

Document:-
A/CN.4/SR.1846

Summary record of the 1846th 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

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

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.1-4,¹ A/CN.4/379 and Add.1,² A/CN.4/382,³ A/CN.4/L.369, sect. E, ILC (XXXVI)/Conf. Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPporteur⁴ (*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)⁵ (*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-

¹ Reproduced in *Yearbook ... 1983*, vol. II (Part One).

² Reproduced in *Yearbook ... 1984*, vol. II (Part One).

³ *Idem*.

⁴ 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.

⁵ For the texts, see 1844th meeting, para. 21.

peting interests of the sending State and the receiving State, while endeavouring to eliminate or at least restrict the possibility of abuses. The phrase “unless otherwise agreed by the States concerned” would seem, in the context of article 36, to refer to arrangements such as those provided for in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations, and should be retained.

2. He disagreed with Sir Ian Sinclair’s view (*ibid.*) that all reference to the inviolability of the diplomatic bag should be deleted and that it was sufficient to provide that the bag should not be opened or detained. That, too, would be likely to encourage abuses, not by sending States, but by receiving States eager to pry into the contents of the diplomatic bag. The term “inviolable” was widely used in international treaties and conventions as well as in writings on diplomatic relations, and seemed to be an appropriate way of conveying the nature of the protection to be granted to the diplomatic bag, without detracting from the need to prevent abuses.

3. While agreeing with previous speakers that the provision that the diplomatic bag should be exempt from examination “through electronic or other mechanical devices” was covered by the concept of inviolability, and that it was unlikely to be effective in the case of advanced countries whose airports were equipped with the latest detection devices, he believed that to delete the provision altogether would be a mistake. The Commission should avoid giving the impression that any kind of examination of the diplomatic bag would be in order, unless it was agreed to by the States concerned.

4. Recommending that paragraph 1 of article 36 should be adopted without change, he observed that developments on the international scene since the adoption of the 1961 and 1963 Vienna Conventions had made it necessary to fill certain gaps in those instruments. For instance, it was no secret to anyone that many captains of aircraft and masters of ships were members of the intelligence community.

5. While not directly proposing the deletion of the provision in paragraph 2 that the receiving State or the transit State should prosecute and punish persons under its jurisdiction responsible for infringement of the inviolability of the diplomatic bag, he had serious doubts as to its potential efficacy. The article as a whole was, however, an excellent piece of work and he was strongly in favour of its adoption.

6. He disagreed with previous speakers who had described draft article 37 as superfluous. On the contrary, it was very much to the point in the case of countries having a federal system, where the Governments of individual component States might have constitutional power to exact dues and taxes in respect of the diplomatic bag, even though the federal Government had waived such powers by ratifying a convention. The same consideration applied to the second part of draft article 38, starting with the words “and shall exempt it from customs duties ...”. It might therefore be appropriate to incorporate that provision in article 37.

7. The provision in draft article 39, paragraph 1,

seemed to be necessary, notwithstanding Mr. Ushakov’s very persuasive objections. Not all persons in power were reasonable or reliable at all times, and it was wise to spell out certain basic precautions. He was also in favour of retaining paragraph 2 of article 39; for whatever might befall the captain of an aircraft or the master of a ship, the office of captain or master subsisted, so that some degree of security was assured.

8. Draft articles 40 to 42 did not call for any comment. In conclusion, he congratulated the Special Rapporteur on dealing so successfully with a delicate problem at a difficult time.

9. The CHAIRMAN, speaking as Special Rapporteur, reminded the Commission that in his oral introduction (1844th meeting) he had suggested the deletion of the phrase “and shall also prosecute and punish persons under its jurisdiction responsible for such infringement” from article 36, paragraph 2.

