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

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

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NOTE

References to multilateral conventions mentioned in the present report are given in the note in document A/CN.4/409 and Add.1-5 (see p. 125 above).

Introduction

1. At its thirty-eighth session, in 1986, the International Law Commission completed the first reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.¹ The consideration of this topic began at the thirtieth session of the Commission, in 1978, with the examination of the report of the Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.²

2. Also at its thirty-eighth session, the Commission decided, at its 1980th meeting, on 2 July 1986, in accordance with articles 16 and 21 of its statute, to transmit the draft articles provisionally adopted on first reading, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General not later than 1 January 1988.³ The Commission emphasized the importance of this deadline in its report on the thirty-ninth session.⁴

3. The General Assembly, in paragraph 9 of its resolution 41/81 of 3 December 1986, urged Governments

to give full attention to the request of the International Law Commission, transmitted through the Secretary-General, for comments and observations on the draft articles . . . on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, adopted on first reading by the Commission.

¹ *Yearbook . . . 1986*, vol. II (Part Two), pp. 24 *et seq.* The draft articles are also reproduced in document A/CN.4/409 and Add.1-5 (see p. 125 above).

² The report of the Working Group (A/CN.4/L.285) is reproduced in the Commission's report on its thirtieth session (*Yearbook . . . 1978*, vol. II (Part Two)), pp. 138 *et seq.*, paras. 137-144. For further details on the consideration of the topic by the Commission up to 1986, see:

(a) The reports of the Commission: (i) on its thirty-first session, *Yearbook . . . 1979*, vol. II (Part Two), pp. 170 *et seq.*, chap. VI; (ii) on its thirty-second session, *Yearbook . . . 1980*, vol. II (Part Two), pp. 162 *et seq.*, chap. VIII; (iii) on its thirty-third session, *Yearbook . . . 1981*, vol. II (Part Two), pp. 159 *et seq.*, chap. VII; (iv) on its thirty-fourth session, *Yearbook . . . 1982*, vol. II (Part Two), pp. 112 *et seq.*, chap. VI; (v) on its thirty-fifth session, *Yearbook . . . 1983*, vol. II (Part Two), pp. 44 *et seq.*, chap. V; (vi) on its thirty-sixth session, *Yearbook . . . 1984*, vol. II (Part Two), pp. 18 *et seq.*, chap. III; (vii) on its thirty-seventh session, *Yearbook . . . 1985*, vol. II (Part Two), pp. 28 *et seq.*, chap. IV; (viii) on its thirty-eighth session, *Yearbook . . . 1986*, vol. II (Part Two), pp. 23 *et seq.*, chap. III.

(b) The previous reports of the Special Rapporteur: (i) preliminary report, *Yearbook . . . 1980*, vol. II (Part One), p. 231, document A/CN.4/335; (ii) second report, *Yearbook . . . 1981*, vol. II (Part One), p. 151, document A/CN.4/347 and Add.1 and 2; (iii) third report, *Yearbook . . . 1982*, vol. II (Part One), p. 247, document A/CN.4/359 and Add.1; (iv) fourth report, *Yearbook . . . 1983*, vol. II (Part One), p. 62, document A/CN.4/374 and Add.1-4; (v) fifth report, *Yearbook . . . 1984*, vol. II (Part One), p. 72, document A/CN.4/382; (vi) sixth report, *Yearbook . . . 1985*, vol. II (Part One), p. 49, document A/CN.4/390; (vii) seventh report, *Yearbook . . . 1986*, vol. II (Part One), p. 39, document A/CN.4/400.

³ *Yearbook . . . 1986*, vol. II (Part Two), p. 24, para. 32.

⁴ *Yearbook . . . 1987*, vol. II (Part Two), p. 53, para. 223.

4. In paragraph 10 of its resolution 42/156 of 7 December 1987, the General Assembly again urged Governments "to give full attention to the request of the International Law Commission, transmitted through the Secretary-General" by letter dated 13 February 1987, inviting them to submit their comments and observations before 1 January 1988 on the draft articles adopted on first reading by the Commission.

5. At the time the present report was prepared, written comments and observations had been submitted by 26 States.⁵

6. In addition to the written comments and observations, representatives expressed their views on the set of draft articles as a whole and on specific draft articles in the debates that took place in the Sixth Committee of the General Assembly at the forty-first session, in 1986,⁶ and the forty-second session, in 1987.⁷

7. Thus, the Commission has at its disposal a substantial body of written and oral comments and observations submitted by Governments which provide the grounds for proceeding to the second reading of the draft articles on the topic.

8. The comments and observations may be summarized in three main categories:

(a) General views on the practical significance of the draft articles and the approach to be applied in their elaboration;

(b) Comments and observations on substantive matters relating to individual draft articles;

(c) Drafting proposals.

9. In the present report the Special Rapporteur intends to deal with all the above-mentioned categories of comments, observations and concrete proposals in a systematic manner. The first category of comments, relating to substantive and methodological issues, will be examined in section I, "General observations", while the other two categories will be considered in section II in connection with the relevant draft articles. The main objective of this study, at the present stage, will be to offer possible solutions to some substantive issues on which differing views still exist. It is hoped that the revised texts to be advanced, in the light of the comments and observations, including drafting proposals, may offer better prospects for improving the draft articles in the course of the second reading.

⁵ These comments and observations, as well as those subsequently received from the Governments of three other States, are reproduced in document A/CN.4/409 and Add.1-5 (see p. 125 above).

⁶ See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-first session of the General Assembly" (A/CN.4/L.410), sect. C.

⁷ See "Topical summary . . ." (A/CN.4/L.420), sect. F.3.

I. General observations

A. Purpose of the draft articles and methodological questions

10. At the time when the Commission is undertaking the second reading of the draft articles on the topic, it might be appropriate to indicate some methodological problems relating to the purpose of the draft and the comprehensive approach applied in its elaboration. These problems have been raised on several occasions in the Commission and reflected in some comments and observations submitted by Governments.

11. The main purpose of the elaboration of the present draft articles, as enunciated by the Commission, has been the establishment of a coherent and, in so far as possible, uniform régime governing the status of all kinds of couriers and bags, based on 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 in Their Relations with International Organizations of a Universal Character. This would mean, first, to consolidate, harmonize and unify the existing rules and, secondly, to develop specific and more precise rules for situations not fully covered by those conventions, in order to facilitate the normal functioning of official communications, ensuring the confidentiality of the content of the bag and preventing its abuse. The emphasis has always been placed on the practical aspects of the régime to be established.

12. The necessity of such a régime and its practical significance have been acknowledged in the debate on this topic held in the Sixth Committee of the General Assembly⁸ and reiterated by several Governments in their comments and observations.⁹

13. At the same time, it should be pointed out that reservations and misgivings as to the usefulness of elaborating a set of draft articles on the topic have also been voiced during the debates held in the Sixth Committee¹⁰ and expressed in the written comments and observations of some States.¹¹ It has been maintained that the existing conventions cover adequately the relevant international rules concerning diplomatic and consular couriers and bags.

⁸ For the views expressed in the Sixth Committee, see "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-seventh session of the General Assembly" (A/CN.4/L.352), paras. 186, 187 and 189; "Topical summary . . . thirty-eighth session of the General Assembly" (A/CN.4/L.369), paras. 303-304; "Topical summary . . . forty-first session of the General Assembly" (A/CN.4/L.410), paras. 251, 252, 257, 266 and 267; "Topical summary . . . forty-second session of the General Assembly" (A/CN.4/L.420), paras. 243 and 245.

⁹ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of: Austria, para. 2; Bulgaria, paras. 2-3; Czechoslovakia, para. 1; German Democratic Republic, para. 4; Germany, Federal Republic of, paras. 1-2; Spain, paras. 1-2; USSR, para. 1; Yugoslavia, para. 1; Switzerland, para. 1.

¹⁰ See "Topical summary . . ." (A/CN.4/L.352), para. 188; (A/CN.4/369), para. 305; (A/CN.4/L.410), paras. 261-262; (A/CN.4/L.420), para. 244.

¹¹ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of: Australia, paras. 1-2; Belgium, para. 1; Canada, para. 1; Netherlands, paras. 1-2; United Kingdom, paras. 1-2.

14. The Special Rapporteur has deemed it appropriate to refer to the views expressed on the practical significance of the draft articles, not only in order to provide fair and objective information about the attitudes of Governments on the draft under consideration but also to give the opportunity to the Commission, when embarking on the second reading, to endeavour to respond to the critical remarks relating to substantive matters.

15. It might be appropriate, at this stage, to ascertain the general orientation of the work of the Commission on the topic under consideration, which brings up some methodological questions that need to be identified. In this connection, two fundamental aspects of the approach to be applied in the elaboration of the draft articles come to mind, namely: (a) the extent to which a comprehensive and uniform approach could be carried out, and (b) the modalities for implementation of the functional approach with regard to the status of the courier and bag, which is closely linked with the question of how to strike a balance between the interests of the sending State in ensuring the confidentiality of the content of the bag and the security and other interests of the receiving or transit State. These methodological problems have to be borne in mind while reviewing the draft articles adopted on first reading, taking into consideration the comments made by Governments. It is also proposed to address briefly the question of the form of the draft.

B. The concept of a comprehensive approach

16. The comprehensive approach with the view of elaborating a coherent and, in so far as possible, uniform régime governing the status of all kinds of couriers and bags has been the subject of consideration since the initial stage of the Commission's work on this topic.

17. It may be recalled that in his preliminary report the Special Rapporteur, on the basis of the comprehensive method of equal treatment for all kinds of couriers and bags in the four codification conventions, had already proposed the global concept of "official courier and official bag". When requesting the guidance of the Commission on the scope and contents of the future work on this topic, he pointed out that:

It is hoped that such a comprehensive approach would reflect more adequately the significant developments that have taken place since the 1961 Vienna Convention. Diplomatic law in all its facets has acquired new forms and new dimensions because of the ever-increasing dynamics of international relations in which States and international organizations are involved in very active contacts through various means, including official couriers and official bags. In view of these developments, the international regulation of the communications between various subjects of international law and, on different occasions, through official couriers and official bags has been faced substantially with the same kind of problems and has to respond to similar challenges and practical requirements, whether the courier is diplomatic, consular or is sent to a special mission or permanent mission of a State or an international organization. The increasing number of violations of the diplomatic law, some of which have raised public concern, also warrant such a comprehensive and coherent regulation of the status of all types of official couriers and official bags. In this way, all means of communication for official

purposes through official couriers and bags would enjoy the same degree of international legal protection.¹²

18. The Commission, recognizing the practical significance of the topic, pointed out "the need for effective protection of the diplomatic courier and the diplomatic bag and the need for prevention of possible abuses".¹³ It was further agreed that

in the work of codification and progressive development of international law on the topic under consideration, special emphasis should be placed on the application of an empirical and pragmatic method, aimed at securing a proper balance between provisions containing concrete practical rules and provisions containing general rules determining the status of the courier and the bag.¹⁴

19. After extensive discussion on the proposed concept of "official courier and official bag", the Commission, without questioning in principle the relevance of the method of comprehensive and uniform treatment of the various kinds of couriers and bags, stated that:

. . . a comprehensive approach leading to a coherent set of draft articles should be applied with great caution, taking into consideration the possible reservations of States. The prevailing view was that, while the draft articles should in principle cover all types of official couriers and official bags, the terms "diplomatic courier" and "diplomatic bag" should be maintained. It was also noted that the codification effort should be basically confined to communications between States. It was assumed by several speakers that, while retaining the concepts of diplomatic courier and diplomatic bag, an appropriate solution might be found through an assimilation formula . . . The main objective should be to achieve as much coherence and uniformity as possible in the legal protection of all types of official couriers and official bags, without necessarily introducing new concepts which might not be susceptible of wide acceptance by States.¹⁵

20. As it was pointed out by the Commission in the commentary to article 1:

This comprehensive approach rests on the common denominator provided by the relevant provisions on the treatment of the diplomatic courier and the diplomatic bag contained in the multilateral conventions in the field of diplomatic law, which constitute the legal basis for the uniform treatment of the various couriers and bags.¹⁶

21. With regard to the status of all kinds of couriers, there is a basic identity of treatment. State practice, as evidenced by national legislation and international agreements, in particular bilateral consular conventions, provides unambiguous evidence of the rule of personal inviolability of consular couriers in the same way as that of diplomatic and other couriers. Most of the bilateral consular conventions and national legislations grant the same rights, privileges and immunities to consular couriers as those granted to diplomatic couriers, which include, first of all, personal inviolability.¹⁷

22. The analytical survey of State practice undertaken by the Special Rapporteur in his fourth report on more than a hundred bilateral consular conventions and a substantial body of national rules and regulations has fully

substantiated this assertion.¹⁸ The uniformity in the treatment of diplomatic couriers and consular couriers has acquired general support by States and thus it may be considered as a well-established rule in conventional and customary law.

23. As a matter of fact, the identity of the legal status of a diplomatic courier and that of a consular courier recognized by State practice was confirmed during the debate at the United Nations Conference on Consular Relations and embodied in article 35, paragraph 5, of the Vienna Convention on Consular Relations, adopted by that Conference in 1963. It may be recalled that there was strong opposition at the Conference to some attempts to accord to the consular courier more limited privileges and immunities than those accorded to the diplomatic courier; but, as the Special Rapporteur pointed out in his second report, the concept of double treatment was rejected by the Conference on the grounds that "it was essential for couriers to receive complete inviolability and not to have the limited inviolability given to consular officials".¹⁹

24. The relevant rules governing the status of couriers under the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States were modelled on article 27, paragraph 5, of the 1961 Vienna Convention on Diplomatic Relations. State practice has proved that these rules were applied even before the adoption of the above-mentioned Conventions of 1969 and 1975.

25. Thus, it could be concluded that there are substantial grounds in contemporary diplomatic and consular law for a coherent and uniform régime relating to the status of all kinds of couriers, particularly regarding their personal inviolability.

26. As regards the legal status of bags used for official communications, particularly the provisions relating to inviolability, some differences in the standards of treatment are apparent. As is well known, the 1961 Vienna Convention on Diplomatic Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States adopt the principle of complete inviolability of the bag. Only the 1963 Vienna Convention on Consular Relations, while recognizing this general rule, according to which the consular bag shall neither be opened nor detained, admits, however, the opening of the bag under certain conditions. This particular treatment of the consular bag, provided for in article 35, paragraph 3, of the 1963 Vienna Convention, constitutes an exception to the régime established by the other codification conventions.

27. The existence of a different standard for treating the consular bag under the 1963 Vienna Convention cannot be overlooked, although, as has been pointed out, most of the bilateral consular conventions, concluded before and after the 1963 Vienna Convention entered into force, stipulate that the consular bag is inviolable and may be neither opened nor detained.²⁰ However, there are some

¹² Document A/CN.4/335 (see footnote 2 (b) (i) above), para. 62.

¹³ *Yearbook . . . 1980*, vol. II (Part Two), p. 164, para. 163.

¹⁴ *Ibid.*, p. 164, para. 165.

¹⁵ *Ibid.*, p. 164, para. 167.

¹⁶ *Yearbook . . . 1983*, vol. II (Part Two), p. 53, para. (1) of the commentary.

¹⁷ See the information received from Governments, *Yearbook . . . 1982*, vol. II (Part One), p. 231, document A/CN.4/356 and Add.1-3.

¹⁸ Document A/CN.4/374 and Add.1-4 (see footnote 2 (b) (iv) above), paras. 47-67.

