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Summary record of the 1950th meeting

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

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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.

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

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

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. BALANDA said that draft article 36 was in some sense the Gordian knot among the articles presented in the Special Rapporteur's seventh report (A/CN.4/400). It was an original text designed to meet particular situations. Paragraph 1 included a number of provisions employed in conventions already elaborated by the Commission. The formulation "wherever it may be" had its counterpart in article 33 of the 1963 Vienna Convention on Consular Relations and afforded better protection of the bag, particularly in the case of fortuitous events requiring deviation of the bag from its normal itinerary. Again, the prohibition on opening and detaining the bag was in keeping with the provisions of article 35, paragraph 3, of the 1963 Vienna Convention and met with unanimous approval in the Commission. The Special Rapporteur had rightly added the stipulation of exemption from examination, thereby strengthening the idea of the indispensable security of the bag.

2. At a previous meeting, the question had arisen whether the most important factor was the contents or the bag itself. Clearly, both the contents and the bag were important, for protection of one was impossible without protection of the other. The word "directly", in paragraph 1 of draft article 36, had prompted one member to suggest that the bag ought, in some circumstances, to be examined simply for the purpose of determining that it was in actual fact a diplomatic bag. An examination of that kind, however, would be dangerous. Other provisions of the draft relating to the external visible marks required to identify the character of the bag already met that concern. Accordingly, a stipulation that the bag could be examined "directly" was unacceptable. Mr. Flitan (1949th meeting) had suggested that the word "indirectly" should be added after the word "directly", a suggestion that merited consideration, for electronic and mechanical devices constituted indirect means of examination. The reference to such devices reflected the desire to guarantee the confidentiality of the contents of the bag and, by mentioning them, the Special Rapporteur was of course seeking to place all States on an equal footing. Nevertheless, if such methods of examination were accepted, developing countries that did not possess them would not be in a position to determine whether or not the contents were in keeping with the rules. For all that, the situation in question involved a bag carried by a diplomatic courier; if the bag was dispatched by post, what could be done to ensure that it was not checked or inspected? Again, Chief Akinjide (*ibid.*) had said that a balance had to be maintained between the legitimate interests of sending,

receiving and transit States and had pointed out that the bag might be wrongfully used for drug or currency trafficking, for example.

3. Draft article 36, paragraph 2, introduced an exception to take account not only of the interests of States other than the sending State, but also of the security factor. The wording should be brought into line with article 35, paragraph 3, of the 1963 Vienna Convention, which provided for the possibility of the bag being opened in the presence of an authorized representative of the sending State and, in the event of refusal of the receiving State's request, for return of the bag to its place of origin. In that connection, it might be quite easy to return the bag to its place of origin when it was accompanied; but if it was not, and it had been sent by mail, for example, it would be better, for practical reasons, to stipulate simply that the bag would be sent back to the sending State.

4. He agreed in general with the comments made on article 37, which definitely belonged in the draft. He nevertheless had some doubts about the use of the word *camionnage* (cartage) in the French text and thought it preferable to use the word *transport*, as in article 36, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations. The word *camionnage* was more restrictive; tolls to be paid on motorways, for example, might be more easily acceptable as "charges for transport". The French text of article 37 should, moreover, be brought into line with all the other articles, which spoke of the diplomatic bag in the singular.

5. Draft article 39 was entirely justified, but paragraph 1 should take account both of the status of the diplomatic courier and of the status of the diplomatic bag. For the time being, paragraph 1 dealt solely with the status of the courier and should therefore be remodelled along the lines of paragraph 2, which was better balanced.

6. Draft article 41 was also useful and the present wording was an improvement over the previous text. The words "non-existence of diplomatic or consular relations" at the end of paragraph 1 were none the less too restrictive, because they did not take account of the case of suspension of diplomatic relations and applied only to severance or absence of diplomatic relations. Unless further details could be provided in the commentary, it would be necessary to find a more suitable term than "non-existence". He would be submitting proposals to the Drafting Committee in connection with the wording of paragraph 2, which should be shortened and improved.

