

**Draft articles on the Status of the Diplomatic Courier and
the Diplomatic Bag not accompanied by Diplomatic
Courier and Draft Optional Protocols thereto
with commentaries**

1989

Text adopted by the International Law Commission at its forty-first session, in 1989, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (at para. 72). The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission, 1989*, vol. II, Part Two.



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articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, unanimously adopted the following resolution:

The International Law Commission,

Having adopted the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier,

Desires to express to the Special Rapporteur, Mr. Alexander Yankov, its deep appreciation of the invaluable contribution he has made to the preparation of the draft throughout these past years by his tireless devotion, professional expertise and incessant labour, which have enabled the Commission to bring this important task to a successful conclusion.

D. Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and draft Optional Protocols thereto⁵⁴

72. The texts of articles 1 to 32 and of draft Optional Protocols One and Two, with commentaries thereto, as finally adopted by the Commission at its forty-first session are reproduced below.

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

PART I

GENERAL PROVISIONS

Article 1. Scope of the present articles

The present articles apply to the diplomatic courier and the diplomatic bag employed for the official communications of a State with its missions, consular posts or delegations, wherever situated, and for the official communications of those missions, consular posts or delegations with the sending State or with each other.

Commentary

(1) The general purpose of the present draft articles is to establish, within certain limits to be mentioned below, a comprehensive and uniform régime for all kinds of couriers and bags employed by States for official communications. This comprehensive and uniform 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 on diplomatic and consular law which constitute the legal basis for the uniform treatment

of the various couriers and bags. There is a basic identity of régime with very few differences between the relevant provisions of 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.

(2) Notwithstanding the foregoing, the Commission is well aware of the fact that many States are not parties to all four of the codification conventions and thus may prefer that the present articles not require the same treatment of the different types of couriers and bags covered by those conventions. While the number of parties to the 1961 Vienna Convention on Diplomatic Relations and, to a somewhat lesser extent, to the 1963 Vienna Convention on Consular Relations is very high and creates an almost universal network of legal relationships in those fields, the 1969 Convention on Special Missions, though already in force, has not yet been the subject of widespread ratification or accession. On the other hand, although it is also true that the 1975 Vienna Convention on the Representation of States does not yet enjoy wide adherence, the Commission has borne in mind the fact that, as confirmed by long-standing State practice, couriers and bags covered by that Convention, namely couriers and bags to and from permanent missions and delegations, are also covered by the provisions concerning couriers and bags of representatives of Members within the meaning of the 1946 Convention on the Privileges and Immunities of the United Nations⁵⁵ and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies.⁵⁶ Both Conventions enjoy wide adherence in the international community and, in essence, they equate the legal régime of couriers and bags sent to and by representatives of Member States to that of diplomatic couriers and bags, as pointed out in paragraph (3) of the commentary to article 3. This equation or assimilation thus provides the link for extending the uniform approach referred to in paragraph (1) of the present commentary also to this kind of courier and bag.

(3) In view of all of the above, and for practical reasons connected with the need to ensure wider acceptability of the present articles without abandoning the underlying objective of providing a uniform legal régime for all couriers and bags, the Commission decided to confine the scope of the articles to diplomatic and consular couriers and bags as well as couriers and bags of permanent missions and delegations (see art. 3). As for couriers and bags of special missions, the Commission decided to keep open the possibility for States to extend the application of the present articles to those couriers and bags by means of an optional protocol, which may be signed and ratified together with the present articles (see draft Optional Protocol One and the commentary thereto).

(4) It was pointed out by several members of the Commission that, in adopting the assimilative approach, the Commission did not intend to suggest that it necessarily reflected or was required by customary international law.

⁵⁴ In the commentaries to the following articles and protocols, the four multilateral conventions on diplomatic and consular law concluded under the auspices of the United Nations,

1961 Vienna Convention on Diplomatic Relations (United Nations, *Treaty Series*, vol. 500, p. 95),

1963 Vienna Convention on Consular Relations (*ibid.*, vol. 596, p. 261),

1969 Convention on Special Missions (United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 125),

1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87), hereinafter referred to as "1975 Vienna Convention on the Representation of States", are referred to as the "codification conventions".

⁵⁵ See footnote 43 above.

⁵⁶ See footnote 44 above.

(5) The drafting of article 1 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, i.e. lateral communications between the missions, consular posts or delegations situated in one State and the missions, consular posts or delegations situated in another State.

(6) There was some discussion in the Commission concerning the inclusion of the words "wherever situated". While some members felt that those words could be deleted without affecting the meaning of article 1, the majority was of the view that their inclusion brought out in clearer terms the two-way and *inter se* character of the official communications referred to in the article. For instance, they made it absolutely clear that the missions, consular posts or delegations of the sending State whose official communications with each other were covered by the present articles were not only those situated in the same receiving State, but also those in different receiving States.

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 special missions or 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.

Commentary

(1) The prevailing view in the Commission and in the Sixth Committee of the General Assembly has been to confine the scope of the present articles, as defined in article 1, to couriers and bags of States. Yet the fact that the articles deal only with couriers and bags of States does not preclude the possibility of substantial similarities between the legal régime of couriers and bags of international organizations, particularly those of a universal or broad regional character, and the legal régime of couriers and bags of States. Such substantial similarity may arise from norms of international law quite independent of the present articles. For example, pursuant to article III (sect. 10) of the 1946 Convention on the Privileges and Immunities of the United Nations and article IV (sect. 12) of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, the couriers and bags of the United Nations and its specialized agencies "shall have the same immunities and privileges as diplomatic couriers and bags".

(2) Furthermore, the Commission felt that it might be appropriate to provide the possibility for States which may choose to do so to apply the present articles to couriers and bags of international organizations of a

universal character. This it did by means of an optional protocol on the status of the courier and the bag of international organizations of a universal character, as explained in more detail in the commentary to draft Optional Protocol Two below.

(3) For the reasons explained in the commentary to article 1, the Commission decided not to include in the scope of the present articles the couriers and bags of special missions. This does not affect the legal status of such couriers and bags as between the parties to the 1969 Convention on Special Missions. In this case also, the Commission decided that it was desirable to allow States wishing to do so to extend the application of the present articles to the couriers and bags of special missions, by means of an optional protocol on the status of the courier and the bag of special missions, as explained in more detail in the commentary to draft Optional Protocol One below.

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; or

(c) a courier of a permanent mission, a permanent observer mission, 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; who is entrusted with the custody, transportation and delivery of the diplomatic bag and is employed for the official communications referred to in article 1;

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

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

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

(c) a bag of a permanent mission, a permanent observer mission, 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;

(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; and

(b) 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 inter-governmental organization.

2. The provisions of paragraph 1 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.

Commentary

(1) Following the example of the four codification conventions, article 3 explains the meaning of the expressions most frequently used in the set of articles, so as to facilitate the interpretation and application of the articles. The definitions have been confined to the essential elements which typify the entity defined, leaving other definitional elements for inclusion in the relevant substantive articles.

Subparagraph (1) of paragraph 1

(2) Subparagraph (1), in defining the diplomatic courier, has recourse to two substantive and indispensable elements: (a) his function or duty as a custodian of the diplomatic bag, charged with its transportation and delivery to its consignee; (b) his official capacity or official authorization by the competent authorities of the sending State. In some instances, an officer of the sending State is entrusted for a special occasion with the mission of delivering official correspondence of that State.

(3) It was felt that the definition of the expression "diplomatic courier" should contain a specific and concrete reference to all the different kinds of courier that it was intended to cover. Although the expression "diplomatic courier" is used throughout the articles for reasons based both on practice and on economy of drafting, it should be made clear that the definition applies not only to the "diplomatic courier" *stricto sensu* within the meaning of the 1961 Vienna Convention on Diplomatic Relations, but also to the "consular courier"

and to the courier of a permanent mission, of a permanent observer mission, of a delegation or of an observer delegation, within the meaning, respectively, of the 1963 Vienna Convention on Consular Relations and the 1975 Vienna Convention on the Representation of States. It was also understood in the Commission that the words "courier of a permanent mission" or "courier of a delegation" within the meaning of the 1975 Vienna Convention also encompassed the notion of a courier of "representatives of Members" (which includes delegates, deputy delegates, advisers, technical experts and secretaries of delegations) within the meaning of article IV (sects. 11 (c) and 16) of the 1946 Convention on the Privileges and Immunities of the United Nations and of article I (sect. 1 (v)) and article V (sect. 13 (c)) of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies.

(4) The definition encompasses both the diplomatic courier employed on a regular basis and the diplomatic courier *ad hoc*. It was agreed that the expression "on a regular basis" should be interpreted as opposed to *ad hoc* or "for a special occasion" and was not intended to convey any idea related to the lawfulness of the appointment. What characterizes the diplomatic courier *ad hoc* is the specific duration of his functions. He performs all the functions of the diplomatic courier, but only for a special occasion. In the prevailing practice of States, the function of diplomatic courier *ad hoc* has been assigned to officials belonging to the foreign service or another institution of the sending State with similar functions in the field of foreign relations, such as the Ministry for Foreign Trade or Foreign Economic Relations or State organs involved in international cultural co-operation. An essential requirement is always the proper authorization by the competent authorities of the sending State. The specific duration of his functions has a consequence on the duration of enjoyment of an *ad hoc* courier's facilities, privileges and immunities as laid down in the relevant article.

(5) The cross-reference to article 1 contained in the definition is intended to clarify that it covers not only one-way communications between the sending State and its missions abroad, but also those between the missions and the sending State, as well as those between different missions of the sending State. The scope of the present articles having already been fixed in article 1, reasons of economy of drafting make the cross-reference both appropriate and advisable.

(6) Elements of the present definition are further elaborated in specific provisions, namely articles 8 and 10 on documentation and functions of the diplomatic courier, respectively.

Subparagraph (2) of paragraph 1

(7) The two objective and fundamental features of the definition of the diplomatic bag are (a) its function, namely to carry official correspondence, documents or articles exclusively for official use as an instrument for communications between the sending State and its missions abroad; and (b) its visible external marks certifying its official character. These two features are essential to distinguish the diplomatic bag from other

travelling containers, such as the personal luggage of a diplomatic agent or an ordinary postal parcel or consignment. The real, essential character of the diplomatic bag is the bearing of visible external marks of its character as such, because even if its contents are found to be objects other than packages containing official correspondence, documents or articles intended exclusively for official use, it is still a diplomatic bag deserving protection as such.

(8) The means of delivery of the bag may vary. It may be accompanied by a diplomatic courier. It may also, instead, be entrusted to the captain of a commercial aircraft or to the master of a merchant ship. Its method of delivery may also vary as to the means of dispatch and transportation used: postal or other means, whether by land, air, watercourse or sea. It was felt that these varieties of practice, not being essential to the definition of the bag, could appropriately be dealt with in another article. Reference is made in this connection to article 26.

(9) Concerning the different kinds of "diplomatic bag" encompassed by the definition and the cross-reference to article 1, subparagraph (2) is structured similarly to subparagraph (1) on the definition of the "diplomatic courier". The same remarks made in the commentary to subparagraph (1) apply also, *mutatis mutandis*, to the present definition of the "diplomatic bag". In particular, it was understood in the Commission that the words "bag of a permanent mission" or "bag of a delegation" within the meaning of the 1975 Vienna Convention on the Representation of States also encompassed the notion of a bag of "representatives of Members" within the meaning of article IV (sects. 11 (c) and 16) of the 1946 Convention on the Privileges and Immunities of the United Nations and of article I (sect. 1 (v)) and article V (sect. 13 (c)) of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies.

(10) Elements of the present definition are further elaborated in specific provisions, namely articles 24 and 25 on identification and contents of the diplomatic bag, respectively.

Subparagraph (3) of paragraph 1

(11) The expressions "sending State" and "receiving State" in subparagraphs (3) and (4) follow the well-established terminology contained in all four codification conventions. This terminology has been maintained in article 3 and the definitions have been tailored to reflect the specific situation involving the diplomatic bag, whether accompanied by a courier or not. By defining a "sending State" as a State "dispatching a diplomatic bag", subparagraph (3) covers all possible situations—a State dispatching an unaccompanied bag as well as a State sending a diplomatic courier whose function is always connected with a bag; it also covers all other possible cases of accompanied bag referred to in the commentary to subparagraph (2) above. The phrase "to or from its missions, consular posts or delegations" not only spells out once more the two-way character of the official communications involved, but also makes it clear that, whatever the starting-point—State, mission, consular post or delegation—the bag is always the bag of the sending State.

Subparagraph (4) of paragraph 1

(12) To use the traditional terminology of "receiving State" within the context of a set of articles concerning the diplomatic courier and the diplomatic bag is entirely justified on the grounds that the same receiving State that is obliged by international law to accord facilities, privileges and immunities to missions, consular posts or delegations of a sending State and their personnel is the one that is envisaged by the present articles in regulating the facilities, privileges and immunities of the diplomatic courier and the diplomatic bag, if the sending State dispatches a courier or a bag to those same missions, consular posts or delegations. To use other terminology, such as "State of destination", would actually lead to confusion, since it would depart from the basic identity or equation between the State subject to obligations *vis-à-vis* foreign missions or posts and their personnel on its territory and the State subject to obligations *vis-à-vis* the diplomatic courier or the diplomatic bag.

(13) With reference to the case of a courier and a bag of a permanent mission, of a permanent observer mission, of a delegation or of an observer delegation, the notion of "receiving State" defined here covers also the notion of "host State" within the meaning of the 1975 Vienna Convention on the Representation of States. The prevailing view in the Commission was that the similarity between the obligations of the "host State" and of the "receiving State" in the traditional meaning, in situations involving a diplomatic courier or a diplomatic bag, did not warrant such a distinction in the present articles, especially since couriers and bags of international organizations were not within their scope and the articles employed a generic term, "mission", to cover the different situations listed in subparagraph (6).

Subparagraph (5) of paragraph 1

(14) It was widely felt in the Commission that the expression "to pass in transit" and, more precisely, the words "in transit" have acquired such a clear and unequivocal connotation in modern international relations and international communications that they are self-explanatory and that it was neither easy nor desirable to use a substitute expression in the definition of a "transit State", even if the definition might appear at first sight to be tautological.

(15) The definition is broad enough to cover the foreseen situation of a State through whose territory a courier or bag passes in transit in accordance with an established itinerary and unforeseen situations in which the provisions of paragraph 2 of article 30 will apply, with its qualifications. Except in circumstances where a visa is required, the transit State may not be aware that a courier or bag is passing through its territory. This broad concept of a transit State is based on the different situations contemplated by article 40 of the 1961 Vienna Convention on Diplomatic Relations, article 54 of the 1963 Vienna Convention on Consular Relations, article 42 of the 1969 Convention on Special Missions and article 81 of the 1975 Vienna Convention on the Representation of States.

(16) By mentioning the diplomatic bag separately from the diplomatic courier, the definition encompasses not only the unaccompanied bag, but also all other cases in

which the bag is entrusted to a person other than a diplomatic courier (captain of a commercial aircraft or master of a merchant ship), whatever the means of transportation used (air, land, watercourse or sea).

Subparagraphs (6), (7) and (8) of paragraph 1

(17) As emerges clearly from subparagraphs (6), (7) and (8), the definitions of the expressions "mission", "consular post" and "delegation" constitute cross-references to the relevant definitions contained in the codification conventions referred to in subparagraphs (1) and (2) of paragraph 1. It was also understood in the Commission that the words "permanent mission" or "delegation" within the meaning of the 1975 Vienna Convention on the Representation of States also encompassed the notion of "representatives of Members" within the meaning of article IV (sects. 11 and 16) of the 1946 Convention on the Privileges and Immunities of the United Nations and of article I (sect. 1 (v)) and article V (sect. 13) of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies. In the view of the Commission, this uniformity of language helps to integrate the set of articles on the topic of the diplomatic courier and the diplomatic bag into the whole system of provisions and the network of conventions already adopted in the area of diplomatic and consular law.

Subparagraph (9) of paragraph 1

(18) Different views were expressed in the Commission as to the drafting of subparagraph (9). It was suggested that, for reasons of symmetry with the drafting of preceding subparagraphs, the text should contain a mention of the 1975 Vienna Convention on the Representation of States, from whose article 1, paragraph 1 (1), the provision had been taken. The question was also raised whether the definition given in the subparagraph should not be confined to inter-governmental organizations of a universal character, to align it with the scope of the 1975 Vienna Convention. It was widely felt that subparagraph (9) was connected with two different aspects of the present articles. On the one hand, the notion of an "international organization" is present, even if in a passive manner, in that the articles are also intended to cover diplomatic couriers and bags of permanent missions, permanent observer missions, delegations or observer delegations accredited or sent to an international organization. This alone would justify the inclusion of a definition of an "international organization". On the other hand, subparagraph (9) is also connected with the scope of the present articles as clarified in article 2 and the commentary thereto.

Paragraph 2

(19) Paragraph 2 reproduces paragraph 2 of article 1 of the 1975 Vienna Convention on the Representation of States. Its purpose is to circumscribe the applicability of the definitions included in article 3, as such definitions, to the context and system of the set of articles in which they are contained. This is, of course, without prejudice to the possibility that some of them may coincide with the definitions of the same terms contained in other international instruments, or to the cross-references which in

some cases have been made to the definitions of certain terms given in other international instruments.

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.

Commentary

Paragraph 1

(1) The source of paragraph 1 is to be found in provisions of the four codification conventions, namely article 27, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations, article 35, paragraph 1, of the 1963 Vienna Convention on Consular Relations, article 28, paragraph 1, of the 1969 Convention on Special Missions and article 57, paragraph 1, of the 1975 Vienna Convention on the Representation of States. Thus the principle of freedom of communication has been universally recognized as constituting the legal foundation of modern diplomatic law and it must also be considered as the core of the legal régime of diplomatic couriers and diplomatic bags. The safe, unimpeded and expeditious delivery of the diplomatic message and the inviolability of its confidential character constitute the most important practical aspect of that principle. It provides the legal basis for the protection of the diplomatic bag, placing upon the receiving State, whenever the courier or the bag enters its jurisdiction, the obligation to grant certain facilities, privileges and immunities so as to ensure adequate compliance with the above-stated ends.

(2) The cross-reference to article 1 explicitly clarifies that the freedom which article 4 regulates applies to the whole range of official communications already specified in the provision stating the scope of the present articles.

Paragraph 2

(3) Paragraph 2 recognizes the fact that the effective application of the rule of free diplomatic communication not only requires that the receiving State permit and protect free communications under its jurisdiction effected through diplomatic couriers and bags, but also places an identical obligation upon the transit State or States. For it is obvious that, in some instances, the safe, unimpeded and expeditious delivery of the diplomatic bag to its final destination depends on its passage, on its itinerary, through the territory of other States. This practical requirement is embodied as a general rule in paragraph 2, which is based on parallel provisions contained in the four codification conventions, namely article 40, paragraph 3, of the 1961 Vienna Convention on

Diplomatic Relations, article 54, paragraph 3, of the 1963 Vienna Convention on Consular Relations, article 42, paragraph 3, of the 1969 Convention on Special Missions and article 81, paragraph 4, of the 1975 Vienna Convention on the Representation of States.

