

Document:-
A/CN.4/420

Comments and observations received from Governments

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

Extract from the Yearbook of the International Law Commission:-
1989, vol. II(1)

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

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

[Agenda item 4]

DOCUMENT A/CN.4/420

Comments and observations received from Governments

[Original: English]
[30 March 1989]

CONTENTS

	<i>Page</i>
Note	75
Introduction	75
Comments and observations received from the United States of America	76

NOTE

Multilateral conventions referred to in the present document

Source

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

Introduction

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

General to Governments for comments and observations and that it should be requested that such comments and observations be submitted to the Secretary-General by 1 January 1988.²

2. By paragraph 9 of resolution 41/81 of 3 December 1986, and again by paragraph 10 of resolution 42/156 of 7 December 1987, both entitled “Report of the International Law Commission”, the General Assembly

¹ For the text of the draft articles, see *Yearbook . . . 1986*, vol. II (Part Two), pp. 24 *et seq.*

² *Ibid.*, p. 24, para. 32.

urged Governments to give full attention to the request of the International Law Commission for comments and observations on the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

3. Pursuant to the Commission's request, the Secretary-General addressed circular letters, dated respectively 25 February 1987 and 22 October 1987, to Governments

inviting them to submit their comments and observations by 1 January 1988.

4. The replies received in 1988 are to be found in document A/CN.4/409 and Add.1-5.³ An additional reply received on 29 March 1989 is reproduced below.

³ *Yearbook . . . 1988*, vol. II (Part One), p. 125.

COMMENTS AND OBSERVATIONS RECEIVED FROM THE UNITED STATES OF AMERICA

[Original: English]
[23 March 1989]

1. The International Law Commission developed draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier that were adopted provisionally by the Commission, on first reading, at the thirty-eighth session, held in 1986.¹ At that time, the Commission transmitted the draft articles through the Secretary-General to the Governments of Member States with a request that they submit written comments and observations to the Secretary-General, to be transmitted to the Commission. The draft articles were discussed in the Sixth Committee during the forty-first, forty-second and forty-third sessions of the General Assembly. The United States of America, among other States, provided its views on the draft articles in the Sixth Committee.²

2. The Special Rapporteur examined in his eighth report³ the written comments and observations submitted by Governments as well as the summary of views expressed by States during the debate in the Sixth Committee. At its fortieth session, the Commission began the "second" reading of the draft articles and discussed the proposals made by the Special Rapporteur for revision of the articles in the light of the comments of Governments. At the conclusion of that discussion, the Commission decided to refer the draft articles to the Drafting Committee, together with the proposals made by the Special Rapporteur as well as those formulated during the discussion in the plenary Commission, on the understanding that the Special Rapporteur could make new proposals to the Drafting Committee on the basis of the comments and observations made in the Commis-

sion's plenary discussion and those that might be made in the Sixth Committee.⁴ Although the report of the Commission on its fortieth session was not available until just before the Sixth Committee commenced, a number of States expressed views on the draft articles in the Committee.⁵

3. Having had the opportunity to review that report, the United States submits the following comments and observations for the consideration of the Special Rapporteur and other members of the Commission at the forty-second session of the Commission. Our initial comments generally address our view that there is no need for draft articles on this topic at this time and that approval of the draft articles would be counter-productive. We then comment specifically on certain articles. The absence of United States comments on particular articles or matters raised by particular articles does not indicate and should not be construed as indicating support for such articles or matters.

I. General comments

4. While the United States Government commends the International Law Commission, and especially its Special Rapporteur, Mr. Alexander Yankov, for the work done on this subject, the United States, like a number of other States that have submitted written comments and observations, remains convinced that articles on the subject are not necessary, or even desirable.⁶

5. The subject of the status of the diplomatic courier and the diplomatic bag, in one form or another, has been before the Commission since 1949. Unlike many, if not most, of the other topics of which the Commission has been seized recently, the topic has already been addressed by the Commission and acted upon by the United Nations and most Member States in a variety of circumstances.

¹ For the text of the draft articles, see *Yearbook . . . 1986*, vol. II (Part Two), pp. 24 *et seq.*

² 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 forty-first session of the General Assembly" (A/CN.4/L.410), sect. C; "Topical summary . . . forty-second session of the General Assembly" (A/CN.4/L.420), sect. F.3; "Topical summary . . . forty-third session of the General Assembly (A/CN.4/L.431), sect. E. See also the comments and observations of Governments transmitted to the Commission through the Secretary-General, reproduced in *Yearbook . . . 1988*, vol. II (Part One), p. 125, document A/CN.4/409 and Add.1-5.

