

Document:-
A/CN.4/SR.1949

Summary record of the 1949th 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:-
1986, vol. I

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

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)

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 42 (Relation of the present articles to other conventions and international agreements) *and*

ARTICLE 43 (Optional declaration of exceptions to applicability in regard to designated types of couriers and bags)⁴ (*continued*)

1. Mr. FLITAN said that he approved of the substance of draft article 36, paragraph 1. In stating the essential principle of the inviolability of the diplomatic bag, that paragraph reproduced and satisfactorily developed the provisions relating to the diplomatic courier that had already been codified. In particular, he supported the change introduced by the Special Rapporteur into the first clause of the paragraph, which now provided that the diplomatic bag was inviolable "wherever it may be".

2. It was also useful to specify, as the Special Rapporteur had done in the last part of paragraph 1, that the bag was exempt from examination "directly or through electronic or other mechanical devices". For it was obvious that, given the rate of technical progress, the confidential nature of the contents of the bag might be violated by electronic or mechanical means. Moreover, if that kind of examination were permitted, the developing countries, which were less well equipped than the developed countries, would be at a disadvantage. With regard to the drafting, in order to remove all ambiguity, the word "indirectly" might be inserted after the word "directly".

3. By providing in paragraph 2 of article 36 that the authorities of the receiving State or the transit State—which were not mentioned either in the 1961 Vienna Convention on Diplomatic Relations or in the 1963 Vienna Convention on Consular Relations—might request that the diplomatic bag be returned to its place of origin, the Special Rapporteur was proposing to apply to the bag a new régime different from those provided for in the four codification conventions. But as the majority of the members of the Commission had recognized, the object of the draft articles under consideration was to supplement the relevant provisions of those conventions, not to change the status of the diplomatic bag established by those provisions, either by strengthening or by relaxing the principle of inviolability of the bag. Paragraph 2 of draft article 36, which departed from the relevant provisions of the four codification conventions, was, moreover, incompatible with paragraph 2 of draft article 42, which provided that "the provisions of the present articles are without prejudice to other international agreements in force as between States parties to them".

4. The same applied to draft article 43, which also purported to establish a régime different from those provided for in the codification conventions. For any State party to the 1961 Vienna Convention and to the 1963 Vienna Convention that made a declaration under article 43, as proposed, for the purpose of applying to the diplomatic bag the régime applicable to the consular bag would be contravening the provisions of the 1961 Vienna Convention. In addition, the plurality of régimes would be a source of complications and confusion in practice.

5. Being opposed to any provision that would impair the principle of the inviolability of the diplomatic bag, he could not accept either paragraph 2 of draft article 36, which would allow the receiving State or the transit State to return the diplomatic bag to its place of origin, or draft article 43, by virtue of which a State could unilaterally decide to apply to the diplomatic bag the régime applicable to the consular bag, which would be contrary not only to the 1961 Vienna Convention, but also to customary international law.

6. In draft article 37, the last phrase "other than charges for storage, cartage and other specific services rendered" was not entirely satisfactory. The word *camionnage* ("cartage") in the French text was too restrictive, for the diplomatic bag need not necessarily be carried by lorry (*camion*); other means of transport could be used. Furthermore, the phrase "other specific services rendered" was too imprecise. It would therefore be preferable to use the wording of article 35, paragraph 1, of the 1969 Convention on Special Missions: "other than charges for storage, cartage [*transport*] and similar services".

7. The term "host State" used in draft article 41 should be defined in article 3.

8. Mr. MALEK drew attention to the provision in paragraph 1 of draft article 36 that the diplomatic bag was exempt from examination by electronic or mechanical devices. As he had already had occasion to say in regard to article 19,⁵ under which the diplomatic courier was exempt from personal examination by those means, such exemption should not be permitted, even for a diplomatic agent. Since electronic and mechanical devices were proving quite effective in preventing acts of sabotage against civil aircraft, examination of the diplomatic bag and personal examination of the courier by such means should be permitted. It was, indeed, to be feared that exemption of the diplomatic bag from examination of that kind might lead to abuses.

9. He did not see why draft article 42 was necessary, but had no objection to it being retained if the Special Rapporteur considered that it was justified.

10. Since the whole of the draft was about to be adopted on first reading, he wished to pay tribute to the Special Rapporteur, who, by his deep knowledge of the subject, his skill, his patience, his industry and, above all, his political sense and ability to reconcile divergent views, had enabled the Commission to elaborate a document regrouping and supplementing the provisions on the status of the diplomatic courier and the diplomatic bag hitherto dispersed in the relevant codification conventions.

