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

Comments and observations received from Governments

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INTRODUCTION

1. At its thirty-eighth session, held in 1986, the International Law Commission adopted provisionally, on first reading, the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The Commission decided that, in accordance with articles 16 and 21 of its statute, the draft articles should be transmitted through the Secretary-General to Governments for comments and observations and that it should be requested that such comments and observations be submitted to the Secretary-General by 1 January 1988. 1/
2. By paragraph 9 of resolution 41/81 of 3 December 1986, and again by paragraph 10 of resolution 42/156 of 7 December 1987, both entitled "Report of the International Law Commission", the General Assembly urged Governments to give full attention to the request of the International Law Commission for comments and observations on the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.
3. Pursuant to the Commission's request, the Secretary-General addressed circular letters, dated respectively 25 February 1987 and 22 October 1987, to Governments inviting them to submit their comments and observations by 1 January 1988.
4. The replies which had been received by 12 February 1988 are reproduced in the present document. Further replies which might be forthcoming will be reproduced in addenda.

I. COMMENTS AND OBSERVATIONS RECEIVED FROM MEMBER STATES

AUSTRALIA

[Original: English]

[30 December 1987]

General comments

Australia's views on this subject have been expressed in the Sixth Committee of the General Assembly on various occasions. Essentially, Australia believes there is no need for a new convention, nor does it believe that the international community is ready for progressive development in this area. It considers that the existing conventions dealing with this question and in particular the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations cover the field adequately. The addition of a new convention or protocol would result in a plurality of régimes applicable to the same bag which would only

1/ Official Records of the General Assembly, Forty-first Session, Supplement No. 10 (A/41/10), para. 32.

create difficulties and confusion. Australia considers that it is more important to concentrate on the observance of the existing laws and conventions. Australia also observes that the draft articles are not based on any survey of existing State practice, nor is there any clear identification of aspects of State practice generally recognized as requiring revision.

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

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

Specific provisions

Article 16. Personal protection and inviolability

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

Article 17. Inviolability of temporary accommodation

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

Article 18. Immunity from jurisdiction

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

Articles 19 to 22

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

Article 28. Protection of the Diplomatic Bag

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

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

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

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

AUSTRIA

[Original: English]

[3 February 1988]

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

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

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

As already stated, Austria sees the major benefit to be drawn from this codification exercise in the consolidation of existing rules into a single instrument, thereby avoiding any problems of interpretation as to the scope of a particular rule applicable in a specific case. Austria therefore finds the retention of the concept laid down in article 33, providing for optional declarations specifying the category of diplomatic courier and corresponding category of diplomatic bag to which this provision should be applied, disappointing. Although Austria is aware of the motives for such an approach and the need for flexibility, it is nevertheless felt that such a plurality of régimes, if not restricted to the absolute necessary minimum, would tend to undermine the very purpose of the whole codification exercise. Austria therefore believes that maintaining the present solution would invariably raise the question as to whether a new international instrument, adding further to the already existing plurality, would serve any useful purpose.

The draft considerably expands the privileges and immunities of the diplomatic courier in comparison to the rules already in existence. The diplomatic courier is being elevated, in many respects, to the level of a "temporary diplomat" for which Austria sees no compelling reason. It would seem that the focus of attention should rather be directed to the bag, for the courier is only a means used by Governments for the delivery of the bag. Any status accorded to the courier should

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be exclusively defined according to functional necessities. A State may, at any time, designate a member of a diplomatic mission as a courier should the need be felt that such courier should enjoy full diplomatic protection. The guiding principle should be the extent to which the protection accorded to the courier who is not a member of the diplomatic staff of a mission is necessary for the performance of his function - which is the delivery of the bag. Consideration must be given to the delicate balance between the sending State's interest in maintaining free communication with and between its missions and the receiving State's legitimate interest in preserving its integrity and security. Austria therefore believes that it should be sufficient to accord the diplomatic courier personal protection and inviolability as provided for in draft article 16. Although it is noted that article 18, relating to immunity from jurisdiction, has been considerably improved in restricting such immunity to acts performed in the exercise of the courier's function, Austria still has doubts as to whether such jurisdictional immunities are really necessary. These doubts also extend to the provision of draft article 19, paragraph 2, according the courier the right to import articles for his personal use free of customs duties, taxes and related charges.

Article 13. Facilities accorded to the diplomatic courier

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

Article 17. Inviolability of temporary accommodation

Draft article 17, providing for the inviolability of the temporary accommodation of the diplomatic courier, remains unacceptable to Austria. As already pointed out repeatedly during the debates on the present topic in the Sixth Committee of the General Assembly, such an extension of inviolability is neither necessary nor practicable. It seems that in most cases the diplomatic courier would either stay at the premises of the mission or, if a hotel or a similar accommodation is used, would not have the diplomatic bag with him in such temporary accommodation. In any event, the protection accorded to the courier in draft article 16 and the provisions providing for the protection of the bag in part III of the draft would be quite sufficient to prevent any breach of confidentiality.

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

Austria considers the categorization of the obligation contained in paragraph 1 of this article not to open or detain the bag as "inviolability of the

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

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

Article 28. Protection of the diplomatic bag

Austria does not favour the restriction of the principle contained in paragraph 2 of article 28 to consular bags. As already stated, Austria is in favour of uniform rules to be developed for all types of diplomatic bags.

BELGIUM

[Original: French]

[13 January 1988]

The Belgian Government has the strongest of reservations concerning the draft articles.

It is not obvious that a uniform régime for the bag and the courier is desirable. The situations are different: the diplomatic bag is governed by the Vienna Convention on Diplomatic Relations of 18 April 1961, whereas the consular bag is governed by the Vienna Convention on Consular Relations of 24 April 1963. Furthermore, there is also the case of bags used by special missions or by representatives of States to international organizations.

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Aware of the difficulties, the International Law Commission has provided for a system of declarations in writing which would permit States to designate any category of diplomatic courier and corresponding category of diplomatic bag to which they would not apply the provisions of the convention. That possibility may give rise to confusion in the applicable law.

Care should be taken not to undermine the rules established by the Vienna Conventions of 1961 and 1963. The aim should be to supplement those rules to the extent that appears necessary.

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

As regards the individual provisions of the draft, the Belgian Government has the following comments:

Article 3. Use of terms

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

Article 5. Duty to respect the laws and regulations of the receiving State and the transit State

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

Article 17. Inviolability of temporary accommodation

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

Article 18. Immunity from jurisdiction

Same comment as for article 17.