¹⁹ Document A/CN.4/347 and Add.1-2 (see footnote 2 (b) (ii) above), para. 34.

²⁰ See the fourth report of the Special Rapporteur, document A/CN.4/374 and Add.1-4 (footnote 2 (b) (iv) above), footnote 286.

bilateral consular agreements which follow the provisions of article 35, paragraph 3, of that Convention.²¹

28. The question of the inviolability of diplomatic, consular and other bags will be considered in connection with article 28. It has been broached here only in order to indicate in general terms the parameters of the comprehensive and uniform approach applied to all kinds of couriers and bags, taking into account the relevant provisions of the four codification conventions.

C. The concept of functional necessity and the proper balance between the interests of the sending State, the receiving State and the transit State

29. The other methodological problem relating to the general orientation to be followed in the elaboration of the draft articles on the status of the diplomatic courier and the diplomatic bag relates to the implementation of the functional approach. The Special Rapporteur deems it appropriate, at this stage, to reiterate the significance attached to functional necessity as the basic factor in determining the status of all kinds of couriers and bags.

30. The functional approach should be considered as a method for identifying all the prerequisites for the efficient performance of the duties of the courier and the attainment of the purpose of the bag. The courier is an official of the sending State whose functions are the custody, transportation and safe delivery of the bag. The bag is an important tool of communication used by States to maintain contacts with or between their missions abroad. The contents of the bag, consisting of confidential materials and articles for official use, should therefore be protected and should be accorded the necessary facilities for speedy delivery to their destination. Equal protection should be accorded to the courier in the discharge of his duties, as a person entrusted with an official mission who has access to confidential documents. Thus the functional necessity should be invoked not only as a restraint in respect of facilities, privileges and immunities but also as an indispensable condition for the efficient performance of the official functions of the diplomatic courier and the diplomatic bag. The problem is not whether the diplomatic courier in his status is assimilated to any category of members of the staff of a diplomatic mission, consular post or other mission of the sending State but, rather, to what extent the facilities, privileges and immunities accorded to him are instrumental to the fulfilment of his official task. This has been the guiding consideration in the process of the elaboration of the present draft articles. It is submitted that such an all-embracing concept should lead the work of the Commission in its further attempts to improve the draft.

31. The application of the functional approach in determining the adequate means of legal protection to be accorded to the courier and the bag in the performance of their official functions would provide the basis for a proper balance between the rights and duties of the sending State, the receiving State and the transit State. This fundamental consideration should also serve as a guiding rule in the further examination of the draft articles.

D. The form of the draft

32. At this stage, when the Commission embarks on the second reading of the draft articles, it might be appropriate to bring up the question of the final form which they should take.

33. It may be pointed out that, as a general rule, in the practice followed so far by the Commission, such issues have always been left for consideration at the time of the completion of the second reading. The final decision on this matter is within the competence of the General Assembly. Therefore, the Commission is entitled only to submit a proposal to the Sixth Committee.

34. The General Assembly, in its resolution 33/140 of 19 December 1978, while appreciating the initiation of the work on this topic and indicating that it "could constitute a further development of international diplomatic law", decided in paragraph 5 that the Assembly would give further consideration to this question "when the International Law Commission [submitted] to the Assembly the results of its work on the possible elaboration of an appropriate legal instrument on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier".

35. In the course of the debates in the Sixth Committee, views on the form of the draft have been expressed on some occasions. At an early stage of the work of the Commission "a number of representatives supported the view that the draft should take the form of a binding instrument, preferably an international convention", but other representatives thought that the final product of the Commission's work on the topic could be "a protocol that did not depart from the relevant conventions adopted under the auspices of the United Nations".²² However, the general opinion was in favour of deferring the decision on the final form until a later stage.

36. The idea of a convention on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier seems to have acquired wider support when the whole set of draft articles was considered during the debates in the Sixth Committee in 1986 and 1987.²³ It was also reflected in the replies of some Governments.²⁴

37. If the idea of an independent convention prevails, its relationship with the codification conventions should be determined in such a way that it keeps a close link with them while being, legally, separate from them.

38. The Special Rapporteur would favour the adoption of a convention as a distinct legal instrument keeping an appropriate legal relationship with the above-mentioned codification conventions.

²² Document A/CN.4/382 (see footnote 2 (b) (v) above), para. 14.

²³ See "Topical summary . . ." (A/CN.4/L.410), paras. 251, 253 and 267; (A/CN.4/L.420), para. 243.

²⁴ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of: Bulgaria, para. 3; Czechoslovakia, para. 1; German Democratic Republic, para. 5; USSR, para. 1; Venezuela, para. 1; Yugoslavia, para. 1.

²¹ *Ibid.*, footnotes 287 and 288.

II. Consideration of draft articles

A. 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.

(a) Comments and observations

39. The only two comments made on this article, which are identical, propose the deletion of the words "or with each other". In one of the comments it is stated that "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".²⁵

40. In the other comment it is pointed out that "this phrase goes far beyond the functional needs and may give rise to abuse". In addition it is maintained that on practical grounds the phrase "serves no useful purpose".²⁶

41. The concept of the *inter se* character of official communications as an additional element was advanced by the Special Rapporteur at an early stage of the study of the topic, in his second report, in 1981.²⁷ The suggestion was motivated by two main considerations of a general, methodological and practical character. First, the Special Rapporteur maintained that the protection of communications between the missions, consular posts and delegations in one receiving State or in several receiving States was an implementation of the comprehensive approach to the scope of the draft articles. Secondly, he had in mind the legislative history of article 27 of the 1961 Vienna Convention,²⁸ particularly the discussions and comments on the words "wherever situated", referring to the obligation of the receiving State to "permit and protect free communication on the part of the mission for all official purposes . . . with the Government and the other missions and consulates of the sending States, wherever situated". This formulation gives a wide scope to the concept of "official communications". Such an approach was advanced during the debate in the Commission at its ninth session, in 1957, on the draft articles on diplomatic intercourse and immunities, when a suggestion was made for the inclusion in the draft of the words "wherever situated", which were later incorporated in article 27, paragraph 1, of the 1961 Vienna Convention. In the commentary to this article (formerly article 21 and then article 25), the Commission explained that the freedom of communication was to be "accorded for all official purposes" and that

in communicating with its Government and the other missions and consulates of that Government, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher.

The Commission further went on to state that

communications with embassies and consulates in other countries no longer always pass through the Ministry for Foreign Affairs in the sending State; often use is made of certain intermediate posts from which dispatches are carried to the various capitals to which they are addressed.

42. Having in mind the above considerations and the present practice of many States, especially where several missions and consular posts are situated in one receiving State, and when for pragmatic and financial convenience communications are transmitted through diplomatic bags also between missions in neighbouring States, the Special Rapporteur proposed to retain the words "wherever situated" and consequently the formulation of the provision for communication between the missions of the sending States. This broader concept of official communications for all official purposes was elaborated in detail in the second report²⁹ and followed up later.³⁰

43. In addition, it should be recalled that the words "wherever situated" and the extension of the freedom of communications to include communications between various missions of the sending State were adopted by the 1961 Vienna Convention on Diplomatic Relations (art. 27, para. 1), the 1963 Vienna Convention on Consular Relations (art. 35, para. 1), the 1969 Convention on Special Missions (art. 28, para. 1) and the 1975 Vienna Convention on the Representation of States (art. 27, para. 1, art. 57, para. 1, and art. 72).

44. The above-mentioned formulations were extensively considered by the Commission. The results of its deliberations are reflected in the commentary to article 1, relating to some aspects of the comprehensive approach to the question of the scope of the draft articles. The commentary contains specific reference to the words "wherever situated" and "or with each other" embodied in draft article 1 as provisionally adopted on first reading.³¹ They are self-explanatory in substance.

²⁹ See footnote 27 above.

³⁰ See the reports of the Special Rapporteur (footnote 2 (b) (iii)-(v) above), documents A/CN.4/359 and Add.1 (paras. 13-18), A/CN.4/374 and Add.1-4 (para. 18) and A/CN.4/382 (paras. 18-19).

³¹ Paragraph (3) of the commentary to article 1 reads:

"(3) The drafting of the article deliberately brings out the two-way character of communications between the sending State and its missions, consular posts or delegations, as well as the *inter se* character of communications between those missions, consular posts or delegations."

Paragraph (4) goes on to explain that:

"(4) There was some discussion as to the inclusion of the words 'wherever situated'. While some members felt that those words could be deleted without affecting the meaning of the provision, the majority was of the view that their inclusion brought out in clearer

²⁵ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of the Nordic countries, para. 3.

²⁶ *Ibid.*, comments of Greece, para. 3.

²⁷ Document A/CN.4/347 and Add.1 and 2 (see footnote 2 (b) (ii) above).

²⁸ For the legislative history of that article and references to the comments cited in the present paragraph, see the second report of the Special Rapporteur (*ibid.*, paras. 20-27).

(b) Proposed new text

45. Assuming that the scope of the draft articles will remain as at present and in the light of the above considerations of a methodological and practical character, the Special Rapporteur would submit that the text of draft article 1 should, in principle, be retained as provisionally adopted by the Commission. The acceptance of the proposed amendments, moreover, would constitute a certain departure from the relevant provisions of the four codification conventions. It is also obvious that the scope of article 1 *ratione loci* and *ratione personae* would have to be confined to communications between the sending State and its missions in a given receiving State. However, if the considerations in favour of simplifying the text prevail, it should be indicated in the commentary that this should not affect the application of the comprehensive approach and therefore should not preclude the possibility of maintaining official communications by means of couriers or bags between the missions, consular posts and delegations of a sending State.

46. The new paragraph that the Special Rapporteur would recommend adding to article 1 in the event of the Commission's deciding to enlarge the scope of the draft articles, as discussed below, is presented in connection with the examination of article 2 (see para. 60 below).

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.

(a) Comments and observations

47. Article 2 did not give rise to many specific comments of a substantive or drafting character. However, there were two general ones which deserve special attention, since they evoked some problems of principle leading in opposite directions with regard to the scope of the draft.

48. In the first case, one Government suggests confining the scope of the draft articles to diplomatic and consular couriers and bags.³² In their view, "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."

terms the two-way and *inter se* character of the official communications referred to in the article. For instance, they made absolutely clear that the missions, consular posts or delegations of the receiving State whose official communications with each other were covered by the draft were not only those situated in the same receiving State, but also those in different receiving States." (*Yearbook* . . . 1983, vol. II (Part Two), p. 54.)

³² See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of the United Kingdom, para. 6.

49. The same Government further argues that they "do not see that article 2 (which appears to enunciate a truism) fulfils any concrete legal function within the 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".

50. In the second case, one Government suggests, on the contrary, that the draft articles should "cover the status of bags and couriers of international organizations".³³ The comment of this Government contains a critical remark to the effect that "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". It considers that "the Commission could have also taken more fully into account emerging practices and needs" and therefore "that the articles could, for example, cover the status of bags and couriers of international organizations".

51. Proposals to this effect have been made on other occasions, when draft articles 1 and 2 were discussed.³⁴ There were suggestions that special provisions should be included in the draft to cover the couriers and bags not only of international organizations but also of national liberation movements recognized by the United Nations.³⁵

52. The above comments and suggestions deserve careful consideration, since they should be dealt with at this stage. It may be recalled that in the commentary to article 2, the Commission pointed out that the question of couriers and bags of international organizations or other entities such as national liberation movements could be examined at a later stage.³⁶ In the view of the Special Rapporteur, there are two main problems of substance which require a final decision by the Commission: (a) whether the draft articles should be *confined* only to couriers and bags of diplomatic missions and consular posts, or even only to diplomatic missions, as suggested by one Government in its written comments and observations;³⁷ and (b) whether the scope of the draft articles should be *extended* to encompass the legal status of the couriers and bags of international organizations and other non-State entities.

53. Having in mind the fact that the comprehensive approach leading to a coherent and uniform régime governing the legal status of all kinds of couriers and bags employed for official communications has acquired wide support, evidenced by the discussions in the Commission and in the Sixth Committee, it would not be advisable to restrict the scope of the present draft articles. It has been generally submitted that the establishment of such a régime should be the main objective of the codification work of the Com-

³³ *Ibid.*, comments of Brazil, para. 1.

³⁴ See the reports of the Special Rapporteur (see footnote 2 (b) (i)-(iii) above): documents A/CN.4/335 (paras. 45-46), A/CN.4/347 and Add.1 and 2 (paras. 47-48), A/CN.4/359 and Add.1 (paras. 17-18); and the reports of the Commission: *Yearbook* . . . 1980, vol. II (Part Two), p. 163, para. 153; *Yearbook* . . . 1981, vol. II (Part Two), p. 160, paras. 235-236; *Yearbook* . . . 1982, vol. II (Part Two), pp. 115-116, paras. 212, 213, 215 and 219.

³⁵ *Yearbook* . . . 1982, vol. II (Part Two), pp. 115-116, paras. 216 and 219.

³⁶ *Yearbook* . . . 1983, vol. II (Part Two), p. 54.

³⁷ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of Belgium, para. 4.

mission. As was pointed out in the written comments of one Government, "one of the most important purposes of the articles prepared by the Commission . . . is the creation of a uniform legal régime for all diplomatic couriers and bags".³⁸

54. The Commission was cognizant of the fact that many States were not parties to all of the four codification conventions. But, as was pointed out in the commentary to article 1, the "comprehensive approach rests on the common denominator" provided by these conventions, which "constitute the legal basis for the uniform treatment of the various couriers and bags". It was further pointed out that "there is a basic identity of régime with very few differences between the relevant provisions" of the four conventions.³⁹ The main difference relates to the treatment of the consular bag, which could be adequately accommodated. It is true that the 1961 Vienna Convention and the 1963 Vienna Convention have acquired almost universal participation, while the 1969 Convention entered into force only in 1985, with a relatively limited number of States parties, and the 1975 Vienna Convention has not yet come into force. However, this fact alone should not overshadow the wide use of couriers and bags by international organizations.

55. In the light of the above considerations, the Special Rapporteur submits that the scope of the draft articles should not be confined to diplomatic couriers and bags, or to diplomatic and consular couriers and bags, but should follow the comprehensive approach.

56. In reply to the second question, regarding the possible extension of the scope of the draft articles, it is suggested, for practical reasons, that the problem of international organizations should be examined, leaving aside the question of national liberation movements. First of all, without underestimating in any way the political significance of national liberation movements recognized by the United Nations, their official communications are of a limited practical importance and need not be the subject of legal regulation in an instrument of a general character. On the other hand, international organizations, whose number is impressive, have been involved in intensive activities in various areas of international relations. This is the case in particular with the United Nations, the specialized agencies and other intergovernmental organizations of a universal or regional character. This trend is acquiring an increasing practical importance which has its impact in the field of official communications of international organizations *inter se* and with a large number of States. In many instances, international organizations, particularly the United Nations, have to employ couriers and bags carrying confidential documents.

57. In this connection, it should be recalled that in the 1946 Convention on the Privileges and Immunities of the United Nations and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies there are specific provisions relating to couriers and bags.

58. Thus, article III (Facilities in respect of communications) of the 1946 Convention stipulates, in section 10:

³⁸ *Ibid.*, comments of Brazil, para. 9.

³⁹ *Yearbook . . . 1983*, vol. II (Part Two), p. 53, para. (1) of the commentary.

The United Nations shall have the right to use codes and to dispatch and receive its correspondence by courier or in bags, which shall have the same immunities and privileges as diplomatic couriers and bags.