11. Sir Ian SINCLAIR said that, in draft article 36, the main aim was to produce uniform rules governing all types of courier and all types of bag. Unfortunately, the existing codification conventions offered only one solution for the treatment of a diplomatic bag, providing simply that it should not be opened or detained. Article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations, however, provided a more flexi-

⁴ For the texts, see 1948th meeting, para. 1.

⁵ Originally draft article 24; see *Yearbook ... 1984*, vol. I, pp. 85-86, 1829th meeting, para. 14.

ble solution, since it permitted a receiving State that had serious grounds for believing that the bag contained prohibited articles to request that it be opened in the presence of a representative of the sending State and, if that request were refused, to require that the bag be returned to its place of origin. In his view, that provision was not a modification of the rule laid down in the other conventions, but a supplement which related to the consular bag alone.

12. If a uniform rule was to be established, it was almost inevitable that one or other of the four codification conventions would have to be supplemented. The text submitted by the Special Rapporteur departed slightly in a number of respects from the wording of some of those conventions. For example, paragraph 1 of draft article 36, which imposed an absolute prohibition on the examination of the bag by electronic or mechanical means, took a position on a highly controversial and delicate issue that was not specifically covered by any of the existing conventions. In principle, the United Kingdom Government did not believe that examination of the diplomatic bag by electronic or mechanical means was likely in all cases to reveal that the bag contained, or might contain, prohibited articles. On the other hand, it wished to reserve the right to subject the bag to such forms of screening in exceptional circumstances if its authorities did have good reason to suspect that the bag contained prohibited articles.

13. He therefore considered that, if paragraph 1 was to lay down a uniform rule, that rule should be limited to the proposition that the diplomatic bag should not be opened or detained. Admittedly, that would leave unsettled the question whether examination by electronic or mechanical devices was permissible, but State practice had not shown sufficient elements of consensus to justify laying down a rule that would prohibit absolutely the use of such devices in all circumstances, particularly when the receiving State had serious grounds for suspecting that the bag contained prohibited articles.

14. He maintained his objection to the words “directly or” in paragraph 1 of article 36: surely the receiving State or transit State was entitled to satisfy itself by external examination that what it was confronted with was a diplomatic bag and not something else. For those reasons, he proposed that paragraph 1 should end with the words “opened or detained”. He would not object to retention of the reference to inviolability of the bag if that were the wish of the majority.

15. Something along the lines of paragraph 2 of article 36 was essential, in his view, to balance the rights of the sending State and those of the receiving State, particularly in the light of recent flagrant abuses of privileges accorded the diplomatic bag. He noted that, although a number of representatives in the Sixth Committee of the General Assembly had supported the revised draft article 36 which he had proposed at the previous session⁶ and which the Special Rapporteur mentioned in his seventh report (A/CN.4/400, para. 36), the majority had been concerned that it might lead to a variety of differing régimes or different types of bag, which it would be difficult for customs officers

to deal with. So he would not insist on his proposal, although he continued to believe that it had considerable merits. If it were not adopted, an effort should be made, in keeping with the wishes of the majority in the Sixth Committee, to lay down a uniform rule which should preserve a correct balance between the rights of the sending State and the right of the receiving State to protect its own security against abuses of privileges accorded the bag.

16. He was prepared to accept paragraph 2 as a basis for consideration by the Drafting Committee. One question that required attention was whether the transit State—as well as the receiving State—had the right to request that the bag be returned to its place of origin. His own feeling was that such a right should perhaps be confined to the receiving State, since if the transit State had serious grounds for suspecting that the bag contained prohibited articles it would no doubt warn the receiving State. According to the present text, however, if such suspicions existed they could not be verified by the use of electronic or mechanical devices, which might well show that, despite the suspicions, the bag did not contain prohibited articles. Thus paragraph 2 could operate in such a way that bags would be returned to their place of origin more often than might otherwise be the case. That was another reason for deleting from paragraph 1 the absolute prohibition on the use of electronic or mechanical devices.

17. Another solution would be to provide in paragraph 2 for an intermediate step, whereby the authorities of the receiving State could request that the bag be opened in the presence of a representative of the sending State and could require that it be returned to its place of origin only if that request were refused. In his view, paragraph 2 as drafted did not involve a derogation from the existing conventions, which simply stated the general principle that the diplomatic bag must not be opened or detained. That was not a rule of *ius cogens*, since clearly a State could consent to one of its bags being opened in the presence of its representative if it so wished.

