

Document:-  
**A/CN.4/SR.1845**

**Summary record of the 1845th meeting**

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

Extract from the Yearbook of the International Law Commission:-  
**1984, vol. I**

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had been incorporated in the Vienna Convention on the Representation of States. The purpose was to ensure that the status of the diplomatic courier and the diplomatic bag would not be affected in cases where diplomatic relations had been severed or did not exist. At the Headquarters of the United Nations in New York, for example, there were a number of missions of States which were not recognized by the host country, but which used diplomatic bags. The references to the "host State" in draft article 41 should be deleted in view of developments in the Drafting Committee.

43. He recognized that, in draft article 42, he had not exhausted a highly complex problem. In any drafting exercise aimed at resolving that problem, more problems automatically arose. That was especially true of legal instruments such as the four codification conventions and the present draft articles, which could be regarded as playing an "umbrella role" for more specific arrangements. While his proposed solution might be over-simplified, he wished to underline three basic points: first, that the draft articles were complementary to the four main codification conventions; secondly, that the draft articles should not prejudice any other international agreements in force; thirdly, that the draft articles should not prevent States from concluding international agreements on the topic under consideration. There was a temptation to set ground rules, as it were, on the diplomatic courier and the diplomatic bag, but draft article 42 had a far more modest purpose.

44. The set of draft articles which he had submitted was not exhaustive, but he understood that the Commission was in favour of a reduction rather than an increase in their number.

45. Sir Ian SINCLAIR noted that, in the Special Rapporteur's fourth report (A/CN.4/374 and Add.1-4, paras. 340-341), the United Kingdom was included in a list of countries which had objected to certain reservations to article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations. That was not entirely accurate. The United Kingdom had indeed raised an objection to the reservation entered by Bahrain, but not to those entered by Kuwait, the Libyan Arab Jamahiriya and Saudi Arabia. As a result of recent events in London, the Foreign Affairs Committee of the House of Commons had set up an investigation into the question of diplomatic privileges and immunities under the 1961 Vienna Convention and had addressed a written request to the Foreign and Commonwealth Office for answers to a number of questions. The text of a memorandum from the Foreign and Commonwealth Office, with which he had been provided, explained why the United Kingdom had not registered a formal objection in respect of the Libyan reservation to article 27, paragraph 3, of the 1961 Vienna Convention and also referred to the reservation entered by Bahrain.

46. The CHAIRMAN, speaking as Special Rapporteur, said that Sir Ian Sinclair was quite right. The main point he had wished to make, however, was that both reservations had derogated from the strict rule laid down in article 27, paragraph 3, of the 1961 Vienna Convention.

*The meeting rose at 1 p.m.*

## 1845th MEETING

*Thursday, 21 June 1984, at 10 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Balanda, Mr. Barboza, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Jagota, Mr. Laclea Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam, Mr. Ushakov.

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (continued)**  
(A/CN.4/374 and Add.1-4,<sup>1</sup> A/CN.4/379 and Add.1<sup>2</sup> A/CN.4/382,<sup>3</sup> A/CN.4/L.369, sect. E, ILC (XXXVI)/Conf. Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPporteur<sup>4</sup> (continued)

- ARTICLE 36 (Inviolability of the diplomatic bag)
- ARTICLE 37 (Exemption from customs and other inspections)
- ARTICLE 38 (Exemption from customs duties and all dues and taxes)
- ARTICLE 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag)
- ARTICLE 40 (Obligations of the transit State in case of *force majeure* or fortuitous event)
- ARTICLE 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations) *and*
- ARTICLE 42 (Relation of the present articles to other conventions and international agreements)<sup>5</sup> (continued)

1. Mr. BALANDA said that the two key provisions of the draft articles were article 36 and its corollary, article 37.
2. He recalled that diplomatic relations were based on a presumption of mutual trust and that the presumption held true until proven otherwise. Such trust was therefore not absolute or irrefragable. International relations

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> *Idem*.

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Arts. 1-8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*

Arts. 9-14, referred to the Drafting Committee at the Commission's thirty-fourth session: *ibid.*, p. 46, footnotes 189 to 194.