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 and the transit State.

Commentary

Paragraph 1

(1) The intention of article 5 as a whole, and of paragraph 1 in particular, is to establish the required balance between the interests of the sending State in the safe and unimpeded delivery of the bag, on the one hand, and the security and other legitimate considerations not only of the receiving State, but also of the transit State, on the other. In this respect, article 5 constitutes a counterpart to article 4, which establishes obligations on the part of the receiving State and the transit State. The object and purpose of the set of 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 or 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. Paragraph 1 refers specifically to the duty of the sending State to ensure that the object and purpose of those facilities, privileges and immunities are not violated. Later articles spell out specific means whereby the sending State may exercise this control, such as recall or dismissal of its courier and termination of his functions.

(2) It was pointed out in the Commission that the expression "shall ensure that" should be taken to mean "shall make all possible efforts so that", and that it was this meaning that should be given to the word *veille*, in the French text, and to the words *velará por*, in the Spanish text.

Paragraph 2

(3) Paragraph 2 extends to the diplomatic courier principles contained in parallel provisions of the four codification conventions and is based, with some modifications, on article 41 of the 1961 Vienna Convention on Diplomatic Relations, article 55 of the 1963 Vienna Convention on Consular Relations, article 47 of the 1969 Convention on Special Missions and article 77 of the 1975 Vienna Convention on the Representation of States. It refers specifically to the duty of the diplomatic courier to respect the laws and regulations of the receiving

State and the transit State, without prejudice to the facilities, privileges and immunities which he enjoys. The duty of the diplomatic courier to observe the established legal order in the receiving or transit State may relate to a wide range of obligations regarding the maintenance of law and order, regulations in the field of public health and the use of public services and means of transport, or regulations with respect to hotel accommodation and the requirements for registration of foreigners, as well as regulations with respect to driving licences, etc. The duty naturally ceases to exist where the sending State or its diplomatic courier are expressly exempted by the present articles from applying the laws and regulations of the receiving or transit State.

(4) It was understood in the Commission that the duty embodied in paragraph 2 also encompasses the obligation to refrain from actions which might be perceived as tantamount to interference in the internal affairs of the receiving or transit State, such as taking part in political campaigns in those States or carrying subversive propaganda in the diplomatic bag directed at the political régime of, and to be distributed in, the receiving or transit State.

(5) Previous versions of article 5⁵⁷ contained a specific mention of the duty of the sending State and the diplomatic courier to respect the rules of international law in the receiving State and the transit State. After some discussion on the matter, the prevailing view was that the mention of international law was unnecessary, not because the duty to respect its rules did not exist, but rather because all States and their officials were obliged to respect the rules of international law regardless of their position, in specific instances, as sending States or diplomatic couriers, respectively. The mention of "international law" in this context would amount, to some extent, to restatement of the obvious.

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 by custom or agreement extend to each other more favourable treatment with respect to their diplomatic couriers and diplomatic bags than is required by the present articles.

Commentary

(1) Article 6 is largely modelled on article 49 of the 1969 Convention on Special Missions and, to a lesser extent, on

⁵⁷ For the original version, see *Yearbook* ... 1982, vol. II (Part Two), pp. 113-114, footnote 308; for the revised version, see *Yearbook* ... 1983, vol. II (Part Two), p. 45, footnote 185.

article 47 of the 1961 Vienna Convention on Diplomatic Relations, article 72 of the 1963 Vienna Convention on Consular Relations and article 83 of the 1975 Vienna Convention on the Representation of States. It lays down the principles of non-discrimination and reciprocity which are part of the general principles underlying the four codification conventions and which stem from the fundamental principle of the sovereign equality of States. Their application with regard to diplomatic or consular personnel leads to the establishment of a viable and coherent régime governing diplomatic and consular intercourse. The intrinsic cohesion between non-discrimination and reciprocity and their effective balance in the treatment of the above-mentioned personnel and of diplomatic couriers contribute to the attainment of a sound basis for a viable legal framework of rules governing the régime of the courier and the bag.

Paragraph 1

(2) Paragraph 1 lays down the general principle of non-discrimination mentioned above, referring not only to the receiving State but also to the transit State.

Paragraph 2

(3) Paragraph 2 introduces some exceptions to paragraph 1, based on the principle of reciprocity, which shall not be regarded as discrimination.

Subparagraph (a) of paragraph 2

(4) The first exception allows reciprocity by permitting a restrictive application of a provision of the present articles by the receiving State or the transit State because of a restrictive application of that provision to its diplomatic couriers or diplomatic bags by the sending State. The option granted by this provision to the receiving and transit States reflects the inevitable impact of the state of relations between those States and the sending State in the implementation of the articles. However, there should be some criteria or requirements for tolerable restrictions. It should be assumed that the restrictive application by the sending State concerned is in keeping with the strict terms of the provision in question and within the limits allowed by that provision; otherwise there would be an infringement of the present articles and the act of the receiving or transit State would become an act of reprisal.

Subparagraph (b) of paragraph 2

(5) The second exception refers to the case where, by custom or agreement, States may extend to each other more favourable treatment of their diplomatic couriers or diplomatic bags. Again in this case, States may apply reciprocity, this time in an active and positive way, establishing more favourable treatment between themselves than that which they are bound to accord to other States by the terms of the present articles. The word "custom" is intended to cover not only custom in a strictly juridical sense as a customary rule, but also practices *comitas gentium* which two or more States may wish to develop in their relations.

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 sending State or its missions, consular posts or delegations may freely appoint the diplomatic courier.

Commentary

(1) The terminology employed in article 7 indicating that the sending State or its missions, consular posts or delegations may freely appoint the diplomatic courier is consistent with that used in the corresponding provisions of the four codification conventions concerning the appointment of diplomatic or consular staff other than the head of the mission or the head of the consular post. Those provisions are article 7 of the 1961 Vienna Convention on Diplomatic Relations, article 19, paragraph 1, of the 1963 Vienna Convention on Consular Relations, article 8 of the 1969 Convention on Special Missions and article 9 of the 1975 Vienna Convention on the Representation of States.

(2) The appointment of a diplomatic courier is an act of the competent authorities of the sending State or its mission abroad directed at designating a person for the performance of an official function, namely the custody, transportation and delivery of the diplomatic bag. The appointment is an act in principle within the domestic jurisdiction of the sending State. Accordingly, the word "freely" is used in article 7. The requirements for appointment or special assignment, the procedure to be followed in the issuance of the act, the designation of the relevant competent authorities and the form of act are therefore governed by national laws and regulations and established practices.

(3) Nevertheless, the appointment of a diplomatic courier by the sending State has certain international implications affecting the receiving State or the transit State. There is a need for some international rules to strike a balance between the rights and interests of the sending State and the rights and interests of the receiving or transit States where the diplomatic courier is to exercise his functions. That is the purpose of articles 9 and 12 mentioned in article 7. The commentaries to those articles elaborate on ways of achieving the above-mentioned balance.

(4) A professional and regular diplomatic courier is, as a general rule, appointed by an act of a competent organ of the Ministry of Foreign Affairs of the sending State; he thus becomes or may become a member of the permanent or temporary staff of that Ministry, with rights and duties deriving from his position as a civil servant. On the other hand, a diplomatic courier *ad hoc* is not necessarily a diplomat or a member of the staff of the Ministry of Foreign Affairs. His functions may be performed by any official of the sending State or any person freely chosen by its competent authorities. His designation is for a special

occasion and his legal relationship with the sending State is of a temporary nature. He may be appointed by the Ministry of Foreign Affairs of the sending State, but is very often appointed by the latter's diplomatic missions, consular posts or delegations.

(5) The Commission was of the view that article 7 did not exclude the practice whereby, in exceptional cases, two or more States could jointly appoint the same person as a diplomatic courier. The Commission also considered that the foregoing should be understood subject to the provisions of articles 9 and 12, although the requirement of paragraph 1 of article 9 would be met if the courier had the nationality of at least one of the sending States.

Article 8. Documentation of the diplomatic courier

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

Commentary

(1) The direct source of article 8 is to be found in the pertinent provisions on the diplomatic or consular courier contained in the four codification conventions, namely article 27, paragraph 5, of the 1961 Vienna Convention on Diplomatic Relations, article 35, paragraph 5, of the 1963 Vienna Convention on Consular Relations, article 28, paragraph 6, of the 1969 Convention on Special Missions and article 57, paragraph 6, of the 1975 Vienna Convention on the Representation of States.

(2) The prevailing State practice, particularly during the past two decades, has closely followed the pattern established by the above-mentioned conventions of providing the courier with a special document indicating his status as such and his most essential personal data, such as his name and, where appropriate, his official position or rank, as well as the number of, and other particulars concerning, the packages constituting the bag, such as their serial numbers and destination. Whether the document is called "official document", "courier letter", "certificate", "courier's certificate" or "special certificate", its legal nature and purpose remain essentially the same, namely as an official document proving the status of the diplomatic courier. The document is issued by the competent authorities of the sending State or its diplomatic or other official missions abroad. The form of the document, its formal particulars and its denomination are entirely within the jurisdiction and discretion of the sending State in accordance with its laws, regulations and established practices. However, it would be advisable to attain a certain minimum degree of coherence and uniformity which may facilitate the safe, unimpeded and expeditious dispatch and delivery of the diplomatic bag through the establishment of generally agreed rules and regulations.

(3) In its previous version, article 8 began as follows: "The diplomatic courier shall be provided, in addition to his passport, with an official document . . .". The phrase "in addition to his passport" reflected the prevailing practice of States to provide the diplomatic courier with a passport or normal travelling document in addition to a document with proof of his status. In fact, many countries provide their professional or regular couriers even with diplomatic passports or passports of official service. The Commission felt that the phrase might create the wrong impression that the possession of a passport was compulsory, including in those cases—not infrequent—in which the laws and regulations of the receiving or transit State did not require one. If a passport is not required, then a visa is not required either on the special document certifying the status as diplomatic courier. The deletion of the phrase, however, does not release the diplomatic courier from the obligation to present a valid passport if the laws and regulations of the receiving or transit State so require.

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

3. The receiving State may reserve the right provided for in paragraph 2 also 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.

Commentary

(1) Paragraphs 1, 2 and 3 (b) of article 9 are modelled on article 8 of the 1961 Vienna Convention on Diplomatic Relations, article 22 of the 1963 Vienna Convention on Consular Relations, article 10 of the 1969 Convention on Special Missions and article 73 of the 1975 Vienna Convention on the Representation of States.

Paragraphs 1 and 2

(2) The similar provisions contained in the above-mentioned codification conventions point to the long-standing consideration that, as a rule, members of the diplomatic staff, consular officers and other representatives should be nationals of the sending State, owing to the political importance and confidential nature of their diplomatic functions. The question of nationality with respect to all kinds of diplomatic officials has always had great political and legal significance, and the same considerations apply to the diplomatic courier. The general rule, therefore, is that diplomatic couriers should in principle be nationals of the sending State.

(3) Paragraph 1, in keeping with the terminology used in all four codification conventions, uses the word "should" instead of "shall". This is due to the fact that the principle in question may be subject to exceptions.

(4) Paragraph 2 provides that the consent of the receiving State is required for the appointment of one of its nationals as a diplomatic courier of the sending State. The text states that this consent may be withdrawn "at any time". The words "at any time" are not intended to legitimize any arbitrary withdrawal of consent, or the interruption or interference with the performance of a mission already begun. The provision has to be interpreted in the light of the fact that the diplomatic courier performs his official functions in the territory of the receiving State and, for that purpose, is entitled to enjoy certain facilities, privileges and immunities which are normally granted by States to foreign subjects and not to its own nationals. Furthermore, due account should be taken of the protection of the diplomatic bag entrusted to the diplomatic courier and its safe delivery to its recipient. In the light of these considerations, the second sentence of paragraph 2 states in express terms that withdrawal of consent, when the diplomatic courier is performing his functions in the territory of the receiving State, shall not take effect until the courier has delivered the diplomatic bag to its consignee.

Paragraph 3

(5) In accordance with paragraph 3, the receiving State may extend the legal régime established in paragraph 2 concerning the need for consent and the possibility of withdrawal of consent at any time to two other categories of persons: (a) nationals of a third State who are not also nationals of the sending State; (b) nationals of the sending State who are permanent residents of the receiving State. The expression "permanent residents of the receiving State" is to be understood in the light of the internal law of the receiving State, since the determination of the status of permanent resident is a matter of domestic law rather than of international law.

(6) As explained in paragraph (5) of the commentary to article 7, the Commission was of the view that, in the case in which two or more States jointly appoint the same person as a diplomatic courier, the requirement of paragraph 1 of article 9 would be met if the courier had the nationality of at least one of the sending States.

Article 10. Functions of the diplomatic courier

The functions of the diplomatic courier consist in taking custody of the diplomatic bag entrusted to him and transporting and delivering it to its consignee.

Commentary

(1) The existing codification conventions do not contain adequate definitions regarding the scope and content of the official functions of the diplomatic courier, although they may be inferred from certain provisions of those

conventions and remarks of the Commission on the draft articles which formed the basis for those provisions. It was therefore necessary to devise an adequate formulation of those functions, which has been attempted in article 10, as well as in paragraph 1 of article 3.

(2) A careful definition of the scope and content of the official functions of the diplomatic courier is of great importance for distinguishing between activities inherent in the courier's status and necessary for the performance of his task, and activities which may go beyond or abuse his functions. The latter case may prompt the receiving State to declare the courier *persona non grata* or not acceptable. Although, in accordance with article 12, such a declaration is a discretionary right of the receiving State, the latter in its own interest does not usually exercise this right in an unwarranted or arbitrary manner, since an adequate definition of the official functions provides States with a reasonable criterion for the exercise of this right.

(3) The main task of the diplomatic courier is the safe delivery of the diplomatic bag at its final destination. To that end, he is in charge of the custody and transportation of the accompanied bag from the moment he receives it from the competent organ or mission of the sending State until he delivers it to the consignee indicated in the official document and on the bag itself. The diplomatic bag, as a means of the freedom of official communications, is the main subject of legal protection, for the legal status of the diplomatic bag derives from the principle of the inviolability of the official correspondence of the diplomatic mission. The facilities, privileges and immunities accorded to the diplomatic courier are closely connected with his functions.

(4) Article 10 should be read in conjunction with the scope of the present articles as defined in article 1 and referred to in paragraph 1 (2) of article 3, which defines the diplomatic bag. In diplomatic practice, the sender and the consignee of the bag may be not only States and their diplomatic missions, but also consular posts, special missions and permanent missions or delegations. This arises clearly from the fact that all four codification conventions, dealing respectively with diplomatic relations, consular relations, special missions and the representation of States, contain provisions on the diplomatic courier. Furthermore, there has been a widespread practice by States to use the services of one diplomatic courier to deliver and/or collect different kinds of official bags from diplomatic missions, consular posts, special missions, etc. of the sending State situated in several countries or in several cities of the receiving State on his way to or from an official assignment for the sending State. For reasons of economy of drafting, the Commission deleted from the original draft article the words which tended to reflect those varieties of practice. However, this was done on the understanding that the deletion in no way affected the two-way as well as the *inter se* character of the communications between the sending State and its missions, consular posts or delegations by means of a diplomatic bag entrusted to the diplomatic courier, as reflected in article 1 and the commentary thereto.

(5) The courier is performing his functions even when he is not carrying a diplomatic bag but is proceeding to a mission, consular post or delegation in order to take possession of a bag, or is leaving a receiving State after having delivered a bag without taking custody of another one.

Article 11. End of the functions of the diplomatic courier

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

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

(b) notification by the sending State to the receiving State and, where necessary, the transit State that his functions have been terminated;

(c) notification by the receiving State to the sending State that, in accordance with paragraph 2 of article 12, it ceases to recognize him as a diplomatic courier.

Commentary

(1) Although none of the existing codification conventions contains any specific provision on the end of the functions of the diplomatic courier, the wording of article 11 was inspired by several provisions contained in those conventions regarding the end of the functions of the diplomatic agent or the consular officer, namely article 43 of the 1961 Vienna Convention on Diplomatic Relations, article 25 of the 1963 Vienna Convention on Consular Relations, article 20 of the 1969 Convention on Special Missions and articles 40 and 69 of the 1975 Vienna Convention on the Representation of States.

(2) It is to be noted that, while a clear determination of the end of the courier's functions is useful for establishing greater certainty with respect to his status at any specific moment in time, the end of his privileges and immunities is regulated by a specific provision, namely article 21, paragraph 2, in accordance with criteria which are explained in the commentary thereto. It is also to be noted that, while article 11 enumerates the most frequent or conspicuous cases of the end of the courier's functions, the words "*inter alia*" in the introductory clause clearly indicate, as further explained in paragraph (6) below, that the list is not exhaustive but indicative.

Subparagraph (a)

(3) The end of the courier's functions may come about in the first place through his own personal actions. The most frequent and usual fact having such an effect is the fulfilment of his mission by completion of his itinerary. In the case of the regular or professional courier, this fact would be marked by the return of the courier to the country of origin. The words "country of origin" should be interpreted as referring to the country from which the courier started his mission. In the case of the diplomatic courier *ad hoc* who is a resident of the receiving State, his mission ends upon the delivery of the diplomatic bag entrusted to him. Subparagraph (a) also contemplates the possibility that the functions of the courier may end without having been fulfilled, because of an urgent and

unforeseen return to the country of origin. This may be caused, *inter alia*, by natural events, such as earthquakes or floods, which prevent the courier from reaching the consignee, or by a decision of the sending State not to deliver a bag which is already on its way.

Subparagraph (b)

(4) The end of the courier's functions may also come about through acts of the sending State. Subparagraph (b) is directly modelled on article 43, subparagraph (a), of the 1961 Vienna Convention on Diplomatic Relations. Although the acts of the competent authorities of the sending State which could bring about the termination of the courier's functions may vary in their substance or motivation and may take the form of recall, dismissal, etc., *vis-à-vis* the receiving State they should be expressed by a notification to the courier service or relevant unit of the Ministry of Foreign Affairs of the receiving State or, where necessary, of the transit State.

Subparagraph (c)

(5) The end of the courier's functions may also come about through an act of the receiving State. Subparagraph (c) is directly modelled on article 43, subparagraph (b), of the 1961 Vienna Convention on Diplomatic Relations. The act of the receiving State is a notification to the effect that the diplomatic courier is either *persona non grata* or not acceptable, as explained in more detail in the commentary to article 12. If the sending State does not recall the courier or terminate his functions, the receiving State may refuse to recognize him as a courier with effect from the time of notification to the sending State.