Article 28. Protection of the diplomatic bag

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

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

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

Article 33. Optional declaration

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

BRAZIL

[Original: English]

[4 February 1988]

Article 18. Immunity from jurisdiction

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

Article 21. Duration of privileges and immunities

Article 21 states that the privileges and immunities that apply to the courier begin when the courier enters the territory of the receiving or the transit State and, if he is already in that territory, when he is appointed as a courier. In the latter case, the article is not clear as to the actual moment at which the courier begins to exercise his functions, which could be the moment of the appointment or the moment at which the courier actually takes custody of the bag. Clarification of this point is necessary in order to avoid possible difficulties that could arise in the interpretation of article 21. With regard to the cessation of privileges and immunities, the Brazilian Government finds the article satisfactory, with the exception of the provision contained in the last sentence of paragraph 1, according to which the privileges and immunities of the diplomatic courier ad hoc shall cease

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at the moment at which the courier has delivered to the consignee the diplomatic bag in his charge. This provision should be revised in order to accord to the ad hoc courier, in this particular situation, the same treatment given to the regular courier. In other words, if the ad hoc courier is not a resident of the territory of the receiving State, and is supposed to leave that territory after delivering the bag, his privileges and immunities should apply until the moment of his departure from the receiving State, as is the case with the regular courier.

Article 25. Contents of the diplomatic bag

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

Article 28. Protection of the diplomatic bag

In relation to article 28, dealing with the protection of the diplomatic bag, the Brazilian Government is of the view that the text of paragraphs 1 and 2 should be adopted with the inclusion of the expressions currently between brackets. In paragraph 1 the concept of the inviolability of the diplomatic bag, although not to be found in the existing conventions that refer to the matter, would be a logical extension of the inviolability of the archives, documents and official correspondence of the diplomatic mission, as reflected in article 25 and article 27, paragraph 2, of the Vienna Convention on Diplomatic Relations. The question of inclusion of the assertion that the bag "shall be exempt from examination directly or through electronic or other technical devices" arises in relation to the possible use of sophisticated means of examination which may result in violation of the confidentiality of the bag. In the view of the Brazilian Government, no such examination should be permitted. Although not unaware that abuses may be committed in the utilization of the diplomatic bag, the Brazilian Government believes that the provision contained in paragraph 2 of article 28 affords sufficient protection for the security interests of the States concerned. According to that paragraph, if the authorities of a receiving (or transit) State have serious reason to believe that the diplomatic bag is being improperly used, they are entitled to request the sending State to open the bag. If that request is refused, they can require that the bag be returned to its place of origin. This system, rather than the admissibility of examination through electronic or other technical devices, would strike a reasonable balance between the security interests of the receiving State and the confidentiality interests of the sending State.

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

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

Article 33. Optional declaration

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

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

BULGARIA

[Original: English]

[29 January 1988]

The Government of the People's Republic of Bulgaria is pleased to note the growing role of the diplomatic courier and the diplomatic bag as a basic means of the free communication of States and their missions abroad. The possibility of free communication of States and their missions abroad is one of the fundamental principles of international law without which the normal functioning of diplomatic missions would be impossible. The elaboration of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier with a view to adopting an international legal instrument, which would develop and codify the norms thereof, is of major importance for ensuring the practical implementation of this principle. In this respect, the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier prepared by the International Law Commission constitute a comprehensive draft which finalizes the process of codification and progressive development of international diplomatic and consular law.

The draft articles on this topic prepared by the International Law Commission constitute an independent and definite system of legal norms which regulates the legal status of the diplomatic courier and the diplomatic bag. In their entirety, they provide a uniform and harmonious régime for all couriers and official bags of States. As a whole, the draft articles synthesize, unify and harmonize the existing legal régime in this area which is presently regulated by the four multilateral universal conventions adopted under the auspices of the United Nations, namely the Vienna Convention on Diplomatic Relations of 1961, the Vienna Convention on Consular Relations of 1963, the Vienna Convention on Special Missions of 1969 and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 1975, as well as by State practice in this field. The draft articles not only complement the existing conventional norms of diplomatic and consular law, but also further develop and specify the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier in a way which constitutes a comprehensive regulation of the régime thereof. The Government of the People's Republic of Bulgaria is of the opinion that these draft articles are a propitious basis for the elaboration and adoption of a universal multilateral convention, which in its capacity as special law lex specialis would have precedence over the general conventional norms of diplomatic and consular law.

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

In elaborating the draft articles, the International Law Commission has quite justifiably proceeded from the necessity to strike and ensure an acceptable balance

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between the interests of the receiving State and those of the sending State. This tendency can be discerned in all draft articles.

In this connection, the Government of the People's Republic of Bulgaria views draft articles 5, 12 and 25 as a necessary and sufficient guarantee for safeguarding the interests of the receiving State and those of the transit State. Their provisions explicitly stipulate the duty of the diplomatic courier to respect the laws and regulations of the receiving State or the transit State and not to interfere in the internal affairs of those States. They also explicitly regulate the content of the diplomatic bag. These guarantees become even more concrete in view of the obligations which the sending State undertakes under draft article 5, paragraph 1, and draft article 25, paragraph 2. Moreover, the draft articles envisage that the receiving State may take certain steps to protect its interests, namely by declaring the diplomatic courier persona non grata or through seeking to engage his responsibility in accordance with draft article 18, paragraph 5. As a whole, this provides and lays down a sufficient guarantee for protecting the interests of the receiving State or those of the transit State.

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

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

Equally unacceptable are the provisions of draft article 28, regulating the status of the diplomatic bag. With a view to ensuring a safe, unimpeded and timely delivery of the diplomatic bag, or, more broadly, free communication of the State and its missions abroad, the status of the diplomatic bag not accompanied by the diplomatic courier should be elaborated proceeding from the only appropriate basis, namely the principle of absolute inviolability of the diplomatic bag. This principle conforms with the norms of customary international law and State practice

in this field. It also follows from the provisions of the Vienna Convention on Diplomatic Relations concerning the inviolability of the official correspondence and documents of the diplomatic mission (art. 24 and art. 27, para. 2). The inviolability of the diplomatic bag is explicitly set forth in article 27, paragraph 3, of the Vienna Convention on Diplomatic Relations. This principle is also laid down in the Convention on Special Missions and in the Convention on the Representation of States in their Relations with International Organizations of a Universal Character. The possibility of opening the diplomatic bag, envisaged only in the Vienna Convention on Consular Relations of 1963, is an exception which should not be translated into a general rule, since it constitutes a departure from the principle of inviolability of official documents delivered by the diplomatic courier or official bag. It is this deviation from the principle of free communication that has prevented the Vienna Convention on Consular Relations from receiving wider acceptance. For this reason and also taking into consideration the fact that a comprehensive approach to regulating the régime of all types of diplomatic bags has been applied in the elaboration of the draft articles adopted on first reading by the International Law Commission, this régime should not contain a deviation from the generally recognized principle of inviolability of the diplomatic bag. The strict implementation of this principle is the only guarantee for safe and unimpeded delivery of the bag.

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

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

CANADA

[Original: French]

[31 December 1987]

The Canadian authorities have studied the text of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Generally speaking, Canada considers that the conventions currently in force, in particular the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, are clear and adequate. The adoption of an additional instrument might give rise to confusion in the application of the existing conventions.