7. The purpose of draft article 42 was to complement the provisions of the codification conventions relating to the diplomatic courier and the diplomatic bag, but he preferred the text submitted by the Special Rapporteur in his sixth report (A/CN.4/390, para. 61), which was clearer. Under paragraph 3 of the present text, States would be free to conclude international agreements relating to the diplomatic courier and diplomatic bag, and it should therefore be made quite clear that the parties to an agreement of that kind could enjoy such freedom only if they agreed on provisions that were

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

compatible with the articles formulated by the Commission.

8. Draft article 43, paragraph 1, could be improved by deleting the words "or at any time thereafter", for they added nothing to the paragraph. Indeed, he had serious reservations about the substance of the article and did not think that the flexibility it allowed would lead to the requisite harmonization. If States were allowed to conclude international agreements in that regard, a plurality of legal régimes could emerge in connection with one and the same subject-matter, namely the status of the diplomatic courier and the diplomatic bag. Article 43 thus weakened the overall structure of the draft, which sought to harmonize the various régimes provided for in a number of different conventions. It was a problem the Commission would do well to avoid.

9. Mr. FRANCIS suggested, for the consideration of the Drafting Committee, that draft article 36 should be rearranged in three paragraphs. The first would be confined to a statement of the general rule relating to the status of the diplomatic bag, namely that it was inviolable and was not to be opened or detained; the second would contain in a modified form the remaining substance of the present paragraph 1; and the third would consist of an amended version of the present paragraph 2.

10. In that form, the second paragraph would deal with the problem regarding the use of electronic and other mechanical devices. Very early in the consideration of the present topic, the Commission had had occasion to discuss the impact of such technical developments, at a time when the Special Rapporteur had as yet submitted only a draft outline of the topic. As he recalled, Mr. Reuter had then raised the question of the use of electronic devices and of the possibility, for example, of a diplomatic bag being screened by means of devices such as those employed in airports.⁵ Clearly, in such a situation the examiners would do more than just look at the diplomatic bag: the confidentiality of communications could be endangered. Developing countries were bound to experience a great deal of concern, because they did not have the means to obtain such technical devices and hence could not apply reciprocity of treatment to the diplomatic bags of other States. It was important to remember that, at the present time, the vast majority of diplomatic bags from developing countries were not accompanied by a courier. Hence some regulatory provisions on the use of electronic and other mechanical devices were essential in order to make the draft articles acceptable.

11. The Drafting Committee should also give careful consideration to Mr. Ogiso's proposal (1949th meeting, para. 34) to insert the proviso "unless otherwise agreed" in paragraph 1, so as to introduce an element of flexibility. It was worth noting that the Special Rapporteur himself had included the proviso "unless otherwise agreed by the States concerned" in paragraph 1 of the earlier version of draft article 36 contained in his sixth report (A/CN.4/390, para. 42).

12. The provisions of paragraph 2 as now proposed by the Special Rapporteur departed from those of article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations, for they appeared to give the receiving State discretion to return the diplomatic bag, thereby opening the door to possible abuse. An official of the receiving State might thus return the diplomatic bag without even consulting the sending State. In view of the abuses to which Chief Akinjide (1949th meeting) had drawn attention, it was clear that a provision along the lines of article 35, paragraph 3, of the 1963 Vienna Convention was required. The commentary should also indicate that, if the receiving State had suspicions about the diplomatic bag, the sending State could voluntarily allow the bag to be inspected and screened.

13. He agreed with Mr. Riphagen (1948th meeting) that paragraph 2 (b) of article 6 fully covered the substance of draft article 42, paragraph 3. It was true that article 6 dealt with non-discrimination, but the set of draft articles had to be read as a whole. Accordingly, paragraph 3 of article 42 could be deleted.

14. Mr. McCAFFREY said that he still had doubts about the viability of harmonizing the rules which governed all types of diplomatic couriers and bags, especially when the vast majority of States had not accepted the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States, in other words two of the four international conventions on which the effort to achieve harmonization was based.

