

Document:-
A/CN.4/L.365 and Add.1

Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Texts adopted by the Drafting Committee: articles 1 to 8 - reproduced in A/CN.4/SR.1806, paras. 2, 4, 6, 19, 21, 23, 25 and 27

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:-
1983, vol. I

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

appearing in other articles: "The immunity of a State cannot be invoked". In order to avoid problems of interpretation, the Committee had felt justified in specifying that the court referred to was "a court of another State which is otherwise competent". Lastly, it had specified that the proceeding in which that court exercised its jurisdiction had to relate to the determination of one of the rights or interests enumerated in subparagraphs (a)–(e) of paragraph 1.

72. Subject to some drafting amendments made in the interests of uniformity and precision, subparagraphs (a) and (b) of the new paragraph 1 corresponded to subparagraphs (a) and (b) of the former paragraph 1, and subparagraphs (c), (d) and (e) of the new paragraph 1 dealt with the three matters covered by subparagraph (c) of the original paragraph 1.

73. The provisions of subparagraph (d) of the former paragraph 1 were reflected, with changes in drafting and presentation, in the new paragraph 2 of the article. Lastly, a new paragraph 3 set out in greater detail the provision in the former paragraph 2.

74. One member of the Drafting Committee had been opposed to paragraph 2, which he considered unnecessary because its contents were partly covered by the provisions of other articles or related to cases outside the scope of the draft. As for paragraph 3, several members had regarded it as a provisional text subject to the approval of article 4 or other additional articles which might prove necessary.

The meeting rose at 1 p.m.

1806th MEETING

Monday, 18 July 1983, at 3 p.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jacovides, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (continued)*

* Resumed from the 1799th meeting.

(A/CN.4/L.365 and Add.1, ILC(XXXV)/Conf. Room Doc.7)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE

ARTICLES 1 to 8¹

1. Mr. LACLETA MUÑOZ (Chairman of the Drafting Committee), continuing the report on the work of the Drafting Committee which he had begun at the previous meeting, said that articles 1 to 8 on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier which had been adopted by the Drafting Committee (A/CN.4/L.365 and Add.1) corresponded to draft articles 1 to 8 submitted by the Special Rapporteur. He recalled that the original texts of draft articles 1 to 6 were contained in the second report of the Special Rapporteur. Those draft articles had been examined by the Commission at its thirty-third session and had been referred to the Drafting Committee, but it had not considered them at that time.² Draft articles 1, 3, 4 and 5, as reformulated, had been reproduced in the third report of the Special Rapporteur which had also contained, without modification, the texts of draft articles 2 and 6. Draft articles 7 to 14 had constituted a new set of articles submitted by the Special Rapporteur in his third report. The 14 draft articles submitted in the third report of the Special Rapporteur had been examined by the Commission at its thirty-fourth session and referred to the Drafting Committee which, for lack of time, had been unable to consider them.³ At the current session, the Commission had also referred to the Drafting Committee draft articles 15 to 19 submitted in the Special Rapporteur's fourth report (A/CN.4/374 and Add.1–4). Articles 9 to 19 would therefore have to be considered by the Drafting Committee at the Commission's next session. The Special Rapporteur had grouped together articles 1 to 6 in part I, entitled "General provisions", and articles 7 to 19 in part II, entitled "Status of the diplomatic courier, the diplomatic courier *ad hoc* and the captain of a commercial aircraft or the master of a ship carrying a diplomatic bag". The Drafting Committee had decided to postpone its decision on the various parts into which the draft might be divided until it had made considerably more progress in its examination of the proposed articles.

2. The Drafting Committee proposed the following text for article 1:

Article 1. Scope of the present articles⁴

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.

¹ For the consideration of these draft articles by the Commission at its thirty-fourth session, see *Yearbook . . . 1982*, vol. I, pp. 293–312, 1745th meeting, paras. 7–37, and 1746th–1747th meetings.