10. Mr. OGISO said he wished to confine himself to the present to expressing some preliminary views on draft article 36; he would speak on the remaining articles later. He fully agreed with the formula suggested by the Special Rapporteur in his fourth report (A/CN.4/374 and Add.1-4, para. 326, *in fine*). It was doubtful, however, whether the sending State’s obligation to take appropriate measures to prevent the dispatch of illicit articles through its diplomatic bag, laid down in draft article 32, paragraph 2, would be a sufficient safeguard to prevent abuse of the bag, particularly as the possibility of high officials of the sending State being involved in such abuse could not be totally excluded.

11. The provision in article 36, paragraph 1, meant that, in principle, even indirect examination of the diplomatic bag was prohibited. While appreciating the Special Rapporteur’s efforts to strike a fair balance between the interests of the sending State and those of the receiving State, he must emphasize that a safeguard mechanism should be a real and effective one. In his oral introduction, the Special Rapporteur had suggested three possible approaches to the problem. The first would consist in following the wording of article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations, with some drafting changes, and adding the word “exclusively” before the words “for official use”, taken from paragraph 4 of the same article, which could have some psychological effect. In his view, however, that solution would not be sufficiently effective in dealing with the problem of abuses.

12. The second approach would be the adoption of a provision on the lines of article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations. Sir Ian Sinclair (1845th meeting), had suggested that the procedure set out in that paragraph should apply when the receiving State had serious reason to believe that a diplomatic bag contained matter other than official correspondence and documents or articles intended exclusively for official use. That suggestion, which would introduce a change in modalities without altering the legal principle embodied in existing conventions, was a valuable one and deserved careful study.

13. As a third possible approach, the Special Rapporteur had put forward the idea that the sending State might be requested to divide the diplomatic bag into two separate bags, one containing only official correspondence and documents and the other containing articles exclusively for official use, different inspection procedures being applied to the two kinds of bag. It was that third possibility which he wished to examine further.

14. Considering that abuses of the diplomatic bag were now common, which had not been the case when the Vienna Conventions had been adopted, and that public opinion was strongly in favour of energetic steps to prevent such abuses, the Commission would be well advised to examine every possibility with an open mind.

15. It was a basic assumption that the principle of inviolability of the diplomatic bag stipulated in article 27, paragraph 3, of the 1961 Vienna Convention should not be changed. Accordingly, the basic provision that the diplomatic bag must not be opened or detained, except with the express consent of the sending State and in the presence of its authorized representative, should be retained. But it should also be borne in mind that the original *raison d'être* of the inviolability of the diplomatic bag had been to safeguard the secrecy of official correspondence and documents, the practice of giving the same protection to "articles intended exclusively for official use" having developed later as a matter of convenience.

16. It might therefore be advisable to introduce some differences in the procedures for dealing with the two different categories of diplomatic bag, while maintaining the principle of inviolability applicable to both. The receiving State might stipulate in advance that official correspondence and documents must be contained in one bag and "articles intended exclusively for official use" in another. It would then be possible to apply a stricter procedure to the bag containing articles. Both bags should be appropriately marked on the outside: one as "official correspondence and documents only", and the other as "articles intended exclusively for official use", with their description and number. The bag containing official correspondence and documents would be exempt from examination, either directly or by indirect methods capable of revealing the contents of the correspondence and documents. The receiving State would not be permitted to use electronic or mechanical devices, but might be allowed to measure or weigh the bag or use a dog to smell it. Where the bag containing articles for official use was concerned, the sending State would not be entitled to refuse examination by electronic or mechanical devices, since there would be no risk of intrusion into the secrecy of official correspondence. As had been mentioned several times, X-ray examination of the baggage or even the person of a diplomatic agent was conducted routinely by airline companies without evoking any protest.

17. If, as a result of examination or information otherwise obtained, the competent authorities of the receiving State had serious reason to believe that the bag contained something other than the items specified in article 32, paragraph 1, they could request that the bag be opened in their presence by an authorized representative

of the sending State; if that request was refused, the bag would be returned to its place of origin.