Arts. 15-19, referred to the Drafting Committee at the Commission's thirty-fifth session: *ibid.*, pp. 48-49, footnotes 202 to 206.

<sup>5</sup> For the texts, see 1844th meeting, para. 21.

and, in particular, diplomatic relations also had to be based on a constant balance between the interests of the States concerned—which were equal—and on mutual respect.

3. Since the elaboration of the 1961 Vienna Convention on Diplomatic Relations, there had, as stated by the Special Rapporteur in his fourth report (A/CN.4/374 and Add.1-4, paras. 328-337), been a change in approach towards the principle of the inviolability of the diplomatic bag. On the basis of international practice and national legislation, article 27, paragraph 3, of the 1961 Vienna Convention enunciated the principle of the absolute inviolability of the diplomatic bag, whereas article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations recognized only the relative inviolability of the bag. In his view, the second approach was more realistic because it took account of the two important points he had just mentioned, namely the need to strike a balance between the interests of the States concerned and the presumed trust on which their relations were based.

4. Since it had apparently been agreed, during the consideration of draft article 24, that for transport safety reasons the diplomatic courier could in some cases be subjected to personal examination carried out at a distance, it would be quite logical if, in the interests of the security of States, the diplomatic bag could also be subject to inspection or at least to examination carried out at a distance. He generally agreed with the view expressed by the Special Rapporteur that:

... Whether the inspection is carried out as a manual search or through mechanical devices, it is in fact an examination aimed at establishing the content of the diplomatic bag and therefore affects the inviolability of official correspondence. (*Ibid.*, para. 346).

Nevertheless, he considered that such an inspection could be physical only: its aim would merely be to ensure that the diplomatic bag did, as it should, actually contain official correspondence or documents or articles intended exclusively for official use, not to obtain information about the contents of that correspondence or those documents or articles.

5. In draft article 36, paragraph 1, the Special Rapporteur had made the principle of the inviolability of the diplomatic bag less unconditional and absolute by providing that States could agree otherwise through multilateral or bilateral agreements. Such a possibility was, however, quite unlikely, since bilateral diplomatic relations were based on a balance of forces. If the States concerned were almost equally strong or had similar interests, they would be able to conclude such agreements. If not, they would be less free to do so. That was particularly true of the developing countries, which were necessarily dependent and would not be in a good position to propose the conclusion of agreements of that kind. Account also had to be taken of a psychological factor: it was difficult to see how two States could agree to allow their diplomatic bags to be inspected or searched, because, in so doing, they would be basing their diplomatic relations not on presumed trust, but on distrust. The element of reciprocity referred to by the Special Rapporteur

would also not come into play, since reciprocity was also based on a balance of forces. The developing countries would be placed at a disadvantage, for they would never take the initiative of requesting such reciprocity. In such circumstances, the rich countries would have nothing to lose: they had highly sophisticated means of determining the content of other countries' diplomatic bags without even opening them, whereas the developing countries did not possess such means. The restriction proposed by the Special Rapporteur would thus have the practical effect of preserving the absolute inviolability of the diplomatic bag and making it impossible to put an end to the abuses of the diplomatic bag that were, unfortunately, so common at the present time. He could therefore not support article 36, paragraph 1, as proposed by the Special Rapporteur.

6. As to article 36, paragraph 2, it was not clear to him how the receiving State or the transit State could take measures to prevent any infringement of the inviolability of the diplomatic bag if the diplomatic courier had the bag in his possession. Paragraph 2 should therefore not be retained, particularly since the majority of the members of the Commission had not been in favour of making it an obligation for the receiving State or transit State to protect the diplomatic courier himself. It would, moreover, be extremely difficult to verify the measures taken by the receiving State and the transit State to give effect to the provisions of that paragraph, since such measures would be adopted at the internal level and, at the international level, it was difficult to verify what States were doing in their own territories.

7. Turning to draft article 37, he again stressed the need to establish an equitable balance between the interests of the parties concerned and to take account of the presumed trust on which international relations were based. Although abuses of the diplomatic bag were, unfortunately, all too common, the security of States must not be sacrificed to the interests of the diplomatic bag itself. Article 3, paragraph 1 (e), of the 1961 Vienna Convention provided that the functions of a diplomatic mission consisted, *inter alia*, in "promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations", but he did not think that those functions included the use of the diplomatic bag to transport narcotic drugs or weapons. It was, moreover, no longer the case today that complete trust could be placed in the word of honour of an individual or a State. Draft article 37 should therefore be brought into line with article 35, paragraph 3, of the 1963 Vienna Convention.

