

Document:-
A/CN.4/SR.1847

Summary record of the 1847th 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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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.

an international agency in a receiving State whose Government was not recognized by the sending State. He would speak on draft article 42 later.

5. Mr. McCaffrey had noted that the Commission was prepared to consider the possibility of re-examining the régime governing the diplomatic bag under the 1961 Vienna Convention on Diplomatic Relations. A number of speakers had suggested various ways of achieving a more equitable balance between the interests of sending and receiving States, without compromising the confidentiality of the official communications whose transmission was the real purpose of the diplomatic bag. Nearly all speakers seemed to agree on the need to afford the receiving State some form of protection against abuses of the bag, which had been increasing at an alarming rate. It was also generally agreed that the diplomatic bag should not be allowed to become a latter-day Trojan Horse, whose entry into the receiving State might seriously threaten its public order, instead of fulfilling the intended purpose of the bag, which was to promote harmonious international relations.

6. In regard to draft article 36, he associated himself with the general approach of those who had examined the extent to which inviolability of the bag was necessary to ensure the confidentiality of diplomatic communications, having regard to the need to provide the receiving State with a reasonable assurance of security. In his view, it was better not to speak of the inviolability of the bag, because that confused the issue; the Commission would be better advised to align the language of draft article 36 with that of the codification conventions.

7. As had already been noted, article 24 of the 1961 Vienna Convention referred to the inviolability of the archives and documents of the mission and article 27, paragraph 2, stated that its official correspondence was inviolable; furthermore, article 27, paragraph 3, said nothing about the bag being inviolable, but only that it must not be opened or detained. Neither did the Convention say anything to the effect that articles for official use were inviolable.

8. The Special Rapporteur's fourth report referred to the "broader principle of the inviolability of the archives and documents of the diplomatic mission" (A/CN.4/374 and Add.1-4, para. 342) and to the "inviolability and secrecy" of the bag (*ibid.*, para. 343). The Special Rapporteur had presumably meant the inviolability and secrecy of the content of the bag, but his wording was symptomatic of the tendency to treat the bag as inviolable. According to the Special Rapporteur: "The opening of the diplomatic bag constitutes a method of direct examination of its content" (*ibid.*, para. 344). While that was true, in one sense at least, he agreed that there was a clear distinction between the content of the bag and the content of official communications contained in the bag. The content of the bag did not seem to be confidential, given the terms of article 27, paragraph 4, of the 1961 Vienna Convention; it was the content of the communications that was sacrosanct. Mr. Ogiso's analysis (1846th meeting) was very interesting in that regard and the proposals he had made deserved further consideration.

9. Sir Ian Sinclair (1845th meeting) had referred to the legislative inquiry being conducted into abuses of diplomatic privileges and immunities by the Foreign Affairs Committee of the House of Commons in the United Kingdom. In the United States of America legislation had been introduced with a view to restricting certain diplomatic privileges and immunities. Such developments were a reflection of the mood of national legislatures and would seem to indicate that the Commission was on the right track. Nobody was suggesting any radical departure from previous régimes, but in the light of the abuses that had occurred it was incumbent on the Commission to subject the area to close scrutiny. It should give serious consideration to introducing a measure of flexibility into the régime governing the bag. As the Special Rapporteur pointed out (A/CN.4/374 and Add.1-4, para. 347), the return of the bag to its place of origin could provide a possible solution in the event of a dispute between the sending and receiving States.

10. The Commission would be well advised to consider dropping the exemption from screening provided for in article 36, paragraph 1. As Mr. Balanda had pointed out (1845th meeting), there was general agreement that the courier should not be exempt from security checks at airports, and similar considerations would appear to apply to the diplomatic bag because of the receiving State's interest in its own internal security. As Sir Ian Sinclair had rightly noted, a literal interpretation of the four codification conventions would seem to permit such checks. Admittedly, the requisite technology had not been available when the earlier conventions had been drafted, but as Sir Ian Sinclair had also pointed out, such an examination could in any event be frustrated by the sending State.