² *Yearbook . . . 1981*, vol. II (Part Two), p. 162, para. 249.

³ *Yearbook . . . 1982*, vol. II (Part Two), p. 120, para. 249.

⁴ For the revised text submitted by the Special Rapporteur, *ibid.*, p. 115, footnote 314.

3. The text adopted by the Drafting Committee corresponded to that of the article 1 submitted by the Special Rapporteur. However, the Drafting Committee had substantially simplified its wording by employing the generic terms used in article 3, namely “diplomatic courier”, “diplomatic bag”, “mission” and “delegation”, which would be explained in that article. Furthermore, it had changed the emphasis of article 1. Whereas the original text had stressed the communications of States for all official purposes, the Drafting Committee had highlighted the very scope of the draft—the diplomatic courier and the diplomatic bag employed for the official communications of a State.

4. The Drafting Committee proposed the following text for article 2:

Article 2. Couriers and bags not within the scope of the present articles⁵

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.

5. The text of article 2 as adopted by the Drafting Committee reproduced, with only a few minor drafting changes, the text of paragraph 2 of the draft article submitted by the Special Rapporteur. The Committee had reached the conclusion that paragraph 1 of that draft had not been necessary and had therefore deleted it. The expression “all official purposes” had been replaced by the expression “official communications”, which was used in article 1. Furthermore, in subparagraph (b), the phrase “with regard to the facilities, privileges and immunities which would be accorded” had been replaced by the expression “which would be applicable”, which was used in the corresponding provisions of, for example, the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. The Drafting Committee’s adoption of the article in no way implied that it had taken a position on the question of extending the scope of the draft to couriers and bags of international organizations or of national liberation movements. That was a matter which could be settled at a later stage.

6. The Drafting Committee proposed the following text for article 3:

Article 3. Use of terms⁶

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

⁵ For the text submitted by the Special Rapporteur, *ibid.*, p. 115, footnote 315.

⁶ For the revised text submitted by the Special Rapporteur, *ibid.*, p. 116, footnote 318.

(d) a courier of a permanent mission, of a permanent observer mission, of a delegation or of an observer delegation, within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975,

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

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

(a) a diplomatic bag within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(b) a consular bag within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

(c) a bag of a special mission within the meaning of the Convention on Special Missions of 8 December 1969; or

(d) a bag of a permanent mission, of a permanent observer mission, of a delegation or of an observer delegation, within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

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

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

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

(6) “mission” means:

(a) a permanent diplomatic mission within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(b) a special mission within the meaning of the Convention on Special Missions of 8 December 1969; and

(c) a permanent mission or a permanent observer mission within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

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

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

(9) “international organization” means an intergovernmental organization.

2. The provisions of paragraph 1 of the present article regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or the internal law of any State.

7. That text corresponded to the article 3 submitted by the Special Rapporteur. However, the Committee had reduced the number of paragraphs from three to two, the first of which comprised nine subparagraphs, compared with 12 subparagraphs in the original text.

8. Paragraph 1, subparagraph (1), defined the term “diplomatic courier”, which covered both the regular courier and the courier *ad hoc*, who had been the subject of a separate subparagraph in the original text. The term referred to a person duly authorized by the sending State either as a diplomatic courier in the strict sense, a consular courier, a courier of a special mission or a courier of a permanent mission, of a permanent observer mission, of a

delegation or of an observer delegation. Those various categories were distinguished by reference to the meaning given to each one by the relevant codification conventions. Moreover, the detailed reference made in the original draft to the active and passive subjects of communications effected through the diplomatic courier had been simplified by a reference to "the official communications referred to in article 1".

