft reproduces or supplements the relevant provisions of these conventions and combines in one whole the differing requirements of the sending State, the receiving State and the transit State, corresponding to the actual situations in which each State may find itself by turn. The text reflects a

difficult compromise and may be regarded as a useful negotiating basis for a diplomatic codification conference, even though, as far as the Swiss Government is concerned, it has a number of imperfections which should be remedied.

2. Like the majority of countries, Switzerland no longer employs diplomatic couriers. Since the end of the Second World War, its diplomatic bags have been sent overland, by air and even by sea without being entrusted to a diplomatic courier. This is why the Swiss Government, in its comments on the topic in 1979,¹ expressed the view that the provisions of the 1961 Vienna Convention, if properly implemented, were sufficient and gave the diplomatic courier adequate protection in cases where States employed a courier. This opinion is still altogether valid today, when recourse to the diplomatic courier has become even less frequent. The preparation of a convention on the status of the courier does not seem to be a priority matter, in the opinion of the Swiss Government. However, the possibility that States might wish to reintroduce the institution of the diplomatic courier in the event of a conflict or a crisis

¹ *Yearbook* . . . 1979, vol. II (Part One), pp. 224-225, document A/CN.4/321 and Add.1-7.

in international relations cannot be ruled out. This being so, it is advisable to afford strengthened legal protection to the diplomatic courier in order to enable him to fulfil his mission without impediment, since in the last resort he is the guarantor of the freedom of communication between the sending State and its diplomatic or consular representatives abroad.

3. The extent to which the diplomatic bag should enjoy protection is doubtless the major problem to be decided. Potential abuse, whether or not associated with international terrorism, makes it necessary for the international community to consider whether the absolute inviolability which the diplomatic bag enjoys under the terms of the 1961 Vienna Convention can be maintained today. In this respect, the Swiss Government welcomes the efforts of the Commission to achieve a balance between opposing interests, namely the concern of the sending State that the content of the diplomatic bag should remain confidential, inasmuch as it contains only documents or articles intended exclusively for official use, and the concern of the receiving or transit State to preserve security in its territory.

4. At the regional level, the Council of Europe has dealt with the question and the Committee of Experts on Public International Law has sought to ascertain, on the basis of existing law; to what extent the diplomatic bag might be subject to inspection. The discussion revealed the difficulty of the subject-matter.

5. The Swiss Government is of the opinion that the work of the Commission should, in the final analysis, facilitate the introduction of a uniform régime governing the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. For the customs, postal and security services in particular, the value and effectiveness of a new convention will depend on the extent to which it simplifies and makes uniform the rules already established. The absence of a provision to regulate expressly the relationship between the draft articles and the four conventions mentioned earlier, together with the possibility for each State, as provided for in article 33, to make a written declaration specifying any category of diplomatic courier and diplomatic bag to which it will not apply the future convention, may lead to a plurality of treaty-based régimes.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 3

Paragraph 1

6. In defining some of the terms used in the draft, the Commission has been guided by the terms in the 1961 Vienna Convention. This approach could give rise to some confusion, in particular when a bag is sent by or to a consular post. To preclude any ambiguity, the Swiss Government proposes that the terms "diplomatic courier" and "diplomatic bag" in subparagraphs (1) and (2) of paragraph 1 should be replaced by "official courier" and "official bag". It further notes that the diplomatic bag is defined not simply by subparagraph 2 of paragraph 1 of this article but also by articles 24 and 25 of the draft. This would seem to indicate that the methodology adopted might require review.

Articles 11 and 12

7. Although the draft articles regulate the termination of the functions of the diplomatic courier (art. 11), they say nothing about the start of those functions. The Swiss Government does not interpret this absence of provisions as an omission. It is of the view that the diplomatic courier is recognized as such as soon as he becomes the bearer of official documents attesting to his status. This notwithstanding, and to the extent that the circumstances so authorize, of course, the notification of the commencement of the functions of the diplomatic courier would help to preclude the situation in which the diplomatic courier would find himself if he were declared *persona non grata* upon arrival in the territory of the receiving State and, as a result, prevented from exercising fully his functions as described in article 10.