18. In conclusion, he reminded the Commission that he had supported (1842nd meeting) the deletion of paragraph 3 of article 31. His main reason for doing so had been the mandatory nature of the provision. A further reason, which he had not mentioned at the time, was that if the suggestion he had just made concerning article 36 was adopted, article 31 would have to be redrafted. The question of the size or weight of the diplomatic bag might become relevant in regard to whether the content of the bag for official correspondence and documents was actually limited to them, or included articles.

19. Mr. NI, referring to the question why an article as important as that on the inviolability of the diplomatic bag did not appear earlier in the draft, said that, on comparing the structural arrangement of part III with that of part II, he found no inconsistency in the arrangement of the draft articles. If any change in their order were to be made, he would only suggest that the content of the diplomatic bag, covered by article 32, should precede the indication of the status of the bag, dealt with in article 31. The two articles might, in the interests of simplicity, be combined, the provisions concerning content appearing first.

20. With regard to draft article 36, it should be made clear from the outset that the diplomatic bag was inviolable whether or not it was accompanied by a diplomatic courier. In view of the confidentiality and secrecy of the official correspondence and documents contained in the bag, it was essential that complete inviolability should be accorded. But complete inviolability did not necessarily mean absolute inviolability. Nor could abuses or the security of the receiving State be ignored. Article 31 of the 1963 Vienna Convention on Consular Relations provided, in paragraph 1, that consular premises were inviolable; but in paragraph 2 of the same article, it was stipulated that consent to enter might be assumed "in case of fire or other disaster" and the same idea had been adopted for article 21 of the present draft, concerning the inviolability of temporary accommodation used by the diplomatic courier. In view of the increase in acts of terrorism, hijacking, the illicit drug traffic and the abuse of diplomatic privileges, however, it might be necessary to reconsider the exemption from examination of the diplomatic courier and the diplomatic bag.

21. Referring to paragraph 2 of article 36, he expressed appreciation of the flexibility shown by the Special Rapporteur in agreeing to delete the clause concerning prosecution and punishment. It might, instead, be provided that States could agree on a reciprocal basis that in special circumstances the diplomatic bag could be opened in the presence of an officer of the sending State in order to satisfy the receiving State or a transit State that the bag did not contain anything other than the items permitted. That point could perhaps be considered in conjunction with the second part of paragraph 1 of article 36, following the words "unless otherwise agreed by the States concerned". It was essential that, on the one hand, complete inviolability of the diplomatic bag should be main-

tained and that, on the other hand, abuses should be avoided or mitigated as far as possible, through arrangements to be made between the parties concerned.

22. The exemption of the diplomatic bag from customs and other kinds of inspection was a long-established international custom and a corollary of the inviolability of the bag. Exemption from customs duties and other dues and taxes was also a long-established rule in international law and State practice. Article 37 and 38 therefore had their place in the draft, but in view of their similar subject-matter and the relative simplicity of their wording, it might be advisable to combine them into one.

23. Draft article 39 had no parallel in the codification conventions. Although the circumstances envisaged might not arise frequently, the possibility nevertheless had to be covered. A case could be made out, however, for incorporating article 39 in article 40, dealing with cases of *force majeure* or fortuitous events, or at least for transferring it to part IV of the draft.

24. Draft article 41 did not raise any great difficulty, but in paragraph 1 it might be necessary to indicate that the granting of facilities, privileges and immunities was not affected by "subsequent" non-recognition of the sending State by the receiving State, the host State or the transit State, or by "subsequent" non-existence or severance of diplomatic or consular relations between them, since it was the subsequent change of circumstances that was relevant. If the receiving State granted facilities, privileges and immunities despite lack of recognition, there would be no need for the provision. The wording of paragraph 2 of the article should be simplified.

25. Paragraphs 1 and 3 of draft article 42 seemed to state the obvious and could perhaps be deleted, in which case paragraph 2 could be amplified to read:

"2. The provisions of the present articles are without prejudice to the relevant provisions in other conventions or to those in international agreements in force as between States parties thereto."