Canada has studied the draft articles relating to the diplomatic bag with three concerns in mind. In the first place, the draft articles should not limit the dimensions of the diplomatic bag. Secondly, the facilities available to diplomatic couriers should be adequate to enable them to monitor the loading and unloading of the diplomatic bag onto or off the aircraft or other means of transport. Thirdly, the draft articles should preserve the inviolability of the diplomatic bag.

Canada is therefore pleased that the Commission has not specified dimensions for the diplomatic bag. Furthermore, article 28, paragraph 1, reaffirms the fundamental principle of inviolability of the diplomatic bag. Canada understands the desire of the receiving or transit State to protect itself against any abuse or damage which might be caused by the transmission of material not intended exclusively for official use. At the same time, the measures taken to prevent abuse in a few cases should not affect the legitimate activities of the vast majority of States which make proper use of the diplomatic bag. Canada cannot therefore accept examination of the diplomatic bag through radiographic, electromagnetic, electronic or technical devices whose effect would be to jeopardize the confidentiality of the official correspondence. Canada cannot agree to any curtailment of the inviolability provided by the Vienna Conventions.

DENMARK*

[Original: English]

[21 December 1987]

It could be argued that the subject of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier is not adequately covered by existing international conventions. The diplomatic courier is an important link in diplomatic relations. The Governments of the Nordic countries,

* Reply submitted jointly by the five Nordic States: Denmark, Finland, Iceland, Norway and Sweden.

however, are inclined to express the view that the privileges and immunities of the courier embodied in the two Vienna Conventions are well balanced. The specific provisions of these two conventions relating to couriers and their bags are supplemented by a body of non-codified rules which reflects customary international usage. In our opinion, the draft articles concerning the status of the diplomatic courier should not go far beyond the protection already provided for. In the light of the wide acceptance of the two Vienna Conventions, caution should be exercised in dealing with matters touching these two conventions, especially when making new provisions exceeding the limits of the existing rules. In this connection reference is made to draft articles 17 to 20 and 28 dealing with the privileges and immunities to be granted to the courier and the protection to be accorded to the bag, on which the following comments are concentrated.

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

As regards the question of immunities for diplomatic couriers, the Governments of the Nordic countries are of the view that these should be granted on the basis of functional criteria. The purpose of the draft articles should not be to give a diplomatic courier the same legal status as a permanently accredited diplomat. The draft articles should provide for the immunity and inviolability necessary to ensure smooth functioning of diplomatic communications, but, on the other hand, should not exceed what is actually necessary for the functions of the diplomatic courier with regard to the custody, transportation and delivery of the diplomatic bag. This point of view is reflected in draft article 16, according to which the courier shall not be liable to arrest or detention or, according to paragraph (3) of the commentary, 2/ any other form of restriction on his person, and is exempted from measures that would amount to direct coercion.

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

To some extent the Governments of the Nordic countries share this opinion, and this is particularly true as far as draft article 17 on inviolability of temporary accommodation is concerned. Since the temporary accommodation of a diplomatic courier is usually a hotel accommodation, a provision along the lines of draft

2/ Yearbook of the International Law Commission, 1984, vol. II (Part Two),
p. 53.

article 17 could give rise to serious legal and practical difficulties. In this connection the Governments of the Nordic countries fully subscribe to the views summarized in paragraph (3) of the commentary. 3/

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

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

Draft article 19, paragraph 1, establishes a complete exemption from personal examination. As described in paragraph (3) of the commentary on article 19, paragraph 1, 3/ 4/ the development of international terrorism has inter alia led to special measures of inspection of passengers and their baggage, including the regular use of electronic and mechanical devices. The Governments of the Nordic countries do not find it justified to create in favour of diplomatic couriers an exemption from such security measures adopted by almost all States and to which, in usual practice, even diplomatic agents submit without protest.

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

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

The Governments of the Nordic countries see no obstacle to subjecting the diplomatic bag to such non-intrusive security checks as, for instance, by using sniffing dogs or by other methods of external examination. Obviously, a more delicate problem is security checks by means of scanning through electronic or other technical devices. The use of electronic scanning might, at least with

3/ Ibid., p. 54.

4/ Ibid., p. 56.

future, advanced technology, infringe upon the confidential character of the contents of the diplomatic bag and thus jeopardize the principle of inviolability.

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

Paragraph 2 of draft article 28 should in our view not be confined to consular bags but should apply also to diplomatic bags. The Governments of the Nordic countries share the opinion, voiced in the Commission, that this paragraph should be modelled on article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations, i.e. it should be up to the sending State either to allow the suspected bag to be opened in the presence of its representatives or to return it to its place of origin.

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

FINLAND

[See the comments reproduced under Denmark above.]

GERMAN DEMOCRATIC REPUBLIC

[Original: English]

[27 January 1988]

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

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

The German Democratic Republic continues to proceed from the premise that strict and unconditional observance of the existing instruments of international

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diplomatic and consular law, notably the Vienna Convention on Diplomatic Relations of 18 April 1961, which is particularly important because of its comprehensive and balanced character, constitutes a major prerequisite for the further codification of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

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

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

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

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

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

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

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

In the interest of protecting the courier's inviolability, article 18 should, however, include a provision calling at least for observance of all the obligations under the laws and regulations of the receiving or transit State with regard to the conclusion of third-party liability insurance for motor vehicles used by the courier. Following the line of article 78 of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, consideration could be given to amending article 18 by adding the following sentence to paragraph 2: "Pursuant to the laws and other legal regulations of the receiving or transit State, the courier when driving a motor vehicle shall be required to have insurance coverage against third-party risks."

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

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

GERMANY, FEDERAL REPUBLIC OF

[Original: English]

[22 December 1987]

The Federal Republic of Germany welcomes the conclusion of the International Law Commission's intensive efforts to establish a set of rules governing the diplomatic courier and bag. It feels, however, that the draft articles are still in need of improvement and supplementation.

Most countries convey the major part of their diplomatic and consular items by air or sea as unaccompanied bag. Any new arrangement should therefore take special account of the modern method of conveying diplomatic and consular items.

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Therefore, the Federal Republic of Germany considers better protection of the unaccompanied bag under international law to be particularly important.

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

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

While article 28 envisages a differentiated procedure, in the final analysis this amounts to the diplomatic bag being treated in the same way as the consular bag, which enjoys less protection.

Unless paragraph 2 of article 28 proposed by the Commission is dispensed with completely, the wording of this paragraph would have to define much more precisely the exceptional situations justifying inspection of the bag and the scope of such inspection.

In particular, it would appear necessary to make it clear that an inspection may in no circumstances jeopardize the confidentiality of the legitimate contents of the bag and may take place only with the express knowledge and consent of the sending State. The Federal Republic of Germany considers such an express provision to be the indispensable prerequisite for limiting the absolute protection of the bag as envisaged in paragraph 2 of the proposed article 28.

