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Summary record of the 1948th 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:-
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the comments made by the Special Rapporteur and then propose to the Commission the necessary deletions or amendments.

*It was so agreed.*¹⁹

The meeting rose at 11.35 a.m.

¹⁹ For consideration of draft articles 2, 3, 4 and 5 proposed by the Drafting Committee, see 1968th meeting, paras. 5-48.

1948th MEETING

Tuesday, 20 May 1986, at 10.05 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Illueca, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/390,¹ A/CN.4/400,² A/CN.4/L.398, sect. D, ILC (XXXVIII)/Conf.Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR³

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR
ARTICLES 36, 37, 39 AND 41 TO 43

1. The CHAIRMAN invited the Special Rapporteur to introduce draft articles 36, 37, 39 and 41 to 43 as revised by him in his seventh report (A/CN.4/400). The articles read:

¹ Reproduced in *Yearbook ... 1985*, vol. II (Part One).

² Reproduced in *Yearbook ... 1986*, vol. II (Part One).

³ The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

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

Article 8 (revised) and articles 9 to 17, 19 and 20, and commentaries thereto, provisionally adopted by the Commission at its thirty-sixth session: *Yearbook ... 1984*, vol. II (Part Two), pp. 45 *et seq.*;

Article 12 (new commentary to paragraph 2) and articles 18 and 21 to 27, and commentaries thereto, provisionally adopted by the Commission at its thirty-seventh session: *Yearbook ... 1985*, vol. II (Part Two), pp. 39 *et seq.*;

Articles 36, 37 and 39 to 43, referred to the Drafting Committee by the Commission at its thirty-seventh session: *ibid.*, pp. 30 *et seq.*, footnotes 123, 128, 130, 131, 133, 135 and 138.

Article 36. Inviolability of the diplomatic bag

1. The diplomatic bag shall be inviolable wherever it may be; it shall not be opened or detained and shall be exempt from examination directly or through electronic or other mechanical devices.

2. Nevertheless, if the competent authorities of the receiving State or the transit State have serious reason to believe that the bag contains something other than official correspondence, documents or articles intended for official use, referred to in article 25, they may request that the bag be returned to its place of origin.

Article 37. Exemption from customs duties, dues and taxes

The receiving State or, as appropriate, the transit State shall, in accordance with such laws and regulations as it may adopt, permit the free entry, transit or exit of the diplomatic bag and shall exempt it from customs duties and all national, regional or municipal dues and taxes and other related charges, other than charges for storage, cartage and other specific services rendered.

Article 39. Protective measures in case of force majeure

1. The receiving State or the transit State shall take the appropriate measures to ensure the integrity and safety of the diplomatic bag and shall immediately notify the sending State in cases of illness, accident or other events preventing the diplomatic courier from delivering the diplomatic bag to its destination, or in circumstances preventing the captain of a ship or aircraft from delivering the diplomatic bag to an authorized member of the diplomatic mission of the sending State.

2. If, as a consequence of *force majeure*, the diplomatic courier or the diplomatic bag is compelled to pass through the territory of a State which was not initially foreseen as a transit State, that State shall accord to the diplomatic courier and the diplomatic bag inviolability and protection and shall extend to the diplomatic courier and the diplomatic bag the necessary facilities to continue their journey to their destination or to return to the sending State.

Article 41. Non-recognition of States or Governments or absence of diplomatic or consular relations

1. The facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag under these articles shall not be affected either by the non-recognition of the sending State or of its Government by the host State or the transit State or by the non-existence of diplomatic or consular relations between them.

2. The granting of facilities, privileges and immunities to the diplomatic courier and the diplomatic bag, under these articles, by the host State or the transit State shall not by itself imply recognition by the sending State of the host State or the transit State, or of their Governments, nor shall it imply recognition by the host State or the transit State of the sending State or of its Government.

Article 42. Relation of the present articles to other conventions and international agreements

1. The present articles shall complement the provisions on the courier and the bag in the Vienna Convention on Diplomatic Relations of 18 April 1961, the Vienna Convention on Consular Relations of 24 April 1963, the Convention on Special Missions of 8 December 1969 and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975.

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

3. Nothing in the present articles shall preclude States from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and from modifying the provisions thereof, provided that such modifications are in conformity with article 6 of the present articles.

Article 43. Optional declaration of exceptions to applicability in regard to designated types of couriers and bags

1. A State may, when signing, ratifying or acceding to the present articles, or at any time thereafter, designate by written declaration those types of couriers and bags to which it wishes the provisions to apply.