Should the Commission wish to retain paragraphs 1 and 3, however, he would have no objection.

26. Lastly, he congratulated the Special Rapporteur on the completion of his *magnum opus*, on which he had worked so assiduously for many years.

27. Mr. THIAM said that draft article 36 clearly showed that the topic entrusted to the Special Rapporteur for study not only was highly technical, but also raised very important questions of principle. At the present time, it was difficult to affirm the rule of absolute inviolability of the diplomatic bag. For the abuses to which the bag was exposed were no longer confined to the old, classical activities such as espionage, but included new activities such as subversion and terrorism, which were carried out by individuals or groups as well as by States. In addition, as he himself had emphasized in his capacity as Special Rapporteur for the draft Code of Offences against the Peace and Security of Mankind, it would perhaps be necessary to treat as such offences the activities of persons enjoying diplomatic privileges and

immunities and using them in a manner injurious to the public order of the country to which they were accredited. Consequently, it was important to take account both of those new activities and of the abuse of privileges and immunities, since the stability of States, particularly that of the weakest of them, could be threatened thereby.

28. In the report under consideration (A/CN.4/374 and Add.1-4, paras. 342-348), the Special Rapporteur appeared to recognize the need for some examination of the diplomatic bag, but that need was not made sufficiently clear in article 36. It would be advisable to treat the problem of inviolability of the diplomatic bag more restrictively than in the past. Formerly, diplomatic relations had been based on a code of honour, which was respected and based on such concepts as honesty and the observance of custom. As that foundation for diplomatic relations was tending to crumble, it was important to draft any provision on the inviolability of the diplomatic bag accordingly. It was true that article 36 affirmed the inviolability of the diplomatic bag in so far as States respected its normal and customary function. But it was a fact that the bag was increasingly being used for other functions, such as the transport of arms, drugs, subversive literature and foreign exchange. Thus its use might infringe laws or regulations which prohibited or restricted the import of certain goods. In that case, the inviolability of the bag no longer served merely to protect the confidential nature of the correspondence and documents or articles intended exclusively for official use which it was supposed to contain.

29. It was probably on the basis of that finding that Mr. Ogiso had been led to propose making a distinction between the bag used for the conveyance of official correspondence and documents, and the bag used to carry articles. In the latter case, however, it was no longer truly a diplomatic bag. It should be borne in mind that for the transport of articles to be used for the normal operation of a mission, the four codification conventions provided sufficient privileges and immunities. Packages of that kind must be distinguished from those for which the diplomatic bag was intended to be used. The bag should merely facilitate communication between a State and its missions, and to accept the notion of a diplomatic bag used solely for the transport of articles would be to recognize a function other than that naturally assigned to it. That would involve a danger of legalizing the very abuses which the Commission's codification work was intended to prevent.

30. It was therefore important to try to confine the concept of the inviolability of the diplomatic bag within precise limits. It was difficult to accept the possibility of abuses, which were referred to in articles 32 and 36, without mentioning the possibility of examination. The Commission could not confine itself to indicating in the commentary to article 36 that an examination could be carried out by agreement between the sending State and the receiving State. The limits of such examination must be fixed. While it was true that all examination must not be prohibited, neither must the examination go beyond what was necessary. A check on correspondence con-

tained in the diplomatic bag could certainly be carried out without violating the secrecy of that correspondence.

31. The abuses of which some diplomatic missions had been guilty and of which Sir Ian Sinclair had given examples could no longer pass unnoticed. They had been possible owing to the laxity which States had permitted themselves, under cover of courtesy, at a time when security had not been of so much concern as it was at present. But it was quite certain that the use of the diplomatic bag must not enable States to infringe or evade the laws and regulations of the receiving State. It could not be maintained, as Mr. Ushakov had done (1845th meeting), that the presence of narcotic drugs in a diplomatic mission did not concern the receiving State so long as those drugs did not leave the mission, without asking how they had entered it. In his opinion, both the introduction into the territory of a State of a diplomatic bag containing prohibited objects and the transport of that bag within the territory of the State were criminal acts which could not be ignored. Consequently, the Commission should take care not only to protect the secrecy of the sending State's communications, but also to safeguard the security and public order of the receiving State.