The indispensable elements could be incorporated in the present version of article 28 as follows:

"Article 28. Protection of the diplomatic bag

1. International Law Commission draft text without brackets.

"2. If the competent authorities of the receiving or the transit State have serious reasons to believe that the diplomatic bag contains any articles which are not intended for official use only and which heavily endanger either the public security of the receiving or transit State or the safety of individuals, they may, after giving the sending State sufficient opportunity to dissipate suspicion, request that the bag be subjected to examination through electronic or other technical devices. Examination may only take place if the sending State consents and a representative of the sending State is invited to be present. The examination may in no circumstances jeopardize the confidentiality of the documents and other legitimate articles in the bag. If such examination does not satisfy the competent authorities of the receiving or transit State, they may further request that the bag be opened in their presence by an authorized representative of the sending State. If either request is refused by the authorities of the sending State, the competent authorities of the receiving or transit State may require that the bag be returned to its place of origin."

At an early stage, the Federal Republic of Germany had also raised the question in the Sixth Committee as to whether such extensive codification of other subject-matters as contained in the draft articles is necessary and expedient. Numerous provisions merely reiterate principles already enshrined in the Vienna Conventions of 1961 and 1963, e.g. the inviolability of the courier (art. 16). Other provisions contain arrangements for which there is no obvious genuine need or which do not appear practicable. It is questionable whether there is a concrete need for articles 20 and 29. Since the courier normally stays only briefly in the receiving or transit State, virtually no tax liability arises in connection with the performance of his functions (art. 20). Under article 36, paragraph 1 (a) of the Vienna Convention of 1961 and article 50, paragraph 1 (a) of the Vienna Convention of 1963, the bag is already exempt from customs duties, taxes and other charges (art. 29). The inviolability of (hotel) accommodation temporarily occupied by the courier does not appear necessary or practicable (art. 17).

The Federal Republic of Germany also considers problematic the question of determining the degree of immunity of the courier from the jurisdiction of the receiving or transit State (art. 18). Reservations exist about the provisions of article 18, paragraphs 2 and 3.

GREECE

[Original: French]

[6 February 1988]

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

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

After these preliminary comments on the draft articles as a whole, we have the following observations.

Article 1. Scope of the present articles

1. The final words of article 1, namely "or with each other", should be deleted. Although consistent with the existing text, this phrase goes far beyond the functional needs and may give rise to abuse. Moreover, judging by our own practice, it appears to have no real value.

Article 5. Duty to respect the laws and regulations of the receiving State and the transit State

The last sentence of paragraph 2, "He also has the duty ... as the case may be", seems superfluous and excessive, and we therefore believe that it should be deleted.

Article 6. Non-discrimination and reciprocity

In particular because of its restrictive character, which limits for no valid reason the contractual freedom of States, we would like the last part of paragraph 2 (b), reading "provided that ... of third States", should be deleted.

Article 9. Nationality of the diplomatic courier

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

Article 17. Inviolability of temporary accommodation

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

Article 18. Immunity from jurisdiction

In paragraph 1, we are in favour of deleting the word "all" before "acts" and employing the terminology of the Vienna Conventions, namely "official acts performed in the exercise of his functions".

Article 20. Exemption from dues and taxes

In our view, article 20 is superfluous because of the temporary nature of the functions of the diplomatic courier.

Article 28. Protection of the diplomatic bag

As regards article 28, we think that the régime of the Vienna Conventions relative to the protection of the diplomatic bag and the consular bag should continue to be applied unchanged.

ICELAND

[See the comments reproduced under Denmark above.]

ITALY

[Original: English]

[28 January 1988]

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

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

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

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

NETHERLANDS

[Original: English]

[1 February 1988]

In practice, the Netherlands experiences virtually no problems with its courier communications. Occasional difficulties reported by other States generally involve instances where existing rules of international law concerning courier communications have not been respected. The Netherlands Government is of the opinion that occasional non-compliance with rules of law cannot be prevented by repeating those rules in a new treaty or by adding further rules.

The Government of the Netherlands therefore sees no need for the draft articles.

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On the contrary, if courier communications were governed by an additional treaty, which inevitably would not be ratified by all the same States as are party to the Vienna Conventions of 1961, 1963, 1969 and 1975, there would be a risk of the prevailing law becoming fragmented, and this would undermine clarity.

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

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

Article 17. Inviolability of temporary accommodation

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

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

Article 19. Exemption from personal examination, customs duties and inspection

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

On the other hand, if the intention is to exempt the courier from the personal examination to which all travellers, including diplomats, are nowadays subjected at most airports, the proposed provision is undesirable.

Concerning paragraph 3 of article 19, a courier requires no exemption from baggage inspections for the proper discharge of his function.

Article 21. Duration of privileges and immunities

As regards paragraph 1 of article 21, the privileges status of the courier can, and therefore should, come to an end as soon as he has finished carrying out his function as described in article 10. Furthermore, there is no good reason in

this regard to make a distinction between couriers and couriers ad hoc (see comment concerning article 23 below).

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

Article 23. Status of the captain of a ship or aircraft entrusted with the diplomatic bag

Proceeding from the view that the privileges and immunities of the courier should be related to his function (see comment concerning article 17 above), it is inexplicable why couriers ad hoc, such as the captain of a ship or aircraft, do not enjoy the same legal position as the ordinary courier.

The Government of the Netherlands also wishes to point out that in practice the function of courier ad hoc is also entrusted to crew members other than the captain.

Article 28. Protection of the diplomatic bag

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

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

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

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

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

In the opinion of the Government of the Netherlands, the proposed wording of this article gives it too broad a scope. On the one hand, its application seems acceptable in the relations between the sending State and the receiving State. (The term "host State", employed in paragraph 3 of the commentary, does not occur in article 3 of the draft articles.) On the other hand, a transit State should retain the right not to admit couriers and diplomatic bags from a sending State which it has not recognized as a State or whose current rulers it has not recognized as the lawful government, or with whom it maintains no diplomatic relations, e.g. because a state of war exists between the two States. It is not sufficient to refer to the restrictions of scope advocated in the commentary; the restrictions should be contained in the text of the article itself.

NEW ZEALAND

[Original: English]

[22 January 1988]

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

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

The functional basis for the immunities accorded to the diplomatic bag and courier has always rested on the need to guarantee the confidentiality of diplomatic communications. In order to ensure that there can be no violation of this confidentiality, we would wish article 28, paragraph 1, to make it clear that the use of electronic screening devices is impermissible.

In all other respects with regard to article 28, paragraph 1, the New Zealand Government would prefer to see the retention of the language of article 27, paragraph 3, of the Vienna Convention on Diplomatic Relations.

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

NORWAY

[See the comments reproduced under Denmark above.]