18. He was grateful to the Special Rapporteur for deleting the reference in draft article 41 to non-recognition of the sending State or of its Government by the receiving State, but wondered whether the article was necessary at all. It added nothing to the relevant provisions of the codification conventions so far as the obligations of host States in such circumstances were concerned and could cause confusion. His own preference, therefore, would be to delete article 41 and rely on the provisions of the existing codification conventions.

19. Paragraph 3 of draft article 42 could be deleted, since it was already covered by article 6, paragraph 2 (b).

20. He continued to believe that a provision along the lines of draft article 43 was essential, if only because of the enormous differences between the various types of courier and bag and the number of ratifications by States of the various codification conventions. Admittedly, the result might be a certain plurality of régimes,

⁶ See 1948th meeting, footnote 5.

but that was the price that might have to be paid to get the draft articles off the ground.

21. Mr. SUCHARITKUL said that he particularly welcomed the deletion from draft article 36 of the words "at all times", because the notion of inviolability as applied to the diplomatic bag was more relative than absolute, just as the inviolability of diplomatic and consular premises was not absolute. If an embassy caught fire, the local fire brigade could not be prevented from entering it; and if the local authorities requested permission to send in a team of experts to investigate a bomb threat to an embassy, it would be hard to do anything but consent. Inviolability, therefore, was necessarily qualified by consent and there was no question of a rule of *jus cogens*.

22. A number of points of detail had to be considered, however. It was necessary to establish that a bag was really a diplomatic bag, since such a bag could take a variety of forms, ranging from a pouch to a container and even a ship or train. It was also necessary to determine exactly what was meant by the words "opened" and "examination". The purpose of protecting communications between diplomatic and consular posts was not merely to facilitate the free flow of information but, above all, to ensure its confidentiality. On that basis, he had no objection to the use of the word "inviolability", provided that it was qualified by reference to functional necessity and the contents of the bag. It would be no violation of a diplomatic bag to subject it to examination by a mechanical device for the purpose of detecting explosives. In that connection, he fully agreed that it was necessary to specify in more detail the types of examination involved.

23. Paragraph 2 of draft article 36 was a step in the right direction. It might be possible to borrow from more up-to-date rules and full use should be made of the possibility of securing consent to open the bag whenever there were reasonable and serious grounds for believing that it contained something other than official correspondence or documents, or articles intended for official use. The sending State should be free to give or withhold its consent, in accordance with the need to respect freedom of communication and to ensure confidentiality.

24. In draft article 39, it would suffice to provide for reasonable and appropriate rather than absolute measures. He invited the Special Rapporteur to reconsider the need for draft article 41.

25. Draft article 42 and draft article 43, which was essential, could be examined by the Drafting Committee in due course.

26. Mr. LACLETA MUÑOZ, referring to draft article 36, said that the principle of inviolability must be correctly interpreted. The provision in article 29 of the 1961 Vienna Convention on Diplomatic Relations that "The person of a diplomatic agent shall be inviolable" did not mean that the receiving State must remain passive whatever happened and, for example, allow the diplomatic agent to commit an offence in the presence of a representative of the authorities. In other words, in the case of a diplomatic agent, as in that of a diplomatic bag, the principle of inviolability had certain limits,

especially as, under the terms of article 25 of the draft, the diplomatic bag might contain, besides official correspondence and documents, "articles intended exclusively for official use". That meant not only the articles referred to in article 36, paragraph 1 (a), of the 1961 Vienna Convention, but all kinds of articles for official use. That was an extremely important change, for the diplomatic bag would henceforth be not only a means of communication, but also a means of transport and could take the form of an enormous container, a lorry, etc. Hence, while respecting the principle of the inviolability of the diplomatic bag, it was important to ensure that a privileged means of transport could not be improperly used.

27. Although he was not in favour of providing expressly for the possibility of examining the diplomatic bag by electronic or mechanical means, since he believed that the use of such means might violate the confidential nature of the contents of the bag, he was firmly convinced of the need to include in the draft a provision such as paragraph 2 of draft article 36. It might be expressly provided in that paragraph that, in the event of serious suspicion, the receiving State could ask for the diplomatic bag to be opened or examined under a procedure agreed upon with the sending State, or even ask that it be returned to its place of origin. Such a provision would not be contrary to article 27, paragraph 3, of the 1961 Vienna Convention, which simply stated: "The diplomatic bag shall not be opened or detained." For it would stipulate not that the receiving State could open the diplomatic bag, but merely that it could request the sending State to have the bag opened. If the sending State refused to grant that request, the receiving State could always request that the diplomatic bag be returned to its place of origin. Yet paragraph 2 of draft article 36 said nothing about the consequences of a refusal by the sending State to return the diplomatic bag to its place of origin. That was a gap which the Special Rapporteur should try to fill.