(6) As evidenced by the words "*inter alia*" in its introductory clause, article 11 does not purport to present an exhaustive rehearsal of all the possible reasons leading to the end of the courier's functions. The end of the courier's functions may also come about through other events or facts, such as his death during the performance of his functions. It must be pointed out that, in such a case, in spite of the termination of the courier's functions, the protection of the diplomatic bag must still be secured by the receiving or transit State, as explained in more detail in the commentary to article 30.

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, the receiving State may cease to recognize the person concerned as a diplomatic courier.

Commentary

Paragraph 1

(1) Paragraph 1 of article 12 extends to the legal régime of the diplomatic courier the institution of the declaration of *persona non grata*. This right of the receiving State established by international customary law has been reiterated in various provisions of the codification conventions, namely article 9 of the 1961 Vienna Convention on Diplomatic Relations, article 23 of the 1963 Vienna Convention on Consular Relations and article 12 of the 1969 Convention on Special Missions.

(2) This institution, in principle, constitutes one form of termination of the diplomatic courier's functions and represents an effective means at the disposal of the receiving State to protect its interests by terminating the functions of a foreign official in its territory. But it may also serve the purpose of preventing a foreign official objectionable to the receiving State from effectively assuming his functions. Since the diplomatic courier is not a head of mission, the institution of *agrément* prior to his appointment does not apply. As explained in the commentary to article 7, the courier is in principle freely chosen by the sending State and therefore his name is not submitted in advance to the receiving State for approval. But if the receiving State, before the courier's arrival in its territory, finds that it has objections to him, it may, as in the case of a head of mission who has not been approved, inform the sending State that he is *persona non grata* or not acceptable, with the same effect as in the case of the head of mission. This might happen, for instance, if the sending State deemed it suitable to notify the receiving State of the appointment of the courier, or in the event of an application for an entry visa if such a visa were required by the receiving State. This is why the Commission considered it advisable to add to the text of paragraph 1 as originally submitted by the Special Rapporteur a third sentence stating: "A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State." This sentence is to be found in the parallel provisions of the codification conventions mentioned in paragraph (1) of the present commentary.

(3) In accordance with the terminology used in article 9 of the 1961 Vienna Convention on Diplomatic Relations, article 12 speaks of a declaration of "*persona non grata* or not acceptable", depending on whether the diplomatic courier objectionable to the receiving State possesses diplomatic rank (*persona non grata*) or not (not acceptable).

(4) Whether the decision of the receiving State to declare a diplomatic courier *persona non grata* or not acceptable takes place before he enters its territory or after his entry during his stay there, in both cases the solution arising from article 12 is that the receiving State is not obliged to explain or justify its decision, unless it decides otherwise. This discretion is not only an expression of the sovereignty of the receiving State but, in many instances, is justified by political or security interests or other considerations.

(5) As provided in paragraph 1, the declaration by the receiving State that a diplomatic courier is *persona non grata* or not acceptable should lead the sending State to recall its courier. The possibility also exists that the

courier cannot be recalled because he is a national of the receiving State, as contemplated in paragraph 2 of article 9. That is why paragraph 1 of article 12 provides the alternative that the sending State shall "terminate his functions to be performed in the receiving State". The latter clause also covers the case in which the courier is not yet in the territory of the receiving State but in transit towards it. The clause also conveys the notion that the termination of functions relates to those to be performed in the specific receiving State which has declared the courier *persona non grata* or not acceptable and does not relate to those functions that a courier with multiple missions may perform in another receiving State.

Paragraph 2

(6) Paragraph 2 is based on comparable provisions contained in the corresponding articles of the codification conventions cited in paragraph (1) of the present commentary. Paragraph 2 should be read in conjunction with article 11 (c) and article 21, paragraph 2, and the commentaries thereto. The commentary to paragraph 2 of article 21 explains in greater detail the interrelationship between paragraph 2 of article 12 and the above-mentioned provisions. Paragraph 2 of article 12 refers to the refusal or failure of the sending State to carry out its obligations under paragraph 1. It is therefore concerned with the termination of the functions of the courier. It is only after the sending State has failed to comply with its obligation to recall the courier or terminate his functions that the receiving State may cease to recognize the person concerned as a diplomatic courier and treat him as an ordinary foreign visitor or temporary resident. The second part of the first sentence of paragraph 2 of article 21 refers to the cessation of the courier's privileges and immunities when he has not left the territory of the receiving State within a reasonable period.

Article 13. Facilities accorded to the diplomatic courier

1. The receiving State or the transit State shall accord to the diplomatic courier the facilities necessary for the performance of his functions.

2. The receiving State or 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.

Commentary

(1) Article 13 deals with the general facilities to be accorded to the diplomatic courier in the exercise of his functions relating to the freedom of communication as well as with some other more specific facilities connected with his temporary accommodation and the establishment of any contacts with the sending State and its missions.

Paragraph 1

(2) Paragraph 1 is of a general character and is inspired by article 25 of the 1961 Vienna Convention on Diplomatic Relations, article 28 of the 1963 Vienna Convention on Consular Relations, article 22 of the 1969 Convention on Special Missions and articles 20 and 51 of the 1975 Vienna Convention on the Representation of States.

(3) The diplomatic courier, as an official of the sending State, may, while exercising his functions in the territory of the receiving State or transit State, need some assistance in connection with his journey. The facilities which he may need could include various means of help or co-operation from the authorities of the receiving State or transit State in order for him to perform his duties expeditiously and without undue difficulties. Some of these facilities could be anticipated well in advance, due to their essential and repetitive character, while others might be unpredictable in nature, so that their explicit formulation in an article is neither easy nor convenient. The main requirement with respect to the nature and scope of the facilities is their close dependence upon the courier's need to be able to perform his functions properly. The facilities could be granted by the central or the local authorities, as the case may be. They may be of a technical or administrative nature, relating to admission or entry into the territory of the transit State or the receiving State, or to the provision of assistance in securing the safety of the diplomatic bag. As the Commission stated in paragraph (2) of the commentary to the corresponding provision (art. 33) of its 1961 draft articles on consular relations:

It is difficult to define the facilities which this article has in view, for this depends on the circumstances of each particular case. It should, however, be emphasized that the obligation to provide facilities is confined to what is reasonable, having regard to the given circumstances.⁵⁸

It should be added that the nature and scope of the facilities accorded to the diplomatic courier for the performance of his functions constitute a substantial aspect of his legal status and they must be regarded as an important legal means for the protection of the freedom of communication between the sending State and its missions, consular posts and delegations.

Paragraph 2

(4) Paragraph 2 deals with two specific facilities to be granted to the courier by the receiving State or the transit State. Its subject-matter was the object of two separate draft articles submitted by the Special Rapporteur, namely draft article 18, on freedom of communication, and draft article 19, on temporary accommodation. The Commission felt that reasons of logic as well as of economy of drafting made it advisable to combine both provisions into a single one as a second paragraph of article 13.

(5) Within the scope of the practical facilities which may be accorded by the receiving State or the transit State to the diplomatic courier for the performance of his functions in their territories, paragraph 2 refers specifically to the assistance to be rendered to him in obtaining temporary accommodation when requested

under certain circumstances. Normally, the diplomatic courier has to resolve himself all the practical problems that may arise during his journey, including his accommodation. However, in certain special situations the diplomatic courier may not be able to find suitable temporary accommodation for himself and for the protection of the diplomatic bag, for example when he is compelled either to change his original itinerary or to stop over in a certain place. In that exceptional case, the receiving State or the transit State may be requested to assist him in obtaining such temporary accommodation. It is of great importance that the diplomatic courier and the diplomatic bag carried by him be housed in a safe and secure place, hence this provision providing for facilities to be rendered by the receiving State or the transit State for the proper performance of his functions. The words "to the extent practicable" used in paragraph 2 point to the fact that the obligation to provide this facility is to be understood within reasonable limits, the obligation being one of providing the means rather than ensuring the result. The Commission felt that, while the internal organization of some States might be such that an intervention from a State organ could ensure the easy availability of a hotel room or other accommodation, this was not necessarily so in other States. In the latter case, the obligation to assist couriers in obtaining temporary accommodation might prove on certain occasions or under certain circumstances to be a particularly burdensome one and therefore had to be kept within reasonable bounds.

(6) The other facility expressly mentioned in paragraph 2 is the obligation for the receiving State or the transit State, as the case may be, to assist the courier at his request and to the extent practicable in establishing contact through the telecommunications network with the sending State and its missions, consular posts or delegations, wherever situated. The diplomatic courier *en route* or at a certain point on his temporary stopover might need to communicate directly with the competent authorities of the sending State or its missions abroad to seek instructions or inform them about delays or deviations from the original way-bill, or to convey any other information in connection with the performance of his functions. This assistance by the receiving State or transit State entails the facilitation, when necessary, of the courier's use of the appropriate means of telecommunication, including telephone, telegraph, telex and other available services. Assistance should in principle not be requested from the receiving or transit State in normal circumstances, when the means of communication are generally accessible. The request for assistance must be justified on the grounds of existing difficulties or obstacles which the courier could not overcome without the direct help or co-operation of the authorities of the receiving State or transit State. In this connection, a possible implementation of the obligation of assistance might be the ensuring of a priority call for the diplomatic courier over the public telecommunications network or, in urgent cases, the placing of other telecommunications networks (such as the police network, etc.) at the courier's disposal. It should also be noted that the qualification introduced by the words "to the extent practicable", as explained in paragraph (5) of the present commentary, also applies to this obligation of assistance.

⁵⁸ *Yearbook* . . . 1961, vol. II, p. 111, document A/4843, chap. II, sect. IV.

Article 14. Entry into the territory of the receiving State or the transit State

1. The receiving State or 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.

Commentary

(1) Article 14 is basically modelled on article 79 of the 1975 Vienna Convention on the Representation of States.

Paragraph 1

(2) The admission of the diplomatic courier into the territory of the receiving State or his crossing the territory of the transit State is an indispensable condition for him to perform his functions. It is obvious that, if a diplomatic courier is refused entry into the territory of the receiving State, then he is prevented from performing his functions. For this reason, the obligation of States to permit the entry into their territory of diplomatic couriers has become well established in international law and State practice as an essential element of the principle of freedom of communication for official purposes effected through diplomatic couriers and diplomatic bags and as a corollary of the freely appointed character of the courier, as stated in article 7 and the commentary thereto, particularly its paragraph (2). The phrase "in the performance of his functions" should be interpreted as meaning "in the course of the performance of his functions", which includes entry into the territory of the receiving or transit State in order to pick up a bag for later delivery.

Paragraph 2

(3) The facilities for entry into the territory of the receiving State or the transit State rendered by those States to the diplomatic courier depend very much on the régime established by them for admission across their frontiers of foreigners in general, and members of foreign diplomatic and other missions and official delegations in particular. The main purpose of those facilities is to ensure unimpeded and expeditious passage through the immigration and other checking offices at the frontier. Where the régime for admission requires an entry or transit visa for all foreign visitors or for nationals of some countries, it should be granted to the diplomatic courier by the competent authorities of the receiving or transit State as promptly as possible and, where possible, with reduced formalities. There has been abundant State practice—established through national regulations and international agreements—on simplified procedures for the issuance of special visas to diplomatic couriers valid for multiple journeys and long periods of time

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 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.

Commentary

(1) The direct source of article 15 is to be found in the pertinent provisions of the four codification conventions, namely article 26 of the 1961 Vienna Convention on Diplomatic Relations, article 34 of the 1963 Vienna Convention on Consular Relations, article 27 of the 1969 Convention on Special Missions and articles 26 and 56 of the 1975 Vienna Convention on the Representation of States.

(2) Freedom of movement and travel within the territory of the receiving or transit State is another essential condition for the proper performance of the functions of the diplomatic courier. It also constitutes an important element of the general principle of freedom of diplomatic communication. Any impediment to the exercise of free movement and travel of the courier in the performance of his functions inevitably leads to retardation of the delivery of the diplomatic correspondence and thus adversely affects official communications. To ensure this freedom of movement and travel, the authorities of the receiving or transit State should, save in exceptional circumstances, assist the diplomatic courier in overcoming possible difficulties and obstacles which could be caused by routine police, customs or other inspection or control during his travel. As a rule, the diplomatic courier has to make all the necessary travel arrangements for his entire journey in the exercise of his tasks. In exceptional circumstances, the courier may be compelled to address a request for assistance to the authorities of the receiving or transit State 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.

(3) Freedom of movement and travel entails the right of the diplomatic courier to use all available means of transportation and any appropriate itinerary in the territory of the receiving State or transit State. However, having in mind the fact that the freedom of movement and travel of the diplomatic courier is subordinated to his function of carrying the diplomatic bag, it should be assumed that he has to follow the most appropriate itinerary, which usually should be the most convenient journey for the safe, speedy and economical delivery of the bag to its destination. It was to emphasize this functional approach of article 15 that the Commission replaced the original formulation submitted by the Special Rapporteur, "shall ensure freedom of movement in their respective territories to the diplomatic courier in the performance of his official functions", by the more precise wording, "shall ensure to the diplomatic courier such freedom of movement and travel in its territory as is necessary for the performance of his functions", which reproduces the formulation of the corresponding provision of the 1969 Convention on Special Missions (art. 27). As for the interpretation of this phrase, the obligation of the receiving State or the transit State, as it

arises from article 15, with regard to the freedom of movement and travel ensured to the diplomatic courier is confined to his journey or movement relating to the performance of his functions. In all other instances, the courier would enjoy the normal freedoms accorded to foreign visitors by the laws and regulations of the receiving or transit State.

(4) Furthermore, certain limitations could be established on the courier's freedom of movement and travel with regard to certain zones in the receiving State or transit State into which entry is prohibited or regulated for reasons of national security. Such a restriction on freedom of movement and travel has been generally acknowledged by international law and State practice with regard to foreign nationals, including members of diplomatic and other missions, and is explicitly recognized in the provisions of the existing codification conventions cited in paragraph (1) of the present commentary. It was precisely for the sake of maintaining uniformity with the texts of those provisions that the Commission introduced certain amendments to the original formulation submitted by the Special Rapporteur. The phrase "zones where access is prohibited or regulated for reasons of national security" was replaced by "zones entry into which is prohibited or regulated for reasons of national security". It was felt that the Commission should keep to that formula, if only to avoid possible misinterpretations. By the same token, the phrase at the end of the original draft article, "or when returning to the sending State", was deleted. In the view of the Commission, that phrase added nothing to the meaning of the article and could lead to misguided interpretations of the conventions which contained no corresponding phrase. On the other hand, the point should also be made, in accordance with the commentary to the corresponding provision (art. 24) of the Commission's 1958 draft articles on diplomatic intercourse and immunities,⁵⁹ that the establishment of prohibited zones must not be so extensive as to render freedom of movement and travel illusory.

Article 16. Personal protection and inviolability

The diplomatic courier shall be protected by the receiving State or 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.

Commentary

(1) The direct source of article 16, as regards obligations of both the receiving State and the transit State, is to be found in the following provisions of the codification conventions, which deal with the personal inviolability of the courier: article 27, paragraph 5, and article 40, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations; article 35, paragraph 5, and article 54, paragraph 3, of the 1963 Vienna Convention on Consular Relations; article 28, paragraph 6, and article 42, paragraph 3, of the 1969 Convention on

Special Missions; and article 27, paragraph 5, article 57, paragraph 6, and article 81, paragraph 4, of the 1975 Vienna Convention on the Representation of States.

(2) A comparison between the above-mentioned provisions on which article 16 is based and the provision on personal inviolability of the diplomatic agent in article 29 of the 1961 Vienna Convention on Diplomatic Relations leads to the conclusion that the personal inviolability of the diplomatic courier comes very close in its scope and legal implications to that of a diplomatic agent. This is justified by the nature of the courier's function with regard to the custody, transportation and delivery of the diplomatic bag and the legal protection of the confidential character of official correspondence. This inviolability of the courier arises not only from the provisions of the codification conventions cited above, but also from numerous other manifestations of State practice, such as bilateral consular conventions and provisions of national legislation.

(3) The principle of the inviolability of the courier has a twofold nature. On the one hand, it implies for the receiving State and the transit State obligations of a preponderantly negative nature, where the duties of abstention predominate. Thus the courier shall not be liable to arrest, detention or any other form of restriction on his person and is exempted from measures that would amount to direct coercion. The other aspect of the twofold nature of the courier's personal inviolability entails a positive obligation on the part of the receiving and transit States. The concept of protection embodied in article 16 includes the duty of the receiving and transit States to take all appropriate measures to prevent any infringement of the courier's person, freedom or dignity. The receiving State and the transit State have the obligation to respect and to ensure respect for the person of the diplomatic courier. They must take all reasonable steps to that end.

(4) Notwithstanding the broad character of the duty of protection and respect for the inviolability of the diplomatic courier, some qualifications are in order. As provided in article 16, the courier shall be protected by the receiving State or the transit State "in the performance of his functions". Furthermore, and in accordance with paragraph (1) of the commentary to article 27 of the Commission's 1958 draft articles on diplomatic intercourse and immunities⁶⁰ (which served as the basis for article 29 of the 1961 Vienna Convention on Diplomatic Relations, dealing with the personal inviolability of the diplomatic agent), it should be understood that the principle of the courier's inviolability does not exclude in respect of him either measures of self-defence or, in exceptional circumstances, measures to prevent him from committing crimes or offences.

Article 17. Inviolability of temporary accommodation

1. The temporary accommodation of the diplomatic courier carrying a diplomatic bag shall, in principle, be inviolable. However:

⁵⁹ *Yearbook ... 1958*, vol. II, p. 96, document A/3859, chap. III, sect. II.

⁶⁰ *Ibid.*, p. 97.

(a) prompt protective action may be taken if required in case of fire or other disaster;

(b) inspection or search may be undertaken where serious grounds exist for believing that there are in the temporary accommodation 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.

2. In the case referred to in paragraph 1 (a), measures necessary for the protection of the diplomatic bag and its inviolability shall be taken.

3. In the case referred to in paragraph 1 (b), inspection or search shall be conducted in the presence of the diplomatic courier and on condition that it be effected without infringing the inviolability either of the person of the diplomatic courier or of the diplomatic bag and would not unduly delay or impede the delivery of the diplomatic bag. The diplomatic courier shall be given the opportunity to communicate with his mission in order to invite a member of that mission to be present when the inspection or search takes place.

4. 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.

Commentary

(1) There are no specific rules regarding the inviolability of the temporary accommodation of the diplomatic courier in any of the four codification conventions or in other international agreements in the field of diplomatic or consular law. However, there exist in those conventions provisions relating to the status of the private residence of a member of a diplomatic mission, and of the private accommodation of members of special missions, permanent missions to international organizations or members of delegations to international conferences. Those provisions are article 30 of the 1961 Vienna Convention on Diplomatic Relations, article 30 of the 1969 Convention on Special Missions and articles 29 and 59 of the 1975 Vienna Convention on the Representation of States.