59. An identical provision is embodied in article IV, section 12, of the 1947 Convention. Similar texts can be found in instruments relating to the legal status, privileges and immunities of other international organizations.

(b) Proposed new text

60. Taking into account these considerations, advanced both in the Commission and in the Sixth Committee, the Special Rapporteur suggests adding a paragraph 2 to article 1, reading:

2. The present articles apply also to the couriers and bags employed for the official communications of an international organization with States or with other international organizations.

61. If this proposal is adopted by the Commission, certain consequential amendments will have to be introduced.

62. First of all, article 2 should be deleted, since it has served as a safeguard clause in respect of couriers and bags employed by international organizations in the event of the draft articles being confined to couriers and bags of States. The practical purpose of this provision was indicated by the Commission in the commentary to article 2, which states that "article 2 safeguards the possibility of a substantially similar legal régime for couriers and bags of international organizations as for those of States".⁴⁰

63. The second eventual result would be the need to amend subparagraphs (1) and (2) of paragraph 1 of article 3 (Use of terms) by adding references, respectively, to the courier and to the bag of international organizations. The exact wording of these amendments will be considered next in connection with article 3.

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

⁴⁰ See footnote 36 above.

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.

(a) Comments and observations

64. The general comments of a substantive nature and the drafting proposals concerning the scope of the terms "diplomatic courier" and "diplomatic bag", defined in paragraph 1 of article 3, have already been touched upon in connection with the consideration of the scope of the draft articles as a whole (see paras. 16-28 and 39-44 above).

65. The Government which advanced the restrictive approach, wishing to confine the draft articles to the status of diplomatic and consular couriers and their corresponding bags, considers it "undesirable to use the terms 'diplomatic courier' and 'diplomatic bag' to embrace also consular bags", and consequently suggests that "the terms to be defined should be 'the courier' and 'the bag'".⁴¹

66. This comment brings up a terminological issue, which has been discussed in the Commission on earlier occasions. As indicated above (see paras. 16-20), the Commis-

sion, after extensive consideration and in pursuing a comprehensive approach leading to a uniform régime of all categories of couriers and bags, declined to adopt the formula "official courier and official bag" proposed by the Special Rapporteur. The Commission considered that the well-established and familiar notions of "diplomatic courier" and "diplomatic bag" should entail a global meaning, comprising all kinds of couriers and bags.

67. The simple denomination "courier" and "bag" in the article on the use of terms and throughout the draft as a whole has advantages and disadvantages. The advantage would be that in article 3, paragraph 1, subparagraphs (1) and (2) respectively, a global definition would employ a neutral denomination of the courier and the bag, specifically identified in subparagraphs (a) to (d) relating to the specific couriers and bags, within the meaning of the four conventions. This consideration may be particularly relevant to the different treatment of the consular bag. The disadvantage might be that: (a) the terms "courier" and "bag" would be lacking an immediate reference to their specific functions in relation to official communications; (b) this would also be a departure from the well-established and generally recognized concepts of "diplomatic courier" and "diplomatic bag". The latter consideration has been emphasized by the Commission in adopting the terms "diplomatic courier" and "diplomatic bag", not only *stricto sensu* within the meaning of the 1961 Vienna Convention but also in respect of the couriers and bags referred to in other codification conventions. This understanding was reiterated explicitly by the Commission in paragraphs (3) and (9) of the commentary to article 3.⁴² Such an approach might entail certain psychological effects which should not be overlooked.

(b) Proposed revised text

68. In the light of the above observations, the Special Rapporteur would not submit to the Commission for consideration a possible new terminology, while expressing some preference for retaining the present notions of "diplomatic courier" and "diplomatic bag".

69. If the Commission agrees with the suggestion to extend the scope of the draft articles to embrace couriers and bags employed by international organizations (see para. 59 above), as envisaged in the proposed new paragraph 2 of article 1, it will be appropriate to amend accordingly paragraphs 1 and 2 of article 3.

70. Thus, the Special Rapporteur suggests adding to paragraph 1 (1) a new subparagraph (e), reading:

(e) a courier employed by an international organization for official communications with States and other international organizations;

71. It is further suggested that a new subparagraph (e) be added to paragraph 1 (2), to read:

(e) a bag of an international organization used for its official communications with States and other international organizations;

⁴¹ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of the United Kingdom, para. 8.

⁴² *Yearbook* . . . 1983, vol. II (Part Two), pp. 55-56.

72. It was deemed appropriate in both instances to allude by way of a brief indication to the official functions of the courier and the bag, respectively, since no reference is made to specific conventions as is the case with subparagraphs (a) to (d).

73. The Special Rapporteur also draws the attention of the Commission to the possible alignment of the terminology used in paragraph 1 (2) of article 3 with that used in article 25, as indicated by the Commission in the commentary to article 25 (see para. 207 below).

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.

(a) Comments and observations

74. The comments of Governments on articles 4, 5 and 6 can be examined together, since their subject-matter relates to general principles of diplomatic law relevant to the functioning of official communications. The other common feature consists in the fact that these articles did not elicit many substantive observations, with the exception of a few general remarks and drafting suggestions.

75. In the view of one Government, articles 4 and 5 are unnecessary, since "their substance appears to be already adequately dealt with by provisions in earlier instruments, such as the 1961 and 1963 Vienna Conventions".⁴³

76. It is true that the three general principles embodied in draft articles 4, 5 and 6 derive from the relevant provisions of the four codification conventions. However, their present wording takes into account the purpose of the exercise, which is the freedom of official communications by couriers and bags. The three articles contain substantive elements particularly relevant to the status of the diplomatic courier and the diplomatic bag, determining in general terms the balance between the rights and obligations of the sending State, the receiving State and the transit State, as well as the non-discrimination and reciprocity in their legal relationship. The general and specific practical significance of these provisions should not be overlooked in a set of draft articles on the status of all categories of couriers and bags used for official communications. As the Commission pointed out in the commentary to article 5:

The object and purpose of the set of draft articles is the establishment of a system fully ensuring the confidentiality of the contents of the diplomatic bag, and its safe arrival at its destination, while guarding against its abuse. All privileges, immunities and facilities accorded either to the courier or to the bag itself have only this end in view and are therefore based on a functional approach.⁴⁴

The principle of non-discrimination and reciprocity has also its specific practical significance in relation to the establishment of a viable and coherent régime governing the status of the diplomatic courier and the diplomatic bag.

77. Turning to specific drafting suggestions, it may be appropriate to deal separately with the individual draft articles.

(b) Drafting proposals

Article 4

78. Article 4 did not elicit any proposed drafting amendments. It is, therefore, suggested that the existing text be retained.

Article 5

79. Several drafting proposals are contained in the written comments and observations from Governments on article 5.

80. Two identical drafting suggestions are made regarding paragraph 2 of article 5. The second sentence of the paragraph, according to which the diplomatic courier "also has the duty not to interfere in the internal affairs of the

⁴³ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of the United Kingdom, para. 5.

⁴⁴ *Yearbook . . . 1983*, vol. II (Part Two), p. 58, para. (1) of the commentary.

receiving State or the transit State, as the case may be", is judged to be "superfluous"⁴⁵ or "superfluous and excessive",⁴⁶ and it is therefore suggested that it be deleted.

81. The Special Rapporteur is of the view that the purpose of this sentence is to make more explicit the duties of the courier not to be involved in any activities which may be prejudicial to the public order or the interests of the receiving or the transit State. This idea is elucidated in the commentary to article 5.⁴⁷

82. However, in the interest of simplicity and brevity, the second sentence could be deleted, it being understood that the duty of the courier to respect the laws and regulations of the receiving or the transit State entails also the obligation not to interfere in any way in the internal affairs of those States.

83. One Government proposes that the title of article 5 should include a reference to "the sovereignty" of the receiving State and the transit State, as well as to their "laws and regulations".⁴⁸

84. Though this amendment is to a certain extent justified, it seems that, for the reasons stated above, it may not be accepted. The reference to "laws and regulations" appears to be sufficient.

85. The same Government proposes that a new 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", should be included in article 5. In the view of that Government, "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."⁴⁹

86. In this connection, it may be recalled that, with a similar idea in mind, namely enhancing measures to prevent practices involving abuses of the diplomatic bag, the Special Rapporteur proposed in his fourth report, in 1983, a provision stipulating the obligation of the sending State to "prosecute and punish any person under its jurisdiction responsible for misuse of the diplomatic bag".⁵⁰ The discussions on this matter in the Commission and the Sixth Committee, however, did not provide enough support. It was considered that such a provision would be excessive and unnecessary.

⁴⁵ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of Belgium, para. 5.

⁴⁶ *Ibid.*, comments of Greece, para. 4.

⁴⁷ *Yearbook . . . 1983*, vol. II (Part Two), pp. 58-59, para. (4) of the commentary.

⁴⁸ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of Thailand, para. 3.

⁴⁹ *Ibid.*, comments of Thailand, para. 4.

⁵⁰ Paragraph 2 of draft article 32 (now article 25), which read:

"2. The sending State shall take appropriate measures to prevent the dispatch through its diplomatic bag of articles other than those referred to in paragraph 1, and shall prosecute and punish any person under its jurisdiction responsible for misuse of the diplomatic bag." (Document A/CN.4/374 and Add.1-4 (see footnote 2 (b) (iv) above), para. 289.)

87. The amendment proposed by one Government to article 5 (see para. 85 above), though motivated by the intention to provide preventive and punitive measures against abuses, may appear superfluous, for it is well established in law and practice that non-compliance with or violation of legal obligations constitute an illicit act which entails responsibility and liability for injury.

88. In the light of these considerations, the Special Rapporteur would submit that since the proposed amendment enunciates an established rule, it may be redundant for the purpose of the present draft articles.

Article 6

89. With regard to article 6, only one comment was made. In the view of one Government, the last part of paragraph 2 (b), beginning with the words "provided that such a modification is not incompatible . . .", should be deleted. The main consideration for the proposed deletion is the restrictive character of this provision, "which limits for no valid reason the contractual freedom of States".⁵¹

90. The object and content of article 6, in particular its paragraph 2, were explained by the Special Rapporteur when introducing the text of this draft article in his second report⁵² and further elaborated by the Commission in the commentary, where it is stated that subparagraph (b) of paragraph 2 has been conceived as a safeguard clause

intended to maintain certain international standards and stability regarding the scope of the facilities, privileges and immunities granted to the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.⁵³

The present text contains three substantive elements: the first is that States may modify among themselves the extent of the facilities, privileges and immunities accorded to their couriers and bags; the second, that those modifications should not be incompatible with the object and purpose of the present draft articles, particularly with the principle of freedom of official communications; and the third, that the modifications agreed by the States involved should not affect the rights and obligations of third States.

91. The Special Rapporteur admits that the wording of paragraph 2 (b) of article 6 is somewhat complex and cumbersome, following too closely article 49 of the 1969 Convention on Special Missions. It might be advisable in this case to simplify the text, taking as a model paragraph 2 (b) of article 47 of the 1961 Vienna Convention and article 72 of the 1963 Vienna Convention.

⁵¹ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of Greece, para. 5.

⁵² Document A/CN.4/347 and Add.1 and 2 (see footnote 2 (b) (ii) above), paras. 226-230.

⁵³ *Yearbook . . . 1983*, vol. II (Part Two), pp. 59-60, para. (5) of the commentary.

(c) Proposed revised text

92. Thus, the revised text of article 6, paragraph 2 (b), could read as follows:

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

(a) . . .

(b) where States by custom or agreement extend to their diplomatic couriers and diplomatic bags more favourable treatment than is required by the provisions of the present articles, provided that such extension is not incompatible with the object and purpose of the present articles.

B. 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.

Comments and observations

93. With the exception of one general remark, no specific comments were made with regard to article 7, either in the debate in the Sixth Committee or in the written comments of Governments.

94. One Government points out that this article is unnecessary, since it is among those which "enunciate rules on matters which have heretofore not been regulated by international agreement and which . . . have not caused practical problems such as to require such regulation".⁵⁴

95. With all due respect for this observation, the Special Rapporteur is of the view that such an article has its place in a set of rules on the status of the diplomatic courier and the diplomatic bag. It codifies a rule which has been established in State practice. The cross-reference to article 9 (Nationality of the diplomatic courier) and article 12 (The diplomatic courier declared *persona non grata* or not acceptable) indicates the significance of the appointment of the courier by the competent authorities of the sending State and its international legal implications. When a courier is exercising his functions on behalf of several States, as might be the case in State practice, the act of appointing him may be relevant to the legal relationship between the courier and the sending State. The Special Rapporteur would therefore propose the retention of article 7 as a logical element in a system of rules relating to the status of the courier and the bag.

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.

(a) Comments and observations

96. One substantive comment was made on article 8 which deserves due consideration. One Government ob-

serves that under prevailing State practice, as noted in the commentary to this article, the official 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". It is of the opinion that the elaboration in article 8 of the particulars which the official document should contain would strengthen "this important safeguard against abuse of the bag".⁵⁵

97. It seems advisable, at this stage, to give further consideration to the rules on the content of the documentation of the diplomatic courier. Taking into consideration prevailing State practice on this matter, it might be appropriate to introduce some additional requirements that may result in greater precision. Such an attempt should be made with great care and within reasonable and realistic confines and this approach should apply to the data about both the courier and the bag contained in the official document referred to in article 8.

98. Regarding the courier's status, indicated in the official document, it might be desirable, in addition, to include essential personal data, such as his name, his official position, or the diplomatic rank or consular category to which he belongs, particularly in the case of a courier *ad hoc* who is an officer with a diplomatic rank within the Ministry for Foreign Affairs or a member of the diplomatic staff of the mission or delegation of the sending State or a consular officer in a consular post.

99. As far as the particulars about the packages constituting the diplomatic bag are concerned, there, too, some details could be added, such as their serial numbers and destination. However, with respect to the size and weight of the packages, the inclusion of such data might prove to be inappropriate, in view of the previous consideration of this matter in the Commission and the Sixth Committee. Particulars of this kind would most probably be viewed as excessive and unacceptable.

100. This assessment derives indirectly from the debate on draft article 31 (Indication of status of the diplomatic bag) submitted by the Special Rapporteur in his fourth report, which contained a provision concerning the maxi-

⁵⁴ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of the United Kingdom, para. 5 (b).

⁵⁵ *Ibid.*, comments of the United Kingdom, para. 9.

imum size or weight of the diplomatic bag.⁵⁶ That draft article was not adopted on the grounds that it was rigid and restrictive and thus would not adequately meet the practical requirements of official communications. Nevertheless, the Commission, in the commentary to article 24 (which replaced draft article 31), agreed that "it was advisable to determine by agreement between the sending State and the receiving State the maximum size or weight of the diplomatic bag and that that procedure was supported by widespread State practice".⁵⁷

101. There is a difference between the purpose and content of the provision of former draft article 31 relating to the size and content of the diplomatic bag and the above-mentioned proposal submitted by one Government (see para. 96 above). In the first instance it was proposed to determine by agreement the size and weight of the diplomatic bag, while in the second instance it is suggested that the official document of the courier should bear an indication of the actual size and weight of the individual parcels. This difference should be taken into account. Nevertheless, in both instances reference is made to the identification of the size and weight of the bag, which might not be generally agreed upon.

(b) Proposed revised text

102. In the light of the above considerations, the Special Rapporteur would submit for consideration the following revised text of article 8:

Article 8. Documentation of the diplomatic courier

The diplomatic courier shall be provided with an official document indicating his status and essential personal data about him, including his name, official position or rank, as well as the number of packages constituting the diplomatic bag which is accompanied by him, their serial numbers and destination.