SPAIN

[Original: Spanish]

[21 December 1987]

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

In elaborating the draft articles, the International Law Commission has displayed skill and flexibility and the necessary responsiveness to differing points of view and tendencies. Such responsiveness has, however, led to the existence of alternative (bracketed) texts in provisions like the extremely sensitive and delicate article 28 ("Protection of the diplomatic bag"). In addition to this general opinion, the Government of Spain has the following comments and observations.

There is in the draft articles a tendency to assimilate the status of the diplomatic courier to the status of the members of staff of diplomatic missions, as though the courier were a professional diplomat with permanent functions. That tendency is particularly evident in the provisions cited below:

Article 9, paragraphs 2 and 3, which require the consent of the receiving State for the designation of a diplomatic courier who has the nationality of that State or of a third State or has his permanent residence in the receiving State. The Government of Spain regards these provisions as unrealistic, since they assume that the diplomatic courier is a person called upon to reside

permanently in a receiving State, whereas, in actual fact, in the majority of cases the receiving State has no advance knowledge of his appointment or arrival.

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

Article 12, concerning the diplomatic courier declared persona non grata or not acceptable, which also contains unrealistic provisions, since in principle and in the majority of cases the receiving State is not aware of the appointment of a diplomatic courier.

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

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

In paragraph 1, the bracketed words should be deleted, so that the text would read: "The diplomatic bag shall not be opened or detained". The absolute inviolability of the bag which would result from the first bracketed portion is not in keeping with the requirement of due observance of the laws and regulations which the receiving State adopted for the protection of its legitimate interests. As to the second bracketed portion, the Government considers its deletion advisable for the reasons given in the commentary to paragraph 2 of the article.

In paragraph 2 of article 28, the bracketed portion referring to the transit State should be deleted, since the accompanied bag holds no danger for that State and the unaccompanied bag which is transshipped in the territory of the transit State will be treated in the same way as the rest of the freight or correspondence in the consignment. The Government of Spain believes that the bracketed word "consular" should also be deleted. As regards the possibility (deriving from the words in brackets) that the receiving State might request the bag's subjection to examination through electronic or other technical

devices, the Government of Spain does not favour such a provision, since modern detection equipment is capable of penetrating secrets protected by the inviolability of the official correspondence of the mission. Instead, it would prefer to provide for the authorized opening of the bag if the competent authorities of the receiving State have good reason to believe that the bag contains something other than correspondence, documents or articles intended exclusively for official use, on the understanding that if the authorities of the sending State turn down this request, the receiving State may require the return of the bag to its place of origin. Accordingly, the relevant bracketed portions of article 28, paragraph 2, should be deleted.

Article 23, paragraph 1, of the draft articles contemplates the possibility that the bag might be entrusted to the captain of a ship or aircraft in commercial service which is scheduled to arrive at an authorized port of entry. The Government of Spain considers that the bag might also be entrusted to a duly authorized member of the crew other than the captain of the ship or aircraft. It notes in this respect that the commentary to article 23 states the Commission's view that the wording of the paragraph does not preclude the existing practice of several States of entrusting the bag to a member of the crew. ^{5/} It also points out that article 30 of the draft, in establishing protective measures in case of force majeure or other circumstances, expressly provides for the situation in which the bag has been entrusted to "any other member of the crew".

SWEDEN

[See the comments reproduced under Denmark above.]

THAILAND

[Original: English]

[17 November 1987]

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

With respect to the draft articles, Thailand wishes to make it very clear from the outset that its comments and observations herein are merely preliminary, without prejudice to its right to make any further comments and observations if and when the occasion presents itself, or to its final position either to accept or to reject the final version of the draft.

^{5/} Ibid., 1985, vol. II (Part Two), p. 46.

PART I. GENERAL PROVISIONS

Article 5. Duty to respect the laws and regulations of the receiving State and the transit State

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

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

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

Article 11. End of the functions of the diplomatic courier

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

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

It may be the practice of the sending State to delay the granting of any type of visa to nationals of the receiving or the transit State concerned. To be fair, therefore, the expression "as promptly as possible" in paragraph 2 should be followed by the clause ", duly taking into account the practice of the sending State in relation to the granting of visas to the diplomatic courier of the State from which the visa is being requested, or, if this latter State does not normally use diplomatic couriers, the practice of the sending State in relation to the granting of visas to the nationals of the State from which the visa is being requested."

Article 17. Inviolability of temporary accommodation

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

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

PART III. STATUS OF THE DIPLOMATIC BAG

Article 27. Facilities accorded to the diplomatic bag

For practical reasons, the expression ", as permitted by local circumstances," should be inserted after the word "shall".

Article 28. Protection of the diplomatic bag

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

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

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

PART IV. MISCELLANEOUS PROVISIONS

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

To be in keeping with the wording in paragraph 1, and to prevent any lacuna, the expression "or other circumstances" should be added to the expression "due to force majeure" in paragraph 2.

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

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

Article 33. Optional declaration

This article is necessary if the draft articles as a whole are to have any chance of becoming widely accepted at all.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

[Original: English]

[22 January 1988]

Introductory observations

The United Kingdom Government commended the International Law Commission and in particular its Special Rapporteur, Mr. Alexander Yankov, for the draft articles which the Commission provisionally adopted on first reading, at its thirty-eighth session, held in 1986. They recognize that to a certain extent, in producing the draft articles in their present form, the Commission has already responded to some of the criticisms that were expressed in relation to earlier drafts. Nevertheless, there are still a number of provisions in the current draft which, in the view of the United Kingdom Government, are unnecessary or inappropriate or are unsatisfactorily formulated; and there are others which, at least in their present form, the United Kingdom would be unable to accept. The United Kingdom Government's specific observations on these provisions are set out below.

As the United Kingdom Government have made clear on previous occasions, they approach the Commission's work on this topic on the basis that, for the most part, and for practical purposes, the relevant rules of international law concerning diplomatic and consular bags and diplomatic and consular couriers (hereinafter

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referred to simply as "the bag" and "the courier") are already adequately established by the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963, as supplemented by customary international law and in particular the rules of customary international law relating to the right of States to self-defence and their duty to protect life. They therefore see the principal purpose of these draft articles, and the principal justification for the International Law Commission's work on the topic, as being to enunciate more precise and specific rules aimed at facilitating the detection and prevention of certain practices involving the abuse of the bag that have, unfortunately, disfigured international relations in recent years.

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

Before turning to the details of the specific provisions in the draft articles, the United Kingdom Government would make one further general observation. As has been said above, the United Kingdom Government see the greater part of the relevant international law on this topic as already adequately covered by the two Vienna Conventions of 1961 and 1963 (on diplomatic and consular relations respectively) and by certain rules of customary international law. The United Kingdom is not a party to the 1969 Convention on Special Missions or to the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, and the United Kingdom Government, for their part, could not by virtue of these articles accept an obligation to accord the treatment provided by the draft articles to couriers of special missions or of missions and delegations to international organizations (or to the bags of such missions and delegations). The United Kingdom Government note the relevance, in this context, of draft article 33 and of paragraph 2 of the International Law Commission's commentary on article 1 in its report on the work of its thirty-fifth session.