8. He supported the principle enunciated in draft article 38, delimiting the scope of the exemptions set out in the fourth report (*ibid.*, para. 357).

9. In principle, he also supported the general idea on which draft article 39 was based. That provision could, however, be shortened by merging paragraphs 1 and 2. A distinction did not have to be made between the case in which the functions of the diplomatic courier were terminated before the diplomatic bag was delivered to its final destination and other circumstances that prevented him from delivering the diplomatic bag. The same situa-

tion, namely that in which the diplomatic bag did not arrive at its final destination, was being dealt with in both cases and, whatever its cause, it called for appropriate measures. In his view, the words "appropriate measures to ensure the integrity and safety of the diplomatic bag" in paragraph 1 referred only to measures to take care of the diplomatic bag, not to measures which were designed to facilitate its onward journey and which were dealt with in draft article 40. He thus agreed with the wording proposed by the Special Rapporteur, but thought it should be made clear that the obligation for which article 39 provided was only an obligation under civil law, not one which would entail the international responsibility of the receiving or transit State.

10. Draft article 40 was acceptable, but it should provide that, when the diplomatic bag was not accompanied by a diplomatic courier, the transit State had an obligation to notify the authorities of the sending State of difficulties due to *force majeure* or a fortuitous event. It was also his understanding that the facilities to be extended for the continuation of the journey would be those that were normally extended and that the transit States did not, for example, have to charter an aircraft or a ship for that purpose.

11. He agreed with the provisions of draft article 41, whose wording might, however, be improved by the Drafting Committee.

12. He reserved the right to comment at a later stage on draft article 42, whose only counterpart was to be found in article 73, paragraph 2, of the 1963 Vienna Convention. If the draft articles under consideration eventually took the form of a convention, such a convention would, under draft article 42 as proposed by the Special Rapporteur, be only of a suppletive nature and, hence, of a less universal character, particularly if States concluded agreements that were not in keeping with its provisions. If article 42 was retained, it would have to be made clear, as had, after all, been done in article 73, paragraph 2, of the 1963 Vienna Convention, what effect the agreements that might be concluded could have.

13. The CHAIRMAN, speaking as Special Rapporteur, recalled that when he had introduced the draft articles under consideration (1844th meeting), he had said that, in order to avoid any misunderstanding, the words "and shall also prosecute and punish persons under its jurisdiction responsible for such infringement" in article 36, paragraph 2, and the words "the host State" in article 41, paragraphs 1 and 2, should be deleted.

14. Mr. USHAKOV said that draft article 35 did not give rise to too many difficulties. The wording of the French text might, however, be amended to read: *L'Etat de réception et l'Etat de transit facilitent le transport et la remise rapide et en toute sécurité de la valise diplomatique*. It would then be clear that that provision embodied a general obligation.

15. Draft article 36 was crucial. The first clause of paragraph 1 was acceptable, but he did not think that the words "unless otherwise agreed by the States concerned" had to be included in the second part of that paragraph because draft article 6, paragraph 2 (b), already contained a provision to that effect. The words "unless

otherwise agreed by the States concerned" should therefore either be included in every article or deleted in article 36, paragraph 1.

16. The application of article 36, paragraph 1, would, however, give rise to problems only in cases where the diplomatic bag was not accompanied by a diplomatic courier. The diplomatic bag would, of course, still be inviolable, but if it was, for example, dispatched by postal service, how was the word "detained" to be interpreted? The Drafting Committee should look into that problem, which also arose in connection with the application of paragraph 2 in cases where the diplomatic bag was not accompanied by a diplomatic courier. What appropriate measures should be taken in such cases to prevent any infringement of the inviolability of the diplomatic bag? The provisions of paragraphs 1 and 2 were not flexible enough, particularly since the unaccompanied diplomatic bag had to be protected at all times, wherever it might be located. In the circumstances, the solution might be to draft two separate provisions, one relating to the diplomatic bag accompanied by a diplomatic courier and the other relating to the unaccompanied diplomatic bag. In any event, account would have to be taken of every possible situation.