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.

(a) Comments and observations

103. One Government makes a general comment to the effect that article 9 should be deleted, since it falls within

the category of rules that have not caused practical problems such as to require specific regulation.⁵⁸

104. Another Government suggests the deletion of paragraphs 2 and 3 of article 9 "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".⁵⁹

105. The considerations regarding the general comment on the deletion of draft article 7 (see para. 95 above) may also be relevant in connection with the same Government's suggestion that draft article 9 should be deleted (see para. 103 above). In addition, it could be pointed out that the question of the nationality of the diplomatic courier has to be the subject of regulation in order to achieve a coherent and uniform régime. So far only the 1963 Vienna Convention contains a special provision regarding the nationality of the consular courier.

106. Paragraphs 2 and 3 of article 9 are a logical elaboration of rules relating to situations constituting exceptions to the general rule of paragraph 1, according to which "the diplomatic courier should in principle be of the nationality of the sending State". The fact that paragraphs 2 and 3 deal with exceptional cases cannot in itself justify their deletion.

107. There are two other comments on paragraph 2⁶⁰ which in substance are identical. They both refer to the timing of the withdrawal of consent by the receiving State in the case of appointment as diplomatic couriers of nationals of the receiving State, nationals of the sending State who are permanent residents of the receiving State or nationals of a third State who are not nationals of the sending State; it is suggested in these comments that the consent of the receiving State should not be withdrawn during the performance of the courier's mission and prior to its completion. These comments should be given the necessary attention.

108. There are some important considerations relevant to the withdrawal of consent. First of all, it should not interfere with the normal functioning of official communications. As has been pointed out by the Commission in the commentary to article 9, paragraphs 1 and 2, "the withdrawal should proceed in serious circumstances, such as those related to grave abuses" of the facilities, privileges and immunities granted to the diplomatic courier "or in circumstances which may lead the receiving State to declare the courier *persona non grata* in accordance with article 12".⁶¹ The other important requirement would be the protection of the diplomatic bag entrusted to the courier and its safe delivery to the consignee.

109. A comment is made by one Government that "the rules set out in paragraph 3 of article 9 do not appear to be compatible with the corresponding rules in respect of con-

⁵⁶ Paragraph 3 of draft article 31 read as follows:

"3. The maximum size or weight of the diplomatic bag allowed shall be determined by agreement between the sending State and the receiving State." (Document A/CN.4/374 and Add.1-4 (see footnote 2 (b) (iv) above), para. 273.)

⁵⁷ *Yearbook* . . . 1985, vol. II (Part Two), p. 48, para. (8) of the commentary.

⁵⁸ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of the United Kingdom, para. 5 (b).

⁵⁹ *Ibid.*, comments of Spain, para. 4.

⁶⁰ *Ibid.*, comments of: Greece, para. 6; Yugoslavia, para. 3.

⁶¹ *Yearbook* . . . 1984, vol. II (Part Two), p. 46, para. (3) of the commentary.

sular couriers that are set out in article 35, paragraph 5, of the 1963 Vienna Convention".⁶²

110. In the view of the Special Rapporteur, the difference alluded to by that Government seems to be of a purely drafting nature. Article 35, paragraph 5, of the 1963 Vienna Convention also refers to "a national of the sending State, a permanent resident of the receiving State". The same is the case with paragraph 3 (a) of draft article 9. It is submitted that the wording of the latter is more precise and is therefore preferable.

(b) Proposed revised text

111. Taking into account the comments from Governments and the above considerations on article 9 as a whole, the Special Rapporteur would suggest that paragraphs 1 and 3 should be adopted in their present form. He further suggests that paragraph 2 be amended along the lines of the comments of Governments by the addition of a second sentence, so that the paragraph would read:

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. However, when the diplomatic courier is performing his functions in the territory of the receiving State, the withdrawal of consent shall not have effect until the diplomatic courier has delivered the diplomatic bag to its final destination.

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.

Comments and observations

112. Article 10 elicited only a general observation submitted by one Government to the effect that the draft article should be deleted, since it falls within the category of rules that "have not caused practical problems such as to require such regulation".⁶³ The same Government states that it has no objection to the formulation of this article but expresses a reservation "in respect of the bags of special missions or of missions or delegations to international organizations".⁶⁴

113. In order to avoid any further reference to the purpose of the present draft articles and the need for a comprehensive approach to their elaboration, it need only be stressed that it would be hard to formulate a set of draft articles on the status of the diplomatic courier without trying to define his official functions.

Article 11. End of the functions of the diplomatic courier

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

⁶² See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of the United Kingdom, para. 10.

⁶³ *Ibid.*, comments of the United Kingdom, para. 5 (b).

⁶⁴ *Ibid.*, comments of the United Kingdom, para. 11.

(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.

(a) Comments and observations

114. Article 11 has been discussed on several occasions by the Commission since it was submitted by the Special Rapporteur in his third report, in 1982.⁶⁵

115. The initial text of this article (then draft article 13) read:

Article 13. End of the function of the diplomatic courier

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

(a) the completion of his task to deliver the diplomatic bag to its final destination;

(b) the notification by the sending State to the receiving State that the function of the diplomatic courier has been terminated;

(c) notification by the receiving State to the sending State that, in accordance with article 14, it refuses to recognize the official status of the diplomatic courier;

(d) the event of the death of the diplomatic courier.

116. As a result of the discussions in the Commission and its Drafting Committee, subparagraphs (a) and (d) were deleted.⁶⁶ With regard to subparagraph (a), it was considered that the termination of the courier's mission upon completion of his task was self-explanatory, while in the case of subparagraph (d) it was agreed that it was obvious that in the event of the death or complete incapacitation of the courier his functions would end, but that the protection of the bag in such circumstances should be secured and should be dealt with in connection with the status of the bag in part III of the draft articles.⁶⁷

117. The question relating to the end of the courier's functions upon completion of his mission has been raised again in some written comments and observations. It is pointed out by one Government that the functions of the courier "end with his departure"⁶⁸ from the territory of the receiving State as the normal situation in this case. Another Government notes that the cases of termination of functions specified in the present subparagraphs (a) and (b) are very exceptional.⁶⁹ In the view of one Government, "it would be helpful if a specific reference to the fulfilment of the courier's functions were added to this article."⁷⁰

⁶⁵ Document A/CN.4/359 and Add.1 (see footnote 2 (b) (iii) above), paras. 115-128.

⁶⁶ *Yearbook* . . . 1984, vol. I, pp. 283-284, 1862nd meeting, paras. 23-25.

⁶⁷ *Yearbook* . . . 1982, vol. II (Part Two), p. 120, paras. 245 and 247.

⁶⁸ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of Spain, para. 5.

⁶⁹ *Ibid.*, comments of Thailand, para. 5.

⁷⁰ *Ibid.*, comments of the United Kingdom, para. 12.

118. It may be recalled that the Commission pointed out in the commentary to article 11⁷¹ that “as evidenced by the words ‘*inter alia*’ in its introductory phrase, article 11 does not intend to produce an exhaustive rehearsal of all the possible reasons leading to the end of the courier’s functions”. It further indicated that “the most frequent and usual fact having such an effect is fulfilment of the courier’s mission”.

(b) Proposed revised text

119. In the light of the above considerations, the Special Rapporteur feels that it may be appropriate to amend article 11 by adding, before the present subparagraphs, a new subparagraph (a) dealing with the fulfilment of the functions of the diplomatic courier, which would read:

(a) the fulfilment of the functions of the diplomatic courier or his return to the country of origin;

120. If this amendment is adopted, the present subparagraphs (a) and (b) will become subparagraphs (b) and (c) respectively.

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.

Comments and observations

121. Article 12 did not elicit any substantive comments.

122. The only points raised relate to paragraph 2, regarding the protection of the bag when the courier is obliged to leave the territory of the receiving State. One Government suggests that sufficient time be provided for a courier declared *persona non grata* or not acceptable to deliver the bag to the recipient, and that a new paragraph 3 be added to this effect.⁷²

123. This preoccupation is well justified. However, it may not be appropriate to include an additional paragraph since in paragraph 2 “a reasonable period” of time is contemplated during which the delivery of the bag could be made and, secondly, the relevant protective measures ensuring the integrity of the bag are provided under draft article 30.

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.

⁷¹ *Yearbook* . . . 1984, vol. II (Part Two), p. 48, para. (5) of the commentary.

⁷² See document A/CN.4/409 and Add.1-5, (p. 125 above), comments of the German Democratic Republic, paras. 8-9.

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.

(a) Comments and observations

124. Only two general comments were made on article 13. According to the first one, the article, particularly its paragraph 1, is “too vague and could be interpreted much too broadly”.⁷³

125. The other comment is more radical in nature, the Government in question doubting that “any provision of this kind is necessary”, since paragraph 1 is “vague and unsatisfactory”, while paragraph 2 “would impose a heavy and unjustifiable burden on receiving States and in particular on transit States”.⁷⁴

126. It may be recalled that article 13 is based on draft articles 15 (General facilities), 18 (Facilities for communications) and 19 (Facilities for temporary accommodation), originally submitted by the Special Rapporteur in his fourth report, in 1983.⁷⁵ Many members of the Commission thought that these draft articles “were too long and too many”,⁷⁶ and it was therefore agreed to combine them, with certain modifications, in one more concise provision. This was done by the Drafting Committee.

127. The commentary to article 13 elucidates the content and purpose of the article and, in the view of the Special Rapporteur, provides convincing evidence of its practical significance.⁷⁷ There is no need to repeat them in order to justify the *raison d'être* of this article, or to reconsider the reservations contained therein.

(b) Proposed revised text

128. In the light of the above considerations the Special Rapporteur would suggest that the present text of article 13 be retained, with one drafting change, namely the deletion of the words “as the case may be” in paragraphs 1 and 2. These words are unnecessary, and their deletion would have the advantage of shortening the text.

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.

Comments and observations

129. Article 14 has not occasioned any difficulties since its submission by the Special Rapporteur in his fourth

⁷³ *Ibid.*, comments of Austria, para. 7.

⁷⁴ *Ibid.*, comments of the United Kingdom, paras. 14-15.

⁷⁵ Document A/CN.4/374 and Add.1-4 (see footnote 2 (b) (iv) above), paras. 31 and 43.

⁷⁶ *Yearbook* . . . 1983, vol. II (Part Two), p. 49, para. 162.

⁷⁷ *Yearbook* . . . 1984, vol. II (Part Two), pp. 50-51.

report, in 1983, and was agreed upon with some drafting improvements.

130. Only one observation, of a drafting character, was made on this article.⁷⁸ One Government suggests that the following text be added at the end of paragraph 2:

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.

131. The proposed amendment has, in principle, its merits. However, a text of this kind may be more appropriate for inclusion in the commentary, since it elaborates in more specific terms the general provision already embodied in the article. Moreover, the observation refers indirectly to the principle of reciprocity contemplated in article 6.

132. The Special Rapporteur is of the view that article 14 could be adopted as it stands at present.

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.

(a) Comments and observations

133. Article 15 was also provisionally adopted without any substantive problems. A number of drafting improvements were introduced during the debates held in the Commission and in the Drafting Committee.⁷⁹

134. Only one general observation was made on this article. In its written comments one Government states⁸⁰ that "while not objecting to article 15 in itself", it does not accept the implication in the commentary that "in exceptional circumstances" a receiving or transit State may have an 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".⁸¹

135. It is obvious from the commentary quoted above that, as a rule, the courier has to make his own travel arrangements and that it is only in exceptional circumstances, facing serious difficulties, that he may have to turn to the local authorities of the receiving or transit State for assistance.

⁷⁸ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of Thailand, para. 6.

⁷⁹ *Yearbook . . . 1983*, vol. II (Part Two), pp. 49-50, para. 164; *Yearbook . . . 1984*, vol. II (Part Two), pp. 51-52, commentary to article 15.

⁸⁰ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of the United Kingdom, para. 17.

⁸¹ *Yearbook . . . 1984*, vol. II (Part Two), p. 52, para. (2) of the commentary.

(b) Proposed revised text

136. The Special Rapporteur therefore proposes that draft article 15 should be adopted with a small amendment, namely the deletion of the words "as the case may be".

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.

(a) Comments and observations

137. Two Governments submitted comments on article 16. One Government makes the general comment that this article is unnecessary since its substance appears to be adequately dealt with by the 1961 and 1963 Vienna Conventions.⁸² In the same vein, the other Government states that "the formulation in article 27, paragraph 3, of the 1961 Vienna Convention is considered preferable".⁸³

138. The commentary to article 16 illuminates the pertinent aspects of the content and scope of the obligations of the receiving State or the transit State with regard to the courier in the performance of his functions. The Special Rapporteur does not deem it necessary to elaborate further on the purpose and practical significance of this provision as evidenced by the four codification conventions and a significant body of bilateral agreements and national legislation.

(b) Proposed revised text

139. The only proposal of a drafting nature would be the deletion, as in the case of articles 13 and 15, of the words "as the case may be".

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

⁸² See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of the United Kingdom, para. 5 (a).

⁸³ *Ibid.*, comments of Australia, para. 4. The reference to paragraph 3 appears to be an error, since that provision relates to the inviolability of the diplomatic bag. The relevant provision would be article 27, paragraph 5, which stipulates that the diplomatic courier "shall enjoy personal inviolability and shall not be liable to any form of arrest or detention". But this formulation is reproduced verbatim in the second sentence of draft article 16.

unreasonable delays or impediments to the delivery of the diplomatic bag.

Comments and observations

140. Article 17 was discussed extensively and widely divergent views were expressed, both in the debate and in the replies of Governments. Two main opposing trends have emerged on this issue.

141. One of them is characterized by strong objections to the present text, which is considered to be unnecessary, unrealistic, not practicable and excessive.⁸⁴ Consequently, according to this point of view, article 17 should be deleted altogether.

142. The other view, expressed in equally strong terms, while emphasizing the practical significance of article 17, favours strengthening the concept of inviolability of the temporary accommodation.⁸⁵ A critical observation is made by one Government to the effect that paragraph 3 of article 17, permitting the inspection of the temporary accommodation of the courier under certain conditions, is inconsistent with paragraph 1 of the same article, based on the principle of inviolability.⁸⁶

143. One Government suggests adding the following words at the end of paragraph 1: "provided that all necessary measures are taken to ensure the protection of the diplomatic bag, as stipulated in article 28, paragraph 1".⁸⁷

144. The same Government also proposes amending paragraph 3 to the effect that the receiving State or the transit State be under the obligation, 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.⁸⁸

145. Between these two main trends there were some comments and proposals in favour of strengthening the compromise provision built into paragraph 3 with a view to making article 17 more acceptable.⁸⁹

146. It may also be pointed out that many Governments do not refer to article 17 in their written replies. Unless specific views are expressed on other occasions, it might be taken, at this stage, that those Governments accept the present text. Of course, the serious and widely divergent views existing on substantive matters relating to this article should not be overlooked. It should also be recognized that its application does represent practical problems and imposes a certain burden on the receiving or transit State. But at the same time this article may be instrumental in certain circumstances in providing appropriate legal protection to the courier and the bag.

⁸⁴ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of: Australia, para. 5; Austria, para. 8; Belgium, para. 6; Greece, para. 7; Netherlands, para. 5; Nordic countries, para. 6; United Kingdom, paras. 18-19; Switzerland, paras. 8-9.