2. A State which has made a declaration under paragraph 1 of this article may at any time withdraw it; the withdrawal must be in writing.

3. A State which has made a declaration under paragraph 1 of this article shall not be entitled to invoke the provisions relating to any of the excepted types of couriers and bags as against another State Party which has accepted the applicability of those provisions.

2. Mr. YANKOV (Special Rapporteur) said that the main purpose of his seventh report (A/CN.4/400) was to set out the present status of the draft articles on the topic and to facilitate completion of the first reading of the whole of the draft at the present session.

3. The entire set of 43 draft articles had been considered by the Commission, and articles 1 to 27 had already been adopted on first reading. The remaining seven articles, namely articles 36, 37 and 39 to 43, although referred to the Drafting Committee, had not yet been considered by the Committee and he had thought it useful to make some changes in the light of the Commission's own discussion and of the comments and suggestions made in the Sixth Committee of the General Assembly. He was therefore introducing six revised articles in order to provide the Commission with an opportunity to improve on the texts it had already considered. The seventh report provided a brief analytical survey of the comments made by representatives in the Sixth Committee on the articles in question.

4. With regard to articles 1 to 27, adopted on first reading, only one point had given rise to certain objections. It related to the scope of the draft, and more particularly the unresolved question whether, under article 2, the draft should apply to couriers and bags employed for the official communications of international organizations and recognized national liberation movements. On first reading, the Commission had decided to retain the present formulation for article 2, without prejudice to its final decision on the applicability of the draft articles to such bodies.

5. Draft article 36 had given rise to considerable discussion in the Sixth Committee (see A/CN.4/L.398, paras. 317-336), with some representatives endorsing the article and others expressing reservations. The discussion had centred largely on the principle, embodied in paragraph 1, of complete inviolability and exemption from examination through electronic or other devices. With regard to paragraph 2, the discussion had focused on whether a suspect bag should simply be returned to its place of origin or whether the procedure specified in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations should apply.

6. The revised draft article 36 which he had now submitted was a compromise formula which set forth in paragraph 1 the well-established principle of complete inviolability of the diplomatic bag, but allowed some flexibility in respect of application. In that regard, he had taken into account the views expressed both in the

Commission and in the Sixth Committee and the proposed text specified that the competent authorities of the receiving State or the transit State could request that a suspect bag be returned to its place of origin. The stipulation that the bag should not be opened or detained was in keeping with article 27 of the 1961 Vienna Convention on Diplomatic Relations, article 28 of the 1969 Convention on Special Missions and article 27 of the 1975 Vienna Convention on the Representation of States.

7. On the other hand, he had not deemed it advisable to introduce the procedure under article 35, paragraph 3, of the 1963 Vienna Convention, whereby it was possible to request that a suspect bag be opened in the presence of an authorized representative of the sending State. No provision of that kind existed in the three other diplomatic conventions. Moreover, an examination of existing bilateral consular conventions showed that some 50 of them deviated expressly from the terms of article 35, paragraph 3, of the 1963 Vienna Convention and provided simply for the return of a suspect bag to its place of origin. It was worth stressing that that practice had been well established in bilateral consular conventions well before 1963.

8. As to the actual wording of draft article 36, he had accepted a number of suggestions for simplifying it by deleting certain expressions which had been criticized as too categorical. The words "at all times" in paragraph 1 had thus been deleted, as had the words "any kind of" before "examination". The only change in paragraph 2 was that the reference to article 32 had been replaced by a reference to article 25, which was the new number of the article in question.

9. The main objection to the earlier version of draft article 37 in the Commission and in the Sixth Committee had taken the form of a proposal that it should be confined to fiscal matters, namely exemption from customs duties, dues and taxes; the question of customs inspection would thus fall under the provisions of article 36. The drafting had been improved by inserting the word "free" before "entry".

10. Revised draft article 39 combined the substance of former draft article 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag) and former draft article 40 (Obligations of the transit State in case of *force majeure* or fortuitous event), in response to suggestions in the Commission and the Sixth Committee. The reformulation largely involved problems of drafting. The reference to a "fortuitous event" had been deleted and was covered by the general concept of *force majeure*. Also, a specific reference had been inserted in paragraph 1 to "illness, accident or other events".