15. Draft article 36 sought to take into account the diversity of current State practice, and the text involved some departures from the letter of the 1961 Vienna Convention on Diplomatic Relations. It was necessary to bear in mind that some States imposed limitations as to the size, weight and quantity of diplomatic bags and that those limitations were accepted by other States. Some States reserved the right, in exceptional circumstances, to carry out remote screening of diplomatic bags. Clearly, the Commission would have to keep those facts in mind: it could not formulate provisions in a vacuum.

16. As to the wording of article 36, an effort should be made to avoid the use of the terms "inviolability" in the title and "inviolable" in paragraph 1. Their meaning was not very clear in the context and article 36 would go beyond the provisions of the existing codification conventions if they were used. In any case, as emphasized by Mr. Lacleta Muñoz (1949th meeting), "inviolability" was not an absolute, but a relative concept. He agreed with the suggestion to delete the words "directly or" in paragraph 1, but the best course would be to delete the whole of the last part of the paragraph, starting with the words "and shall be exempt from ...". It was not advisable to refer expressly to screening through "electronic or other mechanical devices". He tended to sympathize with Mr. Malek's view (*ibid.*) that the diplomatic bag should be subject to the same measures as the diplomatic courier, at least under exceptional circumstances. Again, one should not forget the unaccompanied bag, which many airlines would not accept for carriage without some form of screening.

⁵ See *Yearbook ... 1984*, vol. I, pp. 86-87, 1829th meeting, para. 22.

17. He appreciated the Special Rapporteur's efforts to strike a balance between the provisions of paragraph 2 and those of paragraph 1. On the whole, paragraph 2 was acceptable, but some arrangement should be made for cases in which a request by the receiving State or the transit State for the bag to be opened was refused. In the 1963 Vienna Convention on Consular Relations, article 35, paragraph 3, stated expressly that, if the request to open the bag was refused by the sending State, "the bag shall be returned to its place of origin". There was no reason to omit such a provision, which already existed in the 1963 Vienna Convention and was not inconsistent with the régime established for the diplomatic bag in article 27, paragraph 3, of the 1961 Vienna Convention. He also believed it essential to refer to the transit State, as was done in paragraph 2. The transit State might have obligations under international agreements regarding control of narcotic drugs or other contraband, or it might simply wish to protect itself if it had reliable information that a diplomatic bag contained dangerous materials.

18. The combination of former draft articles 39 and 40 in a new draft article 39 was welcome, for it simplified the drafting. Nevertheless, in the case envisaged in paragraph 1, the receiving State or transit State was required to take "the appropriate measures" to ensure the integrity and safety of the diplomatic bag, whereas in the case envisaged in paragraph 2, when the diplomatic courier or the diplomatic bag was compelled to pass through the territory of a State not initially foreseen as a transit State, "that State shall accord" inviolability and protection to the courier and bag. Greater obligations thus appeared to be placed on that State than on an intended transit State. The Drafting Committee should consider adjusting that anomaly.

19. Draft article 41 was unnecessary: as he had pointed out in the past,⁶ its provisions were likely to create confusion. Draft article 42 was very difficult in that it tried to cover four different régimes in one instrument—an instrument containing some provisions that were broader and others that were narrower than those of the existing codification conventions. Doubts had rightly been cast on the exact meaning of the words "shall complement" in paragraph 1, and he shared the concern expressed by Mr. Riphagen (1948th meeting) and Sir Ian Sinclair (1949th meeting) about paragraph 2. Paragraph 3 could be dispensed with altogether, for any measure extended to another State which was more favourable than the present articles could not be interpreted as incompatible with the object and purpose of the present articles. The situation would thus be covered by paragraph 2 (b) of article 6.

20. Lastly, article 43 must be retained in order for the draft to have a chance of acceptance. The provisions of the article would not necessarily lead to a multiplicity of régimes, and certainly not more than the four régimes now in existence. They might even reduce the overall number, for example where a State declared that it would apply the present articles to all couriers and bags other than those covered by the 1961 Vienna Conven-

tion. In that case, the effect of article 43 would be to replace the four previous régimes by only two régimes.

21. Mr. HUANG said that article 36 was the key article of the draft. It had two objectives: first to safeguard the principle of the freedom of diplomatic communications, which was well established in the codification conventions and was adhered to by States in practice; and secondly, to prevent possible abuse of the diplomatic bag, abuse which could not be ignored, even though it was not common.