11. As to the phrase "unless otherwise agreed by the States concerned", Mr. Balanda might well be right in saying that since all States were not on an equal footing it might be illusory to provide that they could enter into agreements at arm's length. That was something which had not always proved to be a practical possibility at the domestic level, depending on the equality or otherwise of the bargaining position of the parties, and it was therefore a point to be borne in mind. In any event, a better solution, in his view, was to allow the receiving State to treat all bags in the same way as the consular bag.

12. A number of proposals had been made for safeguards, including a separate provision on consular bags allowing receiving States to continue to treat those bags as provided in the 1963 Vienna Convention on Consular Relations. That suggestion was well worth considering, with a view to introducing a measure of flexibility into the draft. He would, however, urge the need for an article allowing States to declare that they retained the right to discriminate between different kinds of diplomatic bag, which was, in effect, permitted under current conventional régimes.

13. With regard to the nature of the Commission's work on the topic, he wished to raise the question whether the Commission was purporting to codify customary international law—a question on which he had already had occasion to express doubts. In that context, article

42 was a critical element in the draft, and careful consideration should be given to reconciling article 42, paragraph 3, with article 6, paragraph 2 (b), since there seemed to be some inconsistency between the two provisions. It was also necessary to consider the extent to which States should be allowed to opt out of the provisions of the draft by means of bilateral agreements. That point also applied to article 36, into which it might be necessary to introduce an element of flexibility.

14. Mr. LACLETA MUÑOZ, referring to draft article 36, emphasized its crucial importance. It was true that States were trying to prevent abuses of diplomatic privileges and immunities and of the diplomatic bag, and that such abuses were becoming more frequent. Some abuses were not dangerous, but they were made easy by the fact that article 27, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations provided that the packages constituting the diplomatic bag could contain "articles intended for official use". Those articles were not distinguished from the other articles "for the official use of the mission" referred to in article 36, paragraph 1 (a), of the same Convention, which were exempt from "all customs duties, taxes, and related charges". It would be advisable to try to restrict the articles for official use which could be sent through the diplomatic bag to articles of a confidential nature, such as coding and decoding material.

15. What gave most cause for concern was that the diplomatic bag could be used for the transport of narcotic drugs, arms and subversive propaganda against the Government of the receiving State. It was therefore necessary to draft a rule under which it would be possible to verify that the diplomatic bag was not being used for such purposes. He was inclined to agree with Sir Ian Sinclair (1845th meeting) that article 27, paragraph 3, of the 1961 Vienna Convention, which provided that "The diplomatic bag shall not be opened or detained", was not incompatible with article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations, which reproduced that principle with a reservation. That was also the interpretation given by the Spanish Ministry of Foreign Affairs. He would not take up the question whether it meant that the diplomatic bag was inviolable or that it was not.

16. Some members of the Commission had said that the title of article 36 proposed by the Special Rapporteur, "Inviolability of the diplomatic bag", might go too far, and that inviolability did not attach to the diplomatic bag itself, but to its contents. In his opinion, that depended on what was to be understood by the term "inviolability", as applied to the diplomatic bag. It could be maintained that under the terms of article 35 of the 1963 Vienna Convention the consular bag was inviolable, in the sense that the receiving State was not entitled to take possession of it or to impair its integrity, and that it could be opened only with the consent of the sending State.

17. In his view, however, that was not the problem; the problem was to find a means of ensuring that the diplomatic bag was not misused. The bag could, of course, be examined by electronic means; indeed, he believed that the 1961 and 1963 Vienna Conventions did not

prohibit that kind of examination; but that did not solve the problem, particularly since such means of examination might make it possible to ascertain the contents of the bag. For instance, the devices used to change the cipher in certain decoding appliances, which could legitimately be sent by diplomatic bag, could be discovered when the bag was X-rayed. He was therefore opposed to such examination.

18. In his opinion, it would be preferable to include in draft article 36, as proposed by Sir Ian Sinclair, a new paragraph containing a provision under which States could reserve the right to apply to all diplomatic bags the régime provided for in article 35 of the 1963 Vienna Convention. It was to be hoped that States which had chosen that option would not reply to every request to open a diplomatic bag by the immediate opening of another bag, whether or not there was reason to believe that it was being misused. Unfortunately, that might happen under cover of the principle of reciprocity, which was really another name for retaliation and reprisal. It was therefore to be hoped that States would not apply the principle of reciprocity automatically and would request the opening of diplomatic bags only in order to verify, without violating their contents, whether they were being used for illicit purposes. He would comment on the last articles submitted by the Special Rapporteur at the next opportunity.