³ *Yearbook . . . 1988*, vol. II (Part One), p. 163, document A/CN.4/417.

⁴ *Yearbook . . . 1988*, vol. II (Part Two), p. 75, para. 292.

⁵ See "Topical summary . . . forty-third session of the General Assembly" (A/CN.4/L.431), sect. E.

⁶ See document A/CN.4/417 (footnote 3 above), para. 13 and footnote 11.

6. The existing régime for the diplomatic courier and the diplomatic bag generally is provided in article 27 of the 1961 Vienna Convention on Diplomatic Relations. The Convention, which generally codified customary international law and practice relating to diplomatic relations, was based upon draft articles developed by the Commission between 1954 and 1958. The Commission in developing those articles and the United Nations Conference on Diplomatic Intercourse and Immunities in adopting them largely unchanged in 1961 recognized that the régime did not address many of the details of this subject, and the Commission was subsequently entrusted with the task of analysing these issues and further elaborating the régime for the diplomatic bag.

7. None the less, the Commission and the United Nations have subsequently dealt with the topic in a variety of different contexts and have continued to provide for the basic régime set out in article 27. The same basic régime was proposed by the Commission in the draft articles that it developed in regard to special missions between 1961 and 1968, and incorporated in the Convention on Special Missions adopted in 1969.⁷ It was also proposed by the Commission in the draft articles that it developed in regard to the representation of States in their relations with international organizations of a universal character, and incorporated in the Convention adopted by the Conference convened by the United Nations on that topic in 1975.⁸ The Commission now proposes a similar régime, modified to elaborate and, in some instances, develop new rights or obligations in relation to the bag and courier. In what has generally been recognized as the most important of the draft articles, the Commission continues to consider a provision that would permit the host State to request that the bag be opened or refuse entry of the bag. This provision is similar to the provisions that the Commission developed in regard to consular missions between 1955 and 1961 and incorporated in the Vienna Convention on Consular Relations, adopted by a conference convened by the United Nations on that topic in 1963. The United States, like other Governments and a number of members of the Commission, opposes any such change in the régime of the diplomatic bag and believes the history of the 1961 Vienna Convention is instructive on this point.

8. In part, the Commission and the United Nations Conference in 1961 declined to address the many details of the régime for the diplomatic bag because the proposed solutions to several specific and sometimes isolated issues created more problems than they appeared to resolve. While the United States commends the work that the Commission has done since it began this most recent effort on this topic, the draft articles reveal that the situation has not changed over the years. The draft articles attempt to bring together in one document the régime of the diplomatic bag as it has been applied in various different contexts, and to resolve the

issues that may have arisen in State practice. The United States Government is concerned that the articles and the controversy that they have generated, particularly in regard to article 28, demonstrate that the situation that existed in 1961 continues.

9. In this respect, the United States Government believes that it is important not to overlook the value of the existing régime. The use of the diplomatic bag, with the protection that it provides to correspondence and other items transported in the bag for the official use of the mission, has been and remains vital to the operation of all diplomatic missions and, therefore, to the efficient conduct of foreign relations. The basic régime provided in article 27 of the 1961 Vienna Convention, as supplemented by customary international law and practice, adequately establishes a legal régime for the conduct of diplomatic relations which strikes the necessary and desirable balance between the corresponding rights and obligations of the sending and the receiving States. That régime, which reflects centuries of practice, has been adapted where necessary by the international community and particular States as circumstances have required. Attempting in these articles to deal with the special features of different adaptations of that régime in other contexts complicates the law in this area, diminishes the flexibility inherent in separate but parallel approaches to the régime of the bag in different contexts and is therefore unnecessary and undesirable.

10. It is the understanding of the United States Government that, given the constant and widespread use that is made of the bag by all countries, as both senders and receivers, the number of problems that have actually arisen, in reality, has been relatively small. In this respect, the United States joins at least one other State in lamenting the failure of the Commission to relate the draft articles to any survey of existing State practice that might demonstrate the need for the proposed articles.⁹

11. Without dismissing the serious nature of some of the problems that have arisen, particularly in regard to the possible use of the bag to support terrorism, the question is whether the comprehensive and detailed overhaul proposed by the Commission, with all the problems that the overhaul appears to entail, is useful or necessary to address those problems. The United States believes that, at this time, the existing problems are better resolved by the States concerned, within the present general framework. For that reason, the United States Government recommends that the Commission lay the topic aside for the time being.