(2) Couriers are often housed in the premises of the mission, in private apartments owned or used by the mission or in the private accommodation of a member of the mission. In such instances, the inviolability of the temporary accommodation of the diplomatic courier will be protected under the relevant provisions of the above-mentioned conventions or customary international law. When the courier's temporary accommodation happens to be in a hotel, motel, guest house, private apartment or other similar common facilities for lodging visitors on a temporary stay, special rules on the inviolability of the temporary accommodation of the diplomatic courier apply.

Paragraph 1

(3) Paragraph 1 lays down the general principle of the inviolability of the temporary accommodation of a diplomatic courier carrying with him a diplomatic bag as well as the two specific cases in which this inviolability may be limited. These exceptions are aimed at striking a

realistic and workable balance between respect for the inviolability of the temporary accommodation of the diplomatic courier carrying with him a diplomatic bag and the need of the receiving State or transit State to take prompt protective action in emergency situations such as a fire or disaster which threatens the temporary accommodation of the courier, as well as to dispel or confirm the suspicion that the bag is being used for introducing forbidden articles.

(4) From the point of view of the receiving State and the transit State, the inviolability of the courier's temporary accommodation provided for in the first sentence of paragraph 1 has two aspects. In the negative sense, they are obliged to prevent their agents from entering the premises for any official purpose whatsoever, except with the consent of the courier. This covers immunity from any search, requisition, attachment or execution and therefore the accommodation may not be entered even in pursuance of a judicial order. Of course, measures of execution could be taken against the private owner of the accommodation, provided that it is not necessary to enter the temporary accommodation. The inviolability of the courier's temporary accommodation also implies for the receiving and transit States a more positive obligation. They should secure the inviolability of the accommodation from any intrusion by unauthorized persons. Moreover, the official functions of the courier, and more particularly the protection of the diplomatic bag carried by him, might in exceptional circumstances warrant the undertaking of special measures of protection.

(5) Subparagraphs (a) and (b) of paragraph 1 tend to establish a balance between the interest of the sending State in protecting the courier and the bag and the interest of the receiving or transit State in protecting its safety and security. They create some limitations under certain conditions to the rule of inviolability of the temporary accommodation. Both subparagraphs should be read in conjunction with their respective counterparts, namely paragraphs 2 and 3, as each subparagraph establishing a possible exception to the principle of inviolability of the temporary accommodation is counterbalanced by a paragraph laying down the strict modalities or conditions under which such an exception may apply. Furthermore, the fact that paragraph 1 refers to a courier "carrying a diplomatic bag" is an explicit indication that the purpose of the inviolability of the temporary accommodation is not so much the protection of the courier as, first and foremost, the protection of the bag.

Paragraph 1 (a) and paragraph 2

(6) The language used in subparagraph (a) of paragraph 1, stating that prompt protective action may be taken if required in case of fire or other disaster, can be traced to article 31 of the 1963 Vienna Convention on Consular Relations and also, to some extent, to article 25 of the 1969 Convention on Special Missions. Such action as may be taken should obviously be directed only at the suppression of the disaster—which may constitute a public hazard jeopardizing public safety or the safety of the courier himself and the bag—and should stop short of any measure which would exceed this original purpose. The exception laid down in subparagraph (a) concerns only the inviolability of the temporary accommodation as such and does not affect the inviolability of the diplomatic

bag, which should be protected at all times. That is why paragraph 2 makes it clear that the prompt protective action taken if required in case of fire or other disaster should be accompanied by measures necessary for the protection of the diplomatic bag and its inviolability.

Paragraph 1 (b) and paragraph 3

(7) Subparagraph (b) of paragraph 1 provides for the possibility that the temporary accommodation of the courier may be inspected and searched when there exist serious grounds for believing that it contains 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. The provision is therefore aimed at ensuring observance of the laws and regulations of the receiving or transit State and respect for their legitimate interests. Paragraph 3, however, counterbalances the above-mentioned provision by requiring that such an inspection or search be conducted in the presence of the diplomatic courier and on condition that it be effected without infringing the inviolability either of the person of the diplomatic courier or of the diplomatic bag and without unduly delaying or impeding the delivery of the diplomatic bag.

(8) The second sentence of paragraph 3 provides that the diplomatic courier shall be given the opportunity to communicate with his mission in order to invite a member of that mission to be present when the inspection or search takes place. The rationale behind this provision is that, under normal circumstances, the hypothesis contemplated in paragraph 1 (b) does not constitute an emergency requiring prompt action and there may be situations in which the presence of a member of the mission may be useful and helpful to the courier, for example if the courier is not fluent in the language of the receiving or transit State. However, it should be noted that the provision does not make the presence of a member of the mission a condition for carrying out the inspection or search. While in many cases it will be possible to wait for him to be present, in other cases (for example if the presence of explosives in the temporary accommodation is suspected) such a delay might prove contradictory to the main purpose of paragraph 1 (b), namely to ensure compliance with the safety regulations of the receiving or transit State.

Paragraph 4

(9) Compliance by the receiving State and the transit State with the obligations deriving from the first sentence of paragraph 1 has to be facilitated by the courier's informing the States concerned of the location of his temporary accommodation. Paragraph 4 is therefore mainly aimed at facilitating the discharge by the authorities of the receiving and transit States of their obligations in implementing the inviolability of the courier's temporary accommodation. The Commission felt that, in the case of a violation of those obligations, the international responsibility of the States concerned might not exist if the requirement of paragraph 4 had not been met. The words "to the extent practicable" point to the fact that, in exceptional circumstances, the courier might be prevented from giving such information.

(10) In cases where a courier employs an individual means of transport of his own in the exercise of his functions, a question could arise as to the application of a special rule concerning the inviolability of that means of transport. The Commission, while of the view that no special provision was necessary, felt that the commentary to article 17 should reflect the notion that, whenever the diplomatic courier uses a means of transport in the performance of his functions, that means of transport should not be subject to measures which might impede or delay such performance, particularly the delivery of the bag. Paragraph (7) of the commentary to article 18 contains further explanations relevant to this question.

Article 18. Immunity from jurisdiction

1. The diplomatic courier shall enjoy immunity from the criminal jurisdiction of the receiving State or the transit State in respect of 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 the transit State in respect of acts performed in the exercise of his functions. This immunity shall not extend to an action for damages arising from an accident involving a vehicle the use of which may have entailed the liability of the courier to the extent that those damages are not recoverable from insurance. Pursuant to the laws and regulations of the receiving State or the transit State, the courier shall, when driving a motor vehicle, be required to have insurance coverage against third-party risks.

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 and provided that the measures concerned can be taken without infringing the inviolability of his person, his temporary accommodation or the diplomatic bag entrusted to him.

4. The diplomatic courier is not obliged to give evidence as a witness on matters connected with the exercise of his functions. He may, however, be required to give evidence on other matters, provided that this would not unduly delay or impede 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.

Commentary

(1) The sources for article 18 are the following provisions of the codification conventions: article 31 and article 37, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations; articles 31 and 36 of the 1969 Convention on Special Missions; and article 30, article 36, paragraph 2, and article 60 of the 1975 Vienna Convention on the Representation of States.

Paragraph 1

(2) Paragraph 1, which refers to the immunity from criminal jurisdiction of the diplomatic courier, represents a compromise solution between two distinct bodies of opinion in the Commission: the opinion that the granting

of absolute immunity from criminal jurisdiction to the courier was essential and entirely justified because of his position and his functions, and the opinion that such granting of immunity was superfluous and functionally unnecessary. The article therefore differs from the text initially submitted by the Special Rapporteur in that the granting of immunity from criminal jurisdiction is qualified by the phrase "in respect of acts performed in the exercise of his functions", the same phrase as that adopted in paragraph 2 for immunity from civil and administrative jurisdiction.

(3) As indicated in paragraph (2) above, views in the Commission were divided on the need for a special provision on immunity from criminal jurisdiction and the scope of such immunity.

(4) On the one hand, reservations were expressed concerning paragraph 1 on the ground that article 16, on the inviolability of the diplomatic courier, already provided the courier with all the protection he needed to perform his functions. On the other hand, reservations were expressed as to the addition of the words "in respect of acts performed in the exercise of his functions", on the ground that the granting of immunity from criminal jurisdiction to the diplomatic courier should be unqualified. The addition of that phrase might create difficulties of interpretation.

(5) The addition of the phrase "in respect of acts performed in the exercise of his functions" is intended to make it clear that the immunity from criminal jurisdiction would not apply to any act performed by the courier not directly related to the performance of his functions. Acts not covered by immunity from criminal jurisdiction would range from the most obvious offences, such as theft or murder, to cases of serious abuse of the diplomatic bag, for example the act of intentionally carrying articles prohibited under article 25, such as weapons for terrorists or narcotic drugs. It was pointed out in that connection that paragraph 1 should be interpreted in the light of and in conjunction with the following: article 5, on the duty to respect the laws and regulations of the receiving State and the transit State; article 10, on the functions of the diplomatic courier, which consist in taking custody of, transporting and delivering the bag; article 12, on the diplomatic courier declared *persona non grata* or not acceptable; and article 25, on the contents of the diplomatic bag. Further observations on the interpretation and practical application of the phrase "in respect of acts performed in the exercise of his functions" are contained in paragraphs (6) to (11) of the present commentary.

Paragraph 2

(6) The first sentence of paragraph 2 is modelled on the second part of paragraph 1 of article 60 of the 1975 Vienna Convention on the Representation of States. Although the four codification conventions adopt a functional approach in respect of immunity from the civil and administrative jurisdiction of the receiving or transit State, most of them do so by enumerating exceptions to the principle of immunity, the underlying rationale being that those exceptions constitute clear cases of acts performed outside the functions of the person enjoying the immunity concerned, for example an action relating

to any professional or commercial activity exercised by the person in question in his personal capacity. Paragraph 2, like article 43 of the 1963 Vienna Convention on Consular Relations and article 60, paragraph 1, of the 1975 Vienna Convention on the Representation of States, reflects the functional approach to immunity from civil and administrative jurisdiction in a non-specific manner by means of a general formula, namely "in respect of acts performed in the exercise of his functions". This is also the approach taken by the codification conventions mentioned in paragraph (1) of the present commentary with regard to members of the administrative and technical staff of the mission concerned, which stipulate that such immunity "shall not extend to acts performed outside the course of their duties".

(7) The next question, as in the case of paragraph 1, is the determination of the legal nature and scope of an act "performed in the exercise of his functions" as distinct from the private activity of the person concerned. The functional approach in this case presupposes that the immunity is recognized in fact by the sending State and is therefore limited to the acts performed by the courier as an authorized official fulfilling a mission for the sending State. The character of such acts could be determined by multilateral or bilateral treaties or conventions, by customary international law or by the internal laws and regulations of States. Clear examples of acts outside the performance of his functions are those enumerated in the provisions of the codification conventions, such as article 31 of the 1961 Vienna Convention on Diplomatic Relations. However, there could be other acts performed by the person enjoying immunity from local civil jurisdiction, such as contracts concluded by him which were not expressly or implicitly concluded in his capacity as an authorized official performing a mission for the sending State. This may be the case in respect of the renting of a hotel room, the renting of a car, the use of services for cartage and storage or the conclusion of a lease or purchase contract by a diplomatic courier during his journey. The obligation to settle a hotel bill or purchases made by and services rendered to the diplomatic courier, although arising during and even in connection with the exercise of his official functions, is not exempt from the application of local laws and regulations. The main reason for such a conclusion is that, in all these instances, purchases are made by and services of a general commercial nature are rendered to the person concerned which have to be paid for by anyone benefiting from them. The same rule applies to charges levied for specific services rendered, as provided for in article 34 (e) of the 1961 Vienna Convention and the corresponding articles in the other codification conventions. Consequently, acts relating to such purchases or services cannot be considered *per se* to be acts performed in the exercise of the official functions of the courier and therefore covered by the immunity from local civil and administrative jurisdiction.

(8) As regards the interpretation of the words "acts performed in the exercise of his functions" within the context of the administrative jurisdiction of the receiving State or the transit State, it was widely held, in the first place, that the concept itself of "administrative jurisdiction" depended largely on the internal law of the

receiving or transit State and that it certainly covered administrative tribunals. Furthermore, the same act might or might not be subject to the administrative jurisdiction of the receiving or transit State depending on the context in which it had been performed. Illegal parking could certainly lead to fines and even withdrawal of the driving licence if such an act had been performed while the courier was *en route* to a private party. The evaluation of the same act should be different if it had been necessary in the context of the urgent and timely delivery of a diplomatic bag. As explained in paragraph (10) of the commentary to article 17, the real criterion should be that “whenever the diplomatic courier uses a means of transport in the performance of his functions, that means of transport should not be subject to measures which might impede or delay such performance, particularly the delivery of the bag”.

(9) As to who is entitled to determine whether an act of a diplomatic courier is or is not “an act performed in the exercise of his functions”, the question, as in the case of consular officers and members of delegations to international organizations, may receive different answers in doctrine and in State practice. One position favours the receiving State, whereas another considers that the determination may be jointly made by the receiving or transit State and the sending State. In the practice of States on this matter both doctrines are followed, i.e. the decision on the distinction may be made by both the sending and the receiving States, or by the receiving State alone. In case of dispute between the sending State and the receiving State, the most appropriate practical solution would be an amicable settlement through diplomatic channels.

(10) Accidents caused by a vehicle the use of which may have entailed the courier’s liability where the damages are not recoverable from insurance may give rise to two kinds of situation. An accident may occur outside the performance of the courier’s functions, in which case, by application of the general rule in the first sentence of paragraph 2, the courier does not enjoy immunity. But an accident may also occur during the performance of the courier’s functions. In this situation, in which by application of the rule contained in the first sentence of paragraph 2 the courier would in principle enjoy immunity from the civil and administrative jurisdiction of the receiving or transit State, an exception is made, and the paragraph specifically provides that this immunity shall not extend to an action for damages arising from such an accident. There are weighty reasons for this exception. The use of motor vehicles for personal or professional purposes has become a part of daily life. Traffic accidents and offences have inevitably increased, giving rise to a growing number of claims. The need to regulate questions of liability for personal injuries and damage to property arising from traffic accidents in which diplomatic agents and other persons enjoying diplomatic immunities are involved has become obvious. Nevertheless, it was some time before the proper codification of international law occurred in this field. While the 1961 Vienna Convention on Diplomatic Relations contains no provision to that effect, later conventions include specific norms regulating the matter, namely article 43, paragraph 2 (b), of the 1963 Vienna Convention on Consular Relations, article 31, paragraph

2 (d), of the 1969 Convention on Special Missions and article 60, paragraph 4, of the 1975 Vienna Convention on the Representation of States.

(11) An earlier version of article 18 contained the expression “vehicle used or owned by the courier”. It was considered in the Commission that these words might be of questionable interpretation under certain legal systems and might encroach upon the assignment of civil and administrative responsibility under the internal law of certain countries. The expression “vehicle the use of which may have entailed the liability of the courier”, although less concrete, was considered to be generically more accurate and more acceptable, since it referred to the internal law of the receiving or transit State the determination of the conditions under which a person was liable in a given accident.

(12) It is also to be noted that paragraph 2 goes a step beyond the codification conventions mentioned in paragraph (10) above. Its third sentence lays down the general principle that, pursuant to the laws and regulations of the receiving State or the transit State, the courier shall, when driving a motor vehicle, be required to have insurance coverage against third-party risks. This is also why, in the second sentence of paragraph 2, the words “where those damages are not recoverable” contained in an earlier version were replaced by the words “to the extent that those damages are not recoverable”, bearing in mind that the damages may be partially or totally recoverable from insurance.

Paragraph 3

(13) Paragraph 3 refers to immunity from measures of execution. As a consequence of the functional immunity of the courier, measures of execution can be taken against him only with respect to cases which are not related to acts performed in the exercise of his functions. It is appropriate that the courier should enjoy immunity from execution. First, on the basis of his official functions, he is entitled to enjoy immunity from local civil and administrative jurisdiction, at least on the same level as members of the administrative and technical staff. Secondly, all the codification conventions explicitly provide for the personal inviolability of the courier, which means that he is not liable to any form of arrest or detention. Thirdly, it is obvious that measures of execution would lead inevitably to impediments to the normal performance of the official functions of the courier. It is precisely for these reasons that, even in cases in which in principle measures of execution might be taken against the courier (for acts outside the performance of his functions), such measures are not permissible if they infringe the inviolability of the courier’s person, his temporary accommodation or the diplomatic bag entrusted to him.

Paragraph 4

(14) Paragraph 4 is inspired by article 31, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations and the corresponding provisions of the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States as to the basic principle it lays down, namely that the diplomatic courier is not

obliged to give evidence as a witness. In substance, however, although with important differences in drafting, it is closer to article 44 of the 1963 Vienna Convention on Consular Relations as to the qualifications or modalities to which the above-mentioned principle is subject.

(15) Paragraph 4 states that the diplomatic courier is not obliged to give evidence as a witness "on matters connected with the exercise of his functions". In that connection two points deserve particular attention. In the first place, the expression "on matters connected with the exercise of his functions" should be interpreted with the same reservations and qualifications as those applying under paragraphs 1 and 2 and reflected in the relevant paragraphs of the present commentary above. Secondly, paragraph 4 refers to cases in which the courier is called upon to give evidence on his having witnessed someone else's acts or behaviour. It does not refer to cases concerning his own acts as an accused or indicted person, as in the second sentence of paragraph 2, in which instance he might be called upon to give evidence in a case arising from an accident involving a vehicle the use of which might have entailed his liability.

(16) Paragraph 4 further provides that the courier may be required to give evidence "on other matters". Two points are also in order in this connection. In the first place, it was the clear understanding in the Commission that a receiving or transit State could request testimony in writing from the courier in accordance with its internal rules of civil procedure or applicable agreements contemplating such a possibility. Secondly, it should be noted that an essential goal of the functions and status of the diplomatic courier is to ensure the safe and speedy delivery of the diplomatic bag, and this goal cannot be compromised by possible undue delays caused by a requirement to give evidence. Paragraph 4 therefore qualifies the possibility that the courier may be required to give evidence on other matters by the condition that this would not unduly delay or impede the delivery of the diplomatic bag.

Paragraph 5

(17) Paragraph 5, which is common to all the provisions on immunity from jurisdiction noted in paragraph (1) of the present commentary, recognizes the fact that the effective jurisdiction of the sending State over its officials abroad serves to enhance justice and legal order. It suggests a legal remedy in the sending State in favour of a claimant of the receiving State whose rights could not be otherwise protected owing to the immunity of the diplomatic agent. The provision also rests on the permanent legal relationship between a person and the State of his nationality, even when the person is abroad.