22. It had been suggested that the first two clauses of paragraph 1 should be couched in the language of the corresponding provisions of the 1961 Vienna Convention on Diplomatic Relations. The difference was slight and he could accept either version. Consideration could, however, also be given to the following reformulation, which was in keeping with the spirit of the 1961 Vienna Convention:

"1. The diplomatic bag, in so far as its contents are concerned, shall be inviolable wherever it may be; it shall not be opened or detained."

The third clause of paragraph 1, concerning the exemption of the bag from examination through electronic or other mechanical devices, should be maintained, since it was possible for the confidentiality of the contents of the bag to be infringed by such examinations. Retention of that provision would ensure that developing countries without the requisite technology were not placed at a disadvantage. It was true that the word "directly" appeared to refer to the possibility of opening the bag, and he too thought it should be deleted. There was some merit in the suggestion that the receiving State should, with a view to safeguarding its own security, be allowed to use electronic examination in special circumstances, but such a course should by no means become routine procedure. Moreover, the special circumstances in question should be specified in paragraph 2 of the article.

23. The purpose of paragraph 2 of article 36 was to prevent abuse of the diplomatic bag. The revised text departed somewhat from the régime for consular bags. Thus the Special Rapporteur had pointed out (1948th meeting) that, in the event of serious doubts concerning the contents of the bag, it was preferable to stipulate that the bag be returned to the sending State than that it might be opened.

24. Nevertheless, it would be going too far to allow the receiving State or transit State to decide at its own discretion to return the bag to its place of origin. If paragraph 2 was to be retained in its revised form, some restrictions should be placed on the receiving State's right to return the bag. For example, any doubts about the contents of the bag should be based on sufficient evidence. Moreover, the receiving State should engage in consultations with the sending State to seek an appropriate solution. The sending State could also produce, on a voluntary basis, a written certificate or guarantee or, as an exceptional measure, accept electronic examination of the bag. Also, the possibility of the sending State agreeing to let the bag be completely or partly opened in the presence of its representative should not be ruled out. Only when the consultations failed to bring about a solution could the receiving State

⁶ See *Yearbook ... 1985*, vol. I, p. 201, 1909th meeting, para. 28.

demand that the bag be returned to its place of origin. Actually, even if paragraph 2 were drafted along those lines, problems would still arise. Legally speaking, it was extremely difficult to formulate a set of unified rules that would merge the two régimes on the diplomatic and the consular bag.

25. Mr. JAGOTA complimented the Special Rapporteur on his efforts to improve draft article 36 in the light of the discussion which had taken place in the Sixth Committee of the General Assembly (see A/CN.4/L.398, paras. 317-336). It was important to remember that the diplomatic courier and the diplomatic bag were defined in a very broad manner in article 3 of the draft. Under the terms of article 3, no distinction would be drawn between the diplomatic bag and the consular bag and the adoption of a uniform set of provisions would necessarily have an impact on the existing codification conventions.

26. The terms of article 36 were crucial to the whole draft and had to be read in conjunction with those of draft article 43, which would enable a State to apply the present articles to one or more categories of diplomatic couriers and diplomatic bags at its discretion. The article was an attempt to combine the relevant provisions of the 1961 Vienna Convention on Diplomatic Relations—reflected in paragraph 1—with those of the 1963 Vienna Convention on Consular Relations. Indeed, paragraph 2 repeated the provisions of article 35, paragraph 3, of the 1963 Vienna Convention in a modified form.

27. The provisions of paragraph 1 were broader than the corresponding ones of the 1961 Vienna Convention in that they specifically exempted the diplomatic bag from examination through electronic or other mechanical devices. On the other hand, paragraph 2 omitted the stipulation in article 35, paragraph 3, of the 1963 Vienna Convention that a request could be made for the bag to be opened by an authorized representative of the sending State.