II. Specific comments on individual articles

Article 1 (Scope of the present articles)

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

Article 3 (Use of terms)

12. The draft articles purport to address the use of the diplomatic courier and the diplomatic bag by interna-

⁷ Article 28 (Freedom of communication) of the Convention, adopted by the General Assembly on 8 December 1969 (resolution 2530 (XXIV), annex).

⁸ Article 57 (Freedom of communication) of the 1975 Vienna Convention on the Representation of States.

⁹ See document A/CN.4/409 and Add.1-5 (footnote 2 above *in fine*), comments of Australia, para. 1.

tional organizations and missions to such organizations, as well as by special missions.

13. A number of States have objected to the comprehensive approach of the draft articles to the use of the bag and courier. While, as the Special Rapporteur suggests, only one Government expressly objected to the comprehensive approach to the bag,¹⁰ it appears from the written comments that a number of States indirectly objected to that approach. At least two other Governments suggested that the draft articles be limited to the 1961 and 1963 Vienna Conventions, noting that the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States have not attained anything near the general acceptance of the 1961 and 1963 Conventions.¹¹ The comments of other Governments relating to the implications of article 33 seem to raise the same concern.¹²

14. For the reason set out above in its general comments, the United States believes that, if these articles are to be adopted, they should not extend beyond questions strictly relating to diplomatic and consular bags and couriers. They should not extend to special missions, permanent missions to international organizations and international organizations since many States are not parties to the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States. If the Commission none the less insists upon extending the articles to cover those types of couriers and bags, the United States believes that, in order to promote acceptance of the articles by the many States that have not become parties to those two Conventions, it must retain a provision like that found in article 33.

Article 17 (Inviolability of temporary accommodation)

15. Article 17 would accord inviolability to the temporary accommodation of a diplomatic courier. It appears that a majority of States that commented on this provision objected to it.¹³ The Special Rapporteur was of the view that the text of article 17 adopted on first reading without any formal reservations offered the basis for an appropriate provision, but that the question deserved further study in order to find a formulation which might offer better prospects for acceptance.¹⁴ The United States would add its voice to that of those States and members of the Commission already objecting to this provision, on the grounds that the provision would depart from the existing law and practice under the 1961 and 1963 Vienna Conventions and would unreasonably impose a new burden on receiving and transit States without a case being made for such extraordinary protection.

¹⁰ Document A/CN.4/417 (see footnote 3 above), paras. 48-49.

¹¹ See document A/CN.4/409 and Add.1-5 (footnote 2 above *in fine*), comments of Australia, para. 3; United Kingdom, para. 4.

¹² *Ibid.*, comments of Austria, paras. 2 and 4; Canada, para. 1; Greece, para. 2.

¹³ *Ibid.*, comments of: Australia, para. 5; Austria, para. 8; Belgium, para. 6; France, para. 16; Germany, Federal Republic of, para. 3; Netherlands, paras. 5-6; Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), para. 6; United Kingdom, paras. 18-19; Switzerland, paras. 8-9.

¹⁴ *Yearbook* . . . 1988, vol. II (Part Two), p. 84, para. 378.

Article 18 (Immunity from jurisdiction)

16. Article 18 would accord the diplomatic courier immunity from criminal jurisdiction in respect of all acts performed in the exercise of his functions and from civil jurisdiction except in the case of an action for damages arising out of an automobile accident in certain circumstances. It also addresses measures of execution and the obligation to give evidence. A number of States objected to this provision.¹⁵ The Special Rapporteur stated that, in the light of the discussion in the Commission, the draft article, with certain proposed non-substantive amendments,¹⁶ seemed to be acceptable to a great number of the members of the Commission.¹⁷ At this time, the United States concurs with those other States that object to this provision, which departs from existing law and practice under the 1961 and 1963 Vienna Conventions, has the potential for creating confusion and controversy and is unnecessary to the performance of the courier's functions in the light of the personal inviolability already accorded the courier.

Article 28 (Protection of the diplomatic bag)

17. Article 28 is the most important provision in the draft. It also continues to be the most controversial article, as reflected in the comments submitted by Governments, their statements in the Sixth Committee,¹⁸ the eighth report of the Special Rapporteur¹⁹ and the report of the Commission on its fortieth session.²⁰ In the view of the United States and of many other States, the provisions of the 1961 and 1963 Vienna Conventions adequately establish an "acceptable balance between the confidentiality of the contents of the bag and the prevention of possible abuses",²¹ and no changes are necessary or desirable.