32. The other articles under consideration called for no comment, except that draft articles 40 and 41, which dealt, respectively, with *force majeure* or fortuitous event and with the non-recognition of States or Governments or absence of diplomatic or consular relations, should probably be placed elsewhere than in part IV of the draft, "Miscellaneous provisions". Those articles were, indeed, too important to be placed under a heading which generally grouped provisions of secondary importance.

33. Mr. JAGOTA said that draft article 36, which was a key article, required careful consideration. The difficulties stemmed from the different approaches of the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, and from increased awareness of the possible abuses of the diplomatic bag. In reviewing the current legal position, as reflected in the codification conventions, it should be borne in mind that diplomatic bags, as defined in the draft articles, fell into two broad categories, namely those accompanied by a diplomatic courier and those entrusted to the captain of a commercial aircraft or the master of a merchant ship or dispatched by postal services or other means.

34. It was then necessary to determine whether it was the contents of the bag that were inviolable, by virtue of their character as documents of State, or the bag itself. The 1961 Vienna Convention contained a number of separate provisions on that point: article 24, under which the archives and documents of the mission were inviolable; article 27, paragraph 2, under which the official correspondence of the mission was inviolable; article 27, paragraph 3, under which the diplomatic bag must not be opened or detained; and article 27, paragraph 4, which unlike the other three provisions, referred to "articles intended for official use". Arguably, if all four provisions were read together, the concept of inviolability could be

said to apply to the diplomatic bag itself. He was not sure, however, whether that was correct.

35. The next question to be decided was whether the basic requirement that the diplomatic bag must not be opened or detained should be absolute or qualified. At the present stage, it was necessary to consider how to deal with the increasing number of abuses of the diplomatic bag, such as the smuggling of arms and currency, which could be a threat to the security and economic stability of States, and the smuggling of narcotic drugs, which could be a danger to the health of nations. If the archives, documents and official correspondence of the mission were to be treated as inviolable, and the opening and detention of the diplomatic bag was to be prohibited, the principles of good faith and reciprocity would have to apply. In other words, the bag would have to contain only what it was supposed to contain and, if it did not, the receiving State could take reciprocal action.

36. It was necessary to look to State practice to determine whether that approach was still adequate or whether some kind of remedy should be prescribed. Specifically, the Commission should consider whether action should be taken only in the event of an emergency or a grave breach; whether an element of proportionality or some form of time element should be introduced; and what criteria should govern the inspection or opening of the bag. His own feeling was that, if the Commission delved too deeply into such matters, it could undermine the whole object of the draft, which was to protect the diplomatic bag and its contents, the confidentiality of which was in the interests of all States. Consequently, he would suggest that for the time being the Commission should confine itself to providing a framework for consideration by the Sixth Committee of the General Assembly.

37. The draft articles should include a provision on the identification of the bag, which should be carefully drafted to close any loopholes. Most abuses would, of course, relate to the unaccompanied bag, and if such a bag were opened unintentionally or broke open, spilling, say, alcohol, the normal reaction of the person taking delivery would be to deny that the bag was his. It would also be useful to include a provision, such as article 31, paragraph 3, on the maximum size or weight of the bag, though the question whether or not it should be couched in mandatory terms would have to be decided later.