⁸⁵ *Ibid.*, comments of the USSR, paras. 3-4.

⁸⁶ *Ibid.*, comments of Thailand, para. 8.

⁸⁷ *Ibid.*, comments of the USSR, para. 3.

⁸⁸ *Ibid.*, comments of the USSR, para. 4.

⁸⁹ *Ibid.*, comments of: Cameroon, para. 1; Thailand, para. 7, containing specific drafting proposals.

147. The Special Rapporteur is of the view that the present text provides an acceptable compromise solution, striking a reasonable balance between the legitimate interests of the sending State and those of the receiving or transit State. Drafting amendments could be made with the view of improving the text, but they should not go beyond this balance.

148. It is submitted that at this point the Commission should make its choice. The deletion of article 17 would inevitably create a lacuna in a coherent system of rules governing the legal status of the courier and the bag. The lack of provisions such as those contemplated in this article would mean that whenever a problem arose relating to the temporary accommodation of the courier, an *ad hoc* solution would have to be found on the basis of practical necessity. The Special Rapporteur submits that, on the whole, it would be desirable to retain article 17, unless the Commission decides otherwise.

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.

(a) Comments and observations

149. Article 18 deals with one of the most disputed issues of the topic under consideration and has been the subject of extensive discussions. The present text of this article constitutes a compromise based on a functional approach leading to a qualified immunity from jurisdiction. The existence of divergent views on this problem has to be underlined, especially at this stage of the Commission's work on the present topic, when it is expected to suggest a solution which may offer better prospects for acceptance of the draft articles as a whole.

150. The comments and observations submitted by Governments provide an indicative account of the existing situation. Three main trends can be identified with regard to the positions taken on the jurisdictional immunities of the diplomatic courier. In the first place, a significant

number of States have acquiesced in the functional approach, recognizing that the present text of article 18 provides a middle ground for agreement.⁹⁰

151. The other two schools of thought are quite distinct in their stance regarding the need for and the practical convenience of this draft article, as well as regarding its effectiveness.

152. Some Governments hold the view that paragraph 1 of article 18, on immunity from criminal jurisdiction, is superfluous, since under article 27, paragraph 5, of the 1961 Vienna Convention and article 16 of the present draft articles, the courier shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.⁹¹ One further maintains that the interpretation and implementation of the exceptions enunciated in this paragraph and also in paragraphs 2 and 3 would produce "practical inconvenience and uncertainties".⁹² Special reference is made by some Governments to the fact that the exception to immunity from civil and administrative jurisdiction in an action for damages arising from an accident caused by a vehicle where those damages are not recoverable from insurance would not be applicable in some municipal legal systems.⁹³ All these considerations have led these Governments to the conclusion that draft article 18 should be deleted.

153. The opposing opinion is that the courier should be granted full immunity from the criminal jurisdiction of the receiving State or the transit State.⁹⁴ It is pointed out that the inclusion in paragraph 1 of article 18 of the words "in respect of all acts performed in the exercise of his functions" is a substantive departure from international practice and the 1961 Vienna Convention.⁹⁵ According to this view, full immunity would be consistent with the official status and functions of the diplomatic courier comparable to the functions performed by the administrative and technical staff of a diplomatic mission and the immunities granted to them by that Convention.⁹⁶ The qualified immunity expressed in the above-mentioned phrase was also considered inappropriate by some members of the Commission since it may create difficulties of interpretation as to whether an act is or is not performed in the exercise of the courier's functions.⁹⁷

154. In addition, one Government expresses the view that "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".⁹⁸ Similar views have been expressed in the debates held in the Commission and the Sixth Committee;

⁹⁰ *Ibid.*, comments of: Brazil, para. 2; Greece, para. 8; Nordic countries, para. 7; Spain, para. 7; Switzerland, para. 10.

⁹¹ *Ibid.*, comments of: Australia, para. 6; Belgium, para. 7; United Kingdom, para. 20.

⁹² *Ibid.*, comments of the United Kingdom, para. 20.

⁹³ *Ibid.*, comments of: Australia, para. 6; United Kingdom, para. 20.

⁹⁴ *Ibid.*, comments of: Bulgaria, para. 7; Czechoslovakia, para. 2.

⁹⁵ "Topical summary . . ." (A/CN.4/L.410), paras. 281 and 284.

⁹⁶ Comments of Bulgaria and Czechoslovakia (see footnote 94 above).

⁹⁷ *Yearbook . . . 1985*, vol. II (Part Two), p. 40, para. (5) of the commentary to article 18.

⁹⁸ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of Bulgaria, para. 7.

those who hold these views object to the concept that immunity should apply only in respect of acts performed by the courier in the exercise of his functions.

155. In order to provide a complete overview of the observations relating to draft article 18, it might be appropriate to refer to a substantive comment on paragraph 2, followed by a concrete drafting proposal. As already pointed out (see para. 152 above), some Governments hold the opinion that the present formulation of the second sentence is liable to uncertainties in interpretation and application, which could make the provision unworkable in some legal systems or may not provide proper protection of the courier in case of motor vehicle accidents. In this connection, one Government proposes the addition of the following sentence at the end of paragraph 2:⁹⁹

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.

156. The Special Rapporteur feels that as regards the substantive issues involved in article 18, which relate to the scope of the immunities from jurisdiction to be granted to the diplomatic courier and their correlation to his legal status and official functions, it would hardly be possible to advance new arguments that may have a decisive impact, one way or the other, on the basic concepts and attitudes in respect of the main opposing trends on this issue. The discussion, therefore, might be considered nearly exhausted.

157. The Commission is thus faced with several possible solutions depending upon which school of thought prevails. The Special Rapporteur personally would prefer a simple formulation on immunity from jurisdiction, without qualification, which may better conform to the functional necessity of the official duties of the courier. Moreover, procedural and substantive matters relating to *onus probandi* regarding the nature of the acts performed in the discharge of the courier's official duties, as well as disputes arising out of the interpretation and application of this provision, would most probably be avoided. However, one should not overlook the merits of a more restrictive concept of functional necessity corresponding to the status of the courier, which is supported by considerations of a practical and pragmatic character; for realism has been considered an important requirement of viable legal rules which States are prepared to adopt. Such an approach may sometimes prevent endeavours to introduce innovation in law-making, but it cannot be neglected. On the other hand, the complete deletion of article 18 would result in a gap as regards substantive elements of the courier's legal status having a bearing on the exercise of his functions.

(b) Proposed revised text

158. In the light of these considerations, the Special Rapporteur would propose that article 18 be retained in its present compromise form, with some drafting amendments referred to in the following paragraphs in connection with some suggestions made by Governments.

159. One Government suggests deleting the word "all"

⁹⁹ *Ibid.*, comments of the German Democratic Republic, para. 11.

before the word "acts" and employing the terminology of the codification conventions, namely "official acts performed in the exercise of his functions".¹⁰⁰ The expression "all acts" is also found in paragraph 2 of article 18, but the drafting amendment alludes specifically to paragraph 1. As a matter of fact, the four codification conventions referred to utilize certain variants of this expression.¹⁰¹

160. For the sake of brevity, the word "all" before the word "acts" could be deleted in paragraphs 1 and 2. It seems, however, superfluous to add the adjective "official" before the word "acts", since the provision specifies that the acts are performed in the exercise of the courier's functions, which by nature and object are official functions, as indicated in, *inter alia*, articles 1, 2, 4 and 10.

161. It may also be desirable, for consistency with previous proposals aiming at the abbreviation of the text, to delete as unnecessary the words "as the case may be" in paragraphs 1 and 2. These amendments could also be considered by the Drafting Committee in relation to some other articles, such as articles 19, 20, 21, 27 and 30.

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.

(a) Comments and observations

162. The Special Rapporteur suggests that articles 19 and 20 be considered concurrently, since they have many

points in common, relating to customs and fiscal procedures and other regulations to be applied at the time of the courier's entry into or sojourn in the territory of the receiving or transit State. It is perhaps for this reason that some Governments preferred to comment on both articles together.

163. Some Governments express the view that articles 19 and 20 should be deleted. Two main arguments are advanced to this effect. In the case of paragraph 1 of article 19, the objection to its retention is based on the grounds that the provision for a courier to enjoy personal inviolability under article 16 makes the exemption from personal examination unnecessary.¹⁰² The other exemptions provided in paragraphs 2 and 3 of article 19 and in article 20 are also considered unnecessary due to the short duration and transitory nature of the courier's stay.¹⁰³ These two general contentions, though leading to the same conclusion, namely the deletion of draft articles 19 and 20, are quite distinct in nature. It is therefore suggested that they be examined separately.

164. The Commission's interpretation of the provision on personal inviolability contained in the commentary to article 16¹⁰⁴ elucidates the scope of the legal concept of personal inviolability. The protective measures implied in this concept may be regarded as adequate in respect of the official functions exercised by the diplomatic courier. Thus, the Commission may find it possible to dispense with paragraph 1 of article 19.

165. It is obvious that the temporary nature of the stay of the diplomatic courier in the receiving State or the transit State affects the scope of the facilities, privileges and immunities accorded to him in the exercise of his functions. In this connection there is a distinct difference between the position of a courier and that of a member of the staff of a mission or consular post. However, with regard to the customs clearance, inspection of personal baggage and customs duties on articles for personal use imposed at a frontier check-point, the duration of the stay is not a decisive factor that necessarily entails a different treatment of the courier in comparison with that of a member of the staff of a diplomatic mission or consular post. It is only the variety and quantity of the articles for personal use in the baggage, which depend on the duration of the stay, that make the difference in the two instances. In this connection a valid point may be raised. Why, for example, should the personal baggage of a diplomatic courier who is exercising an official mission for a sending State not be treated in the same way, in respect of customs duties and inspection, as the articles for personal use in the baggage of a clerk or a driver of the same sending State across the frontier of the receiving State or transit State, as provided for in articles 36 and 37 of the 1961 Vienna Convention and the relevant provisions of the other codification conventions? The courier, who is carrying with him the diplomatic bag and whose stay is limited in time, will naturally have fewer articles for personal use in his baggage. However, this does not mean

¹⁰⁰ *Ibid.*, comments of Greece, para. 8.

¹⁰¹ Compare the expressions employed in each of the four conventions, e.g.: "official acts" in the 1961 Vienna Convention (art. 38, para. 1); "acts performed . . ." in the 1963 Vienna Convention (art. 43, para. 1); "acts performed . . ." in the 1969 Convention on Special Missions (arts. 36 and 37); and the various expressions employed interchangeably in the 1975 Vienna Convention on the Representation of States, such as: "acts performed . . ." (art. 36, paras. 2 and 3), "official acts" (art. 37, para. 1), "all acts performed . . ." (art. 60, para. 1). However, the brief expression "acts performed . . ." seems to prevail.

¹⁰² See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of: Nordic countries, para. 8; United Kingdom, para. 23.

¹⁰³ *Ibid.*, comments of: Germany, Federal Republic of, para. 3; Greece, para. 9; Nordic countries, para. 9; United Kingdom, para. 24.

¹⁰⁴ *Yearbook . . . 1984*, vol. II (Part Two), pp. 52-53.

that he should not be entitled to exemption from customs duties and from inspection, which will facilitate his customs clearance at the frontier and thus assist him in the exercise of his functions, i.e. the speedy delivery of the bag to its destination. It is the functional necessity which makes appropriate the exemptions stipulated in paragraphs 2 and 3 of article 19. The transitory nature of the courier's sojourn may affect only the volume of his personal baggage but not the need for a more favourable treatment in view of his functions.

166. In the light of the above considerations and taking into account State practice, the Special Rapporteur proposes that paragraphs 2 and 3 of article 19 be retained, with some drafting changes as appropriate.

167. The same functional approach should be applied to article 20. It is true that practical cases of dues and taxes for which a diplomatic courier might be liable are relatively limited, due to his short stay in the receiving State. However, such practical cases should not be dismissed *a priori*. Even if draft article 20 appears at present as a contingency provision, it has its place within a set of articles on the status of the diplomatic courier.

(b) Proposed text combining articles 19 and 20

168. In conclusion, the Special Rapporteur would suggest that, if paragraph 1 of article 19 is deleted, paragraphs 2 and 3 of that article be merged with article 20. The revised article 19 would then read:

Article 19. Exemption from customs duties and other dues and taxes

1. The receiving State or 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.

2. 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 of the transit State. Such inspection shall be conducted only in the presence of the diplomatic courier.

3. The diplomatic courier shall, in the performance of his functions, be exempt in the receiving State or 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.

(a) Comments and observations

169. Article 21 elicited comments and observations of two categories: a general assessment of its necessity, and specific substantive and drafting proposals.

170. As regards the need for it, one Government declares in general terms that it cannot support article 21 because it spells 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". The same Government expresses its opposition to the article, including paragraph 3, in view of its objection in principle "to conferring any immunity from jurisdiction on the courier".¹⁰⁵

171. Two specific observations may be relevant in connection with these objections, leaving aside the general problem of jurisdictional immunities, which has already been extensively considered.

172. The first remark relates to the assertion that article 21 spells out, in a "somewhat complicated manner", rules expressly stated in provisions of the 1961 and 1963 Vienna Conventions. Of course, the Special Rapporteur admits that the formulation of article 21 could be further improved and made more precise. However, it seems not fully accurate to maintain the view that provisions concerning the duration of privileges and immunities of the courier are expressly stated in the draft article that deals with such a particular case as that of declaring a courier *persona non grata* or not acceptable (art. 12), or in a general provision on the personal protection and inviolability of the courier (art. 16). Even articles 10 and 11, which are devoted to the functions of the courier, do not make redundant the special provisions on the duration of privileges and immunities in article 21. There are no such provisions in the above-mentioned Vienna Conventions or in the other two codification conventions. The rules relating to the time factor, i.e. the beginning and end of privileges and immunities accorded to the diplomatic courier, have a specific practical significance in view of the temporary and transitory nature of the courier's stay in a given receiving or transit State. Therefore, in the view of the Special Rapporteur, they should be considered indispensable components of a coherent legal régime on the status of the diplomatic courier.

¹⁰⁵ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of the United Kingdom, para. 25.

173. The second remark relates to the need for paragraph 3 within the scope of the article dealing with the duration of the privileges and immunities accorded to the diplomatic courier. The rule in that paragraph on the prolongation of the immunity granted to the courier has been conceived as a logical consequence of the immunity from jurisdiction in respect of acts performed by the diplomatic courier in the exercise of his functions. As has been pointed out on other occasions, safeguard provisions of this kind are applicable under the codification conventions to all members of the staff of a diplomatic or other mission, including their service staff, as well as to consular officers or consular employees.¹⁰⁶ There are therefore sufficient reasons to submit that the same rule should apply to a diplomatic courier, who is also exercising official functions.¹⁰⁷

174. Turning to specific substantive and drafting comments, they relate to two distinct issues: one is the precise moment or fact determining the beginning or the end of the privileges and immunities enjoyed by the diplomatic courier, and the other is the duration of the privileges and immunities granted to the courier *ad hoc*.¹⁰⁸

175. With regard to the precise moment from which the courier shall enjoy privileges and immunities if he is already in the territory of the receiving State, the present text of paragraph 1 of article 21 stipulates that he shall enjoy them "from the moment he begins to exercise his functions".