17. The abuses of the diplomatic bag to which reference had been made were not, in his opinion, as important as they might seem. Compared to the drug traffic as a whole, the amounts dispatched by the diplomatic bag were quite small and problems would arise only if drugs dispatched by that means were subsequently made available for sale. Ordinary general measures would then be taken to suppress such drug traffic. The same was true of weapons. Would a member of a diplomatic mission who had a gun permit not be entitled to have a weapon for his own protection dispatched to him by the sending State in the diplomatic bag? That would give rise to problems only if the weapon in question was used to commit acts of terrorism. He was, of course, not advocating the transport of narcotic drugs or weapons in the diplomatic bag, which should contain only articles intended exclusively for official use.

18. Draft article 37 was unnecessary: since the diplomatic bag was inviolable, it was quite clear that it should be exempt from customs and other inspections.

19. In view of the provisions embodied in draft article 4, paragraph 1 and 2, relating to freedom of official communications, he did not think that the phrase "The receiving State or the transit State shall, in accordance with such laws and regulations as it may adopt, permit the entry, transit or exit of a diplomatic bag" really had to be included in draft article 38. In his opinion, customs duties did not apply to the diplomatic bag, which was only an abstraction or a collection of packages. The articles it contained might, strictly speaking, be subject to customs duties, but since the diplomatic bag itself was inviolable, it could not be opened and its contents could therefore not be determined. By definition, moreover, it contained only official correspondence or documents and articles intended for official use, which were, in principle, all exempt from customs duties. That reasoning also applied to dues and taxes. Article 38 as a whole was therefore unnecessary.

20. If he was right in thinking that the circumstances referred to in draft article 39, paragraph 1, included the death of the diplomatic courier or some other exceptional circumstance, such as illness or an accident that might prevent him from performing his functions, the wording of that provision would have to be amended because, as it now stood, it did not apply to all the cases referred to in article 13 or to the case referred to in article 14. It was, for example, not clear whether a professional courier or an *ad hoc* courier who was declared *persona non grata* or not acceptable by the receiving State or the transit State while in its territory would immediately have to surrender the diplomatic bag and whether the receiving State or the transit State would then be able to take possession of it. In any event, the diplomatic courier had to be able to perform the functions entrusted to him and deliver the diplomatic bag in his custody to its final destination.

21. He did not think that article 39, paragraph 2, should be retained because, if the captain of a commercial aircraft or the master of a merchant ship was prevented from performing his functions, the diplomatic bag in his custody could be handed over to the person designated to replace him.

22. The obligations provided for in draft article 40 were incumbent not on the State which had initially been foreseen as the transit State and whose obligations were clearly defined, but on a "third State", which was not the sending State, the receiving State or the transit State. The wording of article 40 should therefore be amended to refer specifically to that "third State".

23. Referring to draft article 41, he noted that there would be no diplomatic relations and hence no diplomatic courier if the receiving State did not recognize the sending State or its Government. A problem would arise only in the case where a diplomatic bag, whether accompanied or not by a diplomatic courier, was being dispatched to or by a delegation in that receiving State. Unless that point was made clear, article 41 would be incomprehensible. In fact, however, the most important and serious problem which arose in that connection was that of the non-recognition of States or Governments or the absence of diplomatic or consular relations between the transit State, on the one hand, and the sending State or receiving State, on the other, when the territory of the transit State had to be used to dispatch the diplomatic bag. Special provisions would therefore be needed to take account of that situation.

24. Sir Ian SINCLAIR, referring to draft article 36, said it had become apparent that the most critical issue was how to reconcile two conflicting considerations: on the one hand, the need to protect the diplomatic bag and the confidentiality of the official correspondence it contained and, on the other, the need to protect the security interests of the receiving State or the transit State, which could be seriously prejudiced by the risk that the bag might be used to convey illicit articles such as arms, explosive devices or narcotic drugs.