19. Mr. BARBOZA said that draft article 36, which was modelled on the 1961 Vienna Convention on Diplomatic Relations, presented two kinds of difficulty: conceptual and practical. The conceptual difficulties related to the underlying principle of the article, which was to protect the freedom of official communications between the sending State and its missions and between those missions themselves. In that respect, there would be no problem for official correspondence; for as some members of the Commission had observed, the archives and documents which were, after all, part of the correspondence were already protected by the provisions of article 24 of the 1961 Vienna Convention. The problem arose in regard to the "articles" which the diplomatic bag might contain. The first question to be decided was that of the relationship between those articles and the freedom of communication which was to be protected. In the 1961 Vienna Convention and in the draft under consideration, the definition of those articles was far too broad, since it referred only to articles intended for official use. On that point he fully agreed with Mr. Lacleta Muñoz; the borderline between official use and non-official use was very difficult to trace. Obviously, many articles used in an embassy were for official use: for instance, the furniture and vehicles. But it was also obvious that the articles in that category came under different régimes. Some could be sent as freight and others by post and the receiving State naturally reserved the right to decide whether they would be admitted free of duty. But other articles were sent by diplomatic bag: for instance, medicines in exceptional circumstances. And there were others whose dispatch by diplomatic bag should be authorized, namely articles really connected with freedom of communication, such as coding and decoding material, transmitters for sending coded messages, cassettes

on which messages were recorded, etc. There were other articles, again, which should benefit from special security, such as seals. An appropriate provision should therefore be drafted under which, in exceptional cases, certain articles intended for official use could be sent by diplomatic bag, so as to restrict that class of articles as much as possible.

20. The practical difficulties arose from the need to reconcile the principle of inviolability of the diplomatic bag with the security of the receiving State. The inviolability of the diplomatic bag was necessary for the maintenance of good diplomatic relations, but current events showed that the bag could be used for illicit purposes or in contravention of the laws of the receiving State, in such a way as to cause danger. Provision should therefore be made for examination of the diplomatic bag, the inviolability of which could not be absolute. The draft articles submitted by the Special Rapporteur contained some safeguards. The first was in article 5, paragraph 1, but in view of recent events that seemed inadequate. Article 31, paragraph 3, was also relevant: it was not entirely ineffective, since it excluded the possibility of using the diplomatic bag for smuggling large objects, such as arms; but it left the door open for other abuses.

21. Among the ideas put forward during the discussion, he thought Mr. Ogiso's proposal (1846th meeting) that the diplomatic bag should be separated into two, according to its content, and that electronic examination should be permitted for the one containing articles was worth considering. Nevertheless, a preliminary analysis showed that it had drawbacks. For if a State was prepared to send prohibited articles by diplomatic bag, it would also be prepared to declare that the bag contained only correspondence. Thus the absolute inviolability of the bag declared to contain only correspondence would protect the quite dangerous smuggling of small objects such as diamonds, forged banknotes and propaganda literature.

22. Sir Ian Sinclair (1845th meeting) had referred to a practice obtaining before the adoption of the codification conventions, which was reflected in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations. That practice was fairly general and many States regarded it as a right. The provision in question certainly had the advantage of preserving the principle of the inviolability of the bag, which could be opened only with the consent of the sending State and in the presence of its representative, while at the same time protecting the security of the receiving State. He agreed with Sir Ian that the principle of reciprocity might prevent the receiving State from abusing that provision; it was to be hoped that that principle would be reasonably applied. On first reading, he thought it would be well to give careful consideration to any solution of that kind. Of course, the inviolability of the diplomatic bag was a principle which must be applied in good faith and not abused. And since the sending State was required to act in good faith, it must also be recognized that the receiving State was required to act in good faith when it claimed to have serious reason to believe that a diplomatic bag was being misused.