18. If such articles are to be adopted, however, the United States agrees with those States and members of the Commission that believe that the inviolability of the bag is the basic requirement for ensuring the confidentiality of the contents of the bag and the proper functioning of diplomatic communications. With that objective in mind, the United States favours the retention of the bracketed language in paragraph 1 of article 28. In this respect, the United States agrees with what appears to be the overwhelming majority of Governments commenting that diplomatic bags should not be subject to examination.²²

¹⁵ See document A/CN.4/409 and Add.1-5 (footnote 2 above *in fine*), comments of: Australia, para. 6; Belgium, para. 7; Germany, Federal Republic of, paras. 4-8; United Kingdom, paras. 20-21.

¹⁶ Document A/CN.4/417 (see footnote 3 above), paras. 158-161.

¹⁷ *Yearbook* . . . 1988, vol. II (Part Two), p. 85, para. 385.

¹⁸ See "Topical summary . . . forty-first session of the General Assembly" (A/CN.4/L.410), paras. 294-330; and "Topical summary . . . forty-second session of the General Assembly" (A/CN.4/L.420), paras. 246-247.

¹⁹ Document A/CN.4/417 (see footnote 3 above), paras. 221-253.

²⁰ *Yearbook* . . . 1988, vol. II (Part Two), pp. 89-93, paras. 429-452.

²¹ *Ibid.*, para. 430.

²² See document A/CN.4/409 and Add.1-5 (footnote 2 above *in fine*), comments of: Australia, paras. 10-11; Belgium, para. 8; Brazil, para. 7; Cameroon, paras. 3-4; Canada, para. 3; Czechoslovakia, para. 3;

19. Similarly, the United States strongly agrees with those States that oppose the provision found in paragraph 2 of article 28 that would permit a receiving State to require the return of a bag unless it is permitted to examine the bag.²³ The United States would also note that, even among those States that support such a provision, several expressed concern about the manner in which it would be implemented, stressing their view that such authority should only be exercised in the most extraordinary or exceptional circumstances.²⁴ In the view of the United States, this could set an impractical standard that would be subject to abuse. Other States were content to rely on the principle of reciprocity to prevent abuse in the implementation of the provisions of paragraph 2.²⁵ In the view of the United States, in many instances reciprocity is impractical and may exacerbate the situation, possibly triggering a circle of retaliatory actions that would, in fact, impede the free flow of diplomatic communications.

20. In conclusion, the United States reiterates its gratitude for the work of the Commission and its Special Rapporteur on the present topic, but submits that the Commission should not proceed with the second reading of the draft articles without first conducting an examina-

France, paras. 28-29; German Democratic Republic, para. 12; Greece, para. 10; New Zealand, paras. 2-3; Spain, para. 11; Venezuela, para. 3. But see also the comments of: Germany, Federal Republic of, paras. 11-12; United Kingdom, paras. 33-38; Yugoslavia, paras. 5-8; Switzerland, paras. 13-16.

²³ *Ibid.*, comments of: Australia, para. 7; Bulgaria, para. 10; France, para. 7; German Democratic Republic, para. 12; Greece, para. 10; USSR, para. 7.

²⁴ *Ibid.*, comments of: Germany, Federal Republic of, paras. 11-12; New Zealand, para. 4; Switzerland, para. 16.

²⁵ *Ibid.*, comments of: Austria, para. 10; Czechoslovakia, para. 4.

tion of State practice with respect to the diplomatic and consular courier and bag to determine whether any changes in the existing régime are necessary or desirable. In this respect, the United States notes that at least one Government has suggested that sending States do not commonly employ consular bags, given that the 1963 Vienna Convention permits States to use consular or diplomatic bags to communicate with consulates.²⁶

21. If the Commission, none the less, should decide to proceed with the second reading of the draft articles, it is the view of the United States that the modifications discussed above are essential if the draft articles are to have any realistic prospect of being broadly acceptable to Governments. Finally, if the draft articles approved by the Commission are comparable to the present text, the United States believes that the recommendation, if any, that the Commission makes to the General Assembly under article 23 of its statute regarding the disposition of the draft articles ought to reflect the divergent views and practices of States in this matter. In this respect, the United States believes that the Commission should recommend that the General Assembly should, at most, take note of the draft as a possible set of guidelines, and should not envision the convocation of an international conference for the purpose of concluding a convention on the basis of the draft.

22. The United States appreciates this opportunity to make its views known to the Commission in written form, and hopes that they will be helpful to the Commission and the Special Rapporteur in their further work on the topic.

²⁶ *Ibid.*, comments of Australia, para. 9.