25. Prior to the adoption of the 1961 Vienna Convention on Diplomatic Relations, there had been a fair

measure of agreement among publicists that the inviolability of the diplomatic bag was not absolute, in the sense that the receiving State had the right to request that it be opened in the presence of a representative of the sending State to verify that it did not contain prohibited articles and, if the request was refused, to require the return of the bag to its place of origin. As Eileen Denza had stated in her book *Diplomatic Law*,<sup>6</sup> it had certainly been international practice at that time, and probably international law as well, that where there were grounds for suspecting abuse of the bag the receiving State might challenge it; the sending State might then be given a choice between returning the bag or allowing it to be inspected by the authorities of the receiving State in the presence of a member of its own mission.

26. He knew of one instance in which the receiving State had serious grounds for suspecting that a valuable consignment of diamonds was about to arrive in the country in a diplomatic bag. The head of the mission concerned had volunteered to send a member of the mission to be present when the bag arrived. The bag had been opened and a consignment of diamonds addressed to a diplomatic agent in the mission had been found. The diamonds had been confiscated and the diplomatic agent had been declared *persona non grata*. There had been no protest on the part of the sending State.

27. Mrs. Denza's view of the matter had been confirmed during a discussion in the Commission at its ninth session, in 1957.<sup>7</sup> Mr. François had stated at the meeting that the rule that diplomatic mail could be opened in exceptional circumstances was already being applied where it was considered to reflect the existing state of international law. Mr. François had also proposed that a commentary should be added to the effect that, in laying down the general principle of the absolute inviolability of diplomatic bags, the Commission did not wish to stigmatize as contrary to international law the practice of some countries of claiming the right to open bags in special cases, with the consent of the minister of foreign affairs and in the presence of a representative of the mission. At the same meeting, Mr. Scelle, who had supported Mr. François's proposal, had stated that, although the smuggling of the vital parts of atomic bombs in the diplomatic bag was still confined to the realm of fiction, there was nothing to prevent it becoming a fact. Mr. François's proposal, which had been adopted, had eventually been watered down into the version cited by the Special Rapporteur in his fourth report (A/CN.4/374 and Add.1-4, para. 332).

28. That history of events showed that, even in 1957, a majority of the members of the Commission had had serious misgivings about according unqualified protection to the bag because of the risk of abuses. The history of what had subsequently happened in that respect at the United Nations Conference on Diplomatic Intercourse and Immunities, in 1961, had been referred to in the Spe-

<sup>6</sup> *Diplomatic Law. Commentary on the Vienna Convention on Diplomatic Relations* (Dobbs Ferry (N.Y.), Oceana Publications, 1976), pp. 125-126.

<sup>7</sup> *Yearbook ... 1957*, vol. I, p. 79, 399th meeting, paras. 6-7 (Mr. François) and para. 8 (Mr. Scelle).

cial Rapporteur's report (*ibid.*, para. 333) and, in far greater detail, in an article by Ernest Kerley published in 1962.<sup>8</sup> The serious misgivings of the late 1950s and early 1960s had been enormously strengthened by events that had taken place in recent years.

29. At least two methods had been contemplated for dealing with the problem of verifying the contents of the bag. Under the first method, the bag could be opened in exceptional circumstances and on the authority of the ministry of foreign affairs of the receiving State. Under the second, the bag could be challenged by the receiving State when that State had serious grounds for suspecting that it contained prohibited articles; if the sending State refused to comply with a request that the bag be opened, the bag had to be returned to its place of origin. Whereas the first method made a direct inroad into the principle that the bag should not be opened or detained, since it could involve actually opening the bag without the consent of the sending State, the second was less far-reaching and was in fact provided for under article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations. There lay part of the difficulty, for, while the 1961 Vienna Convention on Diplomatic Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States placed no qualification on the rule that the bag should not be opened or detained, the 1963 Vienna Convention did, in its article 35, paragraph 3.

30. The question was therefore what the Commission should do. Had it been starting with a clean slate, he would strongly have favoured applying to all bags the solution provided for under article 35, paragraph 3, of the 1963 Vienna Convention, which struck the right balance between the interests of receiving and sending States. The receiving State would be unlikely to invoke that safeguard clause unless it had substantial grounds for believing that the bag contained illicit articles, since it would be aware that the sending State might reciprocate against one of its own bags on spurious grounds. The danger of creating a major inroad into the principle of freedom of communication could be greatly exaggerated. Every receiving State was simultaneously a sending State and was unlikely to wish to put at risk the freedom of its own bag by challenging bags indiscriminately and without justification.