Detailed comments

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

(a) Provisions which are unnecessary in that their substance appears to be already adequately dealt with by provisions in earlier instruments such as the

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Vienna Conventions of 1961 and 1963. The International Law Commission may wish to reconsider the utility and the appropriateness of the present draft articles seeking to traverse, to the same effect, the ground already covered by existing Conventions. Provisions in this category include articles 4, 5, 16, and 23;

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

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

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

Accordingly, the United Kingdom Government submit the following comments on particular provisions of the draft articles. They reserve the right to offer further comments at a later stage.

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

In response to the International Law Commission's commentary on this article, in its report on the work of its thirty-fifth session, the United Kingdom Government must record their considered view that it would be very damaging to the prospect of these draft articles as a whole attracting wide international acceptance if their scope were to be extended beyond questions strictly relating to diplomatic and consular couriers of States (and their corresponding bags) and in particular if they attempted to deal with the couriers and bags of international organizations and other non-State entities. In any event, the United Kingdom Government do not see that this article (which appears to enunciate a truism) fulfils any concrete legal function within the context of the draft articles as a whole and they consider that nothing would be lost, and some risk of unnecessary confusion might be avoided, if it were omitted.

Article 3. Use of terms

As regards the various references in paragraph 1 of this article (and in certain other draft articles) to the couriers and bags of special missions and of missions and delegations to international organizations, the United Kingdom Government draw attention to what has been said above about their inability to

accept any obligation, by virtue of these articles, in respect of such couriers and bags.

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

Article 8. Documentation of the diplomatic courier

Paragraph 2 of the International Law Commission's commentary on this article (then numbered article 7) in its report on the work of its thirty-fifth session points out that while "the form of the document [to which the article refers], its formal particulars and denomination is entirely within the jurisdiction and discretion of the sending State in accordance with its laws, regulations and established practices," the prevailing State practice has been that the document indicates not only the courier's status as such but also the essential personal data about him and also includes particulars about the packages constituting the bag which he accompanies, for example, their serial numbers, their destination, their size and their weight. The United Kingdom Government are strongly of the opinion that it would be advantageous, from the point of view of strengthening this important safeguard against abuse of the bag, if the article were to elaborate with greater precision, and in terms which imposed a specific and unambiguous obligation in that respect on sending States, the particulars (relating both to the courier himself and to the packages) which should in every case be spelt out in the document.

Article 9. Nationality of the diplomatic courier

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

Article 10. Functions of the diplomatic courier

The United Kingdom Government have no objection to the formulation of this article but, in connection with paragraph (5) of the International Law Commission's commentary on it in its report on the work of its thirty-sixth session, they reiterate their reservation in respect of the bags of special missions or of missions or delegations to international organizations.

Article 11. End of the functions of the diplomatic courier

While accepting what is said in paragraph (5) of the International Law Commission's commentary on this article in its report of the work of its thirty-ninth session about the undesirability of attempting to define exhaustively

all the circumstances which might lead to the termination of a courier's functions and about the significance which therefore attaches to the phrase "inter alia", the United Kingdom Government consider that it would be helpful if a specific reference to the fulfilment of the courier's functions were added to this article since, as the commentary recognizes, that is in fact the most frequent and most typical cause of the termination.

Article 12. The diplomatic courier declared persona non grata or not acceptable

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

Article 13. Facilities accorded to the diplomatic courier

The United Kingdom cannot support this article as it is at present formulated and indeed are not convinced that any provision of this kind is necessary. As regards paragraph 1, they find the reference to "the facilities necessary for the performance of his functions" vague and unsatisfactory: they do not accept that the context within which this article operates can validly be compared with the contexts of article 25 of the 1961 Vienna Convention on Diplomatic Relations and of article 28 of the 1963 Vienna Convention on Consular Relations. They have even stronger objections to paragraph 2, which they consider would impose a heavy and unjustifiable burden on receiving States and in particular on transit States. Given the accepted obligations of receiving and transit States in respect of such matters as the freedom of movement and personal inviolability of the courier and the protection to be afforded to the bag, they see no reason why legal responsibility for the additional matters referred to in this paragraph should even in the circumstances referred to in the International Law Commission's commentary on it in its report on the work of its thirty-sixth session, be made to devolve on anybody other than the sending State.

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

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

Article 15. Freedom of movement

While not objecting to this article in itself, the United Kingdom Government must record that they do not accept the possible implication in paragraph (2) of the International Law Commission's commentary on it in its report on the work of its thirty-sixth session that "in exceptional circumstances" a receiving or a transit State has some sort of obligation to assist the courier "to obtain an appropriate means of transportation when he has to face insurmountable obstacles which may delay his journey and which could be overcome to the extent practicable, with the help or co-operation of the local authorities". The United Kingdom

Government recognize no exception to the rule expressed in the previous sentence of the commentary, i.e. that "the diplomatic courier [has] to make all the necessary travel arrangements for his entire journey in the exercise of his tasks".

Article 17. Inviolability of temporary accommodation

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

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

Article 18. Immunity from jurisdiction

The United Kingdom Government are not persuaded of the need for this article. No such express provision in international law has hitherto been found necessary, and no evidence of functional need for such a provision has been adduced. The numerous and complicated exceptions and qualifications to the proposed immunity which are provided for in the draft article itself, or which the commentary suggests should be read into it by way of interpretative glosses, demonstrate the practical inconvenience and uncertainties which the rule enunciated by the article would produce. For example, the proposition in the second sentence of paragraph 2 (that the courier should be liable to civil proceedings even in respect of an act performed in the exercise of his official functions if that act involved damage arising from a motor accident and if "damages are not recoverable from insurance") is simply not workable in United Kingdom law (or, it is believed, in the law of many other countries). In United Kingdom law the plaintiff in a vehicle accident case (as in any other case) must bring his action against the alleged tort-feasor himself (for example, the driver of the other vehicle) and not his insurer: neither he nor the tort-feasor can always be certain, when the action is instituted, that the insurer will indeed be under a liability to indemnify the tort-feasor in respect of the damages awarded against him.

On another aspect of the draft article, the United Kingdom Government can take no comfort from the safeguard against misconduct by a courier, who would be

protected by immunity, which is supposed to be provided by paragraph 5, given that the International Law Commission itself (see para. (17) of its commentary) regards it as "not as effective as would be desirable" and puts it forward only as "[constituting] a subtle suggestion to the sending State that it should exercise its jurisdiction in cases which might, otherwise, constitute a denial of justice".