(18) However, to state, as does paragraph 5, that the courier's immunity in the receiving or transit State does not exempt him from the jurisdiction of his own country is not the same as to affirm the existence of such jurisdiction. As pointed out in the commentary to the corresponding provision of the Commission's 1958 draft articles on diplomatic intercourse and immunities, namely article 29, on which article 31 of the 1961 Vienna Convention on Diplomatic Relations was based:

... it may happen that this jurisdiction does not apply, either because the case does not come within the general competence of the country's courts, or because its laws do not designate a local forum in which the

action can be brought. In the provisional draft the Commission had meant to fill this gap by stipulating that in such a case the competent court would be that of the seat of the Government of the sending State. This proposal was, however, opposed on the ground that the *locus* of the jurisdiction is governed by municipal law. . . .⁶¹

(19) Notwithstanding the foregoing, the Commission considered that paragraph 5, although not as effective as would be desirable, had a certain value and was useful, if only from a psychological point of view. It constituted a subtle suggestion to the sending State that it should exercise its jurisdiction in cases which otherwise might constitute a denial of justice because of the invocation of the prerogative of immunity with respect to the jurisdiction of the receiving or transit State.

Article 19. *Exemption from customs duties, 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 carried in his personal baggage and grant exemption from all customs duties, taxes and related charges on such articles other than charges levied for specific services rendered.

2. The diplomatic courier shall, in the performance of his functions, be exempt in the receiving State or the transit State from all dues and taxes, national, regional or municipal, 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.

Commentary

Paragraph 1

(1) The direct sources for paragraph 1 of article 19 are article 36, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations, article 50, paragraph 1, of the 1963 Vienna Convention on Consular Relations, article 35, paragraph 1, of the 1969 Convention on Special Missions and article 35, paragraph 1, and article 65, paragraph 1, of the 1975 Vienna Convention on the Representation of States.

(2) The main reason for according to the diplomatic courier permission to carry across the frontier in his personal baggage articles for his personal use exempt from customs duties, taxes and related charges has been the recognition of his official functions, deriving from the fundamental principle of freedom of communication of States for official purposes. National laws and regulations and other forms of State practice have shaped a distinct trend to accord to diplomatic couriers customs privileges and immunities similar to those granted to members of diplomatic missions, although tailored in some aspects to the specific situation of the courier. The commentaries to the draft articles which served as the basis for the provisions cited in paragraph (1) of the present commentary are therefore, *mutatis mutandis*, useful for the interpretation of paragraph 1 of article 19.

⁶¹ *Ibid.*, p. 99, para. (12) of the commentary.

(3) Given the characteristically short stay of the courier in the receiving or transit State, the permission for entry and customs exemption applies to articles for personal use imported by the courier in his personal baggage only, and does not apply to other imports. This, however, should not be interpreted as excluding the case of unaccompanied personal luggage, which, because of the means of transport chosen, traffic delays or mix-ups, or other circumstances, may arrive later than the courier himself.

(4) Paragraph 1 is qualified by the expression "in accordance with such laws and regulations as [the receiving State or transit State] may adopt". It was understood in the Commission that that expression referred to those laws and regulations which might be in force at the time of the courier's entry into the receiving or transit State. The laws and regulations for admission of persons and goods across the frontier, including immigration, customs and sanitary control at frontier check-points, are within the national jurisdiction of the State. They are aimed at protecting the security, economic, fiscal and other legitimate interests of the State. Although not specified in the article, it should be understood that they relate basically to the formal and other procedural requirements aimed at preventing possible abuses of the exemptions. As stated in paragraph (3) of the commentary to article 34 of the Commission's 1958 draft articles on diplomatic intercourse and immunities (which served as the basis for article 36 of the 1961 Vienna Convention on Diplomatic Relations):

Because these exemptions are open to abuses, States have very frequently made regulations, *inter alia*, restricting the quantity of goods imported or the period during which the imported articles for the establishment of the agent must take place, or specifying a period within which goods imported duty-free must not be resold. Such regulations cannot be regarded as inconsistent with the rule that the receiving State must grant the exemption in question. . . .⁶²

The same principles, *mutatis mutandis*, should apply to the diplomatic courier.

(5) The exception to the exemption from duties, which in the sources indicated in paragraph (1) of the present commentary read "charges other than charges for storage, cartage and similar services", was replaced by the phrase "charges on such articles other than charges levied for specific services rendered" because the latter was felt to be better adapted to the situation of the courier, who would normally not need storage or cartage services but only contingent and incidental services for which he was supposed to pay. This change of wording is also in keeping with the terminology used in paragraph 2 of article 19.

Paragraph 2

(6) There is no specific provision in the codification conventions concerning the exemption from dues and taxes of the diplomatic courier. Paragraph 2 is based on the consideration that the diplomatic courier should be accorded in all respects treatment befitting his status as a person exercising official functions and that, with reference to tax exemption, the courier's status should not be inferior to that of a member of the administrative or

technical staff of a mission who is neither a national of, nor permanently resident in, the receiving State. Taking the foregoing into account, the sources for this provision are article 34 of the 1961 Vienna Convention on Diplomatic Relations, article 49 of the 1963 Vienna Convention on Consular Relations, article 33 of the 1969 Convention on Special Missions and articles 33 and 63 of the 1975 Vienna Convention on the Representation of States.

(7) Notwithstanding the foregoing, paragraph 2 has been drafted bearing in mind that the short stay of the diplomatic courier in a given country places him in a somewhat different position from that of members of a mission and renders much less likely and almost impossible the exercise by him of certain activities or his entering into legal relationships which would expose him to liability for particular forms of taxation. Therefore the drafting technique used has been less casuistic with respect to the exceptions to the principle of exemption than the technique adopted for the above-mentioned source provisions, and certain qualifications have been introduced in the general statement of the exemption principle. In this connection, the expression "in the performance of his functions" has been used to indicate clearly the functional approach to the exemptions concerned, which excludes all possible private activities of the courier and compensates for the reduction of the number of express exceptions to the exemption principle provided for in paragraph 2. Furthermore, there is no specific mention of "personal or real" taxes as there is in the source provisions mentioned in paragraph (6) above, since that expression does not seem to fit the specific factual situation of the short stay of the courier, which could hardly afford him the opportunity, for instance, to exercise private rights relating to real property. Paragraph 2 should be interpreted in the sense that the exemption principle would apply to those dues and taxes which the diplomatic courier might encounter in the course of his travels in his capacity as a courier, but not to those for which he would become liable only after a period of residence in the receiving or transit State.

(8) Two exceptions to the exemption principle are expressly provided for in paragraph 2. The taxes and charges contemplated in those exceptions are to be paid by the courier irrespective of whether he is acting in the performance of his functions. They are indirect taxes of a kind which are normally incorporated in the price of goods or services, and charges levied for specific services rendered. Both exceptions are also to be found in the relevant provisions of the codification conventions mentioned in paragraph (6) above.

(9) The Commission did not include in the present articles any specific provision on exemption from personal and public services or on exemption from social security provisions. It felt that the sojourn of a courier in the receiving or transit State was so short that, in practice, the possibility was extremely remote that a courier might be called upon to perform personal or public services, of whatever nature, or that social security provisions might be invoked with regard to him. Express articles for hypothetical situations far removed from reality were not warranted.

⁶² *Ibid.*, p. 100.

Article 20. Exemption from examination and inspection

1. The diplomatic courier shall be exempt from personal examination.

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 the transit State. An inspection in such a case shall be conducted in the presence of the diplomatic courier.

Commentary

Paragraph 1

(1) There is no specific provision in the codification conventions concerning the exemption from personal examination of diplomatic and consular agents. In practice, however, such an exemption is always upheld as it is considered to derive from the principle of personal inviolability. Similarly, the main reason behind the exemption of a diplomatic courier from personal examination has been the recognition of his official functions, deriving from the fundamental principle of freedom of communication of States for official purposes, and the inviolability of the person entrusted with carrying out those functions. Exemption from personal search has also been considered as a courtesy accorded to a State official.

(2) The words "personal examination" refer to bodily examination and do not rule out metal or other detectors employed for security purposes in airports or at other points of departure or arrival. It should be recalled in this connection that the original text of paragraph 1 contained the phrase "including examination carried out at a distance by means of electronic or other mechanical devices". There was a general feeling in the Commission that that phrase represented an unjustified extension of the principle, which would run counter to security measures adopted by almost all States and to which, in usual practice, even diplomatic agents submit without protest. Apart from certain forms of delinquency which had reached alarming dimensions, such as illicit traffic in foreign currency, narcotic drugs, arms and other goods, the spread of international terrorism and the unlawful seizure of aircraft and other forms of air piracy had justified special measures of increased scrutiny of passengers and their baggage, including the regular use of electronic and mechanical devices for examination and screening.

Paragraph 2

(3) The direct sources for paragraph 2 are article 36, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations, article 50, paragraph 3, of the 1963 Vienna Convention on Consular Relations, article 35, paragraph 2, of the 1969 Convention on Special Missions and article 35, paragraph 2, and article 65, paragraph 2, of the 1975 Vienna Convention on the Representation of States.

(4) Paragraph 2, which provides for exemption from inspection of the personal baggage of the diplomatic courier, seeks to curtail abuses of this privilege when there are serious grounds for presuming that the baggage contains articles not for personal use, but for lucrative or other improper purposes, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or the transit State. However, there is one important requirement and safeguard for the courier specifically indicated in the case when such an exception becomes operative: it stipulates that the inspection shall be conducted only in the presence of the courier.

Article 21. Beginning and end 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 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.

2. The privileges and immunities of the diplomatic courier shall cease at the moment when he leaves the territory of the receiving State or the transit State, or on the expiry of a reasonable period in which to do so. However, the privileges and immunities of the diplomatic courier *ad hoc* who is a resident of the receiving State shall cease at the moment when he has delivered to the consignee the diplomatic bag in his charge.

3. Notwithstanding paragraph 2, immunity shall continue to subsist with respect to acts performed by the diplomatic courier in the exercise of his functions.

Commentary

(1) Although none of the codification conventions contains any specific provision on the duration of the privileges and immunities of the diplomatic courier, the wording of article 21 has been inspired by several provisions contained in those conventions regarding the duration of the privileges and immunities of the diplomatic agent or consular officer, namely article 39 of the 1961 Vienna Convention on Diplomatic Relations, article 53 of the 1963 Vienna Convention on Consular Relations, article 43 of the 1969 Convention on Special Missions and articles 38 and 68 of the 1975 Vienna Convention on the Representation of States.

Paragraph 1

(2) Paragraph 1 acknowledges the close link between the beginning of the privileges and immunities of the diplomatic courier and the performance or exercise of his functions. As a general rule, the diplomatic courier enjoys privileges and immunities from the moment he enters the territory of the receiving State or the transit State in order to perform his functions. The moment of commencement of the privileges and immunities is thus the moment when the diplomatic courier crosses the frontier of the territory, the objective of the crossing being the performance of his functions. In such a case, the functions of the courier may well, of course, have commenced before the crossing, for

example if he had previously received the bag to be transported, but the reason or need for the privileges and immunities arises only when, having left the territory of the sending State, he enters the territory of the transit or receiving State. This would normally be the case of a permanent courier appointed by the Ministry of Foreign Affairs who finds himself at the time of the appointment in the territory of the sending State. But the situation may arise in which the person appointed as a courier already finds himself in the territory of the receiving State at the time of his appointment. This would usually happen in the case of an *ad hoc* courier appointed by the mission, consular post or delegation of the sending State in the receiving State. In this case the article provides that the courier's privileges and immunities shall commence from the moment he actually begins to exercise his functions. The expression "from the moment he begins to exercise his functions" should be interpreted as referring to the moment of the courier's appointment and receipt of the documentation referred to in article 8. Although for drafting reasons paragraph 1 contains the phrase "if he is already in the territory of the receiving State", that phrase should be understood as meaning that the person in question, when appointed a courier, should already be in the territory of the receiving State.

Paragraph 2

(3) The first part of the first sentence of paragraph 2 adopts with regard to the normal, or most usual, moment at which the privileges and immunities of the diplomatic courier cease a criterion or rationale symmetric to that adopted in paragraph 1 for their commencement. It lays down that such privileges and immunities shall cease at the moment when the diplomatic courier leaves the territory of the receiving State or the transit State. This would be the case of a permanent courier. If the courier is no longer in the receiving State or the transit State, the foundation for his privileges and immunities disappears.

(4) The second part of the first sentence of paragraph 2, namely the words "or on the expiry of a reasonable period in which to do so", may refer to two different situations. The most likely situation in which this phrase may find an application has to do with the possible declaration of the courier as *persona non grata* or not acceptable. In connection with this possible situation, the words "or on the expiry of a reasonable period in which to do so" should be read in conjunction with article 11 (c) and article 12, paragraph 2, and the commentaries thereto. Those provisions lay down that a diplomatic courier may be declared *persona non grata* or not acceptable by the receiving State. His functions do not end *ipso facto* but, as a consequence of that declaration, there arises for the sending State the obligation either to recall its courier or, for example in the case of a multiple-mission courier, to terminate his functions in the receiving State which has declared him *persona non grata* or not acceptable. If the sending State refuses or fails within a reasonable period to carry out those obligations, the receiving State may notify the sending State that, in accordance with article 12, paragraph 2, it ceases to recognize the person concerned as a diplomatic courier. This notification by the receiving State ends the courier's functions in accordance with article 11 (b). Although the courier's functions have ceased, his privileges and immunities continue to subsist,

in principle, until he leaves the territory of the receiving State by application of the general rule laid down in the first part of the first sentence of paragraph 2 of the present article. But given the very specific factual situation of a *persona non grata* declaration, the receiving State is likely to have an interest in ensuring that the person concerned leaves its territory as rapidly as possible, that is to say on the expiry of a reasonable time-limit. If the courier fails to leave the territory of the receiving State within the given time-limit, his privileges and immunities cease at the moment of expiration of the time-limit.

(5) Although the case of a declaration of *persona non grata* is the most likely situation in which a receiving State may request that the diplomatic courier leave its territory on the expiry of a reasonable time-limit, article 21 does not rule out the possibility that such a time-limit could be set by the receiving State for reasons other than a declaration of *persona non grata*. This would be the case, for instance, of a receiving State which did not want to have recourse to a *persona non grata* declaration and yet wished to curtail possible abuses of privileges and immunities of couriers in its territory during long stays after the bag had been delivered and a courier's mission had been fulfilled.

(6) The second sentence of paragraph 2 contemplates an exception to the general rule laid down in the first sentence. The solution adopted follows article 27, paragraph 6, of the 1961 Vienna Convention on Diplomatic Relations, article 35, paragraph 6, of the 1963 Vienna Convention on Consular Relations, article 28, paragraph 7, of the 1969 Convention on Special Missions and article 27, paragraph 6, and article 57, paragraph 7, of the 1975 Vienna Convention on the Representation of States. It is uniformly provided for in those conventions that the privileges and immunities of the diplomatic courier *ad hoc* cease at the moment when he has delivered to the consignee the diplomatic bag in his charge. Taking everything into account, the Commission was of the view that the differentiation of permanent couriers and *ad hoc* couriers as regards the end of their privileges and immunities was justified in the special case in which the *ad hoc* courier was a member of the staff of the mission or the consular post in the receiving State or was otherwise a resident of the receiving State. Bearing this in mind, the Commission has confined the applicability of the second sentence of paragraph 2 to the *ad hoc* courier "who is a resident of the receiving State", which also covers the cases in which the *ad hoc* courier is a member of the staff of the mission or the consular post.

(7) It should be noted that the expression "privileges and immunities" used in paragraphs 1 and 2 of article 21, unlike the word "immunity" used in paragraph 3, refers to all the privileges and immunities granted to the diplomatic courier and dealt with in the present articles.

Paragraph 3

(8) Paragraph 3 is modelled on the corresponding provisions of the codification conventions referred to in paragraph (1) of the present commentary. This provision, which prolongs the immunity of the courier for acts performed in the exercise of his functions after those functions have ended and subsequent to his departure

from the receiving State, refers only to the immunity from jurisdiction provided for in article 18. Its *raison d'être* is to be found in the official nature of the mission performed by the courier, which corresponds to a sovereign function of the sending State.

Article 22. Waiver of immunities

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

2. The waiver shall, in all cases, be express and shall be communicated in writing to the receiving State or the transit State.

3. However, 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. The waiver of immunity from jurisdiction in respect of judicial proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment or decision, 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 an equitable settlement of the case.

Commentary

(1) The sources for article 22 are the corresponding provisions of the codification conventions, namely article 32 of the 1961 Vienna Convention on Diplomatic Relations, article 45 of the 1963 Vienna Convention on Consular Relations, article 41 of the 1969 Convention on Special Missions and, particularly for paragraph 5, articles 31 and 61 of the 1975 Vienna Convention on the Representation of States.

(2) Article 22 extends to the immunities of the diplomatic courier the procedure of waiver to be found in all the codification conventions. Waiver may thus be considered as one of the forms of suspension of the immunities of the diplomatic courier. This procedure is based on the fundamental concept that such immunities are an expression of the principle of the sovereign equality of States and that they are granted not to benefit individuals, but to ensure the efficient performance of the courier's functions.

Paragraph 1

(3) Paragraph 1 states the general principle that the immunities of the diplomatic courier may be waived only by the sending State. The waiver of immunities must emanate from the sending State because the object of the immunities is that the diplomatic courier should be able to discharge his duties in full freedom.⁶³

⁶³ See paragraph (1) of the commentary to article 30 of the Commission's 1958 draft articles on diplomatic intercourse and immunities, which served as the basis for article 32 of the 1961 Vienna Convention on Diplomatic Relations (*ibid.*, p. 99).

(4) The plural adopted by the Commission for the word "immunities", in paragraph 1, indicates that the possible scope of application of the sending State's decision to proceed to a waiver may be very broad. The most common cases envisaged cover immunity from jurisdiction, either criminal, civil or administrative, or each or all of them, according to the sovereign decision of the sending State. But the decision to proceed to a waiver on the part of the sending State could also extend to immunities and privileges other than those relating to jurisdiction, including immunity from arrest, since the foundation of all of them is to facilitate the better performance of the courier's functions, as explained in paragraph (3) above.