176. It is rightly pointed out by one Government that the present formulation of paragraph 1 is not clear enough 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".¹⁰⁹ In the commentary to this part of paragraph 1 it is noted that some members of the Commission thought that this should be the "moment of the courier's appointment and receipt of the documentation referred to in article 7".¹¹⁰

177. The Special Rapporteur agrees with the observation that the text should be more precise concerning the moment from which a person already in the territory of the receiving State is entitled to enjoy the privileges and immunities accorded to a diplomatic courier. It seems that this should be the moment of the appointment of such a person as diplomatic courier and his receipt of the official document referred to in article 8. Such a provision would entail a legal protection of the diplomatic courier on his way to take the diplomatic bag. Accordingly, the words "from the moment he begins to exercise his functions" should be replaced by: "from the moment of his appointment and receipt of the document referred to in article 8".

¹⁰⁶ *Yearbook . . . 1985*, vol. II (Part Two), pp. 42 and 44, introductory paragraph and paragraph (6) of the commentary to article 21, indicating the pertinent provisions of each of the four codification conventions.

¹⁰⁷ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of: Brazil, para. 4; Netherlands, para. 10.

¹⁰⁸ *Ibid.*, comments of: Brazil, paras. 3-4; Netherlands, paras. 10-11.

¹⁰⁹ *Ibid.*, comments of Brazil, para. 3.

¹¹⁰ *Yearbook . . . 1985*, vol. II (Part Two), p. 43, para. (1) of the commentary.

178. Comments were submitted with regard to the last sentence of paragraph 1 on the cessation of the privileges and immunities of a courier *ad hoc*. One Government suggests that the sentence should be revised in order "to accord to the *ad hoc* courier the same treatment as that given to the regular courier" in this respect.¹¹¹

179. These observations are relevant when the *ad hoc* courier is not a member of the staff of the mission or the consular post or is not a resident of the receiving State. According to the same Government, in this case the privileges and immunities should cease at the moment when the *ad hoc* courier leaves the territory of the receiving State. However, the case of an *ad hoc* courier who is a member of the staff of the mission or the consular post or is otherwise a resident in the territory of the receiving State still remains open. In such a case the privileges and immunities should come to an end at the moment when the *ad hoc* courier has delivered the bag at its destination, or "has finished carrying out his function as described in article 10".¹¹²

180. It seems that the present formulation of the last sentence of paragraph 1 is confined to the latter hypothesis indicated above, without being explicit to that effect. In order to avoid ambiguity and inconsistency in the treatment of regular and *ad hoc* couriers who are in the same position, it should be made clear that the last sentence of paragraph 1 deals with a special case, while the second sentence does not make any distinction between a regular and an *ad hoc* courier regarding the moment from which the privileges and immunities accorded to them come to an end, i.e. when they leave the territory of the receiving State or the transit State.

181. The last drafting amendment proposed to article 21 is the deletion of the word "normally" in paragraph 1.¹¹³

182. It may be recalled that the word "normally" is employed in all the relevant provisions on the duration of privileges and immunities in the four codification conventions. In the view of the Special Rapporteur, the expression "shall normally cease . . ." has been employed to indicate the usual or typical way in which privileges and immunities come to an end, without excluding any peculiar circumstances which may bring about the same result.

183. In view of the well-established formulation relating to the cessation of privileges and immunities and the interpretation advanced above, it would be desirable not to delete the word "normally".

(b) Proposed revised text

184. Taking into account the comments and observations submitted by Governments, the Special Rapporteur suggests that paragraph 1 of article 21 be revised to read as follows:

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

¹¹¹ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of Brazil, para. 4.

¹¹² *Ibid.*, comments of the Netherlands, para. 10.

¹¹³ *Ibid.*, comments of Italy, para. 2.

of the receiving State, from the moment of his appointment and receipt of the document referred to in article 8. 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* who is a resident in the receiving State shall cease at the moment when he has delivered to the consignee the diplomatic bag in his charge.

185. No substantive or drafting comments and observations were made with regard to paragraphs 2 and 3 of draft article 21. Consequently, the Special Rapporteur suggests retaining the present text of those two paragraphs.

186. The Special Rapporteur therefore proposes that article 21 be adopted with the revised paragraph 1 proposed above.

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.

Comments and observations

187. In the observations received from Governments, there was only one general comment on article 22. While accepting "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", one Government questioned the utility of the provisions contained in this article, since it had strong doubts about the need for a provision conferring immunity on the courier.¹¹⁴

188. The Special Rapporteur feels it appropriate to bring this general objection to the notice of the Commission without embarking on its examination in substance, since it derives from a position of total reservation on granting immunity from jurisdiction to the diplomatic courier.

189. During the debate in the Sixth Committee at the forty-first session of the General Assembly, in 1986, one representative expressed the view that the provisions of paragraph 5 of article 22, on the commitment of the sending State in connection with the settlement of a case when that State did not waive the immunity of its diplomatic courier, "should be made stronger; and they should not

merely require that the best endeavours of the sending State be made 'to bring about a just settlement of the case'".¹¹⁵ But no specific follow-up proposal was made on this matter.

190. In the commentary the Commission pointed out that the sources for article 22 were the corresponding provisions of the codification conventions, and that paragraph 5 was based on articles 31 and 61 of the 1975 Vienna Convention on the Representation of States.¹¹⁶ It may be added that the rules on waiver of diplomatic immunity have acquired general recognition in international law as standard provisions.

191. In view of these considerations and the lack of specific proposals, the Special Rapporteur suggests retaining the present text of article 22.

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.

(a) Comments and observations

192. Only two substantive comments were submitted with regard to article 23, namely that the captain of a ship or aircraft entrusted with the bag should have the same legal position as an ordinary courier¹¹⁷ and that the bag might also be entrusted to a member of the crew other than the captain.¹¹⁸

193. It may be recalled that these two points have been extensively discussed in the Commission and in the Sixth Committee.¹¹⁹

194. So far only one Government has expressed the view that the captain of a ship or aircraft entrusted with a diplomatic bag should enjoy the same privileges and immunities as those granted to a courier *ad hoc*, on the basis of functional necessity.¹²⁰

¹¹⁵ See "Topical summary . . ." (A/CN.4/L.410), para. 289.

¹¹⁶ *Yearbook . . . 1985*, vol. II (Part Two), p. 44, para. (1) of the commentary.

¹¹⁷ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of the Netherlands, para. 12.

¹¹⁸ *Ibid.*, comments of: Netherlands, para. 12; Spain, para. 8.

¹¹⁹ See the previous reports of the Special Rapporteur: document A/CN.4/347 and Add.1 and 2 (see footnote 2 (b) (ii) above), paras. 66, 68-70, 73, 86-88, 92-95, 99, 103, 116-120; document A/CN.4/374 and Add.1-4 (see footnote 2 (b) (iv) above), paras. 213-214; document A/CN.4/382 (see footnote 2 (b) (v) above), paras. 70-72; see also the reports of the Commission: *Yearbook . . . 1984*, vol. II (Part Two), p. 23, para. 95; *Yearbook . . . 1985*, vol. II (Part Two), pp. 45-47, commentary to article 23; and "Topical summary . . ." (A/CN.4/L.398), para. 300; (A/CN.4/L.410), para. 290.

¹²⁰ See footnote 117 above.

¹¹⁴ *Ibid.*, comments of the United Kingdom, para. 26.

195. This proposition is not without grounds, although there are certain substantive differences in fact and in law between the courier and the captain as far as the discharge of their duties are concerned. It is true that the captain's functions consist in taking custody of, transporting and handing over the diplomatic bag to an authorized member of the staff of the mission or the consular post. These functions are essentially the same as those exercised by a diplomatic courier.

196. Of course, there are some distinct features inherent in the captain's mission when he is entrusted with a diplomatic bag. First of all, the captain, unlike the courier, is not able to ensure direct and uninterrupted care of the bag in view of his main professional duties during the journey. Secondly, he is not supposed to carry the bag outside the ship or the tarmac where the aircraft is stationed. Thus, there is not the same functional necessity for the legal protection of the captain entrusted with a diplomatic bag, particularly with regard to his inviolability. However, the main distinction has to be made on legal grounds, taking into consideration the relevant provisions of the four codification conventions, which explicitly state that the captain shall not be considered to be a courier.¹²¹ As noted by the Special Rapporteur in his second report,¹²² a proposal to consider the captain to be either a regular or an *ad hoc* consular courier was rejected by the United Nations Conference on Consular Relations of 1963. It may thus be affirmed that the distinction between the legal status of a courier and that of a captain of a ship or aircraft entrusted with the diplomatic bag has become a well-established general rule in international law evidenced by unequivocal State practice.

197. In the view of the Special Rapporteur, there is no valid reason to change this rule for the purpose of the present draft articles.

198. With regard to the observation that the bag might also be entrusted to a member of the crew of a ship or aircraft other than the captain,¹²³ the situation is somewhat different. The Special Rapporteur already indicated in his fourth report¹²⁴ that the bag could be entrusted also to a member of the crew authorized by the captain, as was the practice of some States. The draft article originally submitted by the Special Rapporteur (then draft article 30) contained a reference to "an authorized member of the

crew", along with the words "the captain of a commercial aircraft, the master of a merchant ship" entrusted with the diplomatic bag.¹²⁵ On the proposal of the Drafting Committee,¹²⁶ it was agreed to confine article 23 to the status of the captain of a ship or aircraft entrusted with the diplomatic bag. However, in the commentary to paragraph 1 of article 23 the Commission expressed the view that:

The wording of the paragraph did not preclude the existing practice of several States to entrust the unaccompanied bag to a member of the crew of the ship or aircraft, either by decision of the central authorities of the State or by delegation from the captain of the ship or aircraft to a crew member.¹²⁷

199. Taking into account the above considerations, the Special Rapporteur feels that it would be preferable to reflect in the title and the text of article 23 the possibility of entrusting the diplomatic bag not only to the captain of a ship or aircraft but also to an authorized member of the crew.

(b) Proposed revised text

200. The Special Rapporteur therefore suggests that the Drafting Committee consider the following amendments to article 23:

Article 23. Status of the captain or an authorized member of the crew of a ship or aircraft entrusted with the diplomatic bag

1. The captain or an authorized member of the crew 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 or the authorized member of the crew 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 the authorized member of the crew or to deliver the bag directly and freely to him.

C. 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.

¹²¹ See art. 27, para. 7, of the 1961 Vienna Convention; art. 35, para. 7, of the 1963 Vienna Convention; art. 28, para. 8, of the 1969 Convention on Special Missions; and art. 27, para. 7, and art. 57, para. 8, of the 1975 Vienna Convention on the Representation of States.

¹²² Document A/CN.4/347 and Add.1 and 2 (see footnote 2 (b) (ii) above), para. 86.

¹²³ See footnote 117 above.

¹²⁴ Document A/CN.4/374 and Add.1-4 (see footnote 2 (b) (iv) above), para. 240.

¹²⁵ *Ibid.*, para. 243; the title of draft article 30 was "Status of the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew".

¹²⁶ *Yearbook . . . 1985*, vol. I, p. 215, 1912th meeting, para. 32.

¹²⁷ *Yearbook . . . 1985*, vol. II (Part Two), p. 46, para. (5) of the commentary to article 23.

Comments and observations

201. The only general observation made on article 24 is to the effect that "more precise and specific rules" should be enunciated,¹²⁸ but no concrete amendment is suggested.

202. The Special Rapporteur believes that the revised text proposed for article 8 in the present report (see para. 102 above), though relating to the documentation of the diplomatic courier, has a bearing on the identification of the bag.

203. In the absence of any specific proposal on article 24, the Special Rapporteur suggests that it be retained in its present form.

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.

Comments and observations

204. Article 25 has been the subject of a thorough discussion in the Commission and in the Sixth Committee. The present text reflects the legitimate concern about some abusive practices involving the diplomatic bag which have occurred recently. The purpose of the article, as indicated in the commentary, is to define the permissible content of the bag, emphasizing that it may contain only official correspondence and documents or articles intended exclusively for official use.¹²⁹ Furthermore, in order to strengthen the commitment of the sending State to respect the rule governing the permissible content of the bag, a provision of a preventive character is included in paragraph 2.

205. Article 25 elicited a few comments and observations.

206. Two observations were made in connection with paragraph 1, with regard to the official use and permissible character of the contents of the bag. One is to the effect that the word "exclusively" should be retained in both article 3, paragraph 1 (2), and article 25. The other is to the effect that it should be made clear that the bag may not contain any article whose importation or possession is prohibited by the law of the receiving or transit State.¹³⁰

207. On the first point, it may be recalled that it is already indicated in the commentary that "the provision in article 3 should be aligned with the terminology used in article 25 so as to make clear that the phrase 'intended exclusively for official use' [applies] both to 'documents' and to 'articles'".¹³¹ It is now the appropriate time to harmonize these two articles.

¹²⁸ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of the United Kingdom, para. 27.

¹²⁹ *Yearbook* . . . 1985, vol. II (Part Two), p. 48, paras. (2) and (3) of the commentary.

¹³⁰ Comments of the United Kingdom, paras. 28-29 (see footnote 128 above).

¹³¹ *Yearbook* . . . 1985, vol. II (Part Two), p. 48, para. (4) of the commentary.

208. With regard to the second observation, the Commission should decide whether it is necessary to define further the permissible content of the bag by a specific reference to the inadmissibility of articles the import or possession of which is prohibited by the law of the receiving State or the transit State. In the first place, it should be pointed out that none of the corresponding provisions of the four codification conventions contain such a reference. The proposed restriction goes beyond the meaning of these provisions. Secondly, the present formulation of article 25, paragraph 1, modelled on article 35, paragraph 4, of the 1963 Vienna Convention, may well serve the same purpose without exceeding the well-established rules embodied in the codification conventions with regard to the contents of the bag. Nevertheless, the Special Rapporteur feels it appropriate to bring the above-mentioned proposal and its possible implications to the Commission's attention.

209. Two other observations refer to the contents of the diplomatic bag. The first stresses the need to determine the size and weight of the bag within "reasonable dimensions, proportional to the importance of the mission, consular post or delegation of the sending State".¹³² According to the second, the weight of the bag must be kept within limits "considered to be reasonable and normal having regard to the size and needs of the particular mission."¹³³

210. This question has already been touched upon in the present report in connection with article 8 on the documentation of the diplomatic courier and the particulars it might contain about the packages constituting the bag (see paras. 96 and 99-101 above). Nevertheless, it might be advisable to examine these two proposals briefly, since they have some relevance to the problem under consideration.

211. The Special Rapporteur is of the view that the above-mentioned proposals on the size and weight of the bag contain expressions that could give rise to subjective and contradictory interpretations which may be considered incompatible with the principle of the sovereign equality of States. He therefore considers it advisable to retain the present formulation of article 25.

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.

(a) Comments and observations

212. The few observations submitted on article 26 are to the effect that this provision should reflect in some way the need to ensure the "best possible conditions"¹³⁴ for the expeditious transmission of the bag and the avoidance of "lengthy delays".¹³⁵

¹³² See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of Switzerland, para. 12.

¹³³ *Ibid.*, comments of Yugoslavia, para. 4.

¹³⁴ *Ibid.*, comments of Switzerland, para. 11.

¹³⁵ *Ibid.*, comments of the Federal Republic of Germany, para. 9.

213. The idea of accelerating the transmission of the diplomatic bag by postal service or by any other mode of transport by providing for special treatment for it could be reflected in the text of article 26 only in general terms, since the handling of the bag is dependent on the procedures followed by the respective administrations or agencies.