28. Draft article 37 raised no problems and called for no particular comments except that the word "free" before the word "entry" was perhaps unnecessary.

29. Draft article 39 was acceptable. There might be some doubt, however, about what was meant by the words "to ensure the integrity and safety of the diplomatic bag". What had to be ensured was, in fact, its inviolability.

30. The term "host State" used in draft article 41 should be defined in article 3. It would be sufficient to specify that the definition adopted applied to the term "host State" as used in article 41. It would be impossible to delete that article, which reproduced universally accepted rules of customary international law.

31. He had no objection to draft article 42, although paragraph 3 did not seem absolutely necessary. The only problems raised by draft article 43 related to the wording and would therefore be dealt with in the Drafting Committee.

32. Mr. OGISO commended the Special Rapporteur for his efforts to find compromise solutions in view of the division of opinion on a number of articles, especially draft article 36.

33. The wording now proposed for paragraph 1 of draft article 36 differed in a number of ways from the original text: the words “unless otherwise agreed”, at the beginning of the second phrase, and the words “any kind of”, before the word “examination”, had been deleted. As had been suggested, the last phrase of paragraph 1, “and shall be exempt from examination directly or through electronic or other mechanical devices”, could be deleted. The paragraph would thus end with the words “it shall not be opened or detained”. Should agreement not be reached on that shortened formulation, he would suggest the following rewording:

“1. The diplomatic bag shall be inviolable wherever it may be; it shall not be opened or detained and, unless otherwise agreed, shall be exempt from examination through electronic or other mechanical devices.”

He had thus introduced two changes into the paragraph. The first was the proviso “unless otherwise agreed”, which covered not only general agreements, but also *ad hoc* agreements, and made it clear that the consent of the sending State was required for examination. The second change was the deletion of the words “directly or” before the words “through electronic or other mechanical devices”, which did not involve any change of substance.

34. With regard to paragraph 2, he agreed with those members who found its provisions much too drastic. Provision should be made for some kind of intermediate step, and he supported Sir Ian Sinclair’s proposal that the competent authorities of the receiving State should be able to request that the bag be opened in the presence of a representative of the sending State. But if that proposal was not acceptable to members who were opposed to the application of the consular régime to all diplomatic bags, he would suggest that the proposed intermediate step should take the form of examination by means of electronic or mechanical devices with the consent of the sending State. If the sending State refused that examination, the receiving State or the transit State could then request that the bag be returned to its place of origin. He hoped that that formula would make it possible to reach a compromise on paragraph 2.

35. He found some discrepancy between the statement in paragraph 1 that the diplomatic bag “shall not be opened or detained” and the weaker wording in paragraph 2 to the effect that the competent authorities of the receiving State or the transit State “may request” that the bag be returned to its place of origin, although he appreciated that the Special Rapporteur had adopted that language in an effort to reconcile the conflicting preferences based on article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations and on article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations. His own suggestion would be to adopt stronger language in paragraph 2, stating, as in the 1963 Vienna Convention, that “the bag shall be returned to its place of origin”. If the Special Rapporteur was unable to accept that proposal, he urged him to include in the commentary to article 36 a statement to the effect that, in the circumstances envisaged

in paragraph 2, the sending State would have to have the bag sent back.

36. In regard to draft article 41 and the deletion from both paragraphs of the reference to the receiving State, he agreed with Mr. Riphagen (1948th meeting) that much would depend on the definition of the term “host State”. There were situations in which a reference to the receiving State was still desirable. For example, two States which had no diplomatic relations might wish to establish such relations and, to that end, one of them might send a special mission to the other, which would then be a receiving State. The special mission would wish to make use of a diplomatic courier and diplomatic bag and the appropriate facilities, privileges and immunities would be required in that receiving State, which would not be a host State in the ordinary sense of the term. He therefore suggested that references to both the receiving State and the host State should be included.

37. On article 43 he had only drafting comments. Since the optional declaration to which that article referred related to exceptions, he suggested that, in paragraph 1, the concluding words “to which it wishes the provisions to apply” should be replaced by “to which it does not wish the provisions to apply”. A negative formula of that kind was used in article 298 of the 1982 United Nations Convention on the Law of the Sea, which the Special Rapporteur had referred to in his sixth report (A/CN.4/390, para. 62) as a model for draft article 43.