Article 17

Paragraph 1

8. Article 17, paragraph 1, lays down the principle of the inviolability of the temporary accommodation of the diplomatic courier. This is not, of course, the first time that accommodation which is not permanent has been accorded this privilege. Thus, under the terms of article 30 of the 1969 Convention on Special Missions, the private accommodation of the members of the special mission enjoys the same inviolability and protection as the premises of the special mission. The comparison stops there, however, since the duration of a special mission may extend over months, even years, and thus justify the treatment accorded to the private accommodation of the members of the special mission, but the same is not true of the situation of the diplomatic courier. The latter's stay in the receiving State or transit State is by definition temporary, if not transitory. In the majority of cases, it would last one day or two. It is therefore important that article 17, paragraph 3, which authorizes in certain circumstances the inspection or search of the temporary accommodation, should not be weakened. There is no reason to make a sanctuary of the temporary accommodation (often a hotel room) of the diplomatic courier.

Paragraph 2

9. Inasmuch as the stay of the diplomatic courier in the receiving State or transit State is generally rather brief, paragraph 2 is likely to give rise to administrative problems of a more troublesome nature than its purpose justifies. This paragraph should be deleted.

Article 18

10. In the view of the Swiss Government, it is necessary for the diplomatic courier to enjoy immunity from criminal, civil and administrative jurisdiction in respect of the acts performed in the exercise of his functions, just as immunity is conferred on the administrative and technical staff of the diplomatic mission, in accordance with article 37, paragraph 2, of the 1961 Vienna Convention. After all, the functions of the diplomatic courier are no less important or confidential than those of the administrative and technical staff of an embassy.

Article 23

11. Article 23 regulates in theory the situation in which the captain of a commercial aircraft is entrusted with the diplomatic bag of the State to which the airline company belongs. As the Swiss Government observed in its previous comments,² the diplomatic bags of other States must therefore be sent as air freight and are treated as such upon departure and arrival. In order to avoid the delays that generally result from such a situation, the Swiss Government suggests that draft article 26 should be supplemented to the effect that the diplomatic bag, when sent as air freight, should be forwarded as swiftly as possible and delivered under the best possible conditions to the representative of the mission.

Articles 24 and 25

12. The Swiss Government suggests the addition of a paragraph which would provide that the volume or size of the diplomatic bag should be of reasonable dimensions, proportional to the importance of the mission, consular post or delegation of the sending State. This would reinforce the principle laid down in article 25, paragraph 1, that the diplomatic bag may contain only official correspondence, and documents or articles intended exclusively for official use.

Article 28

13. The need to reconcile conflicting requirements, namely the concern of the sending State to preserve the confidentiality of the correspondence and the desire of the receiving State that security on its territory should not be jeopardized, made the Commission's task particularly difficult. It is time to deal with this question at the universal level. A number of incidents in recent years have shown that the diplomatic bag does not always contain only official correspondence, or documents or articles intended exclusively for official use. In such circumstances the receiving State has at times felt constrained to question the principle of the inviolability of the diplomatic bag.

14. Without being an advocate of absolute inviolability, the Swiss Government nevertheless considers that it is not possible simply to apply to the diplomatic bag the rule contained in the 1963 Vienna Convention, which authorizes the opening of the consular bag if there is serious reason to believe that the bag contains illicit objects. That rule does not provide adequate safeguards for the sending State, since the correspondence exchanged between a diplomatic mission and the Ministry of Foreign Affairs of the sending State is generally of far greater importance than that sent by or to a consular post. This is why there should be very strict requirements governing any examination of the diplomatic bag. In this respect, the Swiss Government draws attention to the opinion which the Committee of Experts on Public International Law of the Council of Europe prepared for the Group of Ministers' Counsellors on Terrorism in which a majority of experts stated the circumstances in which a diplomatic bag could be examined without a breach of the confidentiality of the diplomatic documents or objects it contains.³

15. For its part, the Swiss Government would repeat here that it does not consider it to be contrary to the 1961 Vienna Convention to subject a diplomatic bag sent by air to a metal detector for security purposes. In fact, it would be illusory to believe that, today, the captain of an aircraft would be willing to transport a package without subjecting it to some form of control.

16. On the basis of these considerations, the Swiss Government is of the view that examining the diplomatic bag by means of X-rays or other detectors capable of breaching the confidentiality of the correspondence should, like the opening of the bag, be permitted only if the competent authorities of the receiving State, and possibly of the transit State, have serious reason to believe that the bag contains objects which may endanger the safety or security of persons and installations and only if the examination or, if necessary, the opening, is carried out by or in the presence of an authorized representative of the sending State.

² *Ibid.*

³ European Committee on Legal Co-operation, document CDCJ (87) 39, Addendum.