23. He believed that most members of the Commission, concerned about abuses of the diplomatic bag since the adoption of the codification conventions, were in favour of subjecting the diplomatic bag to some form of examination. On the basis of the many suggestions made during the discussion, the Drafting Committee should not have much difficulty in finding an adequate formulation.

24. Mr. QUENTIN-BAXTER said he fully agreed on the need to be very careful in protecting the interests of receiving and transit States as well as the security of the diplomatic bag itself. In general, he associated himself with what seemed to be a remarkably uniform trend in the discussion. He wondered, however, whether the Commission should not again try to assess what particular importance people attached to the use of the bag. The Special Rapporteur had done his best to produce a uniform text, but at the present stage in the debate there were various dichotomies. For instance, the Commission had been reminded of the difference between the treatment of the diplomatic bag under the 1961 Vienna Convention on Diplomatic Relations and of the consular bag under the 1963 Vienna Convention on Consular Relations; it had been suggested that it might be necessary to make that distinction in the draft articles and perhaps to add a general provision that would enable States to declare their preference for the rule laid down in the 1963 Vienna Convention.

25. There was also a general distinction between the bag accompanied by a diplomatic courier and the unaccompanied bag, as well as the distinction to which Mr. Ogiso (1846th meeting), among others, had drawn attention between the use of the bag for its primary purpose of sending communications and what might be, in some circumstances, perfectly useful and mutually agreed uses for other purposes. Medicine was an excellent example, for most States would not object to its being sent through the diplomatic bag. Again, there was the distinction between the receiving State and the transit State, in which connection it had often been mentioned that the receiving State was, after all, also a sending State; diplomatic relations tended to be reciprocal and there were thus certain checks and balances. That did not necessarily apply to a transit State, which was subjected to much the same risks of abuse without having quite the same focus of attention or quite the same measure of control.

26. It seemed to him that, if the Commission was to do justice to all the interests involved, it would probably have to understand a little better exactly what mattered most to different countries. He understood, for example, that there was a very real problem with customary points of trans-shipment. For historical reasons, or because of lines of communication, bags in transit might go to points in a different continent before coming back to an addressee in the same continent; the unaccompanied bag could suffer all kinds of delays and misfortunes during such trans-shipments. It was difficult to know quite how to approach the question. Was it a matter of attempting a solution within the terms of the article? Or was it rather a matter of making some arrangements with Governments, or possibly with non-governmental agencies at important

transfer points, with a view to improving the service? Was the question at issue really a security question of the kind involved in article 36, or was it more the kind of interest in efficiency and security that everybody had when sending a parcel or letter by post? Depending upon what the interests were, the reactions to the need to relax or split up article 36 would be quite different.

27. It also seemed to him that the interests in bags accompanied by a courier were probably slightly different in their general balance from those relating to the unaccompanied bag. The unaccompanied bag, sent by some commercial means or through the post, already had considerable exposure to interference of one kind or another, without any dereliction on the part of the receiving or the transit State, and possibly bags sent in that way would actually be protected by a provision of the kind relating to consular immunities, which drew the receiving State's attention to the proper procedure if it wished to challenge a bag.

28. He did not propose to follow those questions to any definite conclusion, but he did consider that the Commission should endeavour to determine just what were the interests at stake and how they could best be protected, together with the very real interest of the security of the sending State.

29. Mr. MALEK said that the drafting of article 36 called for much reflection and care, since it was perhaps the most important article in the draft. It dealt with the inviolability of the diplomatic bag, which States were trying, sometimes zealously, to protect, while being fully aware—however paradoxical that might seem—that in doing so they were only increasing the danger by giving unlimited encouragement to the hijacking of aircraft, international terrorism, the fomentation of civil war, the shaking of economic and social foundations, attacks on morality and many other such acts.

30. It must not be forgotten, however, that the rule stated in the article was one of the oldest and best known rules, and had been recognized since the division of the world into modern independent States. Thus the article could only be declaratory, since the rule it stated had already been clearly and distinctly established by a large body of uniform practice. It was therefore necessary to inquire why its formulation raised so many difficulties. The apparent answer, which was quite simple, had been stated many times during the discussions. It had been said that it would be neither technically easy nor politically reasonable to draft an article on the inviolability of the diplomatic bag without first knowing what the bag was—without having in advance a precise and generally accepted definition, or at least a description, of that mysterious object which was understood differently by different States.