31. Unfortunately, the Commission was not starting with a clean slate and, in formulating article 36, it should therefore seek to take account of the differences in the régimes governing consular bags, on the one hand, and other types of bags, on the other. It would have to abandon the goal of uniform treatment for all types of bags, since Governments would simply not agree, in the light of recent experience, to accord a higher degree of inviolability to bags than that already given. Indeed, pressure was already building for a wide-ranging review of the scale of privileges and immunities granted under the 1961 Vienna Convention. In reply to a question from

the Foreign Affairs Committee of the House of Commons, the Foreign and Commonwealth Office of the United Kingdom had stated that, in the period from 1974 to 1983, there had been 546 instances in which diplomatic agents and members of the administrative and technical staff of missions in London had been suspected of committing criminal offences which, under United Kingdom law, carried a prison sentence of more than six months. That was an indication of the scale of suspected abuses.

32. It was against that background that article 36 had to be considered. There was almost universal suspicion that diplomats, who were unpopular at best, were contemptuously flouting local laws and the statistics he had given lent credence to the charge. He had therefore been surprised at the statement by Mr. Ushakov, who had seemed to express a certain lack of concern about flagrant abuses in connection with narcotic drugs. Six or seven years earlier, it had been discovered that a diplomatic mission in a Scandinavian country had been financing almost all of its activities by selling narcotic drugs that had been imported through the diplomatic bag. Although the scale of abuse should, admittedly, not be exaggerated, it should also not be minimized.

33. In the circumstances, a modality should be established whereby States would be able to apply to all bags—diplomatic bags, consular bags, special mission bags and delegation bags—the régime which now governed the consular bag alone. He therefore suggested that draft article 36 should contain an escape clause which would enable States to apply to all bags the safeguard provided for in article 35, paragraph 3, of the 1963 Vienna Convention.

34. As to the question of the possible screening of the diplomatic bag by means of electronic or other devices, his own view, for which there existed much support, was that screening as such was not contrary to existing international law. Although the Special Rapporteur had doubts with regard to that interpretation of existing law, such screening was, according to a literal interpretation of the terms of the 1961 Vienna Convention, not illicit. Since the bag was neither opened nor detained, screening did not constitute a violation of existing international law.

35. He stressed that the United Kingdom did not apply screening devices to diplomatic bags and that, to his knowledge, it had no intention of doing so in the future, not because of doubts as to the legality of such screening, but simply because of the belief that it would have limited value as a deterrent. Illicit materials could, moreover, easily be disguised so as to make screening largely ineffectual. The fact remained that such screening did not represent a danger to the security or freedom of communication. It was known that States other than the United Kingdom were applying screening methods and he agreed with Mr. Balanda that the Commission should not seek to outlaw the practice of remote examination.

36. He had no specific reformulation to propose for draft article 36, but he wished to state from the outset that it was wrong to refer, both in the title and in the text of the article, to "inviolability". The concept of inviolability in connection with the diplomatic bag was not to be found anywhere in existing conventions. The rules on

<sup>8</sup> "Some aspects of the Vienna Conference on Diplomatic Intercourse and Immunities", *The American Journal of International Law* (Washington, D.C.), vol. 56 (1962), pp. 116-118.

the diplomatic bag were specified in the context of freedom of communication. Any attempt to elevate the protection of the diplomatic bag to the level of “inviolability” would be bound to attract resistance on the part of States.

37. For all those reasons, he suggested that draft article 36 should consist of three parts. The first part would state the rule that the diplomatic bag must not be opened or detained—a rule that would be applicable to all bags other than the consular bag. The second part would deal with the consular bag and would reaffirm the rule embodied in article 35, paragraph 3, of the 1963 Vienna Convention. The third part would provide that States could make a declaration reserving the right to apply to all bags the régime of article 35, paragraph 3, of the 1963 Vienna Convention. That would not involve any conflict with any existing convention. In that connection, he drew attention to draft article 42, which specified that the present draft articles “shall complement the provisions” of the 1961 Vienna Convention, the 1963 Vienna Convention, the 1969 Convention on Special Missions and the 1975 Vienna Convention. The possibility he was suggesting did not constitute a derogation from any of those conventions, but would merely supplement them.