(5) While paragraph 1 states the principle that the immunities of the diplomatic courier may be waived by the sending State, it does not say which is the competent authority within the sending State to give such a waiver. There has been a great deal of diversity in State practice and in doctrinal views regarding the authority entitled to exercise the right of waiver. The question has been raised whether it should in all cases be the central authority, for example the Ministry of Foreign Affairs, or whether the head of the mission, another diplomatic agent, or the member of the mission involved in a particular case should also have the right to waive jurisdictional immunity. The Commission was of the view that the possible solutions to this problem depended essentially on the relevant domestic laws and regulations of the sending State, where such laws and regulations had been enacted, or on established practice and procedures where no special legislation existed. Some States confer the power to waive jurisdictional immunity on heads of missions or members of missions, but only on instructions from the Ministry given prior to or on the occasion of a specific case. In such instances, heads of diplomatic and other missions or members of such missions may be required to seek instructions before making a statement of waiver.

(6) Extensive State practice and the relevant commentaries to articles which formed the basis for similar provisions in the codification conventions⁶⁴ indicate that proceedings, in whatever court or courts, are regarded as an indivisible whole and that, consequently, a waiver given in accordance with the relevant requirements and recognized or accepted by the court concerned precludes the right to plead immunity either before the judgment is pronounced by that court or on appeal.

Paragraph 2

(7) Paragraph 2, which closely follows paragraph 2 of article 45 of the 1963 Vienna Convention on Consular Relations, lays down the principle that the waiver must be express and that it must be communicated in writing as the most appropriate and unequivocal manifestation of its express character. An earlier version of paragraph 2 included the words "except as provided in paragraph 3". The Commission decided to delete those words on the ground that, as explained below, the situation contemplated in paragraph 3 is not an implied waiver but an

⁶⁴ See, in particular, paragraph (5) of the commentary cited in footnote 63 above.

absence of immunity and therefore does not constitute a true exception to the principle that the waiver must always be express.

Paragraph 3

(8) Paragraph 3 provides that 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. The rationale behind this provision is that, under such circumstances, the courier is deemed to have accepted the jurisdiction of the receiving State as fully as may be required in order to settle the dispute in regard to all aspects closely linked to the basic claim.⁶⁵ In this connection, it is the understanding of the Commission that the lack of immunity to which paragraph 3 refers is related to civil and administrative proceedings, since an express waiver communicated in writing should always be required in order to subject the courier to criminal proceedings. It is also to be noted in connection with paragraph 3 that the regulations of the sending State usually require that its diplomatic agents as well as couriers obtain prior authorization from the central authorities before instituting legal proceedings in the receiving State; but, if they do institute proceedings, they are presumed to have the necessary authorization.⁶⁶

Paragraph 4

(9) Paragraph 4 draws a distinction between waiver of immunity from jurisdiction and waiver of immunity in respect of execution of the judgment. It stipulates that waiver of immunity from jurisdiction in respect of judicial proceedings shall not be held to imply waiver of immunity in respect of execution of the judgment, for which a separate waiver is required. This rule was established in customary international law prior to the 1961 Vienna Convention on Diplomatic Relations and has been confirmed by State practice. Although some members of the Commission questioned the advisability of this rule, the Commission was of the view that its inclusion in all provisions relating to waiver of immunities contained in all four codification conventions mentioned in paragraph (1) of the present commentary was sufficient demonstration of its existence as an accepted norm of international law.

(10) An earlier version of paragraph 4 spoke of "waiver of immunity from jurisdiction in respect of civil or administrative proceedings", which was closer to the terminology used in the corresponding provisions of the codification conventions mentioned in paragraph (1) above. The present wording, which speaks of "judicial proceedings", is intended to cover not only civil or administrative proceedings, but also criminal proceedings, and reflects the Commission's feeling that the double-waiver requirement should also apply in criminal proceedings.

Paragraph 5

(11) Paragraph 5 reproduces a provision first introduced by articles 31 and 61 of the 1975 Vienna

Convention on the Representation of States. As stated in paragraph (2) of the commentary to article 62 (Waiver of immunity) of the Commission's 1971 draft articles on the representation of States in their relations with international organizations:

... the provision set forth in paragraph 5 places the sending State, in respect of a civil action, under the obligation of using its best endeavours to bring about a just settlement of the case if it is unwilling to waive the immunity of the person concerned. If, on the one hand, the provision of paragraph 5 leaves the decision to waive immunity to the discretion of the sending State which is not obliged to explain its decision, on the other, it imposes on that State an objective obligation which may give to the host State grounds for complaint if the sending State fails to comply with it. ...⁶⁷

(12) Paragraph 5 should be considered as a practical method for the settlement of disputes in civil matters. It may offer, in some instances, effective ways to resolve problems. Taking into account the specific features of the legal status and official functions of the diplomatic courier, the extrajudicial method of amicable settlement of a dispute may be appropriate. It compensates for the eventuality that a sending State may refuse to waive the courier's immunity, offering the possibility of arriving at a just settlement through negotiation of an equitable resolution.

(13) Paragraph 5 should be interpreted as referring to any stage of a civil action and it therefore applies equally to cases in which a sending State does not waive the courier's immunity in respect of execution of a judgment.

(14) The paragraph deals with the case of a civil action because it is in that context that matters of compensation most frequently arise. However, the possibility of resorting to paragraph 5 in connection with minor criminal cases should not be entirely ruled out, particularly in cases of civil actions arising out of criminal acts.

(15) It should also be recalled in connection with paragraph 5 that, as provided in paragraph 5 of article 18, the immunity of the diplomatic courier from the jurisdiction of the receiving State or the transit State does not exempt him from the jurisdiction of the sending State.

Article 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.

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.

⁶⁵ See paragraph (6) of the commentary cited in footnote 63 above.

⁶⁶ See paragraph (3) of the commentary cited in footnote 63 above.

⁶⁷ *Yearbook ... 1971*, vol. II (Part One), p. 321, document A/8410/Rev.1, chap. II, sect. D.

Commentary

(1) With the exception of a few complementary elements and drafting adjustments, the basic components of article 23 are contained in the corresponding provisions of the four codification conventions, namely article 27, paragraph 7, of the 1961 Vienna Convention on Diplomatic Relations, article 35, paragraph 7, of the 1963 Vienna Convention on Consular Relations, article 28, paragraph 8, of the 1969 Convention on Special Missions and article 27, paragraph 7, and article 57, paragraph 8, of the 1975 Vienna Convention on the Representation of States.

Paragraph 1

(2) The relevant provisions of the above-mentioned multilateral conventions, as well as of numerous bilateral agreements, which are confirmed by an examination of the behaviour of States, demonstrate that the practice dealt with in article 23 of employing the captain of a ship or aircraft in commercial service for the custody, transportation and delivery of diplomatic bags forms part of modern international law. The practice of entrusting the diplomatic bag to the captain of a commercial aircraft, in particular, is widespread today. This practice has proved its advantages, which may be summarized as economy, speed and reasonable safety, since the bag, although not accompanied by a courier, is still in the custody or the care of a responsible person. The employment of the captain of a passenger or other merchant ship, although not so frequent, has been resorted to where sea-borne transport is the most convenient means of communication or where the shipment of sizeable consignments is more economical by sea. It was understood in the Commission that, although not expressly stated in the present text of paragraph 1, the diplomatic bag to which it refers may be the bag of a sending State or of a mission, consular post or delegation of that State, in accordance with the scope of the present articles as defined in article 1.

(3) The draft article originally submitted by the Special Rapporteur spoke of the "captain of a commercial aircraft" and the "master of a merchant ship", whereas the article as now worded refers to the "captain of a ship or aircraft in commercial service". The word "captain" has been retained to apply to both a ship and an aircraft for the sake of uniformity with the language used in the provisions contained in three of the codification conventions referred to in paragraph (1) of the present commentary, namely the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States. The word is intended to describe the functions of the person in command and in charge of a ship or aircraft, irrespective of the particular meaning it may have under the domestic law of any country. By conveying the actual meaning in which the word is used, the Commission also intends to relieve the eventual semantic tension that the use of the same word, "captain", for both a ship and an aircraft may create in some of the language versions. As to the expression "in

commercial service", it has been used to categorize both a ship and an aircraft in order to eliminate any possible restrictive connotation that the term "merchant ship" may have had as compared with the term "commercial aircraft", as used in the article originally proposed.

(4) The phrase "which is scheduled to arrive at an authorized port of entry" refers to ships or aircraft in regular service or belonging to a regular line between the States and the port of entry concerned, rather than voyages or flights undertaken by any ship or aircraft on an *ad hoc* basis. It was accepted in the Commission that, under the regulations of certain airlines and the arrangements made with certain countries, "charter flights" could offer all the characteristics of a regular flight, except for the booking system, and could be considered as covered by the phrase "scheduled to arrive". It was, however, also pointed out that the phrase was designed to take into account the fact that article 23 established certain obligations on the part of the receiving State under paragraph 3, and that the receiving State might have difficulties in fulfilling those obligations in the case of non-scheduled flights or voyages. Yet nothing in paragraph 1 should be interpreted as precluding the possibility that States, by mutual agreement, might decide to entrust their bags to the captain of a ship or aircraft on a non-scheduled flight or voyage or of a nature other than "in commercial service".

(5) Although this is not expressly mentioned in the text of paragraph 1 itself, the wording of the paragraph does not preclude the existing practice of several States to entrust the unaccompanied bag to a member of the crew of a 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 the crew member.

Paragraph 2

(6) The captain of a ship or aircraft to whom a bag is entrusted is provided with an official document indicating the number of packages constituting the diplomatic bag entrusted to him. This document may be considered as having the same character as the official document issued to a diplomatic courier, as elaborated upon in the commentary to article 8. It should, however, be noted (and all the above-mentioned codification conventions are clear on this point) that the captain is not to be considered a diplomatic courier, either permanent or *ad hoc*. Therefore the provisions of the present articles which concern the personal status of the diplomatic courier do not apply to the captain of a ship or aircraft.

Paragraph 3

(7) Whenever a diplomatic bag is entrusted by the sending State to the captain of a ship or aircraft in commercial service, the overriding obligation of the receiving State is to facilitate the free and direct delivery of the bag to the authorized members of the diplomatic mission or other authorized officials of the sending State, who are entitled to have access to the ship or aircraft in order to take possession of the bag. The receiving State should enact relevant rules and regulations and establish appropriate procedures in order to ensure the prompt and free

delivery of the diplomatic bag at its port of entry. Unimpeded access to the ship or aircraft should be provided for the receipt of the incoming diplomatic bag at the authorized port of entry or for the handing over of the outgoing diplomatic bag to the captain of the ship or aircraft. In both instances the persons entitled to receive or hand over the diplomatic bag should be authorized members of the diplomatic mission, consular post or delegation of the sending State. This two-way facility for receiving the bag from the captain or handing it over to him should be reflected in the relevant provisions of the rules governing the dispatch of a diplomatic bag entrusted to the captain of a ship or aircraft in commercial service. The drafting changes undergone by paragraph 3 since its original submission by the Special Rapporteur are intended to stress the above-mentioned obligation of the receiving State, shifting the emphasis from the facilities accorded to the captain to the obligation of the receiving State to permit unimpeded access to the ship or aircraft. In order to carry out its obligations under paragraph 3, the receiving State must know of the arrival of the bag, either because of the scheduled and regular nature of the flight or voyage involved or because of the mutual agreements concluded with specific States, as explained in paragraph (4) of the present commentary.

(8) As stated in paragraph 3, the purpose of the receiving State granting unimpeded access to the ship or aircraft to a member of a mission, consular post or delegation of the sending State is to enable the latter "to take possession of the bag directly and freely from the captain or to deliver the bag directly and freely to him". The words "directly and freely" should be interpreted as meaning literally "from the hands of the captain to those of the designated official", and vice versa, without interference from any intermediary individual. The expressions used in the Spanish and French texts, namely *de manos del* and *des mains du*, respectively, reflect faithfully the idea which the English text intends to convey by the words "directly and freely".

(9) It was discussed in the Commission whether the obligation of the receiving State laid down in paragraph 3 should be qualified by the words "by arrangement with the appropriate authorities of the sending State", mention of which was to be found in the corresponding provisions of the codification conventions referred to in paragraph (1) of the present commentary. The Commission decided against incorporating those words in the paragraph so as not to create the impression that such an arrangement would constitute a pre-condition for the existence of the said obligation of the receiving State. Such arrangements could, instead, regulate the modalities of the practical implementation of that obligation.

(10) Although not expressly stated, it should be understood that the member of the mission, consular post or delegation who is to take possession of the bag from the captain, or to deliver it to him, must be duly authorized by the appropriate authorities of the sending State. The determination of the material aspects of such authorization might constitute a matter for special arrangements between the receiving State and the sending State.

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 not accompanied by a diplomatic courier, shall also bear visible indications of their destination and consignee.

Commentary

Paragraph 1

(1) Paragraph 1 is modelled on the initial part of the following provisions of the four codification conventions: article 27, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations; article 35, paragraph 4, of the 1963 Vienna Convention on Consular Relations; article 28, paragraph 5, of the 1969 Convention on Special Missions; and article 27, paragraph 4, and article 57, paragraph 5, of the 1975 Vienna Convention on the Representation of States.

(2) In conformity with long-standing State practice, the diplomatic bag has always been identified through certain visible external marks. The most common visible external feature of the packages constituting a diplomatic bag is a tag or a stick-on label with an inscription such as "diplomatic correspondence", "official correspondence" or *expédition officielle*. In particular, the diplomatic bag must be sealed by the competent authority of the sending State by means of the official stamp imprinted with wax or lead seals, or of padlocks, or in other ways which may be agreed upon between the sending and the receiving States. The existence of such seals operates not only in the interest of the sending State, to ensure the confidentiality of the bag's contents, but also in the interest of the receiving State. The seals, on the one hand, help the receiving State to ascertain the *bona fide* character and authenticity of the diplomatic bag and, on the other hand, can provide the receiving State with evidence to refute possible accusations of having tampered with the bag.

(3) The provisions of paragraph 1 apply to all kinds of bags, whether accompanied or not.

Paragraph 2

(4) The diplomatic bag not accompanied by diplomatic courier, with which paragraph 2 is especially concerned, has acquired a prominent place in modern diplomatic communications. The frequency of the use of this kind of diplomatic bag reflects widespread State practice of increasing dimensions and significance. Article 23 and the commentary thereto deal with one form of unaccompanied bag, that which has been entrusted to the captain of a ship or aircraft in commercial service. But diplomatic bags are also frequently transmitted by postal service or by any mode of transport, as explained in article 26 and the commentary thereto. The use of unaccompanied bags for the diplomatic mail has become

almost a regular practice of developing countries, for economic considerations, but this practice has now become widespread among many other States.

(5) The unaccompanied bag must meet the same requirements in respect of its external features as a bag accompanied by a courier; it should be sealed by the official stamp with wax or lead seals by the competent authority of the sending State. Because the bag is not carried by a professional or *ad hoc* courier, even greater care may be required for proper fastening, or the use of special padlocks, since it is forwarded as a consignment entrusted to the captain of a ship or aircraft. Also in connection with the visible external marks, it is necessary to provide the diplomatic bag with a tag or stick-on label with an indication of its character. But given the greater likelihood that an unaccompanied bag may be lost, a clear indication of the destination and consignee is necessary. In that connection, it was thought in the Commission that, although the latter requirement might be considered necessary only in the case of the unaccompanied diplomatic bag, it might also be helpful in the case of bags accompanied by courier, since the possibility always existed, as some cases of international practice had shown, that a bag might be separated from the courier and be stranded. In those cases, a clear indication of destination and consignee could greatly facilitate speedy and safe delivery. Although paragraph 2 provides for an additional requirement for the practical purpose of ensuring the delivery of the unaccompanied bag, the lack of any such additional indication should not detract from the status of the bag as a diplomatic bag.

(6) The wording "the packages constituting the diplomatic bag" is used for the sake of uniformity with the language of article 27, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations. It is intended to cover the various physical elements constituting the diplomatic bag, as a unified legal notion, but not the individual pieces constituting the contents of the bag.

(7) The original text of paragraph 2 submitted by the Special Rapporteur contained an additional clause to the effect that the unaccompanied bag must also bear a visible indication of "any intermediary points on the route or transfer points". While some members of the Commission thought that the indication of transfer points was very useful, particularly in cases of loss of the bag, and that therefore the said clause should be retained in the text, other members thought that the question of transfer points fell more within the realm of airline itineraries, which could be changed by airlines without prior notice. The Commission as a whole, although recognizing that the practice of some States was to indicate the transfer points and that such a practice could be useful on some occasions, did not deem it advisable to include such a requirement in the text of paragraph 2.

(8) The draft article originally submitted by the Special Rapporteur contained a paragraph 3 stating that "the maximum size or weight of the diplomatic bag allowed shall be determined by agreement between the sending State and the receiving State". After carefully considering that paragraph, as well as proposals for its amendment, the Commission decided not to include it. It was considered that, if drafted in optional terms, as suggested

in one amendment, the paragraph would be superfluous, while if adopted in mandatory terms, as originally proposed, it might convey the mistaken impression that such an agreement was a pre-condition for the granting of facilities for a diplomatic bag by the receiving State. The Commission agreed, however, 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.

Article 25. Contents 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 items other than those referred to in paragraph 1.**

Commentary

Paragraph 1

(1) Paragraph 1 is modelled on the second part of paragraph 4 of article 35 of the 1963 Vienna Convention on Consular Relations. Its wording is also closely related to article 27, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations, article 28, paragraph 5, of the 1969 Convention on Special Missions and article 27, paragraph 4, and article 57, paragraph 5, of the 1975 Vienna Convention on the Representation of States.

(2) The paragraph defines the permissible contents of the diplomatic bag by the criterion of the official character of the correspondence or documents included therein or the official use for which the articles contained in the bag are intended. Under this rule, which is based on extensive State practice as well as on the above-mentioned conventions, the bag may contain official letters, reports, instructions, information and other official documents, as well as cypher or other coding or decoding equipment and manuals, office materials such as rubber stamps or other articles used for office purposes, wireless equipment, medals, books, pictures, cassettes, films and *objets d'art* which could be used for the promotion of cultural relations. The adverbs "only" and "exclusively" emphasize the official character of the permissible items in question in view of recent abuses committed with regard to the contents of the diplomatic bag.

Paragraph 2

(3) The rules governing the contents of the diplomatic bag should comprise not only provisions dealing with the permissible contents, as in paragraph 1 of article 25, but also provisions on the appropriate preventive measures to be taken in order to ensure compliance with the rules on the contents of the diplomatic bag and to avoid any abuses of the facilities, privileges and immunities accorded by international and domestic law to the bag. These two elements, namely the rule for the legally admissible contents of the bag and its efficient

implementation, have practical significance for the proper functioning of official communications in the interests of international co-operation and understanding. Their strict observance would prevent mutual suspicions on the part of the receiving State, when the diplomatic bag is admitted into its territory, and on the part of the sending State, when procedures for inspection, including the use of sophisticated devices for examination, are required by the receiving State. None of the codification conventions has so far offered a viable solution to the problem of verifiability in respect of the legally admissible contents of the diplomatic bag. The increasing number of abuses has given particular importance to this problem, with certain political, economic and other implications. For these reasons, the Commission has deemed it advisable to state expressly in a separate paragraph the duty of the sending State to take appropriate measures to prevent the dispatch through its diplomatic bag of items other than those referred to in paragraph 1. Paragraph 2 should be read in conjunction with article 28 and the commentary thereto.