31. Various ideas had been put forward to fill the gap. One of them was that the diplomatic bag should be defined. In his opinion, that was undoubtedly an excellent idea, but he feared that putting it into practice would require as much time and effort as had been needed to define similar terms covering equally controversial notions. In any case, the question of defining what the diplomatic

bag was, or should be in regard to its content, form, weight, size and other pertinent characteristics, had already been dealt with in draft articles 31 and 32, which had been referred, after laborious discussion, to the Drafting Committee, whose task would no doubt be facilitated by the practical proposals put forward.

32. The other difficulty in drafting article 36 arose from the fact that it was proposed to include unnecessary details. The rule stated in the article was simple and was supported by universal and consistent practice, in spite of the sometimes inevitable irregularities to which it gave rise. Any particulars that it was desired to add to the rule would be useless unless they could be generally agreed on. He believed that article 36 should be strictly confined to stating the rule in question, namely that the diplomatic bag was inviolable. He had serious doubts about the necessity or advisability of including the second part of paragraph 1, especially the clause exempting the bag from any kind of examination by electronic or mechanical devices. He had already expressed his views on that point (1829th meeting) in regard to the similar exemption proposed for the diplomatic courier and would not revert to the matter. He wished to add, however, that it was of little importance that exemption of the diplomatic courier, the diplomatic bag, diplomatic agents or other persons and documents or articles intended for official use from search or examination by electronic or mechanical means had become a generally recognized rule. What was important was to take care not to encourage the strict application of that rule, even in particularly dangerous situations.

33. Since paragraph 2 of article 36 imposed on the receiving State or a transit State the express obligation to take appropriate measures to prevent any infringement of the inviolability of the diplomatic bag, he wondered why that article, rather than article 32, did not impose the same obligation on the sending State in regard to abuses relating to the same rule. From the principle of protection of the status of the diplomatic bag, which was at the root of the whole draft, there followed both the obligation of the sending State to comply with the rules concerning the content of the diplomatic bag and the obligation of the receiving State and the transit State not to infringe the rules on inviolability of the bag. The order of presentation of the articles, or parts of articles, proposed needed revision in the light of the very useful suggestions made on the subject.

34. Mr. MAHIU, confining his remarks to draft article 36, emphasized the equal importance of the two principles to be established in that provision: on the one hand, respect for the secrecy of exchanges and communications between the sending State and its missions, and on the other hand, respect for the security of the receiving State. The receiving State must be permitted to ensure that the diplomatic bag was not used to introduce prohibited imports into its territory, especially those which might impair its security, but at the same time the secrecy of the sending State's communications must be guaranteed. With that object in view, several members of the Commission had made interesting suggestions which merited careful consideration at the next session.

35. In trying to reconcile the two principles involved, it was important to start from the idea that the status of the diplomatic bag was based on the good faith of the sending State and the receiving State. The Commission should be careful not to over-emphasize certain abuses by sending States, however well authenticated they might be, lest they gave rise to other abuses by receiving States when examining the diplomatic bag. At first sight, it seemed useful to make a distinction between the bag carrying official communications of the sending State, which would be inviolable, and the bag used to carry other articles, which might not come under the same régime. But that distinction, suggested by Mr. Ogiso (1846th meeting), would raise the problem of determining the content of the bag and might cause fresh difficulties.

36. Mr. RAZAFINDRALAMBO said that certain points which had emerged from the discussion might lead to a solution. First of all, the situation was no longer the same as it had been when the four codification conventions had been adopted, namely between 1961 and 1975. The abuses to which the absolute inviolability of the diplomatic bag had been subject in recent years must be taken into account. Next, it was still necessary to maintain the balance between the interests of sending States and those of receiving and transit States, at a time when the emergence of numerous States which were geographically remote from each other had accentuated the role of some of them as transit States or receiving States and increased exchanges of diplomatic correspondence. Lastly, for reasons which he had explained earlier (1842nd meeting), certain States could not employ diplomatic couriers and were obliged to send their official correspondence by ordinary means of communication, whence the imperative need to protect the diplomatic bag not accompanied by diplomatic courier.