38. Mr. DÍAZ GONZÁLEZ said that he would comment on draft articles 36 to 42 as a whole when the Commission came to reconsider them after they had been discussed by the Drafting Committee from the point of view of form and substance.

39. Draft article 36 was a key provision on which all the other articles hinged. Article 36, paragraph 1, which had to be taken together with article 31, paragraph 3, stated the principle of the inviolability of the diplomatic bag. It appeared to be generally agreed that such inviolability related not to the diplomatic bag itself, but to the freedom of communication that States had to enjoy in their relations with their accredited agents abroad. It was also generally agreed that the diplomatic bag could contain only official correspondence and documents or articles intended exclusively for official use.

40. A State could, for example, use the diplomatic bag to transport cassettes intended for official use, but it could not, for the purpose of its official and inviolable communications, use a van or a lorry as a diplomatic bag. Since article 31, paragraph 3, did not specify either the maximum size or weight of the diplomatic bag, would it be reasonable to say that a ship being used as a diplomatic bag and carrying three vans filled with weapons and subversive propaganda intended for the overthrow of the constitutional Government of Venezuela should be allowed to anchor off the Venezuelan coast without being searched? Furniture, or a dog, belonging to an ambassador entered the territory of the receiving State not under cover of the diplomatic bag, but rather as property that was exempt from dues, taxes and customs duties in accordance with the privileges and immunities granted to the sending State and to the head of the mission by the receiving State. Cases of abuses did actually occur; they were not hypothetical. For example, one of the persons involved in a recent attempt on the life of a head of State had managed to escape by hiding in a lorry being used as a diplomatic bag.

41. In general, he agreed with the arguments advanced by Sir Ian Sinclair and Mr. Balanda: although the sovereignty of States had to be respected, sovereignty was reciprocal because every sending State was also a receiving State. What had to be protected were communications between Governments and it was difficult to see how States would be able to accept provisions such as article 36, paragraph 1, and article 31, paragraph 3, which might pave the way for abuses. The Commission must therefore pay the closest attention to the drafting of those provisions.

42. Taken as a whole, the draft articles seemed to give greater protection to the sending State than to the receiving State. In practice, the diplomatic bag could not be completely inviolable and it had never been so. Every State had, at one time or another, had to request that a diplomatic bag be opened because of suspicion about its contents. The most common practice was not to allow the diplomatic bag to be used, for example, to transport narcotic drugs or to import subversive propaganda. In one case, Venezuela had had to sever its diplomatic relations with a State which had used the diplomatic bag to transport subversive propaganda. The law was the only protection available to small States, but it must protect the interests of the sending State and take account of the security requirements and sovereignty of the receiving State.

43. Chief AKINJIDE said he had been struck by the fact that the provisions contained, for example, in draft articles 36, 37 and 42 had come up for consideration only at the present time. The international community had obviously been avoiding any discussion of such provisions for a long time. He could imagine three possible reasons for that delay. The first possibility was that the issues at stake were considered too delicate to be dealt with; countries had therefore left them alone as long as possible. The second possibility was that abuses of the diplomatic bag were so serious that the problems involved were regarded as insurmountable and the adoption of any provisions on the subject would have appeared hypocritical. The third possibility was that countries might have considered that the issues in question should be settled on a bilateral basis.

44. Perhaps the Commission was now dealing with such matters because abuses of the diplomatic bag were so serious that it had become embarrassing not to do anything about them or because the countries involved in such abuses had so many alternative possibilities that the whole exercise became irrelevant and it would not matter to them what kind of provisions the Commission adopted.

45. When he considered the situation, he saw that abuses were being committed on all sides—by sending States, by transit States, by receiving States and even by third States. No one was completely innocent. All nations spent millions on what was known sometimes as “intelligence gathering” and sometimes as “espionage”. Everyone was trying to find out what others were doing; everyone engaged in that exercise, but everyone denied it.