11. In the case of draft article 41, he had eliminated the expression "receiving State" from paragraph 1 in the passage "non-recognition of the sending State or of its Government by the receiving State, the host State or the transit State". It had been pointed out that, where the two States concerned did not have diplomatic relations, it would be inappropriate to speak of a "receiving State". Of course, he had originally used the term "receiving State" on the basis of the definition con-

tained in paragraph 1 (4) of article 3 of the draft. The need for legal protection of the diplomatic courier and the diplomatic bag in the exceptional circumstances of non-recognition of States or Governments or the absence of diplomatic or consular relations was obvious, especially in the case of official communications with delegations to international conferences, special missions or permanent missions to international organizations.

12. With regard to draft article 42, there had been general recognition of the importance of including a provision on the relationship between the draft articles and the four conventions codifying diplomatic and consular law.⁴ The case could be considered as one of "application of successive treaties relating to the same subject-matter" under article 30 of the 1969 Vienna Convention on the Law of Treaties. Paragraph 1 of draft article 42 reflected the idea that the draft must be considered as *lex specialis* to supplement the existing conventions in matters pertaining to the status of the diplomatic courier and the diplomatic bag, and paragraph 2 introduced an element of flexibility by preserving the full effect of other international agreements in force. Paragraph 3 made provision for the possibility of concluding future international agreements on the status of the courier and the bag or modifying that status, subject to the proviso that any modifications were "in conformity with article 6 of the present articles". Article 6 dealt with non-discrimination and reciprocity. Hence the modification must not be "incompatible with the object and purpose of the present articles" and must "not affect the enjoyment of the rights or the performance of the obligations of third States", as explicitly stated in paragraph 2 (b) of article 6.

13. As to draft article 43, it should be noted that flexibility in the application of the provisions on various types of couriers and bags resulted in a plurality of régimes which reflected the existing legal situation in the light of the four codification conventions. There had been 146 ratifications of the 1961 Vienna Convention on Diplomatic Relations, whereas the 1963 Vienna Convention on Consular Relations had only some 100 States parties. The 1969 Convention on Special Missions had only just entered into force after having obtained the requisite number of ratifications, and the most recent diplomatic convention, namely the 1975 Vienna Convention on the Representation of States, was not yet in force. The status of the diplomatic courier did not differ materially under the four conventions, but in the case of the diplomatic bag two régimes were applicable: on the one hand, the régime of the 1961 Vienna Convention, the 1969 Convention on Special Missions and the 1975 Vienna Convention, and, on the other hand, the régime of the 1963 Vienna Convention.

14. Accordingly, the purpose of draft article 43 was to reflect the existing legal situation and, at the same time,

⁴ 1961 Vienna Convention on Diplomatic Relations, 1963 Vienna Convention on Consular Relations, 1969 Convention on Special Missions and 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (referred to as "1975 Vienna Convention on the Representation of States").

to provide certain options in connection with the application of the draft articles. The option chosen by a State would, of course, be determined by the fact that it was a party to one or other of the relevant conventions. Naturally, the wording of article 43 took account of the comments made during the discussions in the Commission and the Sixth Committee. At the Commission's previous session, Sir Ian Sinclair had made a proposal to deal with draft article 43 by inserting two new paragraphs in draft article 36.⁵ That proposal had attracted some support in the Commission but he would prefer to keep the two issues separate, so that article 36 covered the question of inviolability and article 43 related to the optional declaration of exceptions to applicability in regard to designated types of couriers and bags.

15. Lastly, some general remarks were called for. The first related to the question of headings. In his earlier reports he had proposed that the draft articles should be divided into four parts: part I (General provisions), comprising articles 1 to 6; part II (Status of the diplomatic courier, the diplomatic courier *ad hoc* and the captain of a commercial aircraft or the master of a ship carrying a diplomatic bag), comprising articles 7 to 23; part III (Status of the diplomatic bag—including the diplomatic bag not accompanied by diplomatic courier), comprising articles 24 to 30; and part IV (Miscellaneous provisions—including obligations of the transit State and third States in cases of *force majeure*, facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag in cases of non-recognition of the sending State by the host State or a transit State or non-existence of diplomatic or consular relations between them, provisions on the relationship between the present articles and other conventions and international agreements, and some other provisions relating to final clauses), comprising articles 31 to 43. Of course, those headings had no legal significance and were merely intended to facilitate the reading of the draft. The Drafting Committee, at an early stage of its work on the draft articles, had decided that the question of headings should be left aside until completion of the first reading.