28. Should the proposed formulation be acceptable to many States, little use would be made of the provisions of article 43. His own view was that, subject to drafting changes, the substance of both paragraphs of article 36 was likely to prove workable. Reliance should be placed on State practice and on good faith to reduce abuses to a minimum. It was also necessary to remember that, if a State indulged in excessive abuses, the remedy of severance of diplomatic relations was always available. The inclusion in paragraph 2 of the words “serious reason” gave every State an opportunity to protect itself against abuse. Whenever it had serious grounds to believe that a diplomatic bag contained something other than official correspondence or the other official material referred to in article 25, a State could request that the bag be returned to its place of origin.

29. He supported Mr. Riphagen’s proposal (1948th meeting) that article 3, paragraph 1, should contain a definition of “host State” if the reference to the receiving State was deleted from draft article 41. The host State should be defined in terms of the seat of an international organization, or the site of an international conference or meeting. Again, some thought

should be given to cases in which diplomatic relations did exist between two countries, but a change of government required recognition of the new Government. In that instance, it would be necessary to retain the reference to “receiving State” unless the term “host State” could be defined so as to cover the situation.

30. He was in broad agreement with the provisions of draft article 42, paragraph 1, but paragraph 2 could be deleted. It could create difficulties because it conflicted with paragraph 1 and detracted from the value of the draft articles as a whole. The provisions of the draft articles should prevail over pre-existing agreements. Paragraph 3 should also be deleted, as the substance was already covered by paragraph 2 (b) of article 6.

31. Lastly, a more suitable expression would have to be found to replace the word “excepted” in draft article 43, paragraph 3.

32. Mr. TOMUSCHAT said that draft article 36 struck a reasonable balance between all the interests involved. The word “inviolable” was not really necessary, but he would certainly not interpret it as excluding some kind of external check of the diplomatic bag, either to identify it as a diplomatic bag or in cases, implicitly permitted under paragraph 2, in which there was *prima facie* evidence of abuse. Again, paragraph 1 did not prohibit such visual control measures for, as he understood it, to examine the diplomatic bag “directly” meant to open it and look at the contents. He therefore disagreed with Mr. Balanda in that regard. The use of machines to ascertain the contents of a pouch or bag would in any event be forbidden. The prohibition was not absolute, for there seemed to be no intention of preventing airlines and the competent authorities of States from carrying out the normal security checks. In acceding to the future convention, therefore, Governments would not be entering into an undertaking to instruct airlines to let diplomatic bags pass unchecked. Indeed, were any such obligation to be inferred, airlines would simply refuse to carry luggage that had not undergone the controls required for all other luggage.

33. He did not share the view of the representatives in the Sixth Committee of the General Assembly who had challenged paragraph 2 of draft article 36 on the ground that freedom of communication might be hampered by arbitrary measures (see A/CN.4/L.398, para. 327). Diplomatic relations rested mainly on the principle of reciprocity, to which article 6 of the draft made express reference. Any State that committed excesses would soon be confronted with the adverse effects of its own practices. The Special Rapporteur had been right to propose a uniform régime, since it would greatly simplify the procedures for handling the diplomatic bag. The commentary should, however, explain that the receiving State would not be justified in returning the diplomatic bag if the sending State agreed to open it to dispel any suspicions as to improper use. The rule stated in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations should be deemed to form an implicit part of article 36. That, too, could be explained in the commentary, or alternatively article 36 could be aligned with article 35 of the 1963 Vienna Convention.

34. The title of draft article 39 should be re-examined, since the situations covered by paragraph 1 did not come under the heading of *force majeure*. Also, the rule in paragraph 1 was too broad: the receiving State or transit State might be totally unaware of cases in which a courier was ill, for example. Possibly, therefore, the expression "as necessary and appropriate" or some similar formulation could be inserted before the words "immediately notify".

35. As to draft article 41, he had never heard any proposition to the effect that the granting of facilities, immunities and privileges to a diplomatic courier implied recognition of the sending State. Hence there was no need for a disclaimer in respect of a non-existent claim.

36. He approved of draft article 42. As he understood it, the intention was that the present articles were always to be applied in conjunction with one of the four codification conventions. In some instances, that would result in a modification of the existing régime. In his opinion, there were no contradictions or inconsistencies. More specifically, article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations and draft article 36 could easily be reconciled: the rule that the bag should be neither opened nor detained would simply be supplemented in situations that had not been fully taken into consideration by the authors of the 1961 Vienna Convention. He none the less agreed that paragraph 3 of draft article 42 could be deleted altogether.