46. It was clear to him that, even if the Special Rapporteur’s draft articles were adopted unamended, they would not prevent abuses or even minimize existing abuses. Even if all the amendments so far proposed by members of the Commission were adopted, there would

continue to be glaring abuses. The truth was that the development of "intelligence gathering" had reached a stage where countries were able to obtain whatever information they wanted.

47. The provisions under consideration were very necessary for developing and developed countries alike. The diplomatic bag had been a very important means of communication between nations 100 or even 50 years previously, but that was no longer the case today, when many nations used the diplomatic bag to send comparatively innocuous articles, while others—partly for financial reasons—used them for all kinds of purposes. When the person carrying the bag was caught committing a breach, the answer would often be that he had not acted under authority. When it could not be denied that the agent had acted under authority, the bold answer was usually that the act had been performed in the vital interests of the State.

48. In the circumstances, the Commission had to decide what action should be taken. In that connection, he supported article 36 as proposed by the Special Rapporteur, but he could not agree with the amendments proposed by Mr. Ushakov and, in particular, with the deletion of the words "unless otherwise agreed by the States concerned", which would go too far in the direction of absolute inviolability. He could also not support the proposal by Sir Ian Sinclair, which went too far in the other direction. On the whole, he found that draft article 36 as it stood struck a balance between two conflicting interests that were very difficult to reconcile.

49. The problem of narcotic drugs was particularly important because drugs could easily be dispatched by the diplomatic bag. He could not agree with those who tried to minimize the drug peril, which was, in his view, nearly as grave as that of the atomic bomb. Some countries had 20 per cent of their youth unemployed and jobless youths often took to drugs. It was no exaggeration to say that drugs could destroy a whole generation. It had been proved that drugs were being pushed not only for gain, but also for political reasons, in order to destabilize nations and demoralize peoples. Drugs had also been used to promote violence and there had even been reports of them being used in some local wars to weaken the enemy. Since it was an established fact that the diplomatic bag was being used to carry drugs, it followed that, if the bag was made inviolable, considerable harm would be done to nations affected by the drug traffic.

50. Another illicit use being made of the diplomatic bag was that of currency smuggling, which could adversely affect a national currency and even precipitate its devaluation. Perhaps the most dangerous illicit use of the diplomatic bag, however, was for the transport of weapons for the purposes of promoting violence in the receiving State. In that connection, reference had been made during the discussion to the recent disgraceful incident that had taken place in London. The closer he looked at all those abuses, the more he hesitated to give the diplomatic bag absolute inviolability. He would continue his statement at the next meeting.

*The meeting rose at 1.05 p.m.*

## 1846th MEETING

*Friday, 22 June 1984, at 10 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Balanda, Mr. Barboza, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam, Mr. Ushakov.

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)**  
(A/CN.4/374 and Add.1-4,<sup>1</sup> A/CN.4/379 and Add.1,<sup>2</sup> A/CN.4/382,<sup>3</sup> A/CN.4/L.369, sect. E, ILC (XXXVI)/Conf. Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR<sup>4</sup> (*continued*)

- ARTICLE 36 (Inviolability of the diplomatic bag)
- ARTICLE 37 (Exemption from customs and other inspections)
- ARTICLE 38 (Exemption from customs duties and all dues and taxes)
- ARTICLE 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag)
- ARTICLE 40 (Obligations of the transit State in case of *force majeure* or fortuitous event)
- ARTICLE 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations) *and*
- ARTICLE 42 (Relation of the present articles to other conventions and international agreements)<sup>5</sup> (*continued*)

1. Chief AKINJIDE, continuing the statement he had begun at the previous meeting, said that he found draft article 36 satisfactory. The deletion of the words "unless otherwise agreed by the States concerned", proposed by Mr. Ushakov (1845th meeting), would remove all safeguards against abuses. It was the Commission's responsibility to strike a reasonable balance between the com-

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> *Idem.*

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Arts. 1-8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*

Arts. 9-14, referred to the Drafting Committee at the Commission's thirty-fourth session: *ibid.*, p. 46, footnotes 189 to 194.

Arts. 15-19, referred to the Drafting Committee at the Commission's thirty-fifth session: *ibid.*, pp. 48-49, footnotes 202 to 206.

<sup>5</sup> For the texts, see 1844th meeting, para. 21.