Article 26. *Transmission of the diplomatic bag by postal service or 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 in such a manner as to ensure the best possible facilities for the dispatch of the bag.

Commentary

(1) Article 26, which deals with the transmission of the diplomatic bag by postal service or by any mode of transport, concerns types of unaccompanied bag other than the unaccompanied bag entrusted to the captain of a ship or aircraft. While this latter type is expressly provided for in specific provisions of the codification conventions referred to in paragraph (1) of the commentary to article 23, the types of unaccompanied bag referred to in article 26 must be considered as covered by the expression "all appropriate means" to be used by missions, consular posts and delegations in communications with the sending State, an expression used in all the relevant provisions of the codification conventions, namely article 27, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations, article 35, paragraph 1, of the 1963 Vienna Convention on Consular Relations, article 28, paragraph 1, of the 1969 Convention on Special Missions and article 27, paragraph 1, and article 57, paragraph 1, of the 1975 Vienna Convention on the Representation of States.

(2) The rules establishing the conditions governing the use of the postal service for the transmission of a diplomatic bag may be of more than one kind: there are multilateral agreements such as the international postal regulations established by the Universal Postal Union; there also exist consular or other bilateral agreements which may mention the postal service among the means of communication between the sending State and its

missions or consular posts; and there are special agreements for the transmission by post of diplomatic correspondence or the exchange of diplomatic correspondence through postal channels by air mail. Besides these international regulations there are also national administrative and postal regulations adopted by some States. In accordance with the terms of article 26, the UPU international postal regulations would apply whenever appropriate between the States concerned. If not ruled out by such regulations, other international regulations would also apply, for example bilateral agreements. Finally, national rules would apply if they were not in contradiction with the international rules in force between the States concerned or in the absence of such international rules. Among national rules, there may be provision for the transmission of bags by commercial means of transportation, in accordance with the internal legislation and administrative rules of each State.

(3) With regard to the "mode of transport" to which article 26 refers, this expression replaces the phrase "whether by land, air or sea" used in an earlier version of the article. The dispatch of diplomatic bags as cargo consignments through commercial means of transportation, whether by land, air or sea, was common practice among States long before the 1961 Vienna Convention on Diplomatic Relations. This kind of official communication has been used particularly for heavy and sizeable consignments and for non-confidential correspondence, documents and other articles, such as books, exhibits, films and other items for the official use of diplomatic missions, consular posts and other missions. In this case again, the article refers to international or national rules governing the conditions of transmission of the bag by such modes of transport. In this connection, the 1980 United Nations Convention on International Multimodal Transport of Goods,⁶⁸ which is concerned with the multilateral regulation of various modes of transport, should be noted. There also exist other international conventions, including regional ones, regulating the carriage of goods by land, air or sea. If any of those conventions are applicable between the States concerned, then such international regulations would apply. National rules would apply in the absence of applicable international regulations.

(4) Article 26 states that the conditions referred to in the article shall apply to the diplomatic bag "in such a manner as to ensure the best possible facilities for the dispatch of the bag". In drafting this part of the provision, the Commission bore in mind that a proposal to introduce a new category of postal items under the denomination of "diplomatic bags" in the international postal service by amending article 18 of the international regulations of the Universal Postal Union had been rejected by the UPU Congress held at Rio de Janeiro in 1979.⁶⁹ Consequently, the diplomatic bag has to be treated in the same way as other letter-post items, unless the postal administrations could enter into bilateral or

⁶⁸ See UNCTAD, *United Nations Conference on a Convention on International Multimodal Transport*, vol. I, *Final Act and Convention on International Multimodal Transport of Goods* (United Nations publication, Sales No. E.81.II.D.7 (vol. I)).

⁶⁹ See the Special Rapporteur's fourth report, *Yearbook ... 1983*, vol. II (Part One), pp. 120-121, document A/CN.4/374 and Add.1-4, paras. 312-317.

multilateral agreements for a more favourable treatment of diplomatic bags conveyed by the postal service. In practice, however, a measure of greater care could be—and often is—dispensed to the diplomatic bag. This part of the article has therefore been drafted with the purpose that, in applying the relevant rules for the transmission of the bag, the authorities of the postal service or of any other mode of transport accord to the bag the best possible treatment under those rules.

(5) The Commission has not deemed it necessary to include an article stating that all provisions of the present articles dealing with the status and protection of the diplomatic bag also apply to all kinds of unaccompanied bags, as this emerges clearly from the texts of the articles concerned. In some instances, the unaccompanied bag is the subject of an additional specific regulation or mention, as is the case in article 24, paragraph 2, and article 30, paragraph 2. The Commission also considered it unnecessary to refer in article 26 to the bill of lading (as the original draft article had done) or to the postal receipt “as a document indicating the official status of the diplomatic bag”. It was considered that article 24 and the commentary thereto, which also applies to the bags referred to in article 26, provided sufficient regulation on the identification of those bags. Although the Commission was of the view that the inclusion of such a reference was not necessary in the text of the article itself, it recognized that the bill of lading or the postal receipt was frequently used in practice as evidence of the nature of the consignment as a diplomatic bag. Although those documents were not strictly necessary for the identification of the diplomatic bag as such, they could serve to facilitate the evidence or proof of such identification.

Article 27. Safe and rapid dispatch of the diplomatic bag

The receiving State or the transit State shall facilitate the safe and rapid dispatch of the diplomatic bag and shall, in particular, ensure that such dispatch is not unduly delayed or impeded by formal or technical requirements.

Commentary

(1) Article 27, which deals with the obligation of the receiving State or the transit State to facilitate the safe and rapid dispatch of the diplomatic bag, is inspired by considerations similar to those that led to the adoption of article 13. It may therefore be said that the sources for article 27 are, *mutatis mutandis*, those indicated in paragraph (2) of the commentary to article 13.

(2) Although article 27 applies to all kinds of diplomatic bags, whether accompanied by diplomatic courier, entrusted to the captain of a ship or aircraft or transmitted by postal service or by any mode of transport, the existence of a specific provision on facilities for the diplomatic courier, a provision which is in practice intended to make easier the safe and speedy transportation and delivery of the accompanied bag, makes the present article even more important for unaccompanied bags, particularly those dispatched by

postal service or any mode of transport, which in practice require greater care for their safe and expeditious dispatch.

(3) The facilities accorded to the bag should be conceived also in close relationship with all other provisions containing explicit or implicit reference to the need for the receiving State or the transit State and their authorities to grant certain assistance or extend co-operation for the proper functioning of official communications through the use of the diplomatic bag. Like the facilities accorded to the diplomatic courier, those accorded to the diplomatic bag should always be considered on the basis of functional necessity and the actual need for assistance, depending on the various modes of transport and the concrete circumstances, and they should be guided by the principle of reasonableness.

(4) Although in many cases the facilities to be accorded to the diplomatic bag would entail duties of abstention on the part of the receiving or transit State, in other instances more positive obligations might be involved, such as favourable treatment in case of transportation problems or, again, the speeding up of the clearance procedures and formalities applied to incoming and outgoing consignments. It would seem neither advisable nor possible to provide a complete listing of the facilities to be accorded to the diplomatic bag. It would rather seem preferable to define the circumstances in which the need for according such facilities would arise. In general terms it may be affirmed that the scope of the facilities should be determined by the official function of the diplomatic bag and the conditions required for the safe and speedy transmission or delivery of the bag to its final destination. Therefore the general criterion would be that the need for facilities could or would arise whenever the safe or speedy dispatch, transmission or delivery of the bag is endangered. In this connection, article 27 stresses that the receiving State or the transit State shall ensure that the dispatch of the bag is not unduly delayed or impeded by formal or technical requirements. Ways to comply with this part of the provision are the easing of, or exemption from, paperwork, clearance formalities and customs procedures, or granting admission to certain places, for example through the issuance of a special pass to members of the mission to receive the bag on the airport tarmac, etc.

(5) Article 27 and the present commentary should be read in conjunction with paragraph 3 of article 23 and the commentary thereto and article 26 and the commentary thereto, in particular its paragraph (4).

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 paragraph 1 of 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.

Commentary

(1) Article 28 has been considered the key provision of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

Paragraph 1

(2) The part of paragraph 1 consisting of the words "The diplomatic bag shall . . . not be opened or detained" is a reproduction of the relevant provisions of the four codification conventions, namely article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations, article 35, paragraph 3 (first sentence), of the 1963 Vienna Convention on Consular Relations, article 28, paragraph 4, of the 1969 Convention on Special Missions and article 27, paragraph 3, and article 57, paragraph 4, of the 1975 Vienna Convention on the Representation of States. This basic concept, already contained in the above-mentioned conventions, is characterized as "inviolability" of the diplomatic bag in article 28 and is clarified, in the text, by the words "and shall be exempt from examination directly or through electronic or other technical devices".

(3) The principle that the diplomatic bag is inviolable wherever it may be and therefore shall not be opened or detained constitutes the most important aspect of this means of communication and has been upheld as a rule with wide-ranging recognition. The immunity of the bag from search has been considered the reflection of the basic principle of the inviolability of diplomatic and consular correspondence and of the archives and documents of the mission or consular office, generally recognized by customary international law and reflected in the codification conventions, namely in article 24 of the Vienna Convention on Diplomatic Relations, article 33 of the Vienna Convention on Consular Relations, article 26 of the Convention on Special Missions and articles 25 and 55 of the Vienna Convention on the Representation of States.

(4) The first substantive element of the rule is that the bag cannot be opened without the consent of the sending State. This duty of abstention on the part of the receiving or transit State constitutes an essential component of the protection of the bag and of respect for the confidential nature of its contents, which derives from the principle of confidentiality of diplomatic correspondence.

(5) The other substantive element of the rule is the obligation of the receiving State or, as the case may be, the transit State not to detain the diplomatic bag while it is in its territory. The detention of the bag constitutes an infringement of the freedom of communication by means of diplomatic correspondence. Furthermore, the detention of the bag would mean that, for a certain period of time, it would be under the direct control of the authorities of the transit State or the receiving State. This could give rise to suspicion that, during this period, the bag had undergone an unauthorized examination incompatible with the requirements for observance of its confidential character. It is obvious that any detention of

the bag may upset the intended time-schedule for its transportation, thus delaying its delivery. Finally, the detention of the bag may compromise its safety, as the receiving or transit State might not be in a position at all times to ensure its integrity and guarantee the continuation of its journey.

(6) The extent of the principle of inviolability of the diplomatic bag is further clarified by the words "and shall be exempt from examination directly or through electronic or other technical devices". The view prevailed in the Commission that the inclusion of this phrase was necessary as the evolution of technology had created very sophisticated means of examination which might result in the violation of the confidentiality of the bag, means which furthermore were at the disposal of only the most developed States. On the other hand, paragraph 1 does not extend to an external examination of the bag and of its visible marks or indications of its character as such, to the extent that such an external examination would be conducted for identification purposes only and with a view to ascertaining that a given container claimed to be a diplomatic bag actually had such a character. The paragraph does not rule out non-intrusive means of examination, such as sniffer dogs, in the case of suspicion that the bag is being used for the transport of narcotic drugs.

Paragraph 2

(7) Paragraph 2, except for the cross-reference contained therein, is a textual reproduction from article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations and therefore applies only to the consular bag *stricto sensu*. It introduces, in connection with the consular bag, a balance between the interests of the sending State in ensuring the protection, safety and confidentiality of the contents of its bag and the security interests of the receiving or transit State.

(8) In this connection, the Commission has been fully aware that cases of possible abuse of the bag are not confined to the consular bag but may extend also to the diplomatic bag *stricto sensu* or to the bags of missions or delegations. Contemporary international practice has witnessed cases of diplomatic bags being used or attempted to be used for the illicit import or export of currency, narcotic drugs, arms or other items, and even for the transport of human beings, which have violated the established rules regarding the permissible contents of the bag and adversely affected the legitimate interests of receiving or transit States. The Commission is of the view that, while the protection of the diplomatic bag is a fundamental principle for the normal functioning of official communications between States, the implementation of this principle should not provide an opportunity for abuse which may affect the legitimate interests of receiving or transit States.

(9) The Commission considered the possibility of extending to all diplomatic bags the régime of the consular bag reflected in paragraph 2. Some members, however, were of the view that a uniform régime for all bags should be established on the basis of the existing régime for the diplomatic bag *stricto sensu* as reflected in the 1961 Vienna Convention on Diplomatic Relations, which does not provide the receiving or transit State with

the right laid down in paragraph 2. Some intermediate solutions were also considered. In the end, and after extensive consideration of the problem, the Commission opted for the present formulation, which maintains the existing régime as contained in the four codification conventions as a compromise solution capable of ensuring better prospects of wide adherence by States to the present articles.

(10) It was made clear in the Commission that, subject to article 6 on non-discrimination and reciprocity, nothing precluded States from introducing by agreement, in their mutual relations, other practices regarding the diplomatic bag. In particular, they could agree to submit the consular bag to the régime of the diplomatic bag, or vice versa.

(11) It was also recalled in the Commission that, in accordance with article 58, paragraph 4, of the 1963 Vienna Convention on Consular Relations, the exchange of consular bags between two consular posts headed by honorary consular officers in different States was not allowed without the consent of the two receiving States concerned.

Article 29. Exemption from customs duties and taxes

The receiving State or the transit State shall, in accordance with such laws and regulations as it may adopt, permit the entry, transit and departure of the diplomatic bag and grant exemption from customs duties, taxes and related charges other than charges for storage, cartage and similar services rendered.

Commentary

(1) There is no specific provision in the codification conventions concerning the exemption from customs duties and taxes of the diplomatic bag. Article 29 is based on the consideration that the bag and its contents are articles for the official use of missions, consular posts and delegations, since, according to the definition provided in article 25, the diplomatic bag "may contain only official correspondence, and documents or articles intended exclusively for official use". Taking the foregoing into account, the sources for the present provision are article 36 of the 1961 Vienna Convention on Diplomatic Relations, article 50 of the 1963 Vienna Convention on Consular Relations, article 35 of the 1969 Convention on Special Missions and articles 35 and 65 of the 1975 Vienna Convention on the Representation of States.

(2) The obligation for States to permit the entry, transit and departure of the diplomatic bag is well established in international law and State practice and constitutes an essential element of the principle of freedom of communication enshrined in article 4 by making possible the safe, unimpeded and expeditious delivery of the diplomatic message. It is also a corollary of the official character of the correspondence, documents or articles contained in the diplomatic bag. The rules and regulations of the receiving or transit State may set principles of orderly administration stipulating, for instance, regular points of entry or exit.

(3) As to the exemptions provided for in article 29, they cover customs and other fiscal dues and taxes levied by the transit or receiving State on the import or export of goods. The exemptions also concern related charges for customs clearance or other formalities, such as those necessary in some States to assure the exempt status of a given object or article. The exemptions are granted in accordance with the laws and regulations of the States concerned and may cover national, regional or municipal dues and taxes, as provided for in the domestic rules and regulations of the receiving or transit State. However, the exemptions from customs duties and related charges, as well as from other dues and taxes levied by the transit or receiving State, do not cover charges for storage, cartage, transportation, postage or similar services rendered in connection with the dispatch, transmission or delivery of the diplomatic bag. Some of these charges for services, such as postage or transportation, could be waived, but only on the basis of reciprocal arrangements between the sending State and the receiving or transit State.

PART IV

MISCELLANEOUS PROVISIONS

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

1. Where, because of reasons of *force majeure* or other exceptional circumstances, the diplomatic courier, or the captain of a ship or aircraft in commercial service to whom the diplomatic bag has been entrusted, or any other member of the crew, is no longer able to maintain custody of the bag, the receiving State or the transit State shall inform the sending State of the situation and take appropriate measures with a view to ensuring the integrity and safety of the bag until the authorities of the sending State recover possession of it.

2. Where, because of reasons of *force majeure* or other exceptional circumstances, the diplomatic courier or the unaccompanied diplomatic bag is present in the territory of a State not initially foreseen as a transit State, that State, where aware of the situation, shall accord to the courier and the bag the protection provided for under the present articles and, in particular, extend facilities for their prompt and safe departure from its territory.

Commentary

(1) Article 30 deals with certain obligations on the part of the receiving or transit State when *force majeure* or other exceptional circumstances (a) prevent the diplomatic courier or any person to whom the diplomatic bag has been entrusted under article 23, including any member of the crew of a ship or aircraft in commercial service, from maintaining custody of the bag; or (b) involve a diversion of the courier or the bag from their scheduled itinerary into the territory of an unforeseen transit State.

Paragraph 1

(2) Paragraph 1 refers to the case where *force majeure* or other exceptional circumstances, such as death,

serious illness or an accident, prevent the courier, the captain of a ship or aircraft in commercial service to whom the diplomatic bag has been entrusted, or any other member of the crew from maintaining custody of the bag. The exceptional character of the circumstances involved and the significance of the protected interests warrant the adoption on the part of the receiving or transit State of special measures of protection of the safety of the diplomatic bag. This obligation must be considered as an expression of international co-operation and solidarity by States in the promotion of diplomatic communications and derives from the general principle of freedom of communication contemplated in article 4. It was made clear in the Commission that 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 (art. 26), since in such cases it was for the service charged with the transmission to assume responsibility under the exceptional circumstances envisaged in paragraph 1.

(3) The action to be taken by the receiving or transit State in these exceptional circumstances includes the adoption of appropriate measures to protect the safety of the bag and its integrity. This requires the provision of the necessary conditions for the proper storage or custody of the bag. The transit State or the receiving State must also inform the competent authorities of the sending State that the bag dispatched by that State happens to be in its custody due to exceptional circumstances. When the sending State has a diplomatic mission or consular post in the receiving or transit State, this notification should be addressed to that mission or post. In the absence of such a diplomatic mission or consular post in their territory, the authorities of the receiving State or transit State where the diplomatic bag was found must notify either the Ministry of Foreign Affairs of the sending State or the mission of another State in their territory which is charged with the protection of the interests of the sending State.

(4) Three clarifications were made in the Commission with regard to the conditions under which the above-mentioned obligations might arise for the receiving State or the transit State. First, it is understood that such obligations can arise only when the receiving or transit State has knowledge of the existence of the exceptional circumstances referred to in paragraph 1. Secondly, in the case of a bag entrusted to the captain of a ship or aircraft, the obligation would arise for the receiving or transit State only when there was no one in the line of command, or no other member of the crew, in a position to maintain custody of the bag. Thirdly, the point was also made that the obligations imposed by paragraph 1 on the receiving or transit State are of conduct rather than result, that is to say that the States concerned have the duty to take all the appropriate measures reasonably necessary with a view to ensuring the integrity and safety of the bag, even though sometimes this end result might not be attained for reasons beyond their control.