37. There appeared to be three possibilities. First, the principle of absolute inviolability of the bag, proclaimed in article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations, could be reaffirmed; the bag could then be neither opened nor detained. Secondly, the possibility of detaining and opening the bag, if there were serious reasons for doing so, could be provided for, following the example of article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations. Thirdly, a distinction could be made between official correspondence and articles intended for official use, examination being permitted only for packages containing the latter.

38. In draft article 36, the Special Rapporteur stated the principle of the inviolability of the diplomatic bag, which could be neither opened nor detained unless otherwise agreed between the States concerned. That system, which tempered the absolute nature of inviolability, seemed to be authorized by the Commission's commentary to paragraph 3 of draft article 25, which became paragraph 3 of article 27 of the 1961 Vienna Convention. In that commentary, referred to by the Special Rapporteur (A/CN.4/374 and Add.1-4, paras. 332 and 346), the Commission did not exclude the possibility of opening the diplomatic bag if there were serious reasons for

suspicion. Draft article 36, however, linked the possibility of opening the bag with the existence of an agreement between the States concerned, which had the disadvantage that, in the absence of an agreement, the receiving State or transit State could only return the bag to the sending State. But as Mr. Balanda (1845th meeting) had remarked, an agreement was not always possible; it was also to be feared that the bag, and particularly the unaccompanied bag, might be subjected, without the knowledge of the sending State, to examination by mechanical or electronic means.

39. The system established by article 35, paragraph 3, of the 1963 Vienna Convention, which provided for the possibility of examination if there were serious reasons, might also lead to systematic examination when there were no diplomatic relations between the States concerned or when relations were strained. If the authorities of the sending State opposed the opening of the bag, it was returned to its place of origin. That system had the disadvantage of leaving it to a transit State or the receiving State to judge whether there were serious reasons for opening the bag.

40. The mixed system proposed by Mr. Ogiso (1846th meeting) had the advantage of protecting the secrecy of official correspondence and of subjecting to examination only packages containing articles intended for official use. That system should not encounter serious objections, but it raised the problem of the content of the bag. It might be necessary to place packages of one kind and the other in separate bags. If that system were adopted, it would be necessary to introduce specific provisions into draft articles 32 and 36. Paragraph 1 of article 32 should be subdivided into two subparagraphs dealing, respectively, with official correspondence and with articles intended exclusively for official use. That distinction should also be made in two separate paragraphs of article 36. The principle stated in the present paragraph 1 applied only to official correspondence, whereas a second paragraph, reproducing the wording of article 35, paragraph 3, of the 1963 Vienna Convention, would apply to articles intended exclusively for official use. The present paragraph 2, which related to measures to be taken by the receiving State or the transit State to prevent any infringement of the inviolability of the diplomatic bag, should be retained, since it stated an obligation parallel to that imposed on the sending State by article 32, paragraph 2.

41. The CHAIRMAN, speaking as Special Rapporteur, said that although he would have preferred consideration of the draft articles on first reading to have been completed at the present session, the matter was, of course, entirely in the hands of the Commission. Since it seemed to be the Commission's wish to defer consideration of draft articles 36 to 42 until the following session, he would refrain from summing up the discussion and would confine himself to offering a few clarifications, some of them of a purely factual nature. Before doing so, however, he wished to say how greatly he had appreciated the debate on the question of the inviolability of the diplomatic bag, and how grateful he was for the comments and criticisms made in the course of an exceptionally rich discussion.

42. The central idea of achieving a proper balance between protection of the confidential nature of the diplomatic bag and prevention of abuses, as well as between the interests of the sending State and those of the receiving or transit State, had been in the forefront of his mind throughout the preparation of his five reports on the topic. It had certainly been his intention at every stage to ensure such a balance, but, of course, good intentions might not be enough and he was ready to make further efforts to achieve that aim. As many speakers had rightly pointed out, the main practical problem that arose in connection with all aspects of the draft articles, but most of all in connection with the inviolability of the diplomatic bag, was that of providing safeguards that were both realistic and effective.