38. Mr. ILLUECA, referring to the important comments made on draft article 36, particularly in regard to the drafting of paragraph 1, noted that some members believed the paragraph should be limited to the opening clause, providing: “The diplomatic bag shall be inviolable wherever it may be; it shall not be opened or detained and shall be exempt from examination”. In view of the recent trend in international relations, however, the Commission must be realistic and take account of the tendency of certain highly developed States to legalize intervention by the authorities in telephonic, telegraphic and other means of communication. In view of that tendency, the Commission would be justified in establishing, in the revised draft article, not only a basic principle prohibiting the opening of the bag, but also its exemption from examination. It was essential to specify that the bag could not be subjected to any examination.

39. An examination of national legislation on surveillance and inspection devices showed that a terminology was used which could be adopted by the Special Rapporteur. Perhaps the last phrase of paragraph 1 could be amended as follows: “or through electronic, mechanical or other surveillance devices”. He did not think that the word “directly” would cause confusion, since it obviously referred to examination of the contents of the bag, not of its external appearance.

40. Draft article 41 referred to the different roles of States, which, according to Mr. Riphagen (1948th meeting), ought to be defined. It was true that article 3 contained a certain number of definitions, but in the present instance the various roles of States should be considered in the light of the explanations given by the

Special Rapporteur in his seventh report (A/CN.4/400, para. 54), which referred to States in whose territory there were international conferences, special missions or permanent missions accredited to international organizations. He therefore proposed that the problem be solved by specifying in draft article 41 that a "host State" meant a State in whose territory an international conference was held or the headquarters of an international organization was established. It would then be unnecessary to include an additional definition in article 3. The situations in question were such as arose under the United Nations system, when conferences or international organizations met or had their headquarters in a given State where delegations to those conferences or organizations had difficulties because the Government of that State unilaterally adopted measures to regulate international relations. Draft article 41 was therefore justified and the explanations given by the Special Rapporteur were clear and convincing.

41. Chief AKINJIDE said that he would speak mainly on draft article 36 and the inviolability of the diplomatic bag. On that issue, he endorsed the main thrust of the arguments put forward by certain other members, in particular Mr. Malek, Mr. Ogiso and Sir Ian Sinclair.

42. It was essential to view the whole problem in the light of present-day practical situations. Instances of abuse of the diplomatic bag had occurred in recent years, and four main kinds of such abuse could be mentioned. The first was the illicit traffic in heroin, cocaine and other harmful drugs between Latin America and the United States of America and between the Middle East and Europe. The second was the use of the diplomatic bag for currency smuggling. The third was the use of the diplomatic bag to carry weapons intended not for the protection of a diplomatic mission, but for delivery to subversive elements. A case of that kind had recently occurred in London. Lastly, there had actually been cases of a live person being concealed in a container that was claimed to be a diplomatic bag. One such case had occurred in Rome some years previously and another more recently in the United Kingdom. Consequently, he could not accept the idea of absolute inviolability of the diplomatic bag.

43. It was necessary to reconcile three competing sets of interests: the security and other interests of the receiving State, the similar interests of the transit State and the interests of the sending State in the inviolability of the diplomatic bag. Accordingly, article 36 should state the inviolability of the bag, but at the same time deal with the cases in which there were good reasons to believe that drugs, weapons or other prohibited articles were being carried in it.

44. A Government which behaved in a reckless and illegal manner did not deserve the protection of international law for its diplomatic bag. Diplomatic law was predicated on reciprocity, and if a State chose to act in a lawless manner, it could not claim the protection of that law. For those reasons, he supported the suggestions for rewording draft article 36 made by Sir Ian Sinclair, Mr. Sucharitkul and other members of the Commission.

45. He did not agree, however, with Mr. Sucharitkul's distinction between the diplomatic bag and its contents. Paragraph 1 (2) of article 3, which defined "diplomatic bag" as meaning "the packages containing official correspondence, documents or articles ...", showed that the bag and its contents could not be treated separately.

46. He had no points of substance to raise on draft articles 37 and 39. He was not satisfied with draft article 41, but appreciated that its presence in the draft might be necessary in order to make the future convention more acceptable to States.

The meeting rose at 1.05 p.m.

1950th MEETING

Thursday, 22 May 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Carero Rodrigues, Mr. Díaz González, 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)

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.