16. As pointed out in his seventh report (A/CN.4/400, para. 4), he had not thought it appropriate at the present stage to submit any proposals for articles on final clauses and on the settlement of disputes, since any proposals would largely depend upon the final form to be given to the draft, namely that of an independent convention or of an instrument to be attached to the existing conventions as a protocol or other subordinate instrument.

17. He expressed the hope that it would be possible to complete the first reading of all the draft articles at the present session and thanked the Secretariat for its valuable assistance in his work.

18. Mr. RIPHAGEN pointed out that, in view of the deletion from paragraph 1 of draft article 41 of the reference to the "receiving State", it would be useful to insert a definition of "host State" in article 3.

⁵ See *Yearbook ... 1985*, vol. I, p. 179, 1906th meeting, para. 7.

19. In regard to draft article 42, he failed to see how the proviso in paragraph 3 could apply. He could not imagine a situation in which the type of modification envisaged could possibly conflict with the object and purpose of the future convention, or again how it could affect the enjoyment of the rights or the performance of the obligations of third States as stipulated in paragraph 2 (b) of article 6, to which paragraph 3 of article 42 referred.

20. Mr. USHAKOV said that article 36 was perhaps the key provision of the entire draft submitted by the Special Rapporteur. The first clause of paragraph 1 did not give rise to any problems, since it reproduced a provision that appeared in international conventions and bilateral agreements and reflected established practice. The same was true of the principle that the diplomatic bag must be neither opened nor detained, a principle that was well established in international law, leaving aside the 1963 Vienna Convention on Consular Relations. It was quite clear that the word "directly" referred to the idea of the opening of the bag, while the words "through electronic or other mechanical devices" applied to exemption of the bag from examination. Those words, which were, in his opinion, essential, introduced a new element in international law and should apply only to the previous phrase, namely "shall be exempt from examination". It was obvious that, in order to avoid any escalation of measures and counter-measures by receiving States and sending States using the latest electronic technology, the bag had to be absolutely inviolable.

21. Paragraph 2 of article 36 gave rise to problems because it bore no relation to paragraph 1, stating as it did that the bag had to be returned to its place of origin "if the competent authorities of the receiving State or the transit State have serious reason to believe ...". Paragraph 3 of article 35 (Freedom of communication) of the 1963 Vienna Convention stated:

3. The consular bag shall be neither opened nor detained. Nevertheless, if the competent authorities of the receiving State have serious reason to believe that the bag contains something other than the correspondence, documents or articles referred to in paragraph 4 of this article, they may request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.

Why had the Special Rapporteur not provided, in draft article 36, paragraph 2, that the bag could be opened in the presence of an authorized representative of the sending State? Return of the diplomatic bag should be envisaged only in cases where the sending State refused a request for the bag to be opened.

22. Again, he wondered why the Special Rapporteur had included a reference to the transit State in paragraph 2, something that went far beyond the terms in the 1963 Vienna Convention. It was all the more unnecessary in that the transit State's sole concern should be to ensure that the contents of the bag did not remain in its territory and that its own postal service or transport companies should be responsible for carrying the bag through its territory. In its present form, paragraph 2 was unprecedented and was not based on any firm foundations.

23. The new paragraph 3 proposed for draft article 36 by Sir Ian Sinclair at the previous session⁶ was superfluous, for, as the Commission had already decided, any State might restrict the scope of the articles and declare that they would not apply to the consular bag, for example (in such a case, the 1963 Vienna Convention would be applicable).

The meeting rose at 11.25 a.m.

⁶ See footnote 5 above.

1949th MEETING

Wednesday, 21 May 1986, at 10.05 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Illueca, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (continued)
(A/CN.4/390,¹ A/CN.4/400,² A/CN.4/L.398, sect. D, ILC(XXXVIII)/Conf.Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR³ (continued)

ARTICLE 36 (Inviolability of the diplomatic bag)

ARTICLE 37 (Exemption from customs duties, dues and taxes)

ARTICLE 39 (Protective measures in case of *force majeure*)

ARTICLE 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations)

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Article 12 (new commentary to paragraph 2) and articles 18 and 21 to 27, and commentaries thereto, provisionally adopted by the Commission at its thirty-seventh session: *Yearbook ... 1985*, vol. II (Part Two), pp. 39 *et seq.*;

Articles 36, 37 and 39 to 43, referred to the Drafting Committee by the Commission at its thirty-seventh session: *ibid.*, pp. 30 *et seq.*, footnotes 123, 128, 130, 131, 133, 135 and 138.