9. Paragraph 1, subparagraph (2), corresponded to paragraph 1, subparagraph (3), of the original draft. However, its wording was modelled on that of subparagraph (1). For example, the description of the dispatchers or recipients of the diplomatic bag had been replaced by a reference to "the official communications referred to in article 1". Similarly, the subdivisions of the subparagraph referred to the various types of bags covered by the term "diplomatic bag", which were defined by reference to the meaning given to them in the relevant codification conventions. The Drafting Committee had further simplified the text by using the expression "packages . . . whether accompanied by diplomatic courier or not" in place of the original phrase "packages . . . dispatched through diplomatic courier or the captain of a commercial ship or aircraft or sent by postal or other means, whether by land, air or sea".

10. Paragraph 1, subparagraph (3), which corresponded to subparagraph (4) of the original draft, defined the term "sending State". The wording had been simplified through the use of the generic terms "missions" and "delegations". The Drafting Committee had deleted the expressions "with or without a courier" and "wherever situated" as being superfluous.

11. Paragraph 1, subparagraph (4), which defined the term "receiving State", corresponded to subparagraph (5) of the original draft, which had defined in two subdivisions the two concepts of "receiving State" found in the codification conventions. The distinction made in those conventions between diplomatic or special missions and missions or delegations to international organizations or conferences had been rendered unnecessary by the use of the generic terms "missions" and "delegations". For reasons of consistency, the Drafting Committee had added a clarification by employing the words "which receive or dispatch a diplomatic bag".

12. Paragraph 1, subparagraph (5), which defined the term "transit State", reproduced the wording of subparagraph (6) of the original text, with the exception of the expression "*en route* to the receiving State", which had been replaced by the words "in transit" in order to cover both communications through a courier or a diplomatic bag originating in the territory of the receiving State and those effected between the territories of two States other than the sending State.

13. Paragraph 1, subparagraph (6), defined "mission" as a generic term covering a permanent diplomatic mission, a special mission, a permanent mission and a permanent observer mission, within the meaning given to them in the relevant codification conventions. Through that drafting technique, used in the 1975 Vienna Convention on the Representation of States in their Relations

with International Organizations of a Universal Character, the Drafting Committee had been able to recast the definitions given in subparagraphs (7), (9) and (10) of the original draft.

14. The definition of the term "consular post" given in paragraph 1, subparagraph (7), was identical to that appearing in subparagraph (8) of the original draft, except that the word "any" had been replaced by the word "a".

15. In order to harmonize the provisions, the term "delegation" had been defined in paragraph 1, subparagraph (8), not as in the corresponding subparagraph (11) of the original text, but by a reference to the meaning given to that term in the Vienna Convention on the Representation of States. The term meant both a delegation in the strict sense and an observer delegation.

16. Lastly, paragraph 1, subparagraph (9), which defined the term "international organization", was identical to subparagraph (12) of the original draft.

17. In view of the definitions adopted, in particular those concerning the terms "diplomatic courier" and "diplomatic bag", the Drafting Committee had not deemed it necessary to retain paragraph 2 of the original draft.

18. The rule set forth in article 3, paragraph 2, was the same as that contained in paragraph 3 of the original draft. That saving clause and the introductory phrase of paragraph 1, "For the purposes of the present articles", reflected the self-contained character of the draft and prevented any confusion as a result of the use of identical terms in other conventions.

19. The Drafting Committee proposed the following text for article 4:

*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.

20. The text of article 4 adopted by the Drafting Committee was a simplified version of the article 4 submitted by the Special Rapporteur. The reference in paragraph 1 to "official communications . . . as referred to in article 1" made it unnecessary to retain the detailed enumeration appearing in the original text. Furthermore, the present text of paragraph 1 specified that the communications concerned were effected "through the diplomatic courier or the diplomatic bag". The wording of paragraph 2 reflected more precisely than the original text the rule laid down in the Vienna Conventions on Diplomatic Relations (art. 40, para. 3) and on Consular Relations (art. 54, para. 3), in the Convention on Special Missions (art. 42, para. 3) and in the Vienna Convention on the Representation of States (art. 81, para. 4). Lastly,

* For the revised text submitted by the Special Rapporteur, *ibid.*, p. 117, footnote 320.

the Drafting Committee had shortened the title of the article.