214. In this connection, it may be recalled that the proposal to introduce a new category of postal items under the nomination of "diplomatic bags" in the international postal service, by amending article 18 of the international regulations of the Universal Postal Union, was rejected by the Universal Postal Congress held in Rio de Janeiro in 1979.¹³⁶ Consequently, the diplomatic bag has to be treated in the same way as other letter-post items, unless the postal administrations enter into bilateral or multilateral agreements for a more favourable treatment of diplomatic bags conveyed by postal service. As was pointed out by the Special Rapporteur in 1983, in this situation "the present work of the Commission on the topic under consideration might well provide the basis for a general legal framework for the transmission of diplomatic bags through postal channels".¹³⁷

(b) Proposed revised text

215. Taking into account the general observations submitted by some Governments, the Special Rapporteur would propose for consideration the following revised text of article 26:

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

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

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.

(a) Comments and observations

216. Some Governments criticize article 27 as being too general and vague.¹³⁸

217. The Commission pointed out in the commentary to article 27 that "it would seem neither advisable nor possible to provide a complete listing of the facilities to be accorded to the diplomatic bag".¹³⁹ It further indicated that

¹³⁶ See the account of the work of UPU on the question of diplomatic correspondence in the Special Rapporteur's fourth report: A/CN.4/374 and Add.1-4 (see footnote 2 (b) (iv) above), paras. 312-317.

¹³⁷ *Ibid.*, para. 317.

¹³⁸ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of: Germany, Federal Republic of, para. 9; United Kingdom, para. 32.

¹³⁹ *Yearbook . . . 1985*, vol. II (Part Two), p. 50, para. (4) of the commentary.

the obligations of the receiving or transit State might entail "favourable treatment in case of transportation problems, or, again, the speeding up of the clearance procedures and formalities applied to incoming and outgoing consignments".¹⁴⁰ At the same time it may be added that the sending State is also under the obligation to take all appropriate measures to avoid any difficulties which may contribute to possible complications for the unimpeded and rapid transmission and delivery of the bag.

218. One Government proposes a drafting amendment to article 27, namely the insertion after the word "shall" of the words "as permitted by local circumstances".¹⁴¹

219. The Special Rapporteur has no objection to this amendment, though it might be considered redundant because it goes without saying that the facilities would always be provided depending upon the practical necessities.

(b) Proposed revised text

220. In the light of the above comments and proposals, the Special Rapporteur submits for consideration the following revised text:

Article 27. Facilities accorded to the diplomatic bag

The receiving State or the transit State shall provide the facilities necessary for the safe and rapid transmission or delivery of the diplomatic bag and shall prevent technical and other formalities which may cause unreasonable delays. The sending State for its part shall make adequate arrangements for ensuring the rapid transmission or delivery of its diplomatic bags.

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.

(a) Comments and observations

221. Article 28 has been discussed extensively and divergent points of view have been expressed throughout the Commission's work on the present topic. The main reason for the special attention given to the text on the protection of the diplomatic bag has been the conception that, as a key provision, it involves basic rules which should lay down an acceptable balance between the confidential-

¹⁴⁰ *Ibid.*, para. (5) of the commentary.

¹⁴¹ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of Thailand, para. 9.

ity of the contents of the bag and the prevention of possible abuses.

222. The comments and observations submitted by Governments on article 28 as provisionally adopted confirm this assessment. A wide range of political, legal and methodological problems are raised, most of which have already been considered by the Commission and the Sixth Committee. A number of proposals are advanced, sometimes in the form of concrete amendments or draft provisions. The main concern of the Special Rapporteur is how to present in the present report, in a concise and analytical manner, an accurate and objective account of the multitude of views expressed. In general terms, the main critical issues involved could be outlined as follows:

(a) The concept of inviolability of the diplomatic bag and its relevance to article 28;

(b) The admissibility of scanning of the bag;

(c) Whether a comprehensive and uniform approach would be applicable to all categories of bags or whether there should be a differentiated treatment of bags in strict compliance with the relevant provisions, on the one hand, of the 1961 Vienna Convention, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States and, on the other hand, of the 1963 Vienna Convention;

(d) If a comprehensive and uniform approach is followed, whether the treatment of all kinds of bags should be governed by article 27, paragraph 3, of the 1961 Vienna Convention, or by article 35, paragraph 3, of the 1963 Vienna Convention;

(e) Whether the transit State should have the same rights as the receiving State with regard to the treatment of the bag, especially if the option to request the opening of the bag is provided.

223. The above-mentioned controversial issues led to the provisional adoption of draft article 28 by the Commission with certain passages of the text put between square brackets to reflect the lack of a consensus thereon. The reasons for bracketing these parts of the text are explained by the Commission in the commentary to article 28.¹⁴²

224. These issues are referred to in the written comments and observations of Governments on paragraphs 1 and 2 of article 28, which are summarized below, paragraph by paragraph.

Paragraph 1

225. The term "inviolable" is the subject of divergent views. Some Governments claim that it is inconsistent with 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".¹⁴³ This approach is questioned by other Governments on the grounds that

inviolability of the bag "would be a logical extension of the inviolability of the archives, documents and official correspondence . . . as reflected in article 24 and article 27, paragraph 2, of the 1961 Vienna Convention".¹⁴⁴

226. The Special Rapporteur holds the view that the inviolability of the bag is a basic requirement for ensuring the confidentiality of its contents and the proper functioning of official communications. The main purpose of such a provision is to prevent any examination which may be prejudicial to the inviolability of the official correspondence and documents or articles intended exclusively for official use. As was pointed out, this rule derives from the inviolability of the archives and other official documents. This provision on inviolability is closely connected with the question of examination of the diplomatic bag by scanning or other sophisticated technical devices. Consequently, the words in the first set of brackets in paragraph 1 should be retained and the brackets eliminated.

227. A significant number of Governments have serious reservations and objections to the examination of the bag directly or through electronic or other technical devices; they propose that the words in the second set of brackets in paragraph 1 be retained and the brackets eliminated.¹⁴⁵

228. Some Governments, however, express the view that an examination by means of scanning might be permissible in exceptional cases and under certain conditions.¹⁴⁶ In this connection, in the amended text proposed by one Government for paragraph 2 of article 28 the basic premise is the qualified admissibility of the examination of the diplomatic bag through scanning and other sophisticated devices. The detailed amendments proposed by this Government: (a) relate to the modalities for carrying out such an examination (for example, it is suggested that the examination may proceed "after giving the sending State sufficient opportunity to dissipate suspicion" and that the "examination may only take place if the sending State consents and a representative of the sending State is invited to be present"); (b) provide that the suspicions of the receiving State would relate, rather than to the whole content of the bag, specifically to "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", and that in such a case the request for examination may be addressed to the sending State; (c) provide for a safeguard provision, according to which "the examination may in no circumstances jeopardize the confidentiality of the documents and other legitimate articles in the bag".¹⁴⁷

¹⁴⁴ *Ibid.*, comments of Brazil, para. 6. See also the comments of: Bulgaria, para. 8; Czechoslovakia, para. 3; Nordic countries, paras. 10-12; USSR, para. 5.

¹⁴⁵ *Ibid.*, comments of: Brazil, para. 7; Bulgaria, paras. 9-10; Czechoslovakia, para. 3; German Democratic Republic, para. 12; New Zealand, paras. 2-3; Nordic countries, para. 12; Spain, para. 11; USSR, para. 6; Venezuela, para. 3; Yugoslavia, para. 6.

¹⁴⁶ *Ibid.*, comments of: Cameroon, para. 2; Italy, para. 3; Thailand, para. 10; United Kingdom, para. 35.

¹⁴⁷ *Ibid.*, comments of the Federal Republic of Germany, para. 12.

¹⁴² *Yearbook* . . . 1986, vol. II (Part Two), pp. 28-29.

¹⁴³ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of Spain, para. 9. See also the comments of: Thailand, para. 10; United Kingdom, para. 38.

229. The proposal summarized above could be assessed as an attempt, by means of certain modalities and safeguards relating to the examination of the diplomatic bag through electronic and other technical devices, to lessen the concern of the sending State, thus making the provision more acceptable. It may, however, give rise to some questions and comments regarding its feasibility. First of all, it is obvious that the examination procedure is retained. The final decision is to be taken by the authorities of the receiving State or the transit State and this decision depends upon their satisfaction. As regards the safeguard provision stipulating that the examination should not jeopardize the confidentiality of the content of the bag, it is difficult to prove that the recourse to scanning would not affect the integrity and secrecy of the documents and articles for official use. Only States that have at their disposal comparable technological capacity could be satisfied with such a provision. But it is also true that in the foreseeable future the great majority of States in the world will not possess a scanning technology comparable to that of the States that are technologically most advanced.

Paragraph 2

230. Paragraph 2 relates to another hard-core issue, which raises several interrelated questions. The first is whether a comprehensive and uniform régime, governing the legal status of all categories of bags under the global denomination of "diplomatic bag", could be applicable in a coherent manner in view of the different treatment provided by the 1961 Vienna Convention, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States, on the one hand, and the 1963 Vienna Convention, on the other. In view of this, it would seem that a differentiated régime should be established. The next question is, however, if a comprehensive and uniform approach proves to be preferable and workable, then on what basis should the universal uniform régime be established? One option would be to adopt as a common legal ground the treatment provided by article 27, paragraph 3, of the 1961 Vienna Convention, while another option would be to adopt as a model article 35, paragraph 3, of the 1963 Vienna Convention. Furthermore, there is the double option procedure contemplated in paragraph 2 of draft article 28, as well as in the proposal by one Government summarized above (see para. 228).

231. The written observations submitted by Governments, like the views expressed earlier during the debates in the Sixth Committee, have attested to the existence of widely diverging stands on these questions. Several distinct trends can be identified with regard to the issues involved in paragraph 2 of article 28.

232. The simplest proposal, advanced by some Governments, is to adopt the text of paragraph 1 without brackets and to delete paragraph 2 altogether.¹⁴⁸

233. Some Governments, maintaining that it would not be possible to overlook the existence under the 1963 Vienna Convention of different treatment for the consular

bag, propose adopting a differentiated approach,¹⁴⁹ to be reflected in paragraph 2 of the article, which should, in their view, deal only with the consular bag in accordance with article 35, paragraph 3, of the 1963 Vienna Convention.

234. Other Governments consider that the present formulation on scanning "does not provide adequate safeguards with respect to the confidentiality of the correspondence"¹⁵⁰ but are prepared to agree to the proposal to apply the treatment provided for in article 35, paragraph 3, of the 1963 Vienna Convention not only to consular bags but also to all categories of bags, including the diplomatic bag under the 1961 Vienna Convention.¹⁵¹ The main argument advanced in favour of such a proposal is that it would lead to a uniform régime for the treatment of all categories of bags and, at the same time, establish a fair balance between the confidentiality of the bag and the legitimate security and other interests of the receiving State or the transit State.

235. In order to complete the review of comments, observations and proposals made regarding article 28, and its paragraph 2 in particular, the Special Rapporteur deems it appropriate to draw the attention of the Commission to one concrete proposal relating to the bracketed words "or transit" and to a general observation addressed to the Commission by the International Conference on Drug Abuse and Illicit Trafficking, held at Vienna in 1987.

236. It is generally agreed that in most circumstances receiving States and transit States may have identical or similar rights and obligations with regard to the treatment of the diplomatic courier and the diplomatic bag. However, as regards the protection of the diplomatic bag and the rights and obligations deriving therefrom, divergent, sometimes outright contradictory, views have been expressed. This has been the case especially with respect to the right to examine the diplomatic bag through electronic or other technical devices and the opening of the bag. The commentary to article 28, explaining the main reasons for the brackets in the expression "[or transit] State", in paragraph 2, states that "some members of the Commission could not accept the extension to the transit State of the rights accorded by the paragraph to the receiving State."¹⁵²

237. The same contradictory opinions are reflected in the replies of Governments. Some are in favour of the concept that transit States are equally entitled to the rights referred to in draft article 28, paragraph 2,¹⁵³ while others express reservations and objections.¹⁵⁴

¹⁴⁹ *Ibid.*, comments of: Germany, Federal Republic of, para. 11; Switzerland, para. 14.

¹⁵⁰ *Ibid.*, comments of Belgium, para. 8.

¹⁵¹ *Ibid.*, comments of: Brazil, para. 7; Czechoslovakia, para. 4; New Zealand, para. 4; Nordic countries, para. 14; Spain, para. 11; United Kingdom, para. 36.

¹⁵² *Yearbook . . . 1986*, vol. II (Part Two), p. 29, para. (11) of the commentary.

¹⁵³ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of: Germany, Federal Republic of, para. 12; Netherlands, para. 15; United Kingdom, para. 37; Switzerland, para. 16.

¹⁵⁴ *Ibid.*, comments of: Cameroon, para. 3; Czechoslovakia, para. 14; Spain, para. 11; Yugoslavia, para. 7.

¹⁴⁸ *Ibid.*, comments of: Bulgaria, para. 10; German Democratic Republic, para. 12; USSR, para. 7.

238. The Special Rapporteur feels that this problem should not create much difficulty in view of the fact that, in practice, if the examination or the opening of the bag are accepted, the transit State would seldom request to exercise its rights. On the other hand, it must also be borne in mind that, in most instances, transit States are on an equal footing with receiving States as far as their obligations regarding the bag are concerned, and that this may be viewed by some Governments as justifying the attribution of the same rights to transit States as to receiving States.

239. The last point, relevant to draft article 28 as a whole and to paragraph 2 in particular, relates to the general observation addressed to the Commission by the International Conference on Drug Abuse and Illicit Trafficking, in which 138 States and a great number of international organizations were represented. The Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control, adopted by the Conference on 26 June 1987 by consensus, contains a special reference to the topic under consideration:

248. If conclusive evidence comes to light of illicit trafficking being carried on by means of the misuse of the diplomatic bag or of the diplomatic status, or of the consular status, it is open to the Government of the receiving State to take measures for halting this traffic and for dealing with the diplomatic or consular staff involved in strict conformity with the provisions of the Vienna Conventions on Diplomatic and Consular Relations. The Conference draws the attention of the International Law Commission to possible misuse of the diplomatic bag for illicit drug trafficking, so that the Commission could study the matter under the topic relating to the status of the diplomatic bag.¹⁵⁵

240. The same Conference adopted by acclamation a declaration in which it requested the Secretary-General of the United Nations to keep under constant review the activities referred to in the Declaration and in the Comprehensive Multidisciplinary Outline.¹⁵⁶ In paragraph 8 of its resolution 42/112 of 7 December 1987 concerning the above-mentioned Conference, the General Assembly requested the Secretary-General to report to it at its forty-third session, in 1988, on the implementation of the said resolution.

241. The Special Rapporteur feels that the above recommendations deserve special attention and should be taken into consideration when the Commission proceeds to the second reading of article 28. It may be recalled that in their written observations some Governments, while not referring particularly to possible drug abuse, most probably had this in mind when suggesting not to exclude "such non-intrusive security checks as . . . the use of sniffer dogs or other methods of external examination",¹⁵⁷ or stating that checks 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".¹⁵⁸

¹⁵⁵ See *Report of the International Conference on Drug Abuse and Illicit Trafficking, Vienna, 17-26 June 1987* (United Nations publication, Sales No. E.87.I.18), chap. I, sect. A.

¹⁵⁶ *Ibid.*, chap. I, sect. B, para. 9.

¹⁵⁷ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of the Nordic countries, para. 12.

¹⁵⁸ *Ibid.*, comments of the Netherlands, para. 13.