37. Draft article 43 posed certain problems. In his view, it would more than suffice to stipulate that the present articles, being designed to complement the four basic conventions, should be applicable only in conjunction with those four conventions—in other words, if and to the extent that both States involved were parties to one of those conventions. Such a provision would be entirely in keeping with the ancillary nature of the draft articles. On the other hand, there was no real need for an optional clause of the type proposed, since it would only lead to complications.

38. Mr. CALERO RODRIGUES said he did not think that the Commission was making the best use of the limited time available to it by engaging in the same debate as it had held at the previous session, particularly since most of the suggestions pertained to drafting matters. He was taking the floor simply because most of the other members had spoken and he did not wish to be thought remiss.

39. The only possible conclusion to be drawn from the discussion was that the draft articles should be referred to the Drafting Committee. The Commission could not solve the few problems of substance, for instance whether there should be exemption from examination of the diplomatic bag by electronic or mechanical means. It was divided on that issue, as it had been at its previous session, and it would presumably endeavour to reach a compromise. However, paragraph 2 of draft article 36 confirmed a trend that had emerged at the previous session, namely that, when a State had serious doubts about the contents of the bag, it should be allowed not only to request that the bag be returned to its place of

origin, but also to open the bag if the sending State agreed.

40. The new version of draft article 37 was an improvement on the previous text (A/CN.4/390, para. 46) and took account of the concern expressed by several speakers, including himself.

41. The combination of former draft articles 39 and 40 was useful, and draft article 41 had likewise been improved because it was now confined to relations between the sending State and the host State or transit State. It would be difficult to imagine cases in which a sending State and a receiving State had no diplomatic relations or did not recognize each other. As for draft article 42, the Special Rapporteur had wisely reverted to the original text submitted in his fourth report,⁷ which took account of the views generally expressed in the Commission and in the Sixth Committee of the General Assembly.

42. It had been pointed out that draft article 43, on optional declarations of exceptions, referred to exceptions in the title but not in the body of the article itself. There, too, the matter could be settled in the Drafting Committee. Some members had expressed doubts about a declaration of that kind on the ground that it would not promote uniformity. Yet the system of the diplomatic bag was simply a system of relations between two countries, the sending State and the receiving State. If, for pragmatic reasons, it was necessary to accept such declarations, he was ready to do so. Admittedly a single régime would be preferable, but what purpose would it serve if countries did not accede to the convention? The final instrument might well be doomed to remain inoperative for the sake of legal purity, just as other instruments had been.

43. Mr. KOROMA said that the draft articles would secure universal approval only if they sought to reflect the divergent interests of the sending State, the receiving State and, where applicable, the transit State. In draft article 36, the Special Rapporteur had largely succeeded in finding a compromise solution. The article said nothing new. The reference to the concept of inviolability was merely a restatement of conventional law and was entirely appropriate, bearing in mind the desire for uniformity in that branch of the law. It did not confer a sacrosanct character on the diplomatic bag or its contents, but merely signified that the bag should be protected at all times in the interests of safeguarding the confidentiality of its contents. The provision that the bag should not be opened or detained was likewise a restatement of existing law. On the other hand, the reference to electronic or mechanical devices was a more contentious issue, and not just between the developed and developing countries, for the essence of the matter was one of confidentiality. It was necessary to take account of the interests of both the sending State and the receiving State, and that had to a large extent been achieved in the formulation proposed by the Special Rapporteur. There was, however, some inadequacy in the language employed that could well give rise to doubts.

⁷ *Yearbook ... 1983*, vol. II (Part One), p. 134, document A/CN.4/374 and Add.1-4, para. 403.