38. Many possibilities had been mentioned for the treatment of the diplomatic bag, but he would narrow the choice down to three. The first, proposed by Sir Ian Sinclair (1845th meeting), was to provide for an optional declaration to be made by States wishing to apply article 35, paragraph 3, of the 1963 Vienna Convention. That would involve an implicit amendment to the other codification conventions and might operate to weaken the customary law aspects of inviolability. The second possibility was to adopt article 36 as proposed by the Special Rapporteur. The third was to adopt Mr. Ogiso's proposal that there should be two categories of diplomatic bag: one containing official correspondence and documents, which would enjoy complete inviolability, and the other containing articles intended for the official use of the mission, to which the régime of article

35, paragraph 3, of the 1963 Vienna Convention would apply. The difficulty there was how to distinguish between the two categories of bag, and careful consideration would be needed to ensure that the inviolability of diplomatic correspondence was not unduly affected. In view of the complex issues involved, he would suggest that the matter be left for further consideration by the Sixth Committee of the General Assembly and by the Commission at its session in 1985.

39. Draft articles 37 and 38 could be referred to the Drafting Committee for consideration in the light of the comments and suggestions made. He agreed that draft articles 39 and 40, the subject-matter of which was similar, should be placed together, either in part III or in part IV of the draft.

The meeting rose at 1.05 p.m.

1847th MEETING

Monday, 25 June 1984, at 3 p.m.

Chairman: Mr. Alexander YANKOV

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Balanda, Mr. Barboza, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, 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. Sucharitul, 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.1-4,¹ A/CN.4/379 and Add.1,² A/CN.4/382,³ A/CN.4/L.369, sect. E, ILC (XXXVI)/Conf. Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPporteur⁴ (concluded)

ARTICLE 36 (Inviolability of the diplomatic bag)

ARTICLE 37 (Exemption from customs and other inspections)

¹ Reproduced in *Yearbook ... 1983*, vol. II (Part One).

² Reproduced in *Yearbook ... 1984*, vol. II (Part One).

³ *Idem.*

⁴ 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.

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 (Obligation 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)⁵ (*concluded*)

1. Mr. EL RASHEED MOHAMED AHMED, referring to draft article 36, said that States which reserved the right to open, or request the opening of, the diplomatic bag were perhaps sounding an indirect warning that States which sought to abide by the principle of absolute inviolability should be estopped from claiming that right. He noted that the Special Rapporteur, in his survey of the practice of States (A/CN.4/374 and Add.1-4, paras. 338-341), had referred to certain bilateral agreements, such as the Consular Convention between the United Kingdom and Norway, under which a request could be made for consular bags to be opened in special cases (*ibid.*, para. 339). Sir Ian Sinclair (1845th meeting) had referred to the fact that there was a measure of agreement among publicists that the inviolability of the bag was not absolute—a fact borne out by the misgivings expressed by a majority in the Commission at its eleventh session, in 1959. The Commission was still plagued by misgivings, and States were concerned about the abuses of the diplomatic bag perpetrated behind the shield of inviolability. As had rightly been observed, the moral standards of the eighteenth century had been such as to warrant mutual confidence in State practice. Regrettably, however, the prevailing situation was one that justified caution, if not outright suspicion, on the part of States.

2. Draft article 36 permitted bilateral agreements, as was clear from the proviso in paragraph 1, "unless otherwise agreed by the States concerned", but he wondered whether such agreements really solved the problem. He agreed that it was necessary to strike the right balance between the interests of sending, transit and receiving States and considered that the suggestions made by Mr. Jagota (1846th meeting) merited further consideration. He also supported Sir Ian Sinclair's suggestion that States should be given the option of making a declaration to apply article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations.

3. There was nothing in existing law that prohibited the use of electronic screening to examine diplomatic bags and, indeed, he saw no harm in such screening, although it was not always available to third world countries. He therefore suggested that the exemption from examination by electronic or mechanical devices should be dropped from article 36, paragraph 1. He also considered that paragraph 2 could be deleted.

4. Draft article 41 was acceptable to him, since it was possible to imagine a situation in which a bag was sent to

⁵ For the texts, see 1844th meeting, para. 21.