(b) Proposed revised texts

242. In summing up, it may be pointed out that the analytical survey of the written comments and observations on draft article 28 has highlighted the main critical issues and the possible solutions to be considered by the Commission. At present no single formulation has obtained overwhelming support in the Commission and in the Sixth Committee. It may, therefore, be advisable to submit for consideration variants that seem to reflect the main trends. This method may reveal which are the most realistic options and thus assist in the search for an acceptable compromise formula. Such an approach has been adopted by the Commission with a certain success in other similar situations.

243. In the light of the above, the Special Rapporteur would propose for consideration the following alternative revised texts, each of which is followed by brief comments:

ALTERNATIVE A

244. Alternative A reads:

Article 28. Protection of the diplomatic bag

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.

245. This provision has certain merits consisting in its simplicity and the fact that it establishes a coherent and uniform régime covering the status of all categories of bags. Of course, it constitutes a deviation from the specific treatment provided for the consular bag under article 35, paragraph 3, of the 1963 Vienna Convention. This departure from the said provision could be justified by the fact that under article 35, paragraph 1, of the 1963 Vienna Convention, the consular post may employ "diplomatic or consular couriers, diplomatic or consular bags". It may also be recalled that, as one Government indicates, "no Government is known to employ 'consular bags'"¹⁵⁹ and that "the distinction between diplomatic and consular bags has become obsolete in international practice".¹⁶⁰ To these assertions could be added the fact that in a significant number of bilateral conventions the treatment of the consular bag has been assimilated to that of the diplomatic bag (see paras. 21-22 above).

246. Alternative A, however, could be the subject of some criticism in that it does not take into consideration the special treatment provided for the consular bag and does not strike the necessary balance between the confidentiality of the bag and the security and other legitimate interests of the receiving State or the transit State.

¹⁵⁹ *Ibid.*, comments of Australia, para. 9.

¹⁶⁰ *Ibid.*, comments of Italy, para. 4.

ALTERNATIVE B

247. Alternative B reads:

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 State or the transit State have serious reason 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 opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.

248. The formulation of paragraph 2 of alternative B basically follows the provision of article 35, paragraph 3, of the 1963 Vienna Convention, with some small drafting changes. First, it refers explicitly to the consular bag, since under the four codification conventions only this type of bag could be opened and returned in specifically indicated conditions and through special procedures. Secondly, the revised text extends the rights of the receiving State to the transit State. Finally, for consistency, reference is made to article 25 of the present draft articles.

249. Alternative B could also be the subject of critical observations from various positions. Reservations on paragraph 1 could centre on the use of the bracketed words contained in article 28, paragraph 1, as provisionally adopted by the Commission, since, as it has been maintained, the concept of inviolability is inconsistent with the examination or opening of the bag (see para. 225 above).

250. In addition, it could be argued that alternative B is not in conformity with the comprehensive and uniform approach leading to a coherent legal régime covering all categories of bags. In the view of many Governments, the main purpose of the present draft articles is the harmonization and uniformization of the rules.

ALTERNATIVE C

251. Alternative C reads:

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 State 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 opened in their presence by an authorized representative of the sending State. If this request is refused by the au-

thorities of the sending State, the competent authorities of the receiving State or the transit State may request that the bag be returned to its place of origin.

252. Alternative C is a compromise provision which takes into account the merits of alternatives A and B and some of their vulnerable points. It is an attempt to achieve a coherent and uniform régime governing the status of the bag, while striking a balance between the requirements for the protection of the confidentiality of the contents of the bag and the legitimate security and other interests of the receiving or transit State. The proposed version contains both preventive and safeguard provisions and coincides with the views of several Governments as representing a flexible and realistic solution.¹⁶¹

253. Of course, the compromise formula embodied in paragraph 2 constitutes a distinct deviation from the prevailing rule that the bag "shall not be opened or detained". The possibility to open or return the bag is considered by many Governments to be an inadmissible departure from present-day diplomatic law; it is pointed out by one Government that "it would be a retrograde step to apply such a provision to diplomatic bags".¹⁶² Similar views are expressed by other Governments.¹⁶³

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.

(a) Comments and observations

254. Article 29 did not elicit any substantive or drafting comments. Only one Government expressed doubt as to whether there was a need for such a provision.

255. The reasons for including such a provision in the set of draft articles on the legal status of the courier are well explained in the commentary.¹⁶⁴ They need not be repeated or further elaborated. In the absence of special provisions on exemption from customs and other fiscal dues and taxes and related charges for customs clearance or other formalities, there might be instances where such requirements would be imposed by the law of a receiving or transit State. Article 29 could therefore be conceived at least as a safeguard provision.

(b) Proposed revised text

256. In view of the above considerations, the Special Rapporteur would propose retaining the present text, with the deletion of the words "as the case may be".

¹⁶¹ *Ibid.*, e.g. comments of: Brazil, paras. 6-7; Chile, paras. 4-6; New Zealand, paras. 2-4; Spain, paras. 10-11.

¹⁶² *Ibid.*, comments of Australia, para. 9.

¹⁶³ *Ibid.*, comments of: Bulgaria, para. 9; Byelorussian SSR, para. 6; USSR, para. 6.

¹⁶⁴ *Yearbook* . . . 1986, vol. II (Part Two), pp. 29-30.

D. 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.

(a) Comments and observations

257. On article 30 only one substantive observation and one drafting proposal were made by Governments in their written comments.

258. One Government, while accepting 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", does not think it reasonable that "additional and positive obligations should be imposed on a receiving or a transit State to act as a custodian of the bag".¹⁶⁵

259. Article 30 refers to situations such as death, serious illness or an accident preventing the courier, or the captain of a ship or aircraft to whom the diplomatic bag has been entrusted, from discharging his duties. The exceptional character of the circumstances involved has been adequately elucidated in the commentary to this article. It was pointed out that the provision in paragraph 1

was not intended to cover the case of loss of or mishaps to the diplomatic bag transmitted by postal service or by any mode of transport . . . since in such cases it was for the service charged with the transmission to assume responsibility under the special circumstances envisaged in the present paragraph.¹⁶⁶

It was further clarified that the receiving State or the transit State could assume such obligations if they had knowledge of the existence of special circumstances, and when there was no one to take custody of the bag.

260. With regard to the circumstances contemplated in paragraph 2, in which the diplomatic courier or an unaccompanied diplomatic bag is present in the territory of a State which was not initially foreseen as a transit State, the obligations of that State under paragraph 2 are of an exceptional character. In normal circumstances the transit States through which a diplomatic courier or an unaccompanied diplomatic bag will pass are known in advance. It is only in cases of *force majeure* or other unforeseen circumstances, such as adverse weather conditions, the forced

landing of an aircraft or other events beyond the control of the courier or the carrier of the bag, that the unforeseen transit State would be called upon to accord protection to the courier and the bag and extend to them the facilities necessary to allow them to leave the territory.

261. It is difficult to conceive how, in an interdependent world in which international co-operation and solidarity among States have acquired ever-growing significance, a provision to the effect that assistance shall be rendered in the case of distress or in exceptional conditions could be considered excessive and therefore not acceptable. It may be recalled that provisions of a similar character may be found in the relevant articles of the four codification conventions, as was indicated in the commentary to this article.¹⁶⁷

262. The drafting proposal mentioned above refers to paragraph 2. It is suggested by one Government that the words "or other circumstances" be added after the words "*force majeure*" in order to keep the paragraph in line with paragraph 1, where the same expression is used.¹⁶⁸ In addition, the Special Rapporteur would propose to delete the words "as the case may be" in paragraph 1.

(b) Proposed revised text

263. Taking into account the above drafting suggestions, the Special Rapporteur proposes the following amendments to article 30: deletion of the words "as the case may be" in paragraph 1; and addition of the words "or other circumstances" after the words "*force majeure*" in paragraph 2.

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.

(a) Comments and observations

264. Article 31 elicited several comments and observations of both a substantive and a drafting nature.

265. Some Governments point out that the scope of article 31 in its present form is too broad and is not in conformity with international law and State practice.¹⁶⁹ One of them suggests that this article should be confined to cases of non-recognition of the sending State or of its Government or non-existence of diplomatic or consular relations between that State and a receiving State which is the host State of an international organization or an international conference.¹⁷⁰

¹⁶⁷ *Ibid.*, para. (5) of the commentary.

¹⁶⁵ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of the United Kingdom, para. 39.

¹⁶⁶ *Yearbook . . . 1986*, vol. II (Part Two), p. 30, para. (2) of the commentary.

¹⁶⁸ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of Thailand, para. 12; see also comments of Czechoslovakia, para. 5.

¹⁶⁹ *Ibid.*, comments of: Netherlands, para. 17; Thailand, para. 13.

¹⁷⁰ *Ibid.*, comments of the Netherlands, para. 17.

266. Another Government proposes that special missions should also be mentioned in article 31, so that it would also apply to the couriers and bags of such missions.¹⁷¹

(b) Proposed revised text

267. In the light of the written comments and observations of Governments and the suggestions contained therein, the Special Rapporteur would propose the following revised text of article 31:

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 between that State and the receiving State in whose territory an international organization has its seat or office, or an international conference takes place, or where a special mission of the sending State is present.

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.

(a) Comments and observations

268. Several substantive comments have been made on three main issues relating to the relationship between the present draft articles and (a) the bilateral and multilateral agreements on the same subject-matter in force as between the parties to them other than the four codification conventions; (b) the four codification conventions;¹⁷² (c) future agreements on the same subject-matter. In connection with the first issue, the term "regional" was questioned.¹⁷³

269. With regard to the relationship between the present articles and bilateral and multilateral agreements in force dealing with the status of the courier and the bag, the Commission's view is that this provision should be considered as a safeguard clause in respect of the rights and obligations of States deriving from those agreements.¹⁷⁴ Similar provisions are embodied in article 73, paragraph 1, of the 1963 Vienna Convention and article 4 (a) of the 1975 Vienna Convention on the Representation of States.

270. The Special Rapporteur is of the view that the term "regional" should be deleted from the title and the text of article 32, since it may create a certain confusion with the

notion of agreements confined to a specific geographical area as contemplated in article 52 of the Charter of the United Nations. In this case it may be appropriate to indicate explicitly the relationship between the present draft articles and the four codification conventions, a problem which is considered below.

271. The main purpose of the draft articles is to establish a coherent régime governing the status of all categories of couriers and bags through the harmonization of existing provisions in the codification conventions and further elaboration of additional concrete rules. These conventions should constitute the legal basis for the draft on the status of the courier and the bag. Therefore, as was pointed out in the commentary to this article, the present articles would complement the provisions on the courier and the bag contained in the codification conventions.¹⁷⁵ However, if the comprehensive and uniform approach is to be carried out in a coherent manner, some of the provisions of those conventions, particularly on the treatment of the bag, may be affected.

272. One Government expresses the view that the draft articles may be considered as a "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".¹⁷⁶

273. With regard to the relationship between the present articles and future agreements on the same subject-matter, the Commission agreed that this problem was settled by the provision of article 6, paragraph 2 (b), adopted on first reading, which stipulates that States may modify among themselves the present articles, "provided that such new provisions are not incompatible with the object and purpose of the present articles and do not affect the enjoyment of the rights or the performance of the obligations of third States".¹⁷⁷ The same objective could also be attained through the revised text proposed by the Special Rapporteur in the present report (see para. 92 above).

(b) Proposed revised text

274. Taking into consideration the written comments and observations submitted by Governments and with a view to clarifying the relationship between the present articles and the agreements on the same subject-matter in force as between States parties to them, including the relationship with the four codification conventions, the Special Rapporteur would propose for consideration the following revised text:

Article 32. Relationship between the present articles and other agreements and conventions

The provisions of the present articles shall not affect other international agreements in force as between par-

¹⁷¹ *Ibid.*, comments of Brazil, para. 8.

¹⁷² *Ibid.*, comments of: Belgium, para. 9; United Kingdom, para. 43; Yugoslavia, para. 8. See also "Topical summary . . ." (A/CN.4/L.410), paras. 341-351.

¹⁷³ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of: Chile, para. 7; United Kingdom, para. 43.

¹⁷⁴ *Yearbook . . . 1986*, vol. II (Part Two), p. 32, para. (2) of the commentary.

¹⁷⁵ *Ibid.*, para. (3) of the commentary.

¹⁷⁶ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of Bulgaria, para. 3.

¹⁷⁷ *Yearbook . . . 1986*, vol. II (Part Two), p. 32, para. (5) of the commentary.

ties to them and shall complement the conventions listed in article 3, paragraph 1 (1) and (2).

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.

(a) Comments and observations

275. The main objective of article 33 was to introduce a certain measure of flexibility into the draft articles in order to provide better prospects for acceptance by States of

the set of rules as a whole. This provision offers States the possibility of exercising a legal option through a declaration specifying any category of courier and bag to which they will not apply the present articles. Initially, during the discussion in the Commission and in the Sixth Committee, this provision was considered to be a necessary and acceptable compromise solution.¹⁷⁸ Of course, there were also serious reservations and objections on the grounds that article 33 might create a plurality of régimes and bring about confusion in the applicable law.¹⁷⁹

276. In their written comments and observations, Governments, with one exception,¹⁸⁰ express serious doubts about the necessity and viability of article 33 and therefore propose its deletion.¹⁸¹

(b) Proposed deletion

277. In view of the insignificant support for article 33 and the substantial reservations and objections to it, the Special Rapporteur submits that its deletion would be advisable.

¹⁷⁸ See "Topical summary . . ." (A/CN.4/L.410), paras. 352-354.

¹⁷⁹ *Ibid.*, paras. 355-360.

¹⁸⁰ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of Thailand, para. 14.

¹⁸¹ *Ibid.*, comments of: Australia, para. 2; Belgium, para. 10; Brazil, para. 9; Bulgaria, para. 11; Byelorussian SSR, para. 8; Czechoslovakia, para. 6; Nordic countries, para. 15; USSR, para. 8; United Kingdom, para. 44; Yugoslavia, para. 9; Switzerland, para. 5.

III. Conclusion

278. The analytical survey of the comments and observations submitted by Governments and the revised texts of several articles proposed for consideration and eventual adoption by the Commission on second reading have revealed the possible options for resolving the controversial issues and for further improving the draft as a whole. The main concern of the Special Rapporteur has been to offer some further suggestions for the elaboration of a coherent set of rules which are intended to meet the requirements for a viable and realistic régime governing the legal status of all categories of couriers and bags.

279. In the elaboration of this draft the Special Rapporteur has followed the structure initially submitted in his preliminary report,¹⁸² which was approved by the Commission.¹⁸³

280. In their written comments and observations, two Governments express the view that it might be desirable, if the present draft articles are incorporated in a treaty, to include a special chapter or provisions containing "binding regulations concerning the settlement of disputes on its interpretation or application"¹⁸⁴ and that "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".¹⁸⁵

281. This being the first time the question of the settlement of disputes has been raised in connection with the topic under consideration, the Special Rapporteur will seek the advice and guidance of the Commission, since the problem is a very important one and deserves special consideration.

¹⁸² Document A/CN.4/335 (see footnote 2 (b) (i) above), paras. 55-60; see also the second report, document A/CN.4/347 and Add.1 and 2 (see footnote 2 (b) (ii) above), para. 7.

¹⁸³ *Yearbook . . . 1980*, vol. II (Part Two), p. 165, para. 170.

¹⁸⁴ See document A/CN.4/409 and Add.1-5 (p. 125 above), comments of the Netherlands, para. 4.

¹⁸⁵ *Ibid.*, comments of Venezuela, para. 4.