Article 19. Exemption from personal examination, customs duties and inspection

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

The United Kingdom Government find it difficult to see any legitimate need for paragraph 1, given the provision for a courier to enjoy personal inviolability under article 16 of the draft. Moreover, the United Kingdom Government believe that the draft should make clear that a courier ought to co-operate in the normal security checks which operate at airports. Accordingly, the United Kingdom Government would wish it to be made clear, first, that the courier ought not to refuse to undergo reasonable measures (not merely "examination carried out at a distance by means of electronic or other mechanical devices") designed to detect abuses of the kind mentioned in paragraph (3) of the International Law Commission's commentary. It also needs to be made clear that the "laws and regulations" mentioned in paragraph 2 of the article may include laws and regulations substantively prohibiting or controlling the import or export of prohibited articles or substances and are not confined to "formal and other procedural requirements": paragraph (6) of the International Law Commission's commentary on the article is not entirely clear on this point.

Article 20. Exemption from dues and taxes

Given the brief and transitory nature of the courier's stay in a receiving or transit State, the United Kingdom Government see no need for this article and are opposed to its retention. They do not accept the validity of the reasoning which apparently led the International Law Commission to include it: see the remark in paragraph (1) of the Commission's commentary on the article in its report of the work of its thirty-sixth session, that "the present provision is based on the consideration that the diplomatic courier should be accorded in all aspects a treatment befitting his status as a person exercising official functions and therefore, with reference to tax exemption, the courier's level should not be inferior to that of a member of the administrative or technical staff of a mission." If new exemptions are to be created - and the first sentence of the same paragraph of the commentary recognizes that this would be a new exemption - the justification for them must be sought in considerations of functional need and not in considerations of status and relative dignity.

Article 21. Duration of privileges and immunities

The United Kingdom Government cannot support this article which, to the extent that it states rules which they find acceptable at all, appears merely to spell out, in a somewhat complicated manner, what is already clearly implicit in other provisions of the draft articles (for example, articles 12 and 16) or is expressly stated in provisions of the 1961 Vienna Convention on Diplomatic Relations or the 1963 Vienna Convention on Consular Relations. In view of the objection which they have recorded above (see the comment on article 18) to conferring any immunity from jurisdiction on the courier, they of course equally object to paragraph 3 of this article (see para. (6) of the International Law Commission's commentary on it in its report on the work of its thirty-seventh session).

Article 22. Waiver of immunities

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

Articles 24 and 25. Identification of the diplomatic bag, and Content of the diplomatic bag

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

On a point of detail but of some importance, the United Kingdom Government would certainly wish to see the word "exclusively" retained both in article 25, paragraph 1, and in article 3, paragraph 1 (2) (see para. (3) of the International Law Commission's commentary on article 25, in its report on the work of its thirty-seventh session) and they also strongly endorse the comment (see para. (4) of the commentary) that the provision in article 3 should be aligned with that in article 25 so as to make clear that the phrase "intended exclusively for official use" applies both to "documents" and "articles".

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

The United Kingdom Government's comments on these two articles must be read together with their comments, below, on article 28.

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

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

Article 27. Facilities accorded to the diplomatic bag

As in the case of article 13 (see the comment on article 13 above), the United Kingdom Government cannot support this article, at least in its present form. They find the phrase "the facilities necessary, etc." dangerously vague and they do not accept that the considerations discussed in the International Law Commission's commentary on the article, in its report on the work of its thirty-seventh session, justify relieving a sending State of the responsibility for making adequate arrangements for the transmission and delivery of its own bags or justify imposing on receiving and transit States any special obligations in that regard beyond the basic obligation to respect the status of the bag and not deliberately to delay or impede its transmission and delivery.

Article 28. Protection of the diplomatic bag

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

The United Kingdom Government have no difficulty with the core of this article, i.e., the proposition that, as a general rule, a receiving or a transit State may not open or detain the bag. That, indeed, is settled law: see article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations and article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations. However, the United Kingdom Government do not regard these provisions of the two Vienna Conventions as preventing - nor is there any rule of customary international law which prevents - a receiving or transit State from subjecting a bag, in appropriate circumstances, to "scanning", i.e. to what the draft article describes as "examination through electronic or other technical devices". The United Kingdom Government accept, of course, that there are limits on the right of a receiving or transit State to subject a bag to scanning. Thus, the scanning must not be of a kind which would reveal the contents of the communications which are being transmitted in the bag; the right to require the bag to be scanned may be exercised only when there is good reason to suspect that the bag is being used for an improper purpose; there should be no general and routine practice of scanning bags and each case should be treated on its individual merits; a representative of the sending State should have the opportunity to be present while the scanning is taking place; and, if the sending State objects to the proposed scanning, it should have the option of having the bag returned, unexamined, to its originator.

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

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

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

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

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

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

This article, too, is one with which the United Kingdom Government have difficulties. They do not agree that there is any valid analogy (as is suggested in the International Law Commission's commentary on it in its report on the work of its thirty-eighth session) with article 45 of the 1961 Vienna Convention on Diplomatic Relations or with article 2, paragraph 3, of the 1963 Vienna Convention on Consular Relations. The former of these provisions, in so far as it imposes obligations on a receiving State in respect of the premises, property and archives of a sending State, deals with what is essentially a transitional situation, i.e. the consequences of the severance of diplomatic relations or the recall of missions between two States who have, immediately previously, maintained such relations and recognized each other and each other's Governments. The corresponding provision in the 1963 Convention is, of course, not article 2, paragraph 3, but article 27, to which the same considerations apply. So far as article 2, paragraph 3, is concerned it imposes no obligation on a receiving State. It merely declares, as a rider to article 2, paragraph 1 (which provides that consular relations between States depend on mutual consent), and to article 2, paragraph 2 (which treats such consent as the prima facie implication of the establishment of diplomatic relations), that the severance of diplomatic relations does not automatically entail the withdrawal of consent for the maintenance of consular relations. Thus, neither of these provisions can be regarded as a precedent for imposing on a receiving or a transit State, without reference to its consent, a legal obligation to accord favourable treatment to couriers and bags belonging to a State which it does not recognize (and may never have recognized) or with whose Government it has chosen, as a matter of its sovereign policy, not to have (and it may never have had) any relations.

In any event the three situations envisaged in the draft - namely non-recognition of a State, non-recognition of a Government and absence of diplomatic relations - give rise to differing considerations which the International Law Commission might wish to consider further. Thus a transit State's position vis-à-vis a sending authority can reasonably be seen to be quite different in the case where it does not recognize the sending authority as a State,

from its position in the case where it recognizes that authority as a State but does not maintain diplomatic relations with it: in the former case, but not in the latter, the transit State does not accept that there exists an international person capable of enjoying such international rights as that of sending diplomatic bags. Similarly, the reference to non-recognition of a Government may require further consideration in this context, in the light of the practice of a number of States (including the United Kingdom) whereby they recognize States, not Governments. Even where the non-recognition of a Government is a relevant consideration, the circumstance that the transit State may recognize the sending State as a State, but not any particular authority as constituting the Government of that State and entitled to authorize action (such as sending diplomatic bags) in its name, may require further consideration.