43. On the question whether the principle of inviolability of the archives and documents of a diplomatic mission was applicable to the diplomatic bag, he had been guided by the provisions of article 24 and article 27, paragraphs 2, 3 and 4, of the 1961 Vienna Convention on Diplomatic Relations, which, in his view, were inter-related and had to be considered together. The confidential nature of articles intended exclusively for official use, as well as of official correspondence and documents, required special protection. Mr. Lacléta Muñoz had drawn attention to the highly confidential nature of articles such as code books and equipments for coding and decoding procedures which might legitimately be contained in the diplomatic bag.

44. As to the question whether opening the diplomatic bag constituted an infringement of the principle of inviolability, he explained that he had avoided using such adjectives as “absolute” or “complete” to qualify the concept of inviolability, because that concept did not seem to require qualification. The purpose of not permitting the diplomatic bag to be opened was to ensure that its contents were not revealed. Similarly, detention of the diplomatic bag was considered to be an infringement of its inviolability because it presupposed an opportunity to ascertain its contents. No useful purpose would be served by trying to distinguish between the inviolability of the diplomatic bag’s contents and that of the bag itself; indeed, there had been no suggestion that such a distinction should be made.

45. If the content of the bag could be ascertained by the use of electronic or mechanical devices, as seemed to be the case at the highest level of current technological development, the possibility of infringing the inviolability of the diplomatic bag without opening it would somehow have to be faced, whether or not a provision such as article 36, paragraph 1, was included in the draft. On that issue, as on all others, he was, however, prepared to accept the majority view in the Commission.

46. Another point which he wished to bring to the Commission’s attention was the possible adverse effects of returning the diplomatic bag to its place of origin if a request to open it was refused by the sending State. The delays, suspicions and retaliatory measures to which such action might give rise would not be in the interests of either party. Of course, the 1963 Vienna Convention on Consular Relations, ratified by more than 100 States,

contained an explicit provision on procedure for opening the bag, a provision whose existence could not be ignored. On the other hand, the Commission should, he thought, be very careful about applying that provision to the diplomatic bags of permanent diplomatic missions and other missions which were not within the framework of existing conventions. A compromise solution should be sought, bearing in mind all the advantages and disadvantages involved.

47. The Commission should, of course, take account of the concern felt over abuses of the diplomatic bag; but it should also bear in mind that the rule of confidentiality and protection of official correspondence had always been a recognized safeguard for official communications. It was far from his intention to belittle the gravity of the various offences committed by persons protected by their diplomatic status; but it would be a mistake to ascribe all such offences to the shortcomings of the status of the diplomatic bag. Without being over-optimistic, he continued to believe that the Commission would succeed in producing an article on the inviolability of the diplomatic bag which was satisfactory to all its members.

48. Some speakers had questioned the necessity of including articles 38 and 39 in the draft, but both those articles were based on State practice. Similar provisions were to be found among the national laws and regulations of Argentina, Austria, Finland and Mexico, to name only a few countries, as well as in bilateral agreements between France and Mexico, Guatemala and Mexico, Argentina and Brazil, Brazil and Uruguay, and between other countries.

49. The question had been raised in connection with article 39 whether, in addition to the obligation of the receiving or transit State to take appropriate protective measures in circumstances preventing the delivery of the diplomatic bag, a further obligation should not also be placed on the sending State to assist in the delivery of the bag. His own view was that the protective measures proposed in the article were sufficient, but there again it was for the Commission to decide. He was quite willing to consider the suggestion that article 39 should be merged with article 40.

50. With regard to Mr. Ushakov’s comment (1845th meeting) that it would be more in line with other conventions to speak of a “third State” rather than a “transit State” in article 40, he reminded the Commission that after its discussion of article 3, paragraph 1 (5), it had been decided to adopt the term “transit State” as meaning “a State through whose territory a diplomatic courier or a diplomatic bag passes in transit”, whether or not such passage had been foreseen originally.⁶ Thus the concept of a third State was covered by that of the transit State.

51. He had no comments to make on articles 41 and 42 at the present stage, but could assure the Commission that the title “Miscellaneous provisions” given to part IV was purely tentative and could be changed if it was so desired.