Paragraph 2

(5) The source of the provision set out in paragraph 2 is to be found in article 40, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations, article 54, paragraph 4, of the 1963 Vienna Convention on

Consular Relations, article 42, paragraph 5, of the 1969 Convention on Special Missions and article 81, paragraph 5, of the 1975 Vienna Convention on the Representation of States.

(6) As a rule, and in normal circumstances, the transit States through which a diplomatic courier or an unaccompanied bag will pass on their way to their final destination are known in advance. However, there may be cases, as stated in paragraphs (14) to (16) of the commentary to article 3, in which the courier or the bag is compelled to enter or stay for some time in the territory of a State which had not been foreseen as part of the normal itinerary. This may happen in cases of *force majeure* or other exceptional circumstances such as adverse weather conditions, the forced landing of an aircraft, the breakdown of the means of transport, a natural disaster, or other events beyond the control of the courier or the carrier of the bag. Unlike a transit State known in advance which has granted a transit visa, if so required, a State through which a bag transits due to *force majeure* cannot be foreseen: it comes into the picture only in extraordinary situations. This is precisely the situation envisaged in paragraph 2 of the present article.

(7) The 1961 Vienna Convention on Diplomatic Relations was the first multilateral treaty to establish the rule of transit passage of the members of a diplomatic mission and their families, as well as of the diplomatic courier and the diplomatic bag, whose presence in the territory of the transit State is due to *force majeure* (art. 40, para. 4). By analogy with that provision, the unforeseen transit State is under an obligation to accord to the diplomatic courier and the diplomatic bag in transit the same inviolability and protection as are accorded by the receiving State. Similar rules are contained in the other codification conventions mentioned in paragraph (5) of the present commentary.

(8) The obligations arising for an unforeseen transit State in a case of *force majeure* or other exceptional circumstances fall into two main categories. First and foremost, there is the duty of protection, so as to ensure the inviolability of the courier and the safety and confidentiality of the bag. Secondly, the unforeseen transit State should accord the courier or the bag all the facilities necessary "for their prompt and safe departure from its territory". This expression should be understood as giving the transit State the option to allow the courier or the bag to continue their journey to their destination or to facilitate their return to the sending State. In this connection, the extent of the facilities to be accorded should be dictated by the underlying purpose of this provision, namely the protection of unimpeded communications between States, and the principle of good faith in the fulfilment of international obligations and in the conduct of international relations. These obligations exist only when the transit State is aware of the situation.

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

The State on whose territory an international organization has its seat or an office or a meeting of an

international organ or a conference is held shall grant the facilities, privileges and immunities accorded under the present articles to the diplomatic courier and the diplomatic bag of a sending State directed to or from its mission or delegation, notwithstanding the non-recognition of one of those States or its Government by the other State or the non-existence of diplomatic or consular relations between them.

Commentary

(1) The basic concept that the rights and obligations of the sending State and of the host State of an international organization are not affected by non-recognition or by the non-existence of diplomatic or consular relations between them is contained in article 82 of the 1975 Vienna Convention on the Representation of States, which is therefore one of the sources for article 31. In drafting the present provision, the Commission's main concern has been clearly and precisely to define its object and scope. This is why it focuses specifically on the granting of facilities, privileges and immunities accorded under the present articles to the diplomatic courier and the diplomatic bag of a sending State directed to or from its mission or delegation and why it opens with the definition of a "host State" as contained in paragraph 1 (15) of article 1 of the 1975 Vienna Convention.

(2) Weighty reasons have led the Commission to the adoption of article 31. The importance and significance of the functions of the courier and the purpose of the bag as practical means for the operation of official communications of States justify special protection and treatment irrespective of problems of recognition of States or Governments or the existence or absence of diplomatic or consular relations. The proper functioning of official communications is in the interest of the maintenance of international co-operation and understanding and should therefore be facilitated.

(3) Article 31 refers both to "non-recognition" and to "non-existence of diplomatic or consular relations" because recognition, whether of States or of Governments, does not necessarily imply the establishment of diplomatic or consular relations.⁷⁰ Furthermore, it covers both the non-recognition of the sending State by the host State and vice versa. The article also covers, as reflected in article 1, the *inter se* aspect of communications between a sending State and its missions and delegations and vice versa.

(4) The granting of the facilities, privileges and immunities referred to in the present article does not by itself imply recognition of the sending State or of its Government by the States granting them. *A fortiori*, it does not imply either recognition by the sending State of the States granting those facilities, privileges and immunities.

⁷⁰ See *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), pp. 52-53, para. (7) of the commentary to article 79.

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

1. The present articles shall, as between Parties to them and to the conventions listed in subparagraph (1) of paragraph 1 of article 3, supplement the rules on the status of the diplomatic courier and the diplomatic bag contained in those conventions.

2. The provisions of the present articles are without prejudice to other international agreements in force as between parties to them.

3. Nothing in the present articles shall preclude the Parties thereto from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, provided that such new agreements are not incompatible with the object and purpose of the present articles and do not affect the enjoyment by the other Parties to the present articles of their rights or the performance of their obligations under the present articles.

Commentary⁷¹

(1) The purpose of article 32 is to establish the legal relationship between the rules governing the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier contained in the present articles and those contained in various categories of agreements on the same subject-matter, which categories are dealt with separately in each paragraph.

Paragraph 1

(2) Paragraph 1 refers to the relationship between the present articles and the three codification conventions mentioned in article 3, paragraph 1 (1), namely the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1975 Vienna Convention on the Representation of States. In this connection, it should be noted that the main purpose of the elaboration of the present articles was the establishment of a coherent and uniform régime governing the status of the courier and the bag. The desired harmonization and uniformity of the rules governing the legal régime of official communications through the diplomatic courier and the diplomatic bag have been sought by means of the progressive development and codification of additional, more elaborate and more specific rules further regulating the matter. The present articles therefore do not purport to amend the above-mentioned conventions, something which could be done only by the States parties to them, but rather to supplement the rules on the courier and the bag contained in the codification conventions. Nevertheless, the application of some of the provisions of those conventions may be affected because of the supplementary character of the present articles, which harmonize and develop the rules governing the legal régime of the courier and the bag. If this is the case, resort should be had to the rules of the 1969 Vienna Convention on the Law of Treaties⁷² concerning the application of successive treaties relating to the same subject-matter.

⁷¹ See also paragraphs 54-60 above.

⁷² United Nations, *Treaty Series*, vol. 1155, p. 331.

(3) The words “as between Parties to them and to the conventions listed in . . . article 3” indicate that the supplementary character attributed to the present articles applies only when the States concerned are also parties to the conventions in question.

Paragraph 2

(4) The direct source for paragraph 2 is article 73, paragraph 1, of the 1963 Vienna Convention on Consular Relations, with the exception of the words “are without prejudice to”, which have been taken from article 4 (a) of the 1975 Vienna Convention on the Representation of States.

(5) Paragraph 2 regulates the legal relationship between the present articles and existing agreements other than those referred to in paragraph 1. It is possible that, at the time of becoming parties to the present articles, States may already be parties to bilateral or multilateral agreements on the same subject-matter other than the codification conventions. The numerous consular conventions or agreements regulating consular relations between some States are a case in point. The purpose of paragraph 2 is to reserve the position of those agreements regulating the same subject-matter and it acts as a safeguard clause in respect of the rights and obligations of States deriving from those agreements. The paragraph should be interpreted in the light of article 30 of the 1969 Vienna Convention on the Law of Treaties.

Paragraph 3

(6) Paragraph 3 draws its inspiration from article 4 (b) of the 1975 Vienna Convention on the Representation of States, but the source of the conditions contained therein is article 41, paragraph 1 (b), of the 1969 Vienna Convention on the Law of Treaties.

(7) Paragraph 3 deals with the legal relationship between the present articles and possible future agreements that certain States parties to the articles may wish to conclude on the same subject-matter in order to confirm, supplement, extend or amplify the provisions thereof among those States parties. The paragraph recognizes the right of States to conclude such new agreements but it sets some limitations intended to safeguard the basic rules contained in the present articles. Thus the new agreements cannot be incompatible with the object and purpose of the present articles and cannot affect other parties in the enjoyment of their rights or the performance of their obligations under the articles. As indicated in paragraph (10) of the commentary to article 28, an agreement whereby two States parties agreed to submit the consular bag to the régime of the diplomatic bag, or vice versa, would not be contrary to the object and purpose of the present articles. The same would be true of an agreement whereby two States stipulated that their bags were to be subject to means of electronic or mechanical examination.

(8) The provisions of paragraph 3 should be read in conjunction with the rules on non-discrimination and

reciprocity laid down in article 6, and with the commentary thereto.

2. DRAFT OPTIONAL PROTOCOL ONE ON THE STATUS OF THE COURIER AND THE BAG OF SPECIAL MISSIONS

DRAFT OPTIONAL PROTOCOL ONE ON THE STATUS OF THE COURIER AND THE BAG OF SPECIAL MISSIONS

The States Parties to the present Protocol and to the articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, hereinafter referred to as “the articles”,

Have agreed as follows:

Article I

The articles also apply to a courier and a bag employed for the official communications of a State with its special missions within the meaning of the Convention on Special Missions of 8 December 1969, wherever situated, and for the official communications of those missions with the sending State or with its other missions, consular posts or delegations.

Article II

For the purposes of the articles:

(a) “mission” also means a special mission within the meaning of the Convention on Special Missions of 8 December 1969;

(b) “diplomatic courier” also means a person duly authorized by the sending State as a courier of a special mission within the meaning of the Convention on Special Missions of 8 December 1969 who is entrusted with the custody, transportation and delivery of a diplomatic bag and is employed for the official communications referred to in article I of the present Protocol;

(c) “diplomatic bag” also means the packages containing official correspondence, and documents or articles intended exclusively for official use, whether accompanied by a courier or not, which are used for the official communications referred to in article I of the present Protocol and which bear visible external marks of their character as a bag of a special mission within the meaning of the Convention on Special Missions of 8 December 1969.

Article III

1. The present Protocol shall, as between Parties to it and to the Convention on Special Missions of 8 December 1969, supplement the rules on the status of the diplomatic courier and the diplomatic bag contained in that Convention.

2. The provisions of the present Protocol are without prejudice to other international agreements in force as between parties to them.

3. Nothing in the present Protocol shall preclude the Parties thereto from concluding international agreements relating to the status of the diplomatic courier and the

diplomatic bag not accompanied by diplomatic courier, provided that such new agreements are not incompatible with the object and purpose of the articles and do not affect the enjoyment by the other Parties to the articles of their rights or the performance of their obligations under the articles.

Commentary

(1) As explained in the commentary to article 1, the Commission decided not to include in the scope of the draft articles the couriers and bags of special missions as defined in the 1969 Convention on Special Missions. Taking into account views expressed in the Commission and by some Governments, and given the relatively small number of parties to the 1969 Convention, the Commission felt that the inclusion of such couriers and bags in the scope of the articles might jeopardize wider acceptability of the articles among States not yet parties to that Convention. Yet, conscious of the fact that the ultimate goal of the present effort of progressive development and codification in the field of diplomatic and consular law is the creation of a comprehensive, coherent and uniform régime for all couriers and bags, the Commission did not wish to prevent States so wishing from applying the régime of the draft articles also to couriers and bags of special missions. It therefore adopted the present draft optional protocol, whose only purpose is to provide States with the legal instrument to extend the application of the draft articles also to the above-mentioned couriers and bags. This solution is more consistent with the goals and reasons stated above than the solution adopted on first reading of the draft articles, whereby, despite the comprehensive scope of the articles, which covered all couriers and bags, States could, by means of an optional declaration provided for in article 33 (later deleted), make at any time a written declaration specifying any category of diplomatic courier and corresponding category of diplomatic bag to which they would not apply the articles. The present solution introduces a more appropriate and finely tuned balance between the need to ensure the realization of the above-mentioned goals in the progressive development and codification of this area of diplomatic and consular law and the interest of the international community in ensuring the widest possible acceptability of the draft articles.

(2) Each article of draft Optional Protocol One has its counterpart, *mutatis mutandis*, in a provision of the draft articles. Article I corresponds to article 1 of the draft articles, article II to article 3, paragraph 1 (1), (2) and (6), of the draft articles, and article III to article 32 of the draft articles. The commentaries to the relevant draft articles are therefore also applicable, *mutatis mutandis*, to the corresponding provisions of the present draft protocol.

(3) Article I, in defining the scope of the draft protocol, also lays down its object and purpose, namely the application of the draft articles also to couriers and bags of special missions within the meaning of the 1969 Convention on Special Missions. Except for the specific mention of couriers and bags of special missions within the meaning of that Convention, it adopts the same formulation as article 1 of the draft articles.

(4) Article II defines the concepts which constitute the specificity of article I on the scope of the draft protocol as compared to article 1 on the scope of the draft articles. These concepts are "special mission", "courier of a special mission" and "bag of a special mission". The purpose of article II is to widen, for parties to the protocol, the interpretation of the expressions "mission", "diplomatic courier" and "diplomatic bag", wherever they appear in the draft articles, to include also special missions and their couriers and bags. The article thus complements the definitions contained in article 3, paragraph 1 (1), (2) and (6), of the draft articles.

(5) Article III establishes the legal relationship between, on the one hand, the rules governing the status of the diplomatic courier and the diplomatic bag as they apply to couriers and bags of special missions by virtue of the draft protocol and, on the other hand, the rules contained in various categories of agreements on the same subject-matter. The article adopts, *mutatis mutandis*, the structure and formulation of article 32 of the draft articles, various categories of agreements being dealt with separately in each paragraph.

3. DRAFT OPTIONAL PROTOCOL TWO ON THE STATUS OF THE COURIER AND THE BAG OF INTERNATIONAL ORGANIZATIONS OF A UNIVERSAL CHARACTER

DRAFT OPTIONAL PROTOCOL TWO ON THE STATUS OF THE COURIER AND THE BAG OF INTERNATIONAL ORGANIZATIONS OF A UNIVERSAL CHARACTER

The States Parties to the present Protocol and to the articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, hereinafter referred to as "the articles",

Have agreed as follows:

Article I

The articles also apply to a courier and a bag employed for the official communications of an international organization of a universal character:

(a) with its missions and offices, wherever situated, and for the official communications of those missions and offices with each other;

(b) with other international organizations of a universal character.

Article II

For the purposes of the articles:

(a) "diplomatic courier" also means a person duly authorized by the international organization as a courier who is entrusted with the custody, transportation and delivery of the bag and is employed for the official communications referred to in article I of the present Protocol;

(b) "diplomatic bag" also means the packages containing official correspondence, and documents or articles intended exclusively for official use, whether

accompanied by a courier or not, which are used for the official communications referred to in article I of the present Protocol and which bear visible external marks of their character as a bag of an international organization.

Article III

1. The present Protocol shall, as between Parties to it and to the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 or the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947, supplement the rules on the status of the diplomatic courier and the diplomatic bag contained in those Conventions.

2. The provisions of the present Protocol are without prejudice to other international agreements in force as between parties to them.

3. Nothing in the present Protocol shall preclude the Parties thereto from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, provided that such new agreements are not incompatible with the object and purpose of the articles and do not affect the enjoyment by the other Parties to the articles of their rights or the performance of their obligations under the articles.

Commentary

(1) Under article I of the draft articles, the scope of those articles is confined to couriers and bags employed by States. Yet at different stages of the Commission's work on the present topic, the question was raised as to the possibility of extending the scope of the draft articles to couriers and bags employed by international organizations in their official communications. The practice whereby international organizations employ couriers and bags in their official communications is widespread and has been recognized in important multilateral conventions regulating the status of international organizations. Thus article III (sect. 10), on facilities in respect of communications, of the 1946 Convention on the Privileges and Immunities of the United Nations⁷³ states that "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". For its part, article IV (sect. 12), on facilities in respect of communications, of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies⁷⁴ states that "the specialized agencies shall have the right to use codes and to dispatch and receive correspondence by courier or in sealed bags, which shall have the same immunities and privileges as diplomatic couriers and bags". It is to be noted that a great number of States are parties to these two Conventions, which not only recognize for the United Nations and its specialized agencies the right to employ couriers and bags, but also equate those couriers and bags with diplomatic couriers and bags as far as their status is concerned.

⁷³ See footnote 43 above.

⁷⁴ See footnote 44 above.

(2) However, since opinions had been divided, both in the Commission and in the comments and observations received from Governments, as to the advisability of enlarging the scope of the draft articles to cover also couriers and bags employed by international organizations, the Commission opted for confining the scope to couriers and bags employed by States, in order not to jeopardize the acceptability of the draft articles. Yet it also believed it appropriate, in the light of the considerations set out in paragraph (1) of the present commentary, that States should be given the choice, if they so wished, to extend the application of the draft articles to couriers and bags of, at least, international organizations of a universal character. This was done by means of the present draft optional protocol.

(3) Article I defines the scope of draft Optional Protocol Two as well as its object and purpose, namely the application of the draft articles to couriers and bags employed for the official communications of an international organization of a universal character. The 1975 Vienna Convention on the Representation of States (art. 1, para. 1 (2)) defines the concept of an "international organization of a universal character" as follows: "the United Nations, its specialized agencies, the International Atomic Energy Agency and any similar [inter-governmental] organization whose membership and responsibilities are on a world-wide scale". The article encompasses the two-way or *inter se* character of the official communications (a) of an international organization with its missions and offices, wherever situated; and (b) of those missions and offices with the organization or with each other. The scope also covers communications by means of couriers and bags between international organizations of a universal character.

(4) The purpose of article II is to widen, for parties to the protocol, the interpretation of the expressions "diplomatic courier" and "diplomatic bag", wherever they appear in the draft articles, to include also "the courier of an international organization" and "the bag of an international organization". It thus complements the definitions contained in article 3, paragraph 1 (1) and (2), of the draft articles.

(5) Article III establishes the legal relationship between, on the one hand, the rules governing the status of the diplomatic courier and the diplomatic bag as they apply to couriers and bags of international organizations of a universal character by virtue of the draft protocol and, on the other hand, the rules contained in various categories of agreements on the same subject-matter. The article adopts, *mutatis mutandis*, the structure and formulation of article 32 of the draft articles, various categories of agreements being dealt with separately in each paragraph. It is to be noted that paragraph 1 of article III specifically mentions 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, as those Conventions, because of the large number of parties thereto, may be considered truly universal codification conventions in the area of privileges and immunities of the United Nations and its specialized agencies. The commentary to the various paragraphs of article 32 of the draft articles is also applicable, *mutatis mutandis*, to article III of the draft protocol.