As regards the application of this article to the couriers and bags of missions or delegations to international organizations or of special missions (see para. (4) of the International Law Commission's commentary on the article), the United Kingdom Government draw attention again to their reservations on this point expressed in the fourth paragraph of the section entitled "General observations", above.

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

The United Kingdom Government have no objection to the substance of this article so far as it goes. They consider, however, that, in view of what is said in the International Law Commission's commentary on it in its report on the work of its thirty-eighth session, the term "regional" is not appropriate and should be replaced by language more apt to express the Commission's intentions. More important, the United Kingdom Government are not persuaded by the Commission's exposition, in paragraph (3) of the commentary, of the relationship between these draft articles as a whole and the four multilateral conventions referred to in article 1, paragraph 1. They do not consider that this article, or any of the other draft articles, adequately grapples with that problem and they would urge the Commission to give more thought to that matter which, as they see it, needs to be dealt with by express provision.

Article 33. Optional declaration

The United Kingdom Government draw attention again, in relation to this article, to the reservations which they have expressed in the fourth paragraph of the section entitled "General observations" above, concerning references in this set of draft articles to the 1969 Convention on Special Missions and to the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. They are not convinced that the arrangements envisaged by this article will in practice provide a workable way of dealing with the problem of the varying application of the four multilateral conventions as between different combinations of States and they have misgivings in principle about the deliberate creation of a number of different régimes deriving from a single instrument.

VENEZUELA

[Original: Spanish]

[28 December 1987]

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

This general observation will now be followed by some brief comments on individual articles of the draft.

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

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

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

YUGOSLAVIA

[Original: English]

[4 February 1988]

In view of the highly developed diplomatic relations in the international community today and of a considerable number of new problems arising in diplomatic

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

In its first reply to the Secretary-General of the United Nations of 27 April 1982, 6/ Yugoslavia pointed out some important issues which should be included in the draft articles. Yugoslavia considers that the work of codification of rules on the topic should be completed as soon as possible. Wishing to contribute to more efficient further work on the codification of rules relating to couriers and bags, the Yugoslav Government would like to point out some articles of the draft and would like to make some suggestions concerning their final drafting.

Article 9. Nationality of the diplomatic courier

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

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

6/ Ibid., 1982, vol. II (Part One), p. 244.

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

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

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

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

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

II. COMMENTS AND OBSERVATIONS RECEIVED FROM NON-MEMBER STATES

SWITZERLAND

[Original: French]

[19 January 1988]

I

Before commenting on the draft articles as a whole, and then on some of the individual provisions, the Swiss Government would like, first of all, to pay tribute to the International Law Commission (hereinafter referred to as "the Commission") and more especially to Ambassador Yankov, the Special Rapporteur, for accomplishing a delicate task with rigour and skill. That task was to prepare detailed rules governing the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, which, while innovative in some respects, harmonize with existing instruments, in particular the Vienna Convention on Diplomatic Relations, of 18 April 1961, the Vienna Convention on Consular Relations of 24 April 1963, the Convention on Special Missions of 8 December 1969 and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975. The Commission's draft reproduces or supplements the relevant provisions of these conventions and combines in one whole the differing requirements of the sending State, the receiving State and the transit State, corresponding to the actual situations in which each State may find itself by turn. The text reflects a difficult compromise and may be regarded as a useful negotiating basis for a diplomatic codification conference, even though, as far as the Swiss Government is concerned, it has a number of imperfections which should be remedied.

Like the majority of countries, Switzerland no longer employs diplomatic couriers. Since the end of the Second World War, its diplomatic bags have been sent overland, by air and even by sea without being entrusted to a diplomatic courier. This is why the Swiss Government, in its observations of 30 April 1979 on the Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, expressed the view that the provisions of the 1961 Vienna Convention on Diplomatic Relations, if properly implemented were sufficient and gave the diplomatic courier adequate protection in cases where States employed a

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courier. This opinion is still altogether valid today, when recourse to the diplomatic courier has become even less frequent. The preparation of a convention on the status of the courier does not seem to be a priority matter, in the opinion of the Swiss Government. However, the possibility that States might wish to reintroduce the institution of the diplomatic courier in the event of a conflict or a crisis in international relations cannot be ruled out. This being so, it is advisable to afford strengthened legal protection to the diplomatic courier in order to enable him to fulfil his mission without impediment, since in the last resort he is the guarantor of the freedom of communication between the sending State and its diplomatic or consular representatives abroad.

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

At the regional level, the Council of Europe has dealt with the question and the expert committee on public international law has sought to ascertain, on the basis of existing law, to what extent the diplomatic bag might be subject to inspection. The discussion revealed the difficulty of the subject-matter.

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

II

The Swiss Government wishes at this stage to make some observations on individual provisions of the draft.

Article 3. Use of terms

In defining some of the terms used in the draft, the Commission has been guided by the terms in the 1961 Vienna Convention on Diplomatic Relations. This

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

Articles 11 and 12. End of the functions of the diplomatic courier, and the diplomatic courier declared persona non grata or not acceptable

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

Article 17. Inviolability of temporary accommodation

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

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

Article 18. Immunity from jurisdiction

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

Article 23. Status of the captain of a ship or aircraft entrusted with the diplomatic bag

Article 23 regulates in theory the situation in which the captain of a commercial aircraft is entrusted with the diplomatic bag of the State to which the airline company belongs. As the Swiss Government observed in its comments of 30 April 1979, ^{7/} the diplomatic bags of other States must therefore be sent as air freight, and are treated as such upon departure and arrival. In order to avoid the delays that generally result from such a situation, the Swiss Government suggests that article 26 of the draft should be supplemented to the effect that the diplomatic bag, when sent as air freight, should be forwarded as swiftly as possible and delivered under the best possible conditions to the representative of the mission.

Article 24. Identification of the diplomatic bag

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

Article 28. Protection of the diplomatic bag

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

^{7/} Ibid., 1979, vol. II (Part One), p. 224.

Without being an advocate of absolute inviolability, the Swiss Government nevertheless considers that it is not possible simply to apply to the diplomatic bag the rule contained in the Vienna Convention on Consular Relations, which authorizes the opening of the consular bag if there is serious reason to believe that the bag contains illicit objects. That rule does not provide adequate safeguards for the sending State, since the correspondence exchanged between a diplomatic mission and the Ministry of Foreign Affairs of the sending State is generally of far greater importance than that sent by or to a consular post. This is why there should be very strict requirements governing any examination of the diplomatic bag. In this respect, the Swiss Government draws attention to the opinion which the expert committee on public international law of the Council of Europe prepared for the group of advisers of ministers responsible for combating terrorism, in which a majority of experts stated the circumstances in which a diplomatic bag could be examined without a breach of the confidentiality of the diplomatic documents or objects it contains. 8/

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

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

8/ European Committee on Legal Co-operation (87) 39, Addendum.