⁶ See *Yearbook ... 1983*, vol. II (Part Two), p. 57, commentary to article 3, paras. (14)-(15).

52. Lastly, he understood it to be the majority view that consideration of articles 36 to 42 should be continued at the next session. That being so, he would prepare a further report taking account of the comments and proposals made at the current session and the debate in the Sixth Committee at the next session of the General Assembly.

53. Mr. USHAKOV said it was essential for the Commission to complete the first reading of the draft articles at the current session; otherwise it would not be able to start the second reading until 1986, since the draft had to be sent to Governments for their comments in the meantime. It would be regrettable if the Commission did not manage to complete a set of draft articles during the term of office of its present members.

54. Sir Ian SINCLAIR said he had some sympathy with Mr. Ushakov's view that it was highly desirable for the Commission, if at all possible, to complete the second reading of the draft during its present term of office. However, many members of the Commission had spoken on the articles still outstanding in a very tentative manner and had reserved their positions. In any event, the Drafting Committee was most unlikely to complete its work on the draft articles at the current session, so that in practice matters would not be delayed by deferring consideration of articles 36 to 42 until the next session.

55. Mr. McCAFFREY agreed. Although the Drafting Committee was working very hard on the draft articles and had devoted only one of its meetings so far to another topic, it was unlikely to reach article 36 by the end of the session. Postponing completion of the first reading of the draft articles until the next session would not materially retard the Commission's work.

56. Since a discussion in the Sixth Committee concerning the Commission's debate on draft article 36 would be extremely useful, he wondered what arrangements would be made for appropriate presentation of that debate in the Commission's report to the General Assembly.

57. The CHAIRMAN said that the report on the work of the session would be prepared and submitted to the Commission for approval in the usual way. Concluding the discussion on item 4 of the agenda, he noted that consideration of the item had not been completed at the current session and that consideration of articles 36 to 42 on first reading would be resumed at the next session.

The meeting rose at 6.05 p.m.

1848th MEETING

Tuesday, 26 June 1984, at 10 a.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. Lacleta 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. Sucharitkul, Mr. Ushakov.

International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/373, ¹ A/CN.4/378, ² A/CN.4/383 and Add.1, ³ A/CN.4/L.369, sect. H, ILC (XXXVI)/Conf. Room Doc.6, ST/LEG/15)

[Agenda item 7]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR

FIFTH REPORT OF THE SPECIAL RAPPORTEUR *and*
ARTICLES 1 TO 5

1. Mr. QUENTIN-BAXTER (Special Rapporteur), introducing his fifth report on the topic (A/CN.4/383 and Add.1), said that he was very much aware of the large volume of work still to be done in the remaining four weeks of the session and therefore proposed to confine his presentation of the topic to reasonable limits. He also fully recognized that the topic overlapped to some extent with that of the law of the non-navigational uses of international watercourses. Both topics were essentially concerned with reconciling the rights of one State with those of another State. In a world that was becoming progressively smaller and more crowded, the need to evolve more subtle methods of regulating problems which involved a State's freedom of action, as well as its right to be free from the harmful effects of action by other States, was assuming increasing importance.

2. Before introducing his fifth report, he drew attention to the survey of State practice relevant to the topic which had been prepared by the Secretariat (ST/LEG/15). That document was now available only in English, but it would be translated for publication, possibly in the *Yearbook* of the Commission. However, the Legal Counsel had indicated in the Enlarged Bureau and in the Planning Group that, if the Commission so wished, arrangements for the translation of the survey could be made immediately. In his view, the Commission should avail itself of that offer, so that, if the treatment of the topic were to run its allotted course, all the relevant materials might be available to all members. He also drew attention to the document containing replies received from a number of international organizations in response to the questionnaire he had prepared with the assistance of the Secretariat (A/CN.4/378), which provided valuable information on the role of international organizations in the field under consideration.

3. The following five draft articles, submitted in his fifth report, corresponded to section 1 of the schematic outline annexed to the fourth report (A/CN.4/373) and modified in accordance with paragraph 63 of that report.

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

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

³ *Idem.*