21. The Drafting Committee proposed the following text for article 5:

Article 5. Duties of the sending State and its diplomatic courier⁸

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.

22. Article 5 of the original draft had comprised three paragraphs. The first two had been to some extent incorporated in paragraph 2 of the current text. Paragraph 3 of the original text, which had concerned temporary accommodation, had been deleted as being unnecessary and inappropriate. In view of the discussion which had taken place in the Commission, the Drafting Committee had considered it useful to insert a provision (para. 1) concerning the duties of the sending State, the wording of which was based on that of article 6, paragraph 2 (b). In the Committee's opinion, that text laid down the duties in question in a more appropriate manner than did paragraph 1 of the original text. Paragraph 2 was concerned solely with the duties of the diplomatic courier. Consequently, the Drafting Committee had deleted the reference in the original text to the duty to respect the rules of international law.

23. The Drafting Committee proposed the following text for article 6:

Article 6. Non-discrimination and reciprocity⁹

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.

24. The text of article 6 adopted by the Drafting Committee reproduced that submitted by the Special Rapporteur with a few drafting changes intended to make it more precise. The Committee had added in paragraph 1 a reference to the receiving State or the transit State and had deleted the phrase "with regard to the treatment of diplomatic couriers and diplomatic bags", which it had considered superfluous. In paragraph 2 (a), it had also inserted a reference to the transit State.

25. The Drafting Committee proposed the following text for article 7:

Article 7. Documentation of the diplomatic courier¹⁰

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.

26. The text of the new article 7 followed closely that submitted by the Special Rapporteur. However, the reference to the passport of the diplomatic courier had been deleted, since a passport was not required in all cases. In addition, the title had been changed in order to reflect more accurately the content of the article. The Drafting Committee had decided to postpone a decision on where to place the article in the draft and on its numbering until further progress had been made in considering the other articles.

27. The Drafting Committee proposed the following text for article 8:

Article 8. Appointment of a diplomatic courier¹¹

Subject to the provisions of articles [9], 10 and 14, the diplomatic courier is freely appointed by the sending State or by its missions, consular posts or delegations.

28. Article 8 as adopted by the Drafting Committee was a simplified version of the corresponding article submitted by the Special Rapporteur, as a result of the use of the generic terms defined in article 3. The reference to "the competent authorities" had been considered unnecessary and had been deleted. Similarly, the Committee had deleted the phrase "and are admitted to perform their functions on the territory of the receiving State or the transit State", considering that article 8 should be confined to the appointment of a diplomatic courier and that those words seemed unnecessary in the light of the provisions of draft article 16, paragraph 1. Lastly, the reference to article 9 had been placed between square brackets, since the Committee had been unable to agree on its relevance, and the reference to article 11, which the Committee had considered irrelevant, had been replaced by a reference—which was appropriate—to article 14.

State responsibility (concluded) (A/CN.4/L.363, ILC(XXXV)/Conf.Room Doc.5)

[Agenda item 1]

Content, forms and degrees of international responsibility (part 2 of the draft articles) (concluded)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (concluded)

CONSIDERATION BY THE COMMISSION

29. The CHAIRMAN invited the Commission to consider the adoption of articles 1, 2, 3 and 5 of part 2 of the draft articles on State responsibility, as proposed by the Drafting Committee, which had been introduced by

⁸ For the revised text submitted by the Special Rapporteur, *ibid.*, p. 117, footnote 321.

⁹ For the text submitted by the Special Rapporteur, *ibid.*, p. 117, footnote 322.

¹⁰ For the text submitted by the Special Rapporteur, *ibid.*, p. 118, footnote 323.

¹¹ For the text submitted by the Special Rapporteur, *ibid.*, p. 118, footnote 324.