44. Paragraph 2 of article 36 introduced a new element with the reference to the transit State and called for a very subjective test which would be difficult to apply and could result in strained relations between sending and receiving States. Again, while he recognized that the transit State was under an obligation to the receiving State to ensure that its territory was not used for unlawful purposes, he considered that paragraph 2 was not in keeping with paragraph 1. If it was accepted that the diplomatic bag was inviolable, could not be opened or detained and was exempt from examination through electronic or mechanical devices, where could evidence be found to indicate that the bag contained something other than official correspondence or material? Both paragraphs of the article should be re-examined with a view to making the wording more precise and dealing with those concerns.

45. He had some misgivings about the reference in draft article 37 to the "free entry" of the bag. He understood what the Special Rapporteur had in mind, but would recommend for consideration a formulation similar to that in article 36, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations.

46. Mr. Tomuschat's concern about the title of draft article 39 was justified, for the title did not reflect the content of the article. Accordingly, it should either be amended along the lines suggested by Mr. Tomuschat or be replaced by "Appropriate measures in circumstances preventing the delivery of the diplomatic bag".

47. The basic proposition in draft article 41 had never been questioned and, although the article might seem to state the obvious, there would be no harm in keeping it. Draft article 42, however, raised some doubts. The Special Rapporteur had explained that the intention was to complement similar provisions in other conventions, but the provisions varied from convention to convention and the question arose whether the article would promote the desired uniformity. It would be better to have an autonomous provision rather than to leave open the option of choosing which provision should apply to which bag.

48. Mr. RAZAFINDRALAMBO said that he fully agreed with the deletion in the revised text of draft article 36, paragraph 1, of the words "all the times" and the phrase "in the territory of the receiving State or the transit State". They were unnecessary, as were the words "unless otherwise agreed by the States concerned ...", which allowed the possibility of derogating from the principle of inviolability, thereby placing too much emphasis on the relative nature of that principle. The residual right of States to decide by way of agreement to apply a different régime had, moreover, been provided for in article 6, paragraph 2 (b). In the last part of draft article 36, paragraph 1, which was of the utmost importance, the Commission might, in order to avoid any ambiguity, decide to add the word "indirectly"; the end of the paragraph would then read "... shall be exempt from examination directly or indirectly through electronic or other mechanical devices".

49. If, in view of the international situation, the Commission decided to retain the reference to the "transit State" in article 36, paragraph 2, despite the doubts ex-

pressed in that regard, it should be made clear that, when a transit State had serious reason to believe that a diplomatic bag passing through its territory contained something other than official documents or articles intended for official use, that State must notify the receiving State and the sending State.

50. Apart from such drafting problems, which could be settled by the Drafting Committee, article 36 struck the right balance between the principle of the inviolability of the diplomatic bag and the need to guarantee the security of the receiving State and the transit State, and was therefore fully satisfactory.

51. The deletion, in draft article 37, of the words "customs inspection" was entirely appropriate, but the same was not true of the other changes proposed by the Special Rapporteur. The word "free", which modified "entry, transit or exit", added absolutely nothing. The words "and related charges" used in the earlier version were simpler and clearer than the words "and other related charges", which had been used in the new version and might imply that national, regional or municipal dues and taxes were also related charges, which was not at all true. It would also be better to speak of "charges for ... transport", rather than "charges for ... cartage".

52. The title of draft article 39 was too restrictive. As Mr. Tomuschat had pointed out, the situations and circumstances referred to in paragraph 1 were not necessarily cases of *force majeure*. The entire article would, moreover, have to be changed considerably in order to establish a clearer distinction between the two ideas dealt with in paragraphs 1 and 2. As to draft article 41, he agreed with the deletion of the term "receiving State" and considered that the term "host State" should be defined in article 3. Draft article 42, which now merely listed the relevant diplomatic conventions, did not call for any comment.

53. The phrase "or at any time thereafter" in draft article 43 could well give rise to doubts about the exact content of the obligations a State would assume *vis-à-vis* the other States parties when it ratified or acceded to the future convention. *A priori*, he was therefore not in favour of retaining it. The last phrase of article 43, paragraph 2, was self-evident. It went without saying that, if the withdrawal of a declaration made in writing was to be brought to the attention of the other States concerned, it also had to be made in writing.

The meeting rose at 1 p.m.

1951st MEETING

Friday, 23 May 